



Silver Shemmings Solicitors

Obtaining Payment & The New Construction Act


Chartered Institute of Arbitrators (London)
Wednesday 18 May 2011

PRESENTED BY:

Richard Silver LLB (Hons), MRICS, ADBM, MCIQB,
MCI Arb, MEWI, MInstCES, Barrister*, Solicitor

* Non practising

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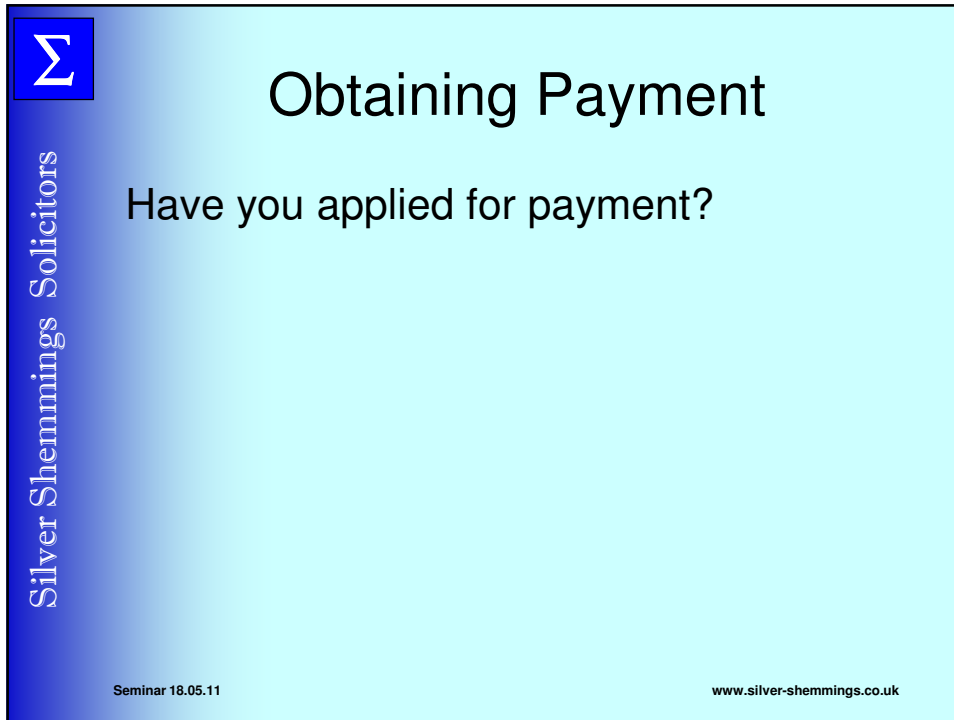



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Obtaining Payment

Is there a contractual right to payment?

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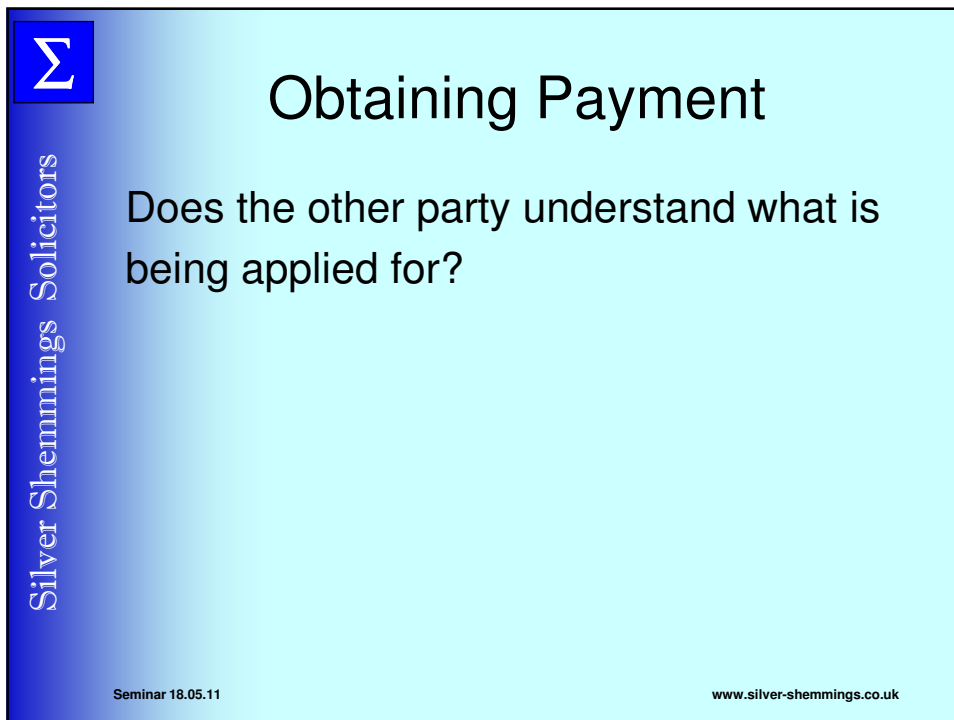



 **Obtaining Payment**

Have you applied for payment?

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Does the other party understand what is being applied for?

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Is there a dispute as to entitlement and/or quantum?

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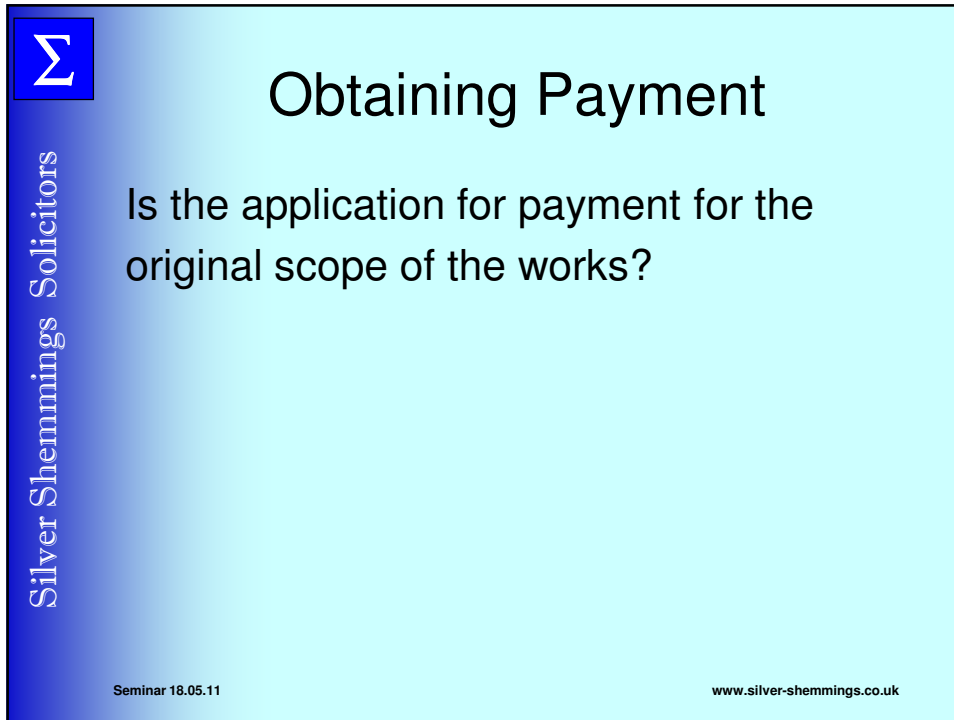


