

A REVIEW OF THE CPA MODEL CONDITIONS FOR THE HIRING OF PLANT

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Outline

1. Introduction
2. Understanding the CPA Conditions
 - The Consumer Conditions
 - The Model Conditions
3. Formation of contracts and inclusion/exclusion of CPA conditions
4. Defences under the conditions:
 - The incompetent operator
 - Defective Machines
5. Claims investigation
6. Payment under the Construction Act 2011

Introduction

The review today will:

- Explain the clauses most frequently encountered, changes to the Model Conditions and the Consumer Conditions
- How the contract is set up
- Defences
- Common problems
- Claims Handling

Introduction

- CPA established 50 years, 1,000 member companies

Introduction

- Owner – is there a recovery?
- Hirer – is there a defence?

Introduction

Conditions onerous to the hirer

- Thou shalt not damage it!
- Though shalt not lose it!

The Consumer Conditions

Changes to the Model Conditions

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CPA Model Conditions 2011

- Last revised 2001.
- Updated in 2011 to reflect changes in legislation and industry practice.
- July 2011 Version of the CPA Model Conditions seeks to dispel previous ambiguities and provide clarity.
- New 2011 Model Conditions take effect from 1 July 2011.

Changes to the Model Conditions

1. Definitions
2. Extent of Contract
3. Acceptance of Plant
4. Unloading and Loading
7. Ground and Site Conditions
8. Handling of Plant
12. Limitation of liability
13. Hirer's Responsibility for Loss or Damage
24. Notice of termination
25. Idle Time
33. Protection of Owner's Rights
35. Dispute Resolution

Understanding the CPA Conditions

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Understanding the CPA Conditions

- Definitions (clause 1).
- Delivery in good order and maintenance: inspection reports (clause 5).
- Handling of plant (clause 8).
- Breakdown, repairs and adjustment (clause 9).
- Hirer's responsibility for loss & damage (clause 13).
- Notice of termination of contract (clause 24).
- Implied conditions

Clause 1

- Hire Period

- Definitions:

Amended definition of “Plant” and new definitions of “Contract”, “Holiday Period”, “Offer”, “Working Day” and “Working Week”. NB: the “Hire Period” includes any “Holiday Period”.

- Extent of Contract

Clause 2 – seeks to exclude all other terms and conditions the Hirer may try to impose.

Clause 4

- Unloading and loading.
- Hirer's responsibility unless otherwise agreed.

Clause 5

- Delivery in good order and maintenance: Inspection reports.
- Deemed to be in good order unless written notification 3/4 days.
 - Except inherent fault or fault not ascertainable by reasonable examination
- Clause 5(a) – the Hirer is responsible for using the Plant “in accordance with the manufacturers and/or Owner’s recommendations”.

Clause 7

Ground and Site Conditions

- Previous entitled “Timber Mats or Equivalent”. Extended to cover site and ground conditions generally.
- The Hirer warrants that the condition of the site is suitable for the use of the Plant and the Hirer is responsible for any damage to utilities.

Clause 8

- Handling of plant
 - Competent operator
 - Direction and control of hirer
 - Servant of hirer
- Clause 8(c) – unless otherwise agreed between the Owner and the Hirer, the Owner’s driver must only operate the Owner’s Plant.

Clause 9

- Breakdown, repair and adjustment
 - Report breakdowns
 - Allowance for stoppages
 - Hirer not to repair
 - Hirers negligence or misuse
 - USA v ARC Construction Limited
- Clause 9(a) – any breakdown of, or damage to the Plant must be notified immediately and confirmed in writing.
- Clause 9(c) – when replacing a tyre, the Hirer must provide one which is of an equivalent specification.

Clause 10

Other Stoppages

- The Hirer is responsible for the cost of recovering the plant from soft/unsuitable ground or hazardous environment.

Clause 12

Limitation of Liability

- Excludes liability on the part of the Owner and confirms that any allowance to be made against hire charges shall be the Hirer's sole remedy.
- Clause 12(d) – clarifies that the Owner cannot exclude liability for death or PI caused by the Owner's negligence.

