



InFocus

Issue No. 9 - Autumn 2023

Insights into the
construction industry
with Pyments Periodical

pyments
“a clear resolution”

CONTRA CHARGES: THE BURDEN OF PROOF AND A DUTY OF CARE

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InFocus

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This 9th 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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Pyments core services:

Dispute Prevention & Resolution >

Programming & Delay Analysis >

Mechanical & Electrical Solutions >

Project Monitoring >

Consultancy Services >

Bespoke Training & Workshops >

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Lies, damn lies and statistics?

Introduction by Gordon Connell, Managing Director of Pymts

Doesn't it feel that, whatever it is we're engaged in, we're exposed to a greater level of competing data, statistics and “*alternative facts*” (remember those!).

I'm often asked... what are the most commonly contested issues in construction disputes? The short answer is of course “time and money” and, in truth, many disputes concerning time will also relate to money; perhaps in respect of entitlement which ‘may’ follow an extension of time award, or, the application of (or relief from) damages... and, in the face of such alternative facts, the sub-set of contested issues (to time and money) are as long and varied as you might possibly imagine!

Another very common question (what should I do to remove or mitigate risk to time and money?) is one that is very often asked, but not routinely acted upon, i.e., either not at all, or not often enough. The long list of answers to this second question are highly interesting, but it starts simply with an appreciation that prevention is better than the cure and, if you, dear reader, have walked over the hot coals of a significant and challenging dispute then, in my experience, you will be far more likely to do “something” to avoid getting burned a second time.



It would, however, be misleading to suggest that the resources you invest in “prevention” is simply about avoiding risk, it is far more about putting in place those measures necessary to deliver projects that do more than simply wash their face; when compared to other industries, profit margins within the engineering and construction industry continue to be amongst the very lowest, and projects that do little more than wash their face are, sadly, often considered a moderate success.

So where is the silver bullet to remedy all of that? The best of the senior leaders that I meet understand the vision they have only works if it's shared, developed and implemented by those tasked with delivering upon that vision, at all levels. Too often though, that vision doesn't reach the ears or laptops of those you need to rely upon to make it happen.

When we invest heavily in *procuring* new business, then it should not be controversial that we expend an appropriate level of resource, time and energy (in advance of stepping into contract on said new business) to ensure we've satisfied ourselves of the risk, and opportunity, that may be realised.

But I have to ask... isn't that only the starting point? Assuming the project isn't mortally wounded before you begin (it's been known!), then identifying and delivering upon the work necessary to realise your vision, is truly where you will nurture the growth that will see a return to profit, project by project, and business-wide.

Our work with client teams embraces the vision and digs deep in the detail, to develop the hands-on and strategic management of project delivery, where the shared ambition is to see the benefits of commercial success on a single project, transition across the business.

If anything of the foregoing sounds familiar, or you'd like to discuss how you and your firm may benefit from a similar approach, then please do get in touch. And as I always say... it doesn't cost either of us anything, to have a five-minute conversation!