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If the dispute is as to entitlement, have you set out adequately the reasons monies are due?

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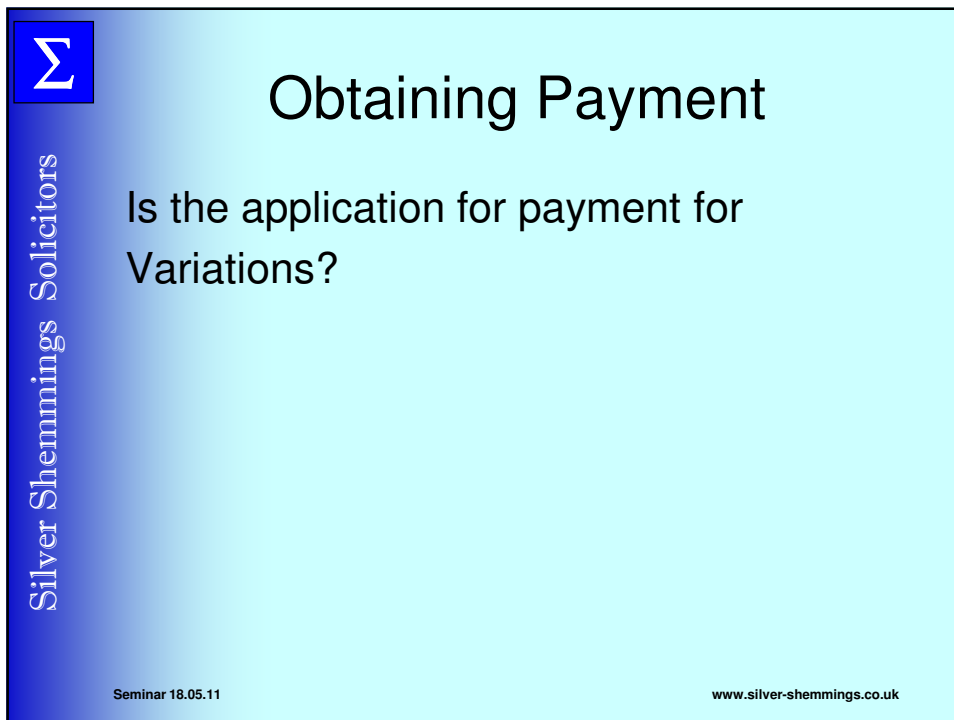
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Is the application for payment for the original scope of the works?

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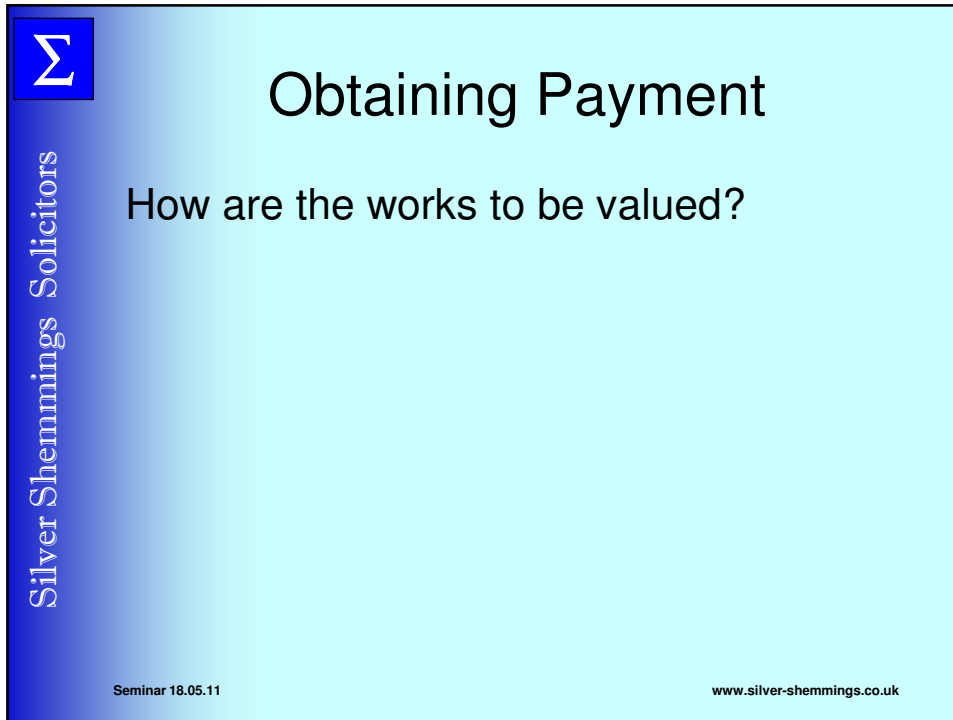
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Is the application for payment for Variations?

