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Expert Constructive Solutions

A GUIDE FOR SME CONTRACTORS, BUILDERS AND SPECIALIST TRADE CONTRACTORS

5 TIPS FOR GETTING PAID WHAT YOU ARE ENTITLED TO, MORE QUICKLY, AND WITHOUT EXPENSIVE LEGAL COSTS

By Trevor Drury

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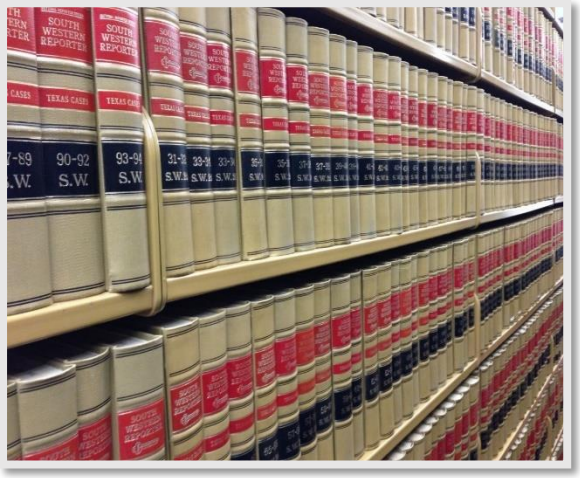
Introduction

The construction industry has been plagued for years with a reputation for poor payment practises. The often complained about situation is that the organisation upstream in the supply chain, for example the main contractor, holds onto the downstream contracting party's money, e.g. the specialist trade contractor.



A remedy to this problem is available by operation of the Housing Grants, Construction & Regeneration Act 1996 (as amended), more commonly known as the "Construction Act". It requires a contract to provide when instalment, stage or periodic payments fall due, the interval between payment due dates, and a final date for payment. In addition, the payer has to provide a payment notice or a payless notice within a specified number of days or run the risk of adjudication proceedings.

If the contract does not comply with the requirements of the Construction Act, then the Scheme for Construction Contracts 1998 ("the Scheme") is implied into the contract. This sets out dates and periods for when payments become due, the requirement for adequate notices and a final date for payment.

If your client has failed to comply with these requirements, there is the option to adjudicate!

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Whilst this provides a means of obtaining payment for the payee, the drafting of the Construction Act and Scheme, is not the most straightforward. To help with understanding, it is recommended to seek advice from practitioners experienced in the field. In addition, there are a number of areas where contractors can improve their maximisation of the financial recovery of their contractual entitlements. In most cases, there will be contractual requirements that need to be properly adhered to, combined with good project administration. That will **maximise your financial recovery and profit!** Five of these hints and tips are considered in this report.

Once you have read the report and if it resonates with you, as to the type of issues you are experiencing and would like a free 15 minutes **Getting Paid Strategy Session** phone call, please email Trevor Drury on trevor.drury@morecraft-drury.com so that a mutually convenient time for that call can be arranged.

Best wishes,

Trevor Drury

Trevor Drury
MBA, FRICS, FCIOB, MCIArb, Barrister, Mediator, Adjudicator
Managing Director

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1. Ensure that you have a written contract in place

It is important to have a written signed contract in place, signed by you and your client, before commencing work and have a legally qualified person review any bespoke contract or proposed amendments to any standard form. Amendments to standard forms of contract by clients are so that they can transfer risk to you or to impose onerous obligations on you. The potential risks to you of not having a qualified construction lawyer review these terms and conditions are huge and could cost you a lot of money or worse.

If you do not have a signed contract, what are the agreed terms and conditions then? Without a signed contract it is frequently the case that there will be a dispute as to what terms and conditions were agreed. If you agreed what you think were the terms and conditions with the other party in a conversation, you will have an oral contract? However, as you have not committed that agreement to writing, it will be your word against the other party's as to the exact nature of the essential terms.

An example of such a situation is a client of ours who, before our engagement, entered into a multi-million-pound contract, without properly agreeing terms and had no formal written contract in place. Prior to our involvement, their solicitors had spent over 6 months arguing with the other party's solicitors as to what the agreed terms of the contract were, and yet still they could not agree. On our employment, we adjudicated the dispute, which included what were the terms and conditions applicable to the contract. We were successful in winning that adjudication for our client and subsequent adjudications where we recovered a six-figure sum.

Did you submit a tender, i.e. your offer to undertake the work? Was that offer accepted i.e. a simple offer and acceptance?

