



**(i) Key characteristics of an  
effective Adjudicator and**

**(ii) ANB Evaluation Processes  
from TeCSA view point**

The overriding objective of the TeCSA Adjudication Service is to promote high quality dispute resolution processes to the construction, engineering and technology industries.

# Premier ANB

- As the 'premier' appointing body from principally within the legal profession, TeCSA is conscious of the desirability of maintaining its reputation as a body that can be trusted to nominate a quality adjudicators. This reputation can only be maintained if the reality matches the expectation;
- The panel has been multi-disciplinary since its initial course in 1996 to TeCSA Solicitors.

# ***Key Characteristics of an effective Adjudicator – attributes and skills***

TeCSA view has always been that it should set appropriately high standards for those who join its adjudication panel and who therefore may be nominated from time to time to act as Adjudicator. TeCSA keeps these issues under regular review as the law and practice is ever moving.

This is natural and normal as TeCSA has been at the heart of the development of statutory adjudication since even before its introduction with the 1996 Act.

# “High quality” service

The characteristics of a “high quality” service means TeCSA as an ANB sees itself as making:

- enforceable Adjudicator appointments
- with minimum fuss (and expense) and one that nominates...
- high quality Adjudicators, “fit for purpose” who uphold the highest standards.

# Being honest and impartial are key characteristics



<https://tribunecontentagency.com/article/ohman-jack-color-editorial-cartoon-20170329edohc-a-tif/>

# We have seen that some adjudicators come unstruck right at the start of the process when they accept appointments

TeCSA has for many years maintained a central register of all adjudicator appointments. It knows who has been appointed, when and the parties. For this reason the issues in *Eurocom Limited v Siemens Plc* were not to anyone's knowledge an issue before or since this case lifted the lid off questionable practices that had developed in some appointment processes.

Hamblen J's judgment in *Cofely Ltd v Bingham and Knowles* acts as a reminder to all those involved in our industry of the relationships that may develop and the need for transparency about those relationships. A key characteristic of an effective adjudicator is being honest and not objectively biased (for apparent bias reasons).

*Davidson v Scottish Ministers* [2004] UKHL 34.

Would an informed and fair-minded observer, with knowledge of all the relevant circumstances, conclude that there was a real possibility that the tribunal was biased?

The test is objective and not dependant on the characteristics of the parties.

The Court must look at all the facts available to it – material circumstances will include any explanation given by the decision maker under review.

# Cofely...

In *Cofely*, the arbitrator's failure to disclose the fact that Knowles had been involved (either directly as a party or in its role as representing parties) in appointing him as arbitrator/adjudicator in 25 cases over the course of three years, despite the requirement in his nomination form to disclose 'any involvement, however remote' with the parties, contributed to the finding of apparent bias.

# In order to meet this objective, the TeCSA Adjudication Service has reviewed and will update its Service, Rules and Nomination processes: very shortly

Including an updated conflict of interests procedure, namely:

- a requirement for the referring party to declare all adjudicators **with potential interests**, including conflicts of interest, on the nomination form;
- the **option** for the referring party to identify on the nomination form those individuals it considers are not suitable to act in the adjudication, but requiring them to provide precise reasons as to why; and
- a requirement for the nominated adjudicator to give an updated undertaking and make a declaration as to conflicts of interests or other involvements, relationships or interests that are likely to, or may reasonably be perceived to, affect the adjudicator's independence or impartiality;

# Nomination



[http://www.philly.com/philly/opinion/Signe\\_Wilkinson\\_2016\\_in\\_review\\_editorial\\_cartoons.html](http://www.philly.com/philly/opinion/Signe_Wilkinson_2016_in_review_editorial_cartoons.html)

# Nomination form...update

We will now require the referring party to send a copy of the nomination form to the responding party at the same time as the nomination form is sent to TeCSA. TeCSA also retains the absolute discretion to send any documents on to the responding party as appropriate;

# TeCSA - Changes to rules and Service

Comparisons highlighting the changes made to the Service, Rules and Nomination forms will be available shortly on the TeCSA website, so watch this space.

