



quantum expert solutions

I'm in two minds about the role of Project Manager

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Agenda

- What's the problem with the Project Manager?
- How did we get to this point?
- How could we fix the problem?

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What's the problem with the Project Manager?

- **Project Manager: Key role in the ECC**
 - at the heart of the ECC
 - actions / inactions of the Project Manager include making decisions in relation to submissions made by the Contractor, programmes, quotations etc
- **Problems:**
 - programmes not being accepted
 - incorrect assessments of Defined Cost and Disallowed Cost
 - compensation events not being accepted
 - compensation events being assessed incorrectly
- **Cause and effect:** Problems = disputes

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Development of the Role of the Contract Administrator

Who is the Contract Administrator?

- Agent of the Client
- Employee of the Client
- Consultant contracted to the Client
- Designer contracted to the Client
- Quality Controller contracted to the Client
- Dispute Resolver



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Influencers: The good, the bad and the ugly

*“By the 1840s there were already good engineers who drove the system towards effective **collaborative relationships** -Robert Stephenson and Joseph Locke for example, and bad engineers who drove it towards **conflict, dispute and destruction** - Brunel for example.”*

New Civil Engineer, 1999



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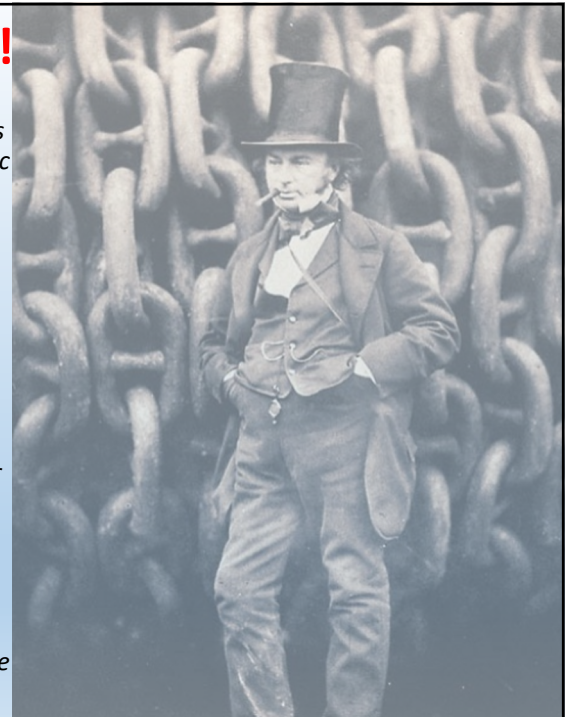
100 Greatest Brittons: #2 Brunel!

- *“Mr Brunel went straight from terminus to terminus, through mountains, over streams, crossing highways, cutting ducal estates in two, and shooting through this man’s cellar and that man’s attic window, and so arriving at his end ... but with cost to his company...”*

