

# TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

www.tecsa.org.uk

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## Chairman's Report 2013

This is the Annual Report of TeCSA covering the 12 months since last year's AGM on 15 November 2012.

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:

Ms Caroline Pope, Ms Suzanne Reeves, Ms Sally Davies, Mr William Gard, Mr Andrew Hibbert, Mr Steven Williams, Mr Rupert Choat, Mr Christopher Hill, Mr Kevin Forsyth, and Mr Matthew E Smith.

Our co-opted members of the Committee have been Peter Rees QC, Ms Caroline Cummins, Simon Baylis (who retired in September), and we thank Simon for all his hard work and dedication, Ian Rogers and Stacy Sinclair. TeCSA is grateful for their support through the year.

Membership of TeCSA now stands at 172 fully paid up (176 last year).

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

## 1. TeCSA/TECBAR Symposia in London

The annual symposia which TeCSA organises every year in union with TECBAR was held in BLP's Auditorium on 25 June 2013, titled: *The Modern Law of Privilege - is it fit for purpose?* The discussion centred on the current state of the law of privilege asking whether or not it was fit for purpose. The event generated much debate, particularly in relation to the extent to which privilege offers protection in the context of international arbitrations and construction adjudications. Each of the talks gave much food for thought, including whether or not Parliament will take up the Supreme Court's invitation in *R (Prudential plc and another) v Special Commissioner of Income Tax and another* [2013] UKSC 1 to revisit the laws of legal advice privilege and the extent of its reach to those outside the legal profession. We were extremely grateful to have Mr Justice Stuart-Smith give us his view from the Bench.

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## 2. 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. Whilst it is good to see LOCOG adopted them for the London Olympics, it is sad perhaps that few, if not any, disputes were adjudicated! TeCSA has led the way thanks to the great work of its adjudication sub-committees, whom remain poised to take action on policy and principle.

In the last 12 months, we have made 83 adjudication nominations (73 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, eight in fact), and the year before that when we had 61 nominations - but rather less than the 113 adjudications in 2009/2010. The average number of nominations in the years before then has been 77, so we up slightly.

In response to developments in the law and because of the need to maintain standards, the Adjudication Sub-committee carried out a further review of its Adjudication procedures, and the criteria for its Adjudicators to uphold with its *Adjudication Service*. The Adjudication Service was revised most recently on 24 May 2013 taking account of feedback.

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

Our Panel comprises now of 80 Adjudicators. Amongst these, and taking into account those who are dual qualified (of which we have quite a number), we have:

Lawyers - Solicitor <sup>1</sup> and Barrister <sup>2</sup> of which two Scottish admitted/called.	47
Chartered Quantity Surveyors (main discipline)	24
Chartered Architects (main discipline)	2
Chartered Civil Engineers (main discipline)	3
Project Managers (main discipline)	3
Chartered Building Surveyors (main discipline)	1

TeCSA is in the process of firming up details of its Panel Adjudicator make-up by discipline areas.

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 is at least every 5 years.

TeCSA continues to push ahead with a 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.

### *Training feedback*

Feedback this year on the Panel suggests a small number of our experienced Adjudicators have not perfected their decision writing in terms of reasoning why they find one way or the other and their use of over prolix recitals and recitations of the submissions made. TeCSA will be focusing on good decision writing this coming year.

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<sup>1</sup> 42 Solicitors (some dual qualified)

<sup>2</sup> 5 practicing Barristers (some dual qualified)

### *Appointments*

A for the procedure for appointments, I am aware many on the Panel want to understand how things work, and try to work out who else has been approached from the emails that are circulated when nominations are sought. TeCSA will now make that transparent. Some ask what happens if they are unlucky. The answer is that under the Rota TeCSA operates they must wait until their surname comes back around in the next block of 10, although where an adjudicator is appointed and the parties promptly settle we will occasionally put their name back in the rota hat, if that is possible, on the next nomination request. The Rota is also disturbed where both parties seek a nomination of a named adjudicator in their contract or by joint agreement request or where a specific discipline is required, say a legally qualified architect, which is a small class. TeCSA wishes to demystify this process, but has to balance things proportionally in a volunteer service. The truth is there just are not that many referrals to go round. One a year is the most to be expected.

### *Adjudication Conference*

Today we held our 2013 Annual Adjudication Conference at the offices of Speechly Bircham LLP, 6 New Street Square, London EC4A 3LX, which included an update on the Adjudication Rules and Procedure; an update on TeCSA Adjudication and the Panel; Case Law Update covering cases such as *ABB Ltd v Bam Nuttall Ltd*; *CG Group Ltd v Breyer Group Plc*; *Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi)*; *TSG Building Services Plc v South Anglia Housing Ltd*; *KNN Colburn LLP v GD City Holdings Ltd*; *Willmott Dixon Housing Ltd v Newlon Housing Trust* and *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd*.

