



LESSONS IN PROFESSIONAL LIABILITY: Communications

**LOSS PREVENTION EDUCATION
FOR ARCHITECTS AND ENGINEERS
FROM XL INSURANCE'S DESIGN PROFESSIONAL GROUP**

UK AND IRELAND REGION

Lessons in Professional Liability: Communications

No matter how much you might wish you could work alone on a new design, you do not have that luxury. Today's construction projects can be extremely complex, often requiring the input of dozens of specialists, all of whom need to communicate with each other. You must interact daily with diverse personalities in order to develop clients, present proposals, listen to subcontractors, deal with public officials, respond to contractors and resolve inevitable conflicts. Any or all of these personalities can be the source of a claim against you. A large number of claims made against design professionals result not simply from technical errors or incompetence but from a breakdown in understanding between parties—either in the written communication of the project itself (the contract documents) or in the day-to-day communications between you and other parties to the construction process.

This need not happen. You can anticipate and deal with many of these problems by considering the factors that lead to misunderstandings between the design professional and other members of the construction team.

THE IMPORTANCE OF COMMUNICATIONS

Effective verbal and written communication does not come naturally for most people. Some who are adept at the spoken word—politicians, for example—may have trouble writing a clear, concise letter. Others, such as literary scholars, can write a beautifully constructed manuscript yet have difficulty in communicating the same ideas in speech.

In general, colleges and universities do little to help fledgling design professionals in these areas. While an exhaustive background in mathematics, physics and other technical subjects is provided, only a few (if any) courses in the humanities or business are required. It sometimes seems that the colleges and universities assume their students will acquire, by some magical process, skill in communications and interpersonal relationships.

To complicate matters further, people often feel they understand one another perfectly when, in reality, they do not. They are operating in what psychologists call “pseudo-communication.” They use the same words and phrases, but each interprets them differently depending upon his or her own background. National origin, gender, culture, education and past experiences all play a role in the “understanding” reached.

THE WORDS WE USE

Communication failures are often at the centre of litigation. A primary culprit is the language we use in our written communication, including correspondence, specifications and contractual agreements.

No matter what you intend to say, when such a claim arises, the courts are called upon to make an objective assessment of the language used. The court's focus will not be on what you intended to say but on “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”¹

¹ *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896

Some words seem to be misunderstood far more often than others. If we categorise words that are most often misunderstood, we find they fall into several groups:

- Extreme words, such as *final*, *all*, *complete* or *best*
- Words of multiple meaning, such as *inspect* or *estimate*
- Words of promise, such as *guarantee* or *certify*.

Have you been asked to sign an agreement with a clause such as the following?

The Design Professional shall assist the Owner in applying for and obtaining from ALL applicable public bodies, ANY consents, approvals or permissions required by law.

If you've seen a clause like the one to the left, your clue to possible trouble is the frequent use of extreme words. It is important to try to delete or change them. Often, you will find that the owner does not intend to impose the impossible conditions that such words imply and would not object to your modifying the clauses.

Take a closer look at the clause. As it reads now, you could be held responsible for obtaining every conceivable consent etc necessary for others to do their work. It establishes an absolute condition that may be impossible for you to meet. You can't know at the beginning of a project what consent etc might be required, but if you accept such a clause, you

are agreeing to an open-ended requirement for any new consent etc that might be imposed in the future. Instead you could modify the clause to read as shown below.

Consider this instead:

The Design Professional shall assist the Owner in applying for those consents, approvals and permissions typically required by law for projects similar to the one for which the Design Professional's services are being engaged. This assistance consists of completing and submitting forms required for the performance of certain works included in the Scope of Services.

Most of us tend to use extreme words. For example, we frequently agree to *maximise*, *minimise* or *optimise* without thinking twice. We often employ words of totality such as *any*, *all*, *none*, *full* or *equal* without qualifications in our brochures, contracts or proposals.

In addition to extreme words, words that have multiple meanings cause innumerable problems for the design professional. Simple little words sometimes have dozens of meanings. Look up the words *run*, *top* and *get* in your desktop dictionary. Seeing the variations of meaning for these three-letter words might make it easier for you to believe that the 500 most commonly used words in the English language have more than 14,000 meanings!

Inspect and *supervise* are two words that mean something different to design professionals than to lay persons. In fact, the word *supervise* should be avoided—or used with extreme caution—by design professionals. Note how a judge might conclude that *supervise* is synonymous with *control* from the following definitions in the reference book *Words and Phrases*:²

- The words *supervise*, *superintend* and *oversee* in ordinary use and common acceptance have substantially the same meaning.
- *Control* is the “power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee.”
- The terms *direct* and *administer* are synonymous. Both mean “to manage, control and conduct affairs of business.”

Clearly, these definitions overlap; at least 10 words are listed as synonymous with *supervise*. For a design professional, this is treacherous ground. In the construction industry, the individual who has *control* of a site

generally has the responsibility for the means, methods, sequence, procedures, techniques or scheduling of construction. This responsibility and control of the site carries with it the responsibility for safety of workers and the public on or about the site. Carelessly using the word *supervise* could lead you into the muddle of greater safety responsibility than you would normally expect.

Furthermore, supervision has been held³ to entail “detailed and continuous direction” and an obligation to provide observation by way of oversight sufficient to confirm that a design was being interpreted correctly and the works carried out in accordance with the contract documents. The expectations and obligations created by the word *supervise* are therefore somewhat greater than those that arise when the words *inspection* or *periodic inspection* are used.

