

## Construction Law Update

### Validity and Interpretation of Pay Less Notices: Be Specific

In the case of *Advance JV & Ors -v- Enisca Ltd* [2022] EWHC 1152, the Technology and Construction Court considered the validity and interpretation of a pay less notice which failed to refer to a particular payment application, and which was fatal to a Part 8 claim.

#### Background

A Joint Venture between Balfour Beatty Group Ltd and MWH Treatment Ltd ("**Advance**") was to design and construct a new water treatment works and hydro-electric power generation facility in Cumbria (the "**Project**").

By a sub-contract dated 21 October 2019 and based on the NEC3 Engineering and Construction Subcontract April 2013 using Option A, with bespoke amendments (the "**Sub-Contract**"), Advance engaged Enisca Ltd ("**Enisca**") to design, supply and install the LV electrical installation for the Project.

#### The Dispute

Pursuant to the terms of the Sub-Contract:

- Enisca was entitled to make a payment application on or before each assessment date;
- Advance was to assess the amount due for payment at each assessment date (the payment due date);
- Advance was to certify a payment by issuing a payment certificate within 3 weeks of an assessment date;
- The final date for payment was 21 days after the assessment date; and
- A party intending to pay less than the notified sum was to notify the other party not later than 7 before the final date for payment.

Enisca's interim application 24 ("**App 24**") sought payment of a net sum of c£2.7m. Advance did not issue any payment certificate or any other response in respect of App 24. In response to Enisca's subsequent interim application 25 ("**App 25**"), Advance issued a payment certificate which enclosed a pay less notice,

both of which specifically referred to App 25. Despite this, Advance argued that the pay less notice was a valid response to both App 24 and App 25, having been served timeously in each case and that, properly construed, the pay less notice would have indicated to a reasonable recipient that Advance did not intend to make any further payment in respect of either application.

Enisca argued that Advance's pay less notice responded only to App 25 and that no valid payment certificate or pay less notice had been issued for App 24.

By a decision dated 8 February 2022, an adjudicator agreed that Advance had failed to issue a valid pay less notice against App 24 and, consequently, Advance was to pay to Enisca the sum applied for of c£2.7m (the "**Decision**"). Before the Decision was issued, however, Advance had commenced Part 8 proceedings in the Technology and Construction Court (TCC) seeking declaratory relief in respect of the validity of the pay less notice.

#### The Statutory Provisions

The interim payment provisions of the Sub-Contract reflected the requirements of sections 110 – 111 of the Housing Grants, Construction and Regeneration Act 1996, as amended (the "**Construction Act**").

It is well established that these provisions require the paying party to pay the "*notified sum*" by the final date for payment, irrespective of whether that sum represents the true value of the work in question. The TCC noted the provisions have "*severe, if not draconian, consequences for a party who fails to serve a pay less notice.*"

#### The Parties' Positions

Enisca submitted that it was a "*backbone*" of the statutory provisions that payment cycles exist which create due dates and final payment dates, and that

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payment notices and pay less notices must be referable to the particular notice and/or application identifying the notified sum.

For its part, Advance contended there was no requirement in the Construction Act or elsewhere for pay less notices to be referable to a particular payment cycle. Rather, the Construction Act was only concerned with time limits for pay less notices. In addition, Advance argued that there was nothing in the Construction Act or the Sub-Contract which precluded a pay less notice from responding to two separate payment applications.

### The Law – Interpretation of Notices

As to the construction of payment notices, the TCC noted:

- the question must be viewed objectively – *“the issue is how a reasonable recipient would have understood the notices”*;
- the purpose of a notice is relevant to its construction and validity;
- Courts will take a common sense, practical view of the contents of a notice and will not adopt an unnecessarily restrictive interpretation;
- To be valid, any payment notice must comply with statutory requirements in substance and form;
- Was the document intended as a notice and is it *“free from ambiguity”*; and
- payment notices must make plain what they are.

### The TCC’s Decision

The TCC agreed with Enisca that it was plain from the Construction Act that payment notices must be referable to individual payment cycles, and rejected Advance’s contention that the Construction Act is concerned only with time limits in respect of pay less notices. The reference to “notified sum” in s111(3) of the Construction Act roots *“the giving of a pay less notice firmly in the payment cycle represented by the payment notice which will identify the notified sum.”*

Any pay less notice must therefore be referable to the payment notice in which the notified sum is identified.

The TCC also rejected Advance’s argument that there was nothing in the Construction Act or the Sub-Contract which precluded a pay less notice from responding to two payment applications. The TCC described this as a *“novel proposition for which no support can be found”* in the Construction Act and the Sub-Contract.

Whilst the pay less notice was likely a valid pay less notice in respect of App 25, the TCC rejected Advance’s position that it was also referable, in form and intent, to App 24. Viewed objectively:

- the express reference to App 25 pointed clearly to an intention that the pay less notice related to App 25;
- there was nothing expressly on the face of the pay less notice, nor the payment certificate to which it was attached, which pointed to it being a response to App 24;
- a reasonable recipient in Enisca’s shoes would not understand the pay less notice to be intended as a response to App 24;
- even if the pay less notice had been intended to respond to App 24, it was neither clear nor unambiguous in that intention; and
- there was no justification in this case for viewing the pay less notice *“on a broader level”* (e.g. by reference to the *“overall message and purpose”* of the pay less notice) as the pay less notice clearly did not relate to App 24.

In the circumstances, the TCC dismissed Advance’s Part 8 claim.

### Analysis

This case makes clear that pay less notices must be referable to a particular payment notice and/or payment application and must relate to a particular payment cycle. A lack of specificity risks profound consequences.