

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

www.tecsa.org.uk

Chairman's Report 2014

This is the Annual Report of TeCSA covering the 12 months since last year's AGM on 20 November 2013.

During this period the Officers of TeCSA have been:

Chairman: Simon Tolson
Secretary: Julia Court
Treasurer and Membership Secretary: Ann Levin
Social Secretary: Dominic Helps

Hon. President: James Hudson
Hon. Vice President: Robert Fenwick Elliott

In addition to the Officers, the Members of the Committee have comprised (alphabetically listed by surname):

Mr Rupert Choat (resigned to return to the Bar in January 2014)
Ms Sally Davies
Mr Kevin Forsyth
Mr William Gard
Mr Andrew Hibbert
Mr Christopher Hill
Ms Suzanne Reeves
Ms Fiona Reilly
Mr Matthew E Smith
Mr Steven Williams

Our co-opted members of the Committee have been:

Mr Peter Rees QC
Ms Caroline Cummins
Mr Simon Hall of Skanska.
Ms Sue Ryan of Wragge Lawrence Graham & Co and
Ms Stacy Sinclair of Fenwick Elliott

TeCSA is very grateful for their huge support through the year.

There have been resignations from our co-opted members this year by Peter Rees QC, a former Chairman of TeCSA and former Legal Director at Royal Dutch Shell who took up the Bar when he joined Thirty Nine Essex Street Chambers in April 2014, Ms Caroline Cummins, former Chair of TeCSA and former Partner of CMS resigned in October with effect from the AGM after many commendable and active years of service both as a past Chair and Committee member. TeCSA is hugely grateful for all that Peter and Caroline have done over past years.

Membership of TeCSA now stands at 170 (176 last year).

Honorary President: James Hudson

Chairman: Simon Tolson, Fenwick Elliott LLP, Aldwych House, 71-91 Aldwych, London WC2B 4HN, Tel: 020 7421 1986

Secretary: Julia Court, S J Berwin LLP, 10 Queen Street Place, London EC4R 1BE, Tel: 020 7111 2411

Treasurer and Membership Secretary: Ann Levin, Herbert Smith Freehills LLP, Exchange House, Primrose Street, London EC2A 2HS, Tel: 020 7466 3521

James Hudson, K&L Gates, One New Change, London, EC4M 9AF, Tel: 020 7648 9000

Social Secretary: Dominic Helps, Corbett & Co, George House, 2 Claremont Road, Teddington, TW11 8DG, Tel: 020 8614 6200

This year has been a particularly enthusiastic one for TeCSA and the following is just a brief summary of its activities.

1. Adjudication

TeCSA is an Approved Nominating Body under the HGCRA, and the TeCSA Adjudication Rules are in widespread use in construction contracts throughout the UK.

Our Panel is accessible on this link: <http://www.tecsa.org.uk/accredited-panel-adjudicators>

In the last 12 months, we have made (79 to 19 November 2014) adjudication nominations (83 last year); so this is a slight decrease compared with last year (but we had a far high number of adjudications settle mid-way through the nomination process). The average number of nominations in the years before then has been 77.

The Panel is changing, we have had additions and in the last 36 months the following have left our panel, the designation “retired” includes those that have asked to leave the panel through change in the type of work they respectively practice. We have also sadly had two deaths:

1	Bingham, Adrian (Retired)	
2	Bryan, Robert (Retired)	
3	Burgess, John (Retired)	
4	Butera, Gerlando (Retired)	
5	Callaghan, Edward (Retired)	
6	Cato, Mark (died)	
7	Chinn, David (Retired)	
8	Colman, Howard (Retired)	
9	Conway, Michael (Retired)	
10	Corbett, Edward (Retired)	
11	Cottam, Guy (Retired)	
12	Dodsworth, Catriona (Retired)	
13	Fairbairn, James (Retired)	
14	Farrell, Ron (Retired)	
15	Francis, Tony (Retired)	
16	Gardiner, Charles (Retired)	
17	Goddard, Nick (Retired)	
18	Gordon, Roddy (Retired)	
19	Greene, Kevin (Retired)	
20	Hall, Peter (Retired)	
21	Hibbert, Andrew (Retired)	
22	Higgins, Joanne (Retired)	
23	Hilton, Mark (Retired)	
24	Holloway, Brian (Retired)	
25	Hoyle, Roger (Retired)	
26	Hudson, James (Retired)	
27	Hudson, Sarah Jane (Retired)	
28	Insley, Ian (Retired)	
29	Jones, Neil (Retired)	
30	Jones, Robert (Retired)	
31	Kennedy, Joanna (Retired)	
32	Letman, Paul (Retired)	

