

InFocus

Issue No. 6 - Winter 2021

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

pyments
"a clear resolution"

a perfect storm

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InFocus

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This 6th Edition of 'InFocus' continues with our team of experts preparing articles which provide their own unique insights into the construction industry. InFocus provides thought-provoking articles which both inform, and encourage best practice, on a wide range of specialist construction issues.

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What a Cop (26) Out!

Introduction by Tim Hart, Managing Director of Pyments

I'm not one to get on the soapbox to express my views on the world without invitation (some people may find that hard to believe!). However, I did think I'd use this introduction for the latest InFocus publication, as an opportunity to remind everyone of the efforts we all need to make to ensure living conditions for future generations are not disastrously impacted by the actions of today and tomorrow.

What's done is done and I see little point in looking back with regret; there's obvious benefit however to be derived from understanding the mistakes of the past in order to learn for the future. Unfortunately, we seem to have identified the mistakes of the past but have not done anything about it.

When it comes to the environment, the numbers appear to generally be supportive of the position, nationally and globally, that we are learning from the mistakes of the past. The issue though is that timing of the action to remedy is not significant enough.

I've been reading reports and watching the news from the COP26 climate summit in Glasgow and understand that more than 500 lobbyists linked to



major oil and gas companies were in attendance.

This provided two depressing statistics:

1. Fossil fuels were better represented than the combined representation of the eight countries suffering the greatest climate change impacts since 2000; and
2. There were more individual fossil fuel lobbyists in attendance, than there were delegates from any single nation (Brazil had 479 delegates).

Whilst fossil fuel companies were banned as sponsors for the COP26 summit (progress I accept, albeit small), I don't really understand why such companies were able to attend in the first place, after all, the tobacco industry is banned from the World Health Organisation's Framework Convention on Tobacco Control!!

Despite my grumblings, it would be remiss of me not to state all the good work which has been, and will be, going into the necessary strides to reduce the impact of climate change. Both on an individual level and within our industry.

The built environment is directly responsible for 25% of the total UK carbon footprint and therefore has a critical role to play in the national transition to Net Zero. The UK Green Building Council (UKGBC) has produced the Net Zero Whole Life Carbon Roadmap which details the actions Government and the industry must take to achieve a net zero UK built environment by 2050.

In the last two decades, built environment emissions have reduced by 30% however 'Business as Usual' projections forecast the industry will be well

short of the 2050 Net Zero target with only a 60% reduction from the 1990 emission levels. To quote from the roadmap..." *...systemic interventions are needed to incentivise change across the design, construction, operation and demolition of buildings and infrastructure.*"

I believe Government and Big Business know it's coming; just look at the names attaching themselves to the Net Zero Whole Life Carbon Roadmap and this tells its own story.

One of the policies looking to be fast tracked by the UKGBC is the minimum EPC ratings for UK homes. They recommend the Government introduction of a mandatory EPC rating of C for all owner-occupied homes at the point of sale by 2028. This will mean as many as 70% of all UK houses would require energy performance upgrades in the next seven years. Whilst it is unclear at this stage, if and how the Government would provide financial support for such strategies, it is clear that change within the industry is coming and I for one will be doing what I can to ensure our industry is as innovative as I have always known it to be.

Tim Hart

Managing Director

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a perfect storm

By Gordon Connell, Lead Consultant (M&E)

Those familiar with the signs of troubled construction firms won't be overly surprised by the recent collapse of NMCN; saddened and disappointed, yes, as there will always be a corresponding impact on the people and firms who work with them and for them, however, the challenges faced by NMCN had become increasingly apparent over the last twelve months or so.

NMCN had gone from defending paying an interim dividend of £1m in August 2020, to then issuing a warning (in September 2020) that it may incur losses; losses that seem to have materialised unsighted, and which continued to increase at an alarming rate.

The effectiveness, or not, of corporate governance and decision-making, will often stand out amongst the cast of the usual suspects in a contractor's downfall. NMCN aren't alone in facing such claims and the year-end results, of many other firms facing similar or other challenges, have correspondingly come under increased scrutiny in recent years...

uncomfortably highlighted by the revolving door of leadership-change across many leading firms.

