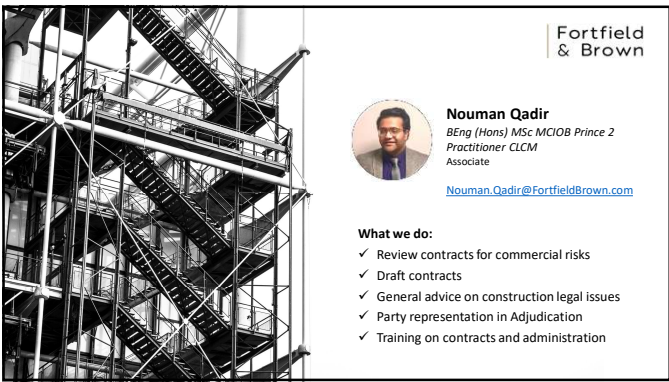




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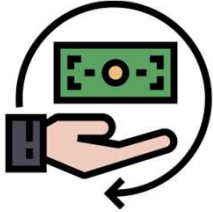
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4

What is a claim?

- A request for additional money and/or time
- Typical sources of claims
 - Variations / scope changes
 - Late provision of design information
 - Lack of access
 - Adverse weather
 - Increased quantities of work
 - Incorrect descriptions of work
 - Changes in law



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5

Who must prove?

- Who has the burden of proof?
- To what standard must they prove?



6

Three simple steps

 Identify entitlement

 Notify in accordance with contract

 Prove the effects

7



Identifying entitlement

8

It is all about risk allocation

- There are three ways to allocate risk in construction contracts
 - Allocate to the Contractor → e.g. labour shortage → No entitlement
 - Allocate to the Employer → e.g. lack of access → Time/money claim
 - Share it → e.g. weather → Time only claim
- The contract allocates the risk
- The parties must price / insure accordingly



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Always remember the pigeonholes



No entitlement



Time only



Time & Money

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10

PWC - Schedule 1K

Contractor's risk

Everything else!

Time only

Delay Events

Weather Strike, lock out etc

Loss or damage under 3.2

Order of court or PA

Archaeological

Unforeseen ground

Utilities

Time & money

Compensation Events

Change Orders

Search for Defect

Suspend work

Factual error in site info

Early take over

No access

11

RIAI

Contractor's risk

Everything else!

Time only

30(a) – force majeure

30(c) – weather

30(d) – clause 21-26 damage

30(e) – civil commotion

30(h) – labour / material shortage

Time & money

Clause 4 – Legislative Enactments

Variations

30(b) – late possession

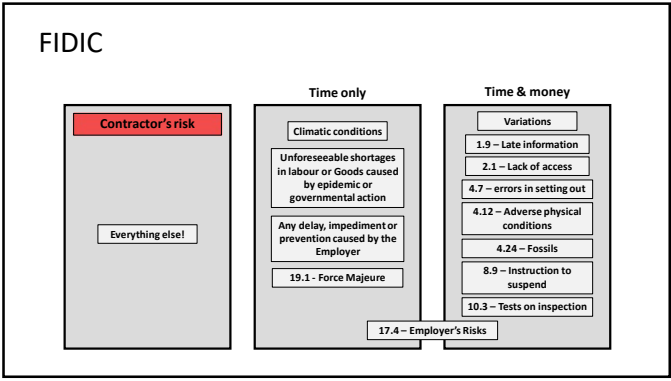
30(f) – Architect's Instruction

30(g) – late instruction

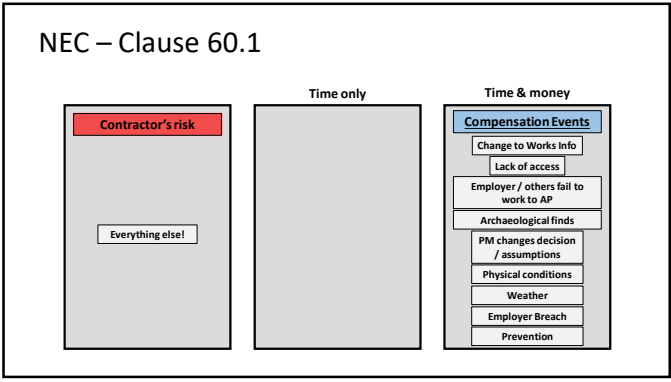
30(i) – delay by others engaged by Employer

30(j) – Employer act of default

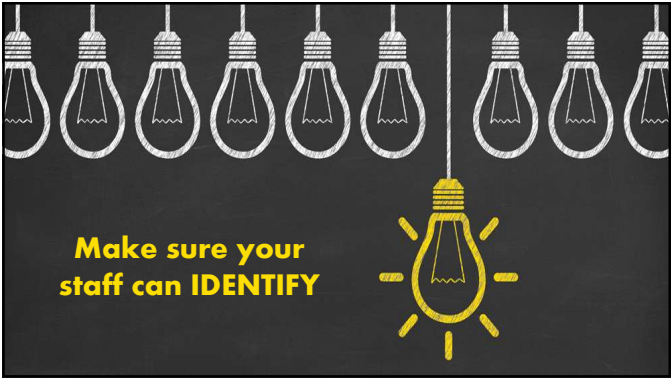
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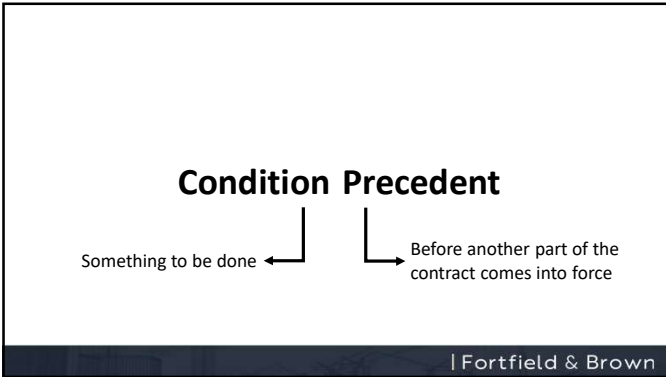
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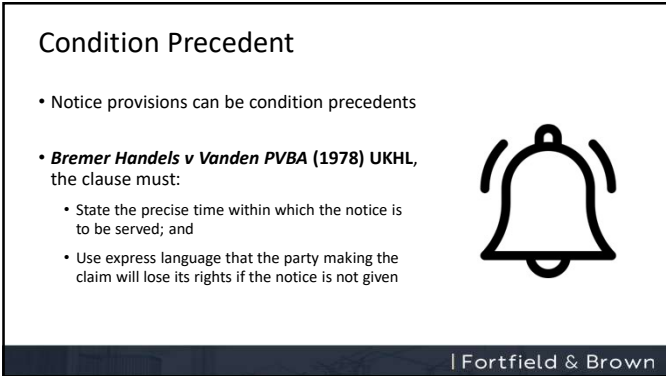
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17



18



Condition Precedent

- ... but why? That seems unfair?
- **Multiplex Construction v Honeywell Control Systems (2007) EWHC**
"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent"

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Notification Requirements

- Would you recognise a condition precedent if you saw one?

