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Changes to the Construction Act – What do they mean in practice?

David Toscano – Solicitor

**Allies and Morrison
9 November 2011**





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Construction Act Changes

- Local Democracy, Economic Development & Construction Act 2009
- The Government has published an analysis of consultation responses to the implementation proposals
- Came in to force on 1 October 2011 (England and Wales) and 1 November 2011 (Scotland)
- Changes coincide with amendments to the *Scheme for Construction Contracts (England and Wales) Regulations 1998* (Scheme for Construction Contracts (England) Regulations 2011 was published followed the consultations)



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Construction Act Changes

The Role of the *Scheme for Construction Contracts (England and Wales) Regulations 1998*:

- Provides 'back up' provisions if construction contracts do not comply with the Construction Act
- The changes reflect the amendments to the Construction Act



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Construction Act Changes

- Applicability
- Adjudication
- Payment



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Construction Act Changes - Applicability

Oral Contracts

- Old Rules
 - S.107 → Construction Act Pt II applies to a construction contract:
 - in writing
 - exchange of written communications
 - evidenced in writing



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Construction Act Changes - Applicability

Oral Contracts

- New Rules
 - S.107 removed – Part II applies to all contracts (including wholly oral)



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Construction Act Changes - Applicability

Potential problems with this change:

- Uncertainty about contract terms in oral contracts – knowing when the Scheme applies.
- Oral variations to written contracts.
- In any disputes, oral agreements will rely on oral evidence / witness statements.
- Another stage of adjudication may develop – what are the contract terms?



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Construction Act Changes - Applicability

- New rules will apply to all contracts entered in to after the 'in force' date (1 October 2011). There is no transitional period.
- Framework Agreements / Term Contracts
- Projects / Suites of Contracts
- Standard Form Contracts (JCT / NEC3 / RIBA / ICC)



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Construction Act Changes - Applicability

Practical Implications & Action Required

- Who have you got contracts with?
- Are those contracts all in writing?
- Are there any terms of those contracts which are not in writing?
- Are any of those contracts Framework or Term Agreements which will require review?



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Construction Act Changes - Adjudication

- Referring a dispute to adjudication
- Slip Rule
- Inter-Party costs



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Construction Act Changes - Adjudication

Referring a dispute to adjudication:

- All construction contracts.
- Oral contracts – Part I of the Scheme will apply.
- Bespoke adjudication process – must comply with sections 108(2) to 108(4) of the amended Construction Act and all 9 provisions **MUST** be in writing.
- If not, the Scheme applies.



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Referring a Dispute to Adjudication

- Paragraph 7(1) of the Scheme for Construction Contracts 1998 requires the dispute to be referred to the adjudicator within 7 days of the notice of adjudication being sent.
- The Scheme for Construction Contracts (England) Regulations 2011 amends this so that the referral must be sent within 7 days of receipt of the referral notice by the adjudicator.



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Construction Act Changes - Adjudication

Slip Rule

- Correction of administrative errors in decision
e.g. award of £100,000.00 instead of £10,000.00
- Corrections must be made within 5 days of the delivery of the decision to the parties (although the obligation on the parties to act on the decision immediately upon delivery remains)



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Construction Act Changes - Adjudication

Slip Rule

- Old Rules – common law slip rule
- New Rule – S.108(3A) - adjudication rules must include a slip rule provision
- Scheme - includes slip rule
- Action - ensure this is dealt with in any adjudication provisions



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Construction Act Changes - Adjudication

Inter-Party Costs

- Old Rule
 - Act silent
 - Case law
- New Rule
 - Inter-party costs provisions in the contract not effective (see Section 108A)
 - But will not render the whole of the contract's adjudication provisions ineffective



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Construction Act Changes - Payment

- What remains the same?
- What is changing?
- What are the practical implications?



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Construction Act Changes - Payment

What is the same?

- Right to stage payments: amounts & intervals
- Requirement for 'adequate mechanism': what is due and when
- Application of scheme where contract fails
- When and what is included in a Payment Notice
- When to give a withholding notice (pay less notice)
- Obligation to pay sum due.



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Construction Act Changes - Payment

What has changed?

- Introduction of definitions
- Who can give a payment notice
- Introduction of default payment notices
- Replacement of 'withholding notice' with 'pay less notice'
- Changes to rights to suspend for non-payment
- Prohibition of 'pay-when-certified' clauses



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Construction Act Changes - Payment

Introduction of definitions

- 'Payer'
- 'Payee'
- 'Specified Person'
- 'Payment due date'
- 'Notified Sum'



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Construction Act Changes - Payment

Payment Notices - Old Rules

- Due date for payment – in contract
- Notice by Payer specifying sum due on 'due date for payment'
- Notice served within 5 days after due date
- No consequences for failure to issue notice.



