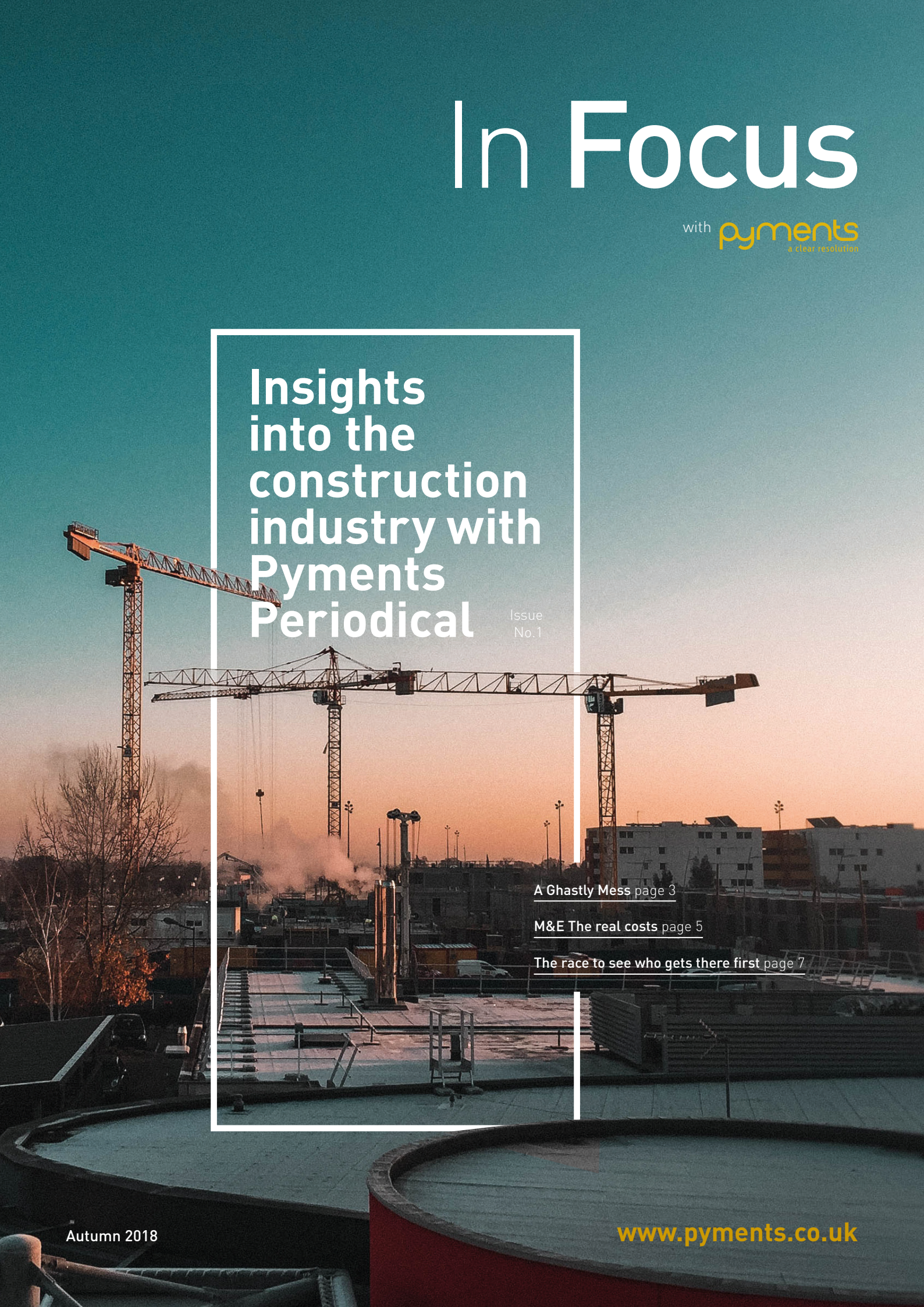
In Focus

with pyments
a clear resolution

Insights into the construction industry with Pyments Periodical

Issue No.1



Autumn 2018

www.pyments.co.uk

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

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

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

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

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

WWW.PYMENTS.CO.UK

JOIN THE MAILING LIST

A Ghastly Mess

I have recently re-read Sir John Egan's report 'Rethinking Construction' which was published 20 years ago in 1998. Sir John was ably assisted by a 'task force' of construction industry experts and amongst many of their excellent recommendations (better working conditions, improved health and safety, standardisation of components – to name but a few) were suggestions that productivity should improve by 10% year on year, capital cost should reduce by 10% year on year and construction time should also reduce by 10% year on year.

