

When will Payment Notices be Considered?

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Housing Grants, Construction & Regeneration Act 1996 (as amended)

What is required of a contract?

• **110 Dates for payment.**

(1) Every construction contract shall—

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(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.

Notices

- Payment Notices
- Default Notices
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Payment Procedure Timeline under the 1996 Act

DAY 1/END OF RELEVANT PERIOD DAY 7-12 DAY 10 DAY 17
Payment application served Payment notice is due with 7 days before final date for payment notice



(plus final date back by the number of days in payment (1 day out of due date) plus any additional time for default)

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What is required of a Notice?

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Payment Notices – s110A

(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**

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Default Notices – S110b

(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.

(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).

Pay Less Notices – s111

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

(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.

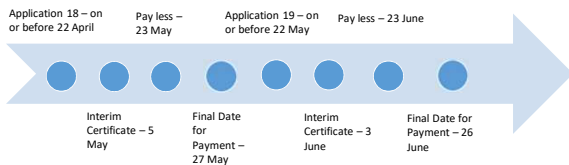
(5) A notice under subsection (3)—

(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.

What do the courts have to say?

Henia Investments v Beck Interiors [2015] BLR 704



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Henia Investments v Beck Interiors [2015] BLR 704

28 April – Application 18 served

17 June – pay less notice served

4 June – Application 19 served

29 June – suspension notice

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Surrey & Sussex Healthcare NHS Trust v Logan Constructions (South East) Ltd [2017] EWHC 17 (TCC)

25 May – the adjusted contract sum is issued.

24 August – End of rectification period/end of making good

21 September – FINAL CERTIFICATE DUE

24 September – Pay Less Notice Due

June to September – Discussions about final account

20 September – Contractor QS sends "Interim Payment Notice"

21 September – Meeting and Final Certificate Issued

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Surrey & Sussex Healthcare NHS Trust v Logan Constructions (South East) Ltd [2017] EWHC 17 (TCC) – Interim Payment Certificates

- Contractual and factual Circumstances must be considered
- Relevant that no certificate had been issued
- Must be clear and free from ambiguity
- Document must be what it purports to be in substance, form and intent

Surrey & Sussex Healthcare NHS Trust v Logan Constructions (South East) Ltd [2017] EWHC 17 (TCC)– Final Certificate

- Not relevant that the email did not address the notice specifically
- The contractual requirements of pay less notice were important
- Intention should be derived from the manner in which it informs the reasonable receipt

Muir Construction Limited v Kapital Residential Limited [2017] CSOH 132

- Clause 4.10.2:
A Pay Less Notice
1. (Where it is to be given by the employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated.

Muir Construction Limited v Kapital Residential Limited [2017] CSOH 132

- Basis on which the sum was calculated
- Reasonable Recipient Test
- *“The PLN in order to properly provide a basis needs at least to set out the grounds for withholding and the sum applied to each of these grounds with at least an indication of how each of these sums was arrived at”*

Things to Remember

- Contracts should be consistent with the 1996 Act, as amended
- Notices must be clear and free from ambiguity
- Form, Substance and Intent
- Reasonable Recipient Test

Questions?

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