

## PAY-LESS NOTICES? PAY MORE NOTICE!

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### INTRODUCTION

A dispute over value is as synonymous to the construction industry as bricks, mortar, and health and safety checks. As Lord Browne-Wilkinson put it, "*Building Contracts are pregnant with disputes*". Continuing with that theme, the payless notice ("**PLN**") is often the source from which many disputes are borne.

PLN's are the instrumental tool in challenging sums contained within a payment notice, or application for payment. It might be that there is an accounting error, or a sum erroneously carried over from a previous application - or, it might just be that there is a true dispute over the value, quality, or timing of the works. Whatever the circumstances, no payment cycle in a construction contract can realistically be challenged without one.



For ease within this article, the party claiming money (from whom a payment application would have originated) is referred to as the **Payee**. On the flip side, the party from whom money is claimed (and from whom a PLN would be required) is referred to as the **Payor**.

The PLN becomes the Payor's best friend in setting out its challenges to the Payee's request for payment and beginning the steps towards effective and efficient resolution, which could potentially spare the need for lengthy and costly litigation processes.

It will come as no surprise to those reading this piece that PLN's frequently arise in disputes arising out of payment cycles in construction contracts. It is the authors' hope that some clarity can be shed on what remains, in our day-to-day practice, one of the most common generators of disputes.

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i ¶105E, Linder Gardens Trust Ltd v Lenesta Sludge Disposal Ltd [1994] 1 AC 85

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## WHAT CONSTITUTES A VALID PLN

Section 111(1) of The Housing Grants, Construction and Regeneration Act 1996 (the “**Act**”) is clear that the Payor must make payment of the “*notified sum*” on or before the final date for payment.

The Act provides that the “*notified sum*” is the sum specified in the Payor’s payment notice or, if no such notice was ever issued, the Payee’s default payment notice. If the Payor wants to pay less than the “*notified sum*” it must serve a PLN.

At section 111(4) of the Act parliament made clear that a PLN issued pursuant to section 111(3) of the Act must comply with the following:

- The PLN must in fact be given (it sounds obvious, but all too often one is never served! <sup>ii</sup>).
- It must specify: (i) the sum the Payor considers due on the date the PLN is served; and (ii) **the basis on which that sum is calculated.**
- A PLN must be given no later than the prescribed period before the final date for payment.
- The PLN may not be given before the notice by reference to which the notified sum is determined.

The contract may define the “*prescribed period*” before the final date for payment, otherwise section 9 of Part II to The Scheme for Construction Contracts (England and Wales) Regulations 1998 (the “**Scheme**”) marks that time period for serving the PLN to be “*not later than 7 days before the final date for payment*”. This date represents the line in the sand; if no PLN is issued by this point the Payor is out of time and the “*notified sum*” falls to be paid in full.

When it comes to assessing compliance with the provisions of section 111(3)/(4) of the Act, all cases turn on their own facts. In each instance the tribunal, be that the Court or an Adjudicator, is tasked with undertaking an interpretation of the contractual notice in question.

### HOW IS A CONTRACT NOTICE CONSTRUED IN THE FIRST PLACE: IS THE DOCUMENT I SENT A PLN?

Perhaps the most useful recent illustration of the Courts’ approach to dealing with this question

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ii Service of notices could generate another article in its own right. For current purposes, the authors’ advocate going back to the contract itself to check how things should be sent. Don’t just assume because it was ok once and went unchallenged (i.e. sending by email), that the same will apply in future.

is the summary provided by Mrs Justice Joanna Smith DBE in *Advance JV & Ors v Enisca Ltd*<sup>iii</sup>. At paragraph 47 the judge summarised the key authorities (our emphasis added in bold):