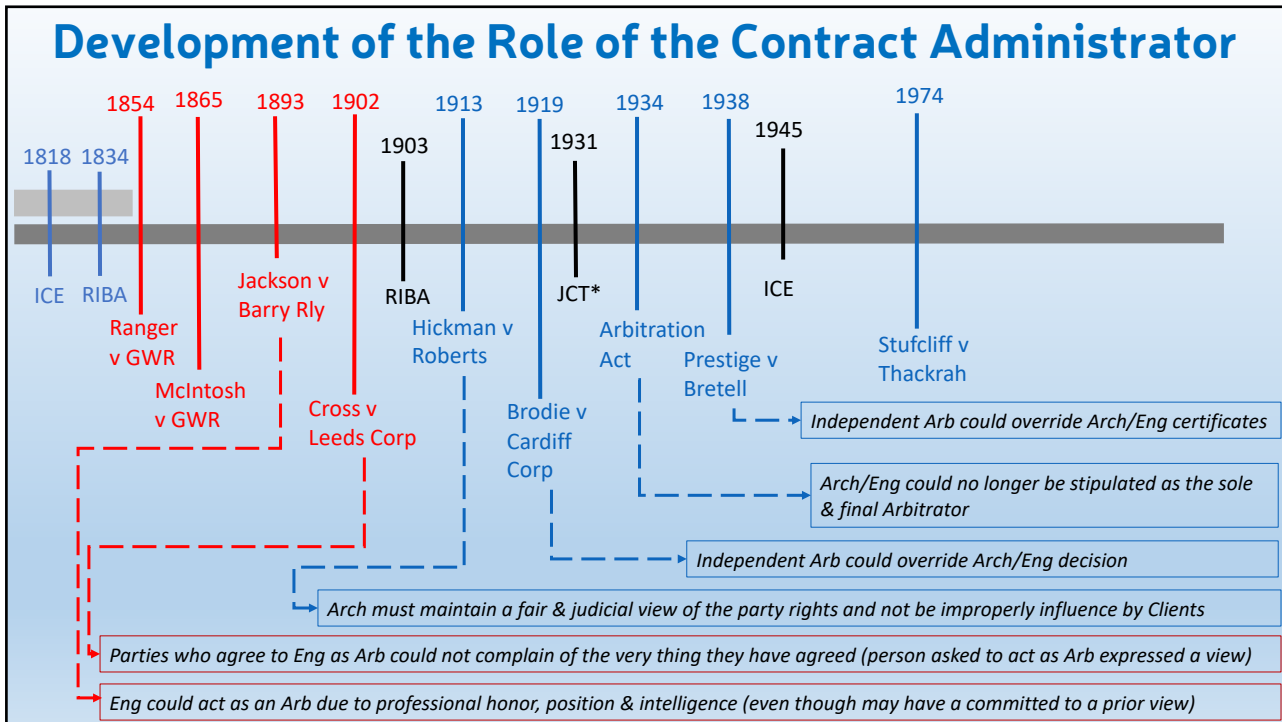
...Brunel’s approach to engineering was replicated in his attitude to dealings with contractors and brought him into considerable litigation.” Ralph Waldo Emerson

- *“Brunel was clearly a very good engineer in many key respects, but as project manager and organiser of relationships he was **decidedly bad**. Most of the schemes for which he was engineer overran cost and time targets hugely and it was commonplace for the disputes which he caused to drag on in the courts for years after the event.” Dr Martin Barnes*

- *“**Shame Brunel Shame** The atmosphere around Brunel was one of **continuous dispute**. He had **no management skills**. His tactic was to starve all contractors of funds to keep them subservient. He was a bully: uncompromising, difficult & cruel.” Tony Bingham*



