

Litigation & Claims Facts & Figures



HILL
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2011

The reasons claims arise

- Inadequate contract preparation
- Mistakes in documents
- Optimisms instead of reality
- Misunderstanding formation of Contract
- Failure to understand risk
- Poorly drafted variation instructions
- Failure to understand basic contractual position
- Failure to analyse / explain additional entitlements

GENERAL PRINCIPLES

Recognising Claims Early

- Essential to avoid disputes and speed resolution
- Allow good record keeping
- Assists in managing entitlements
- Burden of proof on claiming party
- Monitoring procedures
 - (+consequential time / costs)

EXTENSION OF TIME CLAIMS



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Purpose

Protects contractor against liquidated damages by excusing delay

Protects Employer's right to LADs by maintaining a completion date (a date from which to calculate LADs)

- **Holme V Guppy 1838**
- **Wells V Army & Navy Co-op 1902**
 - Otherwise a penalty

Employer's Claims

LIQUIDATED DAMAGES

Reason for Use of LADs

- Contractual equivalent of common law damages
- Benefit for both parties
- For Employer:
 - **a contractual right - no need to prove loss**
 - *Hadley V Baxendale*
- For Contractor:
 - **Obligation known**
 - **Can advise potential liability to others (ie. special damages)**

Employer's Claims

LIQUIDATED DAMAGES

Rules (cont'd)

Rules for applying LADs

- Where procedures apply, must be applied strictly
- Where notice required – condition precedent
 - Principal may lose right to LADs where proper notice not given –
 - *Bell v CBF*;
 - *JF Finnegan Ltd -v- Community Housing Association Ltd*
 - Delaying breach where no corresponding provision
 - (*Rapid v Ealing Family Housing*)
- Incompatibility between contract and appendix
 - (*Sheffield v Bramell & Ogden*)
- 'NIL' in appendix

Penalties

- Sum must not be a penalty
 - ***Dunlop v New Garage & Motor Co (1915)***
 - is it a genuine pre-estimate?
 - is it 'in terrorem' (threat)
 - ***BFI Group of Companies Ltd -v- DCB Integration Systems Ltd (1987)***

Employer's Claims

LIQUIDATED DAMAGES

- Need not be actual loss
 - ***Clydebank Engineering and Shipbuilding Company Limited v Don Jose Ramos Ysquierdo y Castaneda and Others [1905]***

EXTENSION OF TIME CLAIMS

Notices

- Most contracts contain procedures – normally requirement for notice,
 - **JCT** – forthwith after delay apparent
 - **MF/1** – as soon as reasonably practicable
 - **ECC** – within 8 wks of becoming aware of compensation event
 - **GC Works** - Within 56 days

EXTENSION OF TIME (cont'd)

Notices (cont'd)

- Form of notice? – as contract requires
- Some contracts require detailed notice, eg
 - **JCT** – particulars and effects, estimate, update
 - **ECC** – Early warning in writing
 - **MF/1** – full supporting details
 - **Recommendation** - apply as close as possible to event
- Site minutes?
 - In *Haley v Dumfries & Galloway* – not good notice

EXTENSION OF TIME (cont'd)

Grounds for extension (ie. for excusable delay)

Some contracts list 'reasons' in detail, eg:

Employer (late information)

Neutral (exceptional inclement weather)

- Some contracts give general grounds, eg:

JCT Minor Works, MF/1

- **Matters beyond contractor's control**

EXTENSION OF TIME (cont'd)

- Use of Float
 - First to use gets the benefit
 - JCT Architect gives reasonable EOT
 - Use float
 - NEC Actual time added to Programme
 - Float Preserved

EXTENSION OF TIME (cont'd)

- Claimant must identify **Employer's liability that actually causes delay to completion.**
 - I.E. delay on critical path
 - Delay on non critical item –
 - No EOT to contract
 - Perhaps additional prelims as VO

