

Contract payment mechanisms: be prepared or pay the price

10 February 2022

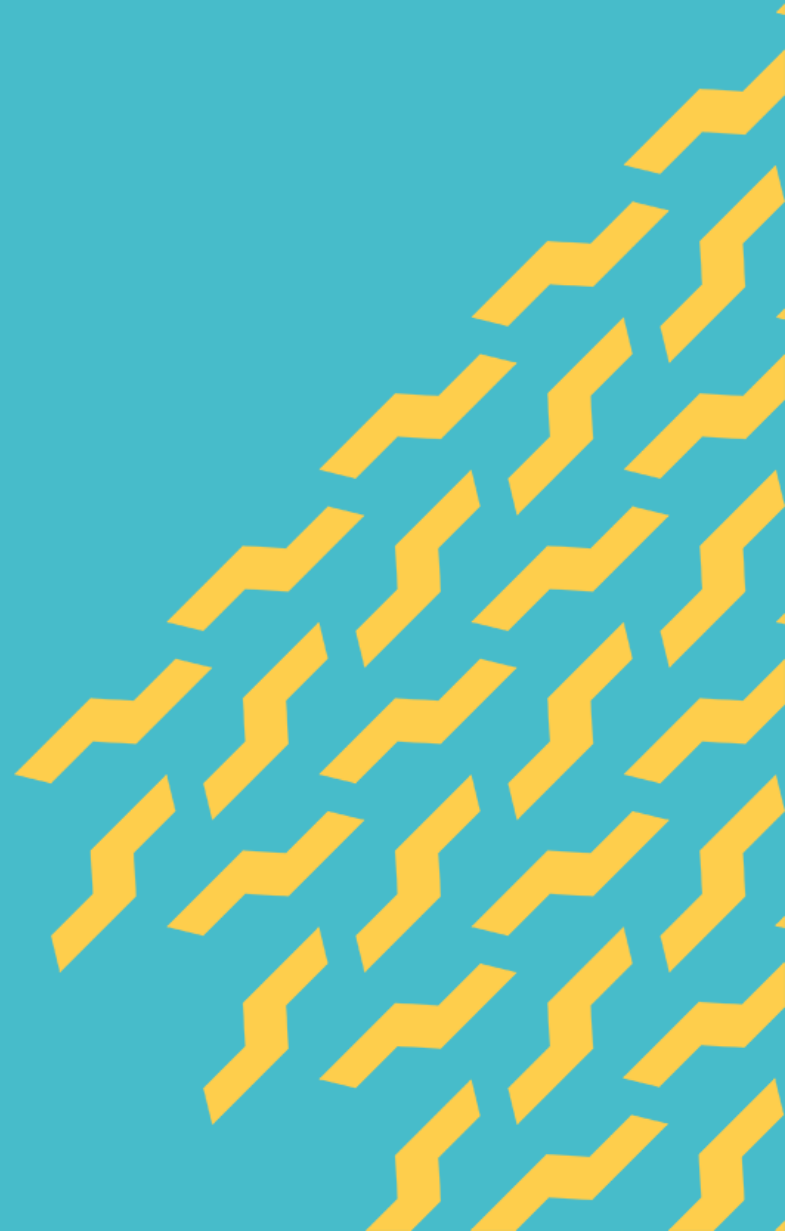
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Introduction

- Payment Mechanisms
 - Statutory
 - Contractual
- Final Account Mechanisms
- JCT Final Statements
 - Conclusivity
- Enforcement
- Housekeeping/practical points

Statutory Requirements



Statutory Requirements

- Part II of the Housing Grants, Construction and Regeneration Act 1996 (*Construction Act 1996*)
 - 109 – staged payments
 - 110 – adequate payment mechanism
 - 111 – requirement to pay sums notified / pay less notices
 - 112 – right to suspend
 - 113 – no pay-when-paid
- Scheme for Construction Contract (England and Wales) Regulations 1998 (SI 1998/649) (*The Scheme*)

Implied terms

Where sections 109, 110 and 113 of the Construction Act 1996 are not complied with, the operation of The Scheme is an implied term.

109 Entitlement to Stage Payments

- (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—
 - (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
- (4) References in the following sections to a payment provided for by the contract include a payment by virtue of this section.