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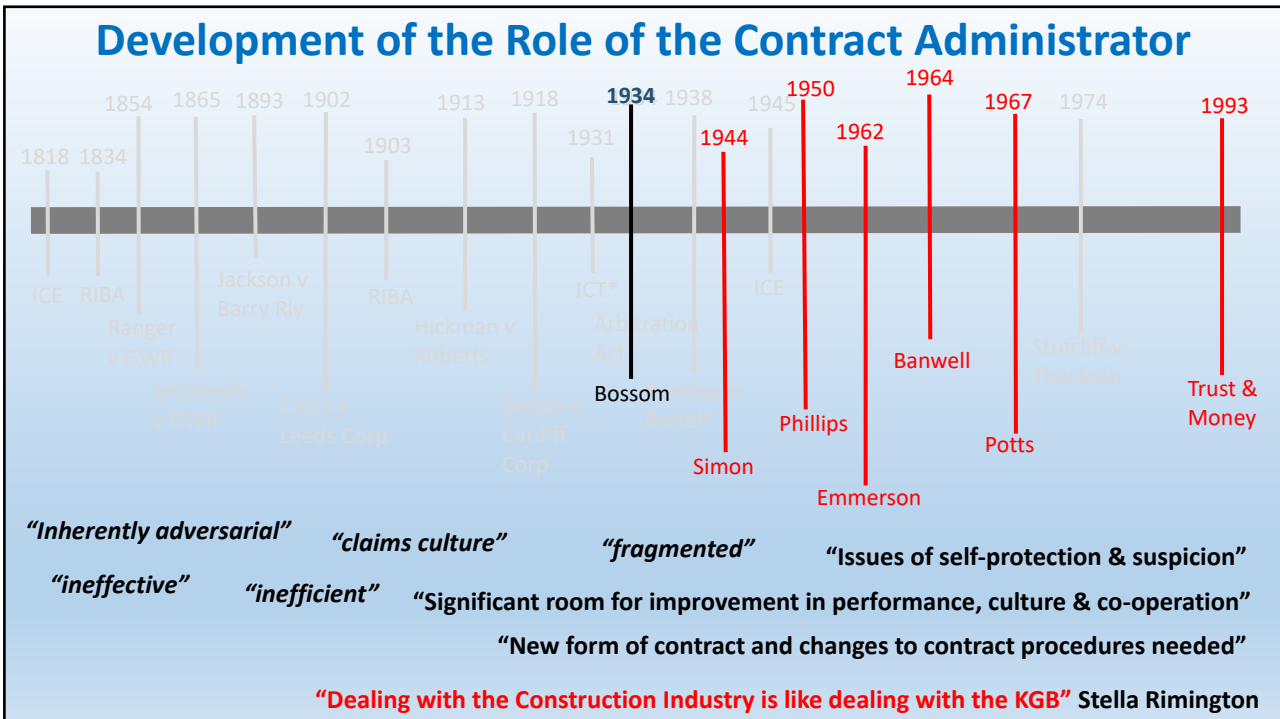
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Development of the Role of the Contract Administrator

Sutcliffe v Thackrah (1974)

- *“It has often been said, I think rightly, that the architect has **two different types of function** to perform. In many matters he is bound to **act on his client’s instructions**, whether he agrees with them or not; but in many other matters requiring professional skill he must form and **act on his own opinion.**”*
- *“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.”*

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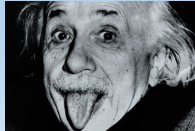
The need for change

"It has been a depressing experience to re-read previous reports to the Government, including those of Sir Harold Emmerson (1962) or the Banwell Committee (1964). Many of the problems which they tackled still persist a generation later."
Sir Michael Latham

"6% of clients are fully satisfied with existing standard forms of contract"
Thompson, Cox and Anderson

The call for Change

"The true definition of madness is repeating the same action, over and over, hoping for a different result."



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The change: **NEC**

*Simple modern contract **drafted from first principles**, without building on existing forms, that is a force stimulating good relationships, effective management and a **reduction in disputes**.*

Objectives:

- **Clarity and simplicity in drafting** (higher degree of clarity than **existing contracts**):
 - simple commonly occurring language, short sentences,
 - avoid subjective test.

- **Flexibility:**
 - applicable to all sectors of construction, different methods of procurement, reimbursement and full range to design responsibility.

- **Stimulating improved project management:**
 - Precisely and clearly set out key duties and responsibilities. **Application of foresight.**

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The change: **NEC – The Project Manager**

*“At the **heart of the NEC** is a new creed that project management techniques can be successfully written into a main contract to produce more co-operation, more efficiency and **fewer disputes**” Prof. John Uff*

Employed by the Client to manage the contract (Many powers similar to those of the traditional CA (Arch/Eng))

Traditional (ICE Conditions of Contract)		NEC Engineering and Construction Contract	
Function	Role	Function	Role
Designer	Engineer	Designer	Designer
Contract administrator	Engineer	Contract administrator	Project Manager
Quality control	Engineer	Quality control	Supervisor

“In the NEC the Project Manager has no design role and the designers have no management role... The PM has no technical responsibilities...The Supervisor carries out technical supervision of the work.” Dr Martin Barnes

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“So long as human nature is what it is, there will always be disputes.” Lord Roskill