PROGRAMMES

- Programmes often not ‘agreed’, e.g.
 - JCT 05 (clause 2.9.1.2): silent other than contractor to “*provide*”
 - ICE (clause 14): acceptance of original
 - GC Works: agreement of amendments by PM
 - NEC3 (clause 31): acceptance of original & revisions by PM

Critical Path Analysis

“The Society of Construction Law Delay and Disruption Protocol – October 2002”

www.eotprotocol.com

Recommendations

- A Critical Path Network
- Uses commercially available Software
- Identifies All Relevant Activities
- Tool to Manage Change

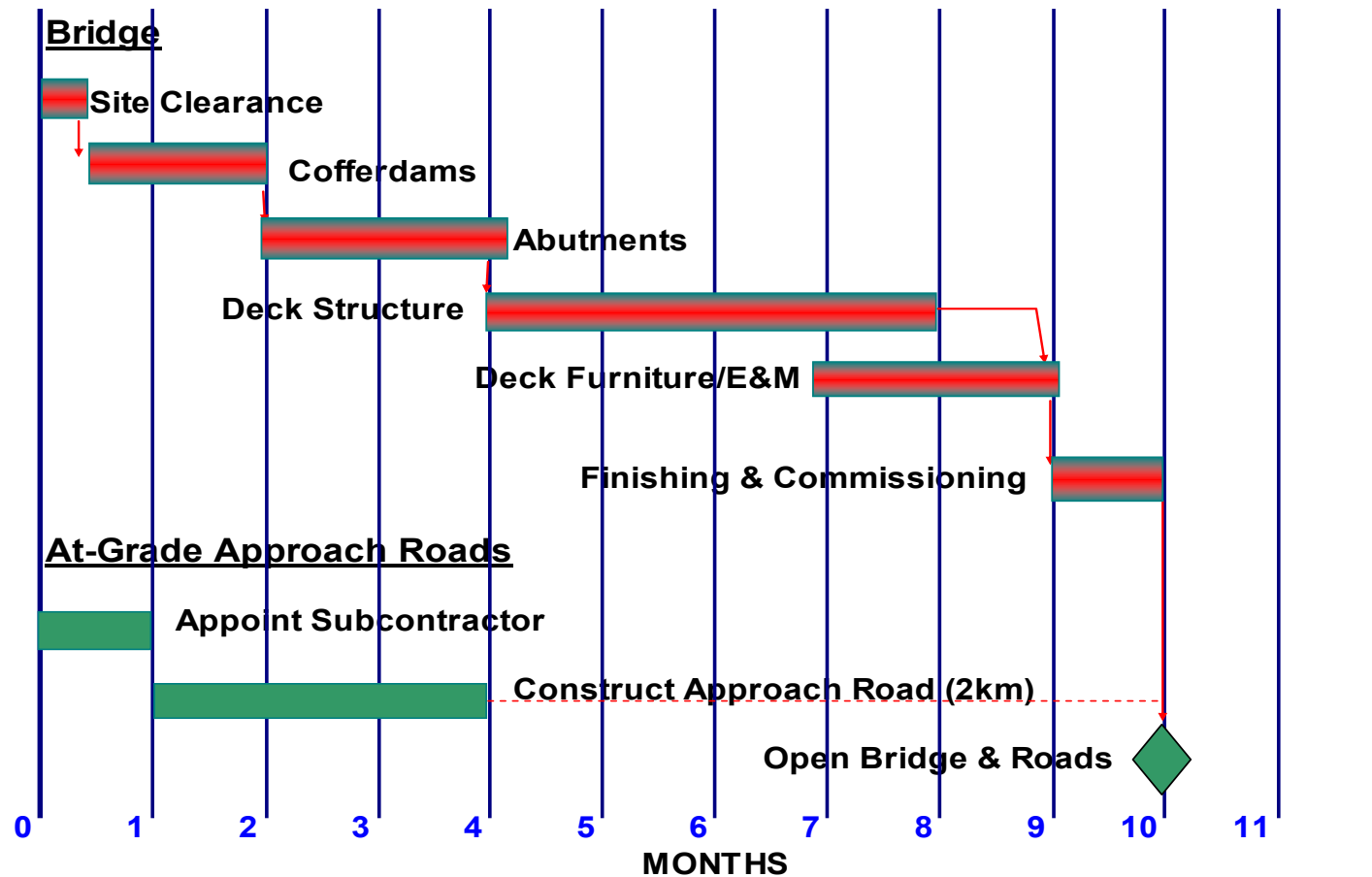
Schedule of delays

| <i>Ref No</i> | <i>Arch Ins Or other + Date</i> | <i>Cause</i> | <i>Period of Delay (days)</i> | <i>Effect on Progrm</i> | <i>Notice Served</i> |
|-------------------|---|--------------|--|---------------------------------|--------------------------|
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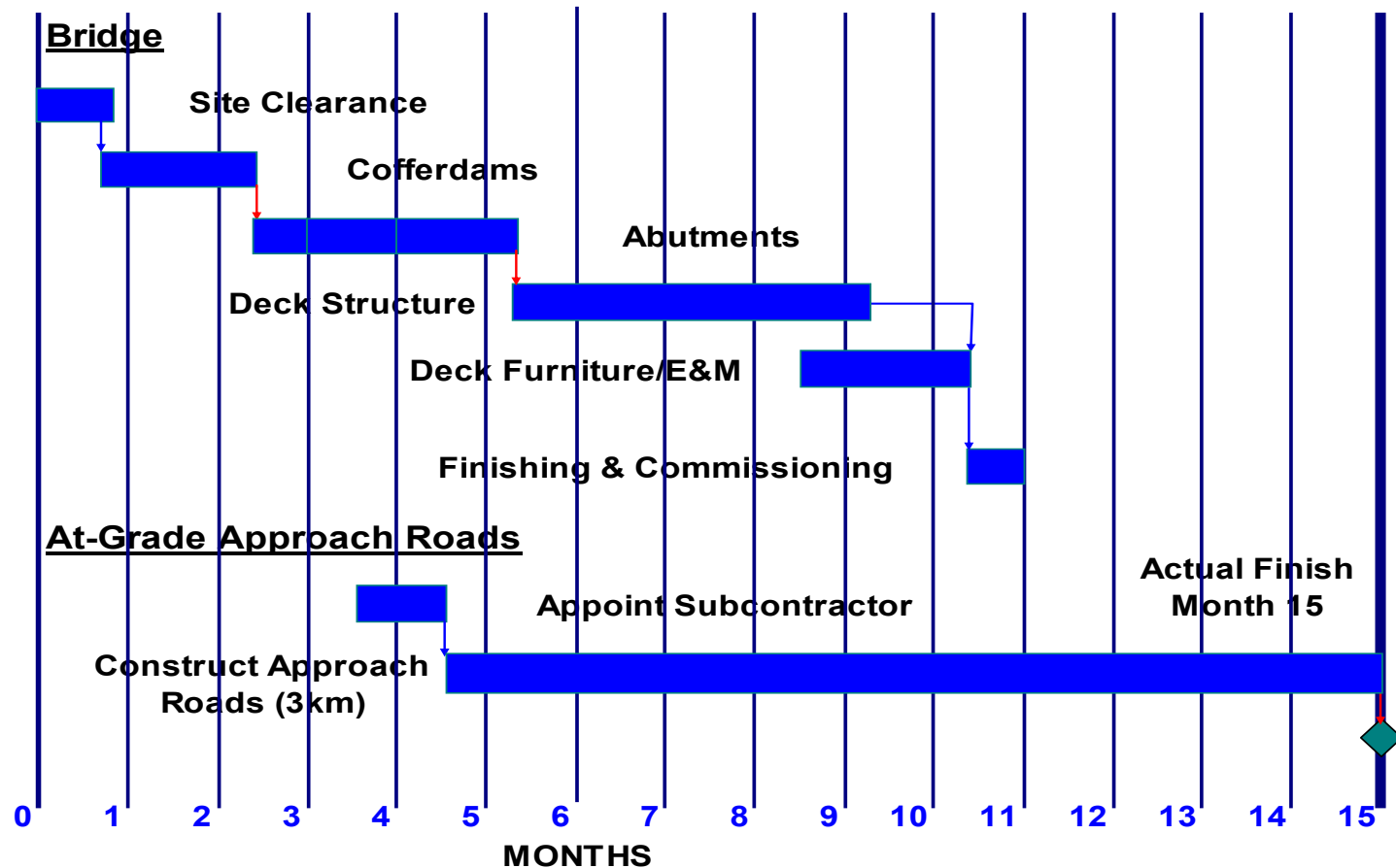
Delay Analysis “Black Art”