# Cool head when asked - RFIs

Adjudicators, like arbitrators, should handle requests for information regarding their relationships with parties in a professional, considered manner, and should refrain from '*descending into the arena*'.

# Fraser J who said in *Beumer Group UK Ltd v Vinci Construction*

Adjudication today is a “*formal dispute resolution forum with certain basic requirements of fairness*” to quote from Fraser J in *Beumer Group UK Ltd v Vinci Construction*

# *Beumer Group UK Ltd v Vinci...*

*“... for all its time pressures and characteristics concerning enforceability, [adjudication] is still a formal dispute resolution forum with certain basic requirements of fairness...” and “... although adjudication proceedings are confidential, decisions by adjudicators are enforced by the High Court and there are certain rules and requirements for the conduct of such proceedings. Adjudication is not the Wild West of dispute resolution.”*

# ***Beumer Group UK Ltd v Vinci...***

By parity of reasoning with Dyson LJ in *Amec v Whitefriars* and Coulson J in *Paice and Springall v MJ Harding Contractors AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* ...appearance of unfairness

# *Beumer Group UK Ltd v Vinci...*

*Beumer Group* is a striking example of obfuscation and poor candour by that adjudicator's failure (Dr Chern) to disclose his involvement in a simultaneous adjudication involving one of the parties which was a material breach of the rules of natural justice.

# As to the panel, some truisms:

- Any person may practice as an adjudicator without endorsement in that capacity from any professional body!
- It is not necessary for a person practising as an adjudicator to be on the list maintained by any adjudicator nominating body.

# As to the panel, some truisms...

- If someone has a good reputation in the construction industry, or with those who serve the construction industry in dealing with claims, once on the panel and provided they keep a clean nose and the CPD they will receive adjudication appointments irrespective of any third party endorsement and....
- They do not have to be a Solicitor!

# As to the panel, some truisms...

Some basic legal training and familiarity is essential, but not all adjudicators need to be legally qualified.

The person best capable to deal with a dispute will rest on the type and facts of that dispute. An engineer to look at an engineering dispute, an architect to look at design, a quantity surveyor to look at value and quantum and so forth.