ICE 5/6th Editions clause 66: two/three stage dispute resolution procedure

*“The employer’s agent has been appointed **to act on behalf of the employer**. If he is genuinely expected to act in the employer’s best interest he would be in **no better position to settle these matters than would the employer**. He would be equally prone to accusations of bias...He is the employer’s man. So far as the Contractor is concerned he is the employer...if the employer’s agent is required to perform an adjudication role he may find that in doing so he has a conflict of interest...**How could he be expected to assess objectively those matters in respect of which he may have had some input as the employer’s agent.**” Michael Stanger*

*“Traditional contracts have the Employer’s Agent as the resolver of disputes. This is often ineffective as the Employer’s Agent can find it **difficult to decide impartially**, particularly when **his own action or inaction is the cause of the dispute**. To avoid this problem, NEC uses a third party called the **adjudicator as the first line dispute resolver.**” Dr Martin Barnes*

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NEC adjudication

*“Adjudication under the NEC is **not intended to be a legal exercise**. The adjudicator should be a person who **understands what influences the cost and timing of construction operations**, not a lawyer. There is virtually nothing in the NEC for lawyers to argue about as it was vetted in exhaustive detail by the best construction lawyers around before publication...*

The prospect of adjudication works as a motive on the PM to be impartial when assessing compensation events. An Employer will soon realise that something is wrong if a particular pm gets a lot of adjudications which over rule his assessments of compensation events.” Dr Martin Barnes

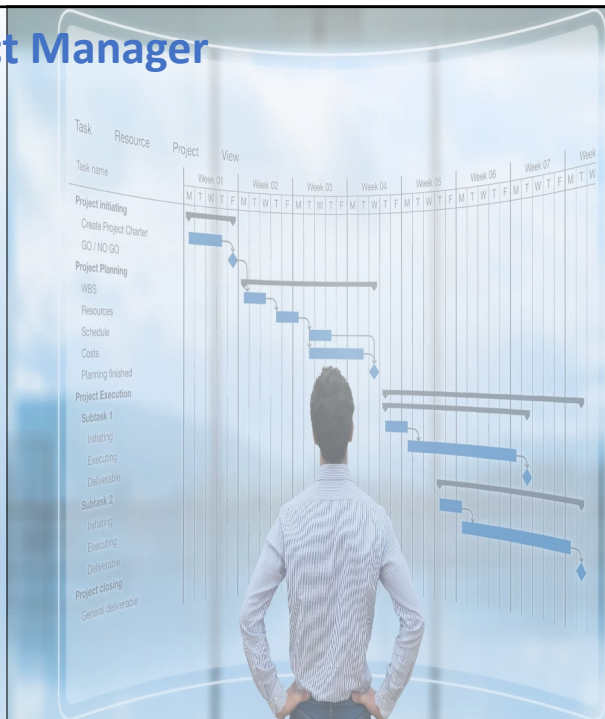
Adjudication under NEC:

- Integrated part of the contract,
- Discrete cost, programme and technical issues,
- **Intention: A COMMERCIAL / TECHNICAL PROCESS NOT A QUASI-LEGAL PROCESS**
- Issues previously raised to the Engineer now raised to an independent adjudicator:
 - actions taken by the Project Manager or Supervisor
 - actions not taken by the Project Manager or Supervisor

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Actions or inactions of the Project Manager

- **accept** programme or notify reasons for not accepting (cl.31.3)
- **assess** the amount due at the end of each assessment date (cl.50.1)
- **decide** if a Contractor notified event is a compensation event (cl.61.4)
- **decide** if the effects of a compensation event are too uncertain (cl.61.6)
- **accept** quotations or notify reasons for not accepting (cl.62.3)
- **assess** compensation events in accordance with cl.63 (cl.64.1)



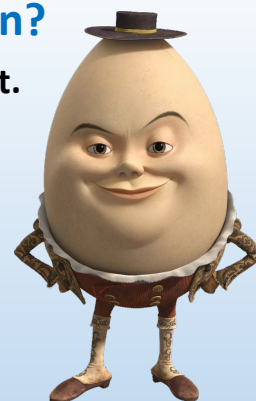
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What do accept and assess really mean?

