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Contract Management

A Regular Practice Note on Contract and Project Management
For the Industrial Plant Business

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Bogus Information?

Some people think the more you write in a claim document the more likely you are to get a result, even if the information included is not directly relevant to the core claim. It is almost as if success is in direct proportion the amount of noise made by the document landing on the receiver's desk! Whilst such an approach would seem on first consideration to be illogical, it seems from recent research there may be something behind such an approach.

A claim with too much information – is there a reason for that?

Recent research on how people react to information is of relevance to those who draft claims and more importantly, to individuals who receive and process claims. The research looked at the presentation of information and in particular how people reacted when that information was presented with an expert gloss – in a scientific or pseudo-scientific manner, or if it contained irrelevant details.

Pseudo-Science

Experiments reported in the March 2008 edition of the Journal of Cognitive Neuroscience, showed that people will accept bogus explanations much more readily when they are dressed up with a few technical words from the scientific world, in this case the world of neuroscience. Subjects were given descriptions of various psychology phenomena, and then randomly offered one of four explanations for them: the explanations either contained neuroscience, or didn't; and they were either good explanations or bad ones (bad ones being, for example, simply circular restatements of the phenomenon itself).

Here is one of their scenarios. Experiments have shown that people are quite bad at estimating the knowledge of others: if we know the answer to a piece of trivia, we overestimate the extent to which other people will know that answer too. A "without neuroscience" explanation for this phenomenon was: "The researchers claim that this [overestimation] happens because subjects have trouble switching their point of view to consider what someone else might know, mistakenly projecting their own knowledge on to others." (This happened to be a "good" explanation.)

A "with neuroscience" explanation was this: "Brain scans indicate that this [overestimation] happens because of the frontal lobe brain circuitry known to be involved in self-knowledge. Subjects make more mistakes when they have to judge the knowledge of others. People are much better at judging

what they themselves know." The neuroscience information is irrelevant to the logic of the explanation.

The subjects were from three groups: everyday people, neuroscience students, and neuroscience academics. All three groups judged good explanations as more satisfying than bad ones, but the subjects in the two non-expert groups judged that the explanations with logically irrelevant *neurosciencey* information were more satisfying than the explanations without. What's more, the bogus neuroscience information had a particularly strong effect on peoples' judgments of bad explanations. As quacks are well aware, adding scientific-sounding but conceptually uninformative information makes it harder to spot a dodgy explanation.

An interesting question is why. The very presence of neuroscience information might be seen as a surrogate marker of a good explanation, regardless of what is actually said. As the researchers say, "something about seeing such neuroscience information may encourage people to believe they have received a scientific explanation when they have not."

Irrationality

More clues can be found in the extensive literature that exists on irrationality. People tend, for example, to rate longer explanations as being more similar to "experts' explanations". There is also the "distracting details" effect: if you present related (but logically irrelevant) details to people, as part of an argument, that seems to make it more difficult for them to encode and later recall the main argument of a text, because attention is diverted.

But any meaningless filler, not just scientific jargon, can change behaviour: studies have found, for example, that people respond positively more often to requests with uninformative "placebo" information in them: for example "Can I use the photocopier? I have to make some copies," is more successful than the simple "Can I use the photocopier?"

Lessons

For those working in claims management there are lessons to be drawn. Experts in the topic giving rise to a claim are unlikely to be impressed by a document containing a long explanation with irrelevant details. But a non-expert, perhaps an executive charged with the responsibility of making a decision on settling a claim may be more impressed. In addition, many claims writers believe the more information or "padding" that is included in a claim the more successful it is likely to be. Presumably they are relying on the research outlined above and hope that they can persuade the other side to settle through the psychological effects of using "placebo" information.

The conclusion is clear. When a claim is received there is no need to rush. Sufficient time should be taken to fully understand what the claim is about and to identify, with the help of the appropriate experts, what is relevant and what is not. For those drafting claims, the danger of including too much information not central to the main matter is that you invite a

response on these issues. You may find yourself arguing over irrelevant details and never resolving the core claim. It is this writer's experience that such claims (and they are very common) are the ones that invariably result in formal disputes. They inhibit understanding of a party's position and reduce the possibilities of settlement.