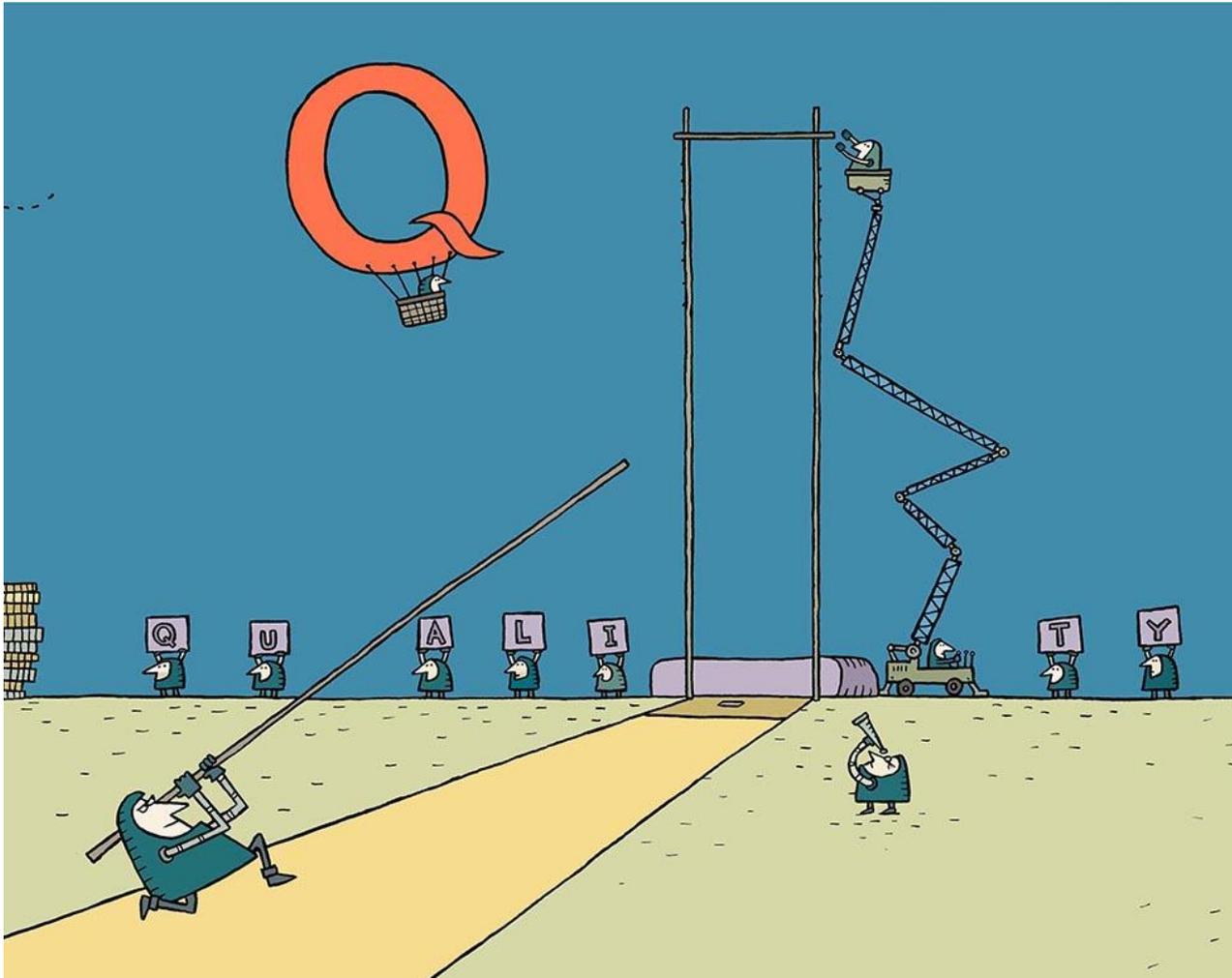
## 4 things you should know about the TeCSA Adjudication Service:

1. The breadth of its multidisciplinary panel of adjudicators ensures that the right individual with the appropriate expertise will be nominated;
2. In all cases nominations are made by senior lawyers with extensive adjudication experience who are well aware of the issues that can arise concerning selection of adjudicators and of the steps that need to be taken to ensure that nominations are effective;
3. The TeCSA Adjudication Rules contain unique features designed to make the adjudication process work more smoothly and to ensure that the cost of the process for the parties is kept as reasonable as possible; and
4. If you are involved in the drafting and negotiation of contracts, the easiest way of ensuring that the TeCSA Adjudication Service will apply to any disputes that may arise is simply to incorporate the TeCSA Adjudication Rules.

# The task

- TeCSA Rules (Rule 13) expressly require fairness and impartiality and prohibit acting if a conflict (Rule 20-4);
- Ascertain the facts and the law;
- Without disproportionate expense, but that still means doing ones best;
- Within the constraints of the 28-day process as may be extended;
- Having regard to the contractual rules and the law;
- Having regard to the provisional and binding nature of the Decision;
- Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of his opponent; and
- Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

# Q is for Quality: Set the bar high



# How high is the bar?

The TeCSA requirements and assessment procedure are designed to implement the quality approach.

Compulsory CPD and periodic assessments of Adjudicators are part of that qualitative process.

# *Key characteristics on the job*

- Top ANBs like TeCSA expect adjudicators to have sufficient knowledge of the Acts and the relevant Statutory Instruments
- Together with an understanding of the court's interpretation of them at the time

# *Key characteristics on the job...*

Adjudicators are expected to be aware of how the drafters of the standard form contracts have incorporated the requirements of the Acts into their documents and, where a particular standard form of contract forms the basis of the construction contract out of which the adjudication arises, grasp how that contract works and has been construed by the courts.

