

DAMAGES In International Arbitration

Arbitration Ireland

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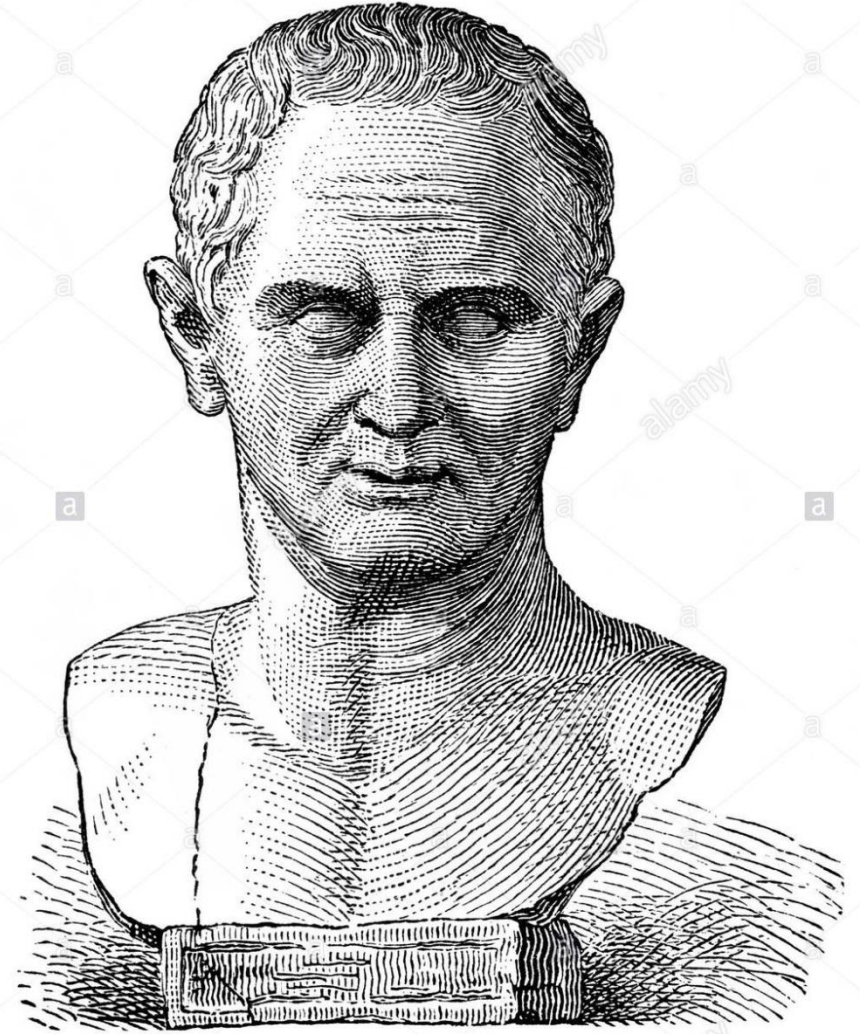
Damages Computation: Legal and Policy

- An illustration by reference to large construction projects
- Typical disputes
 - Time, cost and quality
 - How are damages assessed
 - Law and Policy constraints



Marcus Tullius Cicero (106-43 BC)

“According to the law of nature, it is only fair that no one should become richer through damages and injuries suffered by another”



Key Principles

- Breach of contract
- Compensatory
 - Putting the Claimant in the same position as it would have been had the contract been properly performed (Livingstone v Rawyards Coal Co (1850))
 - Hadley v Baxendale (1854)
 - Interest; loss of profit
 - Consequential loss
 - Moral damages
 - Penal / punitive
- Limitations, exclusions

Hadley v Baxendale

- Two stage test - Fairly and reasonably be considered as either:
 - a) arising naturally ie. according to the usual course of things from such breach of contract itself: or
 - b) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract

Damages for What?

- **Repudiation / Non completion – costs to complete**
- **Defects**
 - **Repair / replace / reinstatement**
 - **Ruxley Electronics v Forsythe**
- **Delayed completion**
- **Consequential losses**
 - **Recoverability**
 - **Remoteness test?**

...Duty to mitigate?



Delayed Completion

- **FIDIC cl 8.2 C shall complete the Works within the Time for Completion**
- **FIDIC cl 8.7 C shall pay delay damages**
- **No other damages for delay**
- **Capped?**
- **Statutory protections?**
 - **Art 390 UAE Civil Code**

Article 390 UAE Civil Code

- (1) parties may fix the amount of compensation in advance...
- (2) The judge may... upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.