Entitlement to Payment

- Clarity
 - *Rochford Construction Ltd v Kilhan Construction Ltd*
[2020] EWCH 941 (TCC)
- Accuracy
 - *Bouygues (UK) Ltd v Febrey Structures Ltd*
[2016] EWCH 1333 (TCC)

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd
[2016] EWCA Civ 990

Adequate Payment Mechanism: Section 110

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.

...What is “adequate”?

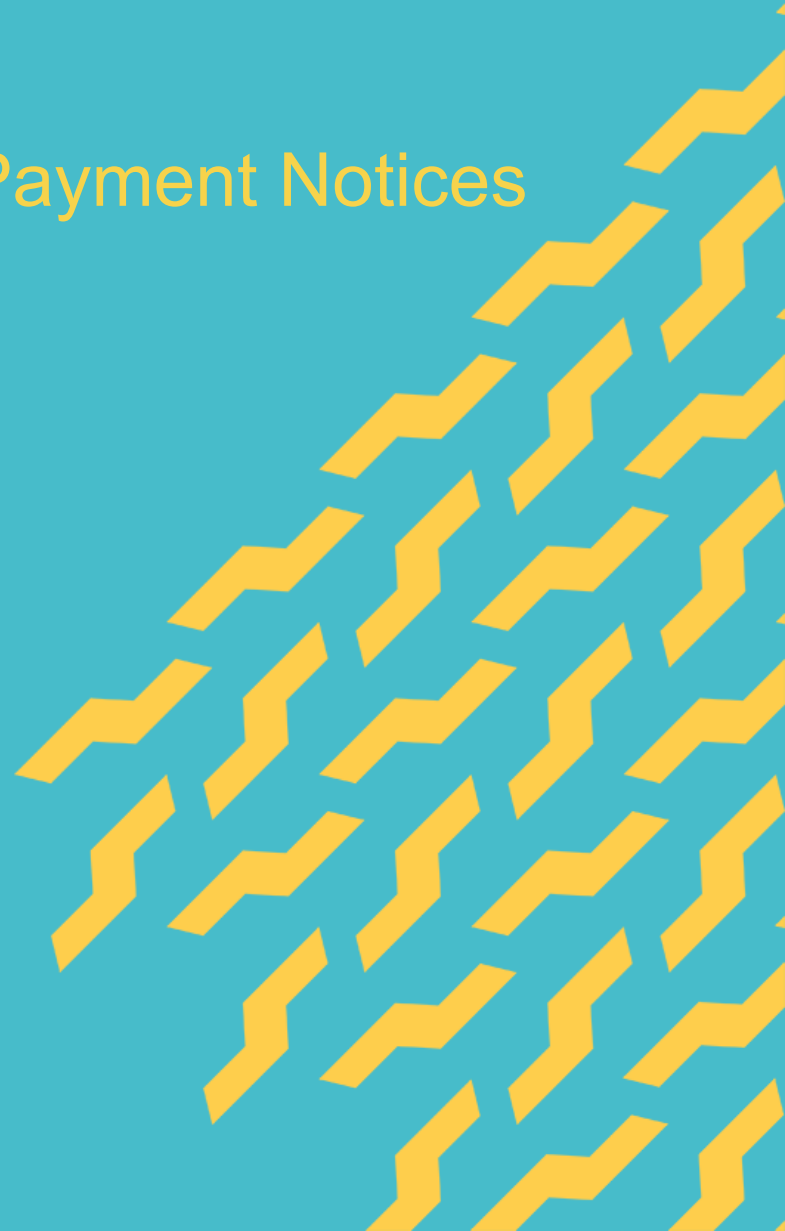
Adequate Payment Mechanism: Conditional Payments

(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.