- *“In considering the true construction of a contractual notice...**the question is not how its recipient in fact understood it.** Instead “the construction of the notices must be approached objectively. **The issue is how a reasonable recipient would have understood the notices**...”*
- *“The notice must be construed taking into account the “relevant objective contextual scene”, i.e. the court must consider “what meanings the language read against the contextual scene will let in”...**This means that, amongst other things, the reasonable recipient will be credited with knowledge of the relevant contract ...**”*
- *“The purpose of the notice will be relevant to its construction and validity...”*
- *“The court will be “unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis”...Instead, as Sir Peter Coulson says... focusing specifically on Pay Less Notices:  
  
“The courts will take a commonsense, practical view of the contents of a payless notice and **will not adopt an unnecessarily restrictive interpretation of such a notice**...It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective.”*
- *“**There is no principled reason for adopting a different approach to construction in respect of different kinds of payment notices... as that would be contrary to the guidance...**”*
- *“... any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form...**Payment notices and Pay Less Notices must clearly set out the sum which is due and/or to be deducted and the basis on which the sum is calculated...**”*
- *“Over and above the question of whether a notice has achieved the required degree of specificity, will be the additional question of whether the document...was in fact intended to be such and whether it is “free from ambiguity”... The sender’s intention is a matter to be assessed objectively taking into account the context...”*
- *“...**there is no requirement for a particular type of notice, such as a Pay Less Notice, to have that title or to make specific reference to the contractual clause in order to be valid...**”*

iii *Advance JV & Ors v Enisca Ltd* [2022] EWHC 1152 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2022/1152.html>

- ***“One way of testing the validity or otherwise of a Pay Less Notice will be to see whether it “provided an adequate agenda for an adjudication as to the true value of the Works...”***

What can be observed from the Court’s summary in *Advance JV* is that there really is no ‘one size fits all’ answer to this question. This is, dependant on what side you are sitting on when a dispute involving a PLN arises, either a blessing or a curse. For illustration purposes, the following are all examples of factual circumstances where the document under examination has met the threshold of a valid PLN:

- An email appending an ‘Interim Payment Notice’, although wrongly labelled, met all the requirements of the contract so as to constitute a PLN<sup>iv</sup>.
- An email, with no documents attached, saying: *“Don’t agree with your application. Phase 2 had to be redone due to your steel not to drawing. Our costs for breaking out and re-concrete phase 2 was in excess of £20k. Take the £20k from the £38k for phase 1 leaves £18,843 ....”*<sup>v</sup>

The above authorities should still be treated cautiously. In *Systems Pipework Limited v Rotary Building Services Limited*<sup>vi</sup> Coulson J (as he then was) found that:

- The lack of reference to the relevant contract clause, coupled with the absence of the actual sum purportedly due, was terminal to the validity of the PLN.
- The fact the Payee might have been able to work out the sum due and the relevant clause was “not good enough”<sup>vii</sup>.

The following are all also examples of where the Court has held the PLN was invalid:

- An email which was claimed to be a PLN was ultimately dismissed as it did not match the manner in which ‘formal’ PLN’s had been issued previously and therefore intention could not be established<sup>viii</sup>.
- Absent calculations explaining the grounds for withholding payment, the PLN was rendered invalid<sup>ix</sup>.

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iv *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2017/17.html>

v *Jonjohnstone Construction Limited v Eagle Building Services Limited* [2017] EWHC 2225 (TCC)

vi *Systems Pipework Limited v Rotary Building Services Limited* [2017] EWHC 3235 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2017/3235.html>

vii Although this appears to conflict with the stance subsequently adopted by Court in *Advance* where the judge summarised the parties should be “credited with knowledge of the relevant contract”

viii *Jawaby Property Investment Ltd v The Interiors Group Ltd & Anor* [2016] EWHC 557 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2016/557.html>

ix *Muir Construction Ltd v Kapital Residential Ltd* [2017] CSOH 132

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WHAT IS REQUIRED TO SHOW TO BASIS THE SUM IS CALCULATED / MAKE THE PLN CLEAR AND UNAMBIGUOUS?

The Act is silent in respect of what information is required of the Payor in order to comply with section 111(4) as regards showing the “*basis of the sum calculated*”.