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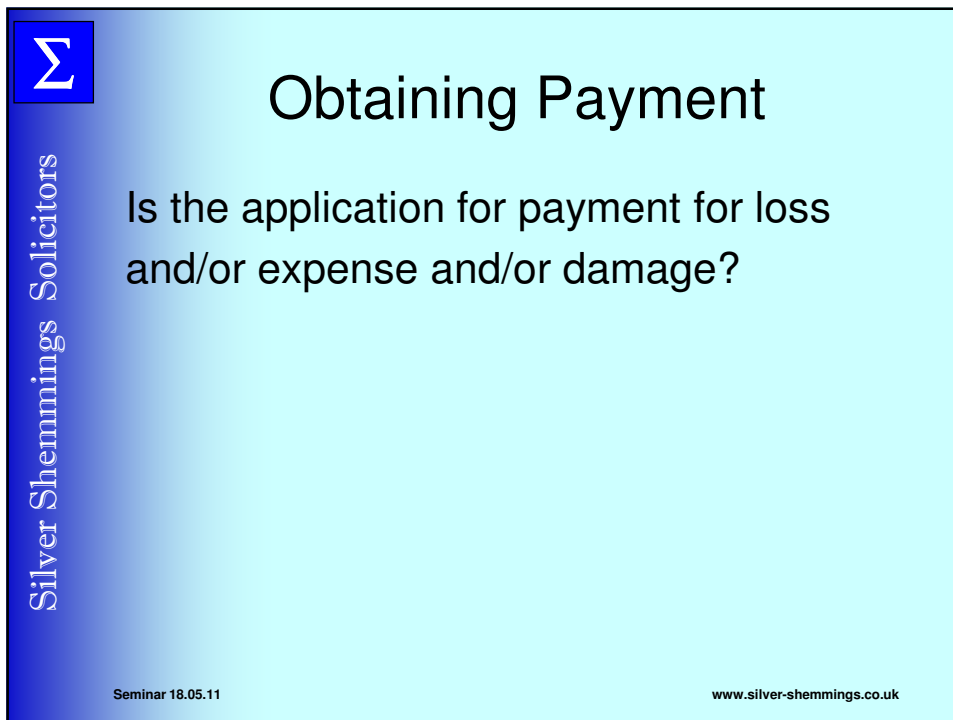



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How are the works to be valued?

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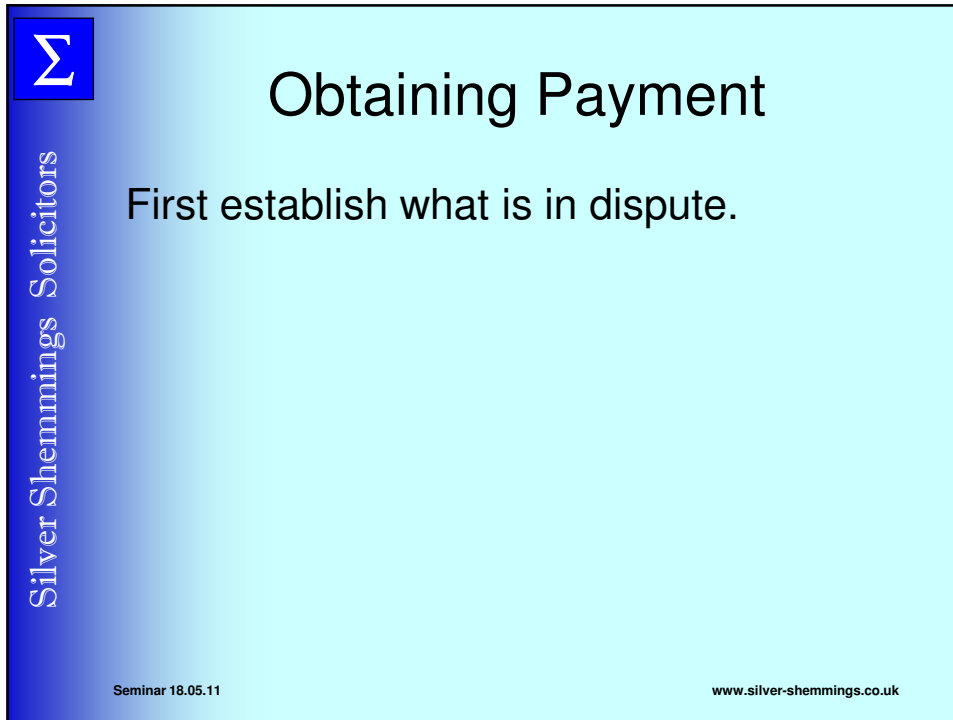


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Is the application for payment for loss and/or expense and/or damage?

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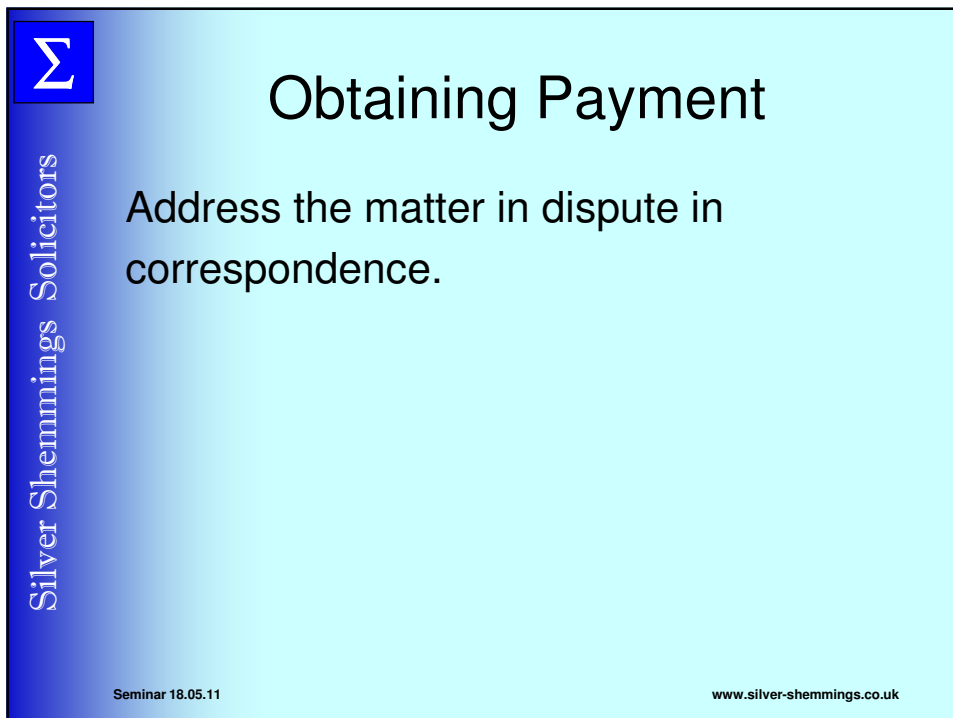
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Obtaining Payment

First establish what is in dispute.