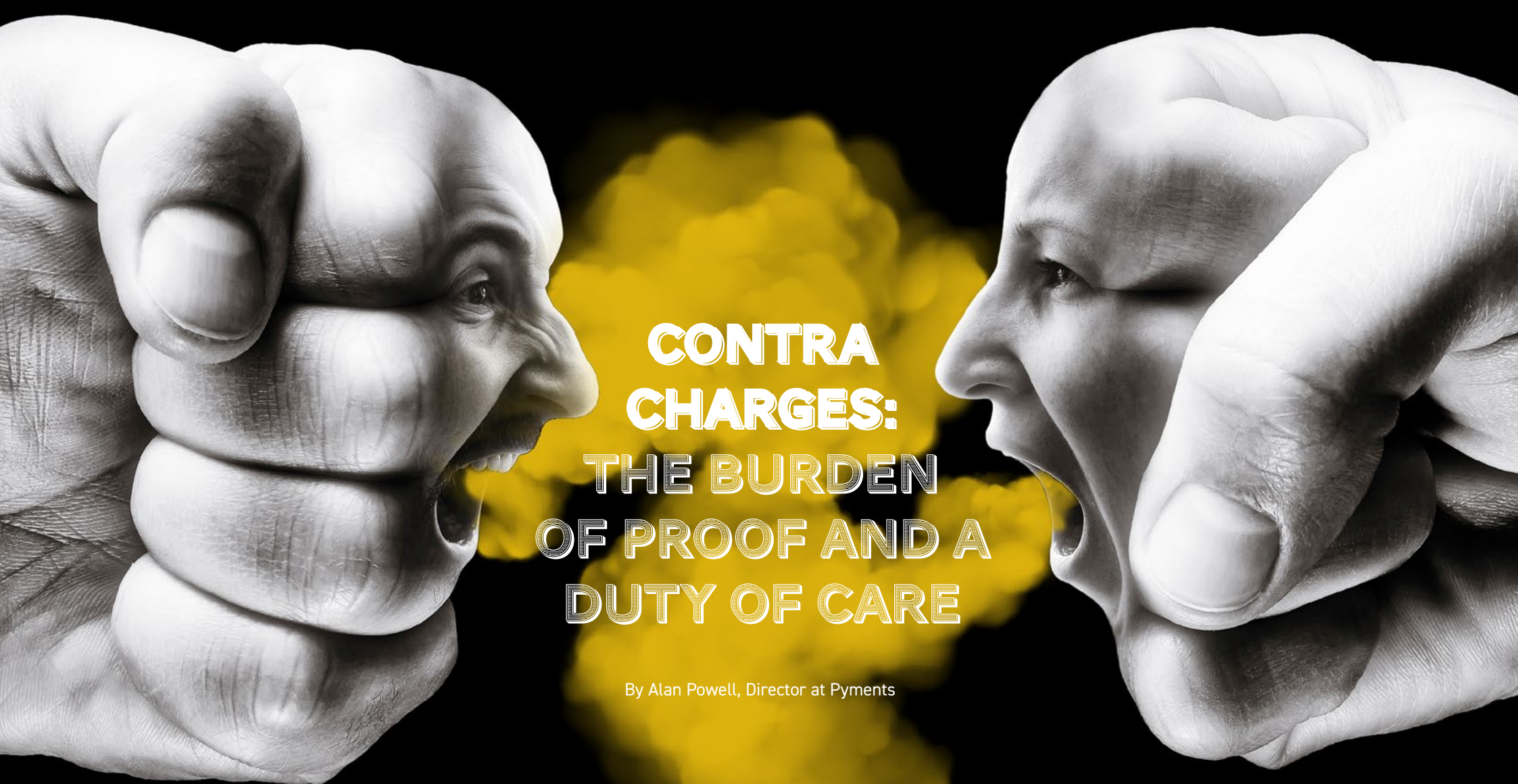
Gordon Connell

Managing Director

Gordon Connell
Managing Director

Gordon brings local and international experience and cross sector exposure to his role as Managing Director of the Pyments business. His strong senior management background benefits client requirements by getting to the root of issues quickly and decisively.

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A dramatic black and white image showing two hands, each with a human face, shouting or arguing at each other. The hands are positioned on the left and right sides of the frame, with their faces facing each other. The background is a bright, glowing yellow cloud-like shape against a dark background.

CONTRA CHARGES: THE BURDEN OF PROOF AND A DUTY OF CARE

By Alan Powell, Director at Pyments

We are seeing an increasing number of Main Contractor / Sub-Contractor disputes which relate either in part or entirely to issues of Contra Charges. They form a regular part of disputed interim or final accounts which are referred to adjudication and typically, it is the 'Contra Charger' (!) and not the 'Contra Chargee' (!) who is on the wrong end of the decision.

The existence of Contra Charges is probably as a result of an error or mistake which is likely to have been an alleged breach of contract or negligence on the part of a Sub-Contractor. No one likes to be told they have erred, and it is rare for people to admit their mistakes; this is



human nature. As a result, Contra Charges and the deduction of monies due from a Sub-Contractor's account are typically emotive issues which frequently leads to ambiguity and dispute between various parties in the supply chain.