Damages for Prolongation

- **Employer's risk event**
 - **Changes / variations**
 - **Delay, impediment or prevention by Employer**
- **EOT**
- **Cost (all expenditure reasonably incurred or to be incurred)**
- **Profit**

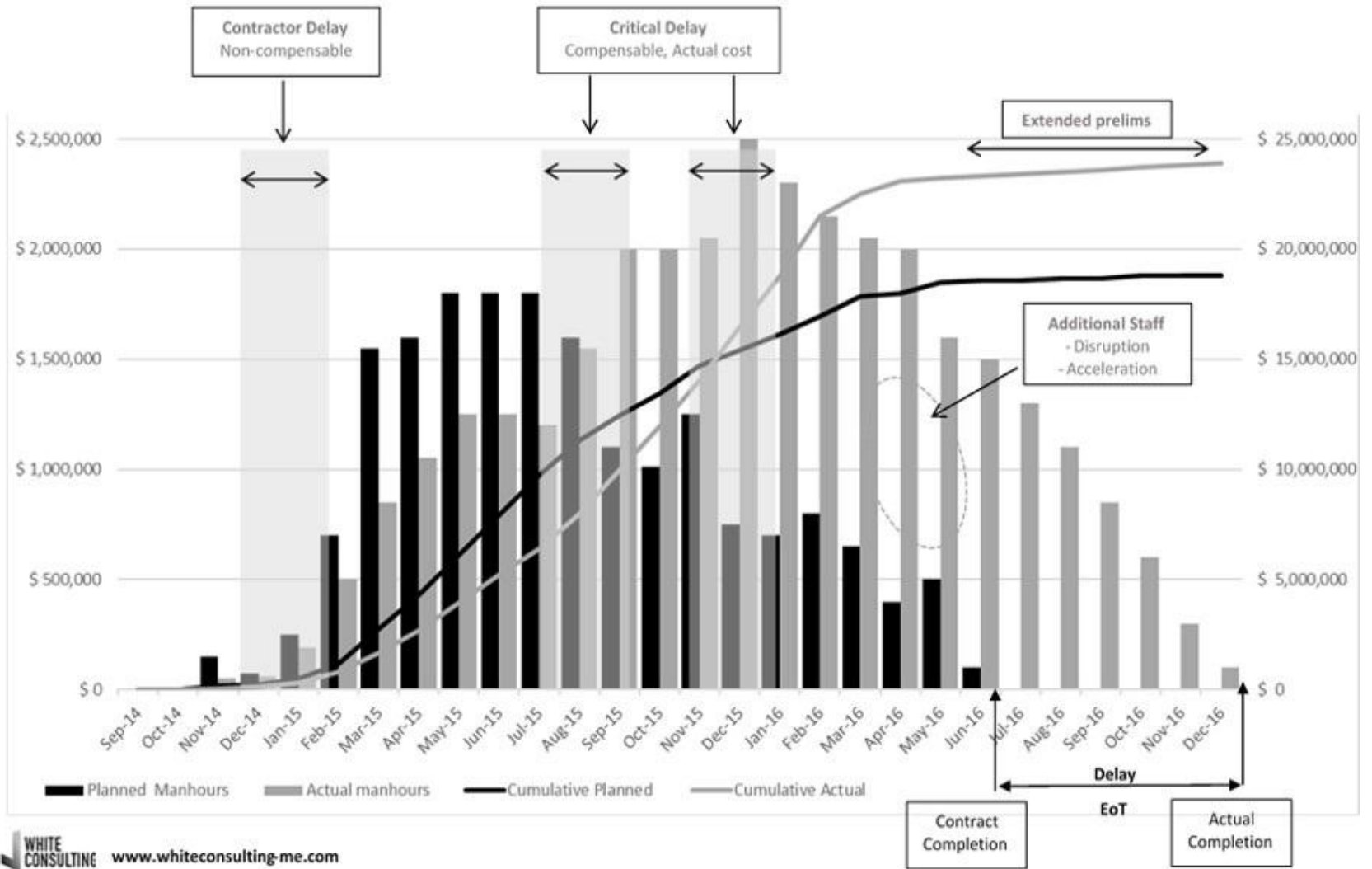


Expenditure Reasonably Incurred

- **Costs of carrying out Change or Variation**
- **Time related costs**
 - Site preliminaries and OH
 - Disruption costs
 - Interest / financing
- **Indirect (consequential?)**
 - Escalation
 - Lost profits
 - Unearned OH / HO OH
 - Reduced bonding capacity



PLANNED vs ACTUAL TIME RELATED COSTS & ENTITLEMENTS



Conclusion

- Records, records and records
- Global / composite / total cost claims
 - “*Matter of fact and degree*” (Bernards Rugby Landscapes v Stockley Park Const 1977)
- Expert opinion
- Keep it real: NI Housing Exec v Healthy Bldgs (Ireland) Ltd [2017] NIQB 43
 - Social Housing / asbestos. NEC3
 - Consultant: forecast costs applied
 - Court: Actual costs; Would not “grope in the dark”

