

# What's going on with Payment Notices?

Or: Why does it take lawyers more than 20 years to work out how to apply an Act?

Legal500 Construction & Energy Set of the Year 2016

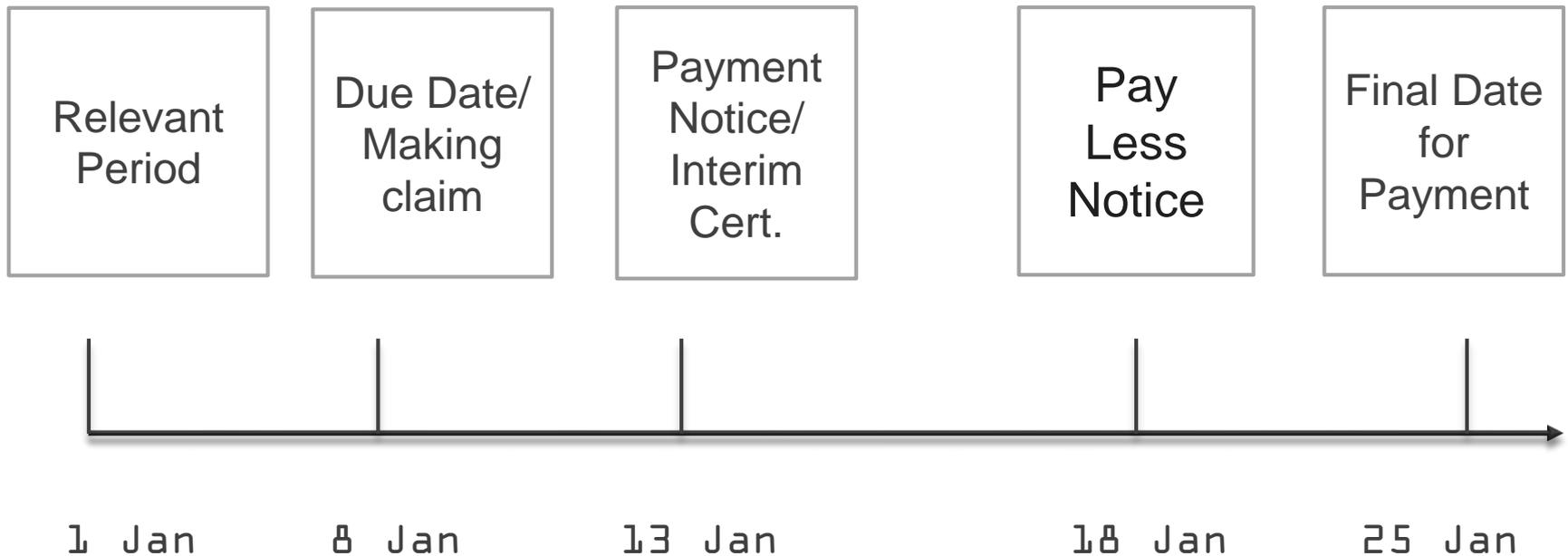
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## Paying the ‘notified sum’

- ▶ Section 111 of the Amended Act provides that a payer must make payment of the “*notified sum*” by the final date for payment.
- ▶ The “*notified sum*” is the sum stated in a validly issued payment notice.
- ▶ The payer’s obligation to pay the “*notified sum*” is subject to its right to give a “*pay-less*” notice.

## Payment Process



(s.110A(1)(a))

## Types of Payment Notice

- ▶ Payment Notice by Employer(s.110A)
- ▶ Default Payment Notice served by Contractor where none served by Employer (s.110B)
- ▶ Contractor's Application for Payment becomes Payment Notice (s.110B)

## What if you get it wrong?

- ▶ *ISG Construction v Seevic College* [2014] EWHC 4007
- ▶ **Draconian consequences** follow an application for payment

*“as between contractor and employer, in the absence of any notices the amount stated in the contractor's application as the value of the works executed is deemed to be the value of those works so that the employer must pay the sum applied for.”*

## Reaction to ISG

- ▶ *Galliford Try v Estura* [2015] EWHC 412
- ▶ *Kilker Projects Ltd v Purton* [2016] EWHC 2616
- ▶ *Harding v Paice* [2015] EWCA Civ 1231

## Form of Notices

- ▶ The Payment Notice/Application must
  - Set out the total sum said to be due.
  - Set out the **basis** on which that sum has been calculated.
  
- ▶ Whilst the cases have considered the Contractor's Payment Notices there is no reason in principle why the same test should not be applied to Employer's Payment Notices.

## Form of Notices

- ▶ *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC) – Coulson J
- ▶ *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC) – Akenhead J
- ▶ *Severfield (UK) Ltd v Duro Felguera UK Ltd* [2015] EWHC 3352 (TCC) - Coulson J
- ▶ *Jawaby Property Investment v The Interiors Group Ltd* [2016] EWHC 557 (TCC) – Carr J

## Requirements of payment notices

### ▶ *Caledonian Modular v Mar City Developments*

“...if contractors want the benefit of [the Construction Act’s payment 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.”

## Requirements of payment notices

### ▶ *Henia v Beck*

“...the document relied upon as an Interim Application... 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.”

## Requirements of payment notices

### ▶ Severfield v Duro Felguera UK

“Because the notice of December 2014 and the accompanying spreadsheet did not begin to address the **complexities** of what were and were not **construction operations**... it was **not a payment notice** in respect of the claim for £1.4 million for construction operations, because the **basis** for the calculation of that figure, let alone the figure itself, is **nowhere explained** or set out in interim payment application 15.”

## Requirements of payment notices

- ▶ *Jawaby Property Investment v The Interiors Group Ltd*

“[the application] 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 case the description of the valuation as “initial” became fatal to the contractor’s case that the application was a valid Payment Notice, as did the fact that the application did not value the works as at the due date.

## Failure to Issue PN or PLN

- ▶ Adjudicate on value of works?
  - No entitlement in relation to interim payments:
    - *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC) at [52] and [53];
    - *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC) at [20]
  - However, acceptable on final account: *Harding (t/a MJ Harding Contractors) v Paice* [2015] EWCA Civ 1231 at [70]

## Top Tips

- ▶ A diary is your best friend.
- ▶ All notices need to be in time, compliant with HGCR & clear and unambiguous.
- ▶ And, in substance, form and intent, what you now say it is.
- ▶ Unclear if possible to say late PN is valid PLN.
- ▶ Unclear if Part 8 Claim can save the position.

Thank you! Any Questions?

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