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Delay Analysis – as built



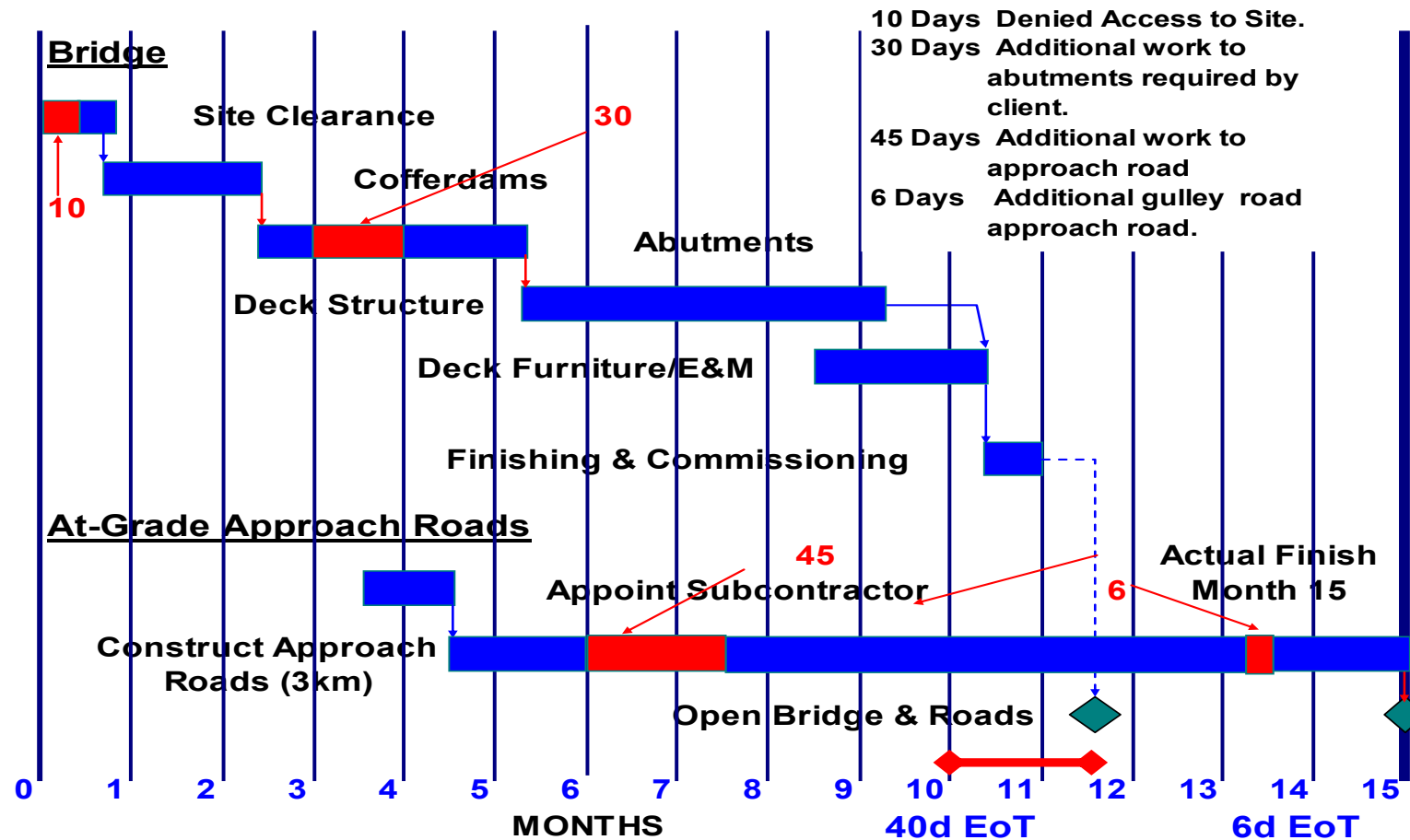
