

In Association With... TeCSA

Exclusive Interview with Simon Tolson, Chairman of TeCSA

This month we take a look at the legal issues surrounding the Technology and Construction industries by speaking to the Chairman of the Technology and Construction Solicitors' Association (TeCSA), Simon Tolson.

Firstly, what do you enjoy most about being Chairman of TeCSA?

Getting into areas that influence policy and change things for the better, be it legislation, procedure, European legislation. I like our parties too!

What are the key issues you are currently aiming at?

Litigation

• **Cost budgeting** – and TeCSA's response to the Civil Procedure Rules Committee's (CPRC) recent consultation into the future application of mandatory cost budgeting and management within the specialist civil courts. These planned law changes in the High Court are highly controversial and TeCSA as an official consultee has had it say. We are not fans!

TeCSA feels it is well informed to comment, it has sponsored the Centre of Construction Law at King's College, London, in this research; King's published its interim report on the Costs Pilot on 3 February 2012 and Final Report in April 2013.

• **eDisclosure** – Also this year TeCSA has promulgated an e-Disclosure Protocol and we invited and enjoined TECBAR and The Society of Computers and Law to work up a Protocol and Guidelines upon it (following our first draft) we duly fashioned and shaped the protocol, met twice with the TCC Judges (and gained their valuable feedback) to now finalise it in a form the Judges say they will include in the next edition of The Technology And Construction Court Guide due later this year.

Adjudication

• As Chairman I nominate and appoint adjudicators on disputes where the parties seek a TeCSA appointment, we do about 85 appointments a year and deal with calls from the public and lawyers, all voluntarily.

• Adjudication – TeCSA carry out training and run a major annual conference.

• We have authored and published 'The TeCSA Adjudication Service' (<http://www.tecsa.org.uk/adjudication>).

• We have a continuing professional development scheme and vetting regime for the adjudicator panel (multi-disciplinary) ensuring our adjudicators are amongst the very best trained and suited by experience, knowledge and background.

International

• TeCSA, The Technology & Construction Court, SCL, and TECBAR hosted the International Construction Law Conference in September last year.

We had sessions on Procurement and International Advocacy and discussions on International Arbitration Tribunals and the Analysis of Delay in different jurisdictions, East meets West style.

Keynote speeches came from the highest of the Judiciary including Lord Chief Justice Judge, Lord Dyson MR, Lord Justice Jackson and Sir Anthony May and were attended by all the London TCC High Court Judges. We had many delegates from diverse associated organisations throughout the world including a delegation from the American College of Construction Lawyers and the Canadian College of Construction Lawyers. It brought together construction lawyers and practitioners from across the world to discuss contemporary issues in construction law and dispute resolution to commemorate the first year anniversary of the opening of the new Rolls Building in London, where the conference was held.

TeCSA also propounds important matters for our solicitor Members and hold symposia and lectures. Topics have included:

• **eDisclosure law and practice** as explained above. By way of background TeCSA set up a Working Group with the objective to provide TeCSA members with guidance, know-how and training on E-Disclosure to raise members' understanding of what is required in practice to meet their E-Disclosure obligations under the CPR and how best to manage the practical and technical complexities of the process consistent with best practice and the new cost management and other rules implementing the Jackson reforms.

A key goal in this mission is to radically reduce the disparity in terms of knowledge and experience that currently exists amongst practitioners which

continues to affect the efficiency and cost-effectiveness of the litigation process and which is a continuing cause for concern for the TCC judges.

• **Construction and Engineering Pre-Action Protocol (PAP):** TeCSA has been keen to ensure PAP keeps up to date with the needs and the dynamics of pre-litigious process and there is little doubt amongst solicitors that in a significant majority of cases, the process has led to settlement without the need to issue proceedings. TeCSA has made the case for maintaining the pre-action protocol, which has been a success! It is very much still in the Rules.

• Major symposia, such as is: The Modern Law of Privilege - is it fit for purpose?

We held this in June. The discussion centred on the current state of the law of privilege asking whether or not it was fit for purpose. The event was extremely well-supported and 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.

• **The interventionist judge and better case management** This joint TeCSA/TECBAR symposia was run last year, it was chosen as the theme because it formed a central plank of the forthcoming package of interlocking civil justice reforms from Lord Justice Jackson's six propositions. The goal of which is to enable both practitioners and the courts to deliver the best possible service to civil litigants at the lowest possible cost. Topics included dealing with Lord Neuberger's speech calling for a debate about the extent of the need for live evidence; tips and tactics for hearing complex evidence-heavy cases in shortened trial windows; "Is it ever the Judge's fault?"; the new test of Lord Neuberger and the rule to be contained in CPR 44.4(5) was announced as the latest cost proportionality test that will come into force from April 2013.