We had two facilitated workshops, the first themed as the, "Client's Perspective" - including the objectives of an adjudication, scoping the dispute, management of procedure, what clients want from a Decision, the control of costs and value for money. The second an "Adjudicator's Perspective" - including ethics, privilege, unrepresented parties, the use of assessors, professional negligence claims and expert evidence.

We were fortunate to have our "Keynote Speech" from the new Judge in Charge of the Technology and Construction Court, Mr Justice Edwards-Stuart.

A great deal of work was also carried out this year assessing and interviewing many on the panel.

## **3. e-Disclosure**

*This year TeCSA promulgated and gave birth to an e-Disclosure Protocol.* Feedback from TCC User meetings and anecdotal evidence from practitioners, clients and the judiciary had confirmed to us the need for guidance before the 'big bang' Lord Justice Jackson reforms in April. Members wanted the necessary practical tools as practitioners to underpin the operation of the newly introduced Practice Direction 31B, the *Disclosure Report* and its sister, *Electronic Document Questionnaire [EDQ]*.

To do this TeCSA duly established a Sub-committee to develop the draft Protocol and supporting guidance document comprising members of its full Committee (Steven Williams, Caroline Cummins (co-opt), Dominic Helps, plus outside support from Marie Claire O'Hara of Nabarro), with Andrew Kennel of FTI Consulting and Andrew Haslam of Allvision in an advisory capacity.

TeCSA saw it as sensible to seek the buy in of TECBAR, chiefly via Michael Soole QC and Matthew Lavy (representing the construction Barristers) and the Society for Computers and the Law - particularly Clive Freedman (actively involved with technology-related litigation in the TCC).

After a series of meetings with them we had a draft approved by all three organisations and we reached consensus to the point where each of the constituent organisations could give its unqualified blessing. The Protocol recognises the need for early informed discussion and agreement between parties about the scope of e-disclosure. It provides an easy to follow template and guidance to assist in this process and to minimise the risks.

The TeCSA e-disclosure working group has published an *e-disclosure pack*, a valuable toolkit for practitioners which 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.

*Along the way TeCSA met with the TCC Judges (and gained their valuable feedback) to finalise it in a form the Judges will include in the next edition of The Technology and Construction Court Guide.*

The e-Disclosure Protocol was *duly fashioned and launched by TeCSA on 1 November 2013 at our sell out conference 'Improving e-disclosure in Practice' held at BLP organized by Caroline Cummins with help from friends in Committee firms.*

As well as a range of extremely knowledgeable speakers at the Conference, all of whom have worked "at the coal face" of e-disclosure, the involvement of Edwards-Stuart J as the key note speaker and the presence of Stuart-Smith J showed just how seriously the TCC are taking the subject of e-disclosure.

The final stage of the process was to seek the support of the TCC Judges since the inclusion of the e-Disclosure Protocol in the TCC Guide has been seen as an important landmark in terms of establishing its "street-cred" and therefore ultimately its usefulness to practitioners and the Court. TeCSA is delighted that Mr Justice Edwards-Stuart as Judge in Charge of the TCC has formally announced the new TCC Guide will make express reference to it and its availability on the TeCSA website with all associated materials.

#### **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 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.

TeCSA considers it is well informed to comment given its specialist Members experience in running litigation for their clients and having taken close interest and co-sponsored the Centre of Construction Law at King's College, London, in its research; by way of King's interim report on the Costs Pilot on 3 February 2012 and Final Report in April 2013.

Whilst TeCSA supports the policy of preparing/lodging with the Court costs budgets and updating the same through the course of an action, that is very different to imposing a Costs Management Order (CMO).

TeCSA emphasised in its response that the Jackson Report supported the TCC and did not advocate mandatory costs budgeting at any level. The Executive Summary of the *Final Report* at page xxi said this:

*"Litigation in the Technology and Construction Court (the "TCC") is often conducted in a proportionate manner, and I make only modest recommendations concerning the operation of that court..."*

Chapter 29, p294:

*“...It is not the function of this Costs Review to tinker with parts of the civil justice system which are thought to be working well and where costs are usually proportionate. I should, therefore, record that respondents during Phase 2 expressed a high degree of satisfaction with the service provided by the TCC to court users. The Bar Council states that in the TCC case management “is thought to be satisfactory”.*

The Jackson Report focussed on the sins of AEI, trips slips, whip lash personal injury and clinical negligence claims cases where ambulance chasers were wagging the dog. We think LJ Jackson rightly identified many things that work wrong with civil procedure but not in the TCC.

TeCSA does not support what is in effect the Courts directing how cases are to be resourced and prospectively capping costs on set deliverables. The assumption seems to be that solicitors have lost a sense of proportionality and that there is something deeply wrong with how TCC cases are planned and run by specialist solicitors and barristers in this Court. TeCSA disagrees.

One of the main concerns is that the costs are assessed by Judges who, through no fault of their own, have no real experience<sup>3</sup> of the costs of construction litigation (without training and keeping up to date with the legal and expert market etc) and indeed the tasks associated with trial preparation and the interface issues between solicitor, the client, in house counsel etc. It is hoped closer liaison between the TCC, TeCSA and TECBAR and at TCC User meetings will reduced these concerns over knowledge and costs lacuna.

