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CIARB East Anglia Branch  
SEMINAR 31st July 2015

**Workshop**  
**Pay Less/Payment Notices**

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Slide 2

**THE SCENARIO/First Discussion Topic**

Those attending are assumed to be familiar with the payment regime provided for in Part 2 of the Housing Grants, Construction and Regeneration Act 1996, as amended in 2011, ("the Construction Act") and in Part II of the Scheme for Construction Contracts (England and Wales) Regulations as amended in 2011 ("the Scheme"). Copies are included in the workshop papers.

**Contract clauses**  
See workshop papers. [Workshop Scenario Handout.pdf](#)

**First Discussion topic**  
A: Are these provisions compliant with ss. 110 to 111 of the Construction Act. If not, why not and which provisions of Scheme would apply and how?

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Slide 3

**First Discussion Topic: Due date**

**The Construction Act**  
s. 110 (1) Every construction contract shall (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and ...

**The Scheme**  
3. Where the parties to a construction contract fail to provide an adequate mechanism for determining ... when [payments] become due for payment ... the relevant provisions of paragraphs 4 to 7 shall apply.  
4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or (b) the making of a claim by the payee.  
12. ... "claim by the payee" means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

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**First Discussion Topic: Final date for payment**

**The Construction Act**  
s. 110(1) Every construction contract shall ... (b) provide for a final date for payment in relation to any sum which becomes due.  
The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

**The Scheme**  
8. (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.  
(2) The final date for the making of any payment of a kind mentioned in paragraphs ... 5 ... shall be 17 days from the date that payment becomes due



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
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**First Discussion Topic: Payment Notice**

**The Construction Act**  
110A(1) A construction contract shall, in relation to every payment provided for by the contract – (a) (b) require the payer ... to give a notice complying with subsection (2) to the payee not later than five days after the payment due date (b) require the payee ... to give a notice complying with subsection (3) to the payer not later than five days after the payment due date.  
(2) A notice complies with this subsection if it specifies - (a) in a case where the notice is given by the payer (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and  
(ii) the basis on which that sum is calculated; ...  
(3) A notice complies with this subsection if it specifies - (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and (b) the basis on which that sum is calculated.



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
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**First Discussion Topic: Payment Notice (continued)**

**The Scheme**  
9. (1) Where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to section 110A(1) of the Act, the provisions of this paragraph shall apply.  
(2) The payer must, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (3).  
(3) A notice complies with this sub-paragraph if it specifies the sum that the payer considers to be due or to have been due at the payment due date and the basis on which that sum is calculated.  
(4) For the purposes of this paragraph, it is immaterial that the sum referred to in sub-paragraph (3) may be zero.  
(5) A payment provided for by the contract includes any payment of the kind mentioned in paragraphs 2, 5, 6, or 7 above.



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**First Discussion Topic: Payee Notice in Default**

**The Construction Act**

110B (1) This section applies in a case where, in relation to any payment provided for by a construction contract (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but (b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

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**First Discussion Topic: Payee Notice in Default (continued)**

**The Construction Act**

s. 110B (continued)

(4) If (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and (ii) the basis on which that sum is calculated, and (b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

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**First Discussion topic: Notified Sum/ Pay Less Notice**

**The Construction Act**

s. 111(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer ... may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

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**First Discussion Topic: Notified Sum/ Pay Less Notice**

**The Construction Act**  
s. 111 (continued)

(4) A notice under subsection (3) must specify (a) the sum that the payer considers to be due on the date the notice is served, and (b) the basis on which that sum is calculated. It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3) (a) must be given not later than the prescribed period before the final date for payment, and (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means (a) such period as the parties may agree, or (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

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**First Discussion topic: Notified Sum/ Pay Less Notice**

**The Scheme**

10. Where, in relation to a notice of intention pay less than the notified sum mentioned in section 111 (3) of the Act the parties fail to agree the prescribed period mentioned in section 111 (5), that notice must be given not later than seven days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

**So how does it all fit together?**

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**Second Discussion Topic**

B: The Sub-contractor submits a document headed "Interim Application Nr. 10 on the 29<sup>th</sup> October stating as follows, supported by schedules giving a breakdown of each sum claimed but without supporting documentation for the delay and disruption claim.

Measured Works:	£2,250,000.00
Variation Account:	£ 500,000.00
Delay and disruption costs:	£ 750,000.00
	£3,500,000.00
Retention:	( £100,000.00)
Sums paid to date:	(£2,100,000.00)
Due for payment:	£1,300,000.00, net of VAT

The Contractor does not give an Interim Payment Notice in respect of this application. (a) Can the Sub-contractor successfully contend that the amount specified in this interim application is a notified sum as defined in s. 111(2) of the Construction Act and is payable to it in the absence of a Pay Less notice under s. 111(1)?

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**Second Discussion Topic (continued)**

Which provision of s. 111(2) might apply?

