The Institute of Construction Claims Practitioners

Blizzards
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10 June 2024

"Getting Paid – I Want MY Money"

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Introduction

We are going to consider:

The Statutory Payment Regime

The JCT Payment Regime

A number of Payment Issues

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Relevant Sources

The Statutory Payment Regime comes from the Legislation:

The Housing Grants, Construction And Regeneration Act 1996 (HGCRA)

The Local Democracy, Economic Development And Construction Act 2009 (LDEDC)

The Default provisions are in the Statutory Instruments:

The Scheme For Construction Contracts (England And Wales) Regulations 1998

The Scheme For Construction Contracts (England And Wales) Regulations 1998 (Amendment) (England) Regulations 2011

The JCT Payment Regime comes from the JCT Contracts

Which may be amended

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Important Definitions

There are four important definitions set out in Section 110A of the LDEDC

"Payee" - the person to whom the payment is due

"Payer" - the person from whom the payment is made

"Payment due date" – the date provided for by the contract as the date on which the payment is due

"Specified person" – a person specified in or determined in accordance with the provisions of the contract

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The Obligation to Pay

The Payer's Obligation is to pay the "Notified Sum"

Therefore, the Question is:

How is the "Notified Sum" created

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The Contents of a Payment Notice

When considering a payment regime it must be remembered that:

A payment notice is only compliant if it states:

The sum the sender considers to be or have been due at the payment due date in respect of the payment

