

Avoiding Construction Nightmares: Practical Advice from Legal Experts

[Nick Coffey]

Hello and welcome to this episode of TW Law Talk by Taylor Walton Solicitors, the podcast series which gets to the heart of legal issues, explaining, advising and reassuring as we go. I'm in Taylor Walton's offices in St Albans and today we're talking about a subject which, I'm not going to lie, is going to rake up some fairly recent trauma for me, residential building work. What happens when it goes wrong? Spoiler alert, I can answer that already, I can tell you!

What to do if it does go wrong and what can you do to prevent it going wrong in the first place? This is the bit where I wish I was here five and a half years ago. So, no pressure then, Saljuq Haider, partner here at Taylor Walton, lots for us to get through.

[Saljuq Haider]

Yes, there's a lot to get through and hopefully we've got enough time to get through it all and de-stress some of our listeners on these issues.

[Nick Coffey]

Sadly, too late for me. We've called in support to help us, David Sawtell is a barrister at 39 Essex Chambers and specialises in construction litigation. Nice to have you along, David.

[David Sawtell]

Always a pleasure to be here.

[Nick Coffey]

I am wondering where to start that doesn't make this the Nick Show, complaining about my absolutely disastrous build when I bought a house that was in some considerable state of disrepair, and I bought it for a really good price and I don't regret buying it because it was the right price for what it was. My rebuild project, and this was post-divorce, so I already had enough stress going on, my rebuild project was, shall we say, a disaster and the first thing I did wrong, and I wonder whether this is actually a really good place to start.

The first thing I did wrong was I asked a friend to do the building work (and David looks horrified), and this friend promised me all manner of amazing ideas at a price which looking back now was absolutely insane. It was a very difficult project and, in the end, involved me removing him from the project and having to go again and start fresh with some builders. Is this a good place to start? Picking the right builders, and when you look at our area here, Saljuq, you know, we're St Albans, Harpenden. It is very, very common in this area that people do considerable building work, that the cost of moving, say, from a three to a four bed is huge, so the thought of going into a loft, going out the back, garden rooms, is actually considerably less than moving.

So, this is a subject which is right at the heart of this area, is this a good place to start? Picking the right builders.

[Saljuq Haider]

Yeah, it's a perfect place to start, and it's that old adage of mixing work and pleasure and not always a good idea when you're dealing with your own property, and it can lead to issues. It can lead to breakdown in relationships as well. So, getting it right from the start and selecting the right builder and the right construction professionals is vitally important.

[Nick Coffey]

What do we need to do, David? So, the obvious starting point is get good references, I also remember, I wish I'd taken note of this, but people saying a builder who is available immediately is not necessarily a good builder. What else do we need to do from the outset when we're choosing, in effect, our suppliers?

[David Sawtell]

Well, we've always had scare stories. You go on your favourite internet search engine, you look up roofer, fiddler on the roof and you will see so many examples of roofers who have ended up in court and sometimes in criminal proceedings because of how badly they've performed. Recommendations are always brilliant, but you also need to do a bit more homework from that.

If you go and look on the Companies House website and they've been a director of more companies than Alan Sugar, then maybe you need to start wondering how many times they're trying to avoid liability for when things go wrong, because ultimately you want a builder who performs, who does well, but then if things do go wrong, then you want them to be worth more than powder and shot.

[Nick Coffey]

Because of course it's an age-old adage of any form of business. Problems do happen; things can go wrong. Of course, the really good businesses are those who remedy it well, quickly and without grief and in your case coming to you for litigation.

[David Sawtell]

Absolutely. No one wants to be in a dispute. Things will go wrong in construction.

It's a messy business. The best builders come back and fix it. The worst builders never come back.

[Nick Coffey]

Saljuq, in terms of setting out from the start what you're looking to do, you've found your builder, you've done your references, you checked Companies House, they don't have 15 existing limited companies and 22 that they've resigned from. How important is it from your experience of seeing these disputes, how important is it to really clearly from the outset set out what the scope of the work is, what exactly is you're paying for, when you're paying for it and also what happens if for any reason that budget needs to shift?

[Saljuq Haider]

Yes, that's vitally important. So, it's not just about selecting the right builder, but once you have them on board, it's keeping an eye on those builders. But before you even get to that stage, you need to ensure that things are in writing and this is critical.

The ideal situation is that you have a formal contract in writing, which sets out the scope of works, the price, your rights to suspend works, potentially terminate works. So, all of these should be in writing. Now for residential construction matters, you can have a JCT homeowner's contract, which is a standard suite document.

