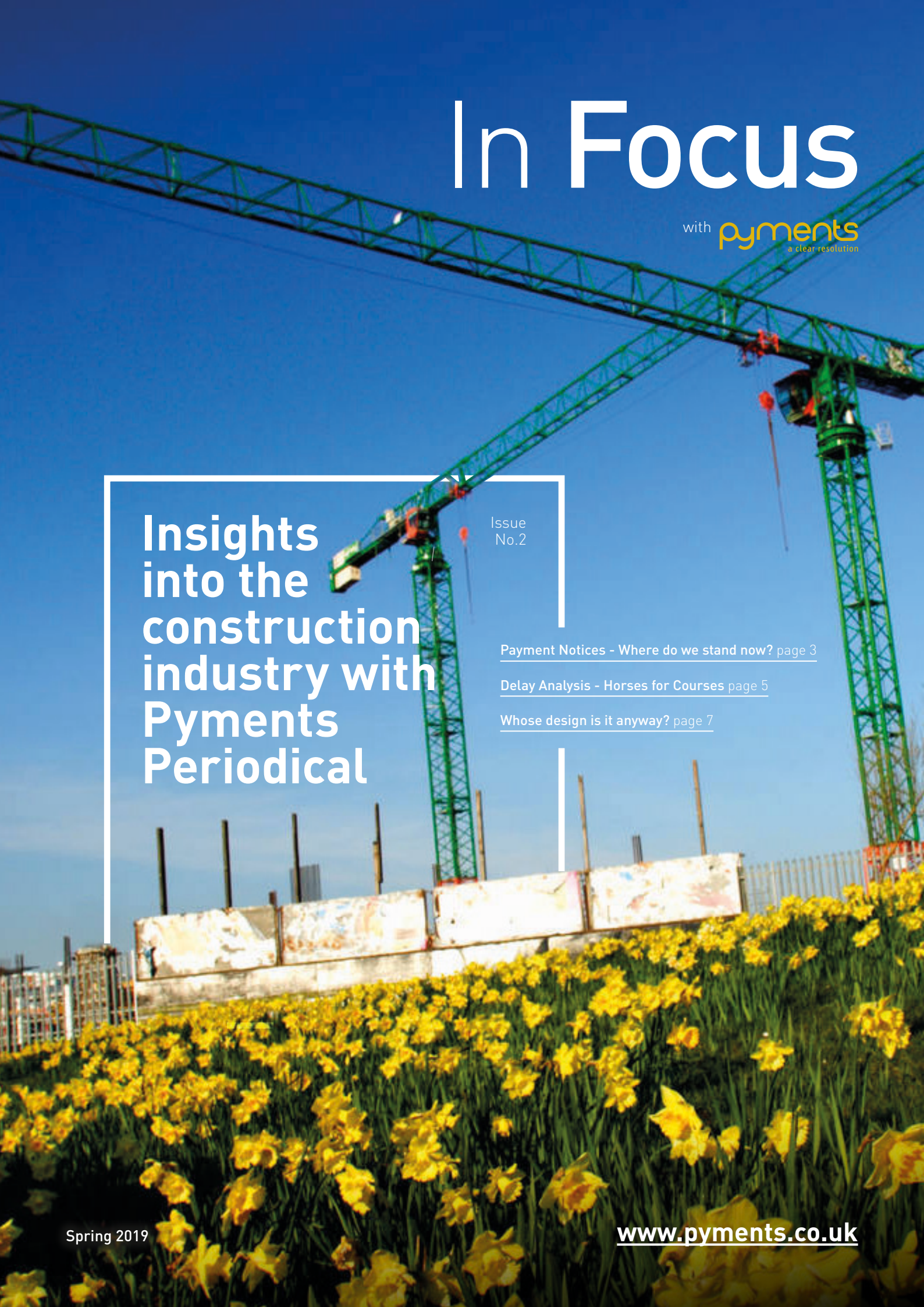
In Focus

with pyments
a clear resolution



Insights into the construction industry with Pyments Periodical

Issue No.2

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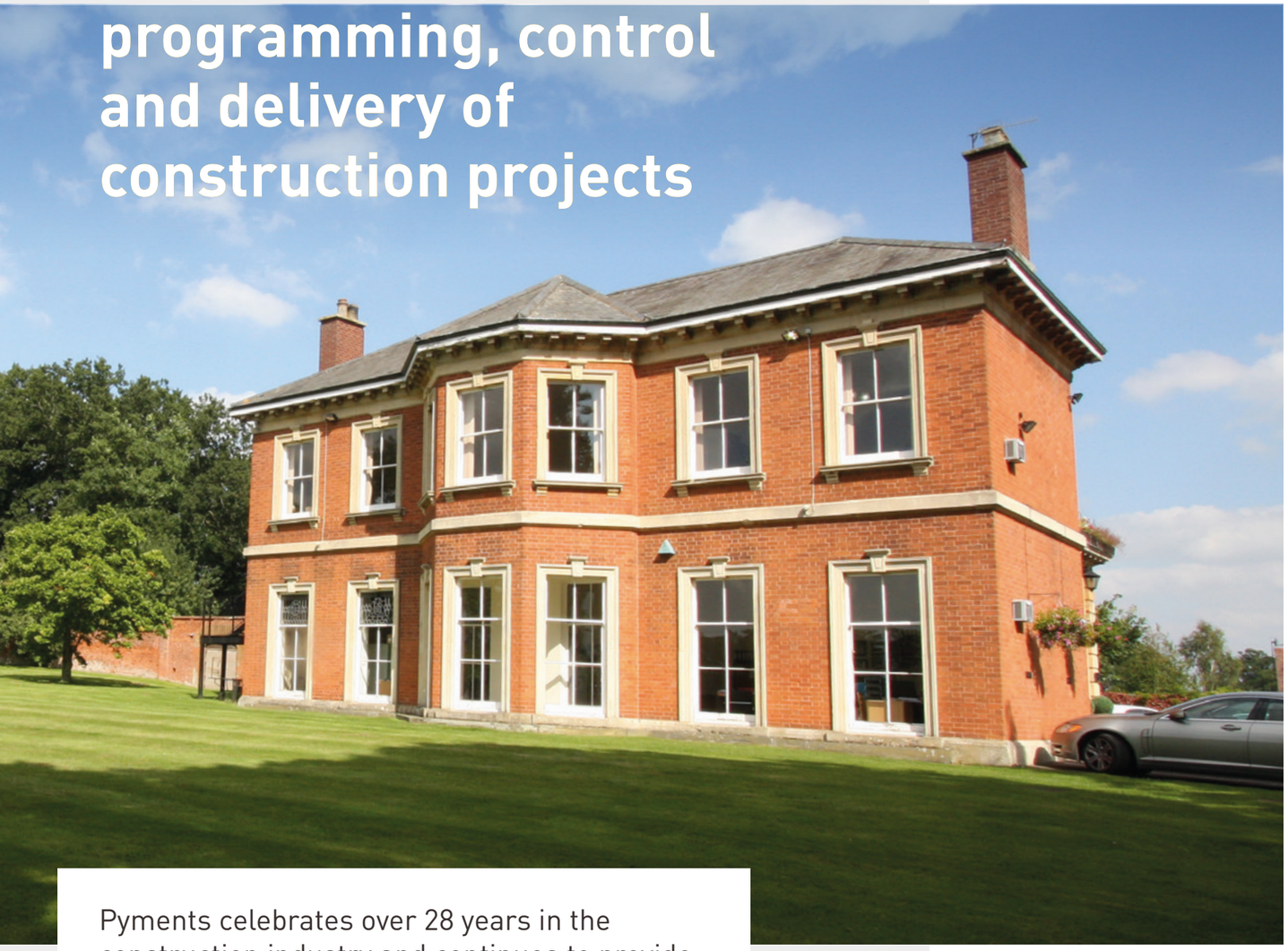
www.pyments.co.uk

Pyments – **a firm of construction experts specialising in commercial project management, programming, control and delivery of construction projects**



Pyments celebrates over 28 years in the construction industry and continues to provide an all-encompassing suite of services, together with a diverse breadth of experience and knowledge to an extensive range of clients.

A firm of construction experts specialising in commercial project management, programming, control and delivery of construction projects, Pyments multi-disciplinary capabilities and unique suite of services provide support to contractors and developers in the contracting, private and specialist sectors of the Construction Industry, on commercial and contractual matters from project inception through to completion.

Celebrating over 28 years of working with clients in various disciplines of construction, we continue to provide a diverse breadth of experience and knowledge delivered by our professional, high calibre, multi-faceted team with a desire and passion for their profession.

Pyments unique personable approach and dispute preventative culture, together with a company ethos founded on collaboration, commercial and contractual compliance (principles that go to the root of our core values), combine to give an outstanding service to each and every client.

