

Insights

PAYMENT NOTICES UNDER THE CONSTRUCTION ACT 1996, A WELCOME CLARIFICATION

Apr 16, 2025

In *Placefirst Construction Ltd v Car Construction (North East) Ltd* [2025] EWHC 100 (TCC), the Technology and Construction Court has shed welcome light on the payment notice requirements of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) dealing with whether a pay less notice was valid when it was served early and whether a payment notice and pay less notice could be served together.

For more information, see [Legal update, Payment and pay less notices valid on objective analysis \(TCC\)](#).

BACKGROUND AND ISSUES

Placefirst Construction Ltd (Placefirst) was the contractor on a construction project in Durham and it engaged CAR Construction (North East) Ltd (CAR) as a sub-contractor under an amended JCT Design and Build Sub-Contract, 2016 Edition (sub-contract).

Under the sub-contract, the payment regime operated as follows:

- Interim payment application: CAR had to issue an interim payment application no later than the 25th day of each month.
- Interim valuation date: the last calendar day of each month.
- Due date: 16 days after the interim valuation date.
- Payment notice: Placefirst was obliged to issue a payment notice not later than five days after the due date.
- Pay less notice: Placefirst could also issue a pay less notice no later than two days before the final date for payment.
- Final date for payment: 12 days after the due date.

In summary and compliant with the Construction Act 1996, Placefirst was required to pay the amount specified in the payment notice or, if there was no payment notice, the interim payment application, by the final date for payment. However, if Placefirst issued a timely pay less notice, its obligation was to pay the amount specified in the pay less notice by that date.

On 24 July 2024, CAR submitted interim payment application 30 for the sub-contract works carried out in July 2024.

As the interim valuation date was 31 July 2024, Placefirst's payment notice was due by 21 August, and it was required to issue any pay less notice by 26 August 2024. However, on 31 July 2024, Placefirst sent an e-mail to CAR together with various attachments, the effect of which was at the heart of the dispute.

PAYMENT NOTICE AND PAY LESS NOTICE

The subject line of the e-mail stated: "CAR Construction Payless Notice and Valuation 30". The e-mail stated:

"Please find the attached Payless Notice and Valuation 30 to support, in relation to your AFP 30 received on 24th July 2024. In consideration of the delays to the sub-contact works there is a balance due in the sum of (£22,812.15)."

The two attachments were identified as "Valuation 30 - Payless Notice.pdf" and "Valuation 30.xlsm".

The first attachment was a pdf comprising a letter dated 31 July 2024, which read as follows and provided a summary as to how the gross amount had been calculated:

"We write further to your application for payment email dated 24 July 2024. We provide our Pay less notice under paragraph 10 of Part II of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) (as amended) and section 111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended). We consider that the gross amount due on the date this notice is served to be £2,769,275.56 (excluding retention and VAT) in accordance with our assessment of the works reference Esh Winning - Car Construction - Valuation 30 which has been enclosed for your information."

The second attachment was an excel workbook containing a number of different tabs. The first tab was titled "summary" and contained the same information as the summary provided in the letter. The second tab was titled "payment certificate". The worksheet within that tab was headed "subcontract payment certificate" and identified the "invoice number" as "Val 30" and the "certificate no" as "PF30". It stated the "date" to be 31 July 2024 and also stated "payment due no later than 28 August 2024" (that being the final date for payment under the sub-contract).

CAR commenced an adjudication, arguing that Placefirst's e-mail was not a valid payment notice but rather a pay less notice and that in turn, the pay less notice was invalid because it was served

before the payment notice was due or the date on which CAR's interim payment application would have become the default payment notice.

For more information on payments under a construction contract, see Practice notes:

- [Payment in construction contracts: Construction Act 1996](#).
- [Payment in construction contracts: Scheme for Construction Contracts 1998](#).

ADJUDICATOR'S DECISION AND COURT PROCEEDINGS

The adjudicator agreed with CAR that Placefirst had failed to serve either a payment notice or an effective payless notice.

Placefirst issued Part 8 proceedings and three days later CAR issued Part 7 enforcement proceedings, which were heard together.

The two issues for determination were:

- Did Placefirst serve a valid payment notice?
- Was the pay less notice invalid because it was served in advance of the date when it could properly have been served under the Construction Act 1996 and the sub-contract?

TCC DECISION

The judge began by summarising the law on interpreting notices. The question was not how the recipient of a notice understood the notice, but rather, how a reasonable recipient would have understood the notice, which is an objective test. The key was to construe the notice taking into account the "relevant objective contextual scene" as well as the purpose of the notice.

The judge made clear that a court would be "unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis", that it would take a commonsense, practical view of the contents of a notice and would not adopt an unnecessarily restrictive interpretation.