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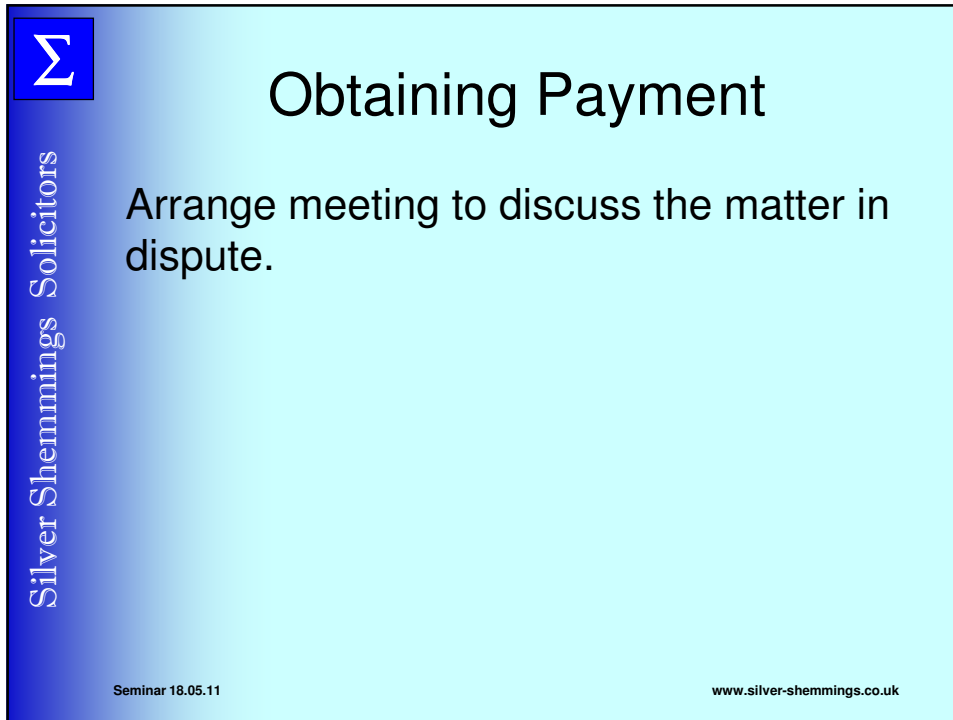
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Address the matter in dispute in correspondence.

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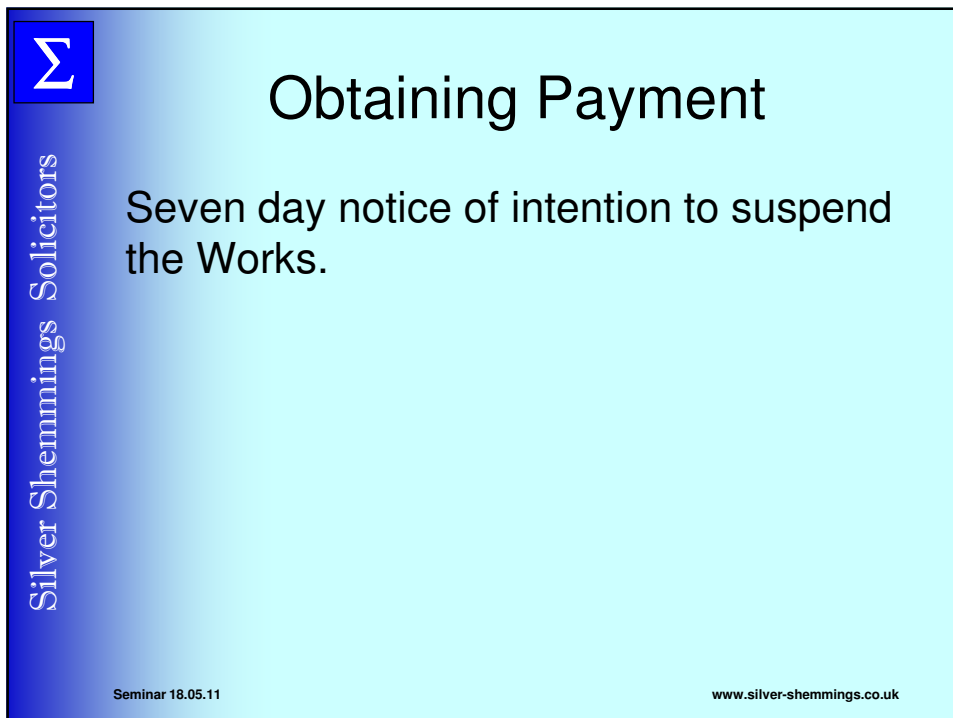
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Arrange meeting to discuss the matter in dispute.

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Seven day notice of intention to suspend the Works.

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Termination.

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Obtaining Payment

Instruct legal/commercial advisors to:

- Advise on your entitlement

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Obtaining Payment

Instruct legal/commercial advisors to:

- Advise on your entitlement
- Write to the other party to seek recovery

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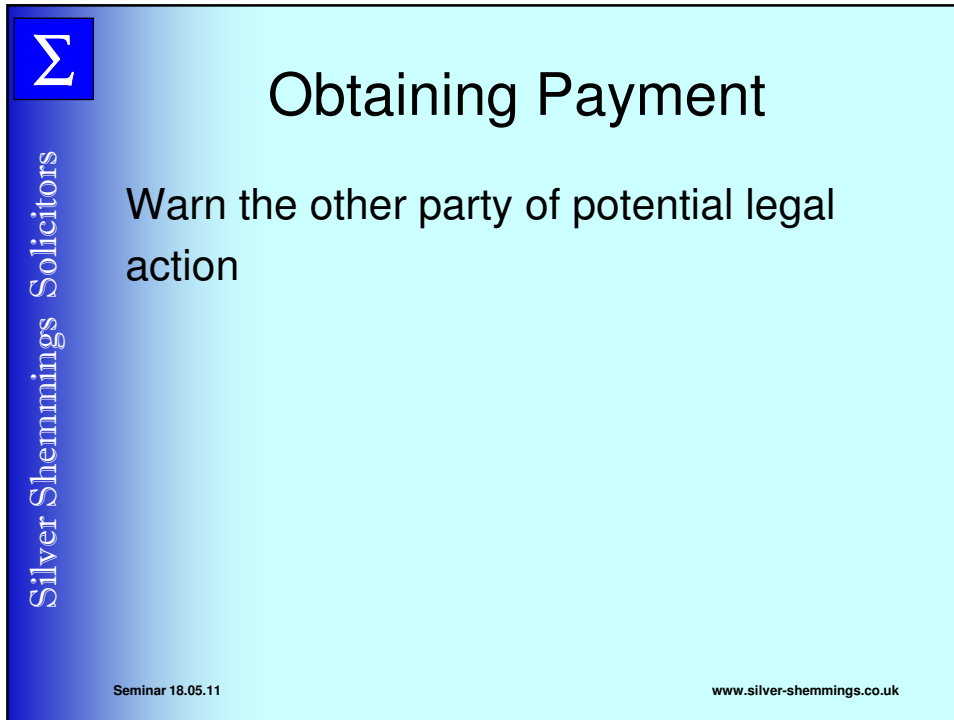
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Obtaining Payment

