Technology and Construction Solicitors' Association

TECSA

EXCELLENCE | KNOWLEDGE COMMUNITY

MEMBERSHIP FEEDBACK FOR TCC USER GROUP MEETING

25 March 2021

To obtain feedback for the TCC User Group Meeting on 25 March 2021, TECSA put five questions to its Membership. 17 Members responded. Not all questions were mandatory. All responses were anonymous. The questions asked are:-

1. *Do you think the Disclosure Pilot should become permanent?*
2. *How do you feel the Disclosure Pilot is working?*
3. *What are your preliminary views on the introduction of Practise Direction 57 AC (Witness Evidence at Trial)?*
4. *Should remote hearings be available as an option following the lifting of COVID-19 restrictions?*
5. *Please provide any comments you may have on your experience of remote hearings and/or their use following the lifting of COVID-19 restrictions.*

RESPONSES

1. Do you think the Disclosure Pilot should become permanent?

2. How do you feel the Disclosure Pilot is working?

	How do you feel the Disclosure Pilot is working?
1	Parties seem to revert to standard disclosure or something close to it – unsurprising given that this has been the norm 'forever'. The cost of DRDs etc is then just wasted cost.
2	I think at the moment is adding expense as parties are debating what type of disclosure to have, but the aim is a good one
3	The menu of options to select is not working. Option D preferred by the judges. The disclosure pilot has added to the front loading of costs before the CMC stage which is making civil litigation a less attractive dispute resolution forum.
4	I have had no adverse experience with it.
5	Becoming too cumbersome so that its original purpose is being lost.
6	Adds to front-loading of costs across the board while having a positive impact on very few cases. Sits alongside prescriptive pre-action protocols and costs budgeting as nice ideas which end up adding unnecessary work and creating their own issues.
7	Working well.
8	Reasonably well, although better guidance on how to complete forms would be helpful.
9	It seriously front loads costs and permits contentious behaviour on what need not be contentious
10	OK – where parties co-operate – not sure that happens enough.
11	The intention was great, but the process is dreadful. It has increased the workload for solicitors and clients exponentially, generating extraordinary costs. Judges do not understand what is involved and commonly prescribe unnecessarily broad models and then slash cost budgets so the increased cost of an increased workload cannot be recovered. It should be scrapped and replaced by a new system led by legal designers

	and disclosure managers from law firms working on large cases with electronic disclosure systems (albeit with solicitor input).
12	Poorly in complex cases. It imposes layers of (unnecessary) work on already complicated cases. It does not allow sufficient flexibility for the parties to work efficiently within the process but instead gives tools to a difficult party to be more difficult. It does not properly cater for cases where there is a Part 20 Defendant. The timescales mean a lot of time and cost is front loaded which is not efficient. It states that parties should cooperate but there are no teeth if this does not happen. The TCC is not able to deal with Disclosure Guidance Hearings quickly. I have a general lack of confidence in the ability of the Judges to fully understand the complexities of electronic disclosure under the Pilot, not least because they have never had to manage such a process or deal with the software and providers and the rigours of collecting in documentation. Serious consideration should be given to solicitors sitting as assessors with judges to deal with such matters or in fact as disclosure judges (in a similar way to costs judges).
13	Experience has been generally favourable. It has forced parties to consider a more streamlined and proportionate approach to disclosure.

3. What are your preliminary views on the introduction of Practise Direction 57 AC (Witness Evidence at Trial)?

	What are your preliminary views on the introduction of Practice Direction 57AC (Witness Evidence at Trial)?
1	None as yet.
2	I consider it unsuitable for construction disputes as there is a need for a witness such as a site manager to recount the narrative of the project and there is currently nowhere for that to be done other than in witness evidence
3	This again will lead to front loading of costs for clients as proofs will have to be taken before claimants know whether their claim is viable. The continuing front loading of costs via the CMC process is making civil litigation a less attractive dispute resolution forum.
4	Good.
5	I hope it will be positive although in some cases it is going to be very difficult due to the language barriers and other issues for construction witnesses.
6	Whilst its intentions are worthy, it is concerning that it seems unlikely to be functional in practice, particularly regarding the presentation of documents to clients when many clients will do much of the work on document collation / review themselves, particularly in the context of quantum heavy construction disputes
7	Broadly welcome.
8	Overly restrictive, meaning there is likely to be widespread lack of compliance.
9	Working well.

