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Practical tips for putting claims together - Part 2

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George Taft, Secretariat

Today's Agenda

- A recap of Part 1;
- What's new?
- Tips for drafting witness evidence;
- Getting the best out of your quantum expert;
- Tips for drafting your claim or Referral Notice;
- What's next for contractors in these uncertain times?
- Questions.

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Recap & What's new?

Jeremy Glover, Partner, Fenwick Elliott LLP

Essential elements of a claim

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- Cause:

The event that has given rise to the claim and is usually based on fact;

- Effect:

Can you demonstrate that the effect on which the claimed compensation is based was caused by the event? Can you link cause with effect?

- Entitlement:

Entitlement will flow from a remedy contained in the contract, a breach of contract giving rise to damages;

- Substantiation:

Prove that statements made and points relied on are actually true

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Causation



- Claimant bears burden of proving claim (delay & loss) on balance of probabilities;
- **Contemporaneous** records are the best form of evidence;
- Reports of delay & quantum experts are only as good as the evidence you provide them.

Lessons to learn from *White Constructions Pty Ltd v PBS Holdings Pty Ltd*

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- Establish & maintain detailed site diary or record:
 - Who is on site, what are they doing & where;
 - What is holding up progress;
 - What instructions were issued;
- Keep worksheets, timesheets, records of progress broken down by workstream;
- Keep emails & diaries from those on site.

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Timesheets, turnstiles and biometric data

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- Timesheets: *“best evidence of hours worked by Premier’s workforce;”*
- Turnstiles: inaccurate, did not record hours worked outside the turnstiles;
- Labour valued against timesheets, but checked against biometric data.
- Importance of operating a consistent approach;
- *“What the timesheets do not do is give any indication of what the men were doing during the hours for which payment is claimed.”*



Premier Engineering (Lincoln) Ltd v MW High Tech Projects UK Ltd [2020]
EWHC 2484 (TCC)

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Timesheets, labour records

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“...the reports and other contemporaneous documents in this case make so few references to standing time or disruption, and the fact that detailed claims were not made in the large amounts now advanced until months, even years, after the period in question, are plainly factors undermining the credibility of OSR’s claims in these proceedings.”

Van Oord UK Ltd & Anor v Allseas UK Ltd

[2015] EWHC 3074 (TCC)

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Tips for drafting witness statements

Lynne McCafferty QC, 4 Pump Court

Drafting witness statements

- Purpose of witness statements – adjudication vs. litigation
- Consider the reader(s)
- Should be starting point to guide the case strategy: what you can & can't prove
- Especially important if statement may be tested at adjudication hearing or court trial!
- In either case, Court rules & guidance give invaluable pointers for how best to make your case - and highlight the pitfalls to avoid....

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Drafting witness statements

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Court rules on statements (PD32 & Court Guides):



- Should be in witness's own words
- Improper to put pressure on witness
- Identify which parts are from witness's own knowledge; if belief/hearsay, identify source
- Should not paraphrase at length, or provide commentary on, documents by way of narrative
- Should not engage in argument (legal or otherwise)
- Should not contain opinion or submissions

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Drafting witness statements

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Business & Property Court Working Group:



- Wholesale change of culture needed
- Final version of statement often far from witness's own words
- Over-lawyered and over-engineered
- Process of developing statements in numerous drafts may corrupt memory
- Extensive recitation of documents
- Straying into legal argument – ‘a vehicle for the lawyer's view of the case’!

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Drafting witness statements

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Result of BPC Working Group: Draft PD57AC



- Likely to come into force 1 April 2012
- Expanded statement of truth & Solicitor's certificate of compliance
- Appendix - Statement of Best Practice:
 - “Human memory is fluid and malleable” – avoid altering / influencing it
 - Testimony of matters witnessed personally
 - Avoid showing witness documents they did not see at the time
 - Refer only to documents if necessary

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Drafting witness statements

- Draft PD57AC is in addition to other recent changes to CPR (came into effect 1 April 2020)
- PD22 adds to statement of truth for witness statements acknowledgment that false statement may lead to proceedings for contempt of court
- PD32: witness statement required to state process by which it was prepared (e.g. face-to-face, by phone, through interpreter etc.)

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How to get the best out of your quantum expert

George Taft, Secretariat

Keep in mind...



- The case should be built like a pyramid:
 - Contemporaneous documents form the base.
 - Next layer – witness recollections – tying-in and augmenting the documents.
 - Forming the top – Expert analysis pulling together all the data and quantum evidence.
- Although the Expert report is at the “top” – it is not a substitute for building the case up from the documents/evidence.
- So, if the foundation/building blocks of evidence (both records and witness statements) are lacking, Judges/Tribunals are unlikely to be persuaded solely by an Expert report.