On a typical construction project, where contracts exist between the Main Contractor and any number of Sub-Contractors, damage may be caused by Sub-Contractor "A" to works carried out by Sub-Contractor "B". The rectification costs will often be claimed by "B" against the Main Contractor. In turn, the Main Contractor will seek the costs claimed by "B", with an addition for its own management costs and sometimes delay or disruption related costs against "A".

The interdependence of several parties to a Construction Contract often all "pointing fingers at each other" when damage or errors occur, does nothing for the collaborative spirit and team ethos often essential to effectively delivering construction projects.

However, the Contra Charge process needs to be effectively managed to ensure the Main Contractor protects itself commercially and contractually. To this extent it is imperative a system of recording alleged breaches of contract or negligence by various parties is put in place; including the formal notification of alleged breaches and the imposition of Contra Charges through further notifications from the Main Contractor to the supply chain.

Record keeping is an essential element for establishing entitlement for Contra Charges, Abatement and / or Set Off. The "burden of proof" rests with the Contractor and therefore record keeping and detailed particularisation to demonstrate both liability and quantum is necessary.

The relevance and importance of good site records cannot be over-emphasised; the records produced must be accurate, informative and explain what actually did happen on site. The foundation of any successful Contra Charge account is the level of records available to support the Contractor's case. So often, a lack of good records can severely prejudice the success of any prospective claim accounts.

In the same way that the Contractor will be expected to justify entitlement and the quantum of a change or variation under the Main Contract, the Contractor will similarly be required to evidence its entitlement to Contra Charge sums and provide supporting particulars of the sums being deducted

from the Sub Contractor's account. Therefore, the Contractor must be cognisant of the fact that when dealing with Contra Charges, it is the Contractor who must satisfy the requisite **"burden of proof"** and demonstrate it has achieved the **"duty of care"** expectation when engaging with the supply chain.

Without the necessary substantiation and an appropriate **"duty of care"**, the Main Contractor may be left having paid

Section 3

Control of the Sub-Contract Works

Clause 3.11

"If any work, materials or goods are not in accordance with this Sub-Contract ('non-compliant work') the Contractor, in addition to his other powers, may:

- 1. issue directions requiring the removal from the site or rectification of all or any of the non-compliant work provided that.....the Contractor shall prior to the issue of such directions **consult with the Sub-Contractor** and shall have **regard to the Sub-Contract Code of Practice set out in Schedule 5;***
- 2. **after consultation** with the Sub-Contractor, issue such directions requiring a Variation as are reasonably necessary as a consequence of any directions under clause 311.1 (but to the extent that such directions are reasonably necessary, no adjustment shall be taken into account in the calculation of the Final Sub-Contract Sum and no extension of time shall be given);....."*

the costs of "B" without meeting the necessary **"burden of proof"** that they can recover these costs against "A".

To ensure the Main Contractor adequately protects itself the inevitable recommendation from Pyments is to refer to the Contract... (or Sub-Contract) ... (or Sub-Sub-Contract)!! Using the JCT 2016 Design & Build Sub-Contract as

example (see extract above) the appropriate conditions of contract when applying the administrative aspect of remedying errors or mistakes within the Sub-Contract Works.

With specific reference to the Sub-Contract, it is essential for the Contractor to clearly set out the 'non-compliant work'. The Contractor must also consult with the Sub-Contractor prior to

issuing any direction in respect of the 'non-compliant work'; and consultation must have regard to the Sub-Contract Code of Practice.

The Sub-Contract Code of Practice is not specifically quoted in this toolbox talk however the JCT 2016 DB Sub-Contract reinforces the **"duty of care"** principle. The Code of Practice requires a detailed assessment of both the extent and significance of the non-compliance and the reasons for the non-compliance recorded. It also recommends the Parties agree the amount and method of the remedial works and the practicability for both time and costs associated with same (i.e.; rectification or removal).

So, what happens when the Sub-Contractor does not rectify the 'non-compliant work'?