Instruct legal/commercial advisors to:

- Advise on your entitlement
- Write to the other party to seek recovery
- Meet with the other party

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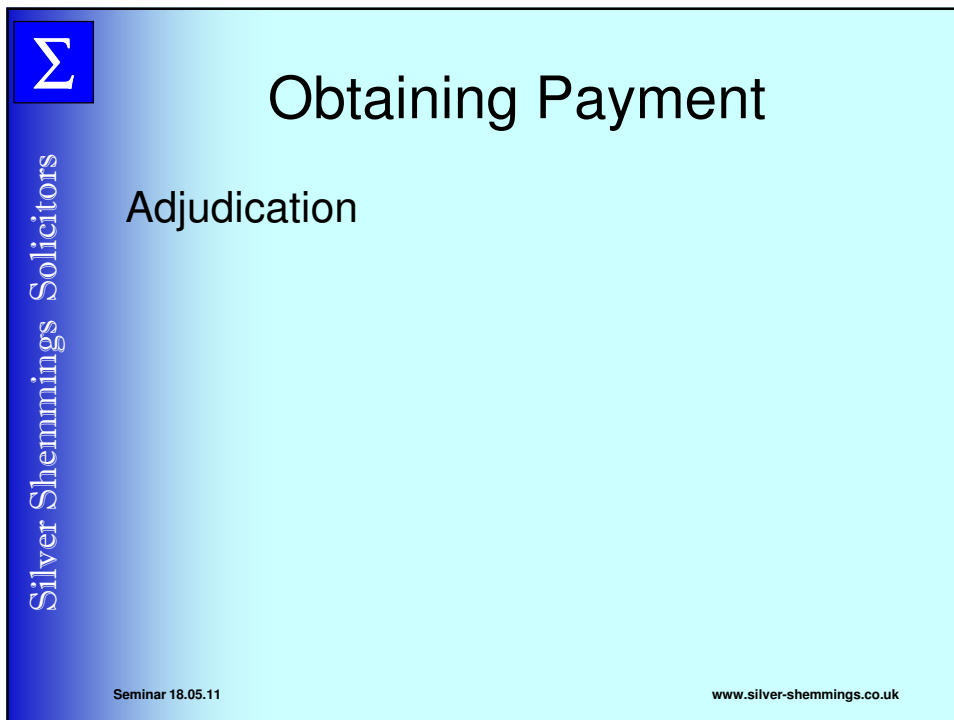



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Warn the other party of potential legal action

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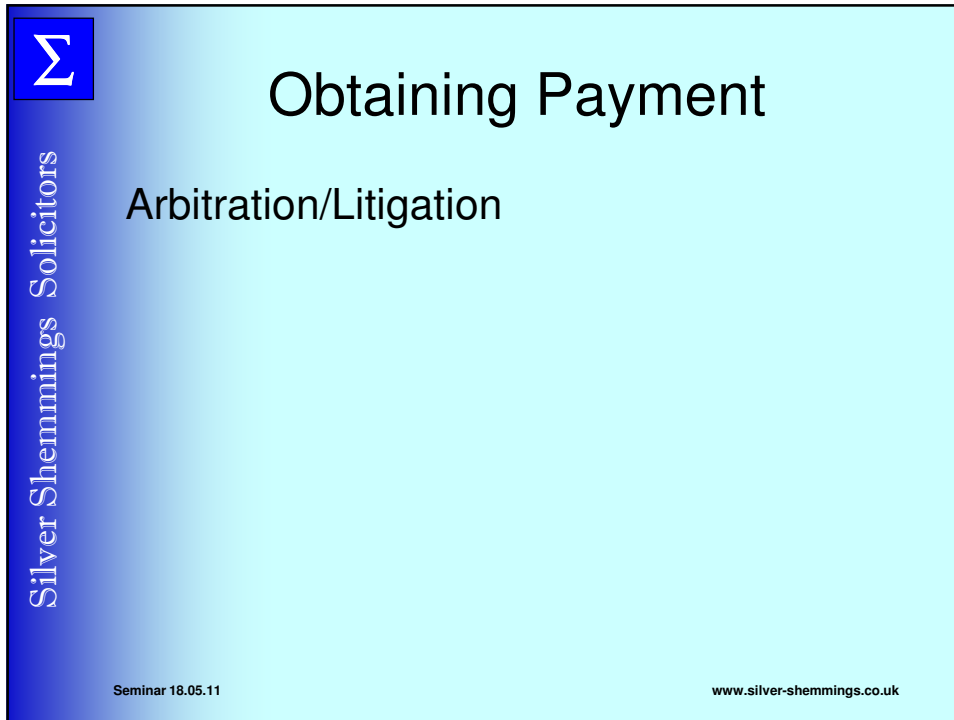