Is there, what is often referred to as a "battle of the forms", i.e. does your standard terms of business trump those of the other party, after an exchange of competing contract terms and other correspondence or visa-versa.?

To avoid potential problems with the above, you should have a signed contract in place.

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A standard set of your own terms and conditions should be produced so that where possible, you contract on your terms.

Avoid letters of intent where possible – there is no substitute for having the actual full contract in place.

If you do have to start a project off on a letter of intent, seek legal advice as to its wording, scope and the financial cap, which is normally included in the letter to protect the upstream party and to limit its financial risk exposure.

It is worth repeating, **do not run the risk of not having a written contract in place**. The consequences can be severe, leading to expensive disputes.

Contracts cannot only be reviewed by solicitors but also by construction barristers, who are the specialists in construction law. Our director is a highly experienced chartered construction professional with over 30 years in the construction industry, who is also a barrister at 12 Old Square Chambers. He therefore has a practical insight into construction issues and can provide separate legal advice on contracts himself through his chambers, as a self-employed Direct Public Access Barrister.

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2. Check that you have received a valid payment notice or payless notice

At each interim payment period or at the final account, if your client failed to provide a valid payment notice or payless notice, then you could adjudicate. Equally, if you have failed to provide valid notices yourselves to sub-contractors, you are exposed to a potential adjudication.

The Construction Act provides a party to a construction contract with the right to refer a dispute to adjudication at any time.

Poor cashflow can lead to additional finance costs or interest charges from your bank or lender and can potentially lead to insolvency in extreme cases, particularly if this happens on multiple projects.

The picture adjacent is a stark reminder of the consequences of poor cashflow. The contractor responsible for this project became insolvent and therefore was unable to complete the project.

There are a number of dangers and pitfalls that can trip you up in your management of the payment process:

- When are you permitted to submit your application for interim or final payment – you can be too early or too late to qualify?
- When are you due a payment – some of the contracts are not that clear and may require a calculation of the date?

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- When is the client or his representative required to notify you of the amount of your payment?
- If the client fails to issue a payment notice, when can you issue a default payment notice and how does that affect your final payment date?
- What is the latest date that the client can issue a payless notice?
- When is the final date for payment?

All of these questions need answering to protect your position to enable you to get paid. Does the contract properly comply with the Construction Act or does the Scheme apply? The Act, the Scheme and contracts in general are often difficult for lay persons to fully understand. This is why it is recommended to get the right help.

Where a client or his agent has not provided payment notices or payless notices, you can obtain payment by issuing adjudication proceedings. However, you are also required to provide payment notices to your sub-contractors and if you fail to do so, you may also receive a notice of adjudication from one of your sub-contractors. In either case, you will need assistance in compiling your case for referring your dispute to adjudication or mobilising swiftly to defend an adjudication from a sub-contractor. The above relate to adjudicating technical breaches of the contract or terms implied by the Construction Act and the Scheme. These are sometimes referred to as “smash and grab” adjudications. You can also adjudicate the “true value” of a payment or other dispute under the construction contract.

Adjudication is a fast form of alternative dispute resolution, within which an adjudicator has to make a decision normally within 28 days, although the period can be extended by the parties. To manage an adjudication case requires experience and specialist knowledge of the process, the contract provisions, the Construction Act and Scheme. There is now considerable case law on adjudication and jurisdictional challenges can be a particular difficulty.

We have successfully represented many clients in adjudication proceedings over the years. Our Director, Trevor Drury is also a panel Adjudicator and so has a perspective from the view of the person deciding such disputes.

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3. Ensure that your construction works are not undervalued and supported with evidence

The majority of construction contracts permit the instruction of additional or varied work. You carry out the instructed variation work and include the value of those works in your next application for payment. Then you end up not being paid or paid only a proportion of the value of the work. Does this sound familiar?

To get paid, you will need to provide the supporting written instructions for any variation/change, calculations and supporting evidence for any new or altered work. This should be provided with your application for payment or prior to it, so that the client's quantity surveyor has had an opportunity to review the information.

From our experience, there is often a large difference between what the contractor values the measured account at, compared to the client's quantity surveyor's valuation of the same. This is frequently due to a failure to compile and then submit the records/evidence required by the contract and to the timetable specified. This allows the client's quantity surveyor to simply put an on-account assessment against items lacking in substantiation. The difference can often be half of the actual amount claimed; on some occasions, it may even get a nil valuation.

So, a failure to carry out the steps outlined above will more often than not, have a negative cashflow effect. At final account this will result in **an under recovery/loss which your business cannot afford**.

