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PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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GENERAL: THE IMPORTANCE OF GOOD LEGAL WRITING SKILLS - LAWYER OR NOT, GOOD LEGAL WRITING SKILLS ARE ESSENTIAL TO THOSE WHO WISH TO ENTER THE MUDDY WATERS OF CONSTRUCTION CLAIMS.

"good legal writing skills are not a matter of luck or genetic predisposition…[they]…can be learned"[1]

The Relevance of Good Legal Writing Skills

We have previously dealt with the importance of keeping records on construction contracts ("The Importance of Being Nice" – March 2015 Edition]. As we head into the new year, before we all start reneging on our resolutions, we thought it would be fitting to suggest a new skill which you may wish to add to your repertoire. Legal writing.

Before you dismiss legal writing skills as being for those who enjoy such things i.e. lawyers and dried up old English professors, consider the claims process in the four most commonly used standard form construction contracts in South Africa i.e. FIDIC, NEC3, GCC and JBCC. Each of these contracts requires a series of written submissions to:

1. the Engineer/Project Manager/Principal Agent;
2. the adjudicator; and
3. the arbitrator and/or judge.

We are not suggesting that you (unless you are very strapped for cash) attempt to prepare your own submissions to an arbitrator or judge. Most contractors, however, will try their hand at preparing their submissions to the Engineer/Project Manager/Principal Agent and a brave few will even go so far as to prepare their own submissions to the adjudicator.

Where these documents (and other preliminary documentation such as notices) are poorly drafted, this will reduce the chances of these claims being successful and create problems for their future management. Expensive, time-consuming problems.

The Importance of Using Good Language

The object in preparing any claim submission, whether to the Engineer/Project Manager/Principal Agent or the adjudicator, is to persuade the reader that the claim is a valid one. You do this by clearly and concisely stating your version of events (telling the story) and supporting this version with relevant evidence.

[1] Strong, S.I., How to Write Law Essays & Exams (3rd Edition) Oxford University Press, 2010, page 1

Poor language and sentence structure are major barriers to effective communication. This problem can be solved, in part, by using smaller simpler words, shorter sentences and paragraphs, and paying attention to your grammar and punctuation. Each paragraph should address only a single idea. Rather than trying to impress (befuddle) the reader with your extensive vocabulary and complex understanding of the issues, with too many words and long involved sentences, keep your submission simple, direct and easy to understand. You are unlikely to persuade anyone that you are correct by making your submission unintelligible to them.

It will assist you, in this regard, to include headings and sub-headings for different topics. It is also important to ensure that you correctly understand the meaning of the words you are using, and chose words that your reader will understand correctly. Submissions should be short and precise, as, it is likely that the person you are addressing them to is busy and will be impatient at having to wade through unnecessarily long documents.

In order to make you version persuasive, you need to have a good grasp of both the facts that gave rise to the claim, as well as the law/contractual provisions you are relying on. If you get either of these wrong, you may affect your credibility with the reader and sow confusion as to the real basis of your claim.

Setting out the Facts

The facts or events giving rise to the claim should be stated simply and unemotionally, in chronological order, avoiding unnecessary information and going off on a tangent. If it does not take your case forward, regardless of how much you want to vent your frustrations, don't include it. Irrelevant material, particularly controversial material that is likely to raise eyebrows or blood pressure, will only detract from the point you are trying to make.

Supporting Evidence

Each of these facts should be supported by relevant evidence (the detailed records you started keeping after reading our previous article, referenced above), the intent being to prove each fact on a balance of probabilities. This is the civil need to persuade the reader that your version is the more probable. When you rely on a written document, you should attach it to the submission and set out those portions you wish to refer to, in the body of the document. This enables the reader to understand your point without having to flip back and forth through a voluminous submission.

In this regard, it is important to understand what kind of evidence the reader will find persuasive. As much as you may enjoy collating all the facts and figures into neat schedules and tables, these will not prove your case. The reader will want to see the original (primary) documents you obtained these facts and figures from, for example, the original letters, photographs and daily diaries and weather records signed by the Engineer/Project Manager/Principal Agent.

The Law/Contractual Provisions

The next step is to determine the law/contractual provisions which are applicable to these facts and what they entitle you to. The law/contractual provisions will determine the essential elements you will need to prove in order for your claim to succeed. For example, the essential elements for a claim for breach of contract are:

1. The existence of a contract;
2. Breach of a term of the contract;
3. Damages suffered;
4. Causation – you must be able to show that the breach of the contractual term caused the damages (which are not too remote) you suffered.

These elements, in turn, help you determine the difference between the facta probanda and the facta probantia. The facta probanda are the facts you need to prove in order to make your case. The facta probantia are the facts which help to prove the facta probanda. For example, the Employer's failure to make payment in terms of the contract would be fact probanda. A letter from the Employer stating that it does not have sufficient funds to make that payment is facta probantia.

In addition to all of the above, most contracts will have a magic formula which they will expect you to have complied with, before you are granted admittance to the inner sanctum of the claims process. This will usually take the form of preliminary notices and reference to specific clauses in these notices or your later submission. Failure to comply could result in anything from a delay to the proceedings while you do so, to the failure of your claim due to a time bar clause. For this reason, it is important that you read and comply with the relevant provisions of the contract.

Obtaining Outside Help

And of course, finally, if you are in any doubt as to whether you have done the above correctly, consult your friendly local lawyer (timeously) so that they can check (or draft) it for you, before you send it off.

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