It's not so mind-boggling, it's not 300 pages long like some of the commercial construction contracts. So ideally you want that particular document signed up to, which would be ideal.

[Nick Coffey]

One of the things we're really trying to avoid doing on these podcasts is say, get legal advice, come to Taylor Walton, go and see a barrister. However, in this instance you're suggesting there's a sort of a hotplate, a contract pack that you can get. Is this the kind of thing where you should be engaging a lawyer at the start to make sure that your agreement is watertight, or is it actually superfluous at that stage?

[Saljuq Haider]

I would always recommend that if you're in any doubt, you should consult with a solicitor or a legal advisor from the outset. It's best to get the advice from the start, but it's not essential. As long as you follow the rules that you need to have a scope of works, an agreement in place, the price, when payments are going to be made, it's not essential to have.

[Nick Coffey]

My guess, David, and you may tell me I'm wrong here, but my guess is that there are a couple of strands that can end up in litigation. One of course is when the building works themselves are a disaster but just talking about scope of work there and payment, I'd imagine that sometimes people will end up in your chambers because they're being charged a huge amount more than initially agreed. What is the window? What is the range on that? So, say for example, I've engaged a builder and that builder has said, all in, everything done, this will cost £100,000. And then six months into a nine-month job, and this kind of happened a few years ago when the cost of building materials rocketed, six months in, this builder says, well actually, you know what, in order for me to finish this, I'm going to need another £75,000.

What is the scope for that if the agreement is already in place?

[David Sawtell]

So that's why you need to have a good contract in place. And Saljuq's mentioned the JCT form that they've provided. And the nice thing about JCT is it's supposed to be a balanced contract, it's not designed by contractors, it's not designed by clients, it's actually a tribunal who sets it.

I've also seen some really good contract forms from the Federation of Master Builders. For example, it's clear wording, you know where you are, and Saljuq's absolutely right. The scope of works says this is what the builder has to do for the initial price.

It's as if you're going on holiday, but you're not quite clear where you're going to, you don't quite know which airline you're going to go on. And you might be there for five days, you

might be there for 10 days. And suddenly at the end, you're presented with a bill and it's not what you signed up for.

If you have a clear scope of works, then you know what the builder has agreed to do for that price. We act for builders as well as for residents.

And they often come back to us and say, this was not what we originally agreed to, this is what we signed up to. We were told to do extra work, we're told to do this extra piece, it wasn't inside the original price. If everyone is clear on what's going to be in that price from a word go, then you can discuss it.

[Nick Coffey]

I'm going to phrase this next question quite carefully. I know a number of tradespeople and they work very, very hard. And it's fair to say that paperwork is not their favourite thing.

Shall we put it that way? They don't always like to do things in a formal manner. And I kind of in some regards get it on occasions where they're dealing with so much different material, and they've got guys who are working for them and they're paying them.

I understand how it can be quite hard to nail down into the kind of sharp document you see, for example, in a huge commercial property project. How do you as lawyers and barristers and how do we as humans who might be doing building work, how do we bridge that gap between a culture and also a need to be protected?

[Saljuq Haider]

Well, I think the issue with that is that you come into a situation where, when disputes arise, there is nothing in writing. And we as lawyers like seeing things in writing because from an evidential point of view, it helps us win cases. It helps us advise clients as to what their prospects are at an early stage.

So, it's a difficult one and it's this fine balance between understanding how builders operate and yet not want to sort of put them off doing your work.

[Nick Coffey]

And David, obviously, Saljuq there emphasises the importance of having everything in writing. Where you come across a builder who perhaps wishes to extol a more relaxed approach, for you as a barrister, is that an immediate red flag?

[David Sawtell]

It's a problem. It's an issue. I'm not going to say my favourite cases were involved going through hundreds of pages of WhatsApp messages trying to tease out what parties were agreeing about what they're going to do about their residential project.

[Nick Coffey]

But did your favourite cases involve going through hundreds of pages of WhatsApp trying to tease out what was agreed between builders and their clients?!

[David Sawtell]

You have to, because that's often the only thing that was recorded. And often as part of this ongoing banter exchange, they'll be talking about prices. They'll be talking about materials being ordered in.

Expectations of when things will be completed. So, we have to go on the best evidence there is. Quite often, WhatsApp is a form of communication which is permanent and does record these things. And it's admissible in court.

[Nick Coffey]

Can we talk about money and how to pay? In both of your opinions, what is best practice when you get involved in these projects? And they can be three, six, nine, twelve months in length.

What is best practice in terms of how often to pay? What to pay up front? What to hold back to leave yourself an element of protection?

