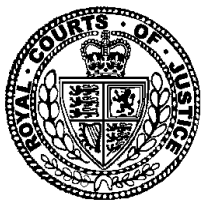

Neutral Citation Number: [2022] EWHC 1152 (TCC)

Case No: HT-2022-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

16/05/2022

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

ADVANCE JV
(A JOINT VENTURE BETWEEN
(1) BALFOUR BEATTY GROUP LIMITED
AND
(2) MWH TREATMENT LIMITED)

Claimant

- and -

ENISCA LIMITED

Defendant

- -
- -

Mr Piers Stansfield QC (instructed by **Pinsent Masons LLP**)
for the **Claimant**
Mr Alexander Nissen QC (instructed by **Quigg Golden Solicitors**) for the **Defendant**

Hearing date: **3 May 2022**

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email. The date for hand-down is deemed to be Monday 16 May, 2022.

Mrs Justice Joanna Smith:

1. In these proceedings, the Claimant ("**Advance**") seeks declaratory relief pursuant to a Part 8 claim issued against the Defendant ("**Enisca**"). The declaration sought concerns the validity of a Pay Less Notice.

2. By a decision dated 8 February 2022, an adjudicator decided that Advance did not issue a valid pay less notice against an interim application for payment and that, consequently, Advance was to pay Enisca the sum of £2,717,992.88. The parties have agreed that the issue raised in these proceedings is amenable to consideration by the court by way of this Part 8 claim. By consent, no separate enforcement proceedings are necessary as Advance has agreed to pay the amounts decided by the Adjudicator within 7 days if the court at this hearing concludes that its application for declaratory relief fails.

3. In support of the Part 8 Claim, Advance relies on a short statement from Mr Craig Morrison, a partner at Pinsent Masons LLP. In opposition to the Part 8 claim, Enisca relies upon a statement from one of its directors, Mr Rory Hampsey.

THE CONTRACT

4. Advance is a Joint Venture between Balfour Beatty Group Ltd and MWH Treatment Limited. It is engaged by United Utilities Water plc to design and construct a new water treatment works, hydro-electric power generation facility and other works in Cumbria ("**the Project**"). By a sub-contract dated 21 October 2019 ("**the Contract**"), Advance engaged Enisca as sub-contractor to design, supply and install the LV electrical installation for the Project.

5. The Contract is based on the NEC3 Engineering and Construction Subcontract dated April 2013, including Option A, but is subject to bespoke amendments. It includes NEC3 Option Y(UK)2, which provides payment terms intended to comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 ("**the Act**").

6. It is common ground between the parties that the key terms of the Contract are as follows. Additions to the standard form by amendment are shown underlined:

7. Clause 50.1 of the Contract, amended from the NEC3 standard form, provides for assessment by the Contractor[1] of the amount due at "each assessment date". These assessment dates dictate the timing of the various steps in the payment mechanism. The first assessment date was 27 September 2019, and subsequent assessment dates are at intervals of 28 days.

8. Clause 50.2 of the Contract provides that the amount due is the "Price for Work Done to Date" plus other amounts to be paid to the Subcontractor, less amounts to be paid by or retained from the Subcontractor. Clause 50.4 contemplates that

[1] It appears to be uncontroversial that the reference in 50.1 to "the Project Manager" must be an error – it should say "Contractor".

applications for payment will be made by the Subcontractor. These applications must be made on or before the assessment date so that they may be considered by the Contractor in assessing the amount due.

9. Clause 51.1, as amended, provides:

> "The Contractor certifies a payment within three weeks of each assessment date. The first payment is the amount due. Other payments are the change in the amount due since the last payment certificate. A payment is made by the Subcontractor to the Contractor if the change reduces the amount due. Other payments are made by the Contractor to the Subcontractor. Payments are in the currency of this subcontract unless otherwise stated in this subcontract."

10. Clause 51.2, as amended, includes the following:

> "The date upon which each payment becomes due and the final date for payment of payments becoming due are as provided in Option Y(UK)2."

11. Clause Y2.2, as amended, states:

> "The date on which a payment becomes due is twenty-one days after the assessment date. The final date for payment is twenty-one days or a different period for payment if stated in the Subcontract Data after the date on which payment becomes due. The Contractor's certificate is the notice of payment to the Subcontractor specifying the amount due at the payment due date (the notified sum) and stating the basis on which the amount was calculated."

12. Clause Y2.3 states:

> "If either Party intends to pay less than the notified sum, he notifies the other Party not later than seven days (the prescribed period) before the final date for payment by stating the amount considered to be due and the basis on which that sum is calculated. A Party does not withhold payment of an amount due under this contract unless he has notified his intention to pay less than the notified sum as required by this subcontract."

