

## Clarity Is Key – How Do You Serve a Valid Pay Less Notice?

Article By:

Kevin Greene

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*Advance JV (A Joint Venture between (1) Balfour Beatty Group Limited; and (2) MWH Treatment Limited); and Enisca Limited [2022] EWHC 1152 (TCC)*

*The parties in this case carried out works pursuant to an amended form of NEC3 Engineering and Construction Contract (Option A). The works consisted of the supply and installation of LV electrical equipment for design and construction of a new water treatment works and hydro-electric power generation facility in Cumbria.*

*The relevant timeline is as below.*

### Timeline

- *Enisca Limited (“**Enisca**”) submitted an application for payment (AP24) on 22 October 2021 for approximately £2.7million;*
- *Advance JV (“**Advance**”) failed to issue a pay less notice against that application;*
- *On 19 November 2021, Enisca made a further application for payment (AP25);*
- *On 25 November 2021, Advance issued a pay less notice, making reference to AP 25 only.*

*The pay less notice issued in November made reference to AP25 only and Enisca’s argument was that no notices were issued by Advance against AP24, and as such Enisca was entitled to the notified sum (i.e. £2.7million) listed in AP24.*

*Advance argued that the pay less notice was a valid response to both AP24 and AP25, and that the pay less notice issued in November time indicated that Advance did not intend to make any further payment in respect of either applications.*

*Enisca issued an adjudication for payment of the sum in AP24 and won the adjudication.*

*Before the adjudicator’s decision was issued, Advance however commenced part 8 proceedings in*

the Technology and Construction Court (“**TCC**”) seeking declaratory relief in respect of the validity of the pay less notice.

## Decision

*The TCC held that:*

1. The crux of the matter is that – or the issue is that – *“how a reasonable recipient would have understood the notices”*, and in this case no reasonable recipient in Enisca’s shoes would have understood, or construed the pay less notice as a response to AP24;
2. *The Court will always take a common sense approach, and adopt a practical viewpoint in respect of the contents of any notice issued (as required under the Construction Act) and an unduly restrictive interpretation is not to be welcomed;*
3. The TCC also rejected Advance’s argument that there was nothing in the Construction Act precluding a pay less notice from responding to two different payment applications. The TCC responded saying this is a *“novel proposition for which no support can be found”* either from the wording of the Construction Act, or from the drafting of the relevant contract as between the parties;
4. The TCC reiterated that any pay less notice must make specific reference to that individual payment cycle and rejected firmly the contention put forward by Advance that the Construction Act is only aiming to regulate the time limits in serving pay less notices – that the Act did not command pay less notice to make specific reference of the relevant payment cycle in question. The TCC made this point clear in the judgment: *“..... it is plain from a review of the payment regime under the Act that payment notices are required to be referable to individual payment cycles”*;
5. The Court also found that, perhaps, even if the pay less notice was, as Advance argued, intended to respond to AP24, such intention was neither clear nor unambiguous, as evidenced by the parties’ overall conduct.

## Analysis

This case made clear that pay less notice must make clear references to a particular payment notice and/ or payment application and must relate to a particular payment cycle.

*If this level clarity is not evident in a pay less notice, the party will risk paying a lot more because of the draconian effect of not having served a valid pay less notice.*

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