Payment Notices and Default Payment Notices



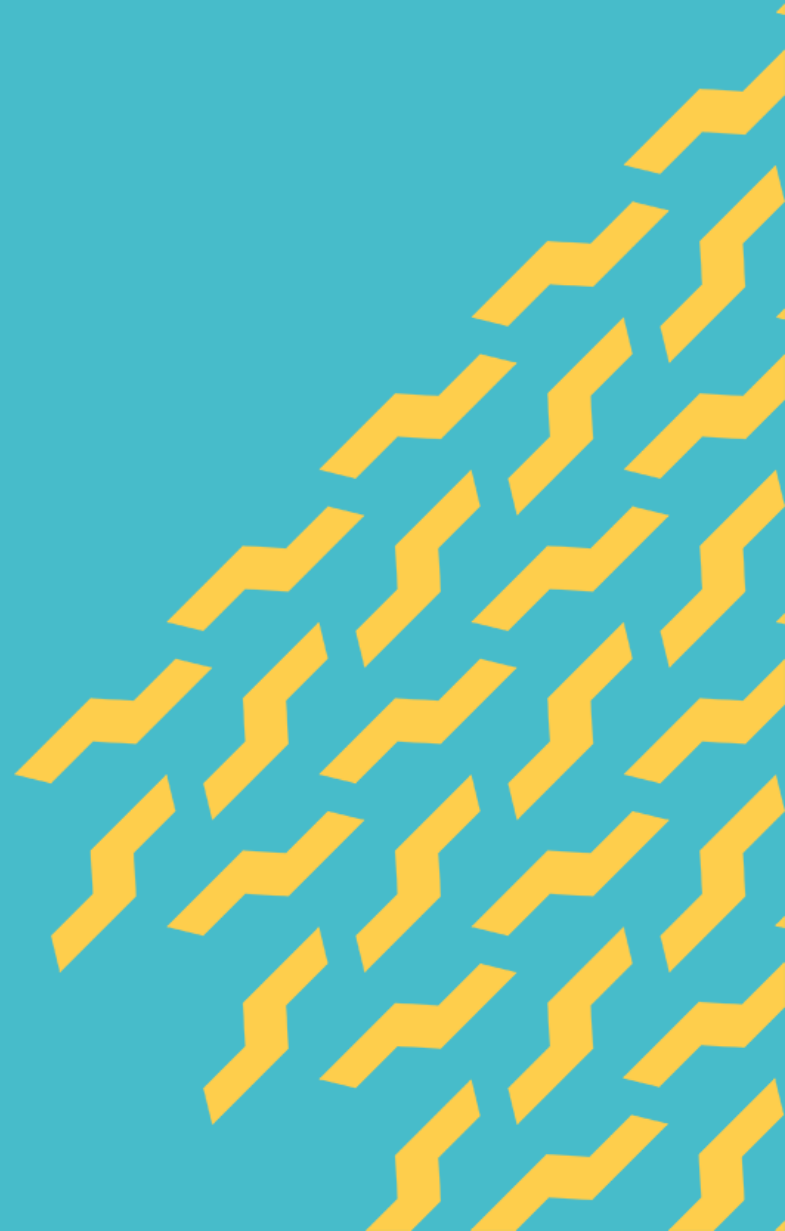
Payment Notices and Default Payment Notices

- Sections 110A and 110B
- Who gives a payment notice?
- Requirements?
 - *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC)
- Applications for payment?
 - *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021] EWHC 2441 (TCC)

Do not forget...

- Statutory requirements:
 - Deadlines
 - Sum Due
 - The basis on which the sum due is calculated
- Practical points:
 - Always respond
 - Diarise dates!!