And

The basis upon which that sum is calculated

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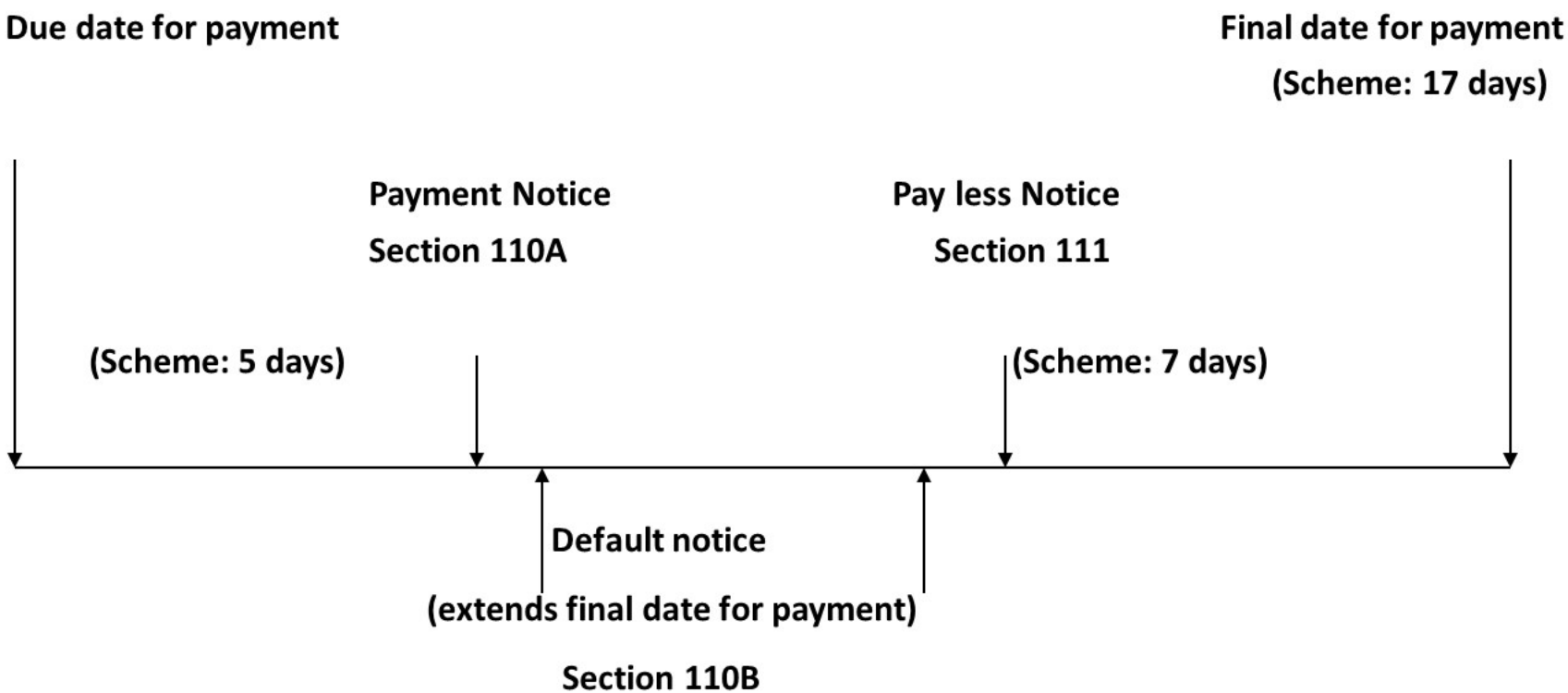
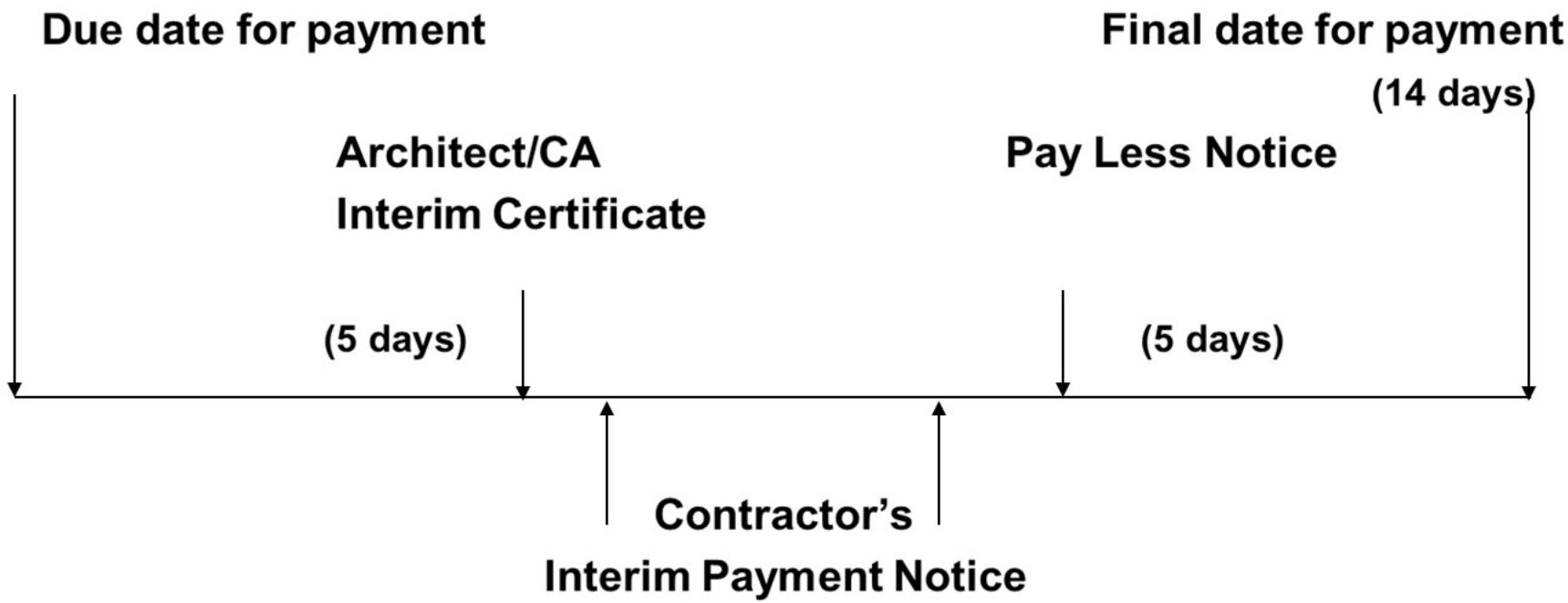
The Statutory Payment Regime



The JCT Payment Mechanism Summary



Relevant Cases on Payment Issues

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ISG Construction Limited v Seevic College [2014] EWHC 4007 (TCC)

The lack of a pay less notice meant the employer had agreed the value of the works the contractor claimed in an interim certificate

It also established the concept that each payment cycle was to be considered separately and there could only be one adjudication per cycle

However, there can now be more than one adjudication per payment cycle in certain circumstances

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Relevant Cases on Payment Issues

Leeds City Council v Waco UK Ltd [2015] EWHC 1400 (TCC)

It was held that an application for payment was invalid because it was made early. This meant the adjudicator's decision in favour of the contractor could not stand.

Caledonian Modular Limited v Mar City Developments Limited [2015] EWHC 1855 (TCC)

The Court followed the Leeds case and refused to enforce an adjudicator's decision, finding the Claimant's interim application for payment was made early and was invalid.

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Relevant Cases on Payment Issues

Henia Investments Inc v Beck Interiors Limited [2015] EWHC 2433 (TCC)

The Court found that there was no valid contractor's payment notice, there was a valid pay less notice and the employer could deduct liquidated damages even though the contract administrator had not decided the contractor's extension of time claim.

