The Ten Commandments of a Dispute

10 things to do in a dispute

A Guide for Contractors and Specialist Sub-Contractors

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Introduction

In my experience people think, because they aren't getting paid for outstanding invoices or valuations, they are automatically in a dispute.

They get angry and start threatening to walk off site, start legal action, and so forth.

All of these things may make you feel better, however, the chances are they will do nothing to help resolve the dispute and most importantly, get you paid.

But what should you do?

This document provides the 10 Commandments that must be carried out before you decide on the best course of action.

You could choose to do this yourself; however, it is worth bearing in mind that the most successful strategies are those which are developed from an objective view point.

I have seen countless disputes falling at the first hurdle because one party cannot even begin to see any side of the argument other than their own.

However, if you follow the commandments and develop a strategy that is strong, compelling and unquestionable, you will be well on your way to resolving the dispute and controlling the destiny of any future relationships.

1. Check you are actually in a dispute

Just because the other side disagrees with your claim doesn't mean you are in a dispute.

You could, after all, look again at your claim and decide that you made an error.

The point is, a disagreement does not make a dispute.

The disagreement only develops into a dispute when either party, for whatever reason, cannot accept the consequences of the disagreement and insist that it is resolved.

A (construction) dispute can only be classified as a **dispute** once it has been "Crystallised". I beg your pardon? No, don't worry, you do not need to be an alchemist. It's a term used to define clarity or coherence.

To crystallise your dispute you will need to clearly and concisely reassert your claim immediately after you are aware it has not been accepted. But before you go back and kick up Mary hell and tell your client you are in dispute, read on.

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2. Check your contract....

First things first - do you have a written contract in place? If not, then you will NOT be able to submit it to Adjudication. A letter of intent is not a contract.

Ever since the Act became law in 1998 companies with deep pockets have sought to undermine what we know as the "spirit" of the Act.

It shouldn't really come as a surprise. The practice of amending contracts to favour the employer and pass risk to subcontractors is nothing new.

So what we have now is a raft of highly questionable Clauses inserted into contracts that seek to remove some or all of the contractor's rights.

Examples include clauses designed to put you off exercising your right to Adjudicate. They will say something like – "all costs arising from any Adjudication will be borne by the party raising said Adjudication."

Immoral I know, but the fact is, if you have signed on the dotted line and accepted them, they are binding. You will need to take this into consideration when developing your dispute resolution strategy as this could potentially swallow up a large chunk of any monies awarded.

Some of these issues will soon be addressed (we hope) with the introduction of the successor to the Construction Act. But that discussion is for another day.

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3. Check the other side's financial position....

The key to resolving a dispute lies in a clearly defined and workable strategy.

A key aspect is the solvency of the other side. Why spend a chunk of your hard earned cash on professional fees to win a dispute, only for the other side to go belly up?

Use a reputable agency and do background checks if necessary. Sometimes it is worthwhile getting a second opinion, either from your advisers or your own network of contacts.

Once you know what you are dealing with, you can begin to develop different approaches and anticipate the reactions from the company.

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4. Gather all of your evidence....

When I take on a new case one of the first things I say to a client is this:

"If you can't prove it to me, then I can't prove it to the other side or an Adjudicator".

It really is that simple.

The burden of proof, more often than not, lies with the party being employed. Not the Employer. So in every case we take on, we always look for:

All pre-contract paperwork
All written variation requests and contract paper work
All measurements
All written communications

Experienced contractors, which may include the party you are in dispute with, will have diligently prepared project files and followed up all verbal agreements with written confirmations.

You need to go through everything with a fine toothed comb. This evidence may ultimately end up in front of an Adjudicator. Therefore it needs to be clear, concise and irrefutable.

If there isn't written evidence or it is very sketchy, this obviously can weaken the case. If you find yourself in this position it is worth speaking to a construction dispute professional as early as possible as there are other methods that can be employed to lend credibility to your argument.

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5. Consider your cash flow....

The position of your cash flow will have a major impact on the strategies you employ. So you must consider:

How long can you survive without the monies?
Can you sustain the loss?
Can you afford the costs of the dispute? If so for how long?

Has the other side certified money but not paid you? You could have recourse in this case.

You really need to ask these questions and be realistic about the answers. There is no sense in throwing good money after bad.

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6. Consider your relationship....

Let's not be naive here. Relationships matter in business. However at some point you will need to consider the possibility of breaking off the relationship and trying to get the best out of the pre-nuptial agreement (aka the contract).

You need to ask the question I ask - "Are they a Client or are they now a liability?"

Often it is the case that the owner of a smaller contractor will be dealing with a commercial employee of a larger contractor. This is usually fraught with tension because no matter how hard the larger contractors QS tries, he simply won't understand and in some cases won't care about the impact non-payment can have on a smaller contractor.

My suggestion is - who do you know higher up in the company who might be more sympathetic and also worldly wise? This serves two purposes:

It may expedite a solution.
If not, it can show you what the senior staff think of the situation and allow you to factor this into your strategy.

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7. Examine the other side....

Disputes require two parties. If you find that you are in a dispute without another party, you may wish to seek medical advice.

It is critically important, strategically, to consider the other side's position.

I am not saying you will agree with it. But in my experience objectivity needs to be injected. By exploring the options that the other side may take, you may discover your case is weak.

It might be that the other side do not really have an appetite for lengthy dispute processes and could very well be looking to settle and put this to bed.

The point is, you need to consider all possible scenarios and have a Plan A, B, C and so on.

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8. Request a meeting....

It is always good to talk. In this modern age of email and mobile communications there is without doubt always a place for face to face discussions.

As I said before, relationships matter and regardless of the intent of both sides it is incumbent on all of us to attempt to negotiate a fair and reasonable settlement.

The meeting can serve many purposes and can often lead to quick and good natured resolution.

Where the meeting does not enable a quick resolution, it can also be used:

- to assess the other side's appetite for a fight
- get a feel for the players in the game and how they feel about the dispute
- to assess your intended strategy and hone if necessary

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9. Categorise the dispute....

Once you have everything in place, you must take a step back and try to take an objective view on things.

The reason a dispute arises usually holds the answer as to which method is best to resolve it. I categorise Disputes into two camps.

One is a genuine difference of opinion. This can usually be settled by an independent expert opinion stating or restating facts or information that one or both parties might not have been aware of.

The other, which is becoming increasingly prevalent in the current climate, is when one or both parties are acting out of self interest or they have a hidden agenda. Instead of being genuine, they will act disingenuously.

The secret to resolving this form of dispute is to be able to find and present objective evidence of the actual case in point, to a level which cannot be disputed. Clearly the more evidence that can be presented the stronger the argument

Whichever camp your dispute lies you need to crystallise, categorise and choose the appropriate method of resolution.

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10. Finalise and action your strategy....

Once you have fully answered / actioned all of the above questions then don't beat about the bush. Initiate whatever strategy you or you and your adviser have agreed upon.

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