

# CONSTRUCTION : BULLETIN

## Requirements for Valid Payment Applications and Pay Less Notices

There has recently been a wave of disputes between contracting parties about failures to issue payment notices and pay less notices. Paying parties will by now be well aware that failure to serve the correct notices on time can be a very expensive mistake. The new case of *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* focuses on the requirements for valid payment applications and pay less notices.

### Background

Surrey and Sussex Healthcare NHS Trust engaged Logan Construction (South East) Ltd to carry out works at East Surrey Hospital under a JCT Intermediate Building Contract with Contractor's Design 2011.

Clause 4.7.1 of the Contract set out various different due dates for interim payment, including a final due date upon issue of the Certificate of Making Good Defects. The Contractor was entitled (but not obliged) to submit applications for payment not less than 7 days before each due date and the Contract Administrator was obliged to issue an Interim Certificate not later than 5 days after each due date. If the Contract Administrator failed to do so, and the Contractor had not previously submitted a payment application, clause 4.10.2.2 allowed the Contractor to submit an Interim Payment Notice stating the sum considered to be due.

Practical completion of the works occurred on 25 August 2015 and the Certificate of Making Good Defects was issued on 24 August 2016. This triggered the final due date for interim payment under clause 4.7.1.4, but no Interim Certificate was issued by the Contract Administrator.

A final account meeting was arranged for 21 September 2016. Shortly before midnight on 20 September 2016, Logan emailed the Contract Administrator stating *"Please see the attached ahead of our meeting tomorrow"*. Attached was a spreadsheet titled *"Logan Interim Payment Notice – Valuation No 24"*. Within the spreadsheet was a worksheet titled *"Interim Payment Notice (Clause 4.10)"* which set out a valuation of the sum due to Logan as at 24 August 2016. The sum claimed by Logan was £1,105,557.95 and the spreadsheet included a detailed breakdown supporting this calculation.

At the meeting the following day, Logan did not mention the Interim Payment Notice issued the night before. Later that day, the Contract Administrator issued an email to the Trust, copied to Logan, attaching the Final Certificate in the gross sum of £4,901,308.70, with a net balance due to Logan of £14,235.43. The email stated:

*"Please note that on 20 September 2016 I received an Interim Payment Notice dated 24 August from Logan Construction... the application issued by Logan Construction yesterday is out of date and void. In any event, the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued."*

Logan subsequently demanded payment of £1,105,557.95 on the basis that no Pay Less Notice had been issued in response to the Interim Payment Notice. The Trust refused to pay, so Logan adjudicated and won. The adjudicator found that the Trust



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had failed to serve a Pay Less Notice and Logan was entitled to the sum claimed in the Interim Payment Notice.

The Trust applied to court for declarations that the Interim Payment Notice was not valid and that the Final Certificate and covering email constituted a valid Pay Less Notice.

### Was the Interim Payment Notice valid?

The Trust argued that Logan had not been sufficiently open and transparent about its intentions and had deliberately not mentioned the Interim Payment Notice in the covering email so that the Contract Administrator would overlook it.

There have been several other cases which have made clear that contractors can only recover payment of a sum applied for if their payment application is clear and unambiguous. The court stated that *“there is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer’s notice is not served”*.

However, the court found that Logan’s Interim Payment Notice was valid, clear and free from ambiguity, notwithstanding that Logan had not been explicit about the nature of the email attachment, because:

- The document was labelled ‘Interim Payment Notice’.
- It referred to clause 4.10, though this was not a requirement.
- The supporting information contained a detailed assessment of the sum said to be due.
- The valuation date of 24 August 2016 was consistent with the due date for payment.

Of course, the Trust’s position was substantially weakened by the fact that the Contract Administrator had acknowledged receipt of the Interim Payment Notice in his 21 September 2016 email. The Trust could not argue that the Contract Administrator had not seen it.

The court also confirmed that in cases of this nature, the disputed document

should be construed against the contractual and factual background. The court considered it significant that the Contract Administrator had breached his obligation to issue an Interim Certificate within 5 days of the Certificate of Making Good Defects, and the dispute would never have arisen if the Interim Certificate had been issued.

### Was the Pay Less Notice valid?

Crucially, Logan accepted that the Final Certificate fulfilled both requirements of a Pay Less Notice i.e. it specified the sum the Employer considers to be due at the date the notice is given and the basis on which that sum is calculated. However, Logan argued that a Pay Less Notice can only be valid if the sender objectively intended the document to act as a Pay Less Notice. Logan also contended that the Final Certificate had an entirely different function to a Pay Less Notice and it was not emailed to Logan directly.

The Trust argued that Pay Less Notices should be construed more generously than applications and notices from the Contractor and that minor complaints about the form or content of a Pay Less Notice should not affect its validity.

The court held that it was irrelevant that the Pay Less Notice was only copied to Logan (rather than being sent directly) because it was obvious that Logan was an intended recipient of the Pay Less Notice and Logan had acknowledged receipt.

Whilst the court agreed that the sender of a Pay Less Notice should have the requisite intention to serve it, in this case the Contract Administrator’s email could be understood to mean that if he was wrong in stating that the Interim Payment Notice was invalid, the valuation in the Final Certificate was the same valuation he would have issued in response to the Interim Payment Notice. The court confirmed that it is acceptable to serve a Pay Less Notice on a contingent, ‘just in case we are wrong’ basis.

The court concluded that the Pay Less Notice was valid because the

contractual purposes of the notice had been fulfilled.

Finally, the court confirmed that it was not necessary for the words “Pay Less Notice” to be used or for any specific contractual clause to be referenced in the document.

### Analysis

This is an interesting case which provides useful confirmation of the high standards to be applied when determining the validity of payment applications and the significantly lower standards applied to valid Pay Less Notices. Importantly, it also confirms that the practice of issuing a Pay Less Notice ‘just in case’ is acceptable.

Given previous cases where contractors have failed in their attempts to profit from payment applications which have been slipped in under the radar, the fact that Logan’s Interim Payment Notice was found to be valid notwithstanding that it was sent late at night and without further discussion may be surprising. However, given that the Contract Administrator acknowledged receipt of it, the document was obviously clear on its face notwithstanding the indirect manner in which it was submitted.

It is likely that both parties in this case benefited from the fact that there was no previously established format for either notice. The outcome could have been different if, for example, the Trust had tried to rely on the Final Certificate as a Pay Less Notice in circumstances where other Pay Less Notices had been served in a different format entirely.

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