33	Levine, Deanna (Retired)	
34	Lewis, Simon (Retired)	
35	Little, Colin (Retired)	
36	Lovatt, Clive (Retired)	
37	MacCuish, Andrew (Retired)	
38	Matcham, Paul (Retired)	
39	Miles, David (Retired)	
40	Millen, Stephen (Retired)	
41	Morris, John (Retired)	
42	Morris, John (Retired)	
43	Morton, Peter (Retired)	
44	Moss, David (Retired)	
45	Needham-Laing, Matthew (Retired)	
46	Pickavance, Keith (Retired)	
47	Pilkington, Simon (Retired)	
48	QC Rees, Peter (Retired)	
49	Quinn, Brian (Retired)	
50	Race, David (Retired)	
51	Rushton, John (died)	
52	Sargeant, James (Retired)	
53	Shackley, Donald (Retired)	
54	Smith, Richard (Retired)	
55	Talbot, Peter (Retired)	
56	Vasey, John (Retired)	
57	Vigrass, Christophe (Retired)	
58	Warchus, John (Retired)	
59	Wishart, Iain (Retired)	

In line with TeCSA's *Adjudication Service* and the need to maintain standards, the Adjudication Sub-committee carried out its third annual review of its Adjudication procedures, and the criteria for its Adjudicators to uphold with its *Adjudication Service*. The Adjudication Service was revised most recently in May 2014 taking account of feedback and in order to deal with a unwelcomed small trend by some applicants to positively exclude named Adjudicators without proffering a bona fide reason why such persons should not be nominated or questionable reasons concerning conflicts of interest that do not bear scrutiny¹, changes in CPD requirements; and an amendment the nomination form regarding.

The TeCSA Adjudication Service is set out in full on the website <http://www.tecsa.org.uk/tecsa-adjudication-service>

Our Panel comprises now of 77 Adjudicators. Amongst these, and taking into account those who are dual qualified (of which we have quite a number), we have these discipline areas:

Practicing Solicitor ² (co or main discipline)	39
Practicing Barrister ³ (co or main discipline)	7
Chartered Quantity Surveyors (co or main discipline)	26
Chartered Architects (co or main discipline)	3

¹ As recently exemplified in *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC) (07 November 2014).

² 42 Solicitors (some dual qualified)

³ 5 practicing Barristers (some dual qualified)

TeCSA continues to advance its Continuing Professional Development and vetting regime for the Panel ensuring our Adjudicators are amongst the best trained and suited by experience, knowledge and background. That work continues through our Adjudication Sub-committee. The current round of interviews is in session and assessment responses are invaluable.

No one can renew his or her adjudication panel membership until submittal of a satisfactory CPD return and then at least every 5 years pending periodic assessment pass the board.

Appointments

TeCSA wishes to demystify this process. The procedure for appointments should be transparent as it can in a voluntary service. Some ask what happens. The answer is that ordinarily (unless an express discipline is requested by an Applicant, such as a legally qualified architect, which is a small class, we will seek to nominate such an Adjudicator if available on the Panel. Or if an existing appointee Adjudicator is dealing with a series of disputes between the same parties under the same contract, then that person will usually be re-nominated. The Rota is also not applied where an applicant seeks a nomination of a contract named adjudicator or by joint agreement request for a named adjudicator. But otherwise the TeCSA 'Rota' operates. Under the Rota Panel Adjudicators' surnames come up on an alphabetical rota basis in a block of 10 surnames with same first surname letter.

There are not that many referrals to go round, one a year is the most to be ordinarily expected.

Adjudication Conference

Today we held our 2014 Annual Adjudication Conference at the offices of K&L Gates, One New Change which included our Keynote Speaker Mr Justice Akenhead updating us all on the latest workings of the TCC, your Chairman's update on the Adjudication Rules and Procedure; a talk on guidelines on Decision Writing by Ashley Pigott; a Case Law Update - Peter Aeberli.

We had two facilitated workshops, (i) "Decision Writing", what is meant by "give reasons"; and (ii) "Conducting Hearings & Meetings" by John Redmond and Will Gard.

