

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

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Chairman's Report 2011

This is the Annual Report of TeCSA covering the year since last year's AGM in November 2010. 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: John Bishop

Hon. Vice Presidents: James Hudson and Robert Fenwick Elliott

In addition to the Officers, the members of the Committee comprise:

Ms Caroline Cummins, Ms Sally Davies, Mr Kevin Forsyth, Mr Will Gard, Mr Andrew Hibbert, Ms Caroline Pope, Ms Suzanne Reeves, Ms Fiona Reilly, Mr Ian Rogers, Mr James Turner and Mr Steven Williams.

Membership of TeCSA now stands at 192 (down from 252 last year).

This year has been yet another active one for TeCSA and the following is just a brief summary of its many activities.

1. TeCSA/TECBAR Symposia in London

The symposia TeCSA held with TECBAR was held in London on 30 June 2011, in which Mr Justice Akenhead and Mr Justice Antony Edwards-Stewart participated, entitled, "E-disclosure and e-working in the TCC". It featured excellent papers from Alex Charlton QC of BskyB fame and needles in haystacks and Mike Taylor barrister-turned-technogeek of i-Lit who inter alia gave excellent papers with original alternatives to Standard Disclosure and how to make intelligent proportionate searches for documents, the smoking gun or not, how technology should be used and how not to be suckered by the e-disclosure vendor industry. The Symposium addressed issues with modern business media and lessons learnt, particularly on what for some has been a painful baptism with e-disclosure.

Mr Justice Edwards-Stewart opened boldly with a quote from a World War 1 general, likening TCC IT experience to a the situation in a hard fought battle: "Hard pressed on my right. My centre is

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yielding. Impossible to manoeuvre. Situation excellent. I am attacking.” Regrettably, he explained the news was not as good as one would hope, but we were reassured that all bugs in the system are being ironed out and the future is bright. We are counter-attacking.

The conferences were well attended and feedback has been excellent, including web and legal blogs.

2. Adjudication

TeCSA is an Approved Nominating Body under the HGCRA, and the TeCSA Adjudication Rules are now in widespread use in construction contracts. It has led the way thanks to the great work of its two adjudication sub-committees. In the last 12 months we have made 73 nominations; this is a slight increase compared with last year, during which 61 nominations took place but less than the 113 adjudications the year before. The average number of nominations in the years before then has been 77, giving an overall average of 79 per annum. Therefore, we are only slightly down. Nowhere near not as bad as other ANBs based on the recent Glasgow Caledonian University paper .

In response to developments in the law and because of the need to maintain standards, the Committee has carried out further reviews and revisions of TeCSA’s Adjudication Rules, and has established a new set of criteria for its adjudicators.

A lot of work was carried out at the beginning of the year for the highly successful TeCSA Adjudication Conference on 22 March 2011. Here we launched the first draft of the TeCSA Adjudication Service (now since finalised) and what is now Version 3.2 of the TeCSA Adjudication Rules. We debated the new canvas with the LDEDCA and then the waited new Scheme.

TeCSA has pushed ahead with a continuing professional development and vetting regime of every single panel adjudicator ensuring our adjudicators are amongst the best suited by experience, knowledge and background. That work continues through our sub-committees.

Nearly all 54 of our current registered TeCSA Adjudicators have filed CPD histories for the year ending 31 July 2011 and are now going through a call up process before a three person board (William Gard (Chair), Neville Tate and Ann Levin and Andrew Hibbert); call up papers for our first three candidates arose earlier this week. The assessment includes the review of a (redacted) reasoned decision made by the adjudicator and an interview.

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

Then, in July TeCSA (Chairman and Suzanne Reeves) with a foot in the Construction Umbrella Bodies Adjudication Task Group (CUBATG) met civil service draftsman and Tony Mulcahy, assistant director of the construction sector unit of the Department for Business, Innovation and Skills (BIS) to reality check the wisdom of s141. This was followed by submissions via CIC to

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support the industry's final unified case to isolate and stay Section 141 of the LDED Act 2009 – which introduces section 108A, the purpose of which was to ban Tolent clauses. Despite plainly poor drafting, BIS said we would have to make out a case and give impact assessments. TeCSA duly did so and produced legal analysis of the existing position. CUB produced an impact assessment on the likely effect on the marketplace of the new section 108A. BIS received and digested and then promptly ignored it – denying any issue exists.

