

# Not getting paid?

## Want to get paid?

### County Flat Roofing - a real life success story

Kevin Hodge, the director of County Flat Roofing Limited, told me that County was not getting paid by a main contractor and asked how best to proceed. In September 2007, County were owed £16,160.90. By October 2007 this had increased to £24,848.21. County got its money, all of it, plus interest and a bit of compensation – let me tell you how.

**F**irst, we wrote a letter to the main contractor setting out County's position and a request for payment to be made. The main contractor did not reply. I called the main contractor's managing director who explained to me that County would not get paid until the main contractor got paid by the client. I did emphasise to him that 'pay when paid' in construction contracts had been outlawed and his reply was: "I know!"

#### Persevere

After a couple of weeks we wrote to the main contractor again. We reminded the main contractor that the sums remained unpaid, and informed them that if County had not received payment, in full within seven days of the date of the letter, we would commence formal proceedings.

The main contractor ignored our letter. We wrote again requesting payment within seven days and said that, if payment was not received we would commence adjudication. We asked the main contractor to confirm whether they agreed to one of three named adjudicators set out in our letter, or, alternatively, to provide a suggestion for another suitable person to act as adjudicator. Again, the main contractor remained silent.

Ten days later, we wrote to the main contractor again to record that County still had not been paid and that the main contractor had not confirmed that it had agreed to one of the three proposed adjudicators or provided an alternative suggestion.

We therefore served a Notice of Adjudication on the main contractor and applied to the RICS for the nomination of an adjudicator. We served the Referral as soon as the adjudicator was appointed. The main contractor had a chance to respond which it did about a week later.

#### Result!

Just seventeen days after the Notice of Adjudication, the adjudicator made his Decision. He decided that the main contractor should pay County forthwith the full amount claimed, plus over £700

interest and £100 compensation.

The main contractor still refused to pay, so we got a solicitor to threaten court proceedings to enforce the adjudicator's Decision. The main contractor paid.

I spoke to Kevin early in the New Year and he said to me:

"When I spoke to you I had no idea what adjudication was. I found the process of adjudication quick, and I got all my money plus interest and a bit of compensation – it only took about 12 weeks from sending the first letter to chase payment until I finally got paid."

See? Even with the most reluctant payer, adjudication can work. Going straight to court or arbitration could, and does, take years – not to mention the legal costs.

Following adjudication, and the threat to commence court proceedings to enforce the Decision in our favour, the main contractor paid the full amount due, plus interest and compensation and all the adjudicator's fees. The main contractor also had to pay County's legal bill for threatening court proceedings.

It would of course have been much easier if the main contractor had paid in full in the first place. Mind you, contractors like the main contractor in this article know that many subcontractors will not go to the lengths that County went to get their money.

#### Adjudication does work

Oh, I nearly forgot, the main reasons the adjudicator awarded County every penny it claimed were that:

- County was honest when making its applications for payment i.e. the applications were not inflated in any way and stood up to scrutiny;
- County kept reasonable records of the work it had done.

This made my life easier, kept fees down and helped County get their money in time for Kevin to enjoy New Year's Eve!

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Many subcontractors tell me that they are angry that retention is being withheld beyond the period it should be and say that as a result it is simply being written off! My next article will therefore look at retention.

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### Retention - when can you get it back?

Over the past few months I have been sending out short questionnaires to gather information and data in preparation for a series of talks that I am now giving. Many of those who completed my questionnaires stated that retention was being withheld beyond the correct period and many subcontractors are simply writing it off!



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**T**he idea is that retention helps to protect the client against incomplete and/or defective work. Half of the retained sum is released when the project reaches practical completion, with the balance being paid when the defects liability period ends, usually 12 months later. The purpose of retaining funds is to provide the client with some assurance that money will be available to rectify defects, or, more commonly, to induce the contractor to rectify any defects during the defects liability period. Once the defects liability period has expired, or a Certificate of Making Good Defects has been issued, the retention money can be released. When the client does not release the main contractor's retention then the main contractor invariably does not release the subcontractor's retention.

#### Retentions affect cash flow

Subcontractors complain of the huge amounts of money they have tied up in retention with the main contractor. It is not uncommon for the equivalent of two years profit to be tied up. What makes it worse is that the subcontractor may have completed their work properly, but the main contractor and/or other subcontractors are taking their time and the main contractor tells you that you will not get your retention until they have finished.

#### What do the standard form sub-contracts say?

Where the JCT form of contract is used, subcontractors usually have to wait until the architect has issued the certificate of practical completion under the main contract before the first half of the retention is released. The certificate of making good defects has to be given under the main contract before the subcontractor receives the final balance of retention. Other standard forms of contract, such as GC/Works/1 and ICE, are similarly worded. Therefore, when it comes to the second half of the retention, subcontractors are very disadvantaged. They have often corrected their own defects, but the certificate of making good defects under the main contract has not been issued due to a failure on the part of the main contractor or other subcontractors.