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Construction Act Changes - Payment

Payment Notices (New Rules)

- 'Payment Due Date' – in contract
- Contract specifies that either the Payer, Specified Person or Payee gives notice of amount they consider due on payment due date (with basis of calculation)
- Notice served within 5 days after due date



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Construction Act Changes - Payment

Payment Notices (New Rules)

- S.110B – Payee’s notice in default – Default Notice
- If Payer or Specified Person doesn’t give S.110A notice....
then Payee may give Default Notice:
 - Includes amount payee considers due at Payment due date
 - Basis of calculation

NB: Payee can only give 1 notice. So, if Payee has submitted an application for payment or a Payee Notice, then they cannot submit a Default Notice.



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Construction Act Changes - Payment

New s.111

- Requirement to pay 'Notified Sum' on or before the Final Date for Payment
- Notified Sum = sum in the Payment Notice
- MUST issue a payment notice even though the Notified Sum is ZERO.



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Construction Act Changes - Payment

Withholding Notice (Old Rules)

- S.111 – withholding notice for sums withheld by payer
- Ground or grounds for withholding
- Amount attributable to each ground
- Prescribed period or no later than 7 days before Final Date for Payment



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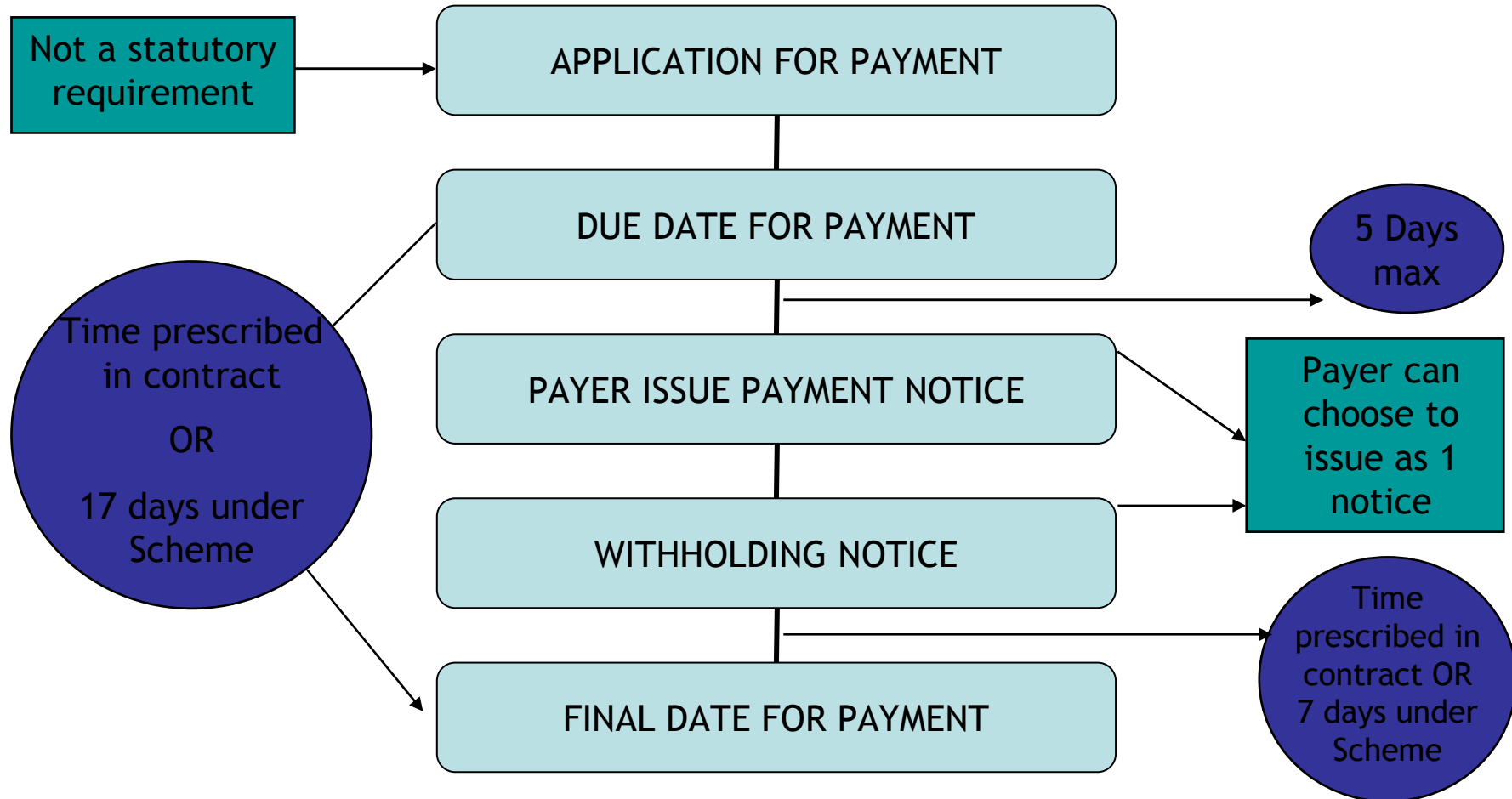
Construction Act Changes - Payment

