



## Payment Notice Adjudications

### What are they and what do they mean for my business?

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I want to begin this article by telling you the reader why I believe this matter is topical. In the last two weeks at Quigg Golden, I alone, have had three separate clients in different jurisdictions come to me with potential "Payment Notice Adjudications".

What are they, I hear you ask. A "Payment Notice Adjudication", refers to an adjudication that is brought for one sides failure to comply with the strict notice time limits set out in the "Act" as opposed to a "Substantive Adjudication", which looks at the substantive issues in dispute between two parties and is decided upon based on the law and the merits of each sides arguments.

"Payment Notice Adjudications" are not new, they have been around for quite some time, however, in our experience the vast majority of contractors and subcontractors do not realise that this remedy is available to them.

This form of adjudication has become unfairly known as a "smash and grab" adjudication in the construction industry. This is because the consequences for the payer not issuing the relevant notice on time is that the amount applied for by the party seeking payment becomes the default amount that must be paid. As such this form of adjudication allows a party seeking payment to enforce same without a substantive deliberation on the facts of any dispute taking place, hence the name "smash and grab."

Despite the negative press this form of adjudication receives, it is an efficient and cost effective means of enforcing payment for smaller contractors and sub-contractors who do not have the financial resources to fight an expensive "Substantive Adjudication" based on all the facts of a dispute.

In providing an example of how the process works, I will use the Main Contractor, Sub-Contractor relationship; however, this example equally applies to the Employer, Main Contractor relationship.

The 'Act' provides that a construction contract must provide an adequate mechanism for determining what payments become due under the contract, when it becomes due and also provide a final date for payment. If the contract fails to provide adequate payment provisions then the Scheme for Construction Contracts Act and the time frames contained within apply.

The contract can either specify that the notice specifying the amount due and the basis on which it is calculated, is to be given by either the Main Contractor or the Sub-Contractor. If the contract is silent on the matter then the Main Contractor is to issue the notice. This payment notice must be issued not later than 5 days after the payment due date.



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If the Main Contractor should have issued a payment notice but did not the Sub-Contractor may serve a notice at any time after the date upon which the payment notice should have been issued by the Main Contractor up until the final date for payment. This notice then becomes the notified sum (unless the Main Contractor issues a valid payless notice). The issue of this notice should be done immediately as the final date for payment is postponed for the period between the default by the Main Contractor and the issuing of the notice by the Sub-Contractor.

If the contract permits the Sub-Contractor to make a payment application prior to the payment due date and the Main-Contractor fails to issue a valid payment notice or payless notice then the amount specified in the Sub-Contractor's original application becomes the notified sum that the Main Contractor must pay.

If the Main Contractor intends on paying less than the sum requested then they must issue a payless notice at a prescribed period before the final date for payment (if the contract does not specify this period the Scheme dictates that it must be issued 7 days before the final date for payment). If the Main Contractor fails to issue a valid payless notice within the specified time, the notified sum that the payer must pay is the sum in the original application.

What does this mean for you as a Contractor or Subcontractor seeking payment? It means that if you issued an interim payment application and did not receive a valid payment notice or payless notice (setting out the basis on which the payer calculated the lesser sum) within the relevant period, you may be entitled to claim the amount specified in your interim payment application by way of a "Payment Notice Adjudication".

What is the advantage of this type of adjudication over a "Substantive Adjudication", you may ask. Put simply, cost is the big difference, it is much cheaper to bring a Payment Notice Adjudication than a substantive one.

Therefore, if you have a payment dispute and you think that the payer has not complied with his obligations under the "Act", what is your first step to recovering money? Firstly, assess the dispute and the likelihood of success at any substantive adjudication based on the merits of the case, having sought the appropriate legal advice. Then look to see if the avenue of a "Payment Notice Adjudication" is open to you by assessing whether the correct payment procedures have been followed based on the forgoing information and finally decide which form of adjudication best suits your needs having regard to the circumstances of the case including the quantum involved, the strength and weaknesses of any substantive arguments and finally by looking to whether payment procedures have been complied with.



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