Well, at the risk of sounding somewhat negative towards Sir John and his 'task force', I can't begin to comprehend how this was supposed to be achievable. I admit that I have had to reach for my 'O' level (they're like GCSEs – but older) maths text book for some assistance, but by my calculations a project that took 100 weeks to complete in 1998 ought (according to Sir John's aspirations) to be completed in a little over 12 weeks in 2018! And the £10 million price tag should be £1.2 million in today's money (ignoring the effects of inflation).

I fear that the admirable intentions with regard to improved productivity, reduced capital cost and reduced construction periods about which Sir John and his chums waxed lyrically, were somewhat mis-placed; and I will explain why.

Firstly, Construction is not at all like other industries where we might be manufacturing thousands of identical widgets (or Jaguar cars for that matter) and sending them whizzing along a conveyor belt. The challenges in the construction world are very different. Each construction project is unique and has its own set of constraints and challenges. The contractor is effectively required to set up the equivalent of a new manufacturing business from scratch each time a new project commences.

Secondly, every brand-new construction project is governed by a fascinating read entitled the 'Building Contract'. This is the set of rules we must follow in order to administer the work and it has an unusual and unique characteristic.
Unlike your common or garden Contract, the vast majority of 'Building Contracts' include an express right to change the original scope of works. It could be said that the Building Contract is the chameleon of the contract world. It might start life as a bargain to build a house in 20 weeks and end up building two bungalows in 30 weeks - and it is all perfectly permissible without fear of vitiating (it means wrecking, destroying, messing up or scuppering) the contract.

Thereby lies the root cause of many of our woes in the construction industry. The customer is allowed to change his mind time and time again. He can omit work, add work and change work willy nilly - and there is little that the hapless builder can do to prevent it.

The upshot of all this change is very often that a ghastly mess ensues. Additional tradespersons appear on the site, subcontractors are delayed and disrupted, the original sequence of work disappears out of the window (which in all likelihood was originally a UPVC window and changed on a whim to hardwood - which is on a 15-week delivery period) and the intended 'order' is replaced by 'disorder'...

"in short, we have a ghastly mess" as Mary Poppins' employer once said.

Could we fundamentally change the nature of construction...

Of course, all of this is catered for by the Building Contract and there are steps that can and should be taken to avoid things deteriorating into a ghastly mess. Procedures are in place that deal with changes, extensions of time and loss and expense (in various guises depending on your form of contract). So, whether you are a Client, a Contractor or a Sub-Contractor you really ought to ensure that your staff understand what is required to protect your interests.

Even if your staff are properly trained in the dark arts of successfully administering the Building Contract (Pyments is able to do this for you incidentally) it is time-consuming and fraught with difficulties. Considerable time and effort is required to manage and avoid potential disputes.

A heavy burden is placed upon construction staff to keep the requisite good quality, contemporaneous records and to give the correct notices. Of course, failure to give notices can be potentially disastrous; a Contractor may lose otherwise legitimate entitlement to additional time and money for delay and an Employer may be faced with making payment of an interim or final application for payment irrespective of whether or not the correct amount has been claimed.

If it all goes belly up there will be disputes to resolve and claims to prepare or defend. In the absence of the requisite good quality, contemporaneous records and the correct notices you will be faced with trying to make a silk purse out of a sow's ear.

If your own staff are struggling with any of this Pyments can help. We strongly advocate a policy of dispute avoidance by early deployment of the appropriate resource. However, if you do end up with a ghastly mess we can assist with the 'silk purse' thing as well.

One final thought: Could we fundamentally change the nature of construction such that buildings are designed 100% prior to starting work on site? Could we change the Building Contract to prevent the customer from changing his mind?