Notice of Intention to pay less (New Rules)

- Payer can issue a notice to pay less than the Notified Sum
- MUST
 - Include amount Payer considers due on the date the notice is served, and
 - Basis of calculation
 - Refer to relevant payment notice.
- Difference is the Payer doesn't have to give 'grounds' for withholding

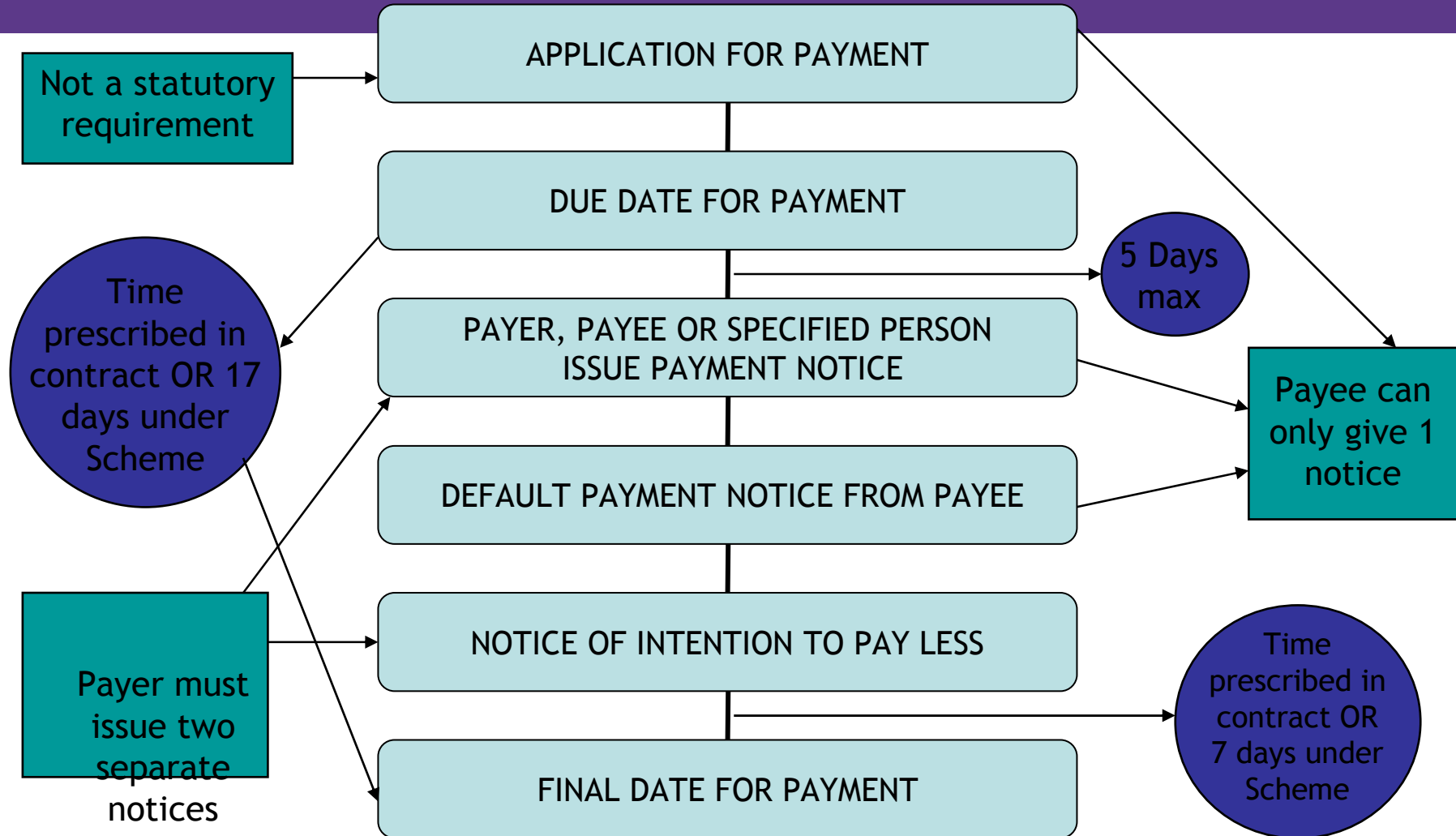


Construction Act Changes - OLD RULES





Construction Act Changes - NEW RULES





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Construction Act Changes - Payment

The Scheme

- Read the Act and Scheme together
- Example: Oral contract lasting more than 45 days starts on 1 October 2011
 - Relevant period ends: 28 Oct & Contractor makes application on same date
 - Due Date for payment: 7 days after – 4 Nov
 - Payment Notice: Payer to issue within 5 days – 9 Nov
 - Pay Less Notice: 7 days before Final Date for Payment – 14 Nov
 - Final Date for Payment – 17 days after Due Date for Payment – 21 Nov.