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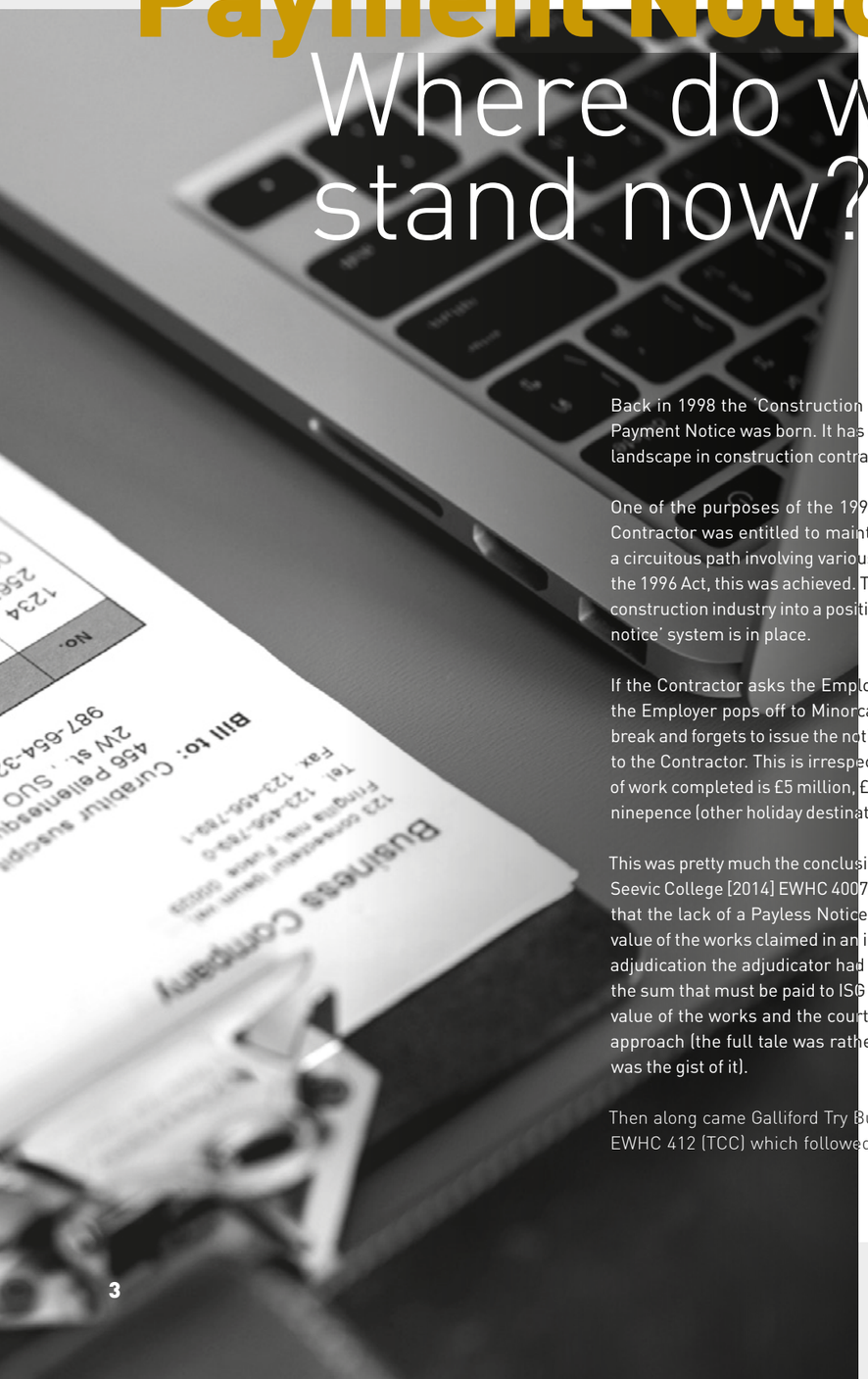
Payment Notices

Where do we stand now?



Back in 1998 the 'Construction Act' came into effect and the Payment Notice was born. It has changed the payment process landscape in construction contracts.

One of the purposes of the 1996 Act was to ensure that the Contractor was entitled to maintain proper cash-flow and, via a circuitous path involving various updates and amendments to the 1996 Act, this was achieved. The legislation has dragged the construction industry into a position whereby a 'default payment notice' system is in place.

If the Contractor asks the Employer to pay him £5 million and the Employer pops off to Minorca for a well-earned fortnight's break and forgets to issue the notice, the £5 million must be paid to the Contractor. This is irrespective of whether the true value of work completed is £5 million, £2 million or three shillings and ninepence (other holiday destinations are available incidentally).