The Contractor has the power to issue any reasonable direction to the Sub-Contractor in regard to the Sub-Contract Works (Clause 3.4), and the Sub-Contractor shall forthwith comply with all directions issued (Clause 3.5) subject to reasonable objection being notified. Non-compliance with directions is referenced at Clause 3.6.



...if within 7 days after receipt of a notice from the Contractor requiring compliance with a direction the Sub-Contractor does not comply, the Contractor may employ and pay other persons to execute work of any kind necessary to give effect to that direction. The Sub-Contractor shall be liable for all additional costs incurred by the Contractor in connection with such employment and an appropriate deduction may either be taken into account in the calculation of the Final Sub-Contract Sum or be recoverable by the Contractor from the Sub-Contractor as a debt.

Although the JCT 2016 DB Sub-Contract does not place a mandatory obligation on the Contractor to issue a notification in accordance with Clause 3.6 it is strongly recommended a notification is issued providing information which where possible / practicable includes the following:

- The amount and extent of rectification / remedial works to be given to others;
- The details of those employed to undertake the rectification / remedial works;
- The specific location and timing of the rectification / remedial works;
- The additional costs incurred for which the original Sub-Contractor is liable.

Whilst this information may not be available in the first instance it is recommended that the Contractor informs the Sub-Contractor as and when additional detail becomes available. When assessing disputed Contra Charge accounts, transparency of contemporaneous information and

a demonstration that the Contractor has acted fairly and reasonably in the circumstances, is a preferred backdrop when such issues are referred to third party dispute resolution.

Upon employing others to rectify / remedy the 'non-compliant work' there is a **"duty of care"** placed upon the Contractor to ensure the costs incurred and seeking to be deducted from the Sub-Contractor are proportional and reasonable. It is not an 'open cheque book' for the newly employed Sub-Contractor to undertake the remedial works.

As you may have gathered, the repeated message in this article is the emphasis on the Contractor to consider the **"burden of proof"** and demonstrates sufficient **"duty of care"** to the supply chain. If deductions are made to interim applications the Sub-Contractor may have the right to adjudicate on these items. In many instances we are finding that when put to the test through the adjudication process, the supporting information in respect of both liability and quantum for the deductions made from the Sub-Contractor's account was lacking and the adjudicator could not find for the Main Contractor, even on the "balance of probability" threshold requirements in adjudication.

For each and every deduction from the Sub-Contractor's account the Main Contractor is reminded "*he who asserts must prove*" to ensure appropriate recovery when Contra-Charge issues arise.

The common mistakes Contractors make are:

1. Failing to ensure that information is available to inform the Sub-Contractor contemporaneously that a proven breach has been notified;
2. Failing to provide reasonable opportunity for the Sub-Contractor to remedy before "others" are employed; and
3. When "others" are employed, failing to maintain a detailed cost log and failing to communicate the costs effectively to the Sub-Contractor.

If you have any queries or require any assistance on issues of Contra Charge please do not hesitate to get in touch.



Alan Powell

Director

Alan's wide-ranging expertise enables him to provide liability, quantum and delay analysis across a variety of commercial and contractual matters, including acting as principal advocate in adjudication and mediation.

Alan also supports Pyments professional training programme, both in the delivery of client training workshops, and in the drafting of training material for Pyments NEC, JCT and Extension of Time workshops, delivered across the UK.

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We are recruiting!

At Pyments we're always on the lookout for great talent to join our team. Pyments are one of the UK's leading construction consultancies, committed to supporting and advising on client needs across a diverse range of projects and sectors.

We have an enviable client base working with some of the biggest and best in our industry. We thrive on the challenge and enjoy a lively and engaging workplace where everyone has the opportunity and a voice to initiate and effect change.



Current opportunities:

Consultant / Senior Consultant

Pyments is seeking a commercially strong individual to join our expanding Dispute Resolution and Claims Management team. The successful candidate will have a minimum of 3+ years commercial / related experience gained within the construction or engineering sector. Both Consultancy and Contractor orientated backgrounds will be considered. Preferably, the candidate will be chartered by a relevant professional body and have a keen interest in developing their experience in the specialist field of dispute resolution.

