

InFocus

Issue No. 5 - Spring 2021

Insights into the
construction industry
with Pyments Periodical

pyments
"a clear resolution"

A close-up photograph of two human hands, palms up, holding pills. The left hand holds a single red pill, and the right hand holds a single blue pill. The background is a dark blue field filled with a pattern of white binary code (0s and 1s).

THE RED PILL OR
THE BLUE PILL

See
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InFocus

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This 5th 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:

Dispute Resolution >

Programming & Delay Analysis >

Mechanical & Electrical Solutions >

Project Monitoring >

Consultancy Services >

Bespoke Training & Workshops >

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It will never be quite the same but it's time to move on!!

Introduction by Tim Hart, Managing Director of Pyments

I can't lie, finding the time to sit down and draft an interesting, light-hearted & though provoking piece for the latest InFocus publication has been a little trickier than I thought.

Not because I don't want to do it, and not because my social diary has been particularly full (thanks Covid!), but because personally I've never been so busy.

When seeking content inspiration, I turned to my previous musings in the InFocus issued in Autumn 2020.

Did I foresee the strains of home working still being prevalent in Spring 2021?

No, I did expect however, perhaps optimistically, that we would be back to the office and having face-to-face meetings. Not rearranging the book shelf in the background of your Teams screen view, and hoping the dog doesn't attack the Amazon delivery driver during the meeting!

Did I foresee a 'stockpiling effect' of work load from 'lockdown 1'?



Yes, the cork has well and truly popped since Autumn 2020 and my personal involvement on a raft of instructions from entitlement preparation documents, to serial adjudications and full-blown litigation has probably been as unrelenting as any time since I started Pyments over 30 years ago.

This has meant that I've spent a little too much time 'in the business' as opposed to 'on the business', however sometimes you've just got to roll your sleeves up, get stuck in and get on with it. Anyone who knows me, knows that I do enjoy it when its 'muck and bullets' time!

That being said, I am also indebted to our stable of experienced, highly competent and dedicated personnel who readily take their own share of such pressures. Moving forward I do intend to adopt a far more strategic role in all sectors of the business. No matter how much I enjoy the challenge and variety of the work which helps to keep the old 'grey matter' ticking, I have to recognise to take Pyments to the next level, demands a bit more than simply 'turning up'.

So, what do I foresee for the next six months before I sit down and draft for the next InFocus in Autumn 2021?

Well, I have to admit, based on current and future work in the pipeline, I can see adjudicators, mediators and TCC judges being kept busy!

It would also be nice to think our highly respected 'Bespoke Training' sector will start to kick in again as offices begin to open and the restrictions on the numbers of people congregating in one place are lifted. This will be a very welcome return to normality; it's always nice to get

out and about to see and hear differing individual's perceptions of the construction industry, and appreciate first-hand some of the issues and challenges which arise under the various forms of Building Contracts.

In short, whilst it will never be quite the same, it's time to move on.

From a personal perspective I will also have my fingers crossed that I get lucky in the ballot for my Euro 2021 tickets! I bought tickets over 18 months ago, so to lose my seats on the cusp of the tournament actually starting doesn't bear thinking about. Not to mention my tickets for the cricket as well. You see, it's not all work!

You can't spell opTIMistic without TIM, so I'm confident I'll be cheering our glorious boys to victory in the Summer!! C'mon England (and best wishes of course to Scotland and Wales as well!).

Tim Hart

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Anything worth doing....

By Stuart Neville, Senior Quantity Surveyor/
Programme Analyst at Pyments

As Aristotle once put it,

“Anything worth doing,
is worth doing well”

Whilst Greek philosophy is not readily associated with the UK construction industry, a few of the more 'entry level' quotations are highly relevant to how we conduct ourselves on an individual basis when completing the day job. One of my personal favourites is included above and is a recurring theme which is to be considered when reading this article.

The article addresses the thorny issue of 'Global Claims' and confirms to Contractors and Sub-Contractors alike that the *Walter Lilly* case is far from a 'green light' for the successful adoption of a global claim when seeking to demonstrate entitlement. This may not make

overly pleasant reading for those looking to promulgate a claim on such a basis however I feel it is important to share this information; after all to quote Aristotle again.....*"A friend to all is a friend to none"*.

"The Protocol still actively discourages the promulgation of global claims and supports fully particularised and appropriately apportioned assessments of entitlement to additional time and money."