This was pretty much the conclusion reached by the court in ISG v Seevic College [2014] EWHC 4007. In that case the judge decided that the lack of a Payless Notice meant Seevic had agreed the value of the works claimed in an interim certificate. In an earlier adjudication the adjudicator had decided the sum claimed was the sum that must be paid to ISG and had therefore decided the value of the works and the court agreed with the adjudicator's approach (the full tale was rather more long-winded, but that was the gist of it).

Then along came Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) which followed a similar scenario. Galliford Try made application for £4 million, Estura didn't react – no Payment Notice, no Payless Notice, nothing. So Galliford Try referred the matter to the adjudicator who said something along the lines of... "£4 million it is – the true value of work is irrelevant, it's a default system".
The people at Estura were a bit miffed. So off they trotted to see the judge in the TCC and came up with the jolly wheeze of claiming poverty. "We're a bit boracic lint at the moment" they said (for the benefit of anyone north of Watford - that means a bit short of money). "Oh dear" said the learned judge. "I'll tell you what, pay £1.5 million now and you can cough up the rest whenever you can afford it" (I'm not quoting 'word for word' here).

There was a further twist in Grove Developments Limited v S&T (UK) Limited [2018] EWHC 123 (TCC). Here, the Judge considered whether an Employer, whose Payment Notice or Payless Notice is deficient or non-existent, can pay the Contractor the sum stated as due in the Contractor's interim application and then seek, in a second adjudication, to dispute the sum that was due.

The judge gave six separate reasons why the Employer is able to do so and thereby disagreed with ISG v Seevic College and Galliford Try Building Ltd v Estura Ltd which had previously decided this strategy was not allowed.

So there we have it; a default payment system that can immediately be trumped b y a second adjudication.

Of course, all the dispute consultants, solicitors, adjudicators and barristers love all this ducking and diving. They've all spent the last 20 years rubbing their hands together, totting up the hours spent debating a point of law and submitting their fee invoices.

So, what does all of this mean to us simple folk who just want to build something and get paid for it? Do all parties now have to pay the consultants, solicitors etc to lead us through two adjudications; the first to secure payment for the amount included in the Contractor's application for payment and the second to agree the correct value of work completed? Is the Contractor any better off than he was before the Construction Act?
Obviously, the Act has given everyone the right to refer any dispute to adjudication and very few would disagree with me when I say this is a jolly good thing. Any dispute can now be resolved (at least on an interim basis) within 28 days. But in terms of improved cash flow, are the Payment Notice provisions helping anyone? I'm beginning to doubt it.

Some years ago, I was employed by a business that called in some business consultants to identify "waste" in the company's business processes. This was with a view to removing the "waste" and thereby saving the business huge chunks of money. The consultants set to work enthusiastically doing something I think they called 'process mapping'. We had sheets of A1 size paper with arrows on and bits of sticky yellow paper everywhere. It occurs to me that a similar analysis could be carried out with the current payment process in construction.

The system we operated in the good old days was reasonably straightforward:

Contractor submits application → Employer ignores it → Contractor jumps up and down and shouts a bit → Employer pays something → Contractor thinks it's not enough and jumps up and down and shouts a bit louder → Dispute ensues which gets sorted out eventually (adjudication nowadays – if it becomes necessary).

The more astute reader will have seen what I did there – process mapping – 5 arrows. The current process appears to me to contain what the business process consultants would call "waste":

Contractor submits application → Employer ignores it → Contractor jumps up and down and shouts a bit → Dispute ensues and the Contractor refers the matter to adjudication (and wins) → Employer has to pay what the Contractor requested → Employer thinks (correctly) that he's paid too much and jumps up and down and shouts a bit → Dispute ensues and the Employer refers the matter to adjudication (and wins) → Contractor repays the over-payment.