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Adjudication

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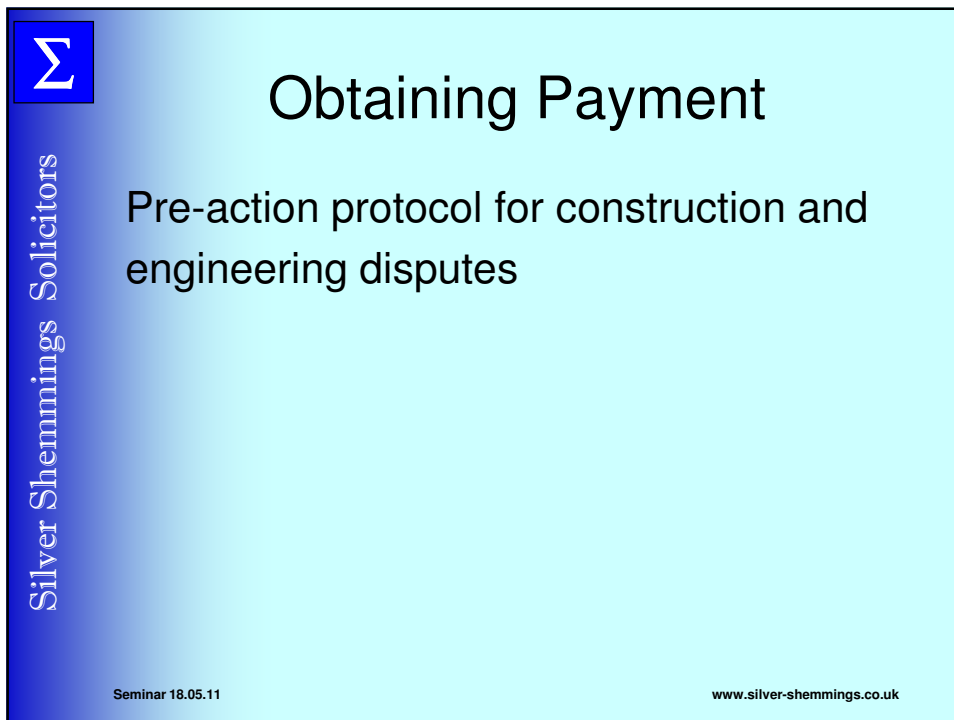
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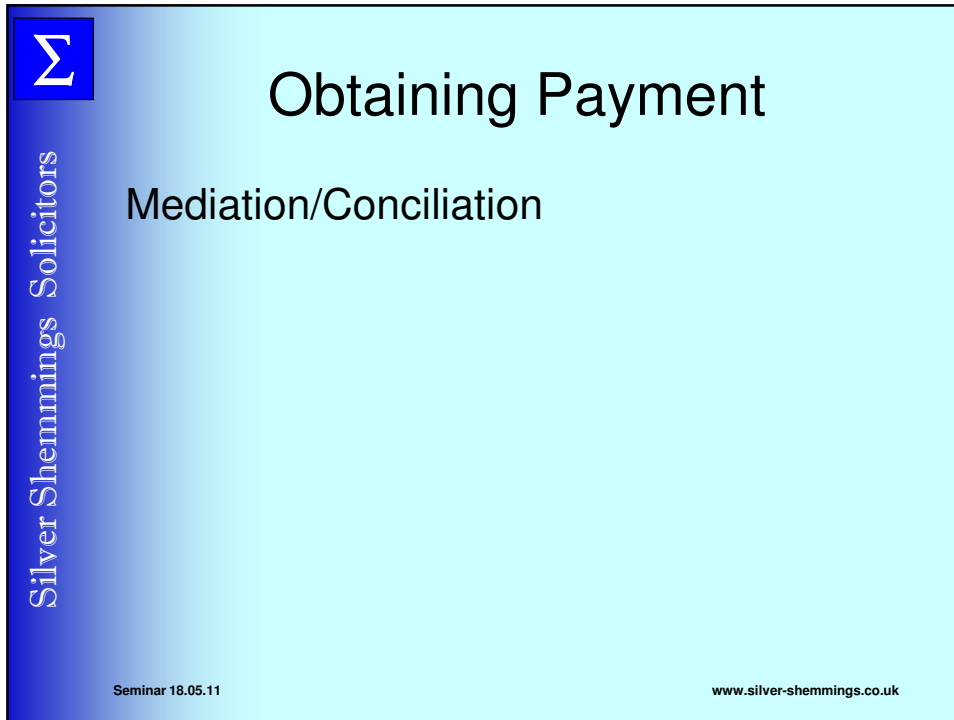
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Pre-action protocol for construction and engineering disputes

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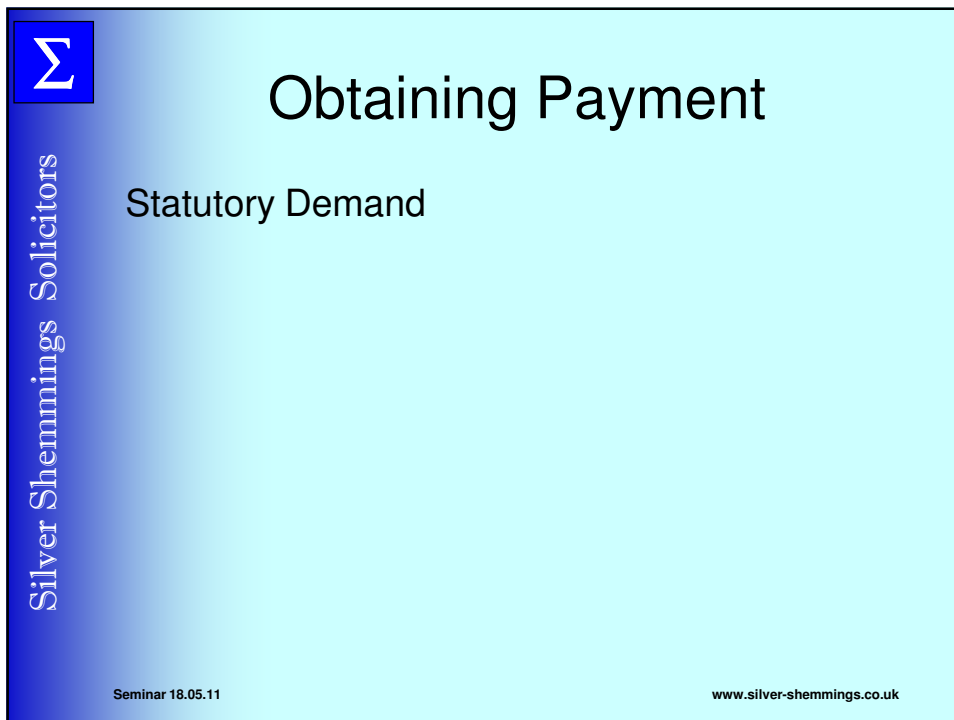



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Mediation/Conciliation

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Statutory Demand

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The New Construction Act 2009

The Local Democracy, Economic
Development and Construction Act
2009 - The New Construction Act 2009

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The New Construction Act 2009

It should be borne in mind though, that until events occur as detailed under Section 148(8) of the New Construction Act this is not “law” but rather “law pending” as specified in Section 149.

Furthermore, the Act is subject to enactment in each jurisdiction and amendment in each jurisdiction, where Section 138(3) is utilised within each jurisdiction.