13. It is clear from Y2.3 that the requirements for notification of an intention to pay less than the notified sum are twofold; first the notice must state the amount considered to be due, and second the notice must state the basis on which that sum is calculated. There is no contractual requirement that this calculation must be correct.

14. In summary therefore:

    i) Enisca may make an application for payment on or before the assessment date;

    ii) Advance is required to assess the amount due for payment at each assessment date (the payment due date) and certify a payment by issuing a Contractor payment certificate within three weeks of the assessment date;

iii) Payment becomes due twenty-one days after the assessment date;

iv) Either party intending to pay less than the notified sum (in this case Advance) must notify the other party within the contractual window, i.e. not later than seven days before the final date for payment.

RELEVANT CHRONOLOGY OF EVENTS

15. Works began on or around 21 October 2019 and Enisca appears to have submitted monthly applications for payment from the early stages of the Project. Although not relevant to the issue in these proceedings, it would appear that the Project has experienced considerable delay and the date of completion of 20 May 2020 has long since passed.

16. The parties generally communicated via a document system known as CEMAR although Enisca's applications for payment were usually sent by email. Mr Hampsey gives evidence in his statement as to examples of the operation of the notice regime in this Contract (to which I shall return later), however, for present purposes I need only focus on the notices given by the parties in the Autumn of 2021.

17. In its Application 23 (the application immediately prior to the application on which the adjudication was based), the gross value applied for by Enisca in respect of its work over the previous two years was £3,686,499.80 exclusive of VAT. Payment was certified by Advance against this application in the sum of £2,270,597.38. The difference between the parties was £1,415,902.42. It is common ground that the assessment date of this application was 24 September 2021.

18. On 22 October 2021 (the next assessment date under the Contract), Enisca submitted Application 24 by email. The gross value applied for was £5,131,642.49, an increase of over £1.4 million or almost 40% of the entire gross valuation since the previous month. Taking account of the sum paid to date of £2,157,068.49, the net payment applied for was £2,717,992.88 against the previously certified figure of £2,270,597.38.

19. No payment certificate was provided by Advance to Enisca in respect of Application 24 (any such certificate being due on or before 12 November 2021) and no document was provided which expressly sought to respond to Application 24.

20. On 19 November 2021 (again, the next assessment date under the Contract), Enisca submitted Application 25, in the gross sum of £5,217,303.71, an increase of £85,661 compared to Application 24. Again, the previously certified figure of £2,270,597.38 was identified and the net payment applied for was £2,799,371.04.

21. Each of the applications for payment numbered 23, 24 and 25 was in the same form; each identified the date of the application, the application number and included the relevant figures in tabular form in three columns. It is common

ground that the relevant dates pursuant to the payment provisions in the Contract for Application 24 (payment cycle 28[2]) were:

i) 12 November 2021 – Contractor certifies and due date for payment. No certificate was provided;

ii) 26 November 2021 – the latest date for provision of a Pay Less Notice;

iii) 3 December 2021 – final date for payment.

22. On 25 November 2021 (one day before the expiry of the time window for provision of a Pay Less Notice in respect of Application 24 and within the 21 day period for certification following the assessment date in respect of Application 25), Advance uploaded to CEMAR a package of documents which included a "Certification of payment assessment" expressly said to be for the assessment date of 19 November 2021 ("**the Payment Certificate**"), i.e. the assessment date referable to Application 25, payment cycle 29.

23. In addition to setting out an assessment in tabular form, the Payment Certificate read as follows:

> "Dear Sirs,
> Please find attached the Advance Assessment of the Enisca AFP 25[3].
> Due to the assessment resulting in a negative payment value (due to a previous on account overpayment), Advance have adjusted the figures below to show a Zero Payment to prevent any credit notes needing to be made.
> Advance Assessment of PWDD[4]: £2,097,662.60
> Less 5% Retention: (£104,883.13)
> **Cumulative Payment due: £1,992,779.47**
> Less Paid to date: £2,157,068.49
> **Payment Amount Due: (£164,288.02)**"

24. Attached to the Payment Certificate were three documents as follows (i) a spreadsheet detailing the assessment carried out by Advance and responding to Application 25 including adding additional columns setting out Advance's alternative assessment; (ii) a document identified as "SCADV35615-049 Enisca Ltd – Application 25 – Payless Notice 24.11.21.pdf" and (iii) Enisca's own application No. 25.

