

PAYMENT PROVISIONS

**Housing Grants, Construction and
Regeneration Act 1996, as amended by the Local Democracy,
Economic Development
and Construction Act 2009**

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The Course

Primary Objectives:

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

Content:

- Statutory payment framework
- Typical payment procedure
- Notice requirements
- Default payment situations and examples
- Case law
- Questions

Do you have a Construction Contract?

- For the 1996 Act to apply the contract must fall within the definitions of 'Construction Contract' and 'Construction Operations' (section 104 and section 105 of the 1996 Act).
- The 1996 Act 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 the parties are free to agree the period between the due 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).

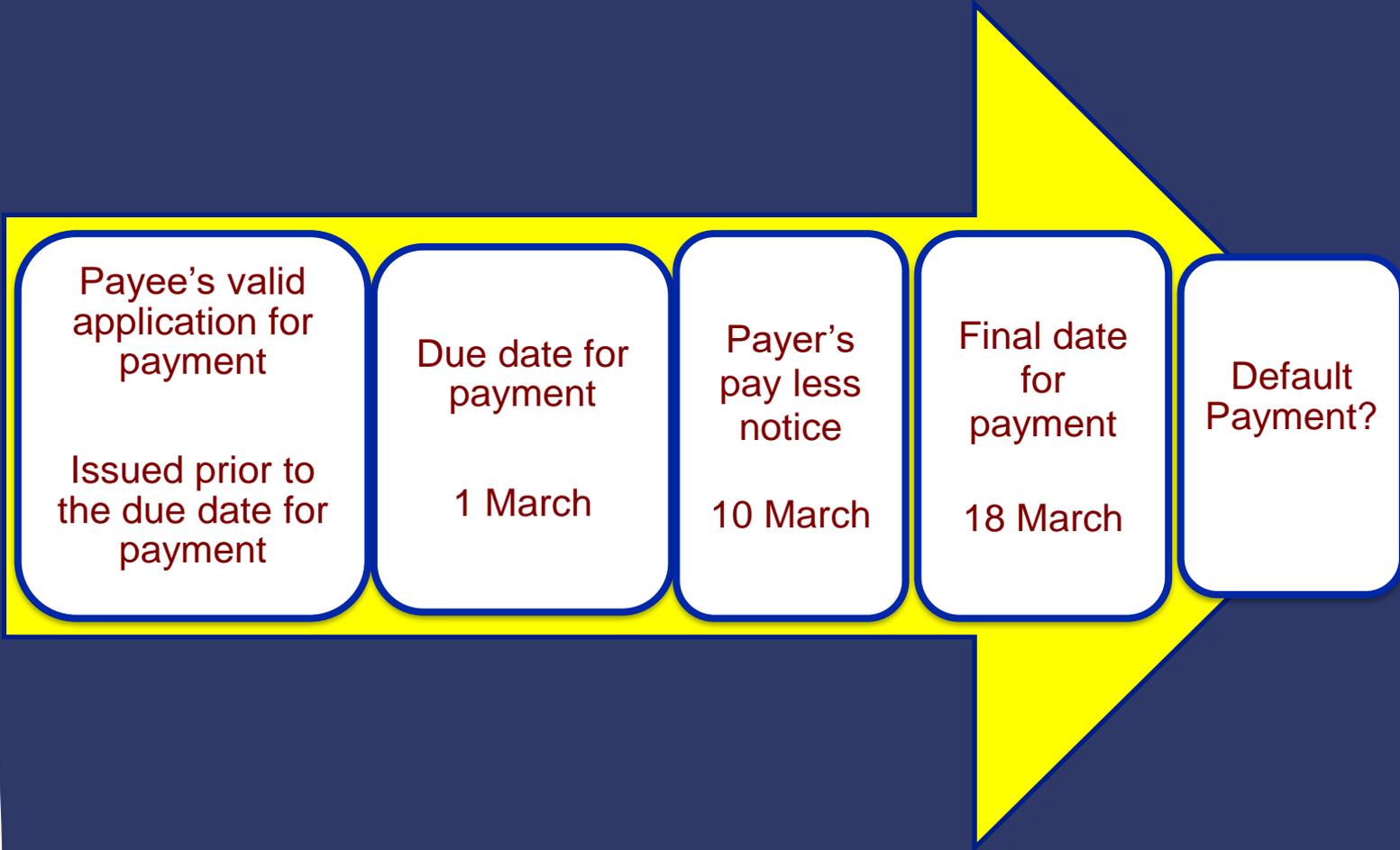
What is the final date for payment?