We tend not to learn '*specifically*' all of what caused the demise of a construction firm, but the same ingredients invariably exist. In NMCN's case there is the added blend of recent rapid growth and a pandemic to consider, the resulting poor availability of labour and the corresponding reduced productivity levels, material shortages, material price increases, uncertainty of the availability of imported goods and the tariffs related to same, not to mention IR35 and a plethora of other seemingly less

significant matters. As most of us will know, this world of construction that we know and love can be a fairly hostile environment, and we need to be on our 'A' game to navigate a sensible and profitable path.

No one ever looks at the contract...

So, let me ask you; how do the contracts you enter into, affect your ability to navigate the challenges you face?

"No one ever looks at the contract, right?"
This is one of the least-favourite one-liners I've heard (too many times) in years gone by;

however, the best (or perhaps that's, the best worst?) happens to be *"I'm surprised anyone ever signs up to our terms and conditions, but they do, and most of the time without pausing to consider what's in there!"*

"...corporate governance and decision-making, will often stand out amongst the cast of the usual suspects in a contractor's downfall."

If you're fortunate enough to sail unaided toward successful project delivery, i.e., without taking your contract off the shelf, reviewing the terms you've agreed to, and remaining blissfully unaware of what's in there, then good luck to you. Before you read any further, please email me this week's lottery numbers.

Forgive me for being blunt about this...

It's highly likely the effect of those issues faced by NMCN (and others) would have been lessened by agreeing more favourable terms on their projects. However, as Shakespeare's Hamlet once uttered, *"here's the rub"* ... if it truly is your desire to avoid or lessen the level of risk you're exposed to on projects, then why

do so many still fail to "properly" review and consider the contracts they sign up to.

The demise of Carillion is now, for most of us anyway (investigations are notably still ongoing...) something we've moved on from; however, prior to their demise, two of the primary concerns highlighted as part of their *"turnaround plan"* remain ever-present in today's marketplace. The concerns identified by Carillion included *"a high degree of uncertainty around key assumptions"* and *"insufficient understanding of and adherence to contract requirements"*.

Forgive me for being blunt about this; however, in my experience, the two *"primary concerns"*

highlighted by Carillion had existed long before I grew into my boots, and will be around long after I've hung them up. It's what we decide to do about them that counts.

A common misconception

In the majority of construction disputes faced by our clients, the review and agreement of contract terms and conditions (and the parties' corresponding obligations detailed therein) have in most cases been negotiated and agreed between the parties corresponding commercial or contract advisory teams and, once concluded, placed into darkness on the nearest and highest shelf... and not necessarily a shelf which happens to be located on site, or with the project delivery team. This scenario is compounded by the fact that, too often, project



teams operate with distinctly separate build and commercial teams.

There's a common misconception that *only* the project commercial team “need” to understand what's agreed in contract. However, in reality, many of the impacts suffered on a project, particularly in respect to time and cost (so, almost everything then), will first be identified by the project build team, and therefore the action of first alerting the project, will also be contingent upon the build team communicating the detail of such matters; i.e., to then enable

“There’s a common misconception that only the project commercial team “need” to understand what’s agreed in contract.”

the issuing of the appropriate and compliant notifications, to the correct recipients, suitably detailed, within the appropriate timescale, etc.

Business critical

Too often, the acceptance of unreasonably onerous terms and conditions places a burden on the project before it gets out of the ground... where your delivery team remain blind to those burdens (and the many related obligations) then you ought not to be surprised when the project subsequently fails... if you do this on all of your projects, and add some or all of the challenges faced by NMCN... then the effect of such burdens is no longer an isolated project matter... it's business critical.

Our work with clients, in seeking to agree equitable terms, considers all of the challenges and risks identified above, and others. Properly considered, and thoughtfully presented, you will realise an improved position in the terms you agree to. It may seem obvious to say, however, any review of the proposed contract terms (and the related contract documents) must also consider the detail of the project they relate to... it's remarkable how often contracts are entered into without the necessary and fundamental due diligence in these areas... and which may, in part anyway, relate to one of the key issues highlighted by Carillion... “a high degree of uncertainty around key assumptions”.

Regardless of the form of contract you're working to, they will often do all of the same things, but with varying frameworks to guide how the related obligations and provisions should be delivered and adhered to.

