



InFocus

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pyments

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**Insights into the construction industry
from our team of construction contract
and dispute resolution specialists.**

Welcome to the latest edition of

InFocus

This 11th edition of 'InFocus' continues with our team of construction experts sharing 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.

We hope you enjoy reading this edition, and if you would like to speak to a member of our team about any of the points raised, please contact us using the details below.

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Contents:

What's in our latest issue

The Usual Suspects (Page 3)

An introduction from Gordon Connell, Managing Director of Pyments.

A Final Statement So Onerous It Was Determined Invalid (Page 4)

Jess considers her recent experience with Final Statements.

We Are Recruiting! (Page 6)

Consultants, delay analysts and expert witnesses wanted.

Compensation Events – Time Distant Assessments of Delay (Page 7)

Stuart explains delay analysis methodology under the NEC form of contract.

Questions and Answers with Daniel Trentham (Page 9)

Say "Hello!" to Daniel...

About Pyments (Page 10)

How we help our clients with expert construction advice and guidance.



The Usual Suspects

Welcome to this current edition of InFocus and to another round of thought-provoking articles prepared by our senior team. I'm always grateful for the positive feedback we receive and the subsequent conversations we have with clients and colleagues in related matters.

I have to say, whilst we all continued to face an extraordinary set of challenges last year, our work with client teams has yielded a fantastic series of results throughout 2025.

We are always intentional in working with client teams to improve outcomes and, in particular, in taking forward all and any lessons learned along the way. It remains true that many of the positive results I refer to would have been a great deal more straightforward, if it were not for the usual suspects challenging client teams in matters which have become contested or disputed.

So, what exactly are the “usual suspects” to which I refer?

It's at this point, Dear Reader, that I have to remind myself that... interrogating all things “contract” and the corresponding “obligations” that derive from them, isn't everyone's idea of quality time; however, this is where the list of usual suspects begins.

Contracts, obligations, and audit trails

If your project team doesn't have a firm (or any) grip on the contracts they're administering, or for that matter the lengthy schedule of amendments we've become accustomed to...

then you cannot expect them to have met their corresponding contractual obligations, fulfilled all that is contractually expected of them, or to have the audit trail (records) in place to support their position when it matters most. I should also note that, where we now regularly see employers challenging the assessments and awards (cost and time) made by their respective QSs, EAs, PMs, etc., then the “usual suspects” I refer to don't only belong to the contractor.

The disconnect between delivery and commercial teams

In my experience, change or impact on most projects will first be identified by colleagues within the wider project “delivery” team, e.g., project managers, planners, design leads, etc., before it reaches the eyes and ears of commercial team colleagues. However, and contrary to the obvious need for project teams to collaborate on all such matters, it is with some regularity that we encounter project teams where the commercial function is disconnected from the day-to-day reality of what's actually happening on live projects.

Success, profit, and hard lessons

We all love to bathe in the afterglow of a high quality or distinguished project, once complete,

and we often forget many of the challenges those projects have brought us. However, whilst marketing those successes will always be valued, including in procuring subsequent projects and commissions, it will matter a great deal less if the project fails, for whatever reason, and including (arguably the greatest reason) that it makes a profit.

I've met few clients who were glad they had to spend significant time, resources and cost in seeking to recover or rescue a project; I've

met a great many more who wished they had invested something more to protect their position, at the outset.

If anything of the foregoing sounds familiar, or you'd like to discuss how to deal with the symptoms of unwanted gut feelings, or to manage and remove the effects of the usual suspects, 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!

An introduction from Gordon Connell
Managing Director of Pyments



Gordon Connell
Managing Director

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A Final Statement So Onerous It Was Determined Invalid



Jess Whiston
Director

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When a Final Certificate is intended to close the account, it should do exactly that, fairly, transparently and in accordance with the Contract. Yet in a recent adjudication, the Adjudicator found that an Employer’s Final Certificate under a JCT Prime Cost Building Contract 2016 was not just inaccurate, but so procedurally flawed that it was declared invalid.

What should have been a routine contractual housekeeping exercise escalated into a major adjudication, raising significant questions about the limits of professional discretion, the duty of fairness and impartiality in certification and what happens when a Final Certificate becomes a weapon rather than a record.