# *What does good look like?*



<http://www.kynang.edu.vn/ky-nang-mem/ky-nang-lam-chu-cam-xuc/17572.html/attachment/ky-nang-quan-ly-cam-xuc>

# What makes a good adjudicator? What are their characteristics?

1. a sound knowledge of construction contracts, standard forms and their payment and valuation processes;
2. the ability to manage time, both the adjudicator's own and management of the parties and the process. An adjudicator needs to be able to plan in detail the course of the adjudication from the outset, so as to ensure that the decision is completed on time;
3. an ability not to be distracted by the minutiae so that disproportionate time is spent on red herrings, rats and mice; by peripheral matters;
4. an aptitude for writing clear directions and active case management;
5. the ability to grasp the essential issues quickly and, therefore, to focus attention firmly on those issues;

# What makes a good adjudicator? What are their characteristics?

6. someone who reads the documents, recognises real issues may not be quite what has been expressed and undertakes a proper analysis, focused on the issues, achieves good understanding on the technical aspects relevant to the issue, has an open mind, proactive, enthusiastic (not a laggard) and flair never go amiss;
7. the ability to treat the parties fairly and politely, no matter what the provocation might be, and wherever possible, to take on board the submissions made by each side, even if the suspicion might be that the documents are not adding to the adjudicator's understanding of the issues between the parties;
8. for the last week or so of the 28 or 42 days, the adjudicator's own timetable should create the discipline to identify times by which important parts of the decision must be completed;
9. as for the decision it needs to be enforceable, soundly reasoned, presented logically and firmly grounded in fact and law.

# What makes a good adjudicator?...

There are also characteristics that are not always helpful to a good adjudicator.

- The desire to work out an answer to each sub-issue and in detail is much more of a hindrance than a help.
- A detailed specialist understanding of the underlying issues can sometimes cause problems in getting bogged down on secondary issues.
- Adjudicators are asked to decide points because of their decision-making qualities and their general familiarity with the technical background and relevant law.

# Balfour Beatty Construction v Lambeth London Borough Council – don't it!

A critical path analysis may be necessary for an adjudication concerning extensions of time and the deduction of liquidated damages to be carried out methodically and fairly. However, an adjudicator who constructs the referring party's case for it and does not give the responding party reasonable opportunity to comment upon the case it has to meet is not acting fairly and impartially and his decision will not be enforced.

# Seven golden rules for adjudicators

1. **Be bold:** Adjudicators have a unique jurisdiction, where the need to have the right answer has been subordinated to the need to have an answer quickly.
2. **Address Jurisdiction issues early and clearly:** Adjudicators should always deal expressly with any jurisdictional challenge, and they should not abdicate the responsibility for providing an answer, even if it is not binding. They should consider the challenge applying common sense, but must avoid being too jaundiced.
3. **Identify and answer the critical issues(s):** Adjudicators must ignore, unless it is unavoidable, the sub-issues and the red herrings.
4. **Be fair:** Wherever possible, the adjudicator should properly consider every aspect of the parties' submissions.
5. **Provide a clear result:** Most decisions are lengthy and detailed.

# Seven golden rules for adjudicators... **FENWICK ELLIOTT**

6. **Do it on time:** The adjudicator must complete the decision within the statutory period or any agreed extended period.

7. Finally, the adjudicator should **avoid making silly mistakes** such as arithmetical errors, name and number transposition, awarding interest incorrectly etc.

Plus:

Manage time (the adjudicator's own time and that of the parties);

Grasp the essential issues quickly and focus on those issues;

Treat the parties fairly and courteously, and to take on board their submissions.

# ANB evaluation processes from TeCSA viewpoint

In terms of evaluation processes TeCSA seeks to ensure its panel meet at least the ethical and professional standards which adjudicators must apply as a matter of general law.