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Relevant Cases on Payment Issues

Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168 (TCC)

It was held that the contractor had no contractual right to make an interim application while the works were ongoing but after an agreed payment schedule had expired.

Balfour Beatty Regional Construction Ltd v Grove Developments Limited [2016] EWCA Civ 990

The Court of Appeal agreed that the contractor had no contractual right to make or be paid for an interim application made while the works were ongoing and after an agreed payment schedule had expired.

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Relevant Cases on Payment Issues

Jawaby Property Investment Limited v (1) The Interiors Group (2) Andrew Stephan George Black [2016] EWHC 557 (TCC)

The Court held that a building contractor's valuation did not constitute a valid interim application in accordance with the building contract.

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Relevant Cases on Payment Issues

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Adam Architecture Limited v Halsbury Homes Limited [2017] EWCA Civ 1735

The Court of Appeal confirmed that a party must give a pay less notice if it wishes to pay less than the sum claimed.

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Relevant Cases on Payment Issues

Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)

It was held that the employer's Pay Less Notice was valid even though it referred to another document to show the basis on which the sums were calculated.

It also cast some doubt on the ISG v Seevic Judgment regarding one adjudication per payment cycle – the second is dependent upon first paying the result of the first smash & grab adjudication

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Relevant Cases on Payment Issues

S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 248

The judgment in Grove Developments Ltd v S&T (UK) Ltd was upheld when the Court of Appeal dismissed S&T's Appeal

It is now confirmed that there can be more than one adjudication per payment cycle – a "Smash & Grab" AND a dispute over the proper value

However, starting an adjudication to determine the proper value is dependent upon first paying the result of a previous "Smash & Grab" adjudication

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Relevant Cases on Payment Issues

M Davenport Builders Ltd v Greer and another [2019] EWHC 318 (TCC)

The Court followed the Court of Appeal's judgment in S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448 (which upheld Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)). In doing so, he has reconfirmed the principle that an employer is entitled to refer to adjudication a dispute about the value of the contractor's final account but only after it has paid the first adjudicator's decision.

BUT the Court did not declare that the second Adjudicator did not have jurisdiction when the second adjudication was commenced before payment had been made

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Relevant Cases on Payment Issues

Global Switch Estates 1 Limited v Sudlows Limited [2020] EWHC 3314 (TCC) (3 December 2020)

The Court held the adjudicator took a restrictive view of his jurisdiction when he excluded substantial parts of the defence and so was in breach of the rules of natural justice, rendering his decision unenforceable.

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Relevant Cases on Payment Issues

C Spencer Ltd v MW Tech Projects UK Ltd [2021] EWHC 1284 (TCC) (31 March 2021)

The Court rejected the responding party's three jurisdictional challenges and enforced the adjudicator's decision (inc simultaneous service of NoA and application to ANB).

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Relevant Cases on Payment Issues

Downs Development LLP v Laxmanbhai Construction (U.K.) Limited [2021] EWHC 2441 (TCC) (7 September 2021)

The Court declared that an adjudicator's decision was not enforceable due to a breach of the rules of natural justice and refused to sever the decision.

He also declared that the employer's payment notice valuing the interim application at £1 was not valid.

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Relevant Cases on Payment Issues

CC Construction Limited v Mincione [2021] EWHC 2502 (TCC) (15 September 2021)

The Court granted part of the declaratory relief the defendant sought and held that the adjudicator's decision was only partly enforceable due to a material breach of the rules of natural justice (the adjudicator had failed to deal with the defendant's liquidated damages defence).

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Relevant Cases on Payment Issues

Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC) (19 April 2022) (O'Farrell J).

The TCC has issued a reminder that Section 111 of the Construction Act 1996 creates an immediate obligation to pay the notified sum, and that any right to adjudicate (under Section 108) to obtain a true valuation of the sum due is subjugated to the right to payment (S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448)

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Relevant Cases on Payment Issues

AM Construction Ltd v The Darul Amaan Trust [2022] EWHC 1478 (TCC) (17 June 2022)

There is ample authority that a sum due under section 111 of the Construction Act 1996 must be paid before starting a "true value" adjudication. However, this judgment clarifies that this principle applies even if the sum claimed has not been confirmed by a previous adjudicator's decision. It is enough for it to have fallen due under the contract.

Practitioners will also not the judge's conclusion that the contractor's service of an earlier invalid default payment notice did not prevent it from later serving a valid one.

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Relevant Cases on Payment Issues

Bellway Homes Limited v Surgo Construction [2024] EWHC 10 (TCC)

The TCC has confirmed that an adjudicator can have jurisdiction to determine the sum due to a party on *either* a technical *or* true value basis within the same adjudication.

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- Thank you for listening
- I hope you have found this talk helpful

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