



6th Annual Construction Update 2009

Wright Hassall
9 October 2009

Proposed amendments to the Construction Act

Professor Rudi Klein, Barrister
Chief Executive, Specialist
Engineering Contractors' Group



How did we get here?


“Following concerns expressed by the construction industry on unreasonable delays in payment, the Government will review the operation of the adjudication and payment provisions in the Housing Grants, Construction and Regeneration Act 1996 to identify what improvements can be made”.


(Chancellor of the Exchequer in his March 2004 Budget



How did we get here?

- Original proposal was for an RRO.
- Formal consultations in 2005 & 2007.

- 
- Draft Construction Contracts Bill published for consultation in July 2008.
 - **Revised Bill receives 1st Reading** in the House of Lords on 4 December 2008 (some changes from original draft).



“Our amendments....will
create greater certainty and clarity of
cash flow for **all** in the construction
supply chain” (emphasis added).

Baroness Andrews in 2nd Reading debate
in House of Lords on 17.12.2008



AMENDMENTS
TO THE
PAYMENT
PROVISIONS

PAYMENT

“The Four Certainties”



Certainty of
Amount



- Payment notice not later than 5 days after due date.
- Adequate payment mechanism
- No withholding unless effective notice
- Limited abolition of pay when paid

Certainty of
Timing



- Adequate Mechanism
- Right to progress payments
- Contracts to state final date for payments
- Limited abolition of pay when paid

PAYMENT (2)

“The Four Certainties”



Certainty of
Enforcement



- Adequate mechanism
- No withholding unless effective notice
- Right of suspension
- Limited abolition of pay when paid.

Certainty that cash
is **Secure**



- ?
- ?



CURRENT WEAKNESSES

- S.110(1)(a) Contracts must have adequate mechanism for determining what payments become due and when.



ADEQUATE MECHANISM


*“This legislation requires that
payment should be defined in
terms of amount and date”
(emphasis added)*

Lord Lucas, in HL Debate on Construction Bill,
26 February 1996



Sections 111 & 112 are wholly dependent on there being an “adequate Payment mechanism”

“A party.... may not withhold payment after the final date for payment of a sum due under the contract unless he has given a effective notice of intention to withhold payment” [s.111(1)]



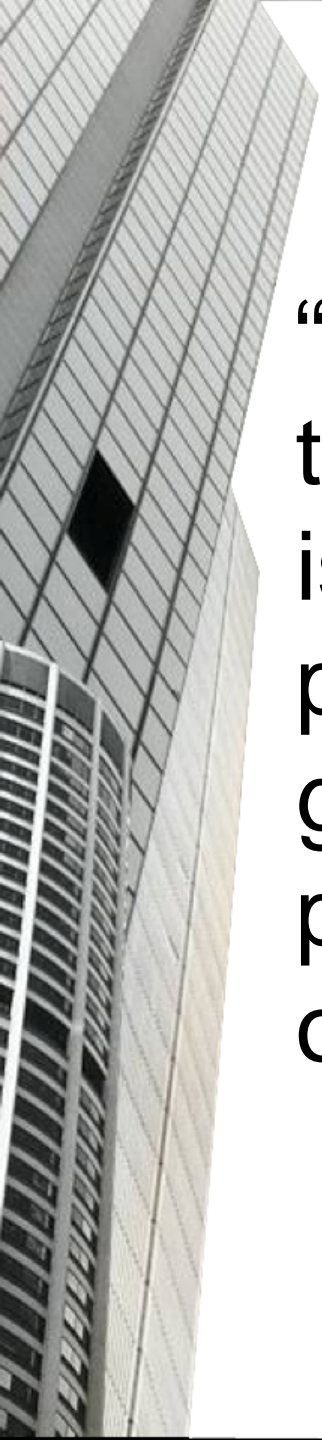
“Where a sum due ... is not paid in full by the final date for payment and no effective notice to withhold payment is given the person to whom the sum is due has the right to.... suspend performance....”
[s.112(1)]



A DUE SUM


“In [the Architecture and Surveying Institutes] contract, the sum is determined by the certificate”

Jacob L.J. In Rupert Morgan Building Services Ltd .v. Jervis 2004 BLR 18



“[Section 111] is designed simply to ensure that once a certificate is issued, payment follows unless proper notice of withholding is given. It has no legal effect even, presumably, on the true incidence of liability.”

