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The Technology and Construction Court today – a TeCSA[1] solicitor's view

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I am certainly not alone in thinking that the respected Sir Rupert Jackson, the judge in charge of the Technology and Construction Court, has brought the TCC up about two clear gears from the modernisation started by his predecessors, Dyson L.J. and Forbes J[2]. The TCC is no longer the Cinderella it once was. We have had visited upon us, its users, a reformist agenda which has greatly improved the service offered by the Court. A renaissance no less!

For the major disputes of our industry not finally disposed of by ADR in its widest sense Rupert Jackson and most of his fellow judges have restored respect to this specialist forum[3] generally acknowledged to handle some of the most complex actions pursued in litigation.[4]

In my opinion there is a resurgence of confidence in TCC litigation. The TCC's reputation has been firmly re-established and is endorsed by the enhanced patter of legal feet to St Dunstan[5] - and its excellent satellites in the regions. In no small measure it is down to the overall quality, speed, legal robustness and specialism of this Court. This has been boosted by a cracking TCC Guide to supplement CPR Part 60 and PD60. Bolstered further by the appointments of His Honour Judge Peter Coulson QC and Mr Justice Vivian Ramsey - both distinguished practitioners in this field.

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[1] Technology and Construction Solicitors Association.

[2] Post *Co-op v ICL* case and review of the TCC launched in 2003 by the Lord Chief Justice and the Lord Chancellor.

[3] Classification of cases into those suitable for trial by a High Court Judge in more complex cases (where the case is marked "HCJ"), and those suitable for a Senior Circuit Judge (marked "SCJ") etc.

[4] This is often due to the combination of complex technical issues, voluminous documents, the detailed and technical evidence involved and the substantial sums at stake in cases of this nature.

[5] According to Her Majesty's Courts Service soon to be replaced with the biggest dedicated business court in the world. The high-spec building to be built on Fetter Lane near the Royal Courts of Justice will match and maintain the UK's world-class reputation as the first choice for business law. Delancey and Invista will construct a new 260,000 sq ft building at Fetter Lane of which HMCS will occupy 145,000 sq ft on a long lease. The new 'super court' - believed to be around four times bigger than its nearest competitor - will provide 29 courtrooms, 12 hearing rooms (for related work such as bankruptcy hearings), 44 public consultation rooms, better waiting facilities for parties involved in proceedings as well as administrative office space for HMCS staff and judicial accommodation. It will replace the existing facilities of the Commercial Court and the Technology Court at St Dunstan's House - also on Fetter Lane - which are no longer suitable for the volume of work the Court handles.

The substance of my short talk

It was not that many years ago I described myself at cocktail parties as a litigator.

Once I was in court at least a couple of times each week. Now maybe once or twice a term - that in itself has much to do with the modern landscape.

Many TCC cases are settled before issue. This now arises more than ever before because the parties have heeded the Construction and Engineering Pre-action Protocol.[6] The Protocol has imposed a pre-action discipline the influence of which has been mainly positive. It has weeded out those disputes which, a decade ago, would have been associated with a writ that was never seriously intended to result in a trial.

Parties must nowadays incur substantial front-end costs before they are in a position to commence proceedings. This has created more pressure to seek a compromise by structured negotiation/ADR without commencing proceedings at all.

When cases do kick off it is worthy of remark that the courts contribute more to the real cost of running them than ever before. Compared with 25 years ago, the court fees for bringing a claim in excess of £300,000 have jumped by 4,150%! This means the economics are more real when prosecuting an action[7].

The mega multi-party trials which characterised the early 1980s that I remember, are long gone, largely as a result of restrictions on tortious litigation, as exemplified, by the House of Lords decision in *Murphy v Brentwood D.C.* [1991] AC 398 which overruled *Anns v Merton L.B.*

The volume is down despite, *inter alia*, the HL overruling in *Beaufort Developments Ltd v Gilbert Ash NI* in 1999 when good old *North Regional Health Authority v Derek Crouch*[8] was kicked into the long grass. By then the surge of change was too strong the other way to counteract the ability of the court to hear certification disputes. This reduction was visited by the success of statutory/contractual adjudication which has been nothing short of astounding – it really is as Sir Michael Latham aimed and hoped for, the "normal method of dispute resolution in the industry". Let us not forget too the growth in ADR.