From routine to ruin

For more than two years, the Contractor and the project Quantity Surveyor had established a collaborative, transparent approach to monthly valuations. Each valuation was prepared, reviewed and certified on an open-book basis and reflected the evolving position of the Prime Cost and fee. However, shortly after practical completion, the QS was stood down, and a replacement QS was appointed. Within weeks, more than £1.8million was stripped out of the established final account projection.

Relying wholesale on the replacement QS’s ethically questionable ‘Recommendation for Payment’ report, the CA/Architect issued a Final Certificate stating not only that nothing was owed to the Contractor, but that the Contractor was liable to repay more than £1.1 million to the Employer.

The Adjudicator accepted the QS’s report as an “onerous” document that went far beyond what the Contract permitted.

Clause 4.22 - The Promise of Finality

Clause 4.22 of the JCT Prime Cost Building Contract requires the Final Certificate to state:

- the Prime Cost;
- the Contract Fee;
- any loss and expense due to the Contractor;
- any deductions from the Prime Cost;
- amounts previously certified as due; and
- any sums paid pursuant to Payment Notices.

In short: a clear contractual statement of account. Not a retrospective rewriting of the project’s commercial history. On behalf of the Contractor, Pyments argued that the Final Certificate was invalid because:

- It ignored two years of previously certified and agreed valuations;
- It failed to follow the Contract’s mechanisms for ascertaining Prime Costs;
- The replacement QS’s assessments reflected their personal preferences for valuation, not contractual entitlement.

The Adjudicator agreed. The Final Certificate was “wholly inconsistent with the contemporaneous valuation record”.

'A Final Statement So Onerous It Was Determined Invalid' (Continued)

Key findings

Interim Valuations vs Final Revision

The Contractor demonstrated that every interim valuation had been supported by invoices, quotations and contemporaneous QS assessments. While interim valuations are not conclusive, the Adjudicator confirmed they cannot simply be discarded. He noted: "Reasonable justifications must be given to revise what had been previously certified". The Final Certificate was therefore not a genuine finalisation, but a unilateral rewrite. That procedural failure...along with others...rendered it invalid.

Procedural Fairness in Certification

CA/Architects and QS's must act independently, impartially and in accordance with the Contract. The Adjudicator was clear that the Employer's late-stage attempt to re-engineer the valuation, setting parameters that were neither advised during the Works nor required by the Contract, breached that duty of fairness.

The outcome

The Adjudicator held that the Final Certificate was invalid and dismissible and determined the proper valuation under clause 4.22.2 instead. The Employer was ordered to pay almost £1million within seven days. Ironically, the Employer's attempt to recast the account not only failed but triggered the very liability it had sought to avoid. A clear reminder: changing advisors late in the day does not entitle an Employer to rewrite the past. And, as for Contractors.....good contemporaneous evidence wins disputes.

A growing trend

A growing trend: This adjudication reflects a wider industry pattern: An increasing occurrence to issue aggressive or procedurally flawed Final Certificates in an attempt to retrospectively 'fix' project accounts. Pyments supports clients, contractors, sub-contractors and employers by ensuring certification and valuation processes remain credible, transparent and defensible.

Final thoughts

Ultimately, this wasn't just a dispute about figures. It was a dispute about fairness. A Final Certificate should bring closure, not conflict. However, when certification loses its balance, the Contract, and those who understand it, will restore it.

A brief introduction to Jess

Jess is a Member of the RICS and Fellow of the CIARB with over 15 years of industry experience. Jess brings a strong civil engineering background and a comprehensive understanding of the NEC and JCT Forms of Contract. She has extensive experience in commercial and contractual matters, specialising in dispute resolution and management, and is frequently appointed as party representative in adjudication proceedings as well as acting as both Expert Witness and Expert Advisor in matters of quantum.

We Are Recruiting!

At Pyments we are dedicated to meeting all of our clients' needs and intentional in exceeding their expectations. We thrive on the challenge. We want to win, always. We work smarter and harder. We have fun, often, and always at the appropriate time.

Take a look at the roles we currently have on offer.

1 Consultant / Senior Consultant

Are you a commercially strong individual with a keen interest in developing your experience in the specialist field of dispute resolution? We have an expanding Dispute Resolution and Claims Management team and provide great opportunity for career progression.

2 Expert Witness

Are you already working in the role of Assistant or Expert in Quantum or Programme Delay? We have a growing team of Experts supporting industry-leading clients across all sectors of the property and construction industry, we work with many of the leading contracting, developer and employer teams in the UK. If this interests you, please get in touch.

