



# InFocus

Issue No. 4 - Autumn 2020

Insights into the  
**construction industry**  
with **Pyments Periodical**

**pyments**  
"a clear resolution"

***BACK TO  
THE FUTURE***

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# InFocus

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This 4th Edition of “In Focus” continues with our team of experts preparing articles which provide their own unique insights into the construction industry. In Focus provides thought-provoking articles which both inform, and encourage best practice, on a wide range of specialist construction issues.

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Pyments core services:

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# There are “not-so” hidden dangers looming!

Introduction by Tim Hart, Managing Director of Pyments

The last six months have been illuminating for all of us. For a start, I never thought in a million years I could work productively from home.

## Why is that?

Because there is always a major sporting occasion going on somewhere and one that Sky could bring right into my living room... and I do love my sport!

However, there wasn't any to watch and so apart from living with four “adult” children, two very loud dogs and one even louder wife, there were no distractions (apart from the even louder wife's insistence I regularly tell her what I was “sort of” doing). So amazingly, I was more productive than ever, and at times, it would be approaching midnight and I still couldn't leave my laptop alone.

But then I started to email and call my colleagues, just to see if they were all working as well as me (or at all!). And guess what, with virtually no exceptions they all responded or answered (including at one point a heavy



breathing office manager who assured me she had only just returned from a lunch time run!).

### So far, so good

And then I started calling clients and here is where the wheels started to fall off. Yes, they were all working from home also, but when I wanted to converse with them about currently instructed and upcoming matters, they seemed incapable of holding a conversation about them.

### Why was this?

Because firstly, they were totally pre-occupied with the security of their own job. Secondly, the security of all their colleague's jobs. Thirdly, the short, medium and long-term security of the firm they worked for. And fourthly, whether we would still have an industry at all. In short – self-preservation was totally consuming their thoughts so that nothing else seemingly mattered.

So, the 'decision makers' were no longer making decisions on matters where they normally would and now, six months later, we are starting to see the 'stockpiling effect' of that.

The cork is about to, or already has, 'popped' and a raft of instructions have started to flow ranging from extension of time entitlement preparation documents (fuelled and compounded by Covid no doubt) to serial adjudications and full blown litigation. And all this at a time when the CLC are endorsing the RICS 'conflict avoidance pledge'. The message is to be commended but, in my opinion, 'business is business' and 'money is

money' I'm afraid. That's why judges and adjudicators will always continue to exist – to sort it all out when the so-called grown-ups amongst us can't.

So, whilst I would like to think this dreadful virus will, as a society, bring us all a little bit closer together, when it comes down to it, most of us are all still prepared to fall out and fight for our corner. We always have and we always will.

You may call it pessimism. I call it the truth!

*Tim Hart*

Managing Director

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# Time Bar Clauses; “I’ve got a great idea!”

By Chris Kevis, Senior Consultant at Pyments

For the benefit of anyone not familiar with the phrase ‘Time-Bar Clauses’, they are notice provisions, which typically state that the failure to submit a notification of a claim within a defined timeframe will lead to the loss of right to that claim.

I will put my cards on the table from the outset. I don’t like them!

## Consider the following:

A contractor is instructed to carry out additional work, the nature of which causes completion to be delayed by 50 weeks. His time-related preliminary costs are £10k a week and liquidated damages are £10k a week.

For reasons of ignorance, incompetence or a simple oversight, the contractor fails to raise the requisite delay notice until a week after expiry of the time-bar period. The effect of this failure is to eradicate the contractor’s genuine entitlement to 50 weeks EOT and to be paid £½m prolongation costs.

This is coupled with gifting a further £½m in liquidated damages to the Employer who has effectively just won £1million.

I can hear a chorus of objecting voices. *“That’s completely ridiculous, nobody would be so daft. It would never happen.”* Well.....

No, it isn’t (completely ridiculous), yes, they would (be so daft) and yes, it would and does happen (remarkably often).

Don’t just take my word for it. There are many authorities on this topic with similar observations.