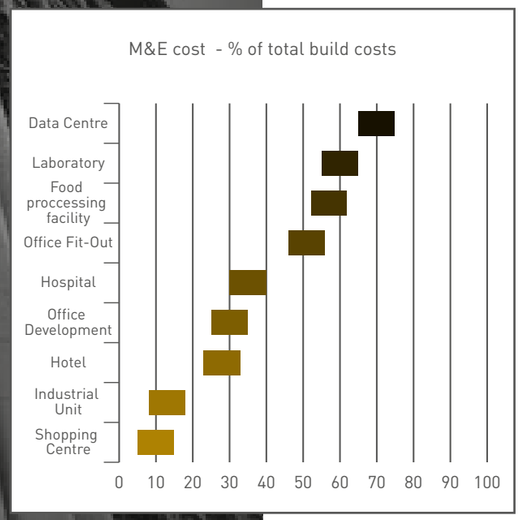
Well... call me a pessimist, a defeatist, a cynic or a prophet of doom if you will, but I fear not. In my view Sir John's aspirations of year on year improvements in productivity are unlikely ever to be realised. In my experience the industry suffers from a general lack of the discipline required to manage change successfully. And without discipline - as George Banks observed "- disorder! Chaos! Moral disintegration! In short, we have a ghastly mess".

Chris Kevis

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

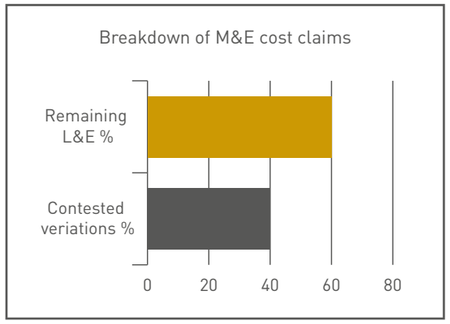
M&E
The real costs

The significant cost of M&E services as a proportion of overall construction costs is well known throughout the industry. Data Centres represent the higher end of the spectrum with M&E costs being 75% of the build total. The chart below shows the M&E cost component of total construction costs for a selection of building types; for many commercial projects M&E costs of 30% or more of the total build costs, appear to be the norm.



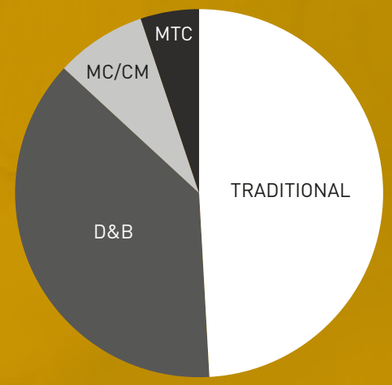
What is rarely documented is the impact M&E costs have upon construction cost claims. An analysis of recent Pyments projects has shown not only how significant the M&E component of construction claims is (where M&E costs typically represent 35%+ of claims), but also the extent to which a detailed technical / engineering knowledge is required to respond to these claims when received.

The chart below graphically shows the breakdown of the M&E claim costs above, with 40% of M&E claims relating to contested variations, leaving 60% resulting from extended period of contract, lost production and other programme related issues.



Our analysis has shown contested variations largely arise out of scope growth or lack of definition around Employer's Requirements and Contractor's Proposals within Design & Build (D&B) procurement routes. This then begs the question: are D&B projects more susceptible to Loss & Expense claims? Whilst studies have been undertaken (including one by NBS shown here) regarding the industry take-up of JCT and other standard forms, they don't properly deal with the extent to which bespoke contract forms are used within the industry. Whilst most of the recent construction disputes that we have been involved with stem from D&B procurement routes, this is considered to be more a reflection on the frequency D&B is used in the industry on major projects, rather than any inherent failing in its approach.

NBS study of Industry use of JCT Forms of Contract



How can Pyments assist clients with future M&E claims? Pyments possess a unique blend of skill sets not normally found amongst other construction consultancies; in-house technical expertise led by a chartered building services engineer in addition to being able to undertake quantum & cost analysis work, allied to benchmarking with other projects handled by RICS qualified staff. This technical work is directed and supported by staff well versed in the latest legal aspects of contractual disputes to create a unified approach in dealing with M&E construction disputes. If you think your project could do with a little help (or a lot!), we're confident you won't find a team better placed to meet your M&E needs.