10.3 Contractor Claims	
10.3.1	If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative. The notice must be given according to sub-clause 4.14 and prominently state that it is being given under sub-clause 10.3 of the Contract. Within a further 20 working days after giving the notice, the Contractor shall give the Employer's Representative details of all of the following:
10.3.2	If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3, except where the Contractor has been required to and has given a proposal complying in full with sub-clause 10.4 [notwithstanding anything else in the Contract] the Contractor shall not be entitled to an increase to the Contract Sum or extension of time or use of the programme contingency referred to in sub-clause 9.4 [and the Employer shall be released from all liability to the Contractor in connection with the matter].

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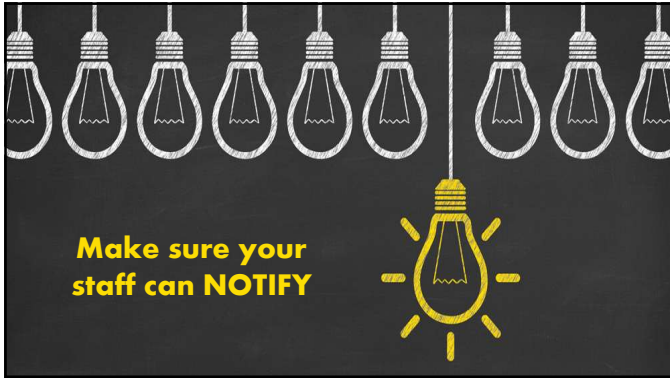
Notification Requirements

"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been"

Manni Investment v Eagle Star Life (1997) UKHL



21



22



23

Read the Contract!

- You do not have to be a lawyer
- Key things to look out for
 - Amendments to communication system
 - Amendments to change management provisions
 - Additional condition precedents
 - Subcontracting requirements
 - Third party agreements

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The Aim of Contractual Damages

- To compensate. Not to punish.
- General rule – **Robinson v Harman (1848)**
to place the innocent party in the position they would have been had the contract been performed as agreed



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Assessing Damages

- Three part exercise:
 - Is there an agreed damages clause?
 - **If not**, consider expectation v reliance interest
 - Then, consider the limiting factors
 - Causation
 - Remoteness
 - Mitigation
 - Limitation periods



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Agreed Damages (Liquidated Damages)

- Agreed damages, for specified breaches of contract
 - E.g. missing a completion date or delivery date
- Perfectly lawful, but subject to restrictions. Why?
- Remember... damages are not designed to punish. They cannot be a “penalty”.



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Agreed Damages (Liquidated Damages)

- When will agreed damages amount to a penalty?
- Old test: **Dunlop Pneumatic Tyre v New Garage (1915)**
 - Were the agreed damages a “genuine pre-estimate of the loss”?
- New test: **Cavendish Square Holdings v Makdessi (2015)**
ParkingEye v Beavis (2015)
V. Westwood v Conduit Street Dev. (2017)

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Agreed Damages (Liquidated Damages)

ParkingEye v Beavis (2015)

- Beavis received £85 charge for breaking two-hour parking limit
- Beavis ignored demand, ParkingEye started proceedings in the County Court
- Beavis argued that the charge was not enforceable at common law as it was a penalty
- UKSC held that the charge was enforceable. Why?



(BBC, 2015)

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The Expectation Interest

• Forward looking - "what position would innocent party have been in, had the contract been properly performed?"

• **Robinson v Harmon (1848)**

• Generally the most favourable measure of damages

• Generally the most commonly awarded

• Three mechanisms to calculate it

- Cost of cure
- Diminution of value
- Loss of amenity



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The Limiting Factors

• Causation - did the breach cause the loss?

• Remoteness - was the loss a direct result of the breach? Or within the reasonable contemplation of the parties?

• Mitigation - did the innocent party take reasonable steps to minimise the effect of the breach?

• Limit. Period - did the innocent party commence an action within the relevant limitation period?

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Breakout Session

How to respond when notices or revised programmes have not been correctly submitted?

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Time claims

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Extension of Time

- The basic premise is very simple
- If the Contractor does not complete by the Completion Date, it pays delay damages
- However, if the Contractor is delayed by certain specified events, the contract period is extended

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The Prevention Principle

The Prevention Principle

- This is the common law principle that a party (**the Employer**) cannot enforce a contractual obligation (**the Completion Date**) on the other party (**the Contractor**) where it has prevented performance of that obligation.
- So...what if an Employer does "prevent performance" and how would it?

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Time at Large

Time at Large

- When there is no fixed date for completion of the works. The contractor is required to complete the works within a reasonable time.
- Old doctrine that is rarely successful
- Most contracts have a mechanism for adjusting the Completion Date

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2. Purpose of EOT

The benefit to the Contractor of an EOT is to relieve the Contractor of liability for damages for delay (usually liquidated damages or LDs) for any period prior to the extended contract completion date and allows for reprogramming of the works to completion. The benefit of an EOT for the Employer is that it establishes a new contract completion date, prevents time for completion of the works becoming 'at large' and allows for coordination / planning of its own activities.



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How is EoT assessed?