For example; Robert Knutson’s paper *“An English Lawyer’s View of the New FIDIC Rainbow – Where is the Pot of Gold?”* Whilst discussing clause 20.1 of the FIDIC standard contract (a ‘time-bar’ clause) he states:

*“Contractors inevitably fail to notify perfectly legitimate claims.....”*

Also, R Champion’s paper *“Variations, Time Limits and Unanticipated Consequences”* includes the following footnote:

*“This [failure to notify], it appears, is all too common. At a recent FIDIC conference*



*in London, two speakers (both lawyers experienced in handling claims under FIDIC contracts), observed in identical terms that, in their experience, contractors habitually did not give notices on time. Other speakers and contributors endorsed the observation."*

### Justification for the use of time-bar clauses

There is of course, some justification for the use of time-bar clauses. The NEC Contract is well-known to contain a time-bar provision in relation to notifying compensation events. The NEC explanatory notes state the reason for the time-bar clause is *"to avoid having to deal with a compensation event long after it has occurred there is a time limit on notification by the Contractor."* This is intended to fit with the NEC's overriding objectives of a "stimulus to good management" and to *"....minimise the incidents of disputes."*

There is also some support from the judiciary. In the case of *Multiplex Construction v Honeywell Control Systems*<sup>1</sup> Mr Justice Jackson held that;

*"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."*

### The alternative justification

Well call me cynical, but I can picture the scene:

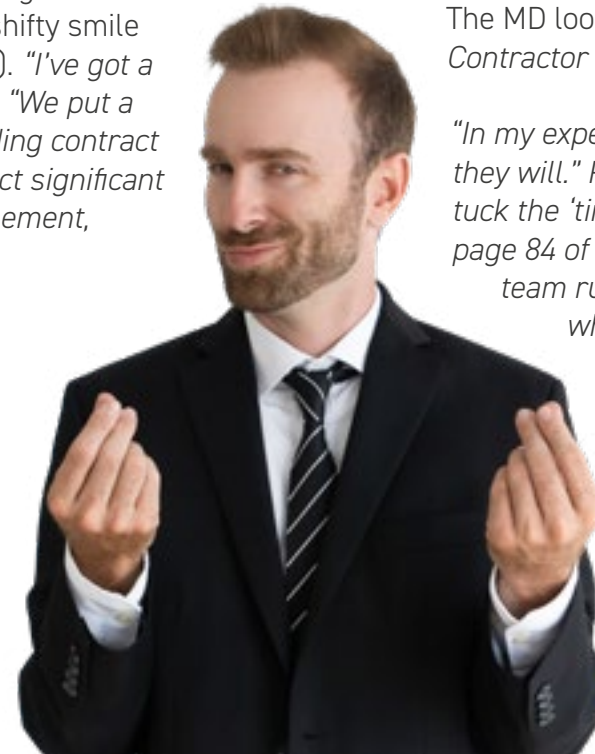
Gathered around a meeting room table is a company MD and half a dozen professional looking business types. Amongst the group is a sharp suit and a shifty smile (you've guessed it; a lawyer!). *"I've got a great idea!" the lawyer says; "We put a 'time-bar' clause in the building contract and that way, you can instruct significant extra work for a bargain basement, knock-down price."*

*"How does that work?" enquires the MD, "surely we must pay for extra work?"*

*"Maybe not," says the lawyer, "if you instruct your contractor to build an extra wing on your hotel it might cost you £2m in total, comprising £1m for the work, a further £½m in time-related preliminaries costs and £½m in lost revenue because your hotel won't open for an extra year. However, with my carefully drafted 'time-bar' clause, if your contractor doesn't give the requisite notice at the correct time, the cost to you will only be £1m. You won't have to pay the time related preliminaries costs and you can recover the lost revenue by way of delay damages."*

The MD looks sceptical. *"Surely the Contractor won't forget to give notice?"*

*"In my experience there's every chance they will." Replies the lawyer. "We tuck the 'time-bar' clause away on page 84 of the building contract, the team running the site won't know where the contract is, let alone what's in it. Whoever*



<sup>1</sup> [2007] EWHC 447 (TCC)

*signed the contract 18 months earlier will have moved on and won't have told anyone about our time-bar clause, and the commercial team will be too busy to issue timely & compliant notices. Believe me, all contractors are the same; an unhealthy mixture of shambolic and gullible."*

*"Brilliant!" says the MD, "get the clause drafted."*

## Unintended Consequences

Pyments has recently seen of a number of building contracts containing 'time-bar' clauses; hence this article! In preparation I did a bit of research.....