We know of a contractor that went out of business because he had a large financial under recovery on a number of projects. He failed to get the right advice early enough. This is why you need assistance from construction experts, such as ourselves, through-out the project, not just at the end. You cannot afford to get this wrong!

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Some contracts permit or require quotations to be provided in advance, for additional or varied work. Therefore, you must also comply with these requirements.

It is important to check whether the work as described in the tender/contract bills or schedules of works properly reflects the scope and conditions under which the work was actually performed, in accordance with the construction drawings.

A lack of time or quantity surveying resource in dealing with the pricing and management of variations can lead to serious undervaluation of your work. If the client's quantity surveyor knows he is up against qualified quantity surveyors, that may assist in obtaining a quicker agreement on items. Our quantity surveyors have also been appointed as expert witnesses on quantity surveying matters in disputes that have been the subject of adjudication or litigation proceedings.

Additionally, being chartered quantity surveyors from a contractor background, experienced in claims production and defence, enables us to provide that additional expertise and resource to enable your day to day commercial management to continue without disruption and to maximise your legitimate entitlements under the contract.

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4. How to obtain recompense for the delays caused by instructed changes/ variations and late information

With regard to delays and extensions of time ("EOT's"), you must follow the requirements of the contract in terms of providing notices promptly and within the period stipulated. It is a condition precedent in some forms of contract to provide notices within a certain period of time, or you will lose the right to claim EOT's and loss and expense. It is also necessary to provide the client or his representative with your initial information/evidence to support your claim as early as possible. This will need to be kept up to date over time as the supporting evidence becomes complete and accurate, and again in accordance with the timetable set out in the contract.

So, have you issued the contractual notices of delay and notices of incurring loss and expense on time, in accordance with the contract and with sufficient detail on your current projects?

If not, you run the very real risk of having liquidated damages deducted. In addition, sufficient supporting details must be provided as to the causes of the delays to completion, which are not your fault or liability, to warrant an extension to the completion date (EOT). Also, there is the additional burden of your own additional costs associated with resources being employed longer on the project.

It will be necessary to review the project files to identify the contemporaneous evidence to support an EOT. It will then be necessary to undertake some form of delay analysis.

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Whilst contractors may have in-house planners and schedulers, it is most likely that in many cases a time/delay expert will be required to establish any entitlement to an EOT, along with quantity surveying expertise (quantum expert) to calculate and draft the loss and expense claim.

There is a real danger that, if you fail to properly manage the construction programme, provide the correct notices in time, provide the correct analysis of delays and calculation of the loss and expense, with evidence, you will substantially under recover against the costs of delay and disruption to the project.

The bringing together of the information to support claims and the drafting of the claim documentation is a special expertise and skill. Contractors should not do this themselves as they are unlikely to have the experience or expertise in drafting claims.

The above picture is of a project which suffered a delay of a number of years and was substantially over budget resulting in a multi-million-pound dispute and commencement of court proceedings. We were employed by one of the parties in successfully managing the claims team and a settlement in our client's favour.

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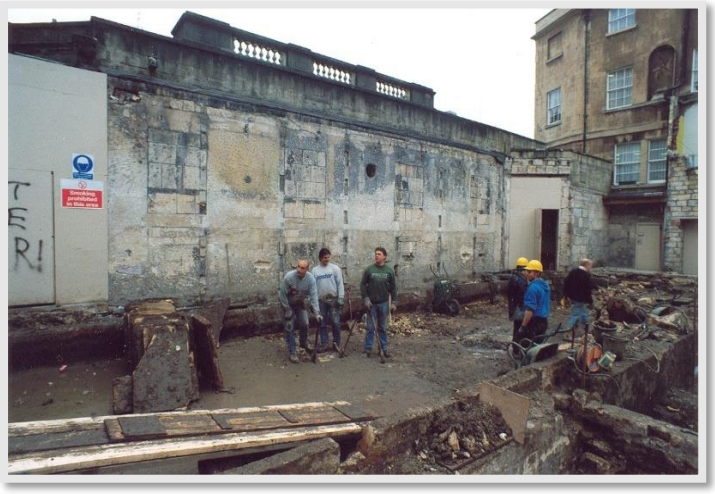
5. The need to keep good quality contemporaneous records

Records …Records…. Records!

Although you may have a contractual entitlement, there is a requirement, whatever the contract, to provide supporting evidence for an EOT and evidence of costs for any loss and expense incurred.