25. The second document (which I shall refer to as "**the Payless Notice**") was marked in bold on its top right-hand corner with the words "Withholding/Payless Notice" and gave reference "35615-049 AFP25". It said this:

> "Dear Sirs,
> **Project No SCADV35615**

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2 It appears to be common ground that Application 24 was in respect of payment cycle 28 in circumstances where no applications had been made in some earlier cycles. However, nothing turns on the point.

3 Application For Payment 25.

4 Price of Work Done to Date.

Sub Contract Order No: SCADV35615-049
REF: WITHHOLDING/PAYLESS NOTICE
We refer to your application number 17, relating to period ending 26th March 2021.
Please be advised that, in accordance with the subcontract terms and conditions between us, we give notice of our assessment of your application number 17 as follows:
~~i) Application paid in full~~
ii) Your application has been amended in accordance with the attached detail;

- **Advance Assessment of PWDD: £2,097,662.60**
- Less 5% Retention: -£104,883.13
- **Payment due: £1,992,779.47**
- Less Paid to date: £2,157,068.49
- **Payment amount due in period: -£164,288.02**…"

…
iii) Cumulative Payment value excluding VAT and before retention is: £2,157,067.49."

26. Towards the bottom of the page, were the words:

"In accordance with section 109 & 110 of the Housing Grants Construction Regeneration Act 1996, as amended by the local Democracy Economic Development and Construction Act 2009 we confirm the following payment to yourselves:
…
ii. Your application No 25 has been amended from your cumulative to date applied value of £4,956,438.53 to £2,097,662.60 as detailed above and on the assessment".

27. This appears to have been a reference to the amended version of the Enisca Application 25, one of the other documents attached to the Payment Certificate, to which I have already referred above.

28. It is common ground that the reference to application number 17 in the Payless Notice was an error, perhaps arising from the fact that the last document entitled Withholding/Payless Notice issued by Advance had been in respect of application 17. Furthermore the reference to sections 109 and 110 of the Act was also an error (those sections not being applicable to a Pay Less Notice) which, it is clear from Mr Hampsey's evidence, had found its way into earlier "Withholding/Payless" notices issued by Advance and had presumably been copied over from those notices.

29. However, Enisca contends that the reference to "application No 25" was plainly intended to signify that the Pay Less Notice was referable to Application 25: it expressly referred to "application No. 25" or "AFP25", the back-up assessment document referred to "application 25" and the sum considered to be due was calculated by reference to Advance's assessment of, and comparison with, the information provided within Application 25. Furthermore, the Pay Less Notice was described in the Payment Certificate as "Application 25 – Pay Less Notice".

30. Notwithstanding these express references to Application 25, it is Advance's case in these proceedings that the Pay Less Notice can be relied upon as a valid notice in response to Application 24. In summary, Advance contends that the contractual requirements for timing and content have been satisfied and that, properly construed, the terms of the Pay Less Notice would have indicated to the reasonable recipient that Advance did not intend to make any further payment, either in respect of Application 24 or Application 25.

31. On 5 January 2022, Enisca gave notice to Advance of its intention to refer a dispute to adjudication ("**the Adjudication**"). An adjudicator was appointed on 11 January 2022. Enisca's claim in the Adjudication was a claim for payment in respect of the sums applied for in Application 24 (namely £2,717,992.88); it was premised upon the alleged absence of either a payment notice or a pay less notice from Advance in response to Application 24, rather than any substantive entitlement to sums claimed in the Adjudication.

32. Advance raised two defences to the Adjudication; first that the Pay Less Notice was a valid notice, satisfying the contractual requirements for such a notice, and second that Application 24 did not contain the required ingredients for it to be a valid payee's payment notice (a point which was also raised in this Part 8 claim but abandoned in advance of the hearing).

33. The adjudicator issued his decision on 8 February 2022 – Enisca was successful. As a result, the adjudicator decided and declared that Advance did not issue a payment certificate by 12 November 2021, that Advance's Pay Less Notice issued on 25 November 2021 was against Enisca's Application 25, and that Advance did not issue an effective Pay Less Notice against Enisca's Application 24. He ordered Advance to pay £2,717,992.88 to Enisca within 7 days, together with interest and any applicable VAT.

34. Advance commenced this claim on 25 January 2022 and served Amended Particulars of Claim (to which Enisca consented) on 25 April 2022. A Consent Order of 11 March 2022 records the acceptance on the part of Advance that there is no defence to enforcement of the Adjudication decision save to the extent of the issues raised by these Part 8 Proceedings together with its undertaking to comply within 7 days with all aspects of that decision upon the substantive dismissal of this Part 8 claim.