Quantity Surveyor / Senior Quantity Surveyor

Pyments is seeking a QS/ Senior QS to manage and oversee projects in both the Contracting and Employer sectors. The successful candidate must have 3+ years post graduate quantity surveying related experience gained within the construction or engineering sector, and an aspiration to accelerate your career and develop your experience in sought-after field.

If this sounds like the environment you would like to work in, please contact Jessica.Whiston@pyments.co.uk

The Scope of Works – is it in, or is it out?

By Chris Kevis, Senior Consultant at Pymnts

This article relates to a case study example of a dispute Pymnts have had involvement with for several months and which has been the subject of serial adjudications. It is a stark reminder that what is written into the Contract is pivotal to the obligations placed upon the parties, despite any agreements reached prior to Contract formation.

The Contractor was appointed under a JCT D&B Contract 2011. The contract was negotiated on an 'open book' basis under a pre-construction services agreement ("PCSA"). The Main Contractor and the Employer agreed to work together under the terms of the PCSA to agree a lump sum cost for inclusion into the Building Contract as the Contract Sum.

What went wrong?

The main reason why a dispute arose, was because there was a difference between the scope of works negotiated and priced by the

Contractor at the PCSA stage and the scope of works that ended up in the contract and included in the Employer's Requirements ("ERs").

Had the Contractor identified these differences at contract stage and insisted the contract documents were corrected, it could have either increased the Contract Sum or amended the scope of work included in the ERs.

It would of course have been preferable if the ERs had not

contained items of work which the Contractor had not priced in the Contract Sum. It is possible this arose because the Contractor wrongly assumed agreements about the scope of works and price reached during PCSA 'open book' negotiations would be directly replicated in the ERs and other Contract Documents.

This adjudication was a stark reminder that the Contractor's obligations are contained within 'the four corners of the Contract'.

Alternatively, it may have been assumed that records of the pre-contract agreements reached with the Employer (which were recorded in correspondence / meeting minutes etc.), would have been sufficient to evidence which items of work were included in the scope of work, and which items of work were not.

There was clear evidence that the parties agreed that particular elements of work would not be included in the Contract Sum. In fact, there was written evidence that the parties removed a six-figure sum from the Contract Sum Analysis for same. Notwithstanding, a drawing indicating this particular element of work and words describing the disputed works, found their way into the ERs.

The Contractor's claim in adjudication for the disputed work failed.

Legal Interpretation

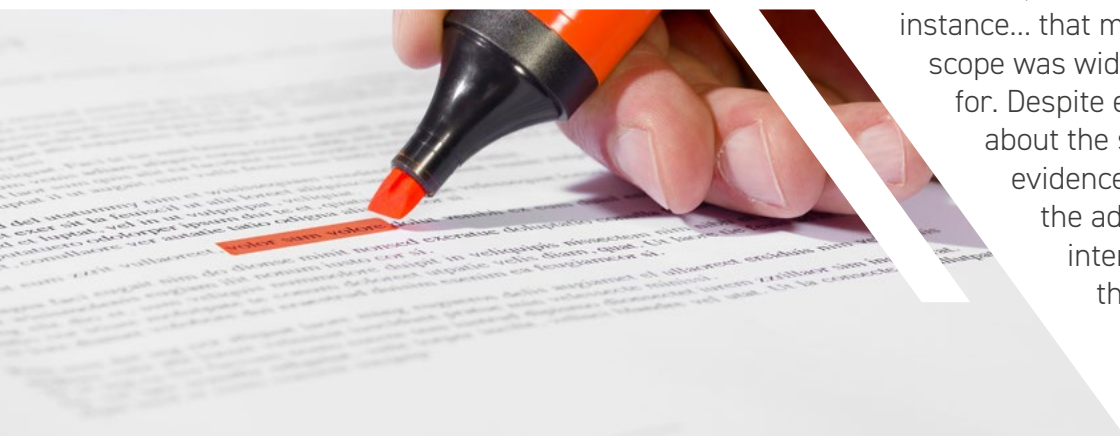
This adjudication was a stark reminder that the Contractor's obligations are contained within 'the four corners of the Contract'. This is a legal phrase which means that even if extraneous evidence exists which directly contradicts the Contract, it cannot be used in court. The courts will determine the meaning of a contract, solely by looking at the words (and other relevant information) in the Contract. In this instance... that meant the Contractor's scope was wider than it had priced for. Despite extensive negotiations about the scope and documentary evidence of those negotiations, the adjudicator was not interested in anything other than the contract itself.