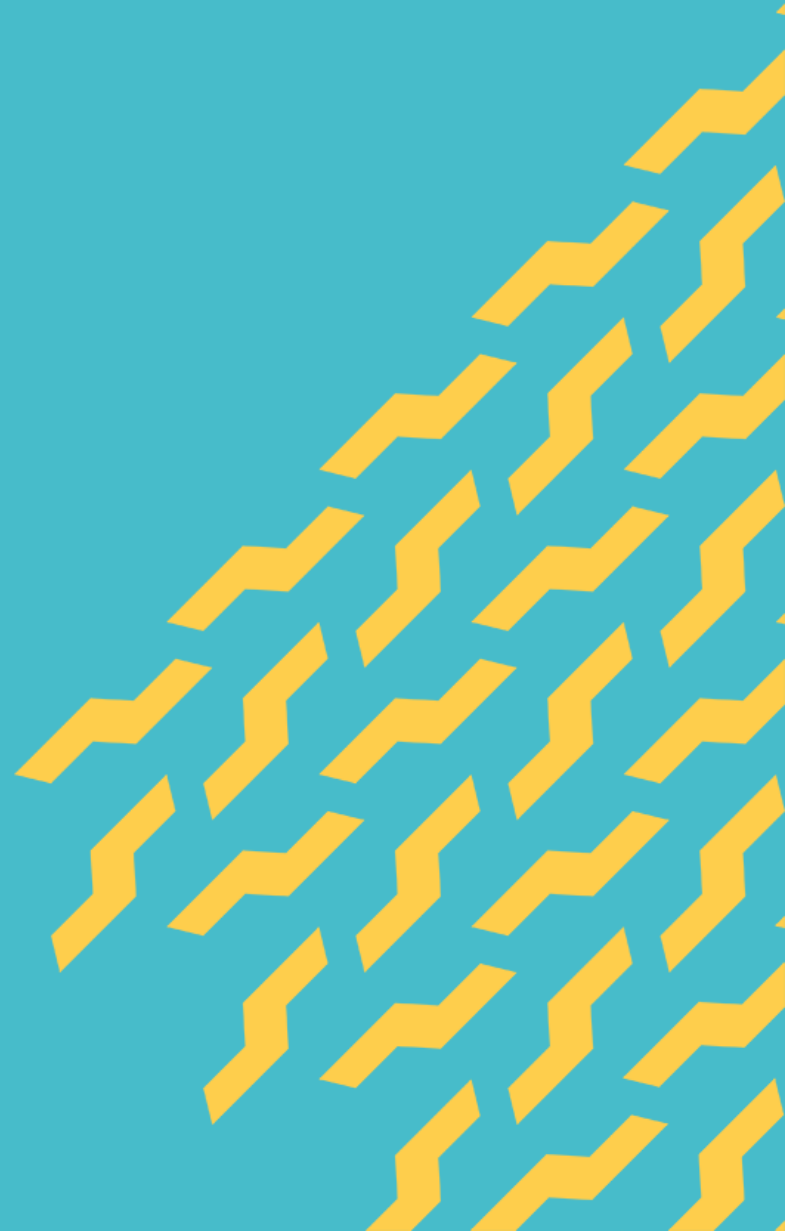
Pay Less Notices



Pay Less Notices

- Section 111
- Requirement to pay notified sum
- Pay less notice must be served if money to be withheld
 - Within time
 - Sum due
 - Basis on which the sum due is calculated
 - Clear and unambiguous