Within a short period of time I discovered more than 60 legal cases concerning time-bar disputes. I also discovered an ocean of academic opinion on whether or not such clauses are enforceable (it seems, as a general rule, the courts have decided they are) and exploring various ingenious strategies to circumnavigate a 'time-bar' clause.

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**"it's a fair cop...keep the £1m!"**

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My research touched upon various fascinating propositions and legal topics such as:

- The prevention principle
- Estoppel
- Unenforceable penalty clauses
- Contra proferentem
- Parallel entitlement by way of damages for breach
- Forfeiture clauses

To name but a few! But what does it all mean?

To be perfectly honest, it would take a far more agile legal mind than my own to explain it properly. Academics, lawyers, barristers, judges – they couldn't be happier! Endless hours debating the enforceability of time-bar clauses and potential legal loop-holes to avoid the consequences of same.

As for the unfortunate 'time-barred' contractor, I consider it highly unlikely the response would be *"it's a fair cop...keep*

*the £1m!"* Conversely, an Employer faced with a windfall of £1m and legal advisors confirming entitlement, is extremely unlikely to respond by saying *"don't be so daft, it doesn't seem fair to keep the money...."*

Isn't there a clear danger that the inclusion of the time-bar clauses will increase rather than reduce the chances of the parties ending up in court? The answer appears to be 'yes' based on the evidence of the weight of case law and legal analysis.

## An Apology

I am mindful that some of my comments could offend employers, contractors, academia, the legal profession and the judiciary.

I apologise to you all. My comments are not intended to offend. They are designed to illustrate the point...'time-bar' clauses can potentially do more harm than good.

If we must have time-bar clauses in our contracts, then the advice to Contractors is clear.

Take the time to understand what clauses are included in your contract and the implications. If your contract includes a 'time-bar' clause, give the notice or make the application in a timely manner as required by the clause.

In fact, why not give the whole 'programme monitoring and progress reporting' thing the attention it deserves? After all – prevention is very much better than cure!

- Produce a workable, properly logic-linked programme and identify the critical path.
- Update your programme regularly and accurately.
- Report programme delay as soon as it occurs and identify what has caused the delay.
- Apply reasonable endeavours in an attempt to realistically mitigate as much of the delay as possible.
- Wherever practical agree revised programmes with the Employer and monitor progress on the “accepted” programme.

And most importantly:

- Give the requisite delay notices along with the necessary supporting particularisation and do so in a timely manner.....

Don't fall foul of the 'Time-Bar Clause'.



**Chris Kevis**  
Senior Consultant

Chris brings over 30 years of commercial and contractual experience at senior level, predominantly in the construction and civil engineering industries. Practical experience of dispute avoidance and management, thorough knowledge of contract law, adjudication, the law of tort, case law, current legislation and its practical application to construction contracts. Chris also has extensive experience in commercial management at both tender and construction stages.

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# BACK TO THE FUTURE

By Alan Powell, Senior Programme Analyst at Pyments

Construction delay analysis is often undertaken retrospectively. There are many factors to consider when determining the appropriate method of analysis; the most important factor of all is the Contract.

In the majority of instances, the NEC form of Contract places a mandatory obligation on project delay being assessed contemporaneously using a prospective method of delay analysis. If such an approach is not adhered to, the Contractor may lose any time entitlement they may have had.

In contrast, the JCT DB'16 places a mandatory obligation on a retrospective method of delay analysis. Pursuant to clause 2.25.5...

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**“...the Employer..., ...not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Contractor, ... fix a Completion Date for the Works ..., whether on reviewing a previous decision or ... whether or not the Relevant Event has been specifically notified by the Contractor under clause 2.24.1”**

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The JCT DB'16 does place a mandatory obligation on the contractor to notify and particularise delay events contemporaneously however unless there are any specific contract

amendments, such notification and particularisation is not a condition precedent to entitlement.

In many instances Pyments programme delay analysts are instructed to undertake retrospective delay analysis. Such instruction may arrive from the employer, the contractor or the sub-contractor. In such circumstances Pyments will need to step into the DeLorean, check the plutonium levels, type in a specific

date, and floor it until we reach 88mph! Fortunately, we do not need the 1.21 gigawatts of power required to return home!