- Check your contract
 - **PWC** – Clause 9.3 – an extension of time “equal to the amount of the delay... caused by the Delay Event”
 - **RIAI** – Clause 30 – a “fair and reasonable extension of time”
 - **FIDIC** – Clause 8.4 – a “fair determination”
 - **NEC** – Clause 63.5 – impact on the planned Completion Dated

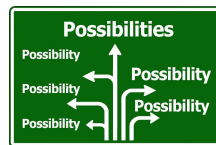
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Dealing with Delay – PWC

Clause 9.4 – Programme Contingency

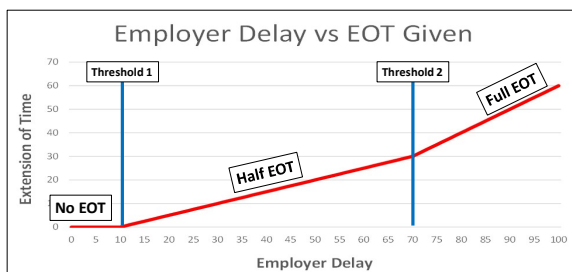
- A complicated mechanism
- Two thresholds (look at Schedule 1K)
- Contractors should programme it in
- Deemed to be included



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Dealing with Delay – PWC



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Dealing with Delay – NEC

- It is all about the effect on planned Completion
- This is used to determine the delay to the Completion Date

Terminology is key!

The diagram is a Gantt chart illustrating project activities and their timing. The activities are represented by horizontal bars: Mobilisation, Condition Survey, Design Period, Ancillary Works, and Installation Works. A 'Free float' bar is shown below the Ancillary Works bar, and a 'Terminal float' bar is shown above the Installation Works bar. The chart also indicates the 'planned Completion' and 'Completion Date' with a duration of '2w' (two weeks) between them. A bracket on the right side of the chart points to the text 'Terminology is key!'.

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Dealing with Delay – NEC

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Dealing with Delay – NEC

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What does fair mean?

- *Sutcliffe v Thackrah* [1974] A.C. 727
- UKHL decision

"The employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill he will act in a fair and unbiased manner in applying the terms of the contract"

- Be fair. Be impartial.



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Tips for preparing an EoT claim

- Deal with time impacts as the work proceeds
- Do NOT adopt a "wait and see" approach
- Review the EoT incrementally
- Concurrent delay?
- Mitigation?



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Know your audience

- Disputes over delay = likely to be resolved by Adjudicator
- Adjudicator will only have a few days to decide
- So the Adjudicator should always be your audience
 - Someone not involved in the day and daily
 - Someone who does not understand your specific trade
 - Someone who wants to make a "safe" decision
- Who wins? Whoever can tell the most convincing story!



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Convincing story telling

- If you were an adjudicator, which would be more convincing?
 - A delay narrative which is consistent with what was said throughout the project – cross referencing contemporaneous marked up programmes, delay notices and regular critical path commentary; or
 - A delay narrative which was prepared several months after PC, which refers to evidence that was never exchanged between the parties.

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The biggest lesson for today

Constantly claim EOT as you go along, do not wait until the end

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The SCL Delay and Disruption Protocol

- Society of Construction Law Delay and Disruption Protocol (2nd Edition 2017)
- A “*balanced and viable*” scheme for dealing with delay and disruption claims
- Not contract or jurisdiction specific



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The SCL Delay and Disruption Protocol

20. Basis of calculation of compensation for prolongation

Unless expressly provided for otherwise in the contract, compensation for prolongation should not be paid for anything other than work actually done, time actually taken up or loss and/or expense actually suffered. In other words, the compensation for prolongation caused other than by variations is based on the actual additional cost incurred by the Contractor. The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred.

21. Relevance of tender allowances

The tender allowances have limited relevance to the evaluation of the cost of prolongation and disruption caused by breach of contract or any other cause that requires the evaluation of additional costs.

22. Period for evaluation of compensation

Once it is established that compensation for prolongation is due, the evaluation of the sum due is made by reference to the period when the effect of the Employer Risk Event was felt, not by reference to the extended period at the end of the contract.

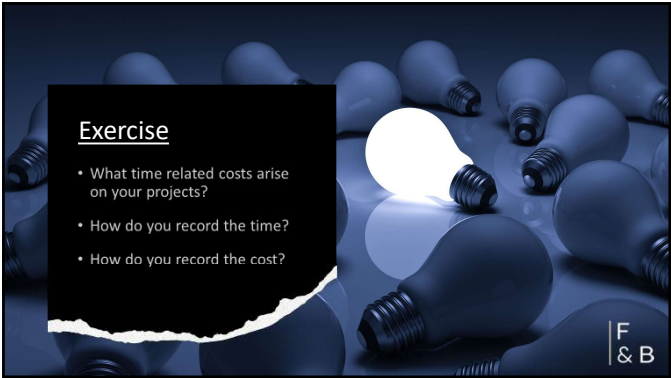


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Exercise

- What time related costs arise on your projects?
- How do you record the time?
- How do you record the cost?



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The SCL Delay and Disruption Protocol

- Key messages
 - Prepare a proper programme
 - Follow any contractual requirements
 - Do not adopt a “wait and see” approach
 - Incrementally review EOT
 - Remember duty to mitigate
 - Avoid global claims



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Elements of a good delay claim

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Elements of a good interim delay claim

- This is our advice, and is based on SCL D&D Protocol
 1. Baseline programme is incorporated into contract
 2. Notice to commence is given
 3. Any commencement delay (so delay between (1) and (2) above) is assessed to give an accurate baseline
 4. Revised baseline is constantly monitored / reported against in an "interim delay report"

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The "interim delay report"

- Section 1 – Details of contract / project
- Section 2 – Details of baseline
- Section 3 – Delay summary
- Section 4 – Details of each delaying event



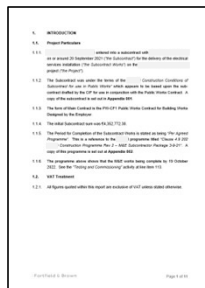
- This is a LIVE document, so keep an accurate record of revision numbers
- The point is, anyone should be able to pick it up and understand how you went from a 6-month programme, to an 18-month programme!

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The "interim delay report"

- Section 1 – Details of contract / project
 - Does not need to be complicated
 - Explains the contractual relationship
 - Explains what the project is all about



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The “interim delay report”

- Section 2 – Details of baseline
 - Should describe how the initial baseline was prepared
 - Cross reference any baseline incorporated into the contract
 - Should give a narrative of the critical path leading to any key milestones

The screenshot displays a project management interface. At the top, a section titled '6. INFORMATION TO BE PROVIDED' contains several numbered items (6.1 to 6.6) detailing requirements for the interim delay report, such as providing a narrative of the critical path, cross-referencing the baseline, and providing a narrative of the critical path leading to any key milestones.