Remedies for unpaid parties



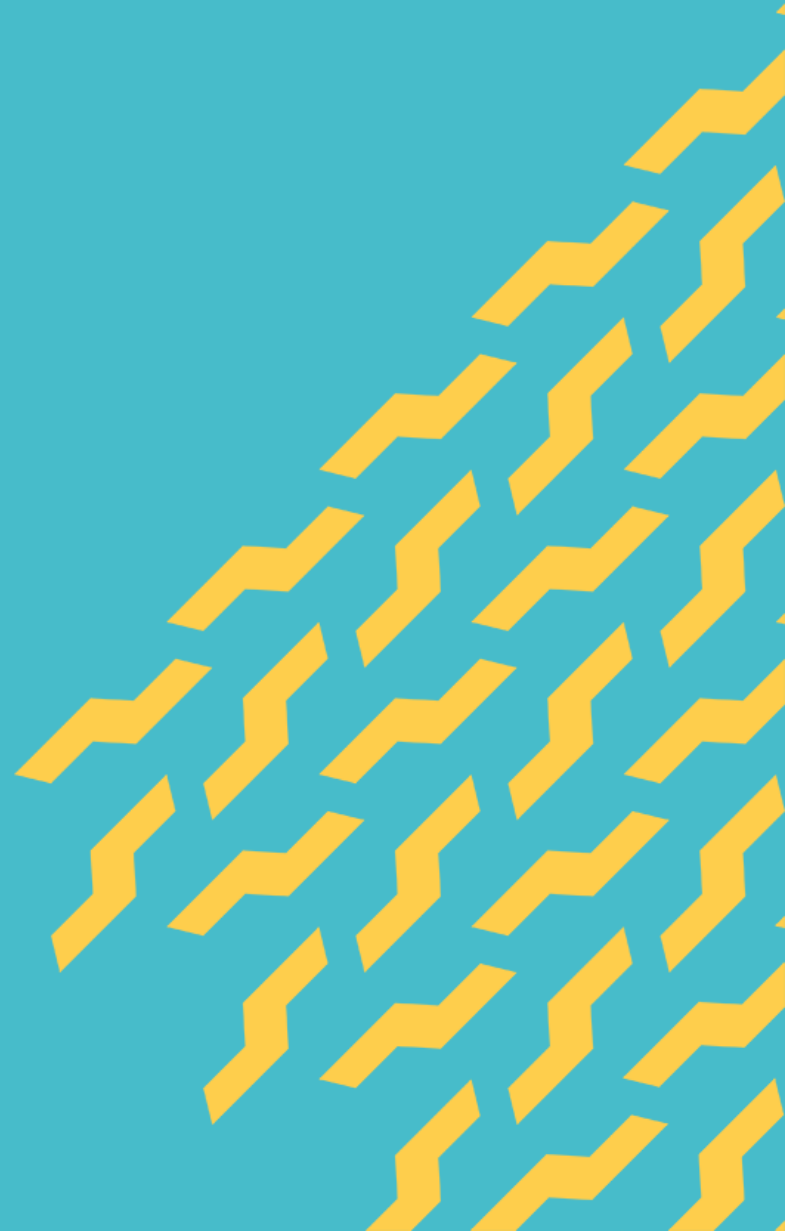
Remedies for unpaid parties

- Right to suspend
- Smash and Grab adjudication
- True value adjudication

When does this payment obligation truly arise?

- *S&T (UK) Limited v Grove Developments Limited*
[2018] EWCA Civ 2448
- *M Davenport Builders Limited v Greer*
[2019] EWHC 318 (TCC)

Final Account Mechanisms



Final Account Mechanisms

- Practical points
 - Contents
 - Notices
 - Deadlines
 - If, and when, they become conclusive and binding
- Are they needed within Construction Contracts?
 - *JSM Construction Limited v Western Power Distribution (West Midlands) PLC* [2020] EWHC 3583 (TCC)