Clause 13

- Comprehensive indemnity to owner
 - Competent operator
 - Direction and control of hirer
 - Servant of hirer
- Continuing hire charges
- Clause 13(b) – when Plant is lost or damaged, payment of the agreed settlement must be made within 21 days.

Clause 14

Notice of Accidents

- The Hirer must give immediate notification by telephone and written confirmation within 24 hours of the telephone notification.

Clause 23

Commencement and Termination of Contract (Transport of Plant)

- Clarifies the Hire Period commences from the time the Plant leaves the Owner's depot and continues until received back at the Owner's depot.
- Clause 23(b) – if Plant is not made available for collection as agreed, the Plant shall be deemed to be back on hire.
- Clause 23(c) – at the end of the Hire Period, the Plant shall be clean and free of contamination.

Clause 24

Liability During Notice of Termination

- Where the Hire Period is indeterminate, the Contract can be terminated on 7 days notice in writing by either party. NB: Clause 13 obligations.
- Clause 24(b) – 7 days notice of termination of the Contract is required and if the Plant is not made available for collection within the 7 day notice period, the Hirer remains responsible for the Plant until collected.
- Clause 24(c) – the Hirer is responsible for all costs should he terminate the Contract before the Hire Period commences.

Clause 25

- Idle time.

Clause 35

Dispute Resolution

- Both parties have a right to refer any difference or dispute arising under or in connection with the Contract to adjudication and the procedure set out in Part 1 of the Scheme shall apply.
- Clause 35(a) – jurisdiction depends on where the site is (if within the UK) or where the Owner's head office is (if outside the UK).
- Clause 35(b) – both parties have the right to adjudicate and Part 1 of the Scheme applies.

Implied Conditions

- Plant supplied in good working order.
- Owner to maintain in good working order.

Formation of Contracts and Inclusion/Exclusion of CPA Conditions

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Formation of Contracts and Inclusion/Exclusion of CPA Conditions

British Crane Hire

v

Ipswich Plant Hire Limited

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Formation of Contracts and Inclusion/Exclusion of CPA Conditions

Transformers & Rectifiers Limited

v

Needs (2015)

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Formation of Contracts and Inclusion/Exclusion of CPA Conditions

Grogan

v

Robin Meredith Plant Hire and
Tricat Civil Engineering Limited (1996)

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Are the CPA Terms Unfair?

- Thompson v T Lohan (Plant Hire) and Another (JW Hurdiss Limited, Third Party) 1987.

“All plant hired out under the terms and conditions of the contractors’ Plant Association Conditions of Hire, a copy of which will be provided on request.”

- Phillips Products Limited v Hyland and Hampstead Plant Hire Company Limited (1987).

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Smith and UMB Chrysler (Scotland) Limited

v

South Wales Switchgear Co Limited (1978)

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Defences Under the Conditions

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Defences Under the Conditions

- The incompetent operator.
- Defective machines.

The Incompetent Operation

- McConkey v Amec PLC.
- William Press Limited and GW Sparrow and Sons Plc.
- Baldwins Industrial Services Limited v Cementation Construction Limited (1992)

Defective Machines/Breakdown

- Clause 5 – machine deemed to be in good order unless notified in writing – subject to inherent fault or hidden defects.
- Breakdown – owner may try to blame hirer for abusing machine (clause 9).
- If plant damaged by inherent defect – owner cannot rely on clause 13.
- Importance of site investigation

Defective Machines/Breakdown

Fire

- Cases where machines set themselves on fire during operation.
- Owner pleads indemnity under clause 13 but because subservient to clause 5 and 9, hirer alleges defective machine (clause 5) and breakdown (clause 9).

Theft

- Usually of smaller non-operator items – generator, compressor, power tools and the like.

Quantum

- Liability under CPA is for market value e.g. “make good”.

Insurance Issues

Claims Investigation

Claims Investigation

- No substitute for thorough site investigation at early stage.