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Claims for Lost Management Time

Some of the most difficult types of claims for damages are those involving claimed management costs allegedly caused by a breach of contract. Such claims are often made when the work of a contractor or an end-user has been disrupted because of the breach and management has been diverted from its everyday work to deal with the problem caused by the breach. The party then seeks to recover the cost of such management time from the breaching party.

A true loss or not? Proof is a problem.

Such claims have always been difficult to substantiate because by its very nature management cost is an overhead to a business. In other words, the cost of employing the staff would be incurred by the business regardless of the breach in question.

Take a simple example to illustrate the problem. In a multiple project business a typical contractor would have management and design staff working on multiple projects. Consider one project manager for such a company working on two different projects. If he is a staff member, then his costs are fixed for any given financial year. Let us assume the cost to the business are €100,000. If the original plan was that he would spend 60% of his time on project 1 and 40% of his time on project 2, the cost to the business would be €100,000, €60,000 charged to project 1 and €40,000 to project 2. If because of delays, disruption or other problems, the project manager spent 70% of his time on project 1, he would only be available for project 2 for 30% of his time. The costs for project 1 would increase, but the business costs would remain the same at €100,000. Can the contractor recover the cost of the additional 10% charged to project 1? Since there has been no loss to the business it would be difficult, unless of course additional staff had been employed to cover the shortfall on project 2, then that cost could be recovered.

Last year in England how to deal with this problem became a little clearer thanks to two different cases. Before these cases were resolved the position in respect of breach of contract cases was that the claimant could only claim employee costs successfully where profit/revenue could be shown to have been lost due to the wasted management time, but not for the wasted management time hour by hour, if no connection with loss of profit/revenue could be shown. The new cases changed that position.

Case 1

Aerospace Publishing Ltd & Anr ("Aerospace") v Thames Water Utilities Ltd (2007) ("Thames Water"), Court of Appeal, 11 January 2007

Aerospace was a publishing company that suffered losses when its valuable book archive was destroyed by flooding caused by a burst pipe owned and operated by the service provider Thames Water. Thames Water admitted liability so payment of damages was the only issue before the court. Aerospace claimed that, had the flooding not happened, certain employees would not have been diverted from their usual duties, but would have concentrated on their usual revenue generating activities. Aerospace's claim for damages therefore included an element for staff costs.

Although this was a claim in tort, the Court of Appeal considered both tort and contract cases when deciding on the issue of the recoverability of staff costs. The court decided that there is no longer a distinction.

The Court of Appeal formulated a three point test:

- In order to succeed with its claim, a claimant must adduce all the evidence that it could reasonably adduce to show the extent of the diversion of staff;
- Further, the claimant must establish that the diversion of staff caused significant disruption to its business;
- If the first two elements can be established, it is reasonable for the court **to infer** [emphasis added] that, had the staff not been diverted from their usual activities, they would have directly or indirectly generated revenue for the claimant in an amount at least equal to the cost of employing them during that time.

Previous cases had left doubt about how to make the link between staff costs and lost profit.

Case 2

Bridge UK.COM Limited ("Bridge") v Abbey Pynford plc (2007) ("Abbey"), T&CC, 4 April 2007

In this case Bridge suffered losses as a result of Abbey's delay in constructing flooring on which a new printing press was to stand. This case adds to the Court of Appeal's formulation in the Aerospace case by setting out the evidence that is required to succeed in a successful claim for lost management time in breach of contract claims. Here, Bridge did not adduce contemporaneous records of the time spent by the manager in question, which was previously thought to be the correct way of proving such losses. Instead, by examining documents and other records a retrospective assessment of the time spent was calculated. The court accepted this rough and ready approach, but reduced the damages awarded under this head by 20% in recognition of the uncertainty inherent in the approach.

This decision confirms that management costs may still be recoverable even where a detailed record of the time spent is not available.

In Conclusion

The two new cases confirm that under English Law, the cost of wasted management time is recoverable, and that this is calculated by reference to the cost of the employees' time, rather than by reference to lost revenue. Of course these rules will not apply necessarily in other jurisdictions. However, given the litigious nature of Anglo-American society, the law is often called upon decide complex issues long before such issues are fully considered in other jurisdictions. Consequently, these societies have an influence beyond their legal jurisdictions. In addition, the international contracting businesses remain dominated by Anglo-American contract administrators who keep up to date with developments in their home countries.

Expect claims for lost management time to become fashionable.