Final Account Mechanisms

NEC3

- No express final account mechanism
- Typically introduced through z clauses

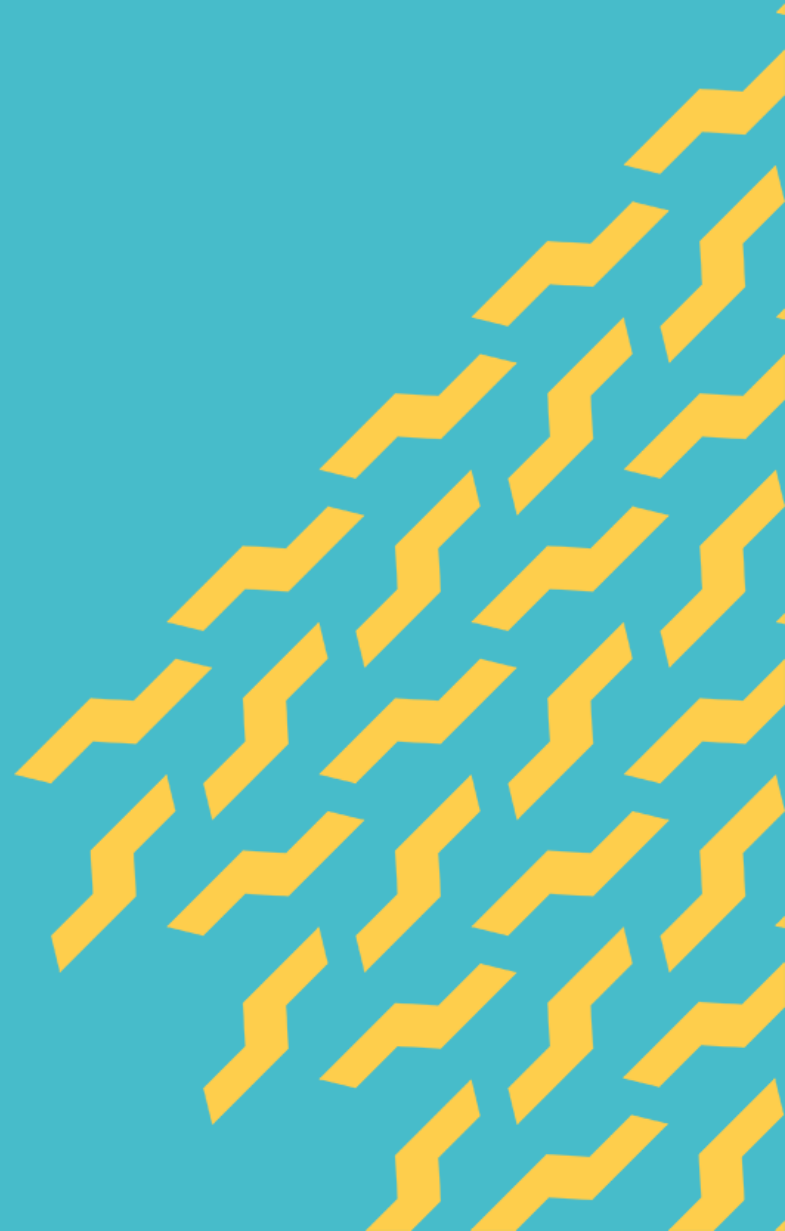
NEC 4

- Project Manager carries out the Final Assessment
- 4 weeks after defects certificate
- Final payment within 3 weeks of assessment
- Contractor may issue its own assessment
- Can become conclusive of sum due

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JCT Final Statements



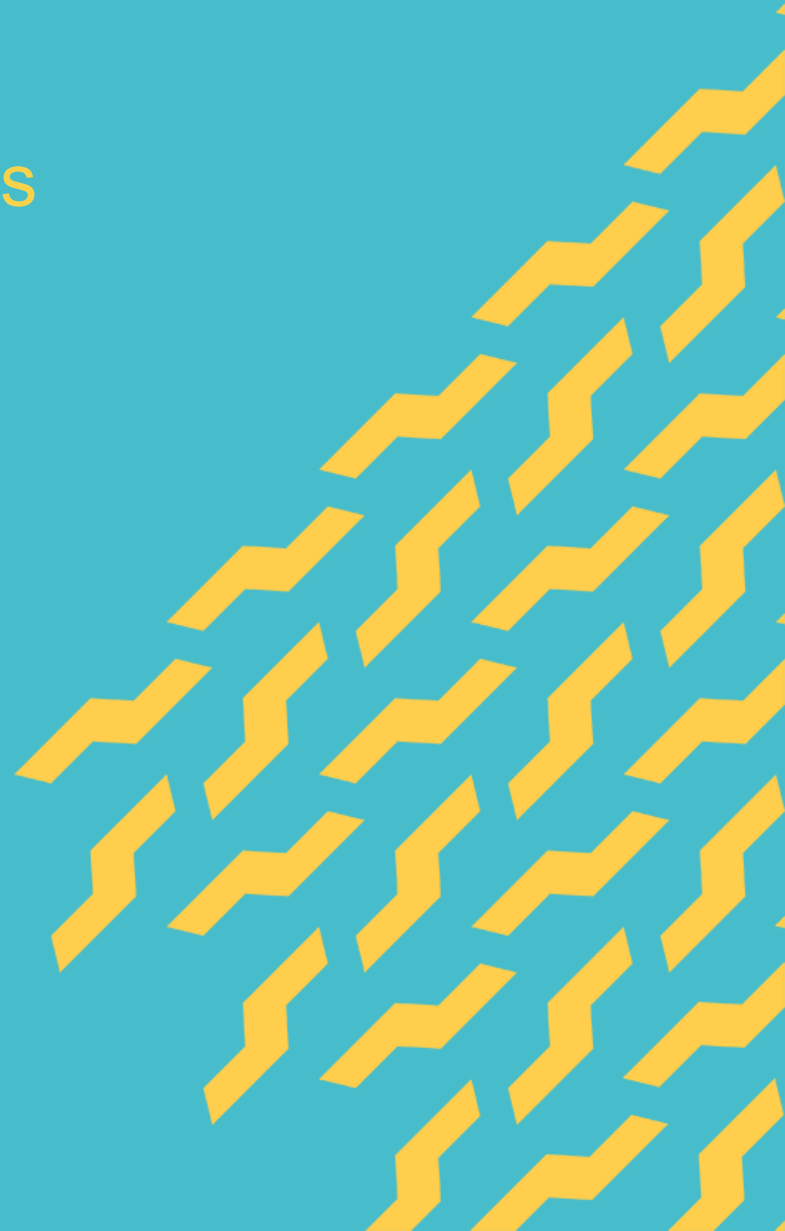
Final statements: JCT

- Contents
 - Check contract
 - Consolidated summary of works completed to date +
 - All valid contractual claims for additional payment
- Supporting documents to be provided?