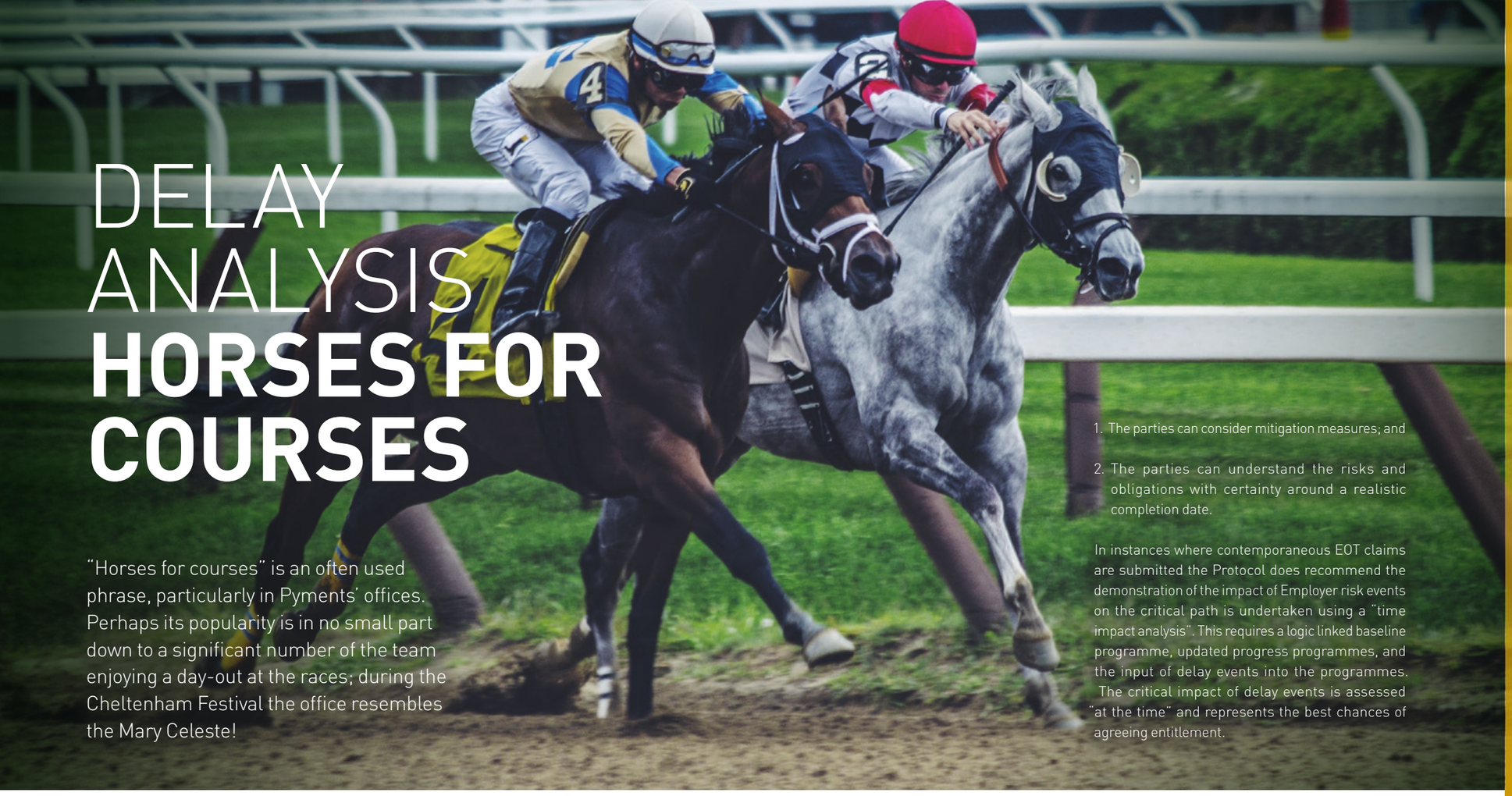
We seem to have gained two arrows and the cost of two adjudications (as opposed to a maximum of one) which leaves me wondering whether or not there is any value in the Construction Act payment provisions as they have now been developed by case law.

It seems to me that the Contractor would be well advised to remove the "waste" from his business processes by relying on the strategy developed during the good old days... i.e. jump up and down and shout a bit.

Chris Kevis

A Senior Consultant at Pyments and brings over 30 years of commercial and contractual experience, he can be contacted at **chris.kevis@pyments.co.uk**

DELAY ANALYSIS **HORSES FOR COURSES**



"Horses for courses" is an often used phrase, particularly in Pyments' offices. Perhaps its popularity is in no small part down to a significant number of the team enjoying a day-out at the races; during the Cheltenham Festival the office resembles the Mary Celeste!

The phrase alludes to the fact that a racehorse performs best on a racecourse to which it is specifically suited. This is then applied so that different people are suited for different jobs or situations, and what is fitting in one case may not be fitting in another.

And so to construction delay analysis! There are many differing methods of analysis and much like an expectant punter stood at the finish line on Gold Cup day, the decision on what horse to back (or delay analysis to choose!) must be weighed up against several competing factors.

Authoritative guidance on how to progress and defend delay and disruption claims is provided by the Society of Construction Law publication of its "Delay and Disruption Protocol". It is not intended to take precedence over the express terms of a contract or be a statement of law, but instead represents a "...scheme for dealing with delay and disruption issues that is balanced and viable."