*“The intolerable **wrestle** between **words** and **meanings**.”* TS Eliot.

“The words of a contract should be construed in their grammatical and ordinary sense, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy” Lewison, K

- **Accept:**
 - means to receive as **adequate, valid** or **suitable** (ODE)
 - the thing being accepted needs to be acceptable e.g. **good enough?**
- **Assess:**
 - means to **evaluate** or **estimate** the nature, ability or quality (ODE)
 - suggests an idea of **judgement** or **appraisal** (Keating on NEC)



“When I use a word, it means just what I choose it to mean – neither more nor less.”
Lewis Carroll

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What do accept and assess really mean?

accept programme or notify reasons for not accepting (cl.31.3)

Cl. 31.1 The Contractor shows on each programme submitted for acceptance:

- **planned** Completion (the date the Contractor plans to complete the works)
- the order and time of the operations which the Contractor **plans** to do in order to Provide the Works,
- the dates when the Contractor **plans** to meet each Condition stated for the Key Dates,
- **float**,
- time **risk** allowance.

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Letters from the trenches

- Project Managers misunderstanding the early warning process
- Contractor's reluctance to notify early warning relating to design issues (Project Manager is also the designer!)
- Project Manager making up spurious reasons not to accept programmes (not realistic or practicable)
- Project Manager takes into account progress since it was submitted to not accept programmes
- Project Manager will not make a decision on the time impact of compensation events until the end of the project and not accept quotations

Niall Faris in the NEC People group on LinkedIn

Question:

"do you face problems getting an Accepted Programme on regular basis?"

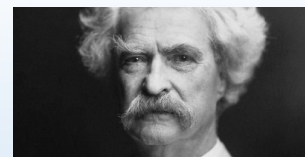
Answer:

90% of respondents said yes!



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Letters from the trenches: Example #1 “Denial is not just a river in Egypt”



21 December 2020
 Operation Director
 101 Elland Road,
 Leeds
 By email

Re: [Redacted]

Further to your letter of the 30 November 2020, I confirm and as you are aware, that I am the Project Manager for the [Redacted] and I have been the Project Manager since the starting date for the project, 1 March 2020. For clarification, I have not accepted any programme submitted by [Redacted], and specifically, I have not accepted the programme titled “[Redacted] Halifax 001 14/01/2020”. Therefore, the programme [Redacted] Halifax 001 14/01/2020, referred to in your submission is not the Accepted Programme.

As a consequence, the basis of your claimed entitled to a change to the Completion Date is incorrect and not accepted.

Yours sincerely,
 [Redacted]
 Project Manager

2 The Contractor's main responsibilities	
If the Contractor is to provide The Scope provided by the Contractor for its design is in Scope for its design	Appendix E
3 Time	
If a programme is to be identified in the Contract Data	The programme identified in the Contract Data is [Redacted] Halifax 001 14/01/2020 – included in Appendix F
If the Contractor is to decide the completion date for the whole of the works	The completion date for the whole of the works is [Redacted]

Clause 11.2(1) The Accepted Programme is the programme identified in the Contract Data or is the latest programme accepted by the Project Manager...

Project Manager thinks it's safer to reject than take the risk of accepting

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Letters from the trenches: Example #2 “ I want it all and I want it now”



SCOPE
 Section 3: Time
 Programme submissions

- In addition to the information required by clauses 31.2 and 32.1 of the conditions of contract, the Contractor shows the following additional information in all programmes submitted to the Project Manager for acceptance:
 - All critical paths for all completion milestones (Completion Date, Sectional Completion Dates as recorded in X5, and for all Key Dates recorded in the Contract Data).
 - All revised programme to include:
 - A excel schedule identify any changes to any activities and operations, and
 - A explanatory narrative explaining any changes to any activities and operations.
 - All programmes shall comply with section 3, pages 101 to 299 of the Project Management Manual Version 3.1.1 or later edition if published before the Completion of the Works. For the avoidance of doubt the compliance with any additional requirements over and above those included in the version of the Project Management Manual at the Contract Date to comply with any later published Project Management Manual is not a compensation event.
- All programmes to be prepared in Primavera P6.
- All programmes to be prepared to level 6.
- All programme to submitted in native format and pdf.
- All programmes to be prepared to level 6.
- Six (6) colour copies in A0.