THE STATUTORY PROVISIONS

35. It is common ground that the interim payment provisions in the Contract reflect the requirements of the payment regime introduced by sections 110, 110A, 110B and 111 of the Act. These sections read as follows:

> **"Dates for payment**
> **110**.—(1) Every construction contract shall—
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
> (b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—
(a) the performance of obligations under another contract, or
(b) a decision by any person as to whether obligations under another contract have been performed.
(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).
(1C) Subsection (1A) does not apply where—
(a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
(b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.
(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.
(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

Payment notices: contractual requirements
110A.—(1) A construction contract shall, in relation to every payment provided for by the contract—
(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
(2) A notice complies with this subsection if it specifies—
(a) in a case where the notice is given by the payer—
(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated;
(b) in a case where the notice is given by a specified person—
(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated.
(3) A notice complies with this subsection if it specifies—
(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
(b) the basis on which that sum is calculated.

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
(6) In this and the following sections, in relation to any payment provided for by a construction contract—
"payee" means the person to whom the payment is due;
"payer" means the person from whom the payment is due;
"payment due date" means the date provided for by the contract as the date on which the payment is due;
"specified person" means a person specified in or determined in accordance with the provisions of the contract.

Payment notices: payee's notice in default of payer's notice
110B.—(1) This section applies in a case where, in relation to any payment provided for by a construction contract—
(a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
(b) notice is not given as so required.
(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
(4) If—
(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—
(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated, and
(b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

Requirement to pay notified sum
111.—(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
(4) A notice under subsection (3) must specify—
(a) the sum that the payer considers to be due on the date the notice is served, and
(b) the basis on which that sum is calculated.
It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
(5) A notice under subsection (3)—
(a) must be given not later than the prescribed period before the final date for payment, and
(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
(7) In subsection (5), "prescribed period" means—
(a) such period as the parties may agree, or
(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
(8) Subsection (9) applies where in respect of a payment—
(a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
(b) a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
(a) seven days from the date of the decision, or
(b) the date which apart from the notice would have been the final date for payment, whichever is the later.
(10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where—
(a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and

(b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
(11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.

36. This regime depends on the issue of a series of notices whereby the payer becomes liable to pay "the notified sum". It is therefore necessary to identify the notice which, by trumping all others, contains "the notified sum" (section 111(2)). It is then possible to pay less than the notified sum (section 111(3)) subject to compliance with the requirements set out in the Act. The obligation to pay the notified sum (or a lesser amount stated in a pay less notice) does not preclude either party's subsequent ability to challenge the true value of the sum due, by means of adjudication or otherwise. But, in the meantime, the notified sum (or lesser amount stated in the pay less notice) is to be paid, with any dispute about true value following on behind.

37. As Carr J (as she then was) observed in *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] BLR 328 ("***Jawaby***") at [39], the effect of the statutory provisions is:

> "…to require an employer at periodic intervals to pay "the notified sum" by the final date for payment, irrespective of whether or not that sum in fact represents a correct valuation of the work to date. If an employer fails to give relevant notice, irrespective of whether this is by mistake, administrative oversight or any other reason, then a sum for which the contractor has applied becomes immediately contractually payable, even if it is wrong in valuation terms."

38. This can have severe, if not draconian, consequences for a party who fails to serve a pay less notice. However, that is the acknowledged effect of the statutory provisions, always assuming that the application for payment is made with sufficient clarity and provides reasonable notice that the payment period has been triggered in the first place (see *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] BLR 694, per Coulson J (as he then was) at [35]-[37]).

39. The conventional sequence of notices contemplated by the statutory regime is for (i) an application for payment to be made by the payee (section 110(B)(4) of the Act). This provides an opportunity for the payee to set out the amount it considers to be due to it at the relevant date, calculated in accordance with the valuation provisions; (ii) a payment notice by the payer (section 110(A)(1) of the Act), setting out the amount it considers due as at the relevant date, calculated in accordance with the valuation provisions and (iii) a pay less notice by the payer (section 111(3) of the Act), again setting out the amount it considers due but taking into account any deductions or cross claims available to it. Depending on which of these notices is actually served, section 111(2) of the Act identifies which should prevail as the notified sum. In this case, and in the absence of service by Advance of a payment certificate, there appears to be no dispute that the notified sum is the sum contained in Application 24.