3. e-Disclosure

Last year TeCSA⁴ promulgated and gave birth to an e-Disclosure Protocol which to our great excitement the TCC 'adopted' at the start of this year, see Sections 5 and 11 of the TCC Guide⁵. Feedback from TCC User meetings and through the two meetings of the TCC E-DISCLOSURE PROTOCOL WORKING GROUP have confirmed the need for continuing guidance on best practice and an update to the Protocol, its Guideline Notes and Guide to e-disclosure is now just finalised and will be going on to the website.

Following the feedback received from users of the Protocol at our last e-Disclosure working group meeting on 13 October 2014 held at Nabarro's, the Working Group have made some minor amendments to the e-Disclosure Protocol. The final version of the amended Protocol (to be referred to as version 0.2) will be loaded to the website very shortly. More substantive amendments have been made to the accompanying Guidelines, principally in the appendices to provide users with worked-up examples of wording based on real experience. The latest version of the Guidelines is also marked as version 0.2. Final approval will be given in the next few days before we submit the documents to the TCC for consideration with the aim of formally launching the newest versions of both documents in the New Year.

⁴ In unison with TECBAR and the Society of Computers and the Law (SCL)

⁵ HMCT, Second Edition, 3rd revision, with effect from 3 March 2014; Costs and Case management and the first CMC; <http://www.justice.gov.uk/downloads/courts/tech-court/tec-con-court-guide.pdf>

Members now have the practical tools as practitioners to underpin the operation of Practice Direction 31B⁶, the *Disclosure Report* and its sister, *Electronic Document Questionnaire* [EDQ]. TeCSA is working to fashion a version with direct applicability to Arbitration and will work with the LCIA to do so over the coming months.

The TeCSA e-disclosure Working Group toolkit for practitioners contains the following documents:

- E-disclosure protocol.
- Guidelines to the e-disclosure protocol.
- Guide to e-disclosure, which serves as a user's manual designed to materially assist the practitioner in all aspects of managing the process. It also includes an analysis of the various vendors and the services which they offer.

See: <http://www.tecsa.org.uk/e-disclosure>

4. Consultation

TeCSA has long established itself as an important body to consult; it has always been highly active in consultations on new law affecting the construction industry and disputes with it. This includes everything from lobbying when the HGCR bill was progressing through the House, the LDEDCA in 2011 after it and European legislation planned to have effect upon the industry of our clients.

In July 2013 TeCSA responded to the Civil Procedure Rules Committee's (CPRC) consultation into the future application of mandatory cost budgeting and management within the specialist civil courts.

This year the Chairman together with Dominic Helps of the Committee were invited by The Right Honourable Sir Rupert Jackson to attend and participate in Workshops of the *Civil Justice Council's* review of the Jackson reforms, one year on.

The event, massively oversubscribed, attracted the attendance of Sir Rupert Jackson, Lord Dyson MR who delivered the dreaded *Mitchell* decision, and Lord Justice Richards who concurred with it.

TeCSA's great concern being that *Mitchell* has been applied in many cases almost mendaciously and to defaults for which no prescribed sanction has been interpreted to justify the imposition of the most extreme sanction, namely one which brings the case to an end. In the TCC experience was thankfully mostly unchanged and to be applauded overall for its balance. Outside the TCC *Mitchell* was causing additional antagonism in litigation between solicitors to the disbenefit of clients and costs and was creeping over to litigation across the civil field. It was doubtless necessary for guidance to be given as to whether *Mitchell* should be applied in this way, and if so as to the circumstances in which it should be so applied.

It was noteworthy no non TCC judge at the *Civil Justice Council's* conference was willing to descend into a defence of authority, instead trotting out the party line that arguments are for court and not conferences and at least not until the reforms had bedded down. The final Jackson report asserted that all parties to litigation asked that something be done to encourage compliance with orders, rules and directions. That principle is reflected in the new Civil Procedure Rule 3.9 and the trilogy of cases, starting with *Mitchell*, where this stern line had been upheld by no fewer than seven different members of the Appeal Court.

It was noteworthy the publicly expressed view of costs specialist Nick Bacon QC, who won for the defendant in *Mitchell*, was that the harsh approach is simply not warranted where breach has neither disrupted the case timetable, nor had adverse impact upon the broad administration of justice.

⁶ To encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner.

Those representing experts voiced disquiet that the robust approach to time limits has had a knock-on effect. Experts feel intimidated, and there is the danger that some will just pull out of the legal market.