Sedley L.J. in *Rupert Morgan Building Services v. Jervis*



“The absence of....a means for resolving deadlock....renders inadequate the machinery for determining when payments are due”.

Lord Macfadyen in *Maxi Construction v Merton Rolls* [2001] CILL 1784



NEW ZEALAND APPROACH

“The Act provides for a contractor to make progress claims by way of a ‘payment claim’ which must be paid or responded to with a ‘payment schedule’. In the absence of this, the contractor becomes entitled to a payment claim as a debt. The ‘payment claim’ and ‘payment schedule’ scheme are designed to ensure timely payment and cash flow...

Associate Judge Christiansen’s summary of the NZ Construction Contracts Act 2002 in *George Developments Ltd v. Canan Construction* (2004). Approved by NZ Court of Appeal



CURRENT WEAKNESSES

- Likelihood is that majority of contracts do not have an adequate mechanism.
- Scheme not helpful: there is only a list of what may be included in interim payments together with due dates and final payment dates.




THE CHANGES NEW S.111

PAYER MUST PAY
NOTIFIED SUM ON OR
BEFORE THE FINAL
DATE FOR PAYMENT



NOTIFIED SUM

- The sum specified in notice issued by:
 - Payer
 - Payee
 - Payee, where payer fails to issue notice.



Notices must comply
with new s.110(A) –
replacing s.110(2)
requiring payer to
issue payment notice



NOTICE REQUIREMENTS

- Contracts to indicate which party to issue notices.
- Notices to be issued no later than 5 days after payment due date.
- Amount of sum considered due must be stated together with basic calculation.



PAYER'S FAILURE TO ISSUE NOTICE

- Payee can issue notice instead but final date for payment extended from expiry of 5 days.
- But final date for payment intact if payee issues application before payment due date (provided such application is required/ permitted by contract).