As regular readers (and why wouldn't you be?!) of In Focus will know, Pyments often make reference to the SCL Delay & Disruption Protocol (2nd Edition) when seeking to demonstrate / ascertain entitlement to additional time and / or additional money. In respect of retrospective delay analysis, the Protocol sets out appropriate methodologies depending upon a particular set of project specific circumstances. The Protocol attempts to cater for all eventualities and all level of records available.

It is therefore surprising that in this digital age and with improvements in record keeping, why global claims for entitlement to time are still promulgated, and if anything would recently appear on the rise.

“A friend to all, is a friend to none.”

The Protocol defines a global claim as *“one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events”*. Further, Keating on Construction Contracts defines global claims as *“one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events / matters relied upon and the alleged loss and damage or delay that relief is claimed for”*. There are mixed definitions on what constitutes a global claim and no hard and fast rule, albeit all sources appear to agree that such a claim fails to adequately explain the cause and effect of delay and the losses attributable to the delay in question.

The history of global claims may well explain the current trend in its use. Historically, a global claim would fail in its entirety if it could

be proved that one part of the delay or loss in a global claim was caused by a ‘not merely trivial’ culpable event. This was often referred to as the ‘Exocet’ defence.

The Courts appeared to soften this position in *Doyle v Laing (2002)* where the culpable event no longer had to be ‘not merely trivial’ but had to be ‘significant’

or dominant in order for global claim to fail.

Walter Lilly v Mackay (2012), changed the law further wherein Judge Akenhead clarified global claims should not fail in its entirety if it was found the claimant was in part responsible for a delay; instead, the claim should simply be reduced by the contributing culpable event. It would seem therefore, similar to the missile which bore its name, the ‘Exocet’ defence was no more.

In cognisance of *Walter Lilly*, The Protocol recognised a new *“trend for the courts to take a more lenient approach when considering global claims”*. However, The Protocol still actively discourages the promulgation of global claims and supports fully particularised and appropriately apportioned assessments of entitlement to additional time and money. In short, *“Anything worth doing, is worth doing well”*.

Some sections of the industry appear to rely upon this recognised leniency toward global claims, which when combined with the relatively low-cost investment in producing global claims, appears to have contributed to my perception that global claims are increasingly common.

When considering appropriate demonstration to additional time and money *Walter Lilly* should



not be purely relied upon as a Case which 'opened the door' to global claims being an accepted industry norm. It is important not to gloss over the conclusion from Judge Akenhead which are now commonly referred to as the *'Seven Principles for Global Claims to Succeed'*.

The breadth of these principles are not detailed within this article, save reference to two key elements;

1. **Judge Akenhead noted there is no need for a court to go down the global route if the actual cost to each attributable loss / event can be readily or practicably determined; and**
2. **If a party chooses to go down a global claim route, when a case could have been produced showing causation, a tribunal will look at it sceptically.**

These principles are fundamental and commonly overlooked by parties when providing reasoning to their use of global claims. Failing to adhere to these principles may well lead to a global claim being dismissed.

As with most modern construction projects, data and records are routinely collated and exchanged between the parties to a Contract. Most often than not, and usually as a bare minimum, updated progress programmes are provided by the Contractor as part of the monthly progress reports. Whilst the quality of this information varies, there is usually sufficient data that exists to analyse and sever delays and associated losses i.e. a traditional analysis can be undertaken.

Given that in most instances both parties will have similar if not the same level of records, and such records facilitate a traditional form of analysis as per the guidance of The Protocol, it would seem a risky strategy for a claimant to promulgate a global claim in lieu of a traditional recognised method. Don't be fooled into thinking a global claim will be successful, and is an appropriate substitute for doing a 'proper job'. After all...

"Anything worth doing, is worth doing well"

For information about delay analysis, project record keeping and commercial and/or contractual advice please do not hesitate to contact Pyments.



Stuart Neville

Senior Quantity Surveyor/Programme Analyst

Stuart is a programming and delay expert and chartered quantity surveyor with over fifteen years' experience. He has wide-ranging experience in many aspects of construction, including commercial office buildings, HM Prisons, hospitals, civil engineering, residential, transport, petrochemicals and infrastructure.

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The red pill or the blue pill?