Final statements: JCT

- Timing
 - Check deadlines for submitting final account/final statement
 - Employer can issue their own Final Statement
 - Payment and Pay Less Notices required
- Be wary: what event occurs last?
 - End of rectification period
 - Date of certificate of making good
 - Date the Final Statement is submitted

Conclusivity of Final Statements



Final Statements: challenging conclusivity

- Check Contract for a conclusive and binding provision
- Are there provisions allowing you to challenge
 - Timescales involved
 - Notices required
 - JCT requires adjudication, arbitration or “*other proceedings*”
- *CC Construction Ltd v Raffaele Mincione* [2021] EWHC 2502 (TCC)

Final Statements: challenging conclusivity

CC Construction Ltd v Raffaele Mincione [2021] EWHC 2502 (TCC)

JCT D&B clause 1.8

Provides two ways for conclusivity to be avoided:

- (i) if adjudication, arbitration or “other proceedings” are commenced before the due date for the final payment; or
- (ii) if adjudication, arbitration or other proceedings were commenced within 28 days after the due date.

In the second case conclusivity is only suspended in respect of the matters to which those proceedings relate.

Final Statements: challenging conclusivity

CC Construction Ltd v Raffaele Mincione [2021] EWHC 2502 (TCC)

JCT D&B clause 4.12.6

“Except to the extent that prior to the due date for the final payment the Employer gives notice to the Contractor disputing anything in the Final Statement..., and subject to clause 1.8.2, the [Final Statement] shall upon the due date become conclusive as to the sum due under clause 4.12.2 and have the further effects stated in clause 1.8”

Final Statements: challenging conclusivity

Time scales

- *University of Brighton v Dovehouse Interiors* [2014] EWHC 940 (TCC)