Below the text, there is a table with columns: 'Activity', 'Start Date', 'Finish Date', 'Duration', 'Status', and 'Comments'. The table lists various activities, including 'Design', 'Construction', and 'Commissioning', with their respective dates and durations. The table is color-coded with green for completed activities and yellow for ongoing ones.

At the bottom of the screenshot, there is a section titled '6.7. Critical path analysis' which includes a narrative of the critical path leading to any key milestones. The text describes the critical path as starting from the 'Design' activity, through 'Construction', and ending at 'Commissioning'.

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- Should describe how the initial baseline was prepared
- Cross reference any baseline incorporated into the contract
- Should give a narrative of the critical path leading to any key milestones

[illegible]

The “interim delay report”

- Section 3 – Delay summary
- This should be an “at a glance” summary of each delaying event
- Tabular format tends to work well

Delaying Event	Critical Delay	Original Completion Date	
		1 June 2023	Revised Completion Date
VO-001	14 days		15 June 2023
VO-018	2 days		17 June 2023
VO-020	10 days		27 June 2023

The screenshot shows a project management software interface. At the top, there's a section titled "DELAY SUMMARY". Below it, there's a table with columns: "Activity", "Start Date", "Finish Date", "Delay Date", and "Delay Days". The table lists several activities, including "VO-001", "VO-018", and "VO-020". To the right of the table, there's a Gantt chart showing the timeline of these activities. The Gantt chart has a horizontal axis representing time, with markers for "1 June 2023" and "15 June 2023". The activities are represented by horizontal bars, with their start and finish dates indicated. The delay dates and delay days are also shown for each activity.

- This should be an *“at a glance”* summary of each delaying event
- Tabular format tends to work well

		Original Completion Date
		1 June 2023
Delaying Event	Critical Delay	Revised Completion Date
VO-001	14 days	15 June 2023
VO-018	2 days	17 June 2023
VO-020	10 days	27 June 2023

[illegible]

The “interim delay report”

- Section 4 – Details of each delaying event
 - Have a sub-section for each delaying event, for example
 - Section 4.1 – VO-001 Commencement delay
 - Section 4.2 – VO-018 Additional containment
 - Each sub-section should follow the same format
 - a) Description of what the delaying event is (target audience = someone new to the project)
 - b) Refer to any contractual notice requirements, and cross reference the delay notice
 - c) Delay narrative (“*Because of this event*”, we had to do A, B and C. This “*caused*” critical delay as...))
 - d) Description of any mitigation undertaken
 - e) Conclude / append revised programme, with the impact marked up.

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- Have a sub-section for each delaying event, for example
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- Each sub-section should follow the same format
 - a) Description of what the delaying event is (target audience = someone new to the project)
 - b) Refer to any contractual notice requirements, and cross reference the delay notice
 - c) Delay narrative (*"Because of this event"*, we had to do A, B and C. This *"caused"* critical delay as...)
 - d) Description of any mitigation undertaken
 - e) Conclude / append revised programme, with the impact marked up.

The “interim delay report”

- Section 4 – Details of each delaying event
 - Do not over complicate the delay narrative
 - Cross-reference any appropriate evidence to back up what you are saying
 - Keep all of the evidence filed away with your interim delay report
 - For example – Instructed to remove ACMs
 - On 20 June 2023 we were instructed to remove ACMs from the bund – see instruction at [X-REF]
 - As a result, we had to procure a specialist. It took them 15 days to come to site – see order email [X-REF]
 - This caused us to put the critical path demolition works on hold – see original method and programme [X-REF]
 - The demolition activity took 5 days longer as they had an additional mobilisation – see sign in sheets [X-REF]
 - The start delay (15 days) and the additional mobilisation (5 days), caused 20 days of critical delay

Section 4.1 - VO-001

Section 4.2 - VO-018

Section 4.3 - VO-020

CT321 Project Delta - Interim Delay Report.docx

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A Key Thing to Remember...

“A party to a dispute... will learn three lessons (often too late): the importance of records, the importance of records and the importance of records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds, often quite real, on which to cast doubt on evidence if it is not backed up by meticulously established records”



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Records

- The most useful records are sometimes the hardest to find:
 - Payment records (applications, invoices, certs etc.)
 - Labour allocation sheets
 - Payments to suppliers, subbies, consultants etc.
 - PMI's, RFI's, VO's, CAI's, notices
 - Meeting minutes
 - Site diaries, photographs
 - Emails, letters, telephone notes
 - Programmes



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Records – Weekly progress reports

- Weekly progress reports are key
 - Reporting should be done every week
 - All site photographs should be date stamped
 - Be as specific as possible – use clear and concise wording
 - Be as specific as possible – grid line / zone / floor / work front
 - ID the reasons for any delays – who / what / when / where / why

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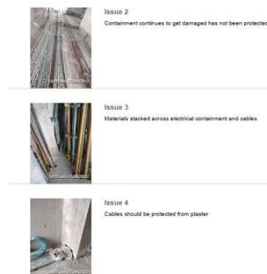
Records – Be seen to be asking

- Be seen to be asking
 - "I need this to be done, or we will be delayed"
 - This is a very powerful statement
 - The more times you say it, the more compelling your story will be
 - Links to duty to mitigate

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Records – A picture tells a 1000 words

- Will help you tell a compelling story
- Makes matters easier to understand



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Money Claims

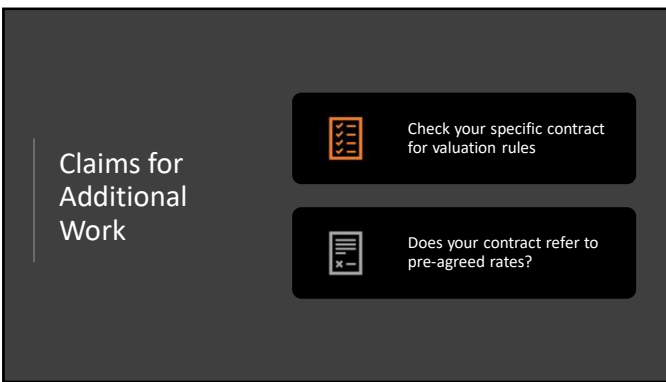
- Condition precedent satisfied?
- Two main categories of money claim
 - Additional Work
 - Loss and/or expense
 - Disruption
 - Prolongation
 - Interest
 - Overheads and profits
 - Claim preparation costs

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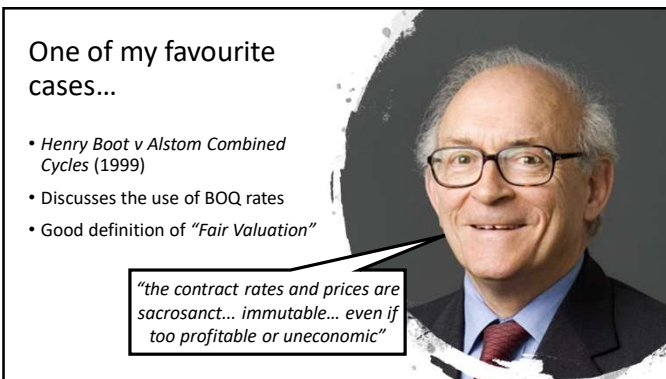
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One of my favourite cases...