So how do you deal with the other key issue highlighted by Carillion, and still challenging many of us today, i.e., where there is... “an insufficient understanding of and adherence to contract requirements”.



“It’s highly likely the effect of those issues faced by NMCN (and others) would have been lessened by agreeing more favourable terms on their projects.”

The answer to that isn’t short, but it doesn’t have to be complicated either. We routinely engage with our clients to develop and implement the necessary systems, processes and safeguards that will support their teams in delivering profitable outcomes.

In an industry where cash-flow will always be king, then your investment in mapping out a path towards profitable project delivery, and maintaining the integrity of your business, must also consider precisely how you intend to achieve that.

For information about contract advice please do not hesitate to contact Pyments.



Gordon Connell
Lead Consultant (M&E)

Gordon’s experience extends across both standard and bespoke construction and engineering contracts and he is proficient in supporting client needs on a wide range of matters, including; advising on procurement strategies, contract negotiation, dispute resolution and prevention, and acting as party advocate in adjudication.

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Call of Duty

By Jess Whiston, Consultant at Pyments

Given some of the references in this article you'd be forgiven to think I was a computer gamer. The truth is I wouldn't know a "Gulag" from a "Lobby"! However, the true theme of this article is to encourage you to think about your duty of care when it comes to termination of Contract, and less about your killstreak!



When a contract has been terminated it is fair to say that animosity can exist between the Parties, and when the time comes to produce the termination account, the terminator (not Arnold Schwarzenegger) in our experience neglects all cost control, in the mindset that the final bill will be passed 'down the line' to the convicted party. Our advice to anyone contemplating this approach, is don't.

The JCT is explicit in that the termination account shall set out *"the amount of expenses properly incurred"* in carrying out and completing the works (if terminated by the Employer), or any direct loss and/or damage

caused by the termination (if terminated by the Contractor). Therefore, you have a duty of care to ensure the losses you declare are losses solely incurred as a result of the termination.

Where the Contract is terminated by the Employer and a replacement Contractor is appointed, the price must be a true representation of the terminated Contractor's

"The purpose of the termination provisions is to compensate and not reward..."

remaining Contract work, that being like for like. Termination is not an opportunity to replace a "pistol" with a "sniper rifle" and then expect the Contractor to bear the cost.

To emphasise the importance of this, Pyments were recently appointed in a matter for a civils Contractor, in which an Employer sought via a termination account to offset alleged expenses incurred in the completion of the remaining Contract Works (which were nominal). In addition to this, the Employer had also not paid for Variation works properly completed. Conveniently, by the

time the matter was referred to Adjudication, the amount offset when compared to the value of Varied works matched to the nearest penny!

The Adjudicator nicely summarised the Employer's responsibilities stating:

“In my opinion, [the Employer] has not demonstrated that the [replacement Contractor's] cost that it says it has incurred related to the same scope of works that [the Contractor] was required to undertake and complete as part of the Contract and does not include for any additional works or Variations.....as the burden of proof lies with [the Employer], which in my opinion it has not discharged, for the purposes of this Adjudication I allow [the Contractor's] valuation”.

In conclusion, a six-figure sum was awarded to the Contractor, but with both parties having already spent significant sums prosecuting and defending a position instigated by the Employer.

Similarly, where the Contract is terminated by the Contractor the calculation of direct loss and/or damage caused to the Contractor by the termination is often lacking substantiation and

fails to consider the Contractor's duty of care to the Employer.

The general principle to be applied when calculating (and intending to recover) loss and/or damage as a result of termination, is similar to that applied when calculating loss and/or expense for prolongation (for further commentary on this see the Spring 2021 edition of Pymments InFocus magazine where the article 'The red pill or the blue

pill?' sets out useful guidance on how to prepare your prolongation claim).

The purpose of the termination provisions is to compensate and not reward. Therefore, the objective is to put the Employer, Contractor or Sub-Contractor in the same financial position it would have been in had the termination not occurred.

The procedures may vary depending on the form of Contract, for example if operating under an NEC contract it is the Project Manager (not



the Employer) who prepares the termination certificate and certifies the final payment. Albeit, the differences in terminology between the JCT and the NEC with regard to *“properly incurred”*, and *“reasonably incurred in expectation of completing the whole of the works”*, may, if using the NEC, be considered an opportunity to some!