As with any other kind of tribunal tasked with deciding a dispute between two or more parties, are bound to act impartially and according to the rules of natural justice.

# Adjudication Service

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<https://iqmsglobal.com/assessment/>

# Six years ago TeCSA introduced an assessment procedure for adjudicators, commencing in 2011

Being on the TeCSA list/panel carries with it a duty to do various things are reflected in the Adjudicator Undertaking.

This in turn steps down into how TeCSA view each of the panel apropos reaching and maintaining standards at appointment, at interlocutory stages and in production and writing of their decision.

# Clause 5 of the Adjudication Service states of the *ADJUDICATOR REQUIREMENTS AND ASSESSMENT PROCEDURE:*

*Each adjudicator on the Adjudicator List shall:*

- (a) Give the undertaking in the form attached at Appendix 1 (as amended from time to time) (“the TeCSA Adjudicator Undertaking”);*
- (b) Undertake the Continuing Professional Development required by TeCSA from time to time. TeCSA’s current requirements are set out in Appendix 2 attached (“the Requirements for TeCSA Adjudicators’ Continuing Professional Development”);*
- (c) Be regularly and independently assessed in accordance with the requirements of TeCSA from time to time. TeCSA’s current requirements are set out in Appendix 3 attached (“the TeCSA Adjudicator Assessment Requirements”).” [Emphasis added]*

# FEEDBACK FROM USERS/ ADVERSE JUDICIAL CRITICISM

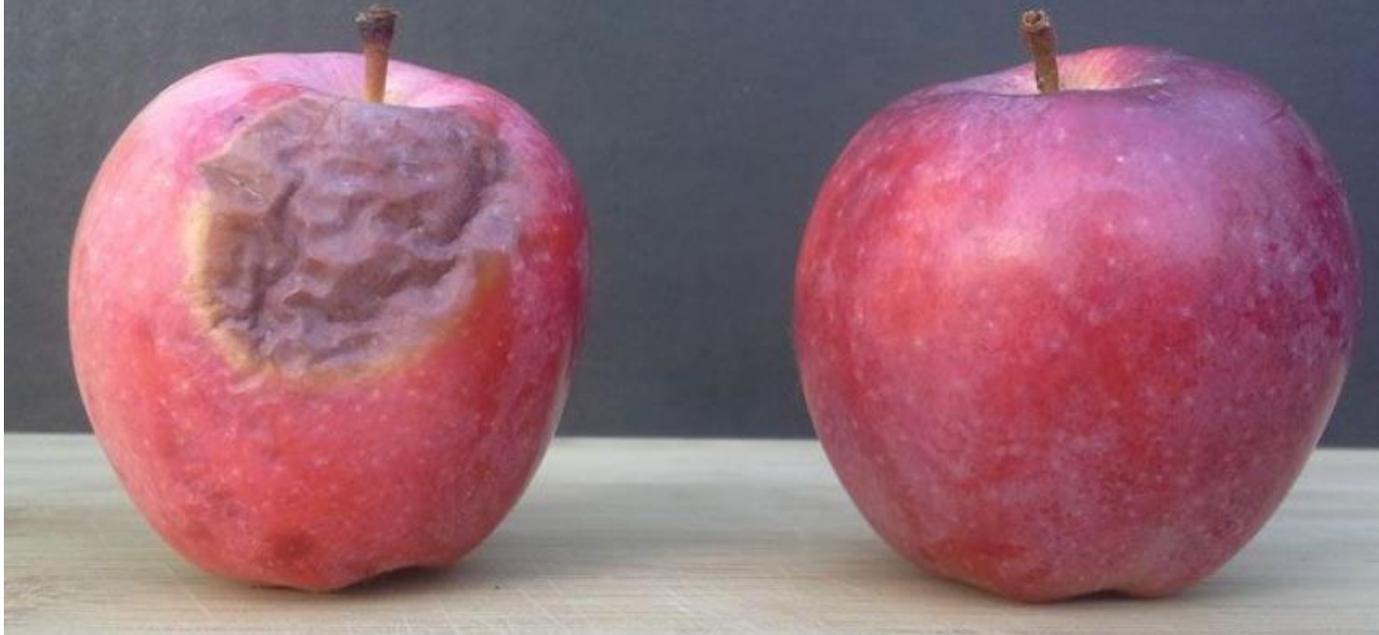
6.1 The Chairman will routinely invite feedback from parties by way of a questionnaire. The Chairman may investigate any adverse feedback received (whether in response to any questionnaire or otherwise), and/or any adverse judicial criticism made and known to TeCSA, concerning any adjudicator.