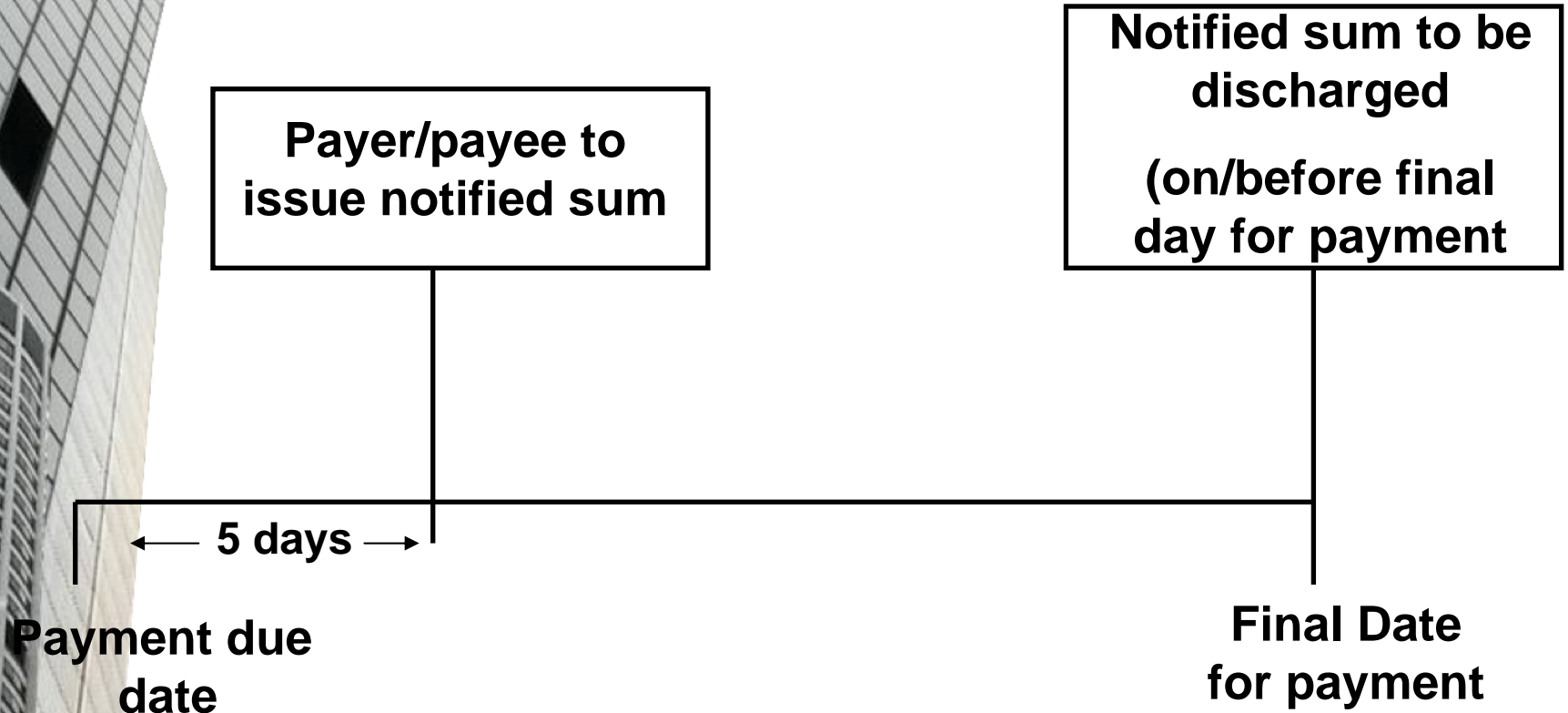


NOTICE TO PAY LESS

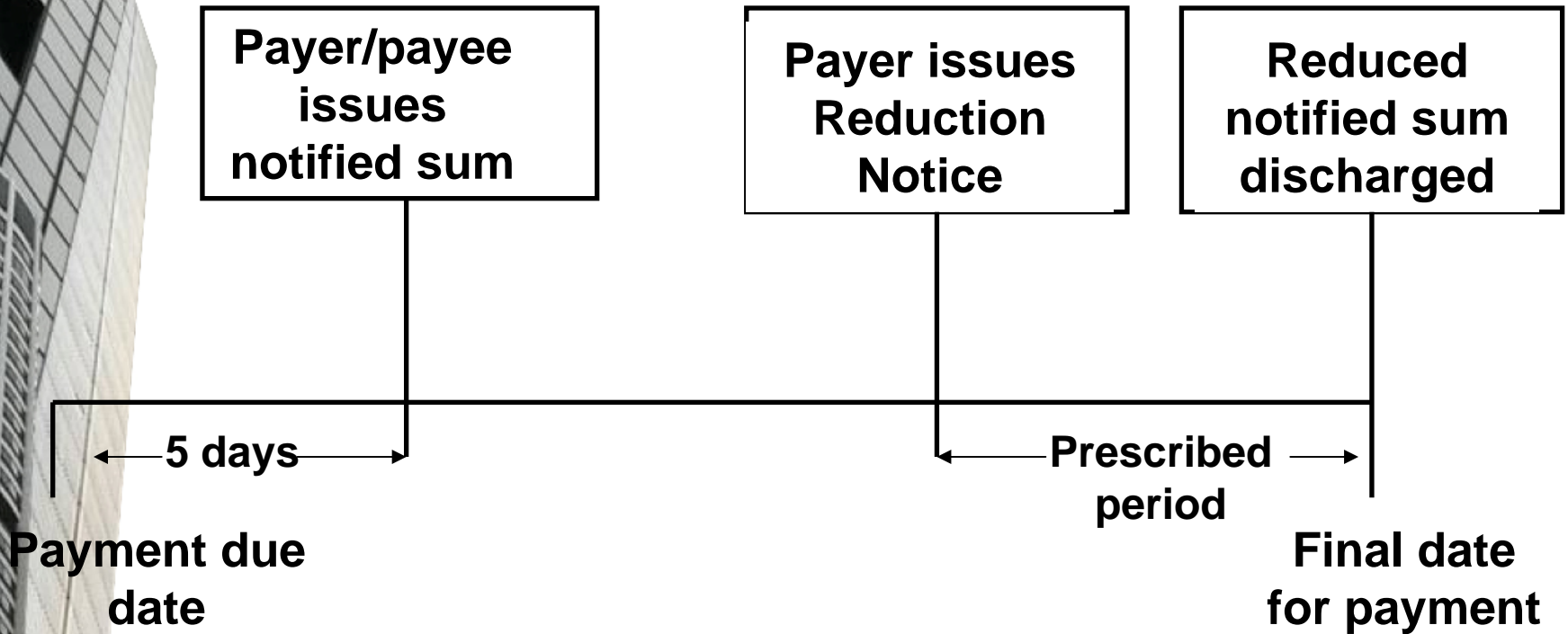
- Payer can issue notice of intention to pay less than notified sum.
- Notice must indicate sum payer considers due on date notice is served and basis of calculation.
- Must be given no later than the “prescribed period” before date for payment.