Without supporting evidence in the form of adequate project records, you will have difficulty persuading an Architect, Contract Administrator or Project Manager to award an EOT. In addition, the client's quantity surveyor will not be able to value the loss and expense without the correct records and evidence of cost incurred. Similar difficulties will be encountered in any subsequent dispute resolution tribunal if you cannot provide sufficient evidence to support your case.

Keeping the right records, with the correct level and quality of information, is an area that contractors time and time again fail to get right and end up losing money and their profit in the job! A common area that is frequently lacking is evidencing where resources have been employed or re-deployed due to delay and disruption caused by late client instructions or additional/changed work.



The project programme must be kept up to date with recorded progress and ideally the electronic programme provided by well-known proprietary software firms should be used for scheduling the work and updating activities with progress as the work proceeds. Marking up a paper copy of a bar chart representation of the programme, as happens frequently on projects, is of little use.

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Early on in a project it is essential that systems are implemented to collect the correct records.

A failure to have the proper records of events and evidence of costs will result in an inability to prove your case.

We can provide assistance in setting up proper record keeping systems and produce the EOT and loss and expense claims from those records, suitable for negotiations, adjudication or more formal legal proceedings.

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Time to Take Action

Apply for a 15-minute complementary **Getting Paid Strategy Session** now to give the best chance of finding a course of action to resolve the issue and plan for the future.

The session will cover:

1. A review of any current issues, problems or disputes
2. An analysis of the best options
3. A plan for your next steps

At the end of the Getting Paid Strategy Session you will have a strategy on what action needs to be taken in order to get paid.

The key to getting paid what you are entitled and to improve your cashflow is to take action. Whether that is to get an initial quick win or a more long-term strategy to maximising your contractual entitlements.

Email trevor.drury@morecraft-drury.com to apply for your **Getting Paid Strategy Session** to get our help to obtain payment from those clients who fail to pay what you are entitled to, consistently pay you late or fail to pay you at all.

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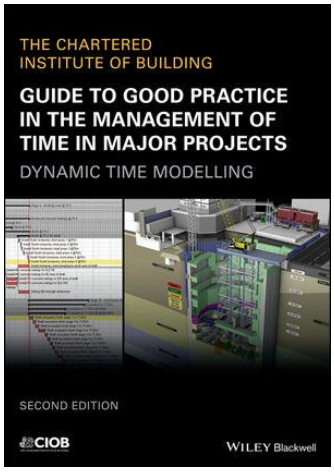
Trevor Drury
Managing Director of Morecraft Drury

We improve our clients' cashflow and profit by getting them payment of the monies they are entitled to under the building contract.

The benefit of employing us is that we have many years in construction dispute resolution. For example, Trevor Drury has over 25 years in construction dispute resolution and over 35 years as a chartered professional within the construction industry.

Trevor is a Chartered Quantity Surveyor, Chartered Construction Manager, Barrister, Mediator and Adjudicator. He has represented successfully numerous clients in adjudications. He has also been a quantity surveying and project management expert witness in legal proceedings. In addition, Trevor is a practising barrister in a London Chambers. This provides the added benefit of being able to enforce adjudicator's decisions in court, by being instructed through his chambers on a Direct Public Access basis by the individuals, partnerships, or companies. This avoids having to employ a separate solicitor and barrister.

Trevor has had a number of articles published in the national construction press.



He is also a contributor to the *Chartered Institute of Building Guide to Good Practice in the Management of Time in Major Projects* 1st and 2nd editions and was part of the editorial team

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Trevor was also a chapter editor of one of the chapters in the Institute of Civil Engineers *NEC Compared and Contrasted 2nd Edition.*

A Selection of Testimonials

'*Trevor Drury was instructed in respect of a construction dispute and gave sound reasonable advice and acted with the utmost professionalism and was extremely efficient in dealing with the matter.*''

Berlad Graham LLP Solicitors

"I am pleased to recommend Trevor Drury, Managing Director of Morecraft Drury.

We chose Trevor due to his wide range of experience dealing with disputes within the industry, his remit was to provide a clear, concise and honest appraisal relating to a dispute with our client, and preparing documentation for submission to the adjudicator should he believe we had a realistic opportunity of winning.

Having worked closely with Trevor, I found him very approachable and professional, listening, appraising, and open to ideas, using all available resources to provide the best outcome for our company.

Because of his experience and hands on approach, we gained a result which I believe would not have been possible without his services.

Should our company find itself in a similar situation again, we would not hesitate to use Trevor Drury"

Harvey Shopfitters Ltd

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