- Henry Boot v Alstom Combined Cycles (1999)
- Discusses the use of BOQ rates
- Good definition of "Fair Valuation"

"A fair valuation means... actual costs reasonably and necessarily incurred plus OHP"

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Who's side is the ER on?

- Sutcliffe v Thackrah [1974] A.C. 727
- UKHL decision

"The employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill he will act in a fair and unbiased manner in applying the terms of the contract"

- Be fair. Be impartial.

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Claims for Loss and/or Expense

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Direct Loss and/or Expense

- The basic premise is very simple
- If a specified Employer risk occurs, and it has been notified correctly, the Contractor is due any "loss and/or expense" incurred as a direct result of that Employer risk
- (... don't forget about EoT)

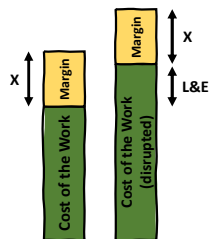


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Direct Loss and/or Expense

- No single definition
- The additional costs incurred as a result of disturbance to the regular progress of works caused by specified Employer risks
- Costs that arise naturally in the natural course of things (not special losses)
- Designed to put the Contractor into the same position it would have been in "but for" the disturbance



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Lets take a trip
through time...

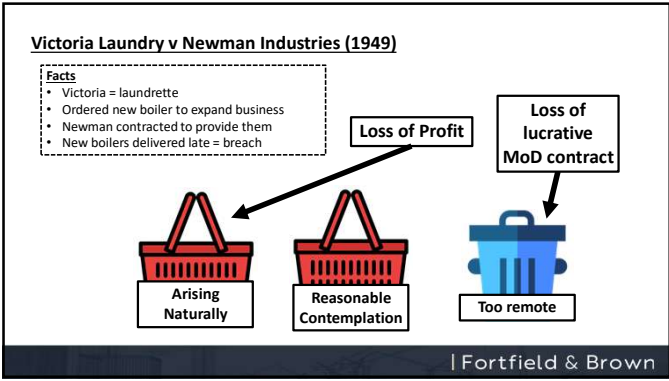
- Hadley v Baxendale 1854
- Victoria Laundry v Newman 1949

Damages
Naturally
Arising

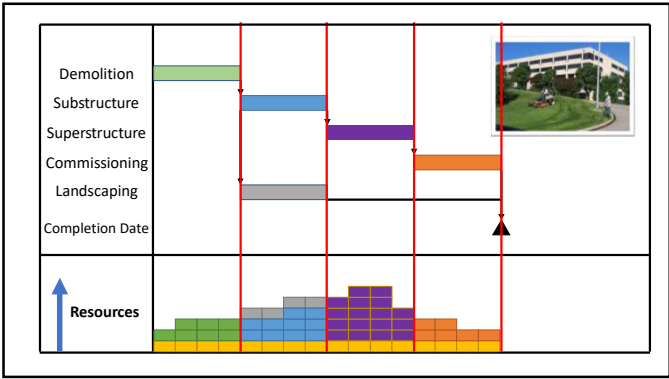
~~Special
Damages~~

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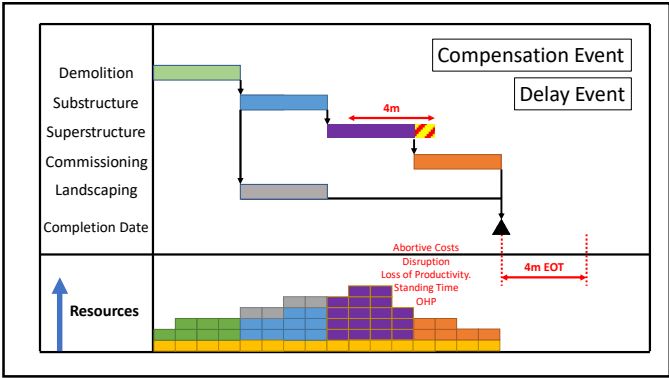
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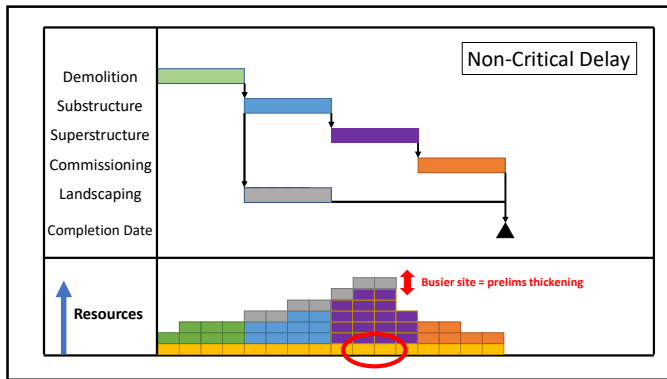
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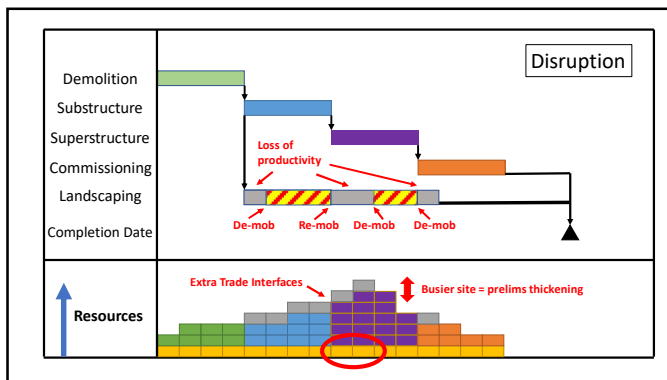
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Disruption

- What is disruption?
 - A disturbance, hindrance or interruption to a Contractor's normal working methods...
 - ... which results in lower productivity
 - Lower productivity results in work taking longer
 - Or the duration can be maintained with more resource
 - Both alternatives above cost the Contractor more money – which can generally be recovered as part of a disruption claim if Client risk



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Disruption

• Examples

Variations being instructed

Late delivery of free issue materials

Design information not available

Damage caused by other trades

No hoists / cranage available

Untidy site

No work fronts available



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Disruption

• Examples

Variations being instructed

Late delivery of free issue materials

Design information not available

Damage caused by other trades

No hoists / cranage available

Untidy site

No work fronts available

Dear Adjudicator,

Because of these issues I was disrupted and the job has cost more £100k more.