6.2 The Chairman will provide any feedback received and/or any adverse judicial criticism made about an adjudicator to the Assessors appointed in accordance with the TeCSA Adjudicator Assessment Procedure.

6.3 Following his investigation the Chairman may in his absolute discretion decide that any adverse feedback and/or adverse judicial criticism concerning any adjudicator gives sufficient grounds to institute an Ad Hoc Assessment under the TeCSA Adjudicator Assessment Procedure.

6.4 Any Adjudicator who is the subject of any adverse criticism shall be given an opportunity to comment on the information provided to the Assessors appointed in accordance with the TeCSA Adjudicator Assessment Procedure.

**Spotting bad content  
isn't as hard as you think**



[https://moz.com/blog/evaluate-content-quality-the-easy-way?utm\\_source=twitter&utm\\_medium=social&utm\\_content=evaluate\\_content\\_quality&utm\\_campaign=blog\\_post](https://moz.com/blog/evaluate-content-quality-the-easy-way?utm_source=twitter&utm_medium=social&utm_content=evaluate_content_quality&utm_campaign=blog_post)

# Criteria for assessment of the Decisions

## Content

1. The content of the decision is dictated by, amongst other things, the type, complexity and number of the issues, the extent and nature of the evidence and the personal style of the adjudicator;
2. The reiteration of evidence and the arguments of the parties should be limited to the extent that is necessary to enable the parties and any third party such as a judge, to understand how the adjudicator reached his conclusions. The parties are already aware of each other's submissions;
3. There should be sufficient commentary to indicate to the parties and any independent third party how the adjudicator has reached the decision. The reiteration of party submissions on a "cut and paste" process alone does not constitute reasons without further explanation;

# Criteria for assessment of the Decisions... pp12-15 of the AS

4. Whatever is written should be set down in an orderly and logical sequence. If there is more than one issue or group of issues the evidence and argument relating to each and the conclusion reached should be separately identified; and reiterated where appropriate. It can be confusing for decisions on the various issues to be scattered throughout the decision;
5. Any requirement for either party to do something should be accompanied by a timescale;
6. Sums of money are generally exclusive of VAT and this must be stated and explained if appropriate. Interest should be dealt with, if it has been raised by either party. The adjudicator's fees and expenses must be allocated, bearing in mind anything set down in the relevant adjudication procedure or rules. The matter of the parties' costs must also be addressed, if it has been raised by either party. The decision must be signed and dated.

In summary, the content of the decision should generally and ideally include/ or refer to those matters on pp 15 and 15 of the AS. On pp 21 and 22 of my paper.

# *Criteria for assessment of the Decisions...*

## **Decision**

Decision on all matters referred;

Set out the issues logically;

Apply the evidence to determine findings of fact;

Apply the law to the facts.



<http://www.celebritypix.us/celebrities/celebrity-apprentice-boardroom-trump-b777c.html>

# *The appointment of the Assessors*

TeCSA will write to each adjudicator to be assessed in the relevant year at the same time as the CPD annual return forms are requested, usually in September.

The assessment will be conducted on the basis of:

- 2 redacted reasoned decisions made by him in adjudications conducted in the previous 2 years (the "Decisions"); and
- the accompanying procedural directions given by the adjudicator in the course of the two adjudications (the "Directions").