Adjudication

Adjudication

Baldwins Industrial Services Plc

v

Barr Limited

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Payment under the Construction Act 2011

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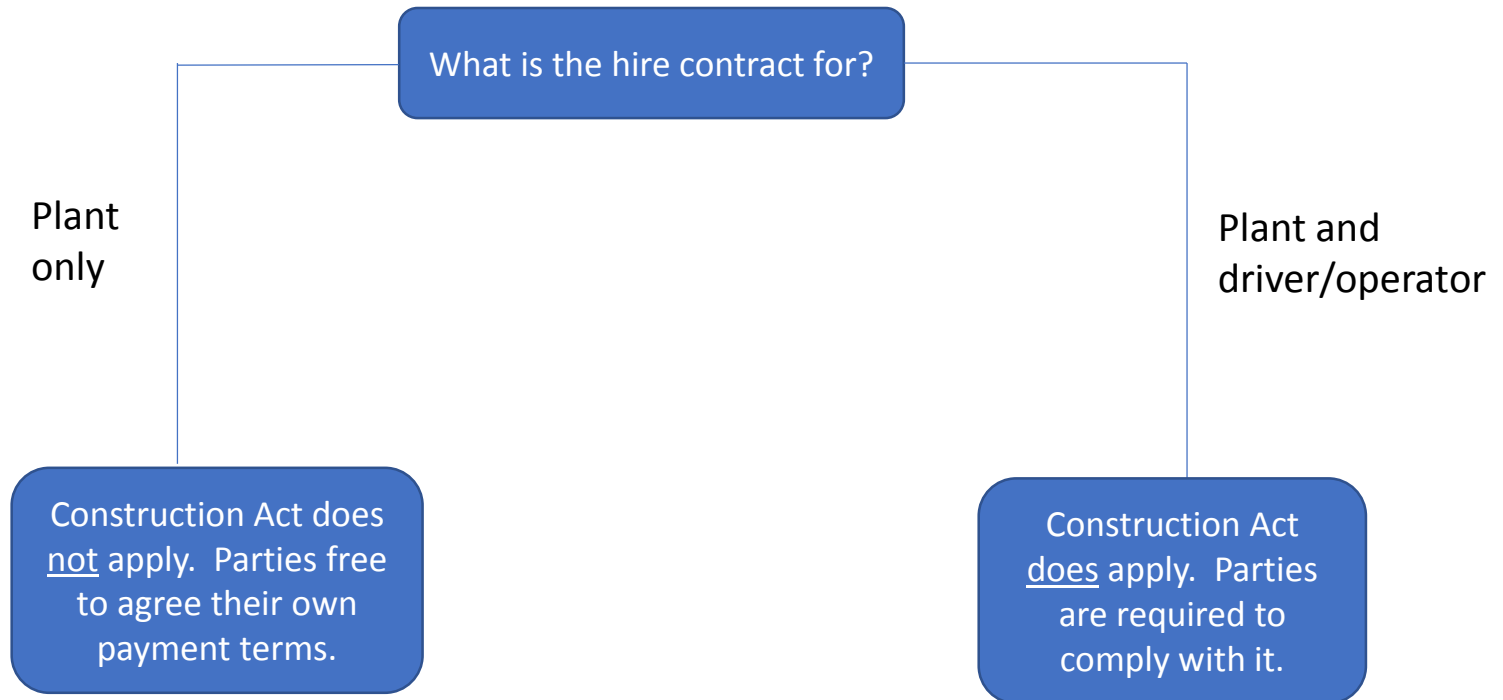
Payment under the Construction Act 2011

When does the Act apply?

- Where the Owner supplies a driver or operator in addition to Plant, in many cases it is likely that this will fall within the definition of “construction operations” set out in the Construction Act.
- This means that a contract for the supply of Plant plus a driver or operator may be classed as a “construction contract” and subject to the new provisions of the Construction Act.

Payment Under the Construction Act 2011

When does the Act apply?



Payment Under the Construction Act 2011

- What must the contract contain?
- The new Act introduces a “Payer-Led” Procedure (hirer).
- One of these must be incorporated into the contract.