Keep in mind...

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- Conversely, if one can show that there were real causes giving rise to definable impacts to cost, and that the estimate of the cost effect is supportable/realistic, success is more likely.
 - Scientific precision is impossible and not needed.
 - A claimant, and its quantum expert, must show a genuine effort to reflect the imprecise (and often complicated truth) of what happened and the cost impact.
 - But, however complicated the truth, if the evidence for the cost (and linkage to causes) is below a certain standard, honest independent experts are unlikely to be able to help.
 - Always consider your expert's independence and credibility; and
 - Your expert should not opine about the facts but give opinion based on the facts.

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What your quantum expert needs

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- Relevant records; but ‘Balance of probabilities’ – one doesn’t have to prove every cost beyond doubt.
- Needs to be sufficient relevant records to show that the claimed effect/cost was likely to have arisen from the claimed cause.
- In our Webinar in June I talked about the example of downtime due to tasks such as hand-washing.
- Particularly for repetitive impacts/tasks, rather than having to engage in an enormous task of exhaustive recording, a sample approach could be taken to analysing a range of staff and operatives to determine the effective of downtime.

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What your quantum expert needs

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- Samples must be:
 - Representative and of a type of impact that will replicate such that the result can be extrapolated.
 - Sufficient but proportionate.
 - Consider changes across time e.g. due to changes to CD-19 restrictions.
- Contractors and Employer's Representatives could seek to agree a method/approach in order to make an assessment
- Some contracts prescribe a more prospective valuation approach e.g. assessments of Compensation Events under NEC which would encourage such an approach.

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Other examples of items relating to Covid-19 seen by contractors in recent months



- Stats for numbers of people on construction projects who have either tested positive and/or been subject to a period of isolation – and in some cases, this has been a material number.
- Whilst some personnel can work remotely – this is of course less so for many personnel engaged on the delivery of construction projects.

Other examples of items relating to Covid-19 seen by contractors in recent months



- Other types of cost impact observed which need consideration – examples:
 - PPE – and cleaning/sanitising
 - Increase in labour engaged on sanitising generally or dedicated to cleaning
 - Social distancing causing increases in the site offices required to house staff
 - More vans/transport
 - More travel when accommodation closed
 - Similar impact on subcontractors: need to agree record-keeping requirements
 - Impact highly variable on suppliers/subcontractors depending on the nature of what they are supplying – impact on materials supply in some cases
 - Subcontractors with significant plant e.g. plant standing due to operatives being absent due to isolation which cannot be planned for.
- The above can result in specific cost impacts at a micro-level; there is also the programme impact (and associated time-related cost) that flows from some of the above items.
- Whilst counter-intuitive, some construction projects might experience some benefit in terms of progress e.g. enhanced progress due to reduced travel-time or traffic issues.

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Tips for drafting your claim or Referral Notice

Lynne McCafferty QC, 4 Pump Court

Drafting Referral Notices

- Explain contractual & legal basis of claim
- Refer to relevant contractual provisions
- Set out factual case: build a readable & accessible narrative
- Refer to & be supported by evidence – guide adjudicator through materials (chronology may be useful)
- Include persuasive submissions & arguments – but maintain moral high ground....
- Pre-empt Response
- Detailed statement of redress sought is essential

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Drafting referral notices

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Paginated bundle of evidence in support:

- Include contents page
- Separate sections or documents by tabs (physical or electronic!)
- Include contract, relevant project documents, and notices
- Include witness statements & expert reports
- Relevant legal authorities
- Must be paginated & cross-referenced in Referral Notice – help the adjudicator navigate the evidence



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What next for contractors in these uncertain times?

George Taft, Secretariat



What next for contractors in these uncertain times

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The Allocation of Force Majeure Risk in the ‘New Normal’ (September 2020, Secretariat)

The article looked ahead to “the next wave” which we are of course now experiencing:

- Whilst the emergence of the COVID-19 pandemic and its effects in 2020 were not foreseeable, it could be said that all parties are now painfully aware of the risk.
- In future, prudent parties to construction contracts may wish to acknowledge the existence of that risk.
- How do you manage a risk such as COVID-19, with limited historical data?
- Measures that employers and tendering contractors might consider to proactively manage the risk of future “waves” could include the following:

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What next for contractors in these uncertain times

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Measures to manage proactively the risk of future “waves”

1. Define a future wave/pandemic as a recognised force majeure event. E.g. define trigger mechanism; and its effect.
2. Consider use of a Provisional Sum to manage the cost of the risk.
3. Consider use of the contract Variation mechanism e.g. specific tailoring setting out requirements.
4. Implementation of ‘liquidated daily rates’ (follow-on to 3.) pre-agreed rates could provide more certainty.

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**Thank you.
Questions?**

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