

CONSTRUCTION ENGINEERING & INFRASTRUCTURE

Webinar: Managing payment from developers

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Introduction

- + Introduction
- + Housekeeping
- + Today's agenda

Current Payment Climate

- + Recent research:
 - 60 per cent of public bodies amended payment provisions in the standard forms of construction contract, 69 per cent in private sector.
 - 28% paid by public bodies within 30 days, 24 per cent in private sector.
- + High profile insolvencies - Carillion, Interserve etc.
- + The “B word”.
- + “Confidence amongst UK contractors has reached historic lows”
Turner & Townsend, 8 October 2019
- + Increasingly important to:
 - agree reasonable payment terms at outset
 - have clear debt recovery process



Developers – the risks

- + Shell companies/SPVs
- + Based outside UK/offshore funding
- + No long term relationship
- + Transfer project between subsidiaries
- + Payment may not be made by “client” you expect
- + May halt project midway through..
- + or abandon if planning not obtained
- + Compliance risks?
- + 2016 - the UK’s 20 largest property developers took 56 days to pay



Improving Payment Position

- + Who is the Client?
- + Construction Act
- + Payment terms
- + Invoicing arrangements



Who is the Client?

- + Financial checks on client obviously key
- + Not as obvious as it may seem...



- + Better the Developer you know

Payment by Third Parties

- + Increasingly common with Developers
- + Third party could be named or become client
- + Or actual “Client” may have no assets
- + Request that all payment is made by the Client
- + If cannot avoid, insist on joint and several liability

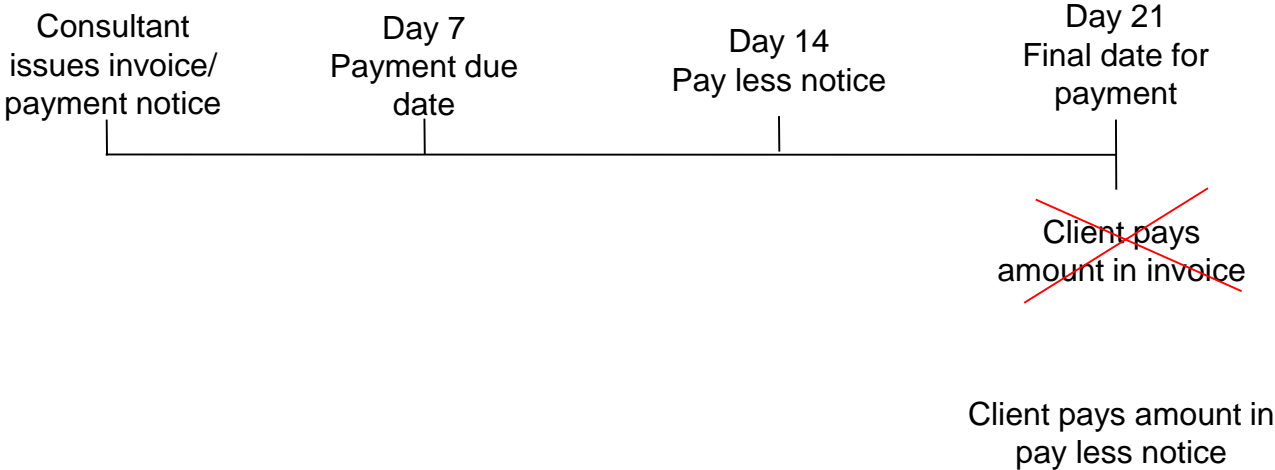


Construction Act

- + Mandatory payment regime (see next slide)
- + Pay when paid unenforceable
- + Remedies – Suspension and Adjudication
- + Should be reflected in invoicing and debt recovery process
- + Use the Construction Act when you can!
- + Need to act quickly with Developer clients
- + If no Act compliant terms, Scheme applies - complex



Construction Act - Example



Reasonable Payment Terms

- + Issue standard terms at outset.
- + How often can you invoice?
- + What is the payment period?
- + Avoid additional administrative requirements
- + Front load payment



Reasonable Payment Terms

- + Resist conditions precedent
- + Agree monthly not milestone payments
- + Additional fees if additional or varied services are required or the services are prolonged?
- + Right to terminate



Good Payment Terms

Each Payment Notice shall comprise the Architect/Consultant's account, setting out any accrued instalments of the fee and other amounts due, less any amounts previously paid, and stating the basis of calculation of the amount specified, which shall be the Notified Sum. The **payment due date shall be the date of the Architect/Consultant's Payment Notice.**

The Client shall pay the Notified Sum within **14 days of the date of issue of the relevant Payment Notice (which shall be the Final Date for Payment)** unless:

- the Architect/Consultant has become insolvent (as defined in the Housing Grants, Construction and Regeneration Act 1996) at any time between the last date on which the Client could have issued the notice under clause 5.16 and the Final Date for Payment
- the Client issues a notice under clause 5.16.

RIBA Professional Services Contract 2018

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- + **RIBA Professional Services Contract 2018**

Bad Payment Terms (1)

Payee Notice - In the event that the Consultant is entitled to serve a Payee Notice it must:

- be in writing containing a Heading in **Red Capitals** stating "**THIS IS A PAYEE NOTICE AND FAILURE TO RESPOND MAY RESULT IN THE FOLLOWING NOTIFIED SUM BECOMING PAYABLE**", and
- it must be **sent in duplicate by courier** both to the Site Office and the Registered Office of the Contractor (service by email will not be accepted), and
- it must be addressed to the Specified Person, include the full Order Number, full postal address of the site,

Failure to comply with all the above provisions shall render **the Payee Notice invalid**.