Payment Under the Construction Act 2011

The “Payer-Led” Procedure:

1. the payer (i.e. the Hirer) must issue a Payer’s Notice not later than 5 days after the payment due date;
2. if the sum set out in its Payer’s Notice is too high, a Pay Less Notice can be issued prior to the final date for payment
3. if no Payer’s Notice is issued, the Owner dictates the sum
4. If the Owner has already submitted an application for payment, then the sum claimed in the Owner’s application will become due.
5. if no application has been submitted, or it does not comply with the contract, the Owner can issue a Payee’s Default Notice setting out the sum it considers to have been due at the payment due date and the basis on which that sum is calculated.
6. if a Payee’s Default Notice is issued, the final date for payment will then be postponed by the number of days which pass between the date the Hirer should have served its Payer’s Notice and the date the Owner serves its Payee’s Default Notice.

Payment Under the Construction Act 2011

- How can ensure that your contract complies with the Construction Act?
- It will be necessary to include payment terms within your plant hire contract.
- For example, if the Payee Led procedure is chosen, the plant hire contract will need to include:
 - A due date and a final date for payment.
 - A provision requiring the plant owner to issue a Payee's Notice not later than 5 days after the due date for payment.
 - A provision allowing the hirer to issue a Pay Less Notice up to a specified number of days before the final date for payment (e.g. the Pay Less Notice must be issued not later than 3 days before the final date for payment).

Payment Under the Construction Act 2011

- What if the contract fails to contain the correct clauses?
- In the absence of agreed payment terms, the provisions of the amended Scheme for Construction Contracts (the “Scheme”) will dictate the payment terms which apply to the hire contract.

Payment Under the Construction Act 2011

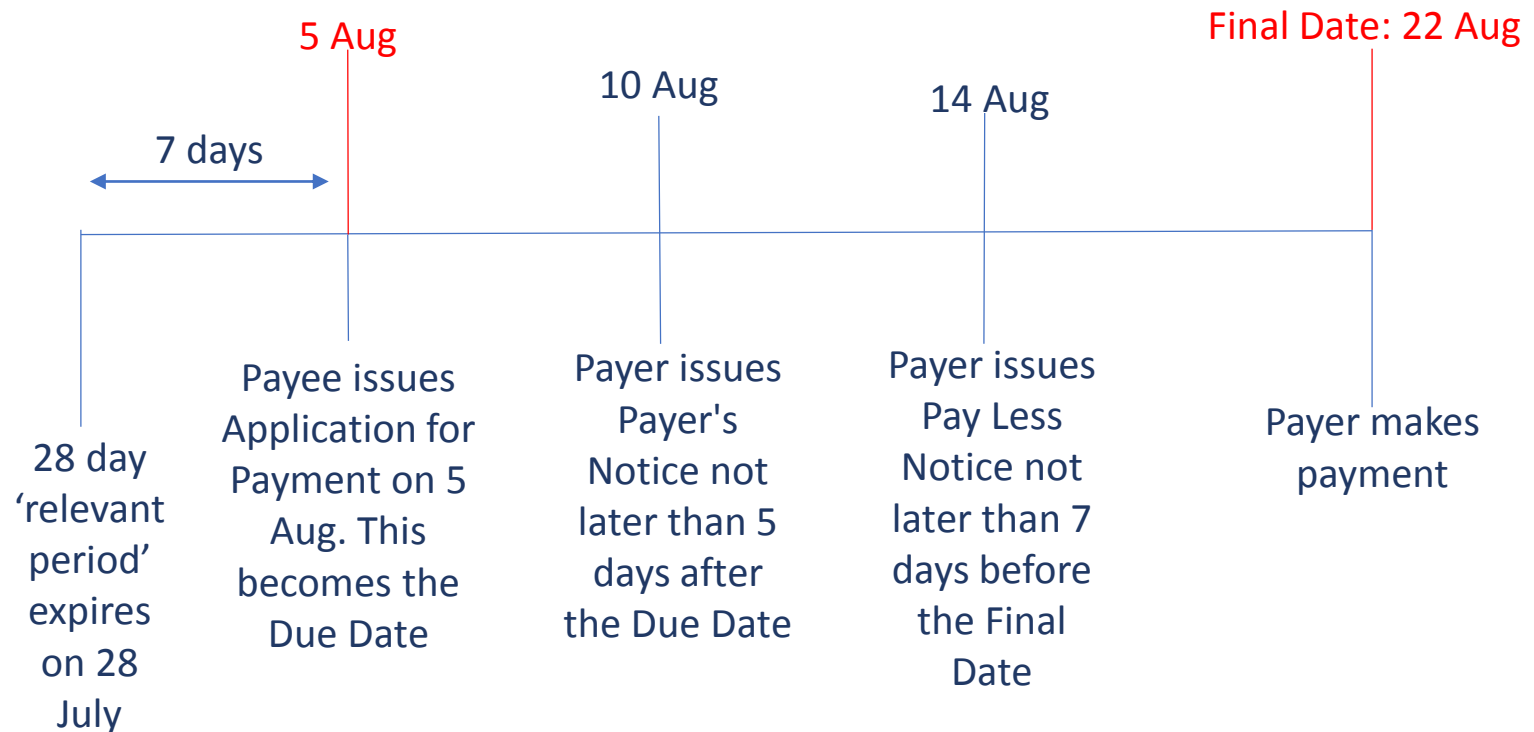
- Payments under the Scheme.
- Where no payment periods have been agreed, the Scheme splits long term hire contracts into 28 day periods. Payments become due on the later of either:
 - the expiry of 7 days following the expiry of each 28 day period; or
 - the making of a claim by the payee (the Owner).