Back at my ranch it remains the case (consistent for about 12 years) that nearly all FE's cases settle before trial > 97% do so. However, those that fight now rarely go full term. Where the fight goes on is in a wholly different part of the food chain.

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[6] TeCSA and TECBAR made a substantial contribution to the drafting of this protocol since revamped by Mr Justice Jackson following consultation last year. A number of practitioners, court users and Judges have expressed the view that there needs to be a review of the Pre-action Protocol for Construction and Engineering Disputes and a working party was set up to carry out such a review in October 2005. The working party comprised Mr Justice Vivian Ramsey, HH Judge Richard Havery QC, Caroline Cummins (chairwoman of TeCSA), Allen Dyer (TECBAR representative) and Philip Morris (industry representative). Their terms of reference were to:
(a) discuss and take soundings about the Protocol, how it is currently working in all categories of case (including the very large and the very small) and how (if at all) it might be improved or modified;
(b) set out their conclusions, reasons and any supporting material in a report, which would then form the basis for wider consultation.

[7] There are now also setting down fees and trial fees beyond issue fees.

[8] [1984] QB 644 CA

Of those which fight:

- Case Management Conferences are a key factor in making litigation less complex and cutting cases that fight to the chase.

- There is near harmonisation of approach to case management by different TCC judges and courts across the country - but there are still exceptions.

- Settlements at the door of the TCC are now fewer and settlements before the hearing day have increased through wider use of, in particular, mediation.

- Timescales in litigation are on average much shorter and more certain. They are nearly always measured in months not years, and second and third fixtures etc. have gone.

- A case set down today can be given a trial date as soon as the parties are ready for it. Sometimes too soon!

Those that do not settle through the Protocol exchange (which will usually narrow things materially), or where bellicosity is raging from an adjudicator's unsatisfactory decision, tend to head for the TCC. Most often in number via Part 8/24 but also procedurally through the fast tracking of Part 7 actions where the parties wish to open up the picture surface to extend their options.

Most of the cognoscenti know that the TCC can now be near as expeditious as adjudication whilst at the same time judgments generally tend to stick and be legally robust. Examples abound of the weeks, not months, approach.

In the case of *Carillion Construction Limited v Devonport Royal Dockyard* [2005] EWHC 778 [TCC] proceedings were commenced by both parties separately on 4 April 2005, there was a two-day trial on 20 and 21 April and judgment was given on 26 April. The TCC is able to offer speedy trial dates. This is attractive to business.

That said, the impact of case management in TCC cases is probably less dramatic than in other areas of litigation because:

- Whilst it is a major part of the case management approach that the court will allocate each case to an appropriate track, all TCC cases, however, are treated as fast track cases.

- Lord Woolf's reforms were modelled upon the sort of case management techniques developed by the Official Referees years ago and in particular the technique whereby the court, at an early stage, fixes a trial date, and sets the timetable for the whole matter leading to that date.

The case management provisions in the CPR have nevertheless had a material impact in TCC cases.

Before I turn to my case study I have some valuable "tips" learnt from experience with the TCC re 'fast track' cases, are born of sweat and heartache!

1. First think very carefully about what you want for your client predicated upon the substantive law and its remedies.

2. Consider the Rules, it is not fatal to start as a CPR 8 and transmogrify to Part 7 with an 'as if' order.

3. Do not try to disguise a Part 8 by dressing it down. At the first CMC it will be defrocked!

4. Procedurally, let the White Book and in particular the TCC Guide aid you – but do not forget the invaluable assistance afforded by the judge's clerk for fine tuning.

5. Part of the court's duty of active case management is the summary disposal of issues which do not need full investigation and trial (rule 1.4(2)(c).[9] Remind yourself if on the receiving end whether you might invoke this Rule to have struck out a case where "the statement of case discloses no reasonable grounds for bringing or defending the claim", or when the case "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings" and to give Summary Judgment under Part 24.

6. Ask yourself: Is the claim I am bringing (or defending) clear? Ditto the amount claimed and particular relief, so that the other party can understand the case that he has to meet!

7. Address: the factual evidence that is needed, and which witnesses necessary – ever so important on Part 7, 8 and 24 "fast-track" cases.