As in most areas of law, a clear document which states its purpose, reasoning, and its intentions is desired. However, this is the real world and in practice perfectly curated documentation is not always forthcoming.

Perhaps the most frequently cited authority on this topic is the judgment of Coulson J (as he then was) in *Grove Developments Ltd v S&T (UK) Ltd*<sup>x</sup>. The following passages from that judgment<sup>xi</sup> will be well known to adjudicators and tribunals throughout the country:

- “A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. **The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.**”
- “...Each has to make plain that it is, respectively, a payment notice or a pay less notice. Each has to **clearly set out the sum which is said to be due and/or to be deducted, and the basis on which that sum is calculated.** Beyond that, the question of whether or not it is a valid notice in accordance with the contract is a matter of fact and degree.”
- “...there can be no possible objection in principle to a notice referring to a **detailed calculation set out in another, clearly-identified document. That is how these things are commonly done...**”

Time is a precious commodity in the construction industry. It is not always possible in reality to prepare a perfectly orchestrated PLN in an Excel document or similar (although in the authors’ views this remains preferable). What is clear is the requirement for PLN’s to offer, as a minimum, a basis for which the sum is calculated. In our experience it is at this hurdle that most PLN’s fall. Where the Courts have expressed a readiness to forgive failings in formalities on the form of a document, the requirement for a PLN to reflect in substance the calculations which give rise to the figure contained therein is inescapable.

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x *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2018/123.html>

xi as subsequently approved by the Court of Appeal in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448.

To that end, the Payor issuing the PLN would do well to ask the following questions:

1. 'Have I given clear calculations for how the figure is arrived at?' - If the answer is no, then do them.
2. 'Are the calculations sufficient such that, with the benefit of the peripheral documents and other evidence, an independent Quantity Surveyor could assess the sum in question and arrive at a similar figure?' - If the answer is no, ensure this level of detail is provided.

## OTHER COMMON PITFALLS

### CAN A PAYMENT NOTICE ALSO SERVE AS A PLN?

The short answer here is no, it cannot. There is academic debate surrounding whether, following the decision of Akenhead J in *Henia Investments Inc v Beck Interiors Ltd*<sup>xii</sup> the path is paved for such an argument to be run successfully, but there is currently no direct authority on the point.

Previous iterations of the Act allowed the Payor to combine a payment notice and a withholding notice (provided the section 110 and section 111 of the Act (as it was then) were complied with). Those provisions are not repeated in the Act as is currently in force.

### NEGATIVE VALUE PLNS

It is trite law that a PLN can certify a negative sum, i.e. a sum as falling due to the party issuing the PLN.

Instances exist of contractors making applications for payment and receiving a PLN in response, within time, certifying a negative sum. The question is then '*who is the paying party*'? In the premise, it is the *contractor* not the *employer* who becomes the Payor.

The result of this type of PLN is that the party issuing the notice is stipulating that the party who made the application for payment has been overpaid.

As a result, the negative sum as certified by the PLN becomes the "*notified sum*". This can have serious ramifications if the following payment application fails to extinguish the negative sum notified by the previous PLN.

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xii *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2015/2433.html>

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## PRACTICAL CONSIDERATIONS

### OOPS – I FORGOT TO SERVE A PAY LESS NOTICE...

If a PLN is not served in time, but the payer wishes to still challenge the ‘true value’ of the sum, *Grove Developments Ltd* has transformed the landscape. Failing to provide a pay less notice in the prescribed period will not prevent the payer from challenging the sum in the future, however, in order to do so, full payment of the disputed amount must be made – its pay now, argue later.