Of course, what Pyments do require is a suitable level of record available to assess and to substantiate, on the balance of probability, the critical delays which impacted on the project completion date. Those of you that have attended the “Programming, Record Keeping and Delay Notices” workshop Pyments have delivered in various guises over the last 20 years, will be familiar with the mantra “Records, Records, Records”.

The workshop unashamedly reinforces the importance of record keeping and provides tangible demonstration as to how the success or failure of time (and money) entitlement documents hinges upon the records available. A lack of good records will severely prejudice the success of a claim, and may result in no demonstrable entitlement whatsoever.

The construction industry's ongoing challenge with the adequacy in both content and volume of record keeping has been an issue which started long before Back to the Future hit the cinema screens (I'm reliably informed!). The Society of Construction Law Delay and Disruption Protocol (1st Edition) advised on

record keeping good practice back in 2002. By the time the 2nd Edition was published in 2017 one of the most significant amendments was the section devoted to record keeping, which had substantially increased in information and advice. This is an indication that the preceding 15 years had not seen sufficient improvement in construction industry record keeping.

The Protocol advises on both the format and accessibility of records to be used to facilitate managing progress of the Works and the resolution of delay and disruption. The Protocol lists numerous examples of records which ought to be taken which in general terms fall into six categories:

1. Programme
2. Progress
3. Resource
4. Costs
5. Correspondence & Administration
6. Contract & Tender Documents

Step into the DeLorean again and return to the present day. The construction industry's immediate response to the Covid-19 crisis had the Government and the Construction Leadership Council (CLC) collaborating on various advice and guidance notes ranging from safe operating procedures to providing template delay notice letters. “Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency” issued by the Government on 07/05/20 confirms:



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**“Responsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19...in relation to...giving notices, keeping records and providing reports under the contract (recognising that the need to keep records of contractual behaviours and decisions... is important).”**

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Given the potentially complex and unknown experiences construction projects have to contend with in the current climate, there is unquestionably an essential requirement to maintain comprehensive records, no matter which form of contract is being used, or the type of work being undertaken, to ensure respective parties have all the necessary evidence to support available entitlement to additional time and money.

It doesn't matter where you are on the space-time continuum and the conditions prevalent at the time, the consistent message is one of "Records, Records, Records".

Pyments Project Monitoring department are specifically tasked with maintaining detailed

progress records. While the service benefits our clients by providing up to date and time relevant progress information to allow proactive decisions to manage and mitigate any potential delays, the service does also ensure extensive progress record information is available and which will ensure the Employer / Contractor / Sub-Contractor entitlement

to additional time and/or money is not prejudiced by a lack of information.

Undertaking retrospective construction delay analysis which has had the benefit of Pyments Project Monitoring service is the Back to the Future equivalent of travelling back to 1955 with the Sports Almanac on the passenger seat of the DeLorean. A book of records which has been compiled contemporaneously and which contains all the historical facts about a particular sporting event or alternatively your construction project! Both the Sports Almanac and the Project Monitoring Reports may put you in a far greater financial position if the records are used appropriately; you just need to make sure the information doesn't fall into the wrong hands!



### **Alan Powell**

Senior Quantity Surveyor / Programme Analyst.

Alan has worked in a variety of sectors in differing roles; from programme progress monitoring and delay analysis, to the preparation and/or rebuttal of claim particulars for entitlement to extension of time/loss and expense documents, as well as the preparation and settlement of final accounts. More recently Alan has provided liability, quantum and delay analysis both as principal and assistant advocate on a number of adjudications, as well as providing drafting assistance for Pyments NEC 3, JCT and Extension of Time Workshops for nationwide roll out.

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# Questions and answers with Connor Steele

Connor is Assistant Quantity Surveyor at Pyments, mainly focusing on commercial support and dispute resolution with regard to delay and disruption caused during the construction process.

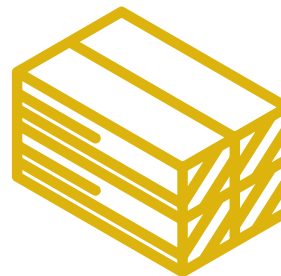


## When did you join Pyments?

I joined Pyments as Assistant Quantity Surveyor in November 2019. Alongside the day job I'm currently studying and being supported by Pyments in obtaining a BSc in Quantity Surveying. I intend to gain chartered membership with the RICS, CIOB and CIARB.