Consider also whether words, particularly words you often see in a legal context, may have a particular legal meaning. The term *set-off*, for example, has a specific legal meaning. It is narrower than the term *counterclaim* and is subdivided into legal and equitable set-offs. Importantly, it is not the same as *abatement*, which is a claim that the works are worth less than the sum claimed because they are incomplete or have not been carried out at all. These subtleties were overlooked in *Acsim (Southern) Limited -v- Danish Contracting and Development Company Limited*⁴ with the result that a clause in a building contract limiting the parties’ rights to withhold payment applied only to set-off not abatement. The Judge said “I am not sure what the businessman who uses this form understands by the phrase ‘rights...in respect of set-off.’ It seems to me, however, that ‘set-off,’ in the context of this contract, means ‘set-off’ in our law as defined by decisions of the court.”⁵ Danish Contracting were therefore entitled to withhold payment notwithstanding a failure to give a required notice.

There are numerous other examples of everyday words that have particular legal meanings, for example:

- *Tenant*: It is natural to think of a tenant as being the occupier of premises, but the term includes anyone who owns a leasehold, as opposed to freehold, interest such as the owner of a flat.
- *Repair*: An obligation to repair is unlikely to encompass an obligation to remedy a design flaw, which would be regarded as improvement.⁶
- *Dispute*: For the purposes of adjudication or arbitration, a dispute will only exist once a claim has been made and it is reasonably possible to infer that it is not accepted. The mere raising of an issue about which a claim may be made or even the making of a claim would not constitute a dispute.⁷
- *Burst*: You might consider a pipe to have burst only where the breach was accompanied by a degree of violence, but that is not required. The crucial factors in characterising an event as a burst are whether it is caused by a build up of internal pressure and the breaking of the composite unit that constituted the pipe.⁸

Optimism is often reflected in the things we say and do. In fact, optimistic words (*better* instead of *worse*, *advance* rather than *retreat*) are used about four times as frequently as their antonyms. In the design professions, however, optimism can be a liability trap. To protect yourself, it is wise to avoid words of

RED FLAG WORDS

Think twice before you use any of the following words in your contracts. There is almost always a better choice available to you.

administer	every
advise	final
all	full
always	guarantee
any	indemnify
approve	maximise
appropriate	minimise
assure	none
best	optimise
certify	oversee
complete	periodic
control	safe
direct	sufficient
ensure	suitable
equal	supervise
estimate	warrant

³ *In Rowlands v Collow* [1992] 1 N.Z.L.R. 178

⁴ (1989) 47 BLR 55

⁵ *Ralph Gibson LJ at page 70*

⁶ *Quick -v- Taff Ely Borough Council* (1985) 3 WLR 981

⁷ See, for example, *AMEC Civil Engineering Limited v The Secretary of State for Transport* [2004] EWHC 2339

⁸ *Board of Trustees of the Tate Gallery v Duffy Construction Limited & Another* (2007) BLR 216

promise like *guarantee, warrant, certify, ensure, assure* and *insure*. Unless you can absolutely state or promise something without qualification, you must refuse to assume the role of risk taker.

Your choice of words should correctly describe your intent. *Will* or *must* are words of positive affirmative action—a promise that the act will definitely happen. Use them only when they are actually intended. If you can't be that definite, *may* or *reasonable endeavours* would be wiser choices.

Two techniques may prevent your becoming entangled in litigation over word meanings. First, find more exact words. If you are an average design professional, you use about 2,000 words in your day-to-day conversation. If that seems like a lot, consider this: There are about 600,000 English words. The Bible⁸ uses about 8,000; highly intelligent people have vocabularies approaching 15,000; and Shakespeare used 34,000 different words in his works! Make the effort to broaden your vocabulary and discover more precise words for what you want to say.

Second, seek feedback. Since most English words have varying connotations, a good method for testing communication is to have listeners feed your communication back to you in their own words. Engineers, architects and contractors, as members of a team effort, must think and act as a unit. Any ambiguities or misunderstandings that exist within this team can lead to errors, delays, disputes and even litigation.

USING THE RIGHT WORD IN CONSTRUCTION DOCUMENTS

Do contractors routinely seek clarification and direction after receiving your documents? If so, this may indicate that your plans and specifications contain ambiguous directions.

For example, how often do you use the words *supply, install* and *provide* interchangeably, intending that they all have the same meaning? Check their meanings, though, and you will discover considerable differences. In the dictionary you will find that *install* means to “set in position and connect or adjust for use”; *supply* means to “furnish or equip”; *provide* means to “furnish, supply... to make available.” As you can see, the words are not synonymous. *Install* does not convey the meaning that the item to be installed is to be supplied by the same party installing it. Similarly, the words *supply* and *provide* do not connote that after an item is supplied, it will also be fixed in place. It is important to be precise.

Design professionals use many words that have very special and limited meanings to others within their field. The average layperson finds it almost impossible to understand this jargon, especially since there is no one standard definition for most of it. An understanding of meaning is acquired only through long experience and exposure to the working vocabulary of the construction industry and even then the law may have a different view from a design professional.

Some words are so susceptible to misinterpretation and so difficult to explain to a contractor (or, worse, to a judge, arbitrator or adjudicator) that you should substitute another word or phrase to describe a particular activity. Consider these examples:

ENGINEERING JARGON	USE THESE WORDS INSTEAD
Approve	Work is in general compliance
Ensure	Endeavour to/Assist in seeking to
Or equal	Or equivalent
Satisfactory operation	Operation as specified