198 pages of additional requirements!

ICE / JCT!!

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Is it me?

- If the Project Manager does not notify acceptance or non-acceptance within the time allowed, the Contractor may notify the Project Manager of that **failure**. If the **failure** continues for a further one week after the Contractor's notification, it is treated as acceptance by the Project Manager of the programme. (Cl.31.3)
- If the Project Manager **fails** to reply to the Contractor's notification of a compensation event within the time allowed, the Contractor may notify the Project Manager of that **failure**. (Cl.61.4)
- If the Project Manager **does not** reply to a quotation within the time allowed ... (Cl.62.6)
- If the Project Manager **does not** assess a compensation event within the time allowed ... (Cl.64.4)

NEC4 User Guide managing an engineering and construction contract volume 4

- Clause 31.3 introduces the possibility of having a deemed acceptance of programmes submitted for acceptance.
- This clause enables the Contractor to have an Accepted Programme in place **when the Project Manager has not followed the acceptance procedure**.

NEC3 and NEC4 Compared

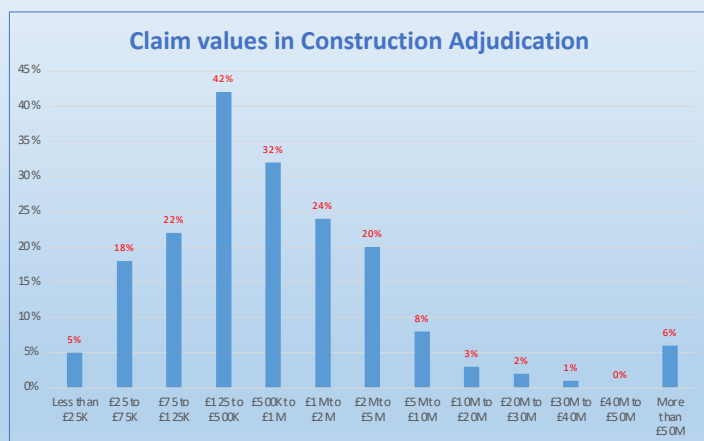
- This change is made to **encourage the Project Manager to act in a timely manner**

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Adjudication

1998: Statutory Adjudication introduced with the enactment of the Housing Grants, Construction and Regeneration Act 1996

- **Intention:** QUICK, COST-EFFECTIVE DISPUTE RESOLUTION



The Adjudication Society and Kings College 2022

Leading Causes of disputes in Construction Adjudication:

- Inadequate contract administration **(49%)**

Expected minimum qualification of adjudicators:

- Knowledge of construction law / adjudication **(95%)**

Most common category of claims:

- Extension of time **(73%)**
- Final Account **(51%)**

Typical length of proceedings

- Between 29-42 days: **56%**
- Between 43-75 days: **20%**

Main factor affecting the length of the adjudication: Complexity of the case **56%**