The Protocol (2nd Edition) was published in February 2017 following various developments in the law, changing construction industry practices, and feedback on the 1st Edition (published in 2002). Two key alterations relevant to this article included:

1. The recommended guidance for the contemporaneous submission and assessment of EOT claims, rejecting a "wait and see" approach.

2. A move away from one preferred delay analysis methodology. Instead, there is a list of factors that should be considered before applying a particular methodology.

The "wait and see" approach would be like a horse falling at the first on the far-side of the track, waiting for the un-seated rider to get back on and continue with the race, and the commentator not informing the unsighted punter that his horse is not going to finish at the same time as the others. You can see why the Protocol does not advocate such an approach!

Contractors are recommended to promulgate the time and monetary impact of Employer risk events / matters as close in time as possible to when the event actually occurs. Likewise, the Contract Administrator should assess the EOT application within a reasonable time thereafter. A stockpiling of the submissions and/or assessments of EOT events is discouraged; the benefit of this is two-fold:

1. The parties can consider mitigation measures; and

2. The parties can understand the risks and obligations with certainty around a realistic completion date.

In instances where contemporaneous EOT claims are submitted the Protocol does recommend the demonstration of the impact of Employer risk events on the critical path is undertaken using a "time impact analysis". This requires a logic linked baseline programme, updated progress programmes, and the input of delay events into the programmes. The critical impact of delay events is assessed "at the time" and represents the best chances of agreeing entitlement.

To continue with the horse analogy, the Protocol does recognise that "you can take a horse to water, but you can't make it drink"! There is a section which refers to delay analysis undertaken after completion of the works, or significantly after the effect of an Employer risk event.

In such circumstances the criteria to be considered when determining the delay analysis methodology is listed as including:

- the relevant conditions of contract;
- the nature of the causative events;
- the nature of the project;
- proportionality (both time & cost);
- the nature, extent and quality of both the records and/or programme information; and
- the forum in which the assessment is being made.

The overriding objective for such delay analysis is that the conclusions derived are sound from a common sense perspective.

Method of Analysis	Analysis Type	Delay Impact Determined	Critical Path Determined	Requires
Impacted As Planned Analysis	Cause & Effect	Prospectively	Prospectively	1. Logic linked baseline programme. 2. A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Prospectively	Contemporaneously	1. Logic linked baseline programme. 2. Update programmes or progress information with which to update the baseline programme. 3. Selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Retrospectively	Contemporaneously	1. Logic linked baseline programme. 2. Update programmes or progress information with which to update the baseline programme.
As-Planned vs. As-Built Windows Analysis	Effect & Cause	Retrospectively	Contemporaneously	1. Baseline programme 2. As-built data.
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	1. Baseline programme. 2. As-built data.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	1. Logic linked as-built programme. 2. A selection of delay events to be modelled.

In this respect the Protocol may be taking heed from the judgement passed down in Skanska v Egger (2004) when commenting upon the approach of the experts:

"It is not advisable to overpower the court with information and numerous delay charts which are difficult to understand...there is a lot to recommend the 'keep it simple' philosophy...it is fundamental the delay analyst is objective, meticulous as to detail, and not hide bound by theory as when demonstrable facts collide with computer programme logic."

The Protocol provides a table which can be applied depending upon the scenario the delay analyst finds themselves in. By utilising this table it should be evident which 'horse' is not suitable given the relevant 'course' you find yourself on. From there Pyments recommend consideration is given to demonstrating the critical path and the timing of events which in turn delay the critical path.

Under such circumstances you will have picked the right horse, for the right course, and will even have the right jockey riding. More often than not the odds will be in your favour however beware, as we know every now and again the punter picking on names and colours romps home!

Alan Powell

A Senior Quantity Surveyor & Programme Analyst at Pyments and can be contacted by email at **alan.powell@pyments.co.uk**

Whose design is it anyway?

Not everyone is aware that Pyments have their own in house Mechanical and Electrical team; Pyments M&E Solutions... Read on for some sound advice...

In the Autumn 2018 issue of Pyment's "In Focus" Steve Watson set out that across recent Pyments projects circa 35% of construction claim costs were attributable to M&E claims, and of those M&E claims 60% of the monetary value was related to programme issues; prolongation, disruption, L&E etc. Steve then proffered the question "are D&B projects more susceptible to Loss & Expense claims?"

It's a good question, as Pyments do see quite a few delay and L&E disputes which originate from M&E design issues.

