

PAYMENTS UNDER THE 1996 ACT

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Introduction

Primary Objectives:

- Ensure familiarity with statutory payment provisions
- Reinforce the need to comply and highlight the implications of getting it wrong

First section of course:

- Overview of statutory payment regime and case law
- Typical payment procedure and notice requirements

Second section of course:

- Scenarios
- Questions

Do you have a Construction Contract?

The 1996 Act:

- Only applies to contracts which fall within the definitions of 'Construction Contract' (s104) and 'Construction Operations' (s105).
- Does not apply to construction contracts with **residential occupiers** (section 106 of the 1996 Act)
- A Construction Contract **does not have to be in writing.**

Section 109 - Stage payments

- Section 109(1) - entitlement to stage payments unless specified or agreed that duration is less than 45 days.
- Section 109(2) - parties free to agree amounts and intervals at which they become due.
- Section 109(3) - in the absence of provision for stage payments, the Scheme payment provisions apply.

Section 110 - Adequate payment mechanism

- Section 110(1) requires construction contracts to:
 - ◆ provide an adequate mechanism for determining what payments become due and when; and
 - ◆ provide for a final date for payment for each sum which becomes due.
- Section 110(1) also says that parties are free to agree the period between the due date and final date for payment.
- If contract does not comply with section 110(1) *“the relevant provisions of the Scheme apply”* (section 110(3)).

Typical Payment Procedure

Application for payment (payee i.e. main contractor/subcontractor)



Due date for payment



Certification/Payment notice (payer i.e. employer/main contractor)



Pay less notice (payer)



Final date for payment

Application for Payment

- The payee's application for payment must specify **the amount that the payee considers due** on the due date, **the basis on which the sum is calculated**, and **comply with the contract**.
- It is advisable for the application for payment to **state the relevant due date** to which it relates (see *Henia v Beck*).

What is the due date for payment?

- If the Contract does not specify a due date for payment, the due date is “the expiry of **7 days** following the *relevant period*” or the “making of a claim by the payee”, whichever is the later (paragraph 4 of Part II of the Scheme).
- Where the Contract does not specify a “*relevant period*”, the default period is **28 days** (paragraph 12 of Part II of the Scheme).
- The “*relevant periods*” should be calculated by reference to the **date upon which the works commenced on site**.

Payment Notice

- Section 110A of the 1996 Act provides that a construction contract shall, in relation to every payment, require the **payer** to give a notice no later than **5 days** after the due date for payment.
- The notice specifies the **amount due** and the **basis upon which it has been calculated** (section 110A(2)(a)).
- It is immaterial if the sum considered due is zero (section 110(A)(4)).

Payment notice not issued by the payer

- Where a payment notice is not issued within **5 days** after the due date for payment, section 110B of the 1996 Act applies.
- A valid **application for payment will constitute a notification** by the payee (section 110B(4) of the 1996 Act).
- If the payee did not have a right to make an application for payment then it may serve its own **default payment notice** (section 110B(2) and (3) of the 1996 Act).

Notified Sum

- Unless a pay less notice is issued, the payer is obliged to pay the notified sum on or before the final date for payment (section 111(1)).
- The notified sum is the amount specified in the payment notice (section 111(2)(a)).
- If no payment notice issued, it is the amount set out in either:
 - ◆ a valid application for payment; or
 - ◆ a payee's notice in default.

Pay Less Notice

- Section 111(7) confirms that the parties are free to agree the period before the final date in which pay less notices can be issued.
- Where the parties fail to agree, any such notice should be given by not later than **7 days before** the final date for payment (paragraph 10 of Part II of the Scheme).
- Eg. if the final date is 30 March, a pay less notice must be issued by 23 March.
- (Note section 116 - bank holidays excluded when reckoning periods of time).

What is the final date for payment?

- If the Contract does not specify a final date for payment, the final date is **17 days** after the due date for payment (paragraph 8(2) of Part II of the Scheme).

When will a default payment situation arise?

- A default payment situation is when the payer is under an obligation to pay the full amount of the payee's application for payment, regardless of any defences and/or counterclaims the payer may have.
- A default payment situation will arise when:
 - ◆ the payee has issued a valid and timely application for payment or default payment notice; and
 - ◆ the payer has failed to issue a valid payment notice or pay less notice; and
 - ◆ the final date for payment has passed; and
 - ◆ the full amount of the 'notified sum' has not been paid by the payer.

Do default payment situations allow for “smash and grab” adjudications?

- “Smash and grab” adjudications have succeeded since the amendments to the Act came into force.
- However, cases in the TCC highlight some of the difficulties that parties face in pursuing monies by reason of a ‘technicality’.

SCENARIOS

QUESTIONS?

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