[Saljuq Haider]

Well, I think this is dictated by the contracts that you sign up to in the first place. So, in a number of contracts, you might have a retention in place. So, the builder will ask for a retention, typically 5%, and say that we'll hold that back as against various works that are going to be done or may need to be done.

But in terms of payment, it's up to the parties to agree what stage they're going to pay money out. There are danger signs that you need to look out for. And one of these is where a builder says, I need the money up front to buy these materials.

I've got a bit of a cash flow problem at the moment. Can you pay up front 50,000 pounds? And I've had a number of disputes where that money has changed hands.

And the materials have never turned up. And the builder's gone. The builder's gone.

So, it's sometimes a trust issue. So, it's a balancing act between what the builders need and what the owner requires.

[Nick Coffey]

Because of course, the builders need cash flow. They need funds in order to start. And the homeowner doesn't want to be putting 50,000 pounds into a project that's going to disappear.

When the works actually begin, and I can hold my hand up here and say I was guilty of this. I'm almost answering my own question. And you guys are just going to nod. And I'm going to feel even worse than I already do. Keeping an eye on the works, being present. Now, I know I didn't do this enough.

But it is important, isn't it, that if you've got a schedule of work, you need to be there ticking off, not feeling that you're embarrassing the builder, not feeling that he or she's going to think you're not trusting them. You need to be keeping a close eye and a close record of what's happening and in writing, David.

[David Sawtell]

I would say that's true of every project, from a great big power station to asking a plumber to dig you a new pipe. How many times in construction projects of all scales and sizes, we do not see people keeping an eye on what contractors are doing. They're not supervising the works; they're not inspecting the works.

And if they are, they're often not doing it to the correct standard. And you can see that across the entire industry. But absolutely, you need to keep an eye at regular intervals on what's going on on-site.

And not least, because if you need to instruct a change, you need things to be done in a slightly different way. It's better to say that early, and so everyone knows where they are, than to say once the work is done. There's a hold to try and open things up, when work has really been completed.

[Nick Coffey]

I wonder if there is, whether there exists or whether there's scope for almost a buddy. Because if you're someone who has no experience of building at all, and you instruct a firm to do something in your house, frankly, I wouldn't know if what they're saying they've done, they have actually done. I wouldn't even know if they've done it well or not.

What can people do to perhaps protect themselves along the way? When I say a buddy, is there somebody or something that we can use that, you know, you call someone every month, they just have a look and they say, well, actually, although they said they've done that, do you know what? There's no wires there.

I mean, what can you do?

[Saljuq Haider]

Well, subject to funds and how much money you have for this project, you should, from the outset, actually instruct a project manager. Now, they can be an external person or company who comes in, a surveyor that comes in, monitors the progress of works and the quality of works at each stage. That's an ideal situation, but it can be costly.

[Nick Coffey]

Are they then liable if it goes wrong? Are they in effect bridging that gap and taking that responsibility?

[Saljuq Haider]

They can be. It depends. It's very fact specific and it depends what's been advised, what the project manager has advised you at any step. So, there's potential for that, but we don't want to think from a litigious point of view right from the outset.

[Nick Coffey]

But the cost of it going wrong must dwarf the cost of having that project manager.

[Saljuq Haider]

Absolutely. Absolutely. And that's why my recommendation would be appoint a project manager.

[David Sawtell]

They can also help with drafting the contract. They can help with putting together the scope of works, the necessary documents that you want to put out to a builder to say, how much would you be charging for this? They can then tell you if that price is right or not.

And as Saljuq has said, they can come at regular intervals at important moments in the building works and make sure it's being done right. You want to find out the foundations are wrong immediately. You don't want to find out once you've built on them.

[Nick Coffey]

Let's get to the, in some ways, the crucial part here. What happens when it does go wrong? If you haven't followed any of this guidance, if it's a little bit too late, I'm quietly holding my hand up here.

What are the options if it goes wrong? You are lawyers and litigators. Obviously, people come to you when this needs to go further.

So, from a scale of one to 10, where one is the sort of soft conservative routes that one could take all the way through to 10, which I'm guessing is full scale litigation. Talk me through the options if it does go wrong. And actually, just to preface that; is option one, talk to the builder first?

[David Sawtell]

Absolutely. The court would expect you to ask the builder to come back and put right their work. It's called mitigation, where you ask the person to put right what's happened, what's gone wrong.

And in fact, many contracts will have a provision for defect rectification, a period in the contract, say six months, where if you notice there's a problem, there's snagging issues, after completion of works, you can ask the contractor to come back. They have to come back as a matter of a contract to put it right, to fix it. Plaster shrinks, paintwork, occasionally cracks in plaster that's been freshly put up; life happens, and good builders will come back and keep their reputations.