Another dynamic to consider for the Contractor is the added complication of a Sub-Contractor's default being the primary cause of its termination under the Main Contract. The Contractor may be required to pass on costs incurred as a result of the Employer's losses, and what may be reasonable to some may not be reasonable to others.

In short, you should fully validate your claims, mitigate any losses, and provide a proper audit trail of the process, i.e., keep everything transparent and demonstratable. Following such established principles, you should not go too far wrong.

The point is, don't fall short of your duty, transparency and validation is the name of this game.

But most of all, be careful, and with one final reference to “Call of Duty”, it's a warzone out there!



Jess Whiston
Consultant

Jess brings a wealth of commercial and contractual experience to her role, predominantly in construction and civil engineering, including acting as party advocate in adjudication, as well as providing hands-on support and advice in the preparation and settlement of final accounts, claim particulars, and liability and quantum analysis.

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Questions and answers with Adrian Purvey

Adrian brings a wealth of experience to the arena of dispute resolution and negotiation, providing consultancy services and advice in relation to commercial matters including review and negotiation of contract conditions, risk and opportunity analysis, negotiation and resolution of extensions of time and loss and/or expense.



When did you join Pyments?

I first undertook a consultancy role for Pyments before joining the gang full time on 1st April 2015 as a Senior Consultant. I don't think there was anything sinister about the date they asked me to join!!



What did you do before?

I started with a Main Contractor construction company in 1980 as a Trainee QS. My interest had been sparked due to living on a new, partly constructed, housing development at the time, and having a conversation with the site team who of course all loved their visiting QS! I remained in the contracting commercial arena for the next 30+ years, working my way through the ranks to the role of Commercial Director for a large multi-national Main Contractor.

What do you do?

Using the experience I have gained throughout my career in being involved in, and leading the commercial aspects of, a multitude of construction projects, and subsequently the strategic aspects of business from a senior management role, I provide commercial and contractual advice and support to a wide range of clients including Main Contractors, Sub-Contractors and Employers/Developers. I also provide services relating to dispute prevention and resolution, and have represented a number of clients in this capacity with negotiating skills, mediation, and where necessary support and principal advocacy in adjudication.

What do you like about Pyments?

I can honestly say the colleagues I work with at Pyments are firstly dedicated, professional, multi-disciplined and multi-skilled individuals, but also, and importantly, they come together as a fantastic team which allows the company to successfully undertake a wide range of commissions, be they high value, complex, or less so, but nonetheless all are approached with the same enthusiasm and dedication to “get the job done” for our clients. A great place to be, and a great place to work.

What do you do away from work?

I used to be a part-owner of an Italian restaurant, which was a complete diversity from my day-job, but was an enjoyable experience. We decided to sell not long before Covid hit, so possibly an astute move! I enjoy going away on holiday (if I can remember that far back!), and as my partner is Swedish, we very much enjoy going to her cottage in the middle of Sweden which is on the shore of a beautiful lake in the middle of a vast forest, the nearest neighbour being about a mile and a half away, bliss.

What might someone be surprised to know about you?

Whilst my sporting passion is rugby union, having played at centre, and having been a season ticket holder at Leicester Tigers for more years than I care to remember, I crossed over (the pond and to the dark side!) to play American Football, as an Outside Linebacker playing at first for Leicester and later in my “career” for Loughborough. I have now returned to the fold, and continue to follow Tigers home and away.

What advice would you give to someone looking at a similar career?

Importantly make sure it's a career that you enjoy. Find out, and ask questions about, the role you will be undertaking, not just at the start, but at intervals along your career path. Set yourself some realistic goals to achieve at those intervals, and don't be afraid to ask for help. However, also don't be afraid to reappraise or change those goals and achievements, be a life-long learner. Find a mentor, and be a mentor, both can give you satisfaction, support and a sense of achievement. Use emotional intelligence as well as IQ wherever you can, as a high degree of emotional intelligence will outperform high IQ in the workplace. Work hard and smart, do what you say you will do, and venture outside of your comfort zone to gain experience, but also play hard, it's important to be happy in what you do.



About Pyments

Pyments is 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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*This list is not extensive. Please contact us for further information about how we can help you.

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