8. Think when proofing: focus enquiry on the facts you need to put before the court, not life stories or unsupported generalised puff.

9. Remember: only as many witnesses as are needed to prove essential facts. not anyone who conceivably could speak to a point.

10. Decide early on which issues need investigation and trial and the order in which issues are to be resolved. Use counsel to debate and focus.

[9] In *Grovit v Doctor* before the House of Lords, it was held that to commence and continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process and proceedings were dismissed on that basis.

11. In order to assist the judge in the exercise of his case management functions, the parties are expected to co-operate with one another at all times – pre-action protocol has helped. However, when the gloves are off civility does not end! Make no mistake, the Court will try to get to the heart of what really needs to be done to resolve the case. Inter-solicitor bickering only makes for grinding and pain and will be viewed in a negative light.

12. Try to fix dates each side can do – use counsel's clerks to arrange – they have invariably better systems and connections for doing so. It is noteworthy some TCC judges also will sit early, like 8:30 a.m., or "after" court, to accommodate tight timetables and advocate availability.

13. Whilst the traditional approach is for the Court to hear first from the Applicant, and then the Respondent and then to permit the Applicant to reply, some Judges in CMCs and PTRs when the business is usually a matter for discussion and agreement rather than contested applications tend towards a different approach. The submissions of each party may be read in advance, and then, at the hearing, a viva voce examination of the advocates may be conducted. You will tend to discover such "house styles" from experience. So be adaptable.

14. Beware but embrace the proactive judge - the TCC operates proactive case management. More often, in order to avoid the parties being taken by surprise by any judicial initiative, the judge may consider (usually but not always!) giving prior notification of specific or unusual case management proposals to be raised at a CMC. Often these can be helpful markers on judicial thinking – so when given do not ignore them!

15. Be on top of your game. If counsel is to be retained ensure that this is done early and with clear concise instructions. Invariably a conference before hand will be useful for solicitor and advocate as the judge to whom a case has been assigned has wide case-management powers and being in command of your action is tremendously positive when the judge exercises these powers to identify:

- the real issues early on and remain the focus of the ongoing proceedings (sometimes (often) the judge will have his own views on the issues – so be prepared to address them!);

- a realistic timetable is ordered which will allow for the fair and prompt resolution of the action (so have firm ideas yourself and canvass with the other side);

- documentary issues. Disclosure of documents, if any, can be effectively limited e.g. to a reliance basis only or less than Standard Disclosure. Have your reasons at the ready to explain.

- cost benefit solutions. Costs must be properly controlled and reflect the value of the issues to the parties and their respective financial positions (less argument as to proportionality in very large cases but very important in smaller actions). Remember the Court is given extensive case-management powers to dictate the pace and cost of the litigation – so warn clients they do not have a god-given right to fight as they choose. However, small cases are not consigned to the legal dustbin as Mr Justice Jackson has made plain.[10]

16. Remember too, oral hearings are not always necessary for CMCs and interim applications. In the interests of saving costs the TCC Guide emphasises this fact. The Court is content to deal with ad hoc case-management issues (Leeds and Birmingham TCCs do so commonly though usually not first CMCs and PTRs) by telephone conference. In emergencies this is also most useful. A huge amount can now be done by email communication - although important or lengthy documents should also be provided in hard copy.

17. Given how the TCC encourages a structured exchange of proposals and submissions for CMCs in advance of the hearing, it is still disappointing to me that many solicitors leave this too late so as not to be able to respond on an informed basis to proposals made. However, bear in mind that whilst the parties can agree between themselves the orders to be made either at the Case Management Conference or the Pre-Trial Review, it is necessary for the Court to consider the case with the parties (either at an oral hearing or by way of a telephone conference) on those occasions in any event.

18. Health warnings are necessary, seeking to agree the timetable for the case may be ineffective. The judge may disregard such agreements at the Case Management Conference!

19. Always try to anticipate. Remember, besides the other side you have to persuade the tribunal – that means not just on your feet but marshalling your paperwork AND that filed in the Court!

20. Remember the TCC seeks to strike a balance between keeping a file of relevant material for case-management purposes, and not swamping itself with bulk.