Steve Watson

A Senior M&E Quantity Surveyor at Pyments and boasts 40 years industry experience including 6 years overseas, he can be contacted by email at **steve.watson@pyments.co.uk**

THE RACE TO SEE **WHO GETS THERE FIRST**

The Space Race which gripped the USA and the Soviet Union throughout the 1960s primarily focussed on who would complete the first successful manned mission to land on the Moon. When Apollo 11 touched down and Neil Armstrong confirmed "the eagle has landed" on July 20, 1969 the race was won. Had the Soviet Union turned up a week later no one would have been watching. Timing is everything!

In the vast majority of instances, delay analysis undertaken by Pyments, whether seeking to substantiate entitlement or sitting in judgement of same, there are issues of concurrency. Again, timing is everything!

Concurrent delay is the occurrence of two or more delay events at the same time, one an employer risk event, the other a contractor risk event. In this scenario, the question of whether the contractor is entitled to additional time is often the subject of great contention. The current position in English Law appears to focus on which delay wins the race to start impacting the Completion Date.

If the contract does not expressly address the issue of concurrency, the position in England and Wales is that the contractor is entitled to an extension of time for employer delay, even if that delay runs concurrently with a contractor delay. In Henry Boot v Malmaison (1999) the Judge determined:

"If there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay notwithstanding the concurrent effect of the other event."

Whilst this principle appears generally accepted within English Law the primary area of debate concerns the definition of concurrent delay when applying the "Malmaison" principle. One such definition applied by the Courts requires two delaying events to be of "equal causative potency". This is where timing is everything.

In Adyard v SD Marine (2011), Adyard presented its case on the basis that causation could be established by just considering the variations (design changes) in isolation regardless of what other events might have been delaying the works and regardless of whether the variation would have any impact on actual progress (i.e. Adyard argued that the Court should only look at the event cited in relation to the contractual completion date; a theoretical delay would suffice, rather than an actual delay).

The Judge found that as a matter of fact the project was already in critical delay well before the design changes occurred and that Adyard was not entitled to additional time simply because the events did not actually cause delay. The Judge said that concurrent delay is:

"...a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."

In more recent years the test for concurrency has been narrowed considerably by focussing on the point in time at which the delaying events occur. Such analysis will typically demonstrate true concurrent delay is rare (the

Causation in fact must be proved based on the situation at the time as regards delay

Space Race equivalent of the USA and Soviet Union landing on the Moon at the same time!).

In Saga Cruises v Fincantieri (2016) there were a number of delays to the scheduled completion date (2nd March 2012). As a matter of fact, Fincantieri were responsible for delay prior to the scheduled completion date, and which delayed actual completion until 16th March 2012. Saga were responsible for delays from 2nd March 2012 and which would have prevented completion up to 14th March 2012.

Saga claimed liquidated damages for the entire delay period, whilst Fincantieri argued it was entitled to an extension of time for the period of delay caused by the relevant event. The Judge concluded that unless there is a concurrency actually affecting the completion date as then scheduled, the contractor cannot clam the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay. Timing is everything!

This emphasis on the timing of delay events is supported by the SCL Delay & Disruption Protocol 2nd Edition (2017). A working example is provided which identifies a similar scenario to that which arose in Saga v Fincantieri in that there was a contractor risk event which started first and lasted the longest. The Protocol recommends the view that:

"...the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. Thus, the only effective cause of the Delay to Completion is the Contractor Risk Event."

The Adyard and Saga cases cited were both heard in the Commercial Courts. Whether the Technology and Construction Court follows the same approach remains to be seen. However, the timing of delay events and the issuing and recording of notices contemporaneously is now more important than ever.

Relying on a retrospective approach to clarify the intricacies of concurrent delay....?! ...Houston we have a problem!!!

Alan Powell

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

pyments
a clear resolution

Building FINALIST AWARDS 2017

Quantity Surveyors offering you a suite of services from project inception through to completion

- Programming Services & Delay Analysis
- Mechanical & Electrical Solutions
- Quantity Surveying Project Services
- Project Monitoring
- Dispute Avoidance
- Bespoke Training

Contact us
01789 766544
info@pyments.co.uk
pyments.co.uk
Kinwarton House, Captains Hill,
Alcester, Warwickshire B49 6HA