



## Payback time: Pay less notice deemed valid despite being served 'early'

**Court declines to take an “unduly legalistic interpretation” to payment and pay less notices, preferring a practical, substance-over-form approach.**

Payment and pay less notices are a key tool in managing cash flow in construction contracts. Used correctly, they negate the potential for a ‘smash and grab adjudication’, where failure to serve a valid notice leaves the paying party liable for the full amount of the payee’s application.

In the case of *Placefirst Construction Ltd v CAR Construction [2025] EWHC 100*, the Technology and Construction Court considered questions around the timing and validity of payment and pay less notices. Here, the two purported notices were served together and immediately following an application for payment — prompting a suggestion that the pay less notice had been served “early”, and was therefore invalid.

### Key takeaways:

- **Pay less notices can be served in conjunction with payment notices under the Construction Act, provided they are clearly separate notices.**
- **Pay less notices can be issued immediately after an application for payment: there is no mandatory ‘waiting period’ while other notice deadlines play out.**
- **The Court will focus on the substance and intent of notices rather than strict formalities. This may provide some flexibility in how notices are labelled, but ensuring they are clear and unambiguous can avoid a serious headache contractually.**

### Factual Background

Placefirst Construction Limited (“**Placefirst**”) was the contractor and CAR Construction (“**CAR**”) was the subcontractor for a construction project at Esh Winning, Durham. The parties entered into a JCT Design & Build 2016 form of subcontract with amendments on 26 October 2022 (“the **Contract**”). On 24 July 2024, CAR submitted an interim payment application for the month ended 31 July 2024. On 31 July 2024, Placefirst sent an email with the subject line ‘*Car Construction Payless Notice and Valuation 30.*’ It enclosed two attachments: a document titled ‘*Payless Notice*’ and an Excel spreadsheet titled ‘*Valuation 30.*’. These documents provided a breakdown and showed a negative figure was due to CAR.

### Adjudication

CAR argued the email sent by Placefirst was:

- Not a payment notice, as it was not titled as such; and/or
- Not a valid pay less notice as it was sent “too early”, i.e. prior to receipt by CAR of a valid payment notice served by Placefirst.

CAR took the above to a ‘smash and grab’ adjudication and won. In his decision on 18 October 2024, the Adjudicator determined that Placefirst had served a pay less notice, but not a payment notice, as the Valuation 30 spreadsheet did not comply with the necessary requirements for such under the Contract and/or the Housing Grants, Construction and Regeneration Act 1996 (the “**Construction Act**”).

It followed that Placefirst’s pay less notice was invalid, since the Adjudicator considered an effective pay less notice could not be issued until a payment notice had been given, determining the notified sum.

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# Construction Law Update

Both parties then applied to the Manchester TCC. Placefirst issued Part 8 proceedings, seeking, amongst other things, declarations that the Valuation 30 document constituted a valid payment notice and that the pay less notice issued on the same date was equally valid and effective.

In tandem with these proceedings, CAR issued a Part 7 application for summary judgment to enforce the Adjudicator's decision.

It was decided that the two proceedings would be heard together on 20 December 2024.

## **Held**

The arguments boiled down to two issues:

- (1) The validity of Placefirst's pay less notice, and
- (2) Whether the Valuation 30 spreadsheet constituted a valid payment notice.

HHJ Stephen Davies found in favour of Placefirst on both counts:

## **Was the pay less notice valid?**

The Judge found that Placefirst's pay less notice was valid because it was not, in fact, served prematurely.

The Construction Act says that where a payee is required to submit an application for payment, that application will be regarded as the default payment notice where a payment notice is not given by the payer, i.e. the application for payment will be treated as setting out the notified sum. Clause 4.6 of the Contract had been amended to substantially follow the payment provisions found within the Construction Act.

On this analysis, Placefirst had issued the pay less *after* the notice determining the notified sum, so it was not served too early.

More generally, the judge held there was "*no logical reason why a pay less notice should not be given before the time for giving a payment notice has elapsed.*" The only limitation was to be found in section 111(5)(b) of the Construction Act, which requires a pay less notice to be issued after the date of the *application for payment* and not before.

Requiring the paying party to wait until the deadline for issuing a payment notice has passed before submitting a pay less notice would also run counter to the ethos of the Construction Act 1996, which aims to promote fair and prompt payment schemes.

## **Did the Valuation 30 document constitute a valid payment notice?**

The Court's ruling on the pay less notice was enough to resolve the dispute in Placefirst's favour, but the Judge went on to address this second question. The issue here was whether the Valuation 30 document was intended as a separate document (and not merely a document supporting the pay less notice), even though it was served simultaneously with the pay less notice in the same email.

Placefirst argued that their "Valuation 30" spreadsheet performed all the functions of an independent payment notice, and included a tab titled "subcontract payment certificate." They referenced a prior court ruling equating "payment certificate" with "payment notice."

In the end, however, such titles were deemed irrelevant. The judge said that "*construction of the notices must be approached objectively*", based on how a "*reasonable recipient would have understood the notice.*" There was no requirement for the Valuation 30 to refer to itself as a "payment notice" for this to be the case; what mattered was whether it complied with the statutory and contractual requirements in "*substance and form.*"

In this instance, the Judge was satisfied that the spreadsheet was not "*purely subsidiary*" to the pay

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less notice. It contained the substance one would expect to find within a payment notice, and therefore was capable of constituting a payment notice on its own.

Accordingly, the Adjudicator's decision was not enforced.

## **Analysis**

Cases where the Court is willing to intervene to prevent the enforcement of an Adjudicator's decision are rare, and increasingly so. The Court's willingness to adopt a commonsense approach and not penalise Placefirst for a perceived technicality will nevertheless be seen by many as reassuring, and aligns with the primary objective of the Construction Act – to promote prompt and fair payment within the industry.

At the same time, we have another reminder for parties to adhere strictly to the terms of their construction contracts. In this case, the subtle modification of clause 4.6 played a role in the Court's reasoning, and had Placefirst not included that amendment, the outcome could have been different. And while the label on a payment notice is not determinative, ensuring that all notices are clearly identified and free from ambiguity can prevent disputes and the need for judicial intervention.

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