That is always stage one.

[Nick Coffey]

And they would have factored into their margin that they may have to come back and do 5% of work that they'd already costed for?

[David Sawtell]

Absolutely. And if you had, as Saljuq was talking about retention earlier, holding back a sum of money, in some contracts, on completion of works, you have what's called a moiety being released to you. So, a part of that retention, when you get the last part of your contract, some released to you at the end of that defect rectification period.

[Nick Coffey]

So that's if we're doing this in effect around the kitchen table, as long as the kitchen table hasn't got flooding around it, or the tiling was correct. Legally, litigationally, what can happen?

[Saljuq Haider]

When a dispute comes my way, typically it's all gone wrong. Residents want their money back. And what they'll say is, what can we do about this?

Now, the first stage is actually to send a letter of claim. And there are various protocols in litigation cases, and there is a specific one for construction cases. It's a pre-action protocol for construction engineering disputes, which is a bit of a mouthful.

But essentially, it's for us to set out the client's case, say where it's gone wrong, why we think it's gone wrong, and what remedies we're seeking.

And it's a prerequisite to court proceedings. So, we will send that letter of claim, and we'll see what response comes back from the other side. Now, it could be that they come back and say, well, let's sit down. Let's talk about this. And they typically will go back directly to the resident.

They'll try and keep the lawyers out of the equation. Sometimes they'll say, let's talk about this. Let's not fall out.

In other situations, they just won't respond. And that's when it gets slightly more serious. That's when we would escalate it to advise a client whether they have the right to adjudicate or issue court proceedings.

[Nick Coffey]

David, adjudication, court proceedings, what's the difference between the two?

[David Sawtell]

I'm going to tell you a short story about the history of construction. So, sit back, have a cup of tea. In the 1970s and 80s and into the 90s, there's a real problem with cash flow in the construction industry, because if there was a dispute, you'd have to go to court.

And that could take you some time, and some proceedings for bigger cases were taking two or even more years. And then in the Housing Grants, Construction and Regeneration Act 1996, for larger projects, they introduced a form of dispute resolution called adjudication. Under this process, the referring party, so we think of it as the claimant or plaintiff for fans of US legal dramas, would ask for an adjudicator to be appointed.

Once they're appointed, you send in your documents to them in, sometimes it's normally seven days. And then after they receive the documents, there's a very short time frame for them to reach a decision.

[Nick Coffey]

Is that decision binding for both parties?

[David Sawtell]

It is binding on both parties. In many forms of adjudication though, if you don't like it, you then have the right still to go to court. Most of the time, we're looking probably about 95% of the time, parties live without decision because they've had a construction professional come, make a decision on the papers, very occasionally with a site visit or a hearing, and has actually decided what the rights and the wrongs are.

And sometimes parties like thinking a decision is better than the perfect decision, which costs a lot more money.

[Nick Coffey]

To get to that point. And court?

[David Sawtell]

With court proceedings, you issue a claim form in a court, typically for residential cases, that would be the County Court. You put in particulars as a claim, which detail what you're looking for, what you're seeking from the other side, and what the basis of your claim is.

The other side puts in a defence. The court has a hearing, a court of case management hearing to give direction and support. And then it proceeds through to a contested trial.

[Nick Coffey]

In terms of how good or how bad it can be, Saljuq, imagine I've done a £100,000 build, and I think it's been a disaster. Can I get that £100,000 back?

[Saljuq Haider]

You can. It depends on the facts of your case, the strength of your case, and we will never lead a client into litigation without advising them of the cost-risk analysis that sits behind this. You don't want to be spending another £100,000 on court proceedings with no guarantees of winning.

And there are no guarantees. There is no bond-proof case in litigation. So, it's a balancing act.

[Nick Coffey]

And if you do then win that case, and the result is several thousands of pounds, indeed several tens of thousands of pounds, and you're perhaps going to a builder who's a sole trader, who may have, as you said, David, several companies, who may just close down his company. How do you get that money?

[Saljuq Haider]

And this is a problem, and it's right to bring it up. This is something that I advise right from the outset, that you can win a case, you can go to trial, but all you'll have is a paper judgment that is essentially worthless if the individual who you've sued, or the company, is insolvent.

So, you need to make this decision from the outset, whether it's worth pursuing, whether you're throwing good money after bad.

[Nick Coffey]

I would guess that in more cases than you would both be comfortable with, companies, especially if they're small, find a way of not paying those fines. Is that a sweeping generalization, or is it fair?