Payment Under the Construction Act 2011

Payments under the Scheme

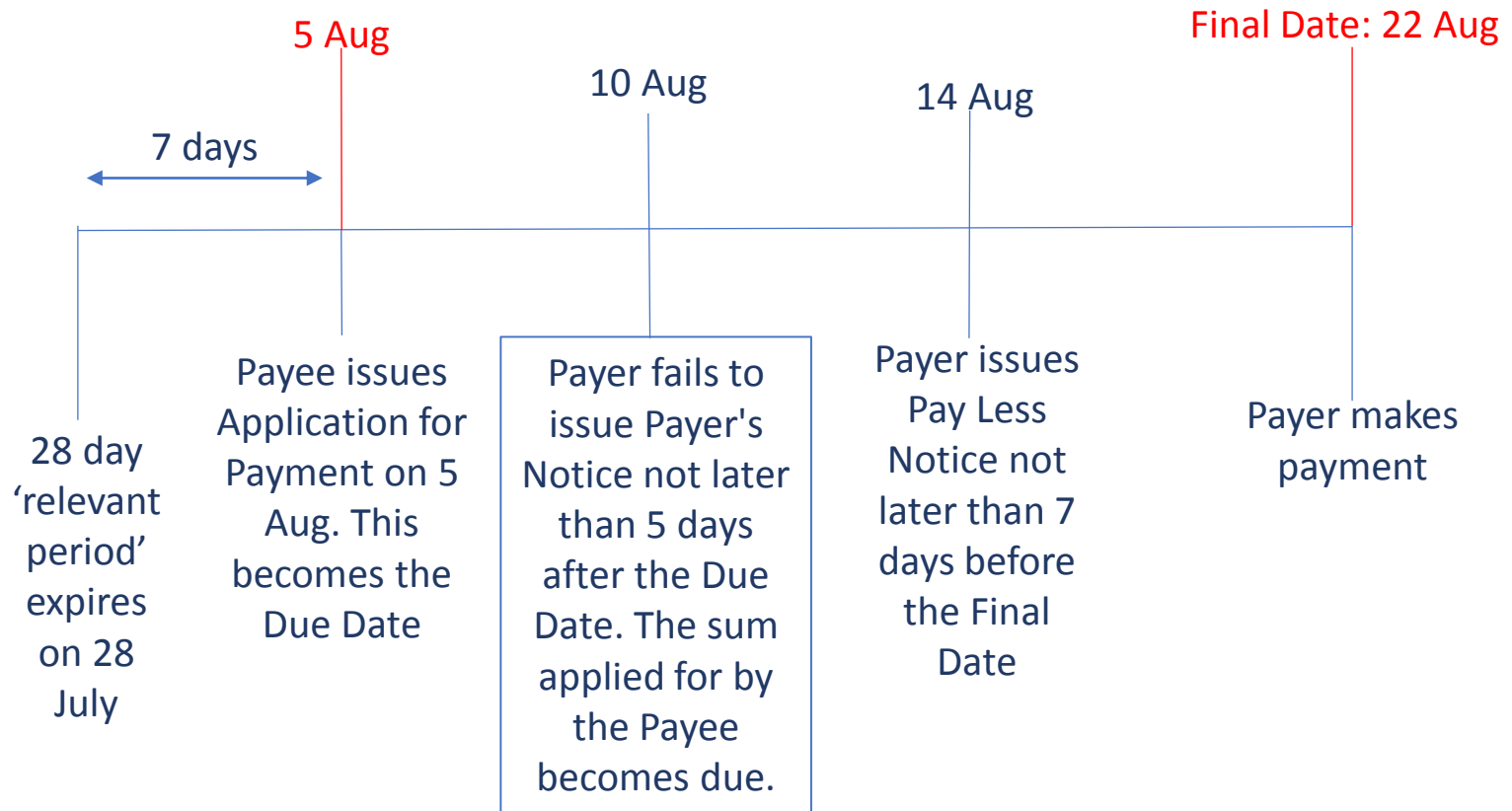
1. Owners should submit an invoice promptly following the expiry of each 28 day period.
2. the Hirer is then required to issue its Payer's Notice no later than 5 days after the due date for payment, if not then the sum specified in the Owner's invoice may become due automatically
3. if the Owner has not submitted an accepted invoice, it is likely that the Owner will be required to issue a Payee's Default Notice.
4. the final date for payment under the Scheme is 17 days after the due date. If the Hirer wishes to pay less than the sum set out in its Payer's Notice (or, if no Payer's Notice was issued, the sum set out in the Owner's Default Notice or the Owner's invoice), the Hirer may issue a Pay Less Notice no later than 7 days before the final date for payment.