- 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).

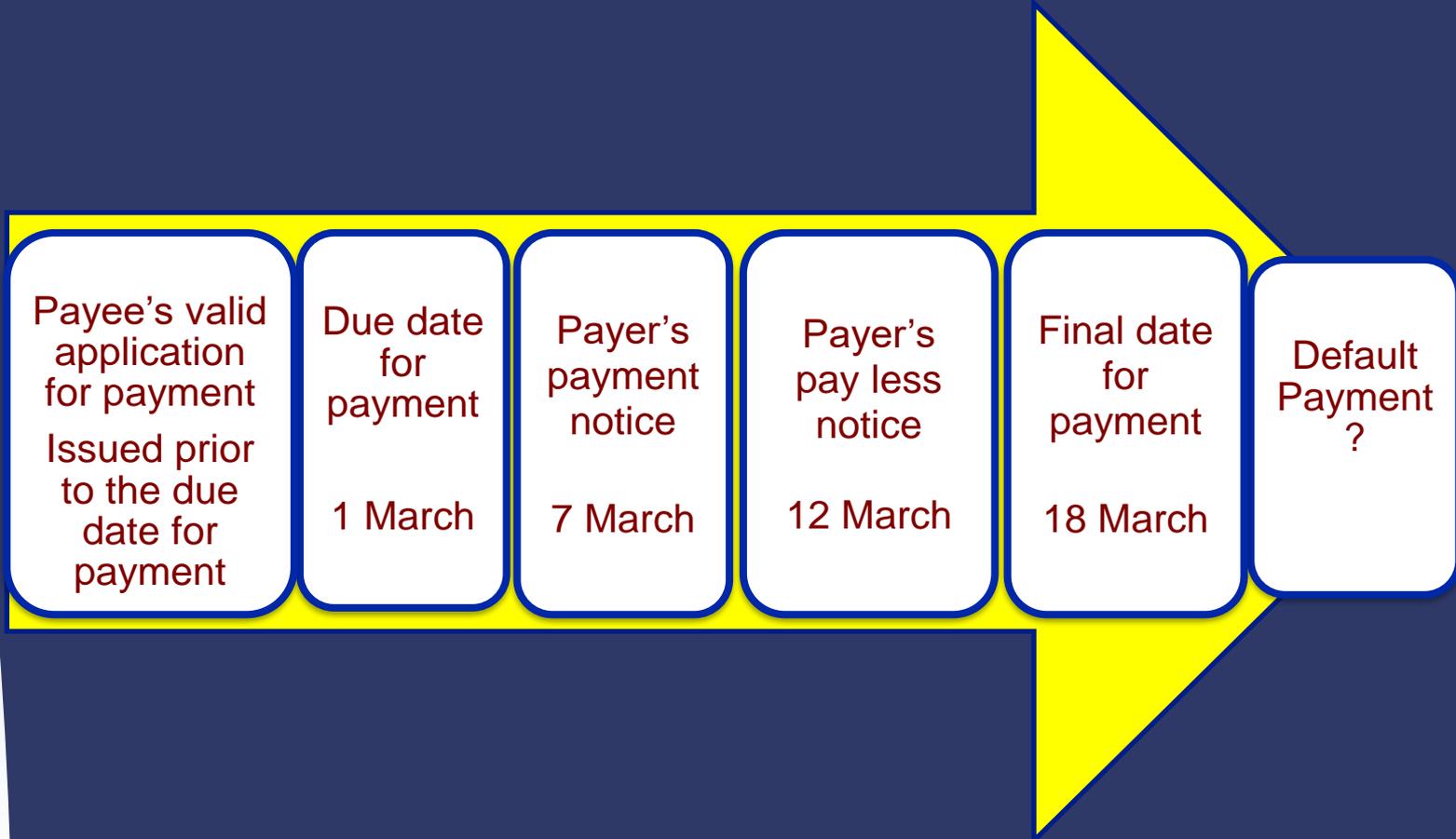
When will a default payment situation arise?

- 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.