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Construction Act Changes - Payment

Suspension for non-payment (Old Rules)

- S112 - contractor's right to suspend ALL works for non-payment
- Notice must state grounds for suspending
- 7 day notice
- extension of time for suspension period



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Construction Act Changes - Payment

Suspension for non-payment (New Rules)

- S.112 - as old rules
- PLUS
 - Right to suspend performance of any or all of obligations under contract
 - Contractor entitled to costs and expenses incurred in exercising right to suspend
 - Extension of time for period in consequence of right to suspend
- Clause expressly referring to cost of remobilisation?



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Construction Act Changes - Payment

Pay when paid (Old Rules)

- S 113(1) prohibits pay-when-paid clauses
- Except on upstream insolvency



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Construction Act Changes - Payment

Pay when certified (New Rules)

- No change to 'pay when paid' rules
- PLUS new sections 110(1A) – (1D) impose further restrictions on conditional payments :
 - No more 'pay-when-certified' or other conditional payments
 - 'Pay-when-paid' in upstream insolvency preserved
 - 'Pay-when-certified' in management contracting and tier 1 PFI sub-contracts permitted – Exclusion Order



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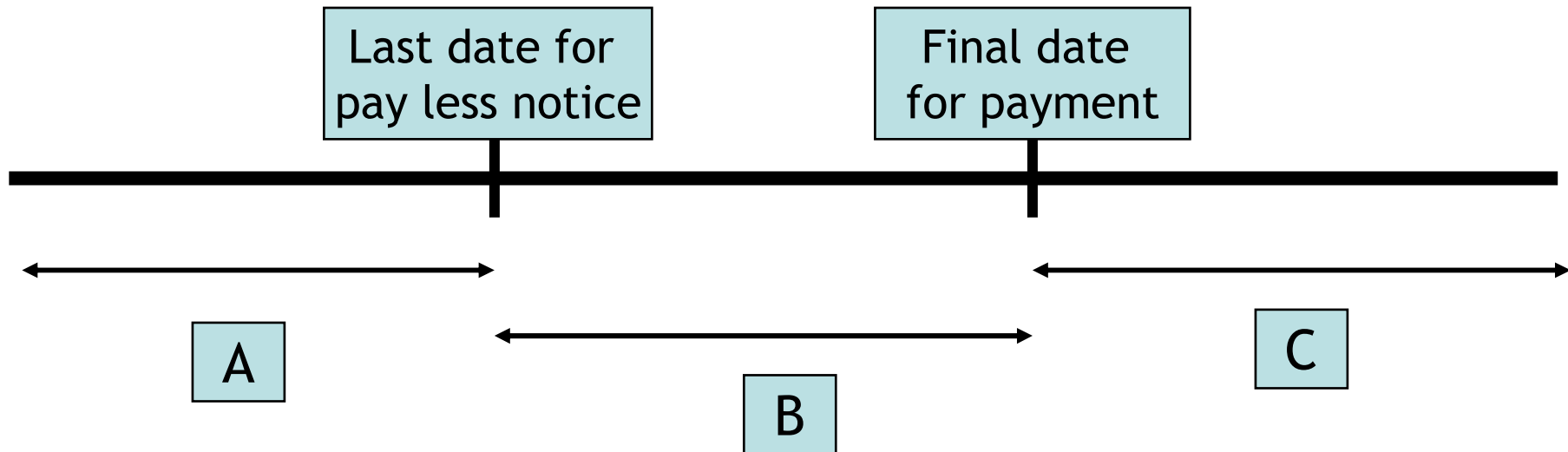
Construction Act Changes - Payment

Insolvency of Payee

- Payer has right to withhold payment only if:
 - The Contract says it can
 - The insolvency occurs after final date for service of a Pay Less Notice k before the Final Date for Payment; and
 - The contractual entitlement has crystallised.



Construction Act Changes - NEW RULES



If the Payee becomes insolvent in period:

A - The Payer can give a 'pay less notice'

B - The Payer does not have to make payment or give a pay less notice and is covered by the Act

C - If a Pay less Notice was not given - Payer must pay.



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Construction Act Changes

Check your contracts:

1. Standard suites: JCT, ICE/ICC, NEC3, RIBA
2. Adjudication and Payment check lists
3. Suspension for non-payment
4. Pay when certified clauses
5. Oral contracts & oral variations to written terms!
6. Contracts made before and after 1 October in the same project



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Thank you

Questions and (hopefully) answers