Payment Under the Scheme



Payment Under the Scheme

Where the Payer fails to issue a Payer's Notice



ISG Construction v Seevic College (2014)

- Seevic engaged ISG under a JCT Design & Build Contract 2011 (the “Contract”).
- The Contract provided for interim payments to be made to ISG.

ISG Construction v Seevic College (2014)

- On 13 May 2014, ISG issued its Payment Application requesting payment of £1.1m.
- Seevic failed to serve a Payment Notice and a Pay Less Notice, nor did it pay any sums to ISG.
- ISG referred the dispute to adjudication.

ISG Construction v Seevic College (2014)

- Four days before a decision was due, Seevic commenced a second adjudication asking the same adjudicator to value ISG's works as at the date of the disputed Payment Application.
- The decision in the First Adjudication found in favour of ISG for £1.1m.
- Subsequently, the decision in the Second Adjudication found that the true value of the works was only £315,000.

ISG Construction v Seevic College (2014)

- ISG referred the matter to Court, seeking a declaration that the adjudicator did not have jurisdiction to make the decision he had in the Second Adjudication.
- The judge found that if the employer fails to serve any notices in time, this can only be construed as agreeing the value stated in the contractor's application.

ISG Construction v Seevic College (2014)

The judge stated: *“Absent fraud, in the absence of a payment or pay less notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out.”*

ISG Construction v Seevic College (2014)

Furthermore, the judge stated that *“The only other circumstance under which the contractor is entitled to payment follows the submission of the Final Statement by the contractor. That sets out the Contract Sum, as adjusted in accordance with the provisions of the contract, and the sum of the amounts already paid. The Final Payment is the difference between these two sums (and so it may be a repayment).”*

ISG Construction v Seevic College (2014)

- This seemed to suggest that it would not be available for the employer to order a repayment until the Final Payment. Thus an employer could not challenge an overpayment on an Interim Payment, rather it had to wait until the Final Account stage.

S&T v Grove

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Any Questions?

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