• **Symposia: 'E-disclosure and e-working in the TCC'** his joint TeCSA/TECBAR symposia was selected with the changes to CPR 31 in play. We had an excellent line-up of speakers which included Mr Justice Akenhead, who delivered an update from the TCC, and Mr Justice Edwards-Stuart, who reported on e-working in the TCC.

• **Major lectures such as 'Reforming the costs of civil litigation: How the Jackson costs reforms will affect the TCC'** a very popular joint TeCSA/TECBAR lecture given by Mr Justice Ramsey on 20 March 2013 at the Royal College of Surgeons.

• TeCSA also actively participates on the Technology & Construction Court Users Committee on such matters as the design of the Rolls Building and facilities for users and public, 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 and filing issues, use of IT in the Court and procedure generally.

What do you feel are some of the main achievements of the Group?

- Our recognition as important consultees by the government, policy and law makers.
- Our leading role in Adjudication law and training.
- Our lecture programme
- Our creation of Protocols adopted in civil TCC procedure be it (i) pre action protocol, (ii) (iii) ADR Protocol, (iv) IT Protocol, (v) e-Disclosure Protocol aimed to help achieve best practice in key areas of civil procedure.
- A very good website.
- Highly motivated Committee comprising all still working lawyers on the tools and leaders in their firms.

What are the benefits for a client in choosing a firm from such a network?

You are getting before specialist informed solicitors who practise in the TCC and deal with technical cases, for example cases involving all aspects of the built environment, including technical defects claims and claims for money and extensions of time. TeCSA helps shape Court practice and legislation relating to dispute resolution and ADR. It also promotes best practice in all forms of disputes resolution. So the benefits for the client are we hope well informed specialist lawyers!

¹http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced

What are the main challenges your members face within the technology and construction sectors?

It is a challenge keeping up to date with the law and changes in procedure whilst remaining efficient and competitive in the market place.

Can legislation ever keep up with the rapid pace at which technology moves?

There will always be a time lag! Lawyers will always enjoy that reality.

Watch this space so far as Building Information Modelling and the next five years. BIM systems use a computer generated model to collect and manage information about the design, construction and operation of a project centrally. But I foresee legal problems associated with BIM implementation will arise and liability issues where design fails the owner. That said the UK is now recognised by its peers as one of the leading nations in the exploitation of BIM technology and processes in construction.

But of course our laws are based on people, places and things. But technology and the advance of engineering, materials, components, plant, tools and BIM and the Internet are not!

Software, the cloud and the internet is not a place. It is everywhere and nowhere in particular. Digital information is not a thing. It flows in tiny packets and exists in multiple copies just to be seen and used. And people are becoming great files of data as companies track them everywhere, and blacklisting in the construction industry is such a hot potato.

Whilst I am not a media lawyer, one only needs to look at other areas of the media to see there's an enormous cultural gulf between the general public and the judiciary (TCC judges less so I must say), whose job it is to interpret and apply those laws. Ignorant of the nuances of the internet and mistrustful of the milieu from which social media types emerge, some say our judges are simply not qualified to determine the appropriateness or effect of a jovial tweet!

Increasingly, debate in the public square is being carried out online, on permanent and public social platforms. Often it is poor quality but by no means always. These platforms are fast-paced, aggressive worlds that encourage rapid-fire debate and quick thinking. They are adversarial by nature, and they can show off much of the beauty and colour of the English language. In other words, these platforms are changing the flavour of public discourse – and the judiciary must not lose sight of this fact. As ever, the medium is the message!

Are there any legislative changes that you would like to see implemented?

From the EU I would like to see the UK firmly opt out of the plan for a proposed Harmonisation of EU Contract Law aka the common European sales law (CESL)! Sadly our European cousins embrace it, but that does not make it right for the construction industry or business in the UK.

At the moment 27 systems of contract law are available for use in the single market and we are yet to see the evidence to persuade us that they are causing real difficulty for traders and consumers. TeCSA has replied officially to consultation twice upon this subject.

We believe TeCSA is peculiarly well-placed to comment upon the desirability or otherwise of this initiative from the perspective of the construction and engineering sectors. Its members are actively involved both at the front end, in advising on the use of standard forms and/or their amendment and drafting and negotiating bespoke forms of contracts and contracting systems for more complex projects also in the application of all forms of dispute resolution to solve the many disputes and problems that the execution of projects across the piece that they tend to generate.

TeCSA stated its strong impression is that those operating within these industries would not welcome or be interested in change for which there is no clearly demonstrable case on the basis of necessity or actual benefit. **LM**

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