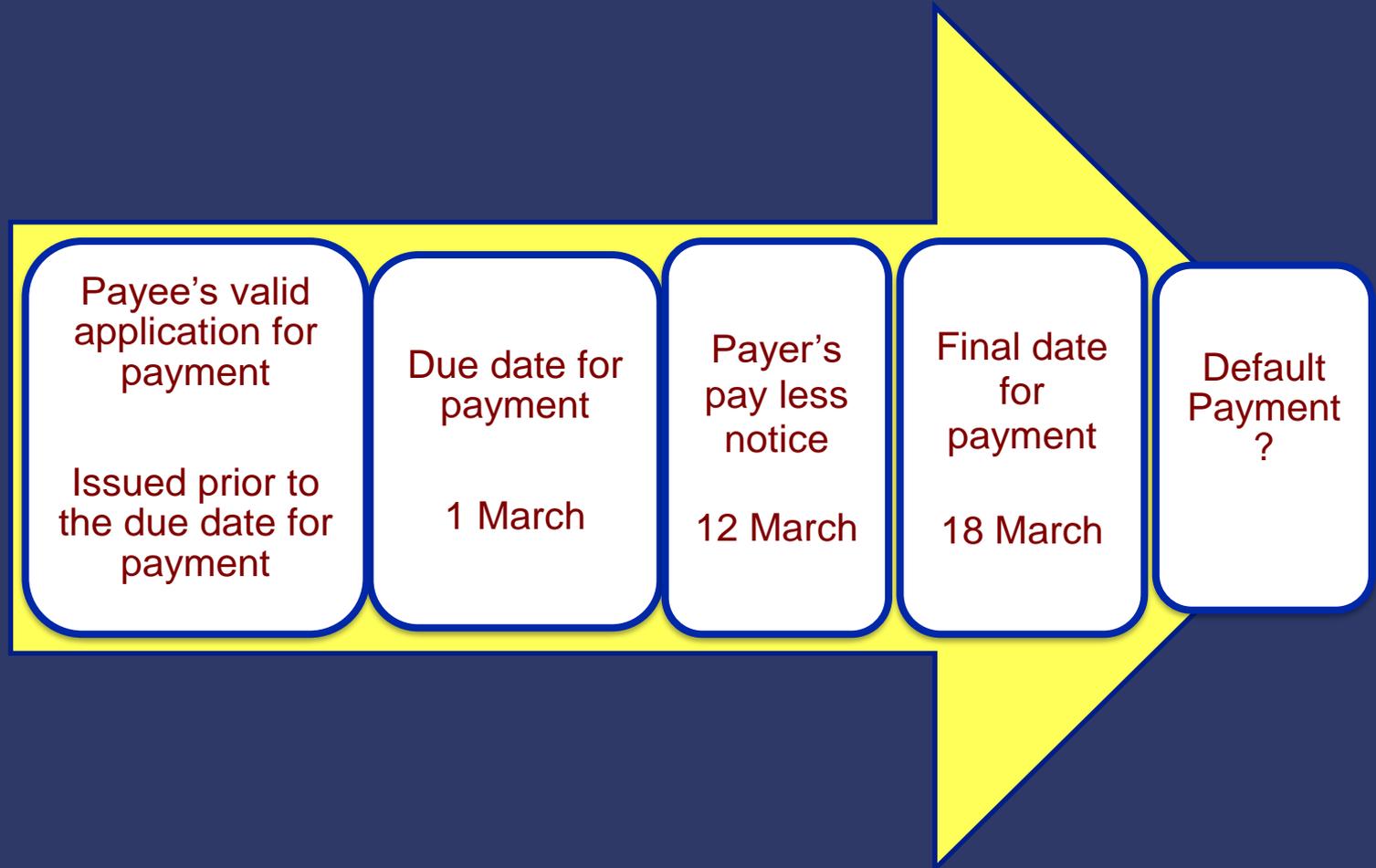
Payment: Example 1



Payment: Example 2



Payment: Example 3



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’.

ISG v Seevic College [2014]

- The employer failed to serve a payment or pay less notice in response to the contractor's interim application for payment.
- The employer was therefore taken to have agreed to the value stated in the application.
- It was not open to an adjudicator to recalculate the sum owed. In the absence of a payment or pay less notice, the sum claimed in an interim application will become the amount due.
- In this instance, the employer therefore became liable for £1,000,000 instead of £300,000.