# *The Interview*

Following their initial assessment of the Decisions and the Directions, the Assessors will **arrange an interview** with the Adjudicator lasting about 1 hour. The Assessors will prepare for this as much as the Adjudicator! The Chairman will provide to the Assessors in advance of the interview a history of any upheld TeCSA complaints, judicial criticisms known to TeCSA (adjudicators remember the TeCSA declaration!) and any feedback received by TeCSA from the parties to any adjudication following an appointment, about the adjudicator over the period since the last review or entry onto the Adjudicator List, as appropriate. An adjudicator who is the subject of any adverse criticism shall be given an opportunity to comment on the information provided to the Assessors.

At the interview, the Assessors will raise points arising from their review of the Decisions and the Directions and any other matters that will enable them to assess the strengths and weaknesses of the Adjudicator for the purpose of the assessment.

The criteria to be considered during the interview process are set out in the Adjudication Service **Schedule 2**. Should they consider it necessary or desirable to do so, the Assessors may require the adjudicator to provide further information.

To be assessed as competent to remain on the Adjudicator List an adjudicator must demonstrate to the Assessors that he satisfies the criteria laid out in this Appendix.

The Adjudication Process	
1	<u>The ability to deal effectively with both threshold and subsequent jurisdictional problems and challenges.</u> This requires a clear understanding of the criteria to be considered when determining whether and how to proceed and the need to communicate clearly to the parties any jurisdictional determination.
2	<u>Awareness of the need to operate within the boundaries of natural justice</u> commensurate with the context of adjudication. There must be an understanding of <u>the overriding importance of fairness</u> in allowing parties to present their cases.
3	<u>Awareness of the risks of both real and apparent bias</u> and the steps that <u>could be taken</u> to avoid reasonably foreseeable difficulties.
4	<u>A knowledge of relevant substantive law</u> , particularly in respect of contract, tort, evidence and legislation sufficient to understand the context of legal arguments, so that a rational and reasoned decision can be made.
5	The ability to <u>identify, express and analyse the issues</u> and sub-issues that need to be <u>considered</u> in reaching a decision.
6	The ability to manage and control the process and to express procedural directions in a clear and logical way.
7	The ability to apply judgemental skills throughout the process.
8	The ability to <u>provide concise, clear and logical reasons</u> for a decision.
9	<u>The ability to manage the adjudication in a transparent, efficient, and expedient manner.</u>
10	<u>The ability to communicate a decision in a structured, fluent and logical fashion</u>
<b>Professional engagement since the previous review</b>	
11	Continuing active involvement in construction dispute resolution in general since the last review or entry to the Adjudicator List as appropriate (the "previous period").
12	<u>Active involvement in relevant CPD</u> , taking into account any TeCSA Committee comments in respect of such over the previous period.
<b>Previous upheld complaints or judicial criticism</b>	
13	Acceptable performance in the carrying out of adjudications, taking into account any upheld TeCSA complaints and/or judicial criticism of the adjudicator in the previous period.

# New Adjudicator declaration to come

## Appendix 2

### TeCSA Adjudicator Declaration

1 Please declare if you have, within the past three years, been appointed as an adjudicator or arbitrator on two or more occasions by one of the parties, by an affiliate or representative of or any adviser to one of the parties

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2 Please declare if you currently serve, or have served within the past three years, as arbitrator/adjudicator in another adjudication/arbitration or other form of dispute resolution involving one of the parties, or an affiliate or representative of or any adviser to one of the parties

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3 If repeat appointments mentioned at paragraphs 1 or 2 or both exist, please declare the approximate percentage of your fees that have resulted from such repeat appointments

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Signed : \_\_\_\_\_

\_\_\_\_\_

Date : \_\_\_\_\_

**Any questions welcome**

**FENWICK  
ELLIOTT**



<https://www.forbes.com/sites/ericsavitz/2013/03/15/so-long-and-thanks-for-all-the-fish/#4e77e5083cfe>

The construction &  
energy law specialists

**FENWICK  
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