Is interim Application Nr. 10 a s. 110A(1)(b) a payee notice required by the express terms of the contract, clauses 3.2 and 3.3. If so does it need to comply with clauses 3.2 and 3.3 and/ or with s. 110A(3)?

If the contract does not comply with s. 110(1) in that it does not provide an adequate mechanism for determining what payments become due and when, is interim Application Nr. 10 a payee notice required by paragraph 4, see also paragraph 12, of the Scheme. Consider [Maxi Construction Management Limited v. Mortons Rolfs Limited, 7th August 2001 OHCS \(Scotland\), Maxi Construction Management Ltd v Mortons Rolfs Ltd \[2001\] ScotCS 199 \(7 August 2001\).pdf](#)

Is interim Application Nr. 10 a s. 110B(4) notification. To be such does it need to comply with clauses 3.2 and 3.3 and/ or with s. 110A(3)? Consider [Leeds City Council v. Waco \[2015\] EWHC1400 \(TCC\) Leeds City v. Waco.rtf](#)

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**Second Discussion Topic (continued)**

(b) Would it make any difference if on the 15th November 2015 the Contractor had submitted a VAT invoice for £1.3 million plus VAT of £260,000 stating the Sub-contract reference and number and including the same calculation as the Application?

Can it be argued that this is a s. 110B(3) payee notice in default? Are the s. 110B(1) pre-conditions for such a notice satisfied. Does it comply with s. 110A(3). Are there any other requirements? Consider [Caledonian v. Mar City \[2015\] EWHC 1855 \(TCC\), paragraph 37: Caledonian v. Mar City.rtf](#)

"37. ... 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."

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**Third Discussion Topic**

C: The Sub-contractor is successful in obtaining a Decision in Adjudication Nr. 1 that the sum specified in this interim Application, £1,300,000.00 is a notified sum and, the Contractor not having given a Pay Less Notice, the notified sum should be paid with VAT and interest to the Sub-contractor. You are nominated as adjudicator in a second adjudication commenced by the Contractor seeking a proper valuation of the Sub-contractor's works at the 30<sup>th</sup> October. The Sub-contractor objects to your jurisdiction on the grounds that this dispute has already been decided in Adjudication Nr. 1. Do you have jurisdiction?

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**Third Discussion Topic**

**ISG Construction Ltd v. Seevic College [ 2014] EWHC 4007 (TCC)** [ISG Construction Ltd v. Seevic.rtf](#)

"9. ... By clause 4.7.2, the sum due as an interim payment is an amount equal to the gross valuation of the work properly executed, **as assessed by the contractor**, less the sums already paid (and one or two other items, such as retention). **[emphasis added]**

28. ... if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question."

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**Third Discussion Topic**

**Matthew Harding v. Paice [2014] EWHC 3824 (TCC)** [Harding v. Paice.doc](#)

"27. Clause 8.12.5 ... **unlike the interim payment machinery in the contract, it does not require the employer to pay the amount stated in the contractor's account. Instead, it provides that the employer is to pay "the amount properly due in respect of the account" within 28 days.** If anything, this suggests that the amount payable under the clause might be different from the amount stated in the contractor's account. **[emphasis added]**

35. ... What is due under clause 8.12.5 is the "... amount properly due in respect of the account". The adjudicator has not determined what is "properly due". He has determined that, in the absence of a valid Pay Less notice, the employer must pay the amount stated in the contractor's account within 28 days. The effect of this, according to the submissions of Mr. Scott Holland, is that the absence of a compliant Pay Less notice converts a sum that may not be properly due into one that is properly due, and does so for all time.

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**Third Discussion Topic**

**Matthew Harding v. Paice [2014] EWHC 3824 (TCC)**  
(continued)

36. I do not accept this argument. In the circumstances, therefore, it seems to me that it is open to the employer to have determined, either by adjudication or litigation, the question of what sum is properly due in respect of the contractor's account. However, that right does not detract from its obligation to comply with the adjudicator's decision in the meantime by paying the sum ordered."

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**Third Discussion Topic**

**Galliford Try Building Ltd v. Estura Ltd [2015] EWHC 412**  
(TCC):[galliford v. Estura.rtf](#)

"25. ... there were two significant differences between the facts of *Harding v Paice* and the facts of *ISG v Seevic*. The first is that the former case was not concerned with interim payments, but with the final payment following termination of the contract. The second is that the entitlement to payment on termination was "... the amount properly due in respect of the account" (that is the account that the contractor has to submit on termination). That provision was quite different from the provisions relating to interim applications, where the amount of the interim payment is, in the absence of any notices served by the employer, "... the sum stated as due in the Interim Application". It is not the sum that ought to have been stated as due in the Interim Application. There is, therefore, a fundamental difference between the payment obligations that arise on an interim application and those that arise on termination. ..."

Which takes one back to the Sub-contract terms and/or, if applicable, the Scheme!

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Workshop  
Pay Less/Payment Notices

Peter Aeberli

Thank you

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