Leeds City Council v Waco UK Ltd [2015]

- The contract payment schedule specified when interim applications were to be made, but the Contractor was consistently late in making its applications.
- The employer consistently paid the applications, despite them being late.
- This situation continued until the Contractor made an application 6 days early, instead of late as usual.
- The employer's decision to withhold this payment was upheld as (despite the previous course of dealing) there was no scope for payment applications to be submitted *prior* to the valuation date.

Caledonian Modular v Mar City Developments [2015]

- Applications 1- 15 were all in the same format and clearly marked as being interim applications. After a pay less notice had been issued in respect of Application 15, Caledonian issued substantiation in respect of final account negotiations. One document was a “final account updated” which was virtually identical to Application 15. Mar City queried this.
- Adjudicator accepted the further documentation as being an interim application. **The Court disagreed:**

“it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place.”

Henia Investments v Beck Interiors [2015]

- Contract required applications to be submitted by no later than 22nd. Application was submitted on 28 April 2015 for the period to 29 April 2015. Contractor accepted it was late for April but contended that it was ‘early’ May application.
- **The Court disagreed.** There was nothing to suggest that the application related to the May due date

“...the document relied upon as an Interim Application under Clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when.”

Jawaby Property Investment Ltd v The Interiors Group Ltd [2016]

- Another example of a contractor failing to prove that a set of documents were an interim payment application.
- The document described itself as an “initial assessment”.
- The document did not state what was due, but what *might* be due.

“...this is an area where, as the authorities make clear, there is little scope for latitude. If a contractor wishes to have the benefit of the interim payment regime such as that contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity. The Valuation here was not such an application.”

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017]

- Adjudicator decided in favour of Logan in respect of its interim payment notice issued during final account negotiations.
- The matter went to court and the Trust argued that: (1) Logan's "interim payment notice" was invalid; and (2) its email including the final certificate constituted a valid pay less notice.
- As to point (1), the court held that Logan's payment notice was clear and free from ambiguity. The document said it was a notice and the Trust was given reasonable notice as to its contents (**Caledonian v Mar City considered**).
- As to point (2), the question was whether, viewed objectively, the email had the requisite intention to fulfil the function of a pay less notice. The court held that a valid pay less notice had been issued. The reasonable recipient would have appreciated that the email was responding to the interim payment notice. It was not necessary for a pay less notice to have that title or to make specific reference to a contractual clause in order to be valid (**Henia v Beck applied, Jawaby v Interiors considered**).

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

- Is an employer entitled to pursue adjudication to determine the correct value of the works at an interim stage?
 - ◆ Yes, even if the employer failed to serve a payment or pay less notice.
 - ◆ Section 111 of the 1996 Act applies to interim and final payments.
 - ◆ Section 111 generates an immediate obligation to pay the notified sum before the final date for payment, however, it does not translate the notified sum into a true valuation of the work done.
 - ◆ Notified sum = provisional figure.
 - ◆ Adjudication stands to facilitate a more detailed valuation of the work if necessary.
- **ICI v MMT approved.**
- **ISG v Seevic, Galliford Try v Estura and Kersfield v Bray not applied.**

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

- Implications:
 - ◆ How can an employer recover any overpayment made at the interim stage?
 - An adjustment at the next interim payment or an adjudicator can order a repayment of any amounts overpaid at the interim stage.
 - ◆ When can an employer adjudicate the valuation of an interim application?
 - Only after the employer has paid the notified sum because the adjudication provisions of the 1996 Act are subordinate to the payment provisions in section 111.

Rochford Construction Limited v Kilhan Construction Limited [2020]

- Adjudicator decided in favour of Kilhan by implying the Scheme for the purposes of determining the due date and final date for payment.
- The matter went to court and Rochford argued: (1) Subcontract provided for the due date as “end of month”; and (2) final date for payment depended on the issuing of an invoice.
- As to point (1), the court held that the argument was flawed – meaning of “end of month” was not clear and there were practical difficulties
- As to point (2), the court held that the final date for payment provisions were unworkable and impractical. The drafting of the contractual documents had not been completed and had to be mended by the Scheme.
- The court found in favour of Kilhan and disagreed with Rochford's interpretation of the subcontract.
- Notably, the court commented, albeit obiter, that:

“while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism.”

QUESTIONS?

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