3. Consultation

TeCSA through its Chairman and Caroline Cummins has actively participated in the Technology & Construction Court Users Committee (Ian Rogers made a valuable contribution on PAP) which this year has covered the move to the Rolls Building by the TCC; e-working, e-disclosure, pre-action protocol, urgent applications, procurement business cases, injunction and enforcement cases.

TeCSA has played a big part in upholding the benefits of the pre-action protocol. Earlier in the year, via Ian Rogers, TeCSA undertook a straw poll. Ian emailed 121 fellow in-house lawyers and claims managers within the construction industry to enquire about their experience of and views upon the Pre Action Protocol for Construction and Engineering disputes. He received 35 responses from 121.

Of which 22 responses were in favour of continuing the protocol in some form; 10 responses against continuing the pre-action protocol; complaints related to abuse and/or tactical use of PAP as opposed to the underlying principle. The strong message was that PAP should not go.

As a result of this mini survey, through its representatives on Mr Justice Ramsey's pre-action protocol Working Group, TeCSA pressed the need for a fuller survey via consultation with TCC users for a broad church view on the pros and cons. TeCSA, with some input from the Working group, then put together a full-blown survey (Caroline Cummins did much of the work. The Chairman had but a small part). This survey was jointly launched by SCL, TECBAR, and TeCSA and ran late July to 5 October. Views were mixed. They do not come out overwhelmingly in favour of scrapping PAP. The working party is still considering the results of the survey and will be making some proposals shortly.

4. Valedictory and spin offs

The Chairman gave a valedictory speech for Judge Toulmin CMG QC in February and in the process, TeCSA have gained a strong ally in the form of John Toulmin (his father was a solicitor and he once worked in his office at the start of his career). Via an introduction by John Toulmin discussions with the Master of the Rolls, Lord Neuberger of Abbotsbury have taken place with a view to a TeCSA/TECBAR lecture/symposia on “the interventionist judge” and all that goes with best judge based proactive case management.

5. Rolls Building

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TeCSA continued to participate in the consultation regarding the new Rolls Building at 110 Fetter Lane which opened for business last month. It is good to see many things said by us were taken on board, even as the budgets were squeezed still further.

TeCSA is a sponsor of the groundbreaking new industry-led campaign to promote London as the global dispute resolution centre titled, 'Unlocking Disputes'. A reception was held (attended by Andrew Hibbert, Caroline Cummins and the Chairman) at the Rolls Building with the legal glitterati to welcome in the new era in "the biggest dedicated business court in the world" for the first time bringing under one roof the Technology and Construction Court, the Chancery Division, Admiralty, Commercial and Mercantile Court.

TeCSA will participate in September 2012 in an international construction law based conference (with TECBAR, SCL, CI Arb, CityUK) predicated on the business that might be attracted to the London Courts.

6. Social

The last Annual Dinner was a great success. It is hoped tonight will be equally good, if not better. Our plan in early summer 2012 is for an 'Olympic Party' having cause to celebrate law for London and shake off this recession – having forgone a party this year.

7. 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. Over the last complete "sitting" year, 17 Marshals sat with TCC Judges under the scheme from various firms, the most we have had so far. The scheme remains extremely popular and has been well supported by the TCC Judges. We are grateful.

8. Technical Course

No courses were held this year to allow some freeboard after four continuous years. It is planned to review the position this coming year. A planned Expert Witness Course is now being finalised and a serious on delay analysis and quantification of claims.

9. Single European contract law

TeCSA's committee have investigated what Ken Clarke has called the "Esperanto fallacy", we debated the European single contract law and how it could erode English hegemony. We reviewed the model rules drawn up by leading contract law academics in Europe. TeCSA (Julia Court and Dominic Helps) filed our submission in May to the Law Society's final response to the Commission on the Feasibility Study for a future instrument on European Contract Law.

10. Information

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The TeCSA website contains valuable information for members and non-members alike and is hopefully improved, however, more work remains to be done.

Our Adjudication Procedure is fully set out including copies of the old and latest TeCSA Rules and suggested forms to use in adjudication. Our IT Protocol, ADR Protocol and Model Mediation Agreement as well as our panels of adjudicators and mediators are amongst the wide variety of resources to be found at www.tecsa.org.uk.

11. Elections

In terms of elections, no one came forward to stand for election except Chris Hill of Norton Rose. Sally Davies and Will Gard re-stood. I am delighted to say Sally Davies and Will Gard were re-elected without the need for a contested election/ballot, as there were more than three places available.

I am thrilled Chris Hill has been elected for the first time to the TeCSA Committee.

Fiona Reilly has resigned from the Committee; she has given many years of service, for which we thank her enormously.

10 November 2011