There was an overwhelming sense that *Mitchell* went just too far - a view shared by everyone in the litigation world.

There was enormous uncertainty about the definition of 'trivial'. How fast must one move so as to make a 'prompt' application for relief? It is easy for the judiciary to say that these are everyday words, but they have the potential to inflict massive harm on a party. Many asked for guidance, but none was forthcoming.

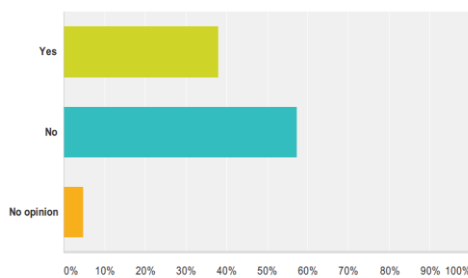
In June 2014 TeCSA in unison with TECBAR ran a very successful Survey Monkey⁷ on the Jackson Reforms and the Pre-Action Protocol. We also provided the results of this survey to the official HM Courts and Tribunals Service, as a result of the invitation from the Master of the Rolls to the Bar Council and Law Society for written submission by 9 June 2014 on the three linked appeals (*Utilise TDS Limited*; *Decadent Vapours*; and *Denton*).

It is refreshing to note that since 4 July 2014 when Lord Dyson upheld the three linked appeals in the said *Utilise TDS Limited*; *Decadent Vapours*; and *Denton* and gave relief for non-compliance, saying his guidance in *Mitchell* remained 'substantially sound' but that the problem was the way it had been interpreted - that some restoration of fair balance has been restored and a wry smile or two raised.

Here are four graphs that tell a thousand words from the collated results of that Survey Monkey:

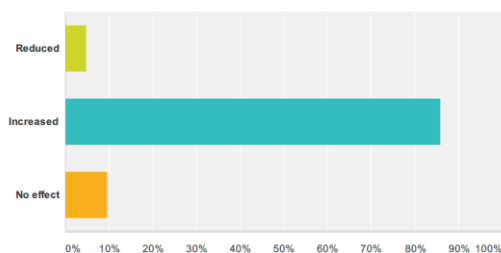
Q4 Do you agree with the decision to raise the costs budgeting exemption threshold in respect of claims from £2m to £10m ?

Answered: 21 Skipped: 2



Q7 Have you found that compliance with the new requirement to prepare a cost budget form has reduced or increased the costs incurred in conducting litigation?

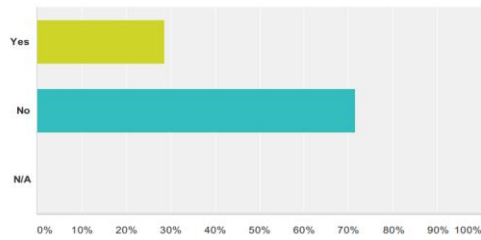
Answered: 21 Skipped: 2



⁷ <http://www.surveymonkey.com/s/K62LCXN>

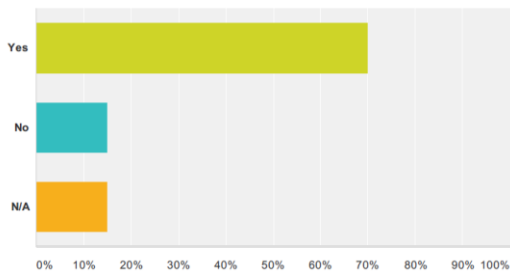
Q13 Do you consider that it should become established practice for the parties to exchange cost budgets during the pre-action protocol process?

Answered: 21 Skipped: 2



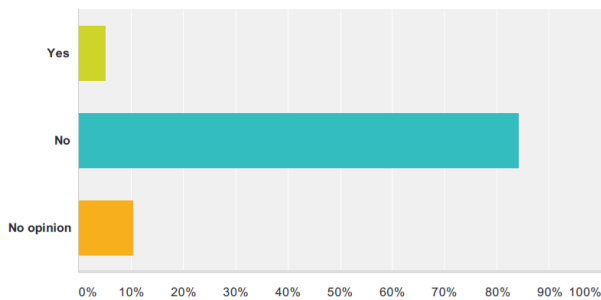
Q17 Have you encountered any difficulty in obtaining precise figures from experts for inclusion in a cost budget?