In short TeCSA did not see a case for the Commercial Court sitting out there on its own with a blanket exemption as currently pertains and the TCC having a £2m threshold for exemption. If costs budgeting is seen as positive overall<sup>4</sup> it is unclear why Commercial Court users should not also benefit from it.

TeCSA also considered that in all cases it should be open to the Court to in any event exempt a specific case from costs management if there is a good reason to do so, and submitted that cases involving the following features are examples of cases where exemption would invariably be appropriate:

1. Cases involving adjudications, including enforcements and arbitrations;
2. International cases of any value (i.e. cases between non-UK resident parties or involving foreign projects or developments);
3. Cases involving new or difficult points of law in TCC business or which have issues of technical complexity suitable for a High Court judge;
4. Any test case, or case which will be joined with others and treated as a test case;
5. Public procurement cases;
6. Part 8 and other claims for declarations;
7. Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;
8. Complex nuisance claims brought by a number of parties, even where the sums claimed are small; and
9. Claims for injunctions.

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<sup>3</sup> It is of note Mrs Justice Gloster, speaking at the Bar Conference 2012, said that the new CPR3.12 to 3.18 dealing with Costs Management may lead to “ill-informed” decisions on costs and that judges must be realistic about legal fees and what it costs to bring a case and that there was a tendency for judges who had made a good living as barristers to become “kind of mean” when it comes to the assessment of costs. Mrs Justice Gloster also said that she had “won the battle” to ensure that the Commercial Court was exempt from costs management.

<sup>4</sup> The King’s College Final Report dated 1 May 2013 on Costs Management Pilot which TeCSA co-sponsored was inconclusive as to mandatory cost budgeting/ imposition of CMOs.

## 5. Social and sporting

This year's TeCSA Champagne Summer Party was held on 12 June 2013 on Pinsent Masons magnificent Level 7 roof terrace overlooking London. Attendance was nothing short of excellent, the weather was a little grim, but we had fun inside and we made a profit.

### *Cricket*

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

Both sides gathered at the UCS playing fields in Hampstead on one of the hottest evenings this summer for an exciting and high quality 20:20 contest which left spectators breathless.

It was not until well after 9pm, with the light rapidly fading, and three balls of TeCSA's innings remaining, that we secured the winning run.

Well done to the team and to the supporters who witnessed TeCSA's triumph in the inaugural year of this challenge trophy. We are looking forward to next year already.

TECBAR had been charged with procurement of the Trophy which process had regrettably not been completed by the time of the game. Undertakings were given so watch this space!

The last Annual Dinner was also a prodigious success. It is hoped tonight will be equally good, if not better.

A big thank you to Dominic Helps and Sally Davies.

## 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 2012), we have placed 10 Marshals (this compares with 9 last year and 17 the previous to that in 2011) on the Scheme. The number would have been greater but there was an absence of Court work at the start of February and some last minute cancellations by Marshals which could not be reallocated in time.

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 has launched Linked-In ...We do not rest on our laurels.

[http://www.linkedin.com/groups?gid=6533220&trk=vsrp\\_groups\\_res\\_name&trkInfo=VSRPsearchId%3A208630421384778505216%2CVSRPtargetId%3A6533220%2CVSRPcmpt%3Aprimary](http://www.linkedin.com/groups?gid=6533220&trk=vsrp_groups_res_name&trkInfo=VSRPsearchId%3A208630421384778505216%2CVSRPtargetId%3A6533220%2CVSRPcmpt%3Aprimary)

TeCSA has just set up the LinkedIn Group and sent invitations to all TeCSA members to join. Chris Hill has agreed to be Owner/Manager of the LinkedIn membership and will get on with establishing the group.

By creating a 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.

The plan is once fully up and running we can send announcements to Group members, raise topics for discussion etc. We can also allow members to use the TeCSA logo on their Linked-In pages to show that they are members of TeCSA. Members can communicate directly with one another but may not send Announcements to the Group. We can use the Group to run on line polls, allow members to advertise jobs - only with the Group Owner/Manager's permission. We can also raise topics for discussion and appoint a moderator to monitor and edit discussions.

Only a Group Owner/Manager may send Announcements to the Group. Group members may start a discussion (subject to moderation).

## **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 three members of the Committee who fell for re-election based upon when last elected were Caroline Pope and Andrew Hibbert last being elected in 2009 and Dominic Helps in 2010.

All three were confirmed as re-elected to the Committee as only one other person, Fiona Reilly, came forward so there was no need for a contested election.

I am delighted Fiona Reilly now of PwC has been selected unopposed to re-join the Committee.

The election results will be formally announced at the AGM today. I am delighted that Fiona Reilly of PwC has been re-selected unopposed to join the TeCSA Committee.



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Simon Tolson  
Chairman  
20 November 2013