3 Delay Analyst / Senior Analyst

An exciting opportunity exists for an experienced programme delay analyst/planner to develop their skills with our industry leading Delay Expert team. We are hard-wired to supporting our people achieve their goals; if you're ambitious and wish to work towards an Expert role supporting industry-leading clients we would love to hear from you.

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



Compensation Events - Time Distant Assessments of Delay



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This article examines how NEC compensation events (CEs) should be evaluated after the fact and why the distinction between prospective and retrospective assessment matters.

Under the NEC, when a CE occurs under core Clause 6, the Contractor must notify the Project Manager (PM) within eight weeks. Failure to do so generally results in the loss of entitlement to time and cost, unless the CE stems from a PM instruction or communication. Entitlement to additional time is assessed prospectively using the Accepted Programme in place at the dividing date, forecasting the impact on planned Completion. This contemporaneous approach relies on timely notification, active programme management, and early agreement of delay impacts.

When the process breaks down

Challenges arise when these mechanisms are not followed, for example, when no Accepted Programme exists, when the PM delays action pending actual outcomes, or when quotations are

prepared long after the event. In such cases, the CE may be distant in the past, prompting debate over the appropriate method of assessment.

These issues have been central to two recent adjudications in which Pyments acted as appointed experts. Although NEC drafting indicates that a prospective approach should apply even after the event, case law shows nuance. In Northern Ireland Housing Executive v Healthy Buildings Ltd (2017), the court confirmed that while NEC3 requires a prospective analysis, an after-the-event assessment should also make use of the best available information on actual cost and delay, with Deeny J noting “why should I shut my eyes and grope in the dark when the material is available to show what work [Healthy Building] actually did and how much it cost them”.



Compensation Events – Time Distant Assessments of Delay (Continued)

Three approaches to retrospective time assessment

Three practical approaches can be used to assess time entitlement after the event:

1 Strict Prospective Assessment

Applying a strict interpretation of the NEC contract (a purely prospective analysis) using the last accepted programme. This identifies the critical path shown in the last Accepted Programme, even if that is not the latest programme issued for acceptance. From which the event is forecast, and the impact on planned Completion is measured, i.e. without the benefit of hindsight. Whilst contractually compliant, it does not align with the Northern Ireland case, and if the Accepted Programme is outdated would likely produce unrealistic results as it would not consider aspects such as the Contractors own progress and efficiencies.

2 Accepted Programme Updated for Actual Progress

Update the last Accepted Programme with progress known at the dividing date (this can usually be identified from programmes that were issued for acceptance but were rejected). This identifies the critical path shown in the last Accepted Programme based on progress achieved, but instead of applying the forecasted effect of the delay, consider the as-built/actual effect of the CE on the remaining Work at the time of the event i.e. with the benefit of hindsight.

3 Latest Programme Issued for Acceptance

Use the last programme issued for acceptance (if deemed realistic and reasonable) and impacting the CE with as-built data. This approach identifies the critical path at the time the event as notified (contemporaneously), using the latest programme issued for acceptance, whether or not it has been formally accepted. This programme would account for any changes in the logic or sequence from the last Accepted Programme, for example, if works were omitted or changed post the Accepted Programme) and evaluates the impact of the event while accounting for the contractor's actual progress and any preceding events. This approach is slightly different from the above and is typically used when the last Accepted Programme is so outdated and/or the sequence has changed so much that relying on it would produce an unrealistic assessment. This method determines the critical path contemporaneously as at the dividing date, but instead of applying the forecasted effect of the delay, it considers the as-built/actual effect of the CE on the remaining Work at the time of the event, i.e. with the benefit of hindsight.

A fully retrospective analysis is also possible, but it diverges further from NEC methodology and typically would increase the risk of dispute.

A purely prospective NEC assessment made long after the event (approach 1) is often criticised for producing results inconsistent with known facts. In practice, adopting a pragmatic approach that incorporates actual progress and as built information (approaches 2 and 3) is more realistic and better aligned with industry guidance.

Accordingly, approaches 2 and 3 are more likely to succeed when retrospectively assessing the time impact of CE's, as they attempt to 'bridge the gap' applying the method of assessment as per clause 63.3 (or clause 63.5 on NEC4), but updating to reflect known progress, events and using as-built

CE information known after the event.