[Saljuq Haider]

I think it's fair. There are companies and individuals, sole traders, who are masters at avoiding payment. But we have our ways.

There are ways that we can, various methods of enforcement, whether it's through the high court enforcement officers, whether it's charging orders, various forms of enforcement are possible. The nuclear option being a winding up petition. But again, you're going to spend money winding up a company that's got nothing inside it.

It's sometimes pointless.

[Nick Coffey]

As a mediator myself, I think it's probably worth mentioning that mediation is also a potential non-court dispute resolution process, isn't it?

[Saljuq Haider]

Absolutely. And what we would tend to do is try to get mediation in as soon as possible, because it's a cheaper option. You get people around the table; you get people talking.

Sometimes you can find a common ground. And part of the mediation process is advising parties that if you do not settle, it's going to cost a lot more money.

[Nick Coffey]

And it's more costly from an emotional standpoint as well. David, I'm putting words in your mouth, but I'm sure you love litigating. I'm sure you love being in court.

However, you know that it can have a real impact on the people involved.

[David Sawtell]

Absolutely. This is someone's home. This is where they're going to be living. And it's a significant investment of their life, their money, their energy. And you see that in these cases.

And with mediation, often that's a real opportunity for the homeowner to say, to give those concerns, to convey those across to the builder. What you don't want to do is see a bad project get even worse by pouring in legal fees, paying lawyers. And then, as you say, even if you win, you might have a judgment that you are struggling to enforce and get money out of.

Sometimes going to mediation, you can speak openly. The builder can speak openly. You can discuss things.

It may not be everything you want, but you may well be able to reach a conclusion you can both live with.

[Nick Coffey]

And this actually leads on nicely to a final point. And this has been very focused on how hard it is for consumers, for homeowners who find themselves on the back end of these kind of disasters. But I wonder whether there's a tiny bit of balance to bring in as well and whether you face this in your work.

And that is that you hinted there, David, at the emotional investment that we have in our building work. And I wonder whether sometimes your job is to be realistic and pragmatic with people and that they're going to come to you. And part of your role is to say, well, potentially, it's not as bad as you think it is.

Potentially, that you're seeing things where your emotion is speaking louder than the actual facts and just trying to find that midpoint between what the person is seeing and feeling and what has actually happened.

[Saljuq Haider]

Yes. And I think it's sometimes a case of managing a client's expectations and essentially telling them that, you know, this has been a bit of a disaster, but it's not insurmountable. We can help and we're here to help and talk them through the process.

I think that's a key point to bear in mind - that not all is lost.

[Nick Coffey]

And in my case, a new builder came in and in three weeks did more than the previous builder had done in about six and a half months. And it cost me a sum of money, but actually not a huge sum of money. And just completely changed the project and he finished it.

He just stripped it out, went back in. And I mean, admittedly, a lot of the heavy lifting had been done, but the three weeks that I invested in him and his very, very merry band was probably the best investment I made in that house. And five years later, of course, I've now forgotten about the cost because the house has gone up in value.

And maybe that's a good point to finish on as well, David, that the stress at the time, if it is a place you're going to live in for a while, yes, 10, 15 grand. Of course, it's a huge amount of money. Don't misinterpret my tone there. But in 10 years' time, it may have just got absorbed.

[David Sawtell]

Often with these disputes, these projects, they are people's dreams. But as you say, time rolls on, you can fix it. And then you are going to have your project, your dream realised.

And what we're trying to do is how to get you over this current dispute so you can get on with your life.

[Nick Coffey]

Really nicely done, both of you. If you want to find David, you can find him on the website of 39Essex, which is 39Essex.com. If you want to see what he looks like, there you are, David, on my screen in front of me here.

And Sawtell is S-A-W-T-E-L-L. So, David Sawtellll at 39Essex.

And you, Saljuq, obviously taylorwalton.co.uk. And your email address?

[Saljuq Haider]

It's saljuq.haider@taylorwalton.co.uk. Can I ask you to spell that? S-A-L-J-U-Q -H-A-I-D-E-R.

[Nick Coffey]

At taylorwalton.co.uk. And I've got through this. It's not been too retraumatising for me. I feel like I may have not done quite as badly as I thought five years ago.

And do you know what? The main thing is I've lived in that house, and I've loved it. And ultimately, that's why we do the work.

And although it was a stress to get there, it's also been a lovely house.

If you're enjoying this series, do click on follow. That way you'll be notified of all future episodes.

And we've got lots of great ideas to come for you. And perhaps if you've got a moment, you can leave us a quick review, because that really does help get the podcast out there as well. But for now, from me, Nick Coffey, Saljuq and David, it's goodbye.

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