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The New Construction Act 2009

Section 139: Requirement for Construction Contracts to be in Writing

- Section 107 of the 1996 Act provides that Part 2 of the 1996 Act only applies to contracts which are "in writing".
- Section 107 has been interpreted restrictively by the courts such that the essential terms of construction contracts must be "in writing" for Part 2 to apply.
- Section 139 removes this general requirement, whilst prescribing that various matters must nonetheless be in writing, i.e. –


Subsection (1)

- Repeals section 107 in its entirety with the effect that Pt 2 of the 1996 Act will apply to all construction contracts –
- those which are wholly in writing, partly in writing or wholly oral.

Subsection (2)

- Provides that certain provisions of a construction contract, relating to adjudication, must be "in writing".
- These are the provisions necessary in order to comply with the requirements specified in section 108(2) to (4) of the HGCR 1996.

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Section 140: Adjudicator's power to make corrections:

- This Section inserts new subsection (3A) into section 108 of the 1996 Act.
- "(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission."
- This concurs with the judgment in *Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Limited [2000] B.L.R 314* (adjudicators have the power to correct mistakes in their decisions) (The Slip Rule)

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The New Construction Act 2009

Section 141 - Adjudication Costs

- Section 141 inserts **new section 108A** into the 1996 Act.
- The new section concerns the costs of an adjudication.
- The new provisions address, and distinguish between, both the parties' own costs in relation to an adjudication, and the fees and expenses of the adjudicator, as follows:
- **New section 108A Adjudication Costs: effectiveness of provision** provides that any agreement between the parties to a construction contract concerning the allocation between the parties of the costs relating to an adjudication is ineffective unless such agreement is made after the appointment of the adjudicator and is in writing.
- New section 108A catches both an agreement as regards the allocation of the parties' own costs, and an agreement as regards paying the fees and expenses of the adjudicator.
- New section 108A Adjudication Costs: effectiveness of provision
- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising, under the construction contract.
- (2) The contractual provision referred to in subsection(1) is ineffective unless-
- (a) It is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or (b) It is made in writing after the giving of notice of intention to refer the dispute to adjudication

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The New Construction Act 2009

Section 142: Determination of Payments Due

- **Section 142 inserts new subsection (1A)** into section 110 of the 1996 Act.
- Subsection (1) of section 110 stipulates that every construction contract is to provide an "adequate mechanism" for determining what and when payments become due under the contract, and, in interpreting subsection (1), the courts have held that an "adequate mechanism" can include a certificate issued by a third party (e.g. an architect or quantity surveyor) under a superior contract.
- This has caused difficulties - a sub-contractor may not be aware that a certificate has been issued in a superior contract and, where such a certificate covers work undertaken by other sub-contractors, payment to the sub-contractor is often delayed until all of the other work has been completed.
- **New subsection (1A)** secures that it is not an adequate mechanism for these purposes to make the determination of what payments are due, and when, dependent upon work carried out in another contract (e.g. A superior contract) or upon someone's decision as to whether work has been carried out in another contract.

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The New Construction Act 2009

Section 143: Notices Relating to Payment

- Section 110(2) of the 1996 Act currently provides that the parties to a construction contract must include terms in their contract to the effect that, in relation to each payment and at most five days after such payment becomes payable (or would have become payable), the payer is to give the contractor (i.e. the payee) a notice.
- The notice must specify the amount (if any) which the payer proposes to pay (or has by that time paid) and the basis on which that sum has been arrived at.
- Section 143 amends the existing legislation relating to these notices and, in doing so, provides for the giving of similar notices by the contractor.
- Section 143 achieves this by repealing section 110(2) (subsection (2)) and inserting **new sections 110A and 110B** into Part 2 of the 1996 Act (subsection (3)).

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The New Construction Act 2009

Section 143: Payment Notices: contractual requirements

- **New section 110A (1)** provides that a construction contract is to contain either:
 - a provision which, in relation to every payment, requires the payer (or a "specified person") to give the payee a "payment notice"; or
 - a provision requiring the payee to give the payer (or a "specified person") a "payment notice"; and in either case, requires the notice is to be given at most five days after the payment in question becomes payable.
- A "specified person" is defined **at new section 110A (6)** - such a person is one identified in the construction contract or one "determined in accordance with" terms in the contract (for instance, terms allowing the payer subsequently to notify the payee of the appointment and identity of such person). In practice, a "specified person" is generally an architect or engineer, i.e. Someone qualified to value construction work.
- **New section 110A (2)** prescribes the contents of a "payment notice" given by the payer (or a "specified person") to the payee.
- Such a notice is to identify the sum which the payer believes is payable (by the payer) on the date that the payment concerned becomes payable (or, where some or all of that amount has been paid before the notice is given, the sum that would have been payable on such date) and is, to explain how that sum has been arrived at.

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- **New section 110A (3)** prescribes the contents of a "payment notice" given by the payee to the payer (or to a "specified person"). Such a notice is to identify the sum which the payee believes is payable (to the payee) on the date that the payment concerned becomes payable (or, where some or all of that amount has been paid before the notice is given, the sum that would have been payable on such date) and is to explain how that sum has been arrived at.
- **New section 110A (4)** has the effect that, where moneys in respect of any payment have been paid before the payment actually becomes payable, the "payment notice" is nonetheless to specify the complete sum, i.e. As if any such moneys had not been paid or whether the sum referred to in subsection (2) (a) or (b) or (3) (a) may be zero.
- **New section 110A (5)** provides that where the parties to a construction contract fail to include terms in their contract for the giving of a "payment notice" pursuant to new section 110A(1), the appropriate provisions of the relevant Scheme for Construction Contracts will apply.
- The consequence of this is that terms providing for the giving of a "payment notice" by the payer to the payee will take effect as implied terms of their contract.
- **New section 110A (6)** in addition to the definition of "specified person", defines what is meant by "payee", "payer" and "payment due date".

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The New Construction Act 2009

- **Section 143: Payment Notices: payee's notice in default of payer's notice**
- **New section 110B** applies in a case where the parties to a construction contract have said in their contract that the payer (or a "specified person") is to give the payee a "payment notice" (at most five days after payments become due) and, in relation to a particular payment, no notice is actually given (or, if given, is late).
- **New section 110B** also applies in a case where the parties have failed to make provisions in their contract for the giving of "payment notices", such that the relevant Scheme for Construction Contracts has implied a payer "payment notice" term into the contract, and, in relation to a particular payment, no notice is actually given (or, if given, is late).
- In other words, new section 110B addresses the situation of a payer failing to serve a payment notice as required either by an express or by an implied term of the contract.
- The effect of **subsection (2) of section 110B** is to allow the payee to give the payer a "payment notice" instead (one which complies with the requirements (as to content) of a "payment notice" given by a payee in cases where parties to a construction contract have agreed in their contract that it is the payee who gives this notice).
- A notice like this given by a payee in default of a payer's "payment notice" must be given before the "final date for payment" (i.e. the date that, pursuant to the express or implied terms of their contract, the sum in question has to be paid).