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Adjudication v adjudication

Practical impact of Statutory Adjudication on adjudication

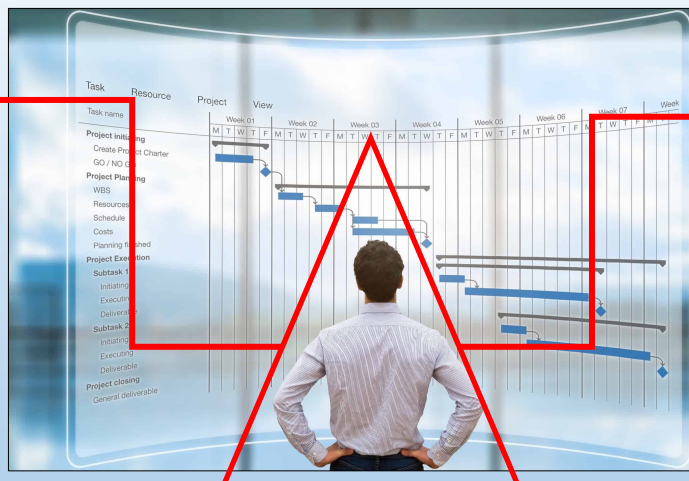
- adjudication became Adjudication
- The first line resolver is not simply part of the contractual process for resolving time / money issues but is now part of a more formal / legal process
- Reluctance to raise issues to the first line dispute resolver (Adjudicator) as and when issues arise and only raised if they become major disputes between the parties (final accounts / extensions of time)



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Where is the risk?

The Project Manager?



Actions or Inactions of the Project Manager?

“The serious issue is whether the NEC does, indeed as claimed, promote or generate better management and thus a better outcome on projects for which the form has been used.” Prof. John Uff

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Early warning notice #1: the Project Manager

Solution: **Senior Representatives?**

EARLY WARNING REGISTER						
EWN #	DATE OF ISSUE	DESCRIPTION OF THE MATTER	ACTIONS TO BE TAKEN TO AVOID / REDUCE	ACTION OWNER	ACTION REQUIRED DATE	STATUS
1	01/04/2023	The Project Manager	Make senior representatives from the parties responsible for the resolution of disputes	Senior Representatives	When you can	On-going

*“The problems with the ICE and FIDIC forms that the Engineer is supposed, in theory, to make his decision impartially. In fact, his task is to design and build something which is just what the client wants for as little money as possible. An **extraordinary paradox.**” Dr Martin Barnes*

- Senior Representatives are Not independent.
- Commercial tension and therefore **same paradox** exists for the Senior Representatives



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Early warning notice #2: the Project Manager

Solution: **Divorce roles?**

EARLY WARNING REGISTER						
EWN #	DATE OF ISSUE	DESCRIPTION OF THE MATTER	ACTIONS TO BE TAKEN TO AVOID / REDUCE	ACTION OWNER	ACTION REQUIRED DATE	STATUS
1	01/04/2023	The Project Manager	Divorce the design function from the Project Management function	The Client	Now	On-going
			Ensure the Supervisor is from a different organisation from the Project Manager	The Client	Now	On-going

As intended

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Early warning notice #3: the Project Manager

Solution: **Independent assessor?**

EARLY WARNING REGISTER						
EWN #	DATE OF ISSUE	DESCRIPTION OF THE MATTER	ACTIONS TO BE TAKEN TO AVOID / REDUCE	ACTION OWNER	ACTION REQUIRED DATE	STATUS
1	01/04/2023	The Project Manager	Create a role of first line dispute avoider to fulfil the role of the originally intended NEC adjudicator, thereby perserving the first line avoider / resolver as part of the contract administration as ICE but with an independent arbiter. Commercial, schedule and technical issues not legal issues, used and encouraged as part of the administration of the contract NOT a formal dispute resolution process.	NEC	Now	On-going

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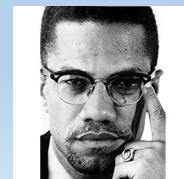
Early warning notice #4: the Project Manager

Solution: **Education. Education. Education.**

EARLY WARNING REGISTER						
EWN #	DATE OF ISSUE	DESCRIPTION OF THE MATTER	ACTIONS TO BE TAKEN TO AVOID / REDUCE	ACTION OWNER	ACTION REQUIRED DATE	STATUS
1	01/04/2023	The Project Manager	Ensure all Project Managers have appropriate education, qualification, training and experience needed to correctly administer the contract.	<u>Universities / Professional Institutes / Consultants / Contractors / Clients / You / Me</u>	When you can	On-going

“You can’t legislate good will – that comes through education.”

Essential



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Qualification, education and training: Buyer Beware!

