

## Construction Law Update

### Flawed Payment Notice Does Not Invalidate a Valid Pay Less Notice, Court Rules

What happens if a Payment Notice is defective, but the Pay Less Notice is properly done?

In *Laing O'Rourke Delivery Ltd v Shepperton Studios Ltd EWHC 612 (TCC)*, the Technology and Construction Court answered that question in the context of a dispute concerning works at one of the world's biggest film studios. The Court held that a flawed Payment Notice does not automatically invalidate a Pay Less Notice, provided the Pay Less Notice itself complies with the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("**Construction Act**").

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#### Key takeaways:

- **A defective Payment Notice does not automatically cancel a valid Pay Less notice.** If the Pay Less Notice is properly drafted, served on time, and clearly explains the deductions, it can still do its job even where the earlier Payment Notice was flawed.
- **Each notice stands on its own.** The Payment Notice and the Pay Less Notice do different jobs under the Construction Act, so a problem with one does not necessarily "contaminate" the other.
- **The details matter.** If you are relying on a Pay Less Notice, you still need to set out the sum due and explain how you got there, because the Court will look closely at whether the notice gives a clear explanation of the deduction.

#### Factual Background

Laing O'Rourke Delivery Ltd ("**LOR**") made an interim payment application for £5.62 million under a £331 million design-and-build contract for works at Shepperton Studios. Shepperton Studios Ltd ("**Shepperton**") responded with a Payment Notice certifying that £2.42 million was due, but it did not properly explain how that figure had been calculated or refer to any supporting documentation.

Shepperton then served a Pay Less Notice deducting a further sum of just over £2.42 million, reducing the amount due to effectively nil. The Pay Less Notice and its appendices set out the deductions in detail, covering things like liquidated damages, utilities and temporary catering.

The Adjudicator found that both notices were invalid and awarded LOR more than £5.6 million plus VAT and interest. Shepperton then resisted enforcement in the TCC and also issued Part 8 proceedings.

One of the main issues before the Court was whether an invalid Payment Notice "contaminates" a Pay Less Notice. LOR said it did – if the Payment Notice was invalid, anything built off it must also fail.

Shepperton argued that the Pay Less Notice was a separate notice with its own requirements, and was valid because it clearly identified the deductions and how they were calculated.

#### Held

Simon Lofthouse KC, sitting as a deputy High Court judge in the TCC, granted summary judgment for circa £3.2 million rather than the full £5.6 million claimed and refused a stay of execution. He effectively separated the two notices and said it was "*not an attractive argument*" to suggest that Shepperton could not rely on deductions it had plainly set out in its Pay Less Notice, simply because the Payment Notice was invalid.

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### 1. Payment Notice and Pay Less Notice

The Court agreed with the Adjudicator that the Payment Notice was invalid because it did not set out the basis on which the sum had been calculated. Earlier spreadsheets did not cure that defect because they were not clearly incorporated into the notice.

The Court disagreed, however, that the Pay Less Notice was invalid. It held that the notice and its appendices explained the deductions sufficiently, so those deductions were effective. The basis of those deductions was not "contaminated" by the fact that they had been applied to a starting figure derived from the invalid Payment Notice.

### 2. Later adjudications and set off

Shepperton also argued that five subsequent adjudication decisions (concerning extensions of time, liquidated damages and other deductions) should reduce or defeat the amount payable. The Judge rejected that route, saying those decisions could not be used as a set-off in these enforcement proceedings because they had not themselves been separately enforced as required by previous case law.

However, this made no difference to the result. The Court's decision turned on the validity of the Pay Less Notice, which reduced the amount payable in any event.

### 3. Stay of execution and Part 8

The Court refused a stay of execution despite Shepperton's concerns about LOR's insolvency and the risk that, if it paid the sum awarded by the Adjudicator, Shepperton would be unable to recover the money if it later succeeded in the final determination of the dispute.

Although insolvency concerns can matter, the Judge found that a continuing parent company guarantee, governed by English law, provided sufficient security

and was enough to displace the usual reason for a stay.

It also refused to delay enforcement because of the pending Part 8 proceedings, saying the case was not the kind of short, self-contained issue that would justify withholding enforcement, and the Court was not prepared to treat the case as so obviously wrong that enforcement would be unconscionable.

### Comment

For contractors and employers, the practical lesson is that a defective Payment Notice is serious, but it does not automatically wipe out a well-prepared Pay Less Notice. What matters is whether each notice satisfies the contract and the Construction Act requirements on its own.

Employers still need to make sure their Pay Less Notices clearly explain the deductions, and contractors should not assume a flaw in the first notice destroys the employer's whole position.

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