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Why construction disputes are like exams

by Toby Randle

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At the moment, I have the dubious pleasure as a parent of trying to help two 'head strong' teenagers navigate A levels and GCSEs in the English schools system. In exams, (in fairness they haven't had much practice due to COVID) neither can resist the urge to write down everything they can remember about their subjects, regardless of whether it is really relevant to the question. It sometimes reads like a stream of consciousness.

They are long on facts and short on analysis. They struggle to ensure that each particular fact or argument being regurgitated is relevant to the issues in hand. In their mocks, despite working pretty hard, they didn't do quite as well as they had hoped.

We talked about 'exam technique' at the weekend (parental feedback never well received in my household!). We discussed resisting the urge to try show the reader how much work you have done and how clever you are. You simply don't get any marks for that. Rather, focus solely on the issues in hand, relate every point being made back to the question and be clear and concise in your answers. And most importantly do not repeat yourself!

We also talked about finding time to plan and structure the answer and write a short introduction and conclusion. Hopefully the statement "I think I did ok in that exam – I managed to write loads anyway" will never be used again!

I realised that in my work, which is predominantly large and complex construction disputes, it is common to see the same challenges arise, especially with experts.

Clients often applaud lawyers and experts for producing huge volumes – the thinking being that it will simply intimidate the other side into settling. Judges and Arbitrators on the other hand in my experience are rarely so appreciative. I learned this early in my career, back in the '90s, when I was a junior lawyer involved in an international arbitration where there was a huge claim and even larger counterclaim. The Tribunal clearly lost patience with both sides, and particularly the experts because the evidence and submissions were too voluminous and complex to be properly understood in the time available. The pleadings were lengthy and chronological and there was no clearly defined list of issues for the Tribunal to refer the pleadings and evidence back to.

After two weeks of hearing and countless pages of submissions and evidence, the Tribunal decided that both the claim and the counterclaim should fail because they were "not proven" and each side should bear their own costs. Although this result actually suited my side rather well, I couldn't help feeling what a total waste of time it all was.

Tribunals often despair at the huge volume of documents and evidence they have to grapple with. Hundreds of thousands of pages are not uncommon. But unlike criminal fraud trials, or public enquiries where there might be a year-long hearing, big construction cases often have hearings no longer than three or four weeks, and sometimes much less than that – especially in civil law and middle eastern jurisdictions. No matter how

hard working your Tribunal or Judge, they are busy and don't have weeks and weeks of reading time. With the best will in the world, they simply cannot read everything, especially if they are reading in a second language.

So my point is that everyone, and I include myself in this, should find time to distil down the written documents they are producing so that they only deal with the issues in hand and nothing else. When dealing with the issues don't write ten pages on a subject when one will suffice. As Mark Twain once said, "sorry I've written a long letter, I didn't have time to write a short one".

Just because an analysis has been done, that doesn't mean that it should be deployed. We all go down cul-de-sacs in our preparation, but the best lawyers and experts always seem to have the confidence to focus on the key issues and only the key issues. They seem to avoid the temptation to feel the need to justify their fee by also including analysis they have done that relates to matters that are no longer key issues in the case. They make sure that everything they ask the Tribunal or Judge to read is relevant to one of the key issues and they explain why it is relevant. This is no different to exam technique.

The Dreaded Chronology

Whilst very detailed day by day document chronologies are a useful tool in preparation for a case, in my experience they can also be dangerous if you are a slave to them. I say this because chronologies are not organised by issues and nearly always contain irrelevant information. The approach people sometimes take when preparing the chronology is typically "if in doubt put it in".

What sometimes then happens is that this chronology is then used as a road map for the pleadings, expert reports and witness statements. They start at the beginning in terms of time and tell the story to the end.

In my view, the better approach is to try and tell the story of the case by reference to the key issues you have isolated and then use mini chronologies within each issue. As with the best Netflix box set, an engaged audience will be able to follow the story even though it jumps about in time provided they are engaged with the story line – or 'issue' in dispute parlance. The audience may not be as well engaged if you rigidly follow the chronology and then jump about between story lines.

My Conclusion

In my experience, the best practitioners adopt at least some of the following principles when dealing with construction disputes:

1. They identify the key issues at the earliest possible opportunity;
2. They focus only on those issues;
3. They keep it as short and simple as possible;
4. They include introductions, executive summaries and conclusions wherever possible;
5. They do not repeat themselves; and
6. They are not a slave to the Chronology – they tell the story by reference to the issues.

So, my message is: if you adopt good exam technique when dealing with construction disputes you won't go far wrong.

Toby Randle
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