In practice, navigating these complexities requires a balanced, evidence led approach that respects the NEC's prospective intent while recognising the value of real world data when assessing delay and entitlement. As demonstrated, approaches that blend contemporaneous programme logic with as built insight are far more likely to withstand scrutiny and deliver outcomes grounded in reality.

At Pyments, we specialise in exactly this, bringing technical clarity, rigorous programme analysis, and expert judgement to help clients resolve compensation events confidently and credibly, whether assessed contemporaneously or long after the fact. If you want pragmatic, defensible advice rooted in both contract and reality, we're here to help.

A brief introduction to Stuart

Stuart has extensive experience in the analysis of construction delays and methodologies and has been appointed as a CPR Part 35 expert witness, giving expert testimony in the High Court (TCC) and in adjudication hearings on matters concerning delay and disruption in construction contracts. Stuart is an accredited delay and disruption expert (MAE) and Chartered Quantity Surveyor (RICS) with over twenty years of experience in construction projects, including commercial, HM Prisons, hospitals, defence, civil engineering, energy, residential, transport, and infrastructure.



Questions and Answers with Daniel Trentham



Daniel joined the team in October 2025, and we thought this latest edition would be a great opportunity to introduce him, his experience, and his role here at Pyments. He brings lots of practical experience of contractual matters and commercial requirements, applying a strong understanding of construction law and contract administration under various forms of contracts, including NEC, JCT and Bespoke Forms.

Question 1: When did you join Pyments?

I joined as a Consultant in October 2025.

Question 2: What does your job involve?

My role focuses on the commercial and contractual management of construction projects, with a particular emphasis on dispute resolution and prevention. I work to ensure that clients' contractual rights are protected, risks are properly managed, and any issues are resolved fairly and efficiently throughout the project lifecycle.

Question 3: What do you like about Pyments?

I really enjoy working in an environment where I can make a difference by helping clients protect their commercial positions. I've got a real passion for construction law and the role it plays in keeping projects running fairly and smoothly.

Question 4: What is your favourite food?

I love a Nando's! You can't beat their chicken, spicy rice, peri-salted chips and of course some halloumi.

Question 5: What were you doing before Pyments?

Before joining Pyments, I was working for a consultancy based in Birmingham city centre, providing cost plans and advice on M&E solutions. Before this, I worked for an M&E sub-contractor based in Wolverhampton as their Commercial Manager.

Question 6: What do you do away from work?

I like to unwind by spending time with my fiancée, my family, and our dog. I also love to travel and explore different places around the world, and I also enjoy playing and watching football and golf whenever I can.

Question 7: What might someone be surprised to know about you?

Even before I joined the profession, I wanted to work in the construction industry and during secondary school, I completed my work experience working for a firm in the U.A.E, completing take-offs for the construction of Zayed University in Abu Dhabi. I loved this experience and was even rewarded with tickets to watch Abu Dhabi host its first-ever Formula 1 event!

Question 8: If you could offer one piece of advice to someone looking at a similar career, what would it be?

My advice would be to invest time in understanding the commercial and contractual aspects of the industry. It's easy to focus on the day-to-day project work but developing a strong grasp of how contracts operate will give you the confidence to make sound decisions and support your clients effectively.

pyments: Trusted Commercial and Contractual Expertise for Over 35 Years

A clear resolution for your construction project

We are proud to have provided our clients with pragmatic contractual advice alongside cost-effective commercial solutions for more than 35 years.

Our team has experience working with all parties – Main Contractors, Sub-Contractors or Employers - involved in delivering complex schemes in a variety of sectors of the construction industry.

We are Construction Contract and Dispute Resolution specialists, recognised leaders in the field of Construction Claim Disputes, providing cross-sector specialist support dealing with Construction Disputes, Contracts, Quantum, Programme Delay Analysis, CPR35 Expert Witness and a very wide range of related Specialist services.

You can explore our services further on our website by clicking on the links below or by contacting a member of our team:

- Dispute prevention and resolution (including expert reports)
- Consultancy services (commercial and contractual services)
- M&E solutions (commercial and technical support)
- Project monitoring (construction progress verification)
- Programming and delay analysis (forensic programming support)
- Bespoke training and workshops (JCT / NEC / delay analysis)



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