To be valid, a notice had to comply with the statutory and contractual requirements. While a notice must make it clear what it is, a particular type of notice is not required to have a particular title or refer to relevant contractual clauses.

The judge then applied these general principles to the two issues in dispute.

WAS THE PAY LESS NOTICE ISSUED TOO EARLY?

The judge considered this issue first because if the pay less notice was valid, this was determinative of the case in Placefirst's favour. CAR relied on section 111(5) of the Construction Act 1996, arguing that Placefirst's pay less notice was invalid because it was given before "the notice by reference to which the notified sum is determined" (*section 111(5)(b)*). On CAR's analysis, Placefirst failed to give a compliant payment notice not later than 5 days after the payment due date as it was required to do under the sub-contract. As a result, CAR's interim payment application became the payment notice that determined the notified sum and the date of such payment notice was the date that it would have been able to give a default payment notice under section 110B(2) of the Construction Act 1996 (anytime from 22 August 2024 onwards).

The judge rejected this argument. Having considered the provisions of the Construction Act 1996 in detail (particularly sections 110B(4) and 111(5)(b)), the judge held that the pay less notice was valid. This was because Placefirst's payment notice would determine the notified sum or, in absence of a valid payment notice, CAR's interim payment application (dated 24 July 2024) would operate as the payment notice, which in turn determined the notified sum. On this analysis, Placefirst's pay less notice was not given before CAR's interim payment application.

The judge observed that in any event there was no reason why a payer could not serve its pay less notice before the time for issuing its payment notice had elapsed. In his view, there was no difference of substance between the content of a payment notice and a pay less notice, which meant the decision whether or not to serve a payment notice and a pay less notice, or just to serve only one or the other, rested with the payer and that such choice did not prejudice the payee.

WAS A VALID PAYMENT NOTICE SERVED ON 31 JULY?

The judge went on to consider whether the excel spreadsheet attached to Placefirst's e-mail was intended to be a separate and distinct payment notice, or whether it was a supporting document to the pay less notice.

The judge held that the content of the excel spreadsheet was akin to a payment notice (that is, it set out the sum the payer considered to be due and the basis of calculation of such sum). It was unimpressed by CAR's argument that the spreadsheet was not a payment notice because Placefirst labelled it as a "subcontract payment certificate".

The judge also observed that a curious feature of the Construction Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) is that the substance of what is required to be contained in a payment notice and a pay less notice is precisely the same. He also approved the extra-judicial view expressed by Coulson LJ at paragraph 3.28 of *Coulson on Construction Adjudication* (fourth edition, Oxford University Press, 2018) that one notice cannot operate both as a payment notice and as a pay less notice:

"The original provisions, which entitled a payer to serve a notice, operating as both a payment notice and a withholding notice, have been deleted in their entirety. Thus the payer must serve both

the payer's notice and a payless notice in accordance with the new s111 in the periods identified."

The judge did not read this as saying that the payer must serve both, only that both must be served within the identified period if they are to be relied upon, although noted that "there appears to be no judicial determination on this point".

The judge concluded that the separate document, described as a valuation and a subcontract payment certificate, which was plainly intended to have a formal effect under the sub-contract separate from the pay less notice, amounting in substance to a payment notice, was intended to be a payment notice.

KEY TAKEAWAYS

The decision provides practical guidance on payment and pay less notices, making it clear that:

- The payer is not required to serve both a payment notice and a pay less notice.
- One notice cannot operate as both a payment and payless notice
- A payment notice and a payless notice can be served at the same time under cover of the same letter or e-mail or other communication.

It also includes a useful summary of the relevant principles on interpreting notices and a reminder that the court will adopt an objective approach. A notice will be a valid notice if a reasonable recipient credited with knowledge of the relevant contract would regard the notice as a payment notice or a pay less notice, regardless of the label of the document.

This pragmatic approach looked at "substance over label" and is to be welcomed. Nonetheless, the facts in this case serve to highlight the risk of issuing documents by e-mail and as attachments, without clarifying what they are intended to be. These arguments can be avoided by clearly identifying the type of document, including where it is a contractual notice, the type of notice and the contractual clause to which it relates, as well as ensuring it contains the requisite information and is served within the required statutory or contractual period.

This article was co-authored by Trainee Solicitor, Chloe Tan.

A version of this article was published in PLC Construction on 15 April 2025. This article also contains links which are only accessible by PLC subscribers.

RELATED CAPABILITIES

- Construction Disputes
- Commercial Construction & Engineering

MEET THE TEAM



Shy Jackson

London

shy.jackson@bclplaw.com

+44 (0) 20 3400 4998

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.