	Unnecessary and just makes the process of obtaining witness evidence more complicated/difficult and increases costs. Do not see any need for the changes. More tinkering and pointless changes.
10	n/a
11	I think some regulation is necessary but I am not sure this will have the desired effect and it will certainly significantly increase costs. For construction defects cases where the project may have been complete 12 years ago, we rely on clients to pull together information - to list every document in the witness statement and the audit trail relating to them is extremely onerous.
12	There should have been some kind of trial period. The proposals look like they are going to increase the costs of disputes, which cannot be a good thing.
	It is time to improve the quality of witness evidence, so I am in favour of reform. Whether this will improve it, I am not sure.
13	None so far.
14	It is likely to be significantly costly and require disproportionate senior fee earner time.

4. Should remote hearings be available as an option following the lifting of COVID-19 restrictions?

5. Please provide any comments you may have on your experience of remote hearings and/or their use following the lifting of COVID-19 restrictions.

	Please provide any comments you may have on your experience of remote hearings and/or their use following the lifting of COVID-19 restrictions.
1	Remote hearings have worked well every time I have used them. They save a huge amount of time travelling to venues and waiting for them to start. While they may not be ideal for more substantive hearings, for CMCs, PTRs, and short hearings with no evidence to test (e.g. enforcement) they should become the norm for cost and efficiency reasons.
2	My team's experience suggests that cross-examination is not as thorough remotely. But yes for directions, CMCs, short applications.

3	None.
4	After the lifting of restrictions I think that there will be a role for remote hearings, particularly to save costs and with the parties' consent, but with remote evidence it is more difficult to form a view as to credibility because the link often breaks down and you cannot see who else is present and how they may be priming a witness.
5	Limited, however, it does seem that they are sometimes harder for the judge to control allowing some Counsel to act in ways that they may not have done in open court.
6	The hearings themselves work well and there are obvious efficiencies to be had. I do though wonder whether it will impact upon the role of interim hearings as a catalyst to get parties to budge into "settlement ready" mode, as so often happens for those not used to TCC litigation when a client / opponent sits in the court room and listens to directions and costs budgeting - that shock factor in the formality of an in person hearing can be very useful to assisting that change of mind set.
7	Although an option, the default should be for a physical hearing of any trial or heavy application. For directions and routine applications, a virtual hearing is sensible and cost effective.
8	Generally fine, occasionally defendants will claim IT issues prevent them taking part which can be disruptive and lead to adjournments/delays. Should be retained as an option but used carefully in light of such issues, and ideally not where cross examination is going to be required.
9	Saves time and cost.
10	Remote hearings work well and save time and costs.
11	I think remote hearings should remain for interlocutories, CMCs etc but not for trial, unless it is purely submissions with no factual or expert evidence.
12	Not for cross examination of experts and witnesses.
13	There may be a costs and efficiency benefit attached to remote hearings, especially for short hearings of up to half a day.
14	Remote hearings can be very beneficial and cost efficient where parties are in different geographical locations particularly for interim applications, Part 8 hearings and preliminary issues where little to no witness evidence will be provided.
15	CMCs and half day applications should by default be heard remotely. It saves significant cost and there is little if any benefit of such hearings being held in person. PTR and Trials should by default revert back to in person hearings as witnesses and counsel experience significant fatigue from long days in video hearings.
16	Live hearings always preferable as allows you to have off the record discussions with other side to see if settlement/agreement can be reached or to try to build up some dialogue/rapport.