

DOES THE TCC MEET THE NEEDS OF THE CONSTRUCTION INDUSTRY?

Note of a panel discussion at a meeting of the Society of Construction Law in London on 1st November 2005 to discuss the Technology and Construction Court Guide¹

The panel was chaired by His Honour Judge Peter Coulson QC, the members being Paul Darling QC,² Henry Sherman³ and Christopher Miers.⁴

Background

The panel were uniform in their praise for the Technology and Construction Court (TCC) Guide (the Guide), the second edition of which took effect on 3rd October 2005. In particular, it was widely accepted that:

- the changes addressed in the Guide *did* need to be made at the TCC;
- the perception amongst users had been that the TCC had lost its way;
- judgments had taken too long to be handed down;
- the TCC appeared to be quiet, yet it was not always accessible.

All the negative aspects of the TCC had been addressed in the Guide. The panel agreed that the Guide was the end product of a two way consultative approach where all the TCC users had had an opportunity to comment. TECBAR and TECSA representatives had been fully involved. Consultation was not restricted to the London TCC but had been actively spread to the District Registries.

Role of High Court Judges

It was acknowledged that the project, headed by Mr Justice Jackson (the judge in charge of the TCC), had been a great success and that there were dramatic changes in store at the TCC. One change that is highly significant and provides tangible evidence of greater recognition of the TCC within the High Court and the senior judiciary is that TCC cases can now be assigned to the following High Court judges:

1 The Technology and Construction Court Guide, 2nd edition, in force from 3rd October 2005; available from www.hmcourts-service.gov.uk/docs/tcc_guide.pdf.
2 Chair of the Technology and Construction Court Bar Association (TECBA).
3 Member of the Technology and Construction Court Solicitors Association (TECSA).
4 Member of the Society of Construction Law.

- Mr Justice Jackson
- Mr Justice Elias
- Mr Justice Ouseley
- Mr Justice Simon
- Mr Justice Christopher Clarke
- Mr Justice Ramsey.

ADR and Pre-Action Protocol

Another prominent change was the added emphasis given to adr and the Pre-Action Protocol. The Guide advocates greater involvement by the TCC at the pre-action stages. Further, the TCC will provide greater encouragement to the parties to use adr and whenever appropriate will facilitate its use.

The audience were particularly interested in the new role of the TCC in early neutral evaluation (ENE). Again, in appropriate cases, and with the consent of all parties, a TCC judge may provide an ENE either in respect of the full case or of particular issues arising within it. Clearly, there is a degree of overlap in this process with the procedure of isolating preliminary issues by judges.

The issue of the judge seeing privileged material was raised. It was considered to be not fatal to ENE – if one of the parties *did* consider that the judge had seen privileged material, then that judge could be simply replaced by one who had not seen such privileged materials.

Expert evidence

The role of experts in the TCC was a prominent issue. Although section 13 of the TCC Guide is devoted to expert evidence, the panel agreed that the question of whether a guide or code of conduct for experts should be produced would be given serious consideration by the judge in charge of the TCC. Large parts of the audience showed their support for such a guide. A number of questions from the floor evidenced unhappiness with the way that some TCC judges had treated expert witnesses, and the consensus appeared to be that uniform rules had to be established.

Cost-capping

A question from the floor on the issue of cost-capping was provocative. The panel considered that cost-capping was a difficult process, not least because the judge is not in a position to cost-cap right at the beginning of proceedings. Later on, when the judge could assess a cap, a large proportion of the monies has already been spent. Further, cost-capping does not prevent a party from expending sums in the litigation but merely limits what it can recover if it is successful. Clearly, litigants with deep pockets would not, in any event, be deterred by cost-capping.

Despite widespread acknowledgment that the TCC Guide marks a high point in the TCC's reforming agenda it was accepted that it had to adapt to co-exist

alongside the continued growth in adjudication. Clearly, the TCC could not now accommodate the volume of cases that existed pre-adjudication. Instead the TCC has had to look at ways in which, for example, adjudication enforcement proceedings can be dealt with more quickly.

Conclusion

In conclusion, the panel view was that the TCC Guide has gone a long way to meeting the needs of the construction industry. The TCC is now enjoying a high profile in the High Court and with the senior judiciary. It is therefore likely that further improvements can be more readily made. The TCC is seeking to continue to improve, and users can expect further consultation and an increased level of service.

Reported by Hamish Lal

December 2005