## What were you doing before Pyments?

Originally, I gained construction site experience as a carpenter and labourer working with small building contractors before moving into Quantity Surveying. Having 'cut my teeth' on relatively small projects, I then joined one of the largest national housing developers in the UK which provided exposure to the development, refurbishment and maintenance of residential properties, commercial buildings, educational establishments, healthcare organisations and heritage sites.



## Is working with Pyments any different?

Whilst I am still being trained as a Quantity Surveyor, Pyments are unlike traditional private surveyors and the multi-disciplinary approach provides a variety in workload. From commercial support on 'live' projects to dispute resolution on final accounts, I assist the team in representing our clients' best interests (whether that be employers, contractors or sub-contractors). In time I hope to gain "hands-on" experience in all of the services we provide.

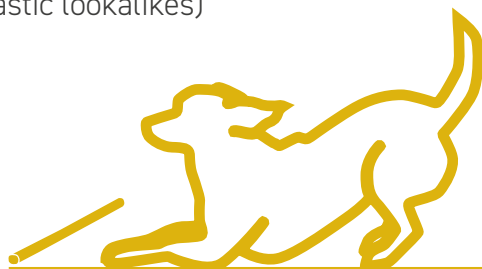


### What do you like about Pyments?

The working environment in the office is second to none. I can honestly say I've got the best boss and colleagues supporting me on my career journey *[Ed – annual review must be on the horizon!]*. It is a unique opportunity to continue my development with the muck and bullets of traditional quantity surveying whilst also assisting wherever possible with multi-million pound claim entitlement documents, expert reports and adjudication documentation. My commercial and contractual knowledge is being enhanced with practical experience.

### Away from work what do you get up to?

The boss will read this so I'd better say study! Jokes aside, I have a young dog so the majority of my free time is spent on walks, training and keeping him entertained. I'm a keen photographer and picture editor; love to read an engaging book or binge-watch a TV series/documentary. I can occasionally be found exercising but never in the gym and I'm an avid target shooter (No animals are harmed, just metal & plastic lookalikes)



### What might someone be surprised to know about you?

I originally started out at university studying television production. But it wasn't until the end of the first semester that I realised my fascination for cameras and editing was a hobby rather than the career path I wanted to go down.

### Favourite food?

Here's a taste of a few - Full English Breakfast, Spaghetti Bolognese, Steak, Pizza and Sunday Roast. I can't decide!

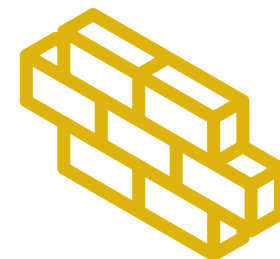


### What trends do you see emerging over the next five years?

Further development in the use of drones and robotics in the construction industry. With the requirements for social distancing I can see significant investment in the technology associated with delivering materials around site and the logistics associated with how we build at present, including further development in modular building.

### In your opinion what makes a good Quantity Surveyor?

A practical and logical mind with an eye for detail. Strong numeracy and IT skills are required alongside an organised and ethical approach to work. A knowledge of building legislation, building materials and building design will provide you with a very firm footing.



### If you could offer one piece of advice to someone looking at a similar career, what would it be?

Personally, I would advise individuals to sign up to degree apprenticeship/traineeship opportunities. The experience gained has been invaluable to my personal and career development. Working alongside experts in the industry whilst studying has allowed me to put theoretical knowledge into practice and develop the necessary vital skills at an early stage.

# About Pyments

Pyments are a firm of commercially and contractually minded construction experts offering multi-disciplinary services to an extensive range of clients all across the United Kingdom.

Pyments has celebrated over 30 years within the construction industry and continues to go from strength to strength enjoying continuity of leadership throughout, and benefitting from a long-serving and exceptionally talented and experienced team.

Working with Main Contractors, Sub-Contractors and Employers, the company has acquired extensive knowledge and understanding of how to represent the 'best interests' of its clients. The Pyments team pride themselves on their ability to provide pragmatic contractual advice, which married with their commercial expertise, allows repeat business through successful results.

The company enjoys the trust and longevity of many 'first tier' clients who entrust Pyments to deliver on high value and complex projects and issues. These relationships have developed because of Pyments hard work and dedication to ensure the highest levels of client service and satisfaction to all of its clients and in all of its instructions.

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