By Alan Powell, Senior Quantity Surveyor/Programme Analyst at Pyments

“This is your last chance. After this, there is no turning back. You take the blue pill, the story ends, you wake up in your bed and believe whatever you want to believe. You take the red pill – you stay in Wonderland and I show you how deep the rabbit hole goes...”



To continue the theme of shamelessly shoehorning movie references into Pyments 'In Focus' articles, I draw your attention to the quotation taken from a favourite film of mine; The Matrix (...not sure about the sequels though!). The quote is taken from the moment Morpheus offers Neo two paths depending upon which pill Neo decides to take. The red pill offers the opportunity to learn a potentially unsettling truth (“you can’t handle the truth” – Ed !!), whilst the blue pill will result in remaining in contented ignorance. Obviously, it would have been a bit of a short film had Neo taken the blue pill, however it is a concern how many Contractors and Sub-Contractors seem to

have swallowed a healthy dose of the blue pill when it comes to recovering prolongation costs.

Those of us who have swallowed the metaphorical red pill, will be aware that Contractor’s entitlement to additional time does not automatically result in entitlement to additional money, and vice versa. If a project is in delay and over budget, establishing time entitlement is only half the battle. The monetary

“just like Neo, it is important to unplug and enter the real world!”

assessments produced by many Contractors still falls some way short of the necessary demonstration which would be required if the matter was heard in front of a third party.

Whether working in a capacity to advise the Employer, the Contractor, or the Sub-Contractor we at Pyments are still finding we have to make assessments and / or adjust entitlement papers which demonstrate a seemingly contented ignorance when it comes to prolongation costs. As we know, claims for prolongation costs would typically include the cost of time related resources

expended by the Contractor / Sub-Contractor and which can be generally categorised as (i) Site Management; (ii) Accommodation; and (iii) Plant and Machinery. These types of costs are typically referred to as Preliminaries.

The calculation for additional Preliminaries is often confused and we see a number of instances where tender rates are applied as opposed to the actual cost incurred and / or the period of additional Preliminaries being applied for has been assessed during the period between the original completion date and the actual completion date. In such instances, just like Neo, it is important to unplug and enter the real world!

The general principle one must apply when calculating prolongation is that the purpose is to compensate and not reward; therefore, the objective is to put the Contractor / Sub-Contractor in the same financial position it would have been in had the prolonged period on site not occurred. Compensation for prolongation should not be paid for anything other than work actually done, time actually taken up or loss and / or expense actually suffered. In other words, the compensation for prolongation caused other than by variations is based on the actual additional cost incurred by the Contractor / Sub-Contractor.

This position may on occasion vary depending on the form of Contract; for example if operating under an NEC contract, prolongation costs can only be recovered through 'compensation events' which due to the prospective nature of the assessment may have been 'accepted' without the need for actual cost to have been incurred. This may, in some instances, provide a financial opportunity to the Contractor, however the pitfalls associated with not assessing the impact of prolongation based costs at the time and through the compensation event mechanism can be severe, and financial entitlement may be lost.

Another factor to consider for the Contractor is the complication of passing a Sub-Contractor's prolongation claim 'up-the-line' as a composite part of its own claim. Working on the basis that prolongation costs are only to be recovered as compensation, then technically the Contractor is only entitled to recover the Sub-Contractor's prolongation costs actually paid. The Contractor is left in the unenviable position of paying the Sub-Contractor's prolongation costs without having any guarantee that the same costs will be recovered 'up-the-line'. Whilst such claims are often brought 'up-the-line' on a contingent liability basis there is an inherent risk that if a commercial deal is brokered 'down-the-line' the necessary demonstration that the costs

“When calculating a prolongation claim, a logical approach to determine such costs is to calculate an average of the actual time related costs during the delay periods, which can then be multiplied against the period of delay.”

incurred are reasonable, appropriate and evidence may be sadly lacking. Ultimately, the Contractor will have a duty of care to the Employer and the necessary burden of proof remains with the Contractor. Commercial



awareness is essential to ensure the Contractor is able to dodge bullets (to continue The Matrix metaphors!).

To ensure the bullets are successfully dodged this article sets out guidance on how to prepare your prolongation claim. It is a common misunderstanding in the construction industry that if the Contractor has made inadequate allowance for site overheads in its tender, then that fact limits its entitlement to compensation for prolongation where the basis of recovery is actual cost incurred. This is not correct. Under these circumstances recoverable compensation requires the ascertainment of the actual cost of remaining on site for the additional time. The tender allowances are therefore of little relevance to the ascertainment of compensation under these circumstances.

