

# The Cambridge Lecture

## Records and Evidence

## The building blocks or the road to success

25/10/2017

© John L Riches  
1



Henry Cooper Consultants Ltd

# To win any claim

- 10 most important items
- Records
- Records
- Records
- Records
- Records
- Records
- Records
- Records
- Records
- Records
- Records



# Records Vinyl is best!

*Kate Bush*



*Hounds of Love*

© John L Riches  
3

25/10/2017



Henry Cooper Consultants Ltd

# What Generates records?

- Force of habit?
- Something to do?
- There needs to be a reason or a purpose
- Use the contract as a tool.
- If the contract says do something do it.
- Always do it in writing.
- There may further requirements in the contract documents for records and reports



# Contract



25/10/2017

© John L Riches  
5

# Contract



# Typical Records JCT

- **The contract and contract documents**
- **Design documents under Contractor's Design Portion**
- **Compliance goods and materials**
- **Supply of documents**
- **Master programme**
- **Levels**
- **Information Release Schedule**



# Typical Records JCT

- **Notice of errors and discrepancies**
- **Notices of delay**
- **Instructions**
- **Variations**
- **Certificates**
- **Applications and payment notices**
- **Extension of time**
- **Loss and expense etc**
- **I have merely scratched the surface**





# Typical Records NEC

- **The Contract Data**
- **Early Warning Notices and Register**
- **Contractor's Proposals**
- **Instructions**
- **Design**
- **The Programme**
- **Quality management, tests and inspections**
- **Payment regime with all its notices etc**



# Typical Records NEC

- **Compensation Events**
- **Termination notice**
- **Cost Records (do they ever exist)**



# Means of Keeping Records

- **Everything should be in writing**
- **It may be stored electronically**
- **Telephone calls are useless (unless you record them)**
- **I wrote a stiff letter to the Architect. (its still in the file, I dare not send it)**
- **Physical samples**
- **Photographs**
- **Text messages/ the world of emails**



# Some Tips on Record keeping

- **The world was bad when we had telex**
- **Fax was not much better**
- **Email is the worst thing ever (back to even bigger toilet rolls than telex)**
- **Letters were much better because they required thought.**
- **The record should be intelligible, self contained and cogent.**



# The Tribunal may read your emails

- **Everything should be produced for the person who is going to read it.**
- **You must treat the reader as stupid**
- **Unless you tell the reader everything he will know nothing**
- **The ten second test**
- **No title**
- **I don't know who these people are?**



# The Tribunal may read your emails

- The attachment isn't attached, or if it was now lost
- No subject matter
- The body of the text gives no clue as to what the communication is about
- Ergo it doesn't communicate
- Stick to the facts



# Are evidence and records the same?

- **Yes and no**
- **If a fact is in issue (the parties do not agree) you need evidence to determine what the fact was.**
- **These are the disputed facts that you must prove to the tribunal**
- **Without a fact the law is impotent**
- **An ounce of fact is worth a pound of law**



# What is evidence?

- Purpose of Evidence
- Rules of evidence
- Facts
  - Admissions, Presumptions and Judicial Notice
  - Disputed Facts
- Proof
  - Burden of Proof
    - Legal burden
    - Evidential Burden
  - Standard of Proof
- Types of Evidence
  - Direct & Indirect
  - Primary & Secondary
  - Testimony
  - Documents
  - Real
  - Circumstantial
  - Hearsay



# Purpose of Evidence

- **What is the purpose of evidence?**
- **To prove facts**
- **Records should contribute in three ways**
- **Evidential burden – sufficient evidence to raise an issue**
- **Legal burden – he who asserts must prove**
- **Probative or persuasive burden – to satisfy the legal burden**



# Facts that need to be proved

- Facts which must be proved?
- *If we leave aside the facts which need not be proved (formal admissions, presumptions and judicial notice) what kind of facts need to be proved?*
- Answer:
- ‘Facts in Issue’



# Facts in Issue

- **Facts in issue**
  - Relevant facts
  - Otherwise inadmissible
- **Question:**
  - *In an adjudication concerning a claim for breach of contract what examples of facts in issue might arise?*



# Facts in Issue

- **The existence of a contract.**
- **The terms of that contract**
- **That a particular term was breached.**
- **That loss was suffered as a consequence.**
- **The amount of that loss.**



# Facts in Issue

- **Claimant to succeed – persuade the tribunal**
- **Respondent**
  - **Simple denial**
  - **Defective work**



# Witnesses

- **Witnesses of fact are now experts, lawyers**
- **Expert evidence is hearsay**
- **If it is from a delay analyst it is also probably heresy**
- **Plain Fact - a witness of fact cannot make good a lack of contemporaneous evidence**
- **Experts never bother with the facts see Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Anor [2005] EWHC 181 (TCC) (24 February 2005)**



# Proof

- **Two aspects:-**
  - **Burden of Proof**
  - **Standard of Proof**
- **Burden of Proof**
  - **Legal burden**
    - ***“He who asserts must prove.”***



# Proof

- **Question:**
- ***What does a claimant have to prove in a breach of contract case if the defendant denies everything?***





# Proof

- **Answer:**
- ***That a contract exists.***
- ***That the defendant breached its obligations under the contract.***
- ***That loss has been suffered which, but for the breach, would not have otherwise been suffered.***
- ***The quantum of the loss.***
- ***The loss is not too remote.***



# Proof

- **Question**
  - ***Which of the following would a respondent not have to prove in breach of contract case?***
    - ***There is no contract.***
    - ***Performance of the contract by the claimant was defective.***
    - ***The contract has been frustrated by some supervening event.***



# Proof

- **Answer:**
  - **A respondent does not have to prove that a contract does not exist.**
  - **A claimant must prove that a contract exists because it is an element of the cause of action of breach of contract even if the defendant makes a simple denial.**



**John L Riches FRICS FCIARB MAE  
Henry Cooper Consultants Ltd**

**Cardiff House**

**51 Thorpe Road**

**Norwich**

**NR 1 1UG**

 **Phone 01603 660024**

 **Mob 07831522860**

 **Fax 01603 765291**

 **Direct Fax 01603 63440**

 **email [johnriches@henrycooperconsultants.com](mailto:johnriches@henrycooperconsultants.com)**