I seek to recover this figure.

Global claim = BAD

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Disruption

• Examples

Variations being instructed

Late delivery of free issue materials

Design information not available

Damage caused by other trades

No hoists / cranage available

Untidy site

No work fronts available

Because of this, I had to reallocate resource - £20k

Because of this, standing and out of seq work - £20k

Because of this, standing and out of seq - £20k

Because of this, needed more resources - £10k

Because of this, work took longer to do - £10k

Because of this, work took longer to do - £10k

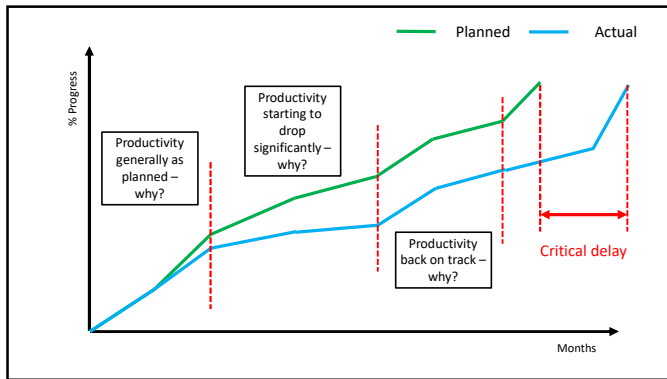
Because of this, standing time - £10k

Cause and effect analysis = GOOD

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Four Steps

- To recover disruption costs, you must demonstrate:
 - How much it should have cost to do the work
 - How much it actually costs to do the work
 - That the difference between 1 and 2 above was due to a client risk event
 - That the client risk event was notified in accordance with the contract

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Step 1 – How much it should have cost

- There are two ways to do this:
 - Determine anticipated costs based on expected productivity Recommended
 - Determine anticipated costs based on tender allowances

SCL Delay and Disruption Protocol (2nd edition)

- “...tender allowances have limited relevance to the evaluation of the cost of prolongation and disruption caused by breach of contract or any other cause that requires the evaluation of additional costs”*

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Step 1 – How much it should have cost

Determining anticipated costs based on required productivity

- You will have agreed to doing a certain amount of work (work) e.g. 1000m ductwork
- You will have agreed to a duration / programme of works (time) e.g. 10 days

$$\frac{\text{work}}{\text{time}} = \text{productivity rate}$$

Use MEASURED MILE, or EXPERT EVIDENCE to prove what was required to achieve productivity

E.g. 100m ductwork per day

To achieve this, 2-man gang required, being paid £50/hr

So cost for 1,000m is
 $10 \times 800 = \text{£8,000}$

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Step 1 – How much it should have cost

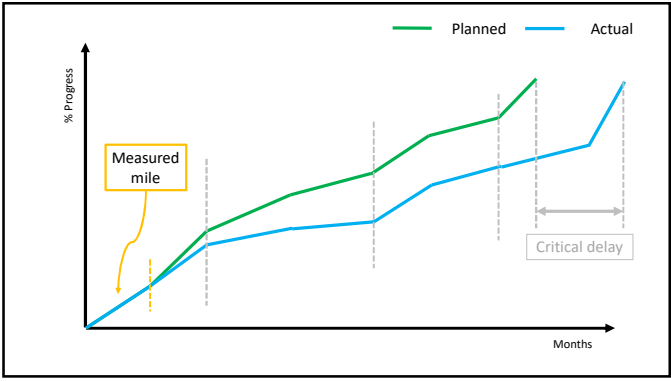
Determining anticipated costs based on required productivity

- Proving your expected productivity rate, and what resources were required to achieve them is a FUNDAMENTAL step in proving your anticipated costs
- The MEASURED MILE approach:
 - What productivity was achieved elsewhere on the project where there was no disruption?
 - Care must be taken to compare like for like
 - More records = more data = better evidence = stronger claim
- The EXPERT EVIDENCE approach:
 - If no measured miles are available, then an expert can attest to expected productivity

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Step 1 – How much it should have cost

Determining anticipated costs based on required productivity

- Back to our example
 - Elsewhere on the same project, a 2-man gang was progressing 100m of ductwork per day = MEASURED MILE
 - How is this proven?
 - Sign in records
 - Progress reports
 - Marked up drawings
 - How much did you pay them?

This seemingly
mundane
evidence is key!!



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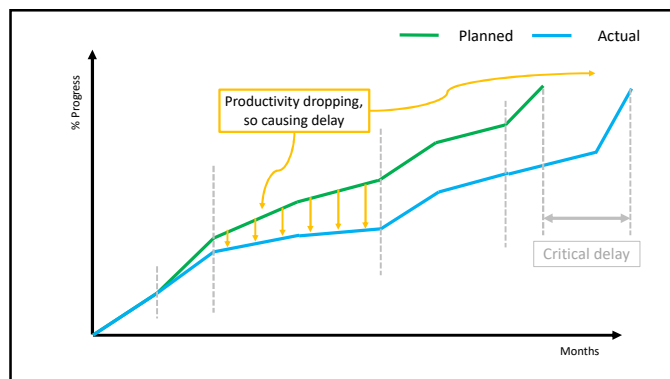
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Disruption!