Delay Analysis – Time Slice/Window



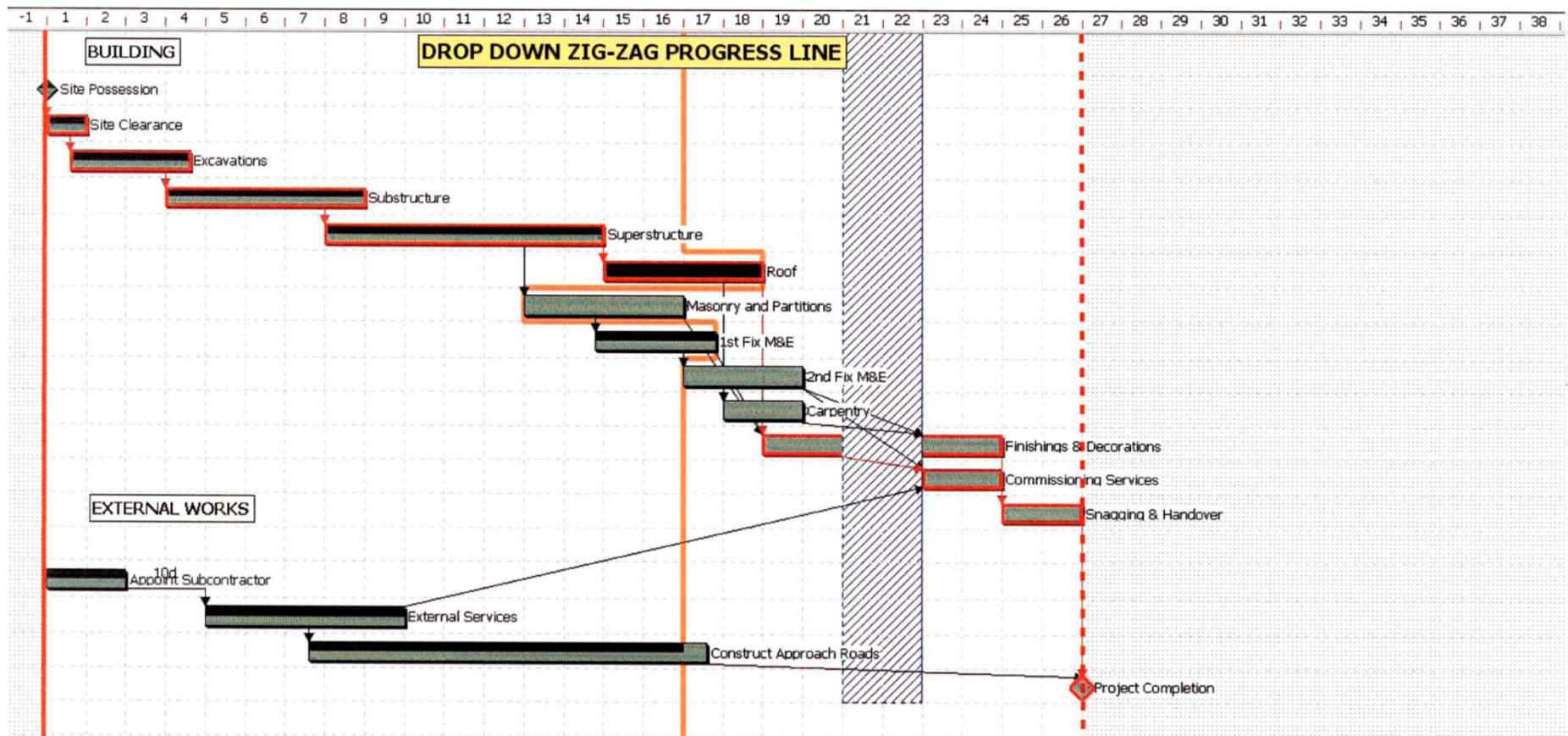
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Progress after 15 months