The adjudicator is almost certainly correct in this regard... albeit Pyments attempted a number of legal arguments in the adjudication to try to persuade him otherwise.

Human Behaviour

Another potential error of judgment by the Contractor was that they may have assumed, wrongly, the Employer would act honestly and would honour agreements reached during PCSA negotiations... however, that didn't happen.

In Pyments' experience, parties often become greedy in circumstances where contractual terms are unclear, giving an opportunity to avoid parting with very large sums of money.



Case Study Conclusion

In summary, where the Contractor identified the differences, it would have been preferable if they had gone on to actively change the relevant contract documents to properly reflect the scope the Contractor had priced. Whilst this can be a daunting task given the very extensive quantities of documents routinely included in Contract Documents, it is absolutely essential the Contractor properly and fully checks that the scope of work accords with whatever it has previously negotiated.

The Contract

We set out the Scope of Works and the Contractor's overall contractual obligations based upon the terms and conditions contained in the current JCT Design & Build Contract (2016).

Scope of Works

The First Recital is completed to include a description of the nature and location of 'the Works'.

"Recitals"

"First

the Employer wishes to have the design and construction of the following work carried out.

.....

at.....('the Works')

and the Employer has supplied to the Contractor documents showing and describing or otherwise stating his requirements ('the Employer's Requirements');"

The note at the end of the First Recital confirms that the work the Employer wishes to be carried out is described in the documents titled **"the Employer's Requirements"**.

The Second and Third Recitals confirm that the Contractor has provided proposals which meet the Employer's Requirements.

"Second

in response to the Employer's Requirements the Contractor has supplied to the Employer:

- *documents showing and describing the Contractor's proposals for the design and construction of the Works ('the Contractor's Proposals'); and*
- *an analysis of the Contract Sum ('the Contract Sum Analysis');"*

“Third *the Employer has examined the Contractor’s Proposals and subject to the Conditions, is satisfied that they appear to meet the Employer’s Requirements^[3]”*

Interestingly, the foregoing is often transposed, i.e., to refer that the Contractor has examined the ER’s and is satisfied that their corresponding Contractor’s Proposals comply with the ER’s.

Footnote [3] is important and states:

“Where the Employer has accepted a divergence from his requirements in the proposals submitted by the Contractor, the divergence should be removed by amending the Employer’s Requirements before the Contract is executed.”

Thus, the finally negotiated and agreed scope of works should always be precisely as described in the Employer’s Requirements.

Articles 1 and 2 set out the Contractor’s obligations and the Contract Sum.

“Article 1: Contractor’s obligations

The Contractor shall complete the design for the Works and carry out and complete the construction of the Works in accordance with the Contract Documents.”

“Article 2: Contract Sum

*The Employer shall pay the Contractor.....the VAT-exclusive sum of
..... (£.....) (‘the Contract Sum’)*

In summary, the Contractor must carry out and complete “*the Works*” and the Employer must pay the Contractor “*the Contract Sum*”.

Clause 1.1 of the conditions provides a definition of “*the Works*” which refers you back to the First Recital and therefore, the ERs.

In summary, the Contractor is only paid for the scope of works described in the ERs (no more, no less).

Additional Payment under JCT DB 2016

Clause 5.1 of the conditions defines a “*Change*” (equivalent to the JCT standard contract “*Variation*” or the NEC “*compensation event*”).

“The term ‘Change’ means:
a change in the Employer’s Requirements.....”

Therefore, the Contractor is only entitled to additional payment for work that is in some way different to the scope of works included in the ERs.

The Contractor is only paid for the scope of works described in the ERs. If work

is included in the ERs, the Contractor has contractual obligation to carry out that work, even if there is no money included in the Contract Sum for that work.