### IS IT STILL ‘PAY NOW, ARGUE LATER’, OR...

This concept was developed on once more in *Davenport Builders Ltd v Greer*<sup>xiii</sup> where the judge held that *Grove* remained authority for the proposition that the Payor must make payment in accordance with the contract, or section 111 of the Act as a pre-requisite to commencing a ‘true value’ adjudication. The industry has been keen to latch on to elements of that judgment where the Court suggested that a Payor would not always be restrained from launching a true value adjudication until such time that its immediate payment obligations (those requiring it to pay the “notified sum” following a failing to issue a valid PLN) had been discharged.

In *Davenport* the judge was cautious to make clear: “*It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so*”.

### HAS ANYTHING CHANGED: DO I HAVE TO PAY BEFORE LAUNCHING A ‘TRUE VALUE’ CHALLENGE?

Since *Davenport* the Court has given further clarification via its decision in *Bexheat Ltd v Essex Services Group Ltd*<sup>xiv</sup> that: “unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a ‘true value’ adjudication under section 108.” If anyone was left wanting for clarify, it appears to have been given by the then Judge in Charge of the TCC.

Consequently, caution should prevail in any situation where a Payor dares to venture against the tide and run a true value type challenge in circumstances where it has not discharged its immediate payment obligation.

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xiii *Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) - [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2019/318.html&query=\(.2019.\)+AND+\(EWHC\)+AND+\(318\)+AND+\(\(TCC\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2019/318.html&query=(.2019.)+AND+(EWHC)+AND+(318)+AND+((TCC)))

xiv *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) - <https://www.bailii.org/ew/cases/EWHC/TCC/2022/936.html>

## WHAT CAN I DO TO DECREASE THE CHANCE OF A DISPUTE

In our view, the following should be included in any PLN to foster clarity between the parties:

- 1. Label the document "Pay Less Notice" followed by the payment cycle it relates to. For example, saving the document as "Payment Notice\_Application 12".**
- 2. Do not just tag your PLN onto a lengthy email chain which may obscure its intention. Create a brief covering email, if necessary attaching previous email threads relevant, and use a clear subject line. For example "John Bloggs Employer Ltd: Payless Notice – Application 12".**
- 3. Set out the reasons for paying less than the notified sum having regard, as a yardstick for measuring the clarity of those reasons, whether an independent quantity surveyor would be able to follow your reasoning and arrive at a similar determination.**
- 4. Provide clear calculations showing how the notified sum is being reduced. Succinctly put, tell the Payee how the sum asserted as due is calculated. Ask yourself 'if an adjudicator ever had to construe this, would my calculations make sense'.**
- 5. Confirm the sum which, by virtue of the PLN, will be paid to the Payee.**
- 6. Avoid referring to other documents not attached or included. This only muddies the waters. If a document providing background, or a more detailed breakdown for the calculations in the PLN needs to be referred to, then confirm as much within the PLN itself as well as the email.**

## CONCLUSION

PLN's remain, notwithstanding the swathe of authorities on the topic, a common and critical battleground in disputes relating to payment cycles in construction contracts. At the risk of stating the obvious, a PLN should still be issued promptly in reference to a specific payment notice or application for payment, with all deductions backed up in a manner that can be reasonably understood. Waiting for the prescribed period to expire should only be a last resort for a party (i.e. perhaps in the event that the deductions are too complicated to quantify sufficiently in the period permitted).

Paying an interim application in full whilst waiting to challenge the 'true value', particularly if



there are questions over the payee's liquidity, can lead to an uncomfortable and vulnerable situation for the Payee that would constitute a risk well worth avoiding.

Practical steps which take (in the grand scheme of things) a modest amount of time, go a long way towards mitigating the risks associated with this issue which remains a 'hot topic' in the industry.

There is no fixed rule which can be apportioned to all PLN's; the Courts have reiterated time and time again that the enquiry as to the validity of a PLN is a fact sensitive enquiry. If the Payor wants to find itself on the right side of that factually nuanced enquiry it would do well to have regard to the key questions the Court will ask itself when construing, through the lens of retrospect, what the parties contemporaneously intended. Clarity is key and will go a long way to avoiding a raft of issues.

Written By Joe Mills & Sam Slater



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