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Bad Payment Terms (2)

The Employer's obligation to pay and the Consultant's obligation to be paid shall **only be effective**:

1. if there are **no conditions precedent** to payment which at the Due Date have not been satisfied;
2. should the Consultant have consent if it has assigned, transferred and/or sub-let any benefit and/or interest in this agreement and/or sub-let the Services in whole or part;
3. should the Consultant have made its written application **on the dates of the months agreed** and recorded in the Schedule; and
4. in the event that all of the Services comprising the Stage shall not have been completed, should the **maximum entitlement for an applicable Stage not have been reached**.

Bad Payment Terms (3)

Third Party Payment

The Consultant's attention is drawn to the fact that from time to time **another Group Company may meet the payment obligations of the Client.**

Condition Precedent

The Consultant **must obtain the Client's approval in writing before proceeding with a Works Stage** and, notwithstanding any other provision of this agreement, **such approval shall be a condition precedent** to the Client's obligation to pay and the Consultant's right to be paid the Fee payable in respect of/on account of any of the Services forming part of any such applicable Works Stage.

Invoicing Arrangements

- + Many invoices:
 - include standard statements such as “payment is due in 28 days”
 - do not state the amount considered to be due and basis calculated
- + Could make recovering payment more difficult.
- + Ensure your invoices reflect:
 - Construction Act (see next slide)
 - Appointment terms
- + Tie in with debt recovery process



Payment Notices

- + Must state:
 - sum considered to be due; and
 - basis on which that is calculated.
- + Must be a payment notice in “form and intent”.
- + Final Account valuation not notice of sums considered due - **Systems Pipework Limited v Rotary Building Services Limited** [2017]
- + *“If they intended to serve a valid payee's notice ...they could and should have said that that was what they were doing”* - **Caledonian Modular v Mar City** [2015]
- + Make as clear as possible that invoice = payment notice



Recovering Payment

“Money is like muck, not good except it be spread.”

Sir Francis Bacon – Lawyer, author & philosopher (1625)

- + There is no silver bullet
- + Follow the terms of the appointment
- + Keep records
- + Recognise and identify payment issues when they arise and take appropriate action
- + Timing and leverage are key



Good communication is key

Bob Hoskins

“It’s good to talk”

© *British Telecom 1990...*



- + Record what is discussed
- + Reserve right to recover the full amount if concessions are made and payment isn't received within time
- + Withdraw any offers made if necessary

Construction Act (1 / 2)

- + Construction Act “Construction Contract”
- + Housing Grants, Construction and Regeneration Act 1996 (The Construction Act)
- + Definition of Construction contract: S.104(2) of the Construction Act
 - S.104(2) “an agreement –
 - a) to do architectural, design or surveying work, or
 - b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations.”
 - c) Since October 2011, no longer a requirement for the agreement to be in writing
- + Construction Operations:
 - S.105(1)(b) “construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of the land (whether permanent or not)
- + Exclusions / exceptions
- + Hybrid contracts?
- + C Spencer Limited v MW High Tech Projects UK Ltd



Construction Act (2) Payment Notices

- + Requirements of payment notices under S.110A and S.110B(2) of the Construction Act
- + Interim, periodic or stage payments
- + Due and final dates for payment
- + The requirements for valid payment / payless notices
- + Remedy for non-payment is adjudication...

Suspension

+ Services?

- Is there a contractual right under the appointment?
- In what circumstances?
- Notice provisions
- Construction Act, Section 112
 - Written notice giving at least seven (7) days' notice of intention to suspend
 - Any period of suspension will be added to the time for performance



+ Copyright?

+ Warning...



Escalation

+ Termination?

+ Statutory demand / winding up petition

- Debt of more than £750
- Debt must not be disputed
- Unsecured creditor?

+ Appointment, dispute resolution clause?

- Adjudication (under appointment or Construction Act – see next slide)
- Court/Arbitration
- Counterclaim?



Adjudication

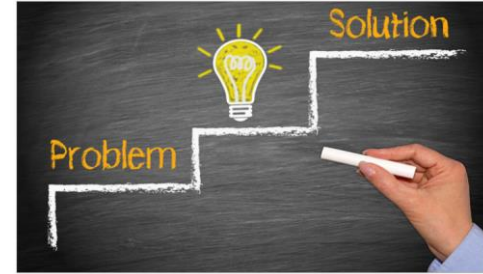
- + What is adjudication?
 - Interim dispute resolution procedure
 - Aims to provide a timely and efficient resolution to disputes
 - Construction Act s108, Statutory adjudication available on constructions contracts.

- + When can adjudication be used?
 - A party may give notice of an intent to adjudicate at any time
 - Exclusions?
 - Dispute must have “crystallised”

- + Outcomes

Final thoughts

- + Follow the terms & keep records
- + Recognise and identify payment issues when they arise
- + Timing and leverage
- + Structured escalating debt recovery process is useful



Upcoming Webinars

- + Public Contracts Regulations 2015 – Refresher, 13 November
- + Register at – webinars@beale-law.com

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