Payment Procedure

Option A

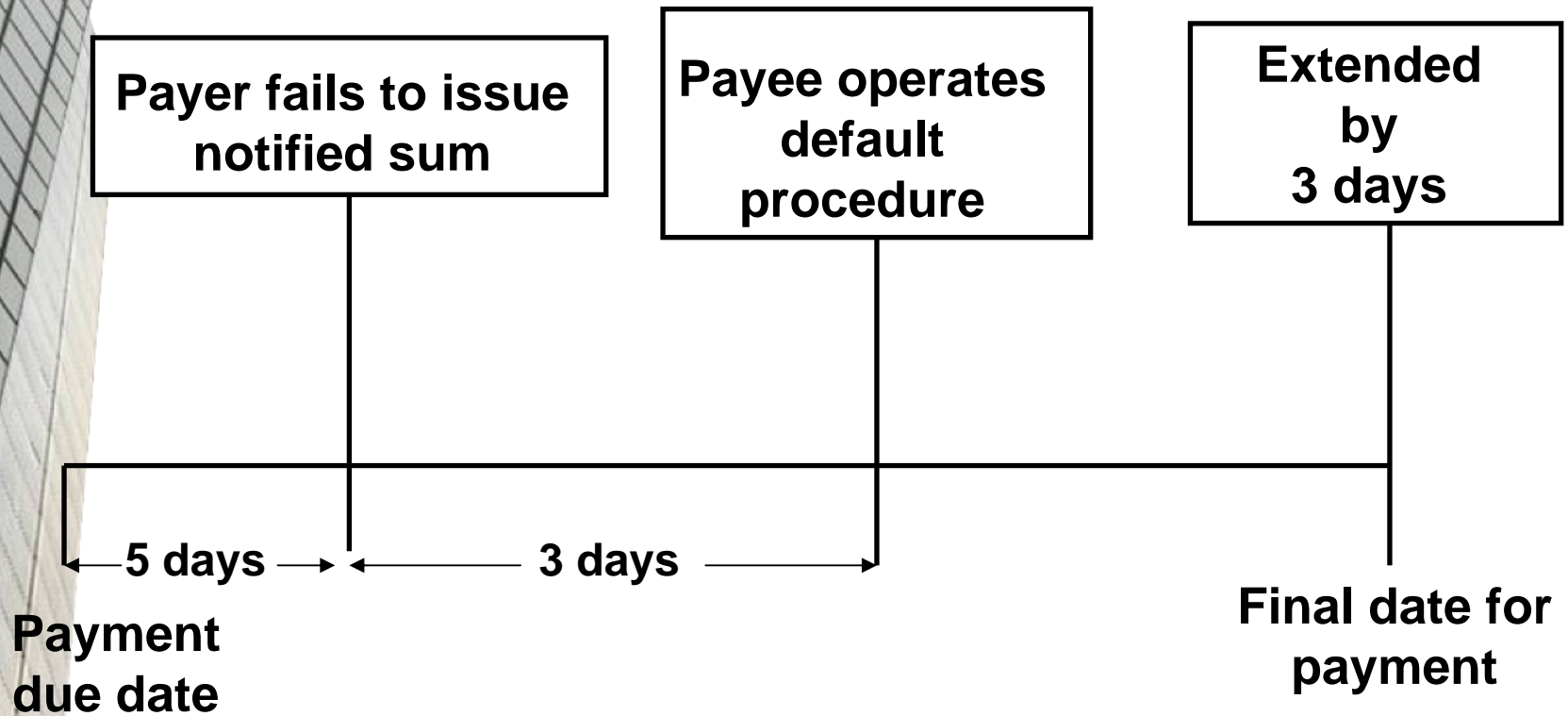


Payment Procedure Option B



Payment Procedure

Option C






CONDITIONAL PAYMENT PROVISIONS

(e.g. pay when certified provisions)


Adequate mechanism requirement not satisfied where payment made conditional on performance of obligations under another contract or decision by any person as to whether such obligations have been performed.

[New sub-section 110(1)A]



The Outer Court of Session in Edinburgh has held that a pay when certified clause did not qualify as an adequate mechanism.

Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd., 2001 SCLR 95



CONDITIONAL PAYMENT PROVISIONS (2)

- Pay-when-paid exemption in s.113 not removed.
- Pay if paid clauses prevent an insurable interest from arising.

Trade Indemnity Australia Ltd v Parkinson
Airconditioning Pty Ltd (1998) BCL 39

OTHER CHANGES

- No requirement to pay sum due where payee became insolvent after prescribed period and contract permits payer not to pay sum due in this event (prompted by *Melville Dundas* case).
- Improvement to suspension (s.112) allowing payee to recover reasonable compensation for “costs and expenses reasonably incurred” during suspension.
- Payee can suspend any or all of his contractual obligations.



**AMENDMENTS
TO
ADJUDICATION
PROVISIONS**



S.107 – REQUIREMENT FOR CONTRACTS TO BE IN WRITING

**(RJT Consulting Engineers v
DM Engineering) (2002) BLR 217**

- S.107 repealed: oral or oral/partly written contracts within scope of Act.
- BUT provisions relating to adjudication (8 “compliance points”) must be in writing to comply with s.108.



SLIP RULE

(New s.108(3)A)

- Contracts must include provisions that adjudicator has power to correct and clerical/ typographical error arising by accident/omission
- What about time limits on exercise of power?



COSTS IN ADJUDICATION (New 108A)

- Agreement allocating “costs relating to the adjudication” ineffective unless made in writing after giving notice of intention to refer the dispute to adjudication.
- This also refers to the fees and expenses of the adjudicator.



Amendment to Part 8 Adjudication Provisions

In the absence of an agreement under subsection (1) the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.




Report Stage

13 October 2009

Amendments

- Simplification of notice procedure.
- Payment reduction notice to be issued within 14 days of due date.

- 
- Extension of statutory suspension where adequate security for payment cannot be given.
 - Single adjudication procedure.



VERDICT

- Payment provisions “getting there” but are very complex and still “lean” towards payer.
- Abolition of s.107 welcome.
- Abolition of *Bridgeway v Tolent* welcome.
- What about adjudicator’s fees and costs?
- Need for single adjudication procedure but is this too intrusive into freedom of contract?



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