- The ductwork installation activity is now been disrupted
- This could be caused by:
 - Lack of available work fronts → Speak up... communicate the effect of this issue
 - Interfacing with other trades → Speak up... communicate the effect of this issue
 - Additional constraints e.g. no hoists → Speak up... communicate the effect of this issue
 - Resources being reallocated to variations → Speak up... communicate the effect of this issue
- As a result of the disruption, productivity has dropped to 50m per day

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Step 2 – How much it actually costs

How much it actually costs to do the work

- Determine the cost based on the (disrupted) productivity being achieved
- Same calculation as before:

$$\frac{\text{work}}{\text{time}} = \text{productivity rate}$$

E.g. 50m ductwork per day

2-man gang being used, being paid £50/hr

So cost for 1,000m is
 $20 \times 800 = \text{£}16,000$

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21. Relevance of tender allowances

The tender allowances have limited relevance to the evaluation of the cost of prolongation and disruption caused by breach of contract or any other cause that requires the evaluation of additional costs.

- 21.1 For prolongation or disruption compensation based on actual cost or loss and/or expense, the tender allowances are not relevant because the Contractor is entitled to its actual costs of the prolongation or disruption.
- 21.2 It is a common misunderstanding in the construction industry that if the Contractor has made no or inadequate allowance for site overheads in its tender, then that fact limits or removes its entitlement to compensation for prolongation and/or disruption where the basis of recovery is actual cost incurred. This is not correct. Under these circumstances recoverable compensation requires the ascertainment of the actual cost of remaining on site for the additional time. The tender allowances are therefore of little relevance to the ascertainment of compensation under these circumstances.



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Step 2 – How much it actually costs

How much it actually costs to do the work

- Back to our example
 - The actual productivity being achieved is 50m of ductwork per day
 - How is this proven?
 - Sign in records
 - Progress reports
 - Marked up drawings
 - How much did you pay them?

Same as
before...

Records,
records, records

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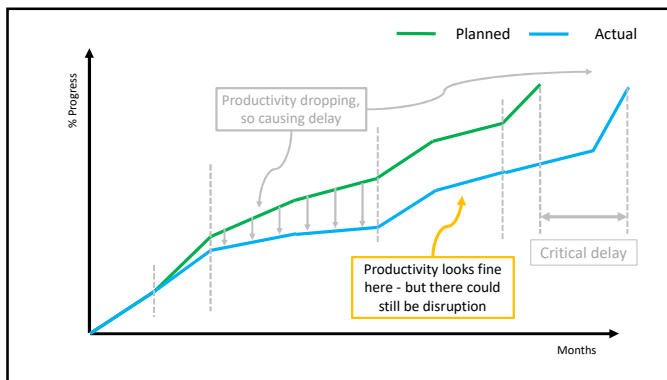
Step 2 – How much it actually costs

How much it actually costs to do the work

- The cost of installing 100m of ductwork:
 - Before the disrupting event = £8,000 ← Established using MEASURED MILE, based on records
 - After the disrupting event = £16,000 ← Established using as-built records
- Direct cost of the disruptive event = £8,000
- What about the indirect costs?
 - This disruptive event caused delay = prelim costs? ← As-built records, records of attendances etc.
 - Procurement delays? ← Procurement programme, emails, meetings
 - Change of conditions for follow on work? ← Re-sequenced programme, subbie emails

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Step 2 – How much it actually costs

How much it actually cost to do the work

- Determine the cost based on the productivity being achieved
- Same calculation as before:

$$\frac{\text{work}}{\text{time}} = \text{productivity rate}$$

Resources have been increased to maintain planned productivity

E.g. 100m ductwork per day ← Planned productivity being achieved

3-man gang being used, being paid £50/hr

So cost for 1,000m is $10 \times 1200 = £12,000$

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Step 2 – How much it actually costs

How much it actually cost to do the work

- Looking at our **alternative example**, cost of installing 100m of ductwork:
 - Before the disrupting event = £8,000
 - After the disrupting event = £12,000
- Direct cost of the disruptive event = £4,000
- What about the indirect costs?
 - ~ This disruptive event caused delay = prelim costs
 - ~ Procurement delays?
 - ~ Change of conditions for follow-on work?



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Step 3 – The additional cost was caused by a Client risk

- All you have proved at this point is that the work cost more than it should have
- The additional costs can only be recovered if they were “caused” by a client risk event
- Looking at our example:
 - Lack of available work fronts → CHECK CONTRACT – NEC 60.1(5)? JCT 2.19.97
 - Interfacing with other trades → CHECK CONTRACT – NEC 60.1(5)? JCT 2.19.97
 - Additional constraints e.g. no hoists → CHECK CONTRACT – NEC 60.1(1)? JCT 2.19.97
 - Resources being reallocated to variations → CHECK CONTRACT – NEC 60.1(1)? JCT 2.19.17

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Step 3 – The additional cost was caused by a Client risk

- Practical advice
 - Speak up** – what is the immediate impact?
 - Speak up** – what is the wider impact? Step back and look at the bigger picture
 - Speak up** – keep the pressure on, mention the issue/s at every progress update
- Evidence is about quality, not quantity = but quantity also helps!
- Marked up programmes, meeting minutes, emails, supplier invoices, photographs, sign-in sheets – all of this is vital evidence

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Step 4 – Any required contractual notices are given

- Claiming additional loss and/or expense for disruption = normally subject to a notice requirement
- Condition precedent
- No notice = no entitlement
- Be as specific as you can within the notice, and keep adding to it!

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Interest

Contractual interest?

Statutory interest?

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Overheads and profit?

- Two types of overhead
 - Dedicated overheads e.g. Project QS
 - Unabsorbed overheads e.g. Managing Director
- To recover unabsorbed overheads and lost profit a Contractor must prove that there was other work out there which it would have secured "but for" the prolongation
- Formula?

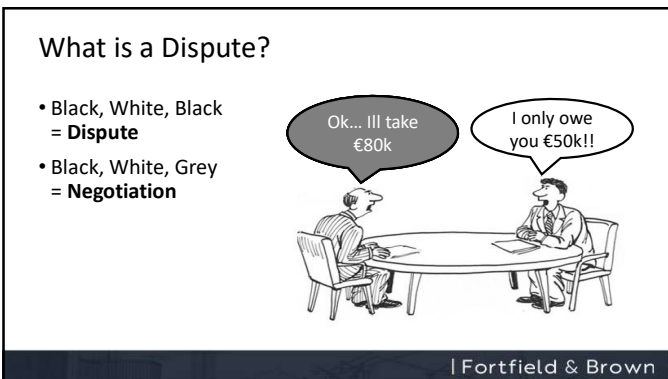
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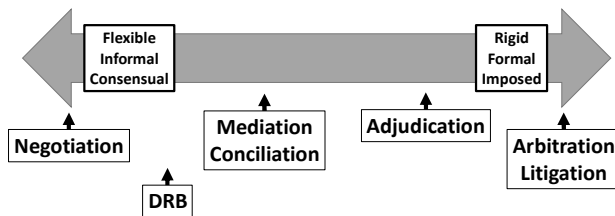
Overview of Dispute Resolution Methods