#### Court case

Let me tell you about a case that went to the High Court in 2000. It was a case between Pitchmastic, a roofing contractor, and Birse Construction. A dispute arose concerning the release of retention. Pitchmastic were subcontractors to Birse and the subcontract was an amended DOM/2. The subcontract roofing works were completed on 26 February 1998, followed by practical completion of the main contract works on 22 May 1998. The Defect Liability Period under the main contract was 12 months. At the end of the Defects Liability Period under the main contract, 21 May 1999, Pitchmastic's roofing works were defects free. However, defects remained to be corrected under the main contract and therefore Pitchmastic's final half of retention, (£33,651), was not released. Pitchmastic were not happy and began an action in the High Court to recover the balance of the retention. The judge said:

"... Provided that Birse and its subcontractors were proceeding with reasonable diligence to make good the defects, Birse was not preventing the issue of the certificate..."

This finding meant that Pitchmastic did not get the final half of its retention until the whole of the works under the main contract, which included the works of all other subcontractors, were completed and defects free.

So there you have it – unfortunately, provided the correction of outstanding defects in the main contract and/or other subcontracts is proceeding with 'reasonable diligence', the main contractor will not be obliged to release the outstanding retention to the subcontractor who has completed its works and is defects free.

#### Next article

Most subcontractors include for 2.5 percent discount when submitting quotations and state that the discount is in return for payment on time. However, subcontractors frequently complain that many contractors pay late but still deduct cash discounts. Contractors often argue that they are entitled to deduct cash discounts irrespective of whether they have paid on time or not. My next article addresses this dilemma.



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### Are contractors entitled to deduct cash discounts if they haven't paid on time?

When submitting quotations, most subcontractors allow for a 2.5 percent discount. Standard forms of subcontract, such as DOM/1 and NSC/C used with JCT forms, provide for a 2.5 percent discount but clearly state that the discount is in return for payment on time.



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**W**here non-standard terms apply, what does the term 'cash discount' mean? Does it mean a discount for payment on time, or a trade discount which is, in essence, a price reduction which applies whether a payment is made on time or not?

Subcontractors frequently complain that many contractors pay late but still deduct a cash discount. Contractors often argue that they are entitled to deduct cash discounts whether they have paid on time or not.

#### Dictionary definitions of cash discount:

- New Collins Concise Dictionary:  
"Cash discount: A discount granted to a purchaser who pays before a stipulated date."
- Encyclopaedia of Real Estate Terms 1987 edition: "Cash discount: A reduction in price or consideration for early or prompt payment."

The meaning appears clear. However, many disputes arise concerning cash discounts taken when payment has not been made on time.

#### Plain English please

In the case of Team Services Plc v Kier Management & Design (1992), Team Services argued that Kier was entitled to deduct 2.5 percent cash discount from interim certificates only if payments had been made within the timescale provided within the subcontract. Kier argued that the discount could be deducted whenever the interim payments were made. The Judge found in favour of Team Services, i.e. that Kier was only entitled to deduct 2.5 percent cash discount from interim certificates if payments had been made within the timescale provided within the subcontract. This judgement has been upheld in subsequent court decisions.

Wouldn't it have been better and more straightforward, if unambiguous wording had been included in the contract if the intention was for a discount to have been deducted only when all payments were made on time?

#### Know your discounts

As a result of Team Services and subsequent judgments, discounts expressed as 'cash discount', or stipulated as being offered in return for payment in

accordance with the contract terms, cannot be deducted if payment is made late. Trade discounts, on the other hand, may be deducted whenever payment is made.

It is worth noting that, if a discount can only be deducted if payment is made on time, contractors may be tempted to calculate discounts by reference to the gross amount due before the deduction of previous payments. If this method is used then the contractor need only make the final payment on time to become entitled to deduct the full discount from the gross value of work executed. The contractor would have to forgo discounts from interim payments made late. If he decided to pay late but deducted discount the contractor's liability would be to pay interest on the overdue money.

The process would be:

- 1) Take discount off the gross payment before deducting previous payments
- 2) Make all interim payments late and forgo the discount
- 3) Pay the final payment on time and deduct discount from the gross final account.

The net result will be that the main contractor will have paid all interim payments late, but because the final payment was made on time the discount can be deducted.

From the decision in Team Services it is clear that the term 'cash discount' means a discount which can only be deducted if payment is made on time. This is, on the face of it, good news for subcontractors in that late payment will result in the contractor losing his cash discount.

Unfortunately for subcontractors, in the subcontract in question, and indeed many of the standard forms of subcontract, discount is deducted from the gross value and the position can therefore be changed by timely payment of a subsequent valuation.

The advice to subcontractors is to vary the subcontract terms in this regard – if they are in a strong enough position to do so.

Next article: Where a contractor/subcontractor receives a letter of intent, is he at risk in commencing work, ordering materials or carrying out design? If the project is abandoned before a contract is signed, will there be an entitlement to payment?