The way **NOT** to show progress and delays



Variations Claims

Employer / agent changes;

- the features, scope or complexity of the project
 - Therefore;
- Adjustment to the contract price
- Adjustment to the contract period

Claim Problems

- Viability of Original Programme
- Original Resources correct?
- Variation in critical path
- Subcontractors information
- Lack of Records

Claim Issues

- JCT

Wide definition of variation

- Access to site, working space, working hours, specific order of works
- Variations must include adjustment of preliminary items as SMM
- Change in conditions under which **other work** is executed must be taken into account in variations
- Include *fair allowance* for any change caused by variations
- Exclusion for reimbursement under any other provision

Claim issues

- GC /Works/1
 - Very wide definition of variation
 - Change, suspension, “any other matter”
 - Disruption to be included in price of variation
 - Allowance for expense only (money expended) not loss
 - Obligation to submit information within 28 days
 - QS to notify within 28 days
 - Contractors objection to QS limited to 14 day “window”
 - Weather delays excluded
 - Embargo on delay claims after completion

Claim issues

- NEC (ECC)
 - Wide range of rights to claim compensation events
 - BUT notice must be given within 8 weeks = condition precedent to rights
 - References to EOT = Change in Completion Date
 - Contractor can be locked into his quote
 - Project Manager must give decision within one week

Claim Problems

- Acceleration claims are almost impossible
 - Nearly all current contracts have special clauses
- No instruction – no acceleration
- Thickening claims
 - Include in preliminaries for additional staff in variations

- **Percy Bilton Ltd v Greater London Council [1982]**
 - Lowdell (first Nominated Sub-Contractor) stops work and is liquidated
 - Crown House (second Nominated Sub-Contractor) withdraws without starting work
 - Home Counties (third Nominated Sub-Contractor) completes work
 - Employer must re-nominate in reasonable period
 - Time not at large

- **Walter Lawrence & Sons Ltd v Commercial Union Properties Ltd [1984]**
 - Contractor defers work into period of bad weather
 - Test: does exceptionally inclement weather actually give rise to a delay

- **Yorkshire Water Authority v Sir Alfred McAlpine & Son Ltd [1986]**
 - **McAlpine programme and method statement included in Contract**
 - **Works were impossible to build to programme sequence**
 - **Change is Variation under Contract**

- **Glenlion Construction Ltd v The Guinness Trust [1987]**
 - **Glenlion programmed to complete works early**
 - **Glenlion entitled to work to programme**
 - **Guinness obliged not to hinder or obstruct**
 - **BUT Guinness not obliged to provide information early**

- **Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd [1999]**
 - **Ascon cause McAlpine delay**
 - **McAlpine main contract programme contains “float”**
 - **McAlpine not entitled to “benefit of “float”**

- **Great Eastern Hotel Company Ltd v John Laing [2005]**
 - Laing used Impacted As-planned analysis
 - GEHC used a form of Time Impact Analysis
 - Judge favoured the factual basis of GEHC and Laing analysis hypothetical

So what to do?

- Question over the probative value of different techniques
- Remember 'rubbish in rubbish out' especially to computerized CPA models
- Don't get lost in the analyses;
- Assemble a matrix of facts in the form of planned and as-built dates
- Beware of manipulation to create a preferred result;
- Complex networks can be very difficult to follow and the relationships between activities difficult to understand
- Adopt the appropriate one using a level of detail which is both persuasive and yet proportionate to the scale of the dispute.