- The method chosen is often dictated by:
 - The relationship between the parties
 - The complexity of the issue
 - The money at stake
- The methods of dispute resolution vary in terms of:
 - Flexibility
 - Enforceability
 - Consensuality

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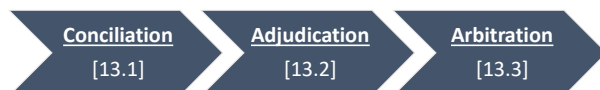
The Dispute Resolution Spectrum



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Dispute Resolution under CF5

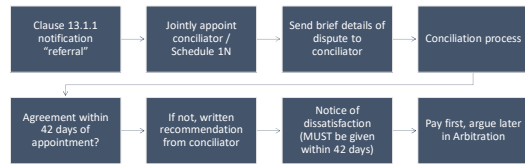


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Dispute Resolution under PWC

• Conciliation under PWC



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What is Adjudication?

- A process designed to help with cashflow
 - 28 day duration (well...)
 - Temporarily binding (well...)
 - Decision by a neutral third party

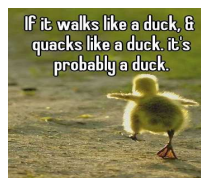


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When can you Adjudicate?

S.6 Right to refer payment disputes to adjudication

(1) A party to a **construction contract** has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under a construction contract (... a **payment dispute**)



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When should you adjudicate

• Just because you can... doesn't mean you should

Representation Costs

Counter-claim

Commercial Relationship

Potential Recovery

Adjudicator's fees

Quality of Adjudicator



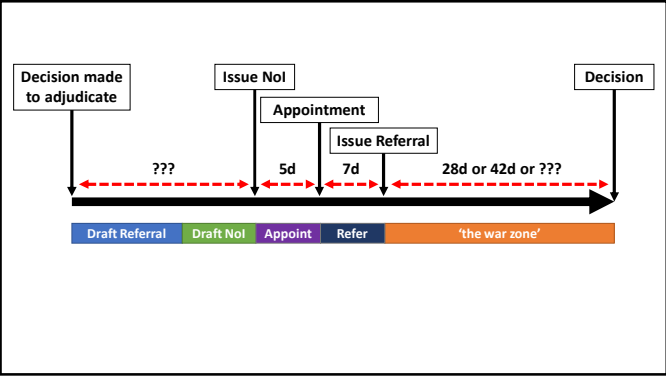
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Running one from start to finish

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The diagram illustrates the timeline of an adjudication process. It begins with a box labeled "Decision made to adjudicate". A red dashed arrow points to a box labeled "Issue Nol". Below this arrow is a blue box labeled "Draft Referral". From "Issue Nol", a red dashed arrow points to a box labeled "Appointment". Below this arrow is a green box labeled "Draft Nol". From "Appointment", a red dashed arrow points to a box labeled "Issue Referral". Below this arrow is a purple box labeled "Appoint". From "Issue Referral", a red dashed arrow points to a box labeled "Decision". Below this arrow is a blue box labeled "Refer". The final red dashed arrow points to a box labeled "Decision". Below this arrow is an orange box labeled "'the war zone'". The timeline is marked with "???", "5d", "7d", and "28d or 42d or ???".

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Drafting the Referral Notice

PROVE IT



Draft Referral

Draft Noi

Appoint

Refer

'the war zone'

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Drafting the Notice of Intention

- This is a small, but mightily important document
- Executive summary of the referral?
- Check Code of Practice para 5
 - Name, address and contact details of the parties
 - Relevant details of the payment dispute, nature of dispute, site address
 - Copy of relevant payment claim notice, and any response to it
 - Copy of contract, or relevant details

Draft Referral

Draft Noi

Appoint

Refer

'the war zone'

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Appointing an Adjudicator

- Check contract for an appointment procedure
- Generally three ways to appoint:
 - Request the adjudicator in the contract to act
 - Appoint someone by agreement
 - Request an appointment by Chairperson
- Do the application forms early, see paras 13-20 of Code of Practice

Draft Referral

Draft Noi

Appoint

Refer

'the war zone'

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The War Zone

- Procedure will be dictated by Adjudicator
- Generally involves the following:
 - Jurisdictional challenges
 - Supplementary submissions
 - Correspondence with the Adjudicator
- Potentially a meeting



Draft Referral

Draft Noi

Appoint

Refer

'the war zone'

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Supplementary submissions

Referring Party

- Notice of Intention
- Referral Notice
- Reply to the Response
- Surrejoinder 1

Responding Party

- Response to the Referral
- Rejoinder
- Surrejoinder 2

Draft Referral

Draft Noi

Appoint

Refer

'the war zone'

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Adjudication Meetings/Hearings

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The Adjudicator's Decision

- Adjudicator's costs?
- Party costs?
- Enforceable?



Draft Referral

Draft Nol

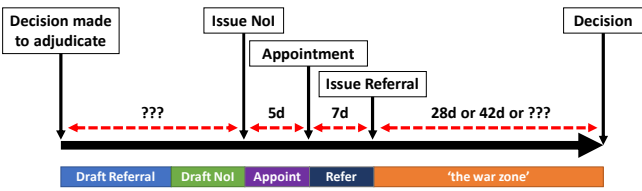
Appoint

Refer

'the war zone'

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Decision made to adjudicate

Issue Nol

Appointment

Issue Referral

5d

7d

28d or 42d or ???

???

Draft Referral

Draft Nol

Appoint

Refer

'the war zone'

Recap on what we just zipped through...

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Recap

"How Irish construction contracts deal with money and delay claims"

- PWC, RIAI, FIDIC, NEC
- Law of damages
- Time claims
- Money claims
- Dispute resolution



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Nouman Qadir
*BEng (Hons) MSc MCIQB Prince 2
Practitioner CLCM
Associate*
Nouman.Qadir@FortfieldBrown.com

What we do:

- ✓ Review contracts for commercial risks
- ✓ Draft contracts
- ✓ General advice on construction legal issues
- ✓ Party representation in Adjudication
- ✓ Training on contracts and administration

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