With M&E building services the choice at project inception stage is not as simple as selecting "pre-designed" or "design & install". On what could loosely be referred to as "full" pre-designed projects the Contractor and specialist installers will have some design to undertake. Similarly, on "full" design & install jobs the Client's team will also have ongoing design related exercises and probably partial design responsibility (devilish contract clauses notwithstanding) as errors within the Employer's Requirements documents may remain their risk.

The successful design of M&E installations is in practice a joint effort, where at some point the early stage design work is provided to the Contractor to take forward. This handover "point" is normally at Contract formation but how far developed should the M&E design be at that stage, and is it clear what design activities remain for Client's design team during the Contract period?

On live projects and during retrospective analysis, Pyments have identified delays arising from design activity disagreements; a design related delay is not always caused by the M&E design being incorrect, it's more often related to a design activity not being undertaken in a timely manner.

In addition, where systems were found not to perform as expected, for example during the commissioning period, delay can arise whilst the team try to determine if there is a design problem or an installation problem, and then while arguing about who is responsible.

How many times have asked yourself in frustration *"whose design is it anyway?"* as the team in the meeting room continue to argue about;

- Who should produce the builder's work drawings and the reflected ceiling plans?
- Are the sub-contractor's installation drawings adequately detailed?
- Who should have undertaken a detailed survey and identified the location of those problematic existing services?
- Was the M&E design provided at Contract stage sufficiently advanced?
- Who owns the risk when the M&E plant selected by the specialist sub-contractor, to meet the performance specification, won't fit in the plantroom which has been built to the Architect's dimensions?
- What is covered by co-ordination? Contractors produce co-ordinated installation drawings, but are they obliged to rectify all earlier design inadequacies?

Our starting point when asked to advise on issues of this type is to ask: "what does it say in the Contract documents?". However, we often find reference to the M&E specification and tender drawings does not readily provide a definitive answer.

As ever with construction projects, the more time spent prior to entering into Contract, setting out in detail exactly what has to be done and in what time frame, will improve the chances of the right product being delivered on time and without dispute. With regard the M&E design process, help is at hand in the form of BSRIA publication BG6; *"A Design Framework for Building Services"*.

"Drawing definition: Coordinated working drawings"

"A Design Framework for Building Services"

This document (now in its 5th edition) BSRIA BG6/2018 has been available since 2006 and is still not used as frequently as it should be. BSRIA have set out the activities necessary to take a M&E design, stage by stage, from initial brief, through concept design, developed design, and technical design, and then through construction stage (installation drawings) and handover. The design stages are aligned with the RIBA Plan of Work 2013, and broadly in line with the ACE schedule of services. Separate proformas are provided to set out the individual design activities to be undertaken within each stage.

BG6/2018 does not attempt to prescribe *how* you design M&E services from a technical point of view; we have to refer to CIBSE documents (and other publications) for that, but it does set out what has to be done at each stage and armed with this understanding, we can move forward to deciding who should undertake the various activities.

The first stage in that process has to be determined by the Client's team, as they have to decide how far to develop their plans before sending the project out for tender; they may choose to produce a Concept Design, RIBA Stage 2 and appoint a Contractor on that basis, or a Developed Design, RIBA Stage 3 or Technical Design being RIBA Stage 4. (Pre-2013 these RIBA design stages were referenced as stage D, E, F1, F2 etc). Once the Client's team have made that decision, the Client's Consultant will know, by reference to BG6/2018, what level of M&E detail has to be included in the M&E tender package (and can set his fee's accordingly). As the titles suggest a Developed Design has more detail than a Concept Design.

It should be clear within the tender documentation what M&E design stage has been completed and what design exercises the successful Contractor will be expected to undertake. This is where BSRIA BG6/2018 should be used; firstly, a plain statement should be provided that the tender documentation has been prepared to say "Stage 3 – Developed Design" and to clarify what design activities remain, and which party is expected to complete them, the BSRIA BG6 design activity proformas for the remaining stages, stages 4, 5 and 6 in this example, should be completed and included in the tender documentation.

BSRIA advise when completing the design activity proformas that "design leadership" for each activity is allocated to a single party; Consultant, Architect, Contractor, M&E Sub-Contractor or specialist Sub-Contractor, and where necessary "support" and "review" are also allocated. So, we may see, "lead" and "support" for certain activities. Examples of individual activity allocation would be the M&E Sub-Contractor providing Builder's Work Information and the Architect designing the roof top weatherproofing details for M&E services passing through the external envelope.