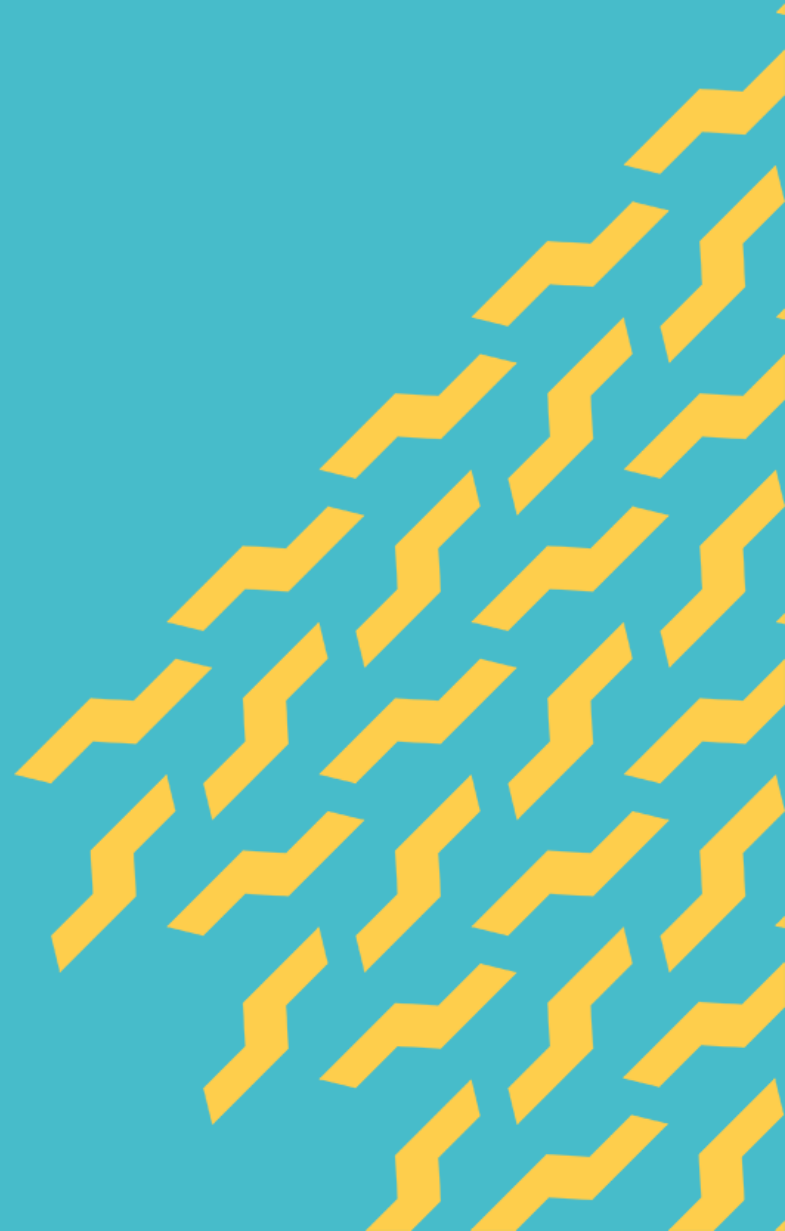
Proceedings

- *Marc Gilbard 2009 Settlement Trust (trustees of) v OD Developments and Projects* [2015] EWHC 70 (TCC)

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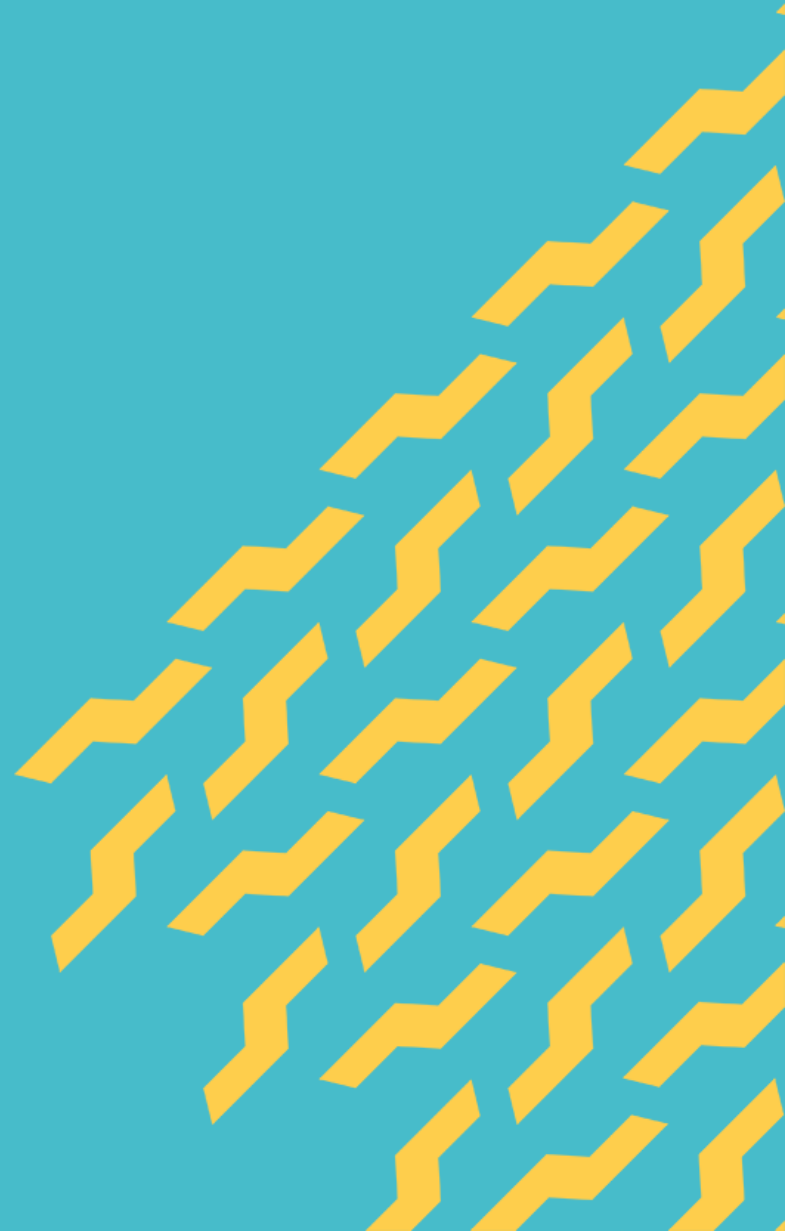
Interest



Interest

- Check contract for express clause
- No implied term at common law
- Limited statutory rights:
 - Goods and services - Late Payment of Commercial Debt (Interest) Act 1998

Housekeeping/Practical Points



House keeping – practical points

- Record keeping is key
- Notice /Account content requirements
- Know your deadlines
- Know your service options and requirements
- Do not sit on Final Statements
- When drafting consider whether conclusive and binding provisions can be removed

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Thank you.
Questions?

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