Answered: 20 Skipped: 3



Q22 The key objective of the Jackson Report was “to promote access to justice as a whole by making costs of litigation more proportionate”. Do you consider that the reforms have been successful in achieving that objective in relation to litigation conducted in the TCC?

Answered: 19 Skipped: 4



5. Social and sporting

This year’s TeCSA Champagne Summer Party was held on 25 June 2014 at King & Wood Mallesons SJ Berwin’s Roof Terrace overlooking London with a World Cup feel to it. Attendance was nothing short of excellent, the weather was a brilliant, we had fun with a variety of excellent entertainers and we made a small profit.

Cricket - Hudson Ashes

TeCSA again won all the laurels in its cricketing clash with TECBAR (thank you again to Martin Bowdery QC for all the behind scenes organising) entitling TeCSA to lift the *TCC 20:20 Cricket Challenge Trophy* and the bragging rights for one more year.

Both sides as tradition now has it gathered at the UCS playing fields in Hampstead on one of the warmest evenings this summer for an exciting and high quality 20:20 contest which left spectators near breathless.

Well done to the team and to the supporters who witnessed TeCSA's triumph of this challenge trophy. We are looking forward to next year already. The 'Hudson Ashes' are again to be bestowed on TeCSA at the Annual Dinner tonight!

The Annual Dinner last year was a prodigious success. It is hoped tonight at One Great George Street (our first return here after 23 years) will be equally good, if not better.

On behalf of the rest of the Committee we extend a big thank you to both Dominic Helps and Sally Davies for all their hard work.

6. Marshal Scheme

TeCSA continues to coordinate a Marshal Scheme whereby Trainees and Junior solicitors are able to sit with a TCC Judge in a Court hearing for a week to gain insight and experience.

In the last 12 months (i.e. from 11 November 2013), we have placed 10 Marshals (this compares with 10 also last year and 9 the previous to that in 2012) on the Scheme. We have one more allocated space this year (on 24 November) which we have also filled (so 11 in total until the end of 2014).

The scheme remains extremely popular and has been well supported by the TCC Judges; we just need to ensure slots are kept. I huge thank you to Will Gard and his assistant Richard Adams for helping make this system so accessible.

7. Information

TeCSA launched last year a Linked-In ...page. We do not rest on our laurels.

https://www.linkedin.com/groups?trkInfo=VSRPsearchId%3A208630421384778505216%2CVSRPtargetId%3A6533220%2CVSRPcmt%3Aprimary&trk=vsrp_groups_res_name&gid=6533220

TeCSA sent invitations to all TeCSA members to join. Chris Hill is the Owner/Manager of the LinkedIn membership and is getting on with establishing the group. Only a Group Owner/Manager may send Announcements to the Group. Group members may start a discussion (subject to moderation).

Through the TeCSA Linked-In Group we can:

- Stay in touch with our members;
- Raise topics for Group discussion;
- Run on line polls;
- Set up sub-groups of members interested in particular topics;
- Put TeCSA members directly in contact with one another.

8. Committee Elections and rules 14 and 15

Rule 9 provides in each Annual General Meeting one third (or as near one third as may be) of the elected members shall retire, but with the right to offer themselves for re-election. The members to retire shall be those who have been longest on the Committee since election or re-election, ties (unless otherwise agreed) to be determined by lot.

The Secretary reported at the Committee meeting on 23 September 2014 that Rupert Choat having retired during the year left three members of the Committee to stand down for re-election. By rotation these were Sally Davies, Will Gard and Chris Hill. There would therefore be four places to fill. Sally Davies, Will Gard and Chris Hill have indicated that they would wish to stand for re-election. Adrian Bell of CMS had expressed an interest in standing and the Secretary has contacted him to let him know the procedure.

On 23 October 2014 Notice was given that there will be an election of members to the Committee and that the Officer positions of Chairman, Treasurer and Secretary are also up for re-election. In respect of the Officer positions, Simon Tolson (Chairman), Ann Levin (Treasurer) and Julia Court (Secretary) also all agreed to stand for re-election.

The Annual General Meeting takes place this evening, 20 November 2014 at One Great George Street, London, SW1P 3AA at 6.30 pm, prior to our Annual Dinner.

The election results will be formally announced at the AGM today.

A handwritten signature in black ink, appearing to read 'Simon Tolson', with a large, sweeping flourish extending to the right.

.....
Simon Tolson
Chairman

20 November 2014