When calculating a prolongation claim, a logical approach to determine such costs is to calculate an average of the actual time related costs during the delay periods, which can then be multiplied against the period of delay. When ascertaining an average for the actual

time related costs the following considerations should be taken:

1. Obtain a cost pool which should set out all costs incurred on the project during the relevant period.
2. Remove from the cost pool all direct costs (i.e. fixed costs and task / volume related costs linked to units of work) and any one off costs which are not time related (e.g. mobilisation charges that would have been incurred in any event).
3. Identify and add any indirect time related cost (i.e. head office costs)
4. Calculate any abatements for any indirect related costs which have been recovered elsewhere (i.e. dayworks, variations or other claims)
5. Provide relevant explanation on how relevant resources have been delayed by the events.
6. Keep records to evidence the costs (i.e. site diaries, photographs, timesheets, subcontractor records)
7. Issue all necessary formal notices required by the contract, entitlement may be lost if not served.
8. Do not add a percentage profit, as profit is not a cost incurred (profit can only be recovered as a loss of opportunity).

In conclusion, within the frantic and chaotic environment of a project which is in delay and over budget, it is very easy to lose track of reality, and disregard the basic principles of recovery for prolongation. I hope by following me through the rabbit hole, you can see it is not too difficult, by adhering to the principles set out above a Contractor / Sub-Contractor should be able to greatly improve its prospects of success in pursuing a prolongation claim, but I can only show you the door, you're the one that has to walk through it!

For information about delay analysis, project record keeping and commercial and/or contractual advice please do not hesitate to contact Pyments.



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. 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 Dilaur Rahman

Dilaur is an experienced Project Monitoring Analyst and Programme Analyst and has successfully undertaken instructions across a range of different sectors including Higher Education, Private Healthcare, Major Banking, UK M&E Infrastructure, UK Space Technology, Large Scale Residential Apartment Complexes and Care Villages.



When did you join Pyments?

I joined the Pyments Project Monitoring (PPM) division of Pyments as a Technician in December 2014.

What does your job involve?

I am responsible for the 'PPM' instructions. This involves site visits and record keeping, liaising between the different construction parties, analysing delays and drafting month end reports. In addition, I have acted as both assistant and primary delay analyst in the preparation and analysis of construction delays.

What were you doing before Pyments?

Having completed my degree in 2012 and subsequently my masters in 2013 I went on to gain some much-needed experience working for a large nationwide house builder and then a structural firm specialising in strengthening and repair. Both very different environments providing invaluable 'on-site' experience.



What do you like about Pyments?

I like the variety of work. Every job has a different challenge and it is these challenges which has enabled me to acquire additional skills and to develop professionally. Also, when Government restrictions allow us to go into the office, I really like the picturesque and calm countryside setting where Pyments is located. It's just not the 'norm' or what you would expect from a construction consultancy business working on high profile construction projects.

Away from work what do you get up to?

Well, since Covid has been with us not a lot! I have a young family so most of the time my wife and I are usually busy keeping our Disney princess obsessed 2-year-old daughter and boisterous one year old son entertained. Like the rest of the general public, we have been soldiering on making the most of it, taking up nice long family walks and exploring the beautiful local woodlands.

Favourite food?

My wife's version of Wagamama's Firecracker Chicken is to die for! Definitely my favourite at the moment.

What might someone be surprised to know about you?

When we were younger my cousin and I were very much into kickboxing; we fought regularly in tournaments organised against other local gyms in Birmingham doing reasonably well. One thing I will ashamedly admit to was how we used to skip the odd training session and instead go to the local kebab house, eventually getting caught out.... Yikes!

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

Get as much experience as you can before, during and after your university studies and also consider trades like carpentry or bricklaying. If opportunities are scarce, try voluntary/charity work too, this will show prospective employer's that even if you haven't got the experience that is required, you can at least evidence a can-do and hands on attitude to work.

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

Lately there has been an upturn in Construction Technology (also referred to as 'ConTech') being used to aid management of construction processes. With the amount of investment being ploughed into this area I can see more and more construction companies trying new ways to do 'more for less'. However, the integration of new and unproven solutions can be expensive so this may still be a slow transition/process over the next 5 years.



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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