21. In large cases, it is convenient to try to maintain a "rolling" court bundle, such that the same documents do not need to be copied repeatedly for subsequent hearings. It is notable that the consultation process leading to the 2005 review of the TCC Court Guide reveals that the judges sometimes experience "huge difficulties created by the failure of the parties to file documents with courts, resulting in applications being dealt with without pleadings, statements, etc."! We have all been there at some time in our

[10] Denning Lecture, 28 November 2006, "The Tower of Babel - What happens when a building project goes wrong".

careers! So depending on the nature of the case, it might be appropriate to include some or all of the following in the "rolling" court bundle:

- the Statements of Case;
- inter-solicitor correspondence evidencing attempts to reach agreement, etc;
- if the case will involve questions of construction of a contract, extract from that contract;
- if the issue concerns an event, such as a disputed determination;
- documents central to that issue, such as the disputed determination notice;
- if experts reports have been obtained, it may be appropriate to include them;
- if a case summary has been prepared, it should be included.

22. Parties are well advised to liaise with the judge's clerk as to what the judge would like to see on file.

23. The bundle (ideally paginated and indexed!) for the hearing of anything other than the most simple and straightforward application (so a must on all Part 24/8) should consist of:

    a. the permanent case-management bundle (it will of course be rather modest in short form cases);
    b. the witness statements provided in support of the application, together with any exhibits (remember if a lot of exhibits a chronological bundle is usually necessary, too);
    c. the witness statements provided in opposition to the application together with exhibits;
    d. any witness statements in reply, together with exhibits.

24. Depending upon the order made at the first CMC the permanent case management bundle should either be with the Court or with the claimant's solicitors. If it is with the claimant's solicitors, it should be provided to the Court not less than 2 working days before the hearing be it CMC or PTR. In any event, a paginated bundle containing any material specific to the application should also be provided to the Court not less than 2 working days before the hearing, unless otherwise directed by the Judge. A failure to comply with this deadline may result in the adjournment of the hearing, and the costs thrown away being paid by the defaulting party! It is known to happen!

25. Cost estimates – remember a statement of costs must be exchanged 24 hours before a hearing estimated to last one day or less!

26. Ask yourself what might make things run even more smoothly? If you do, it usually pays dividends. Remember that you can enquire of the judge's clerk

> what reading in time the judge has so as to get bundles, skeletons and authorities to him early to get best bang for your judicial buck!

My case study utilised most of the above in one form or another:

Taylor Woodrow Holdings Limited and George Wimpey (Southern) Limited v Barnes & Elliott Limited [2006] EWHC 1693

I will start with the final paragraph of the Judgment:

> Finally, I express my thanks to the solicitors and counsel on both sides for the *efficient conduct of this litigation* and the clear presentation of the evidence and arguments. As a result of the endeavours of the lawyers on both sides, this action has progressed from commencement to a two day trial and then to judgment, all within the space of two months [emphasis added].

This statement typifies what I am going to talk about, the adaptability of this Court for short-form, fast-track cases.

Background

This was a case arising from a domestic arbitration (there had also been earlier adjudications and an appeal from the arbitration to the TCC on other points). As some of you may know, under JCT 98 clause 39B.4.1 (pursuant to s. 42(2)(a) of the 1996 Act) the Court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question of law arising in the course of arbitral proceedings[(11)] which the Court is satisfied substantially affects the rights of one or more of the parties: Arbitration Act 1996: s.45.[(12)] Once so determined the parties continue their arbitration with that question of law decided.

A major issue between the parties under their conversion and refurbishment contract case involving a former mental asylum was the extent of structures risk that sat with the contractor under the particular JCT WCD contract.

One party was naturally keen this was decided by the arbitrator, and not surprisingly, the other against it.

So pre-issue a round of fire was exchanged over whether such application under s.45 could be pursued under CPR Part 8[(13)] or at all. The Employer proceeded to issue. The Contractor's position was maintained in the proceedings and it urged the Court to refuse to exercise its discretion under s. 45(1) of the 1996 Act to hear the Application. The Contractor argued this was not a short crisp point of law available for the Court's decision.

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(11) Clause 39B of JCT WCD 98

(12) Section 45(1) of the 1996 Act states that the Court "may" hear an application to determine a preliminary point of law, not the Court "must".