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- However, **subsection (3) of the new section 110B** provides that where the parties had agreed in their contract that the payee was to notify the payer (or a "specified person") of the sum that the payee believed was due in relation to a payment and of how that sum was arrived at (what in the construction sector is known as a payee's "application"), such a notification is deemed to be a notice given pursuant to **new section 110B (2)** and, indeed, the payee cannot give a notice pursuant to **new section 110B (2)** in such a case.
- **New section 110B (4)** is a provision to postpone the "final date for payment" of a relevant sum where, pursuant to **new section 110B (2)**, the payee serves a notice in default of the payer giving a "payment notice".
- The effect of this new provision is to postpone the final date for payment of the sum in question by the same number of days after the sum first became payable as the number of days that the default notice was given, see following example.

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The New Construction Act 2009

Section 144: Requirement to Pay Notified Sum

- Section 111 of the 1996 Act currently provides that a party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given a notice of his intention to do so.
- **Subsection (1) of Section 144** substitutes a **new section 111** and, in doing so, replaces this provision in respect of "withholding notices" with (generally speaking) a requirement on the part of the payer to pay the sum set out in such a notice. New section 111 also makes provision for the sum in such a notice to, in effect, be challenged or revised by the giving of a type of counter-notice.
- **Subsection (1) of new section 111** provides that the payer must pay the "notified sum" - i.e. The sum set out in such notice - on or before the final date for payment of such sum.

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The New Construction Act 2009

Section 144: Requirement to Pay Notified Sum

- **Subsection (2)** has the effect of explaining what is meant by "the notified sum". In relation to a payment, it is (as appropriate):
 - the sum set out in a "payment notice" given by a payer (whether such notice is given pursuant to an express term or one implied into the contract pursuant to the relevant Scheme for Construction Contracts) or by a "specified person" (subsection (2) (a));
 - the sum set out in a "payment notice" given by a payee (subsection (2)(b));
 - the sum set out in a payee's "payment notice" in default of one given by the payer or "specified person" (see paragraph 40 above) (subsection (2)(c)); or
 - the sum set out in a payee's "application", where such notification is deemed to be a notice given in default of one given by the payer (subsection (2)(c)).
- This requirement to pay the "notified sum" is intended further to facilitate "cash flow" by determining what is provisionally payable. What is properly and ultimately payable as a matter of the parties' contract is unaffected (see the decision of the Court of Appeal in Rupert Morgan Building Services (LLC) Limited v Jervis [2003] EWCA Civ 1563).

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The New Construction Act 2009

- **Subsection (3) of new section 111** provides that a payer (or a "specified person") may, in relation to a payment, give a notice to the payee of the payer's intention to pay less than the notified sum.
- **Subsection (3)** permits both the giving of such a counter-notice where the notice containing the "notified sum" was given by the payee and, also, the giving of such a counter-notice where the notice containing the "notified sum" was given by the payer - a payer may wish to revise the amount he proposes to pay because, for instance, he subsequently discovers that the work in question was unsound.
- **Subsection (4)** prescribes the content of such a counter-notice. It must identify the sum which the payer believes is payable on the date that such notice is given and is to explain how that sum has been arrived at.
- **Subsection (5)** read in conjunction with subsection (7), prescribes the timing of such a counter-notice.
- It must be given no later than such number of days as the parties have agreed in their contract before the final date for payment or, where there is no contractual provision, such number of days before the final date for payment as the relevant Scheme for Construction Contracts provides.
- **Subsection (5) (b)** has the effect of prohibiting the giving of such a counter-notice before the payee has actually given his "payment notice" (whether in a case where the parties had agreed in their contract that "payment notices" were to be given by the payee, or the payee is giving (or is deemed to have given) his "payment notice" in a default of the payer giving a "payment notice").

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- **Subsection (6)** has the effect that the amount set out in a counter-notice given under subsection (3) of new section 111 becomes the "notified sum" which the payer must pay pursuant to subsection (1).
- In such a case, **subsection (9)** provides that any such additional amount must be paid by the date which is the later of seven days from the date of the adjudicator's decision or the date which, but for the notice, would have been the final date for payment.
- **Subsection (10)** has reference to the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others (2007) UKHL 18* (a transcript of which judgment can be found at <http://www.baillii.org/uk/cases/UKHL/2007/18.html>).
- **Subsection (10)** is intended to ensure that the *Melville Dundas* decision remains confined to insolvency situations alone (and is not interpreted to include other events which the parties may have specified in their contract).
- In the context of new section 111, it provides that the subsection (1) requirement to pay the "notified sum" does not apply where the contract allows the payer to withhold moneys upon the payee's insolvency and the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than this sum (pursuant to subsection (3)).
- **Subsection (11)** applies the existing definitions of "insolvent" in the 1996 Act (section 113) to subsection (10).
- **Subsection (2) of Section 144** makes consequential amendments to section 112 of the 1996 Act such that, in effect, relevant references in that section are to the new subsection (1) requirement i.e. The requirement to pay the "notified sum".

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Section 145: Suspension of Performance For Non-Payment

- **Section 112** of the 1996 Act permits a contractor to stop carrying out work under the contract in the event of non-payment by the other party.
- **Subsection (2) of Section 144** amends subsection (1) of section 112 to put it beyond doubt that a contractor may stop carrying out some, and not simply all, of the work in such a case.
- **Subsection (3)** of Section 145 inserts a new subsection (3A) into section 112. The effect of this is to make the "party in default" (i.e. The party who has not paid) liable to pay to the contractor stopping work pursuant to section 112 a reasonable amount by way of the costs and expenses he incurs by stopping work (ex, the payee's reasonable costs in redeploying staff or removing plant and equipment).
- **Subsection (4) of Section 145** amends subsection (4) of section 112. Section 112 provides that any period during which the contractor stops work in pursuance of this right to do so in a non-payment situation is to be disregarded in calculating any time period prescribed in the contract.
- The amendment extends this to any period in which the contractor stops work "in consequence of the exercise of" this right; with the effect that extra time is allowable - for example, the time which the payee requires to remobilise staff or return plant and equipment to the relevant site.

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