But it can be... and often is worse than that!!!

It's very possible that the Contractor will take longer to complete the Works (because he made no allowance in his programme to carry out work which he believed he wasn't required to carry out).

If work is included in the ERs, the Contractor has contractual obligation to carry out that work, even if there is no money included in the Contract Sum for that work.

However, the work in question will not qualify as a "*Relevant Event*" pursuant to clause 2.26.1 of the conditions and does not qualify as a "*Relevant Matter*" pursuant to clause 4.21.1 of the conditions (because the work in question is not a "*Change*").

Therefore, the Contractor will not be entitled to an extension of time and will not be able to recovery his additional time-related costs for the period of delay.

And worse still.....

The Contractor is liable to deduction of liquidated damages by the Employer for the period of delay.

In summary, the ERs is the key set of documents in JCT DB 2016. Those compiling the contract documents must ensure that the ERs states exactly the scope of works the parties have agreed. Those carrying out the Works need to be aware which documents comprise the ERs and exactly what is contained in those documents.

The place to look for this information is in the "*Contract Particulars*" which lists the documents that comprise the ERs. On large projects, this information might include numerous drawings, specifications, schedules, appendices, annexes, etc, etc.

The Contract Sum must match the scope of works priced by the Contractor and that exact same scope of works must be defined in the Employer's Requirements.



Chris Kevis
Senior Consultant

Chris has extensive commercial and contractual experience having been employed in senior roles, predominantly for main contractors, for more than 30 years. During this period Chris has gained comprehensive practical experience of what he refers to as the 'muck and bullets' issues routinely encountered in the construction and civil engineering industries.

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Questions and answers with Allan J. Chesworth

Allan provides specialist advice and support across a wide range of complex commercial and contractual matters, including in the preparation of claim particulars, liability and quantum analysis, and in developing and implementing strategies to deliver successful outcomes. Find out a little more about him.....



When did you join Pyments?

In April 2023 so relatively recently but not without a barrage of interesting new experiences.

Management Team will have plenty more in store for me in the months and years ahead.

What does your job involve?

So far, I've been involved in providing commercial & contractual advice to contractors on specific issues and problem accounts. This has extended into adjudications where I have been provided the opportunity to draft submission documents – we've already had positive results which is obviously very pleasing. There is no doubt the Senior

What were you doing before Pyments?

Prior to joining Pyments I was working at another consultant firm carrying out contract administration quantity surveying services and assessing claims for variations and extension of time. Before that I worked for Main Contractors as a Senior Quantity Surveyor and so I've seen both sides of the coin. That gives me valuable knowledge and experience to draw from when performing my new role at Pyments.



What do you like about Pyments?

The environment in the office is friendly and engaging full of knowledgeable people that know the industry inside out. There is always time to sit with other colleagues and debate the best strategy.

Favourite food?

I'm a stickler for pizza! Thin crust with extra vegetables and BBQ sauce base, it's the best!

What do you do away from work?

I am very keen on the gym, working out and in recent months boxing. Additionally, I'm considering getting into Tennis for some extra cardio. At home I follow competitive e-sports (video gaming), and enjoy unwinding to the latest Counter Strike Tournament..

What might someone be surprised to know about you?

When I started work at 16, I manufactured door frames in a wood-working workshop. I have now worked my way through the construction industry from joiner to quantity surveyor to consultant advising and representing clients in construction disputes. I don't intend to stop there though and will continue my studies in Construction Law.

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

Construction Law Dispute Resolution is a niche marketplace, and therefore you should never

be disheartened by rejection when seeking a role in this field. Just keep striving towards that goal, look at rejection as experience and eventually you will find a firm that is both a perfect fit for you, and you will be a perfect fit for the firm. I think I'm living proof of that.

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

With the exponential advances of Artificial Intelligence, I think there will be an incredible array of tools available to assist everybody in their day-to-day role with the help of AI over the next 5 years. However, in my view, this must be used as a tool (like the Word Processor was and continues to be used), and not viewed as an easy way of getting an AI computer to write your Dissertation or monthly report!



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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