(13) Part 8 (Alternative Procedure for Claims where a party seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact or the Rules allow) and courts' case management powers (CPR rule 3.1(2)), give the court a very wide discretion as to the order in which issues are determined and how the hearing of the case is to be structured.

The task of construction it argued would involve reading voluminous provisions of the contract and setting them against the sequence of the contract correspondence.

There was also a substantive argument on the ultimate issue of contractual interpretation over where the structural risk lay under the contract.

I need not go into the findings but in essence the timetable addressed the issue of whether Part 8 was the proper means by which this could be effected and subject thereto to determine the structural risk issue.

1. 28 April 2006: the Claimant proposes a preliminary issue be pursued under AA s.45.

2. 3 May 2006; the Claimant issues the Part 8 Application in the TCC in London. The Part 8 Claim form; details of claim; Part 8 Acknowledgement of Service Form; and notes for defendant replying to the Part 8 Claim form are served.

3. A CMC date is agreed and fixed between clerks to respective counsel.

4. 17 May 2006: the Acknowledgment of Service is served and lodged and the Claimant serves its note on the case and proposed directions.

5. 18 May 2006: CMC is heard, skeletons having been exchanged, trial date fixed for 27 and 28 June 2006.

6. At the CMC the Court orders the trial to be split into two parts over two days. The Defendant to file and serve his written evidence (if so advised) by 4 p.m. on Wednesday **31 May 2006**. The Claimants to file and serve their written evidence in reply (if so advised) within 7 days after service of the Defendant's evidence upon them. Claimant to prepare an agreed, indexed and paginated bundle of all the evidence and other documents to be used at the hearing and to file the same not later than 4 p.m. on Tuesday **20 June 2006**. Parties to file their estimates for the length of the hearing not later than 4 p.m. on Tuesday **20 June 2006.**

7. The Defendant filed its evidence on 31 May; the Claimant chose not to file any**.**

8. On 22 June 2006 counsels' skeleton arguments for trial are exchanged as directed.

9. Trial takes place on 27 and 28 June, the judge took an interested and mildly interventionist approach. It was obvious he is thoroughly familiar with the detail and the bundles from the outset of the hearing.

10. On 3 July the judge handed down his judgment on *all* matters.

11. At the end of the hearing the judge informed the parties that the transcript of the judgment could be expedited. The judge and his clerk had made arrangements prior to the hearing for the judge's clerk to take the tapes down to the transcribers as soon as the hearing was completed in order that the transcription could be done by that day or the next, subject to the parties' agreement.

12. Approved judgment was available within a week thereafter and on Bailii within days!

My observations: This is the sort of service business users, in large and/or complex cases' can now regularly expect of the TCC. It is not a one-off. I have cases proceeding in a similar fashion now as expedited Part 7s with specialist TeCSA and TECBAR teams on each side.

In adjudication enforcement cases the service is truly fast track-too. Commonly 3-4 weeks from commencement to Part 8 judgment. The ability to predict costs is also firmer than it was, usually circa £10-12k for such enforcements.[14]

Given the importance to the UK's economy of the construction and IT sectors, and the complex and arduous disputes arising within them, domestically the industry has what it requires. It is not perfect, and only as good as the people who make it work, but we are in an age now when the Court Service has the skill and dynamics to meet these needs. The reforms we have seen in the last few years are a tacit recognition that the nature of construction litigation has changed and the TCC has met that challenge!

However, it is no time for being complacent, with the Olympics around the corner and a lot more to come to test the system. Let us hope the DCA resources it!

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[14] You only have to consider Mr Justice Jackson's case of *Gray & Sons Builders (Bedford) Ltd v Essential Box Ltd* [2006] EWHC 2520 (TCC**)** Resistance to enforcement of an adjudicator's decision may turn out to be quite expensive, and certainly not an economic way of protecting your cash flow. In this case, the sum of money to be paid was £115,000. Interest was running on that at 11%. The costs awarded to the claimant for the enforcement action amounted to £11,842. No doubt a similar sum was payable to the defendant's own solicitors. The opposition had gained the defendant just one month. Very roughly, if you add up the interest payable and the costs incurred, the cash flow benefit of contesting the payment was obtained by paying a finance charge of about 240% per annum.