BSRIA advise that activities not required should simply be struck out; if there is no requirement for cooling on the project there is no need to allocate any party the task of refrigeration pipework sizing. If there was cooling this task would probably be allocated to the relevant specialist sub-contractor.

With regard deliverables; such as provision of co-ordinated working drawings or builders' work drawings, BSRIA again provide proformas to allow allocation of the activity and provide example drawings to show the level of detail which would be considered acceptable, and clarify whether they need to show dimensions or what scale they should be.

BSRIA BG6/2018 therefore provides a ready made "framework" for the design of M&E building services which enables the Client to accurately detail which design activities they require their supply chain to undertake. If the Client has not done this the Contractor may introduce the BSRIA BG6 proformas as a tool to help resolve any ambiguity, before entering into Contract. The completed proformas may be used by the Contractor down the supply chain so specialist sub-contractors are in turn clear on their design activities. Further, the proformas should be used as ongoing management tools to flag up activities not yet completed.

Establishing clearly who has to undertake which design activity at Contract stage can only help to reduce the number of disagreements and delays which arise during the onsite period. It also provides visibility to allow the Contractor to price in the cost of the required exercises; behind many of those frustrating delays and arguments is the matter of who is going to pay for undertaking the activity.

Note that BSRIA refer to the design exercises on the design allocation proformas as "activities" rather than "responsibilities". That is quite correct as dependent upon specific contract amendments it would be possible for one party to be required to undertake a design *activity* but another party be *responsible* for it, and therefore own the risk.

"BG6/2018 and the RIBA Plan of Work"

Returning to the original question; *"are D&B projects more susceptible to Loss & Expense claims?"* maybe the answer is "not necessarily"; D&B, self-evidently works but care must be taken to clearly set out at Contract stage exactly what design has already been completed and who has to do what during the Contract period to complete the exercise. BSRIA BG6/2018 is the management tool designed to achieve this.

Pyments possess a unique blend of skills to help you navigate these design related conundrums, including technical, commercial, contract law, delay analysis and project services. The focus at all times at Pyments is upon "dispute prevention".

Contact us if you feel we can help.

Steve Bedder

A Senior Consultant at Pyments with over 40 years' experience in building services engineering, Steve can be contacted at **steve.bedder@pyments.co.uk**

"Chinese... Thai food... Mexican... the list goes on!"

Meet the gang
Jessica Whiston

When did you join Pyments? I joined Pyments as Assistant Quantity Surveyor in November 2012 and gained full RICS chartered status in April 2014.

What were you doing before? Previously I worked in the Infrastructure division of Mouchel Group, primarily involved with coastal and highway schemes.

This is a bit different? Yes, Pyments is very different. I've previously only worked for larger organisations where it can be easy to get lost in the crowd and it can be difficult to really make your mark. Pyments has given me the opportunity to flourish, which did involve getting thrown in the deep end at times, but I like to think that's when I perform to my best.

What do you like about Pyments? I consider Pyments to be quite unique, in that we are generally considered a small firm, but the projects we become involved with are large scale, nationwide projects, with lots of variety to keep things interesting.

Away from work what do you get up to? I'd like to say working out and making sure I eat right, but the truth is eating out is one of my favourite things to do.

What might someone be surprised to know about you? I think people are surprised to hear I am co-owner of an MMA/Boxing gym. It is my husband that runs the show really, he's an ex professional MMA fighter. But getting involved in Martial Arts has made me a bit of a combat sports fan and I will take part in the odd Thai Boxing or Jiu Jitsu class from time to time.

Favourite food? Do I really have to pick one? Chinese...Thai food...Mexican...the list goes on! But if I had to pick one thing to live off, it would probably be Chinese food.

What trends do you see emerging over the next five years? As design novation has become common place it seems Contractors are increasingly giving greater consideration to the performance of the project designers and are less tolerant to design 'development'. However, design Appointments may not be given the same level of focus as the Building Contract, which can result in discrepancies and scope documents that lack 'real' detail.

In your opinion what makes a good QS? As with most things, I'd say communication and the ability to communicate in a concise manner is essential, whether that be to colleagues or clients. Pyments are a real close-knit group and we all bounce ideas around with each other and that's what makes for diverse thinking, which I think is very important, specifically in relation to our field of work, and having that communication really helps.

If you could offer one piece of advice to someone looking at a similar career, what would it be? Do your research, Quantity Surveying is a very broad field and your day-to-day role can range immensely. I was 17 when I had to choose a University Course, and I didn't have much understanding of this, which could have easily led me down the wrong route.

pyments
a clear resolution

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