40. The Amended Particulars of Claim set out the statutory provisions in some detail. As Sir Rupert Jackson made clear in the Court of Appeal in *S&T (UK) Ltd v*

Grove Developments Ltd [2019] BLR 1 at [42], section 111 of the Act imposes direct obligations on contracting parties such that in the event of contractual terms providing something different, they are overridden. Where the contractual terms are compliant with the Act "they are a mere aide memoire – what matters are the statutory provisions. The Act requires the Employer to pay the "notified sum" by the final date for payment, unless it has specified a lesser sum in a timeous Payment Notice or a timeous Pay Less Notice".

41. There is no dispute between the parties that the Contract terms are compliant with the statutory provisions and so no need for me to consider those provisions in any detail, subject only to one point. Mr Nissen QC on behalf of Enisca submits that it is the "backbone" of the legislative provisions that payment cycles exist which create due dates and final payment dates. Provision is made for notices to be given during each of these cycles and pay less notices must be referable to the notice identifying the notified sum, in this case (and absent a certificate of payment from Advance) the application notice provided by Enisca. Whilst there is no absolute requirement for a pay less notice to make express reference to the notice to which it is responding, it must nevertheless be clear that it is in fact responding to that particular notice. Indeed, it was Mr Nissen's contention that, whilst the requirement for a pay less notice to be referable to a particular application notice could not be found expressly anywhere in the Act, nonetheless this was tantamount to "a rule of law" when one takes an overarching view of the payment regime created by the Act.

42. In this context, Mr Nissen drew my attention to the very recent decision of O'Farrell J in *Bexheat Limited v Essex Services Group Limited* [2022] EWHC 936 (TCC) ("***Bexheat***"), a case involving an application for summary judgment to enforce a second adjudication decision in which the defendant to the application (which had failed to serve a pay less notice in respect of application 23 for the period ending 31 August 2021) argued that the "true value" of that application, the subject of the second adjudication decision, had already been determined in an earlier "first" adjudication, such that there was no obligation to pay the notified sum for application 23. The first adjudication had determined the true value of application no 22, for the period ending 31 July 2021. It was argued that the consequence of the binding effect of an adjudication decision on a dispute or difference is that an adjudicator has no jurisdiction to determine matters which are the same or substantially the same in a subsequent adjudication.

43. Against this background, O'Farrell J observed that the starting point was to consider the scope of the first adjudication and, in particular "whether the dispute or difference the subject of the first adjudication is the same or substantially the same as the dispute or difference in the second adjudication". At paragraphs [47] to [49] she went on:

> "[47]The dispute or difference referred in the First Adjudication concerned the true valuation of the BHL's entitlement in respect of Interim Application 22. The Notice of Adjudication expressly sought declarations and payment based on "the true value of BHL's Application for Payment Number 22 dated 16 July 2021". On its face, Interim Application 22 was for payment in respect of work for the valuation period up to 31 July 2021. The net sum claimed by BHL was calculated by reference to the line items and figures in Interim Application 22.

ESG's identification of the dispute was set out in its response in which it defined the relief it sought based on the true valuation of Interim Application 22.

[48]In contrast, the dispute or difference referred in the Second Adjudication was whether ESG had served a valid Pay Less Notice in response to Interim Application 23; if not, whether BHL was entitled to payment of the sum claimed as 'the notified sum'. The Notice of Adjudication expressly sought declarations and payment based on Application for Payment Number 23 dated 17 August 2021. On its face, although the line items and figures in Interim Application were substantially the same as those in Interim Application 22, Interim Application 23 was for payment in respect of work for a different valuation period, that is, up to 31 August 2021. In its response, and subsequent submissions, ESG focused on the issue as to whether it had served a valid Payment Notice or Pay Less Notice in response to Interim Application 23 and the main relief sought was a declaration as to the validity of its Pay Less Notice.

[49]Thus, on analysis, the dispute or difference the subject of the First Adjudication was not the same or substantially the same as the dispute or difference in the Second Adjudication."

44. Mr Nissen relies upon this case as emphasising the importance of payment cycles of which payment notices are an integral part.

45. Mr Stansfield QC on behalf of Advance rejects the contention that there is any requirement in the Act, or anywhere else, for pay less notices to be referable to a particular payment cycle. He contends that *Bexheat* is not a case about the validity of notices and casts no light on the approach to be taken when considering the true interpretation of the Pay Less Notice in this case. I shall have to return to this issue in due course; in many ways it lies at the heart of the dispute between the parties in these proceedings.

THE LAW ON INTERPRETATION OF NOTICES

46. I was taken during the hearing to a number of authorities in the context of the proper approach to be taken by the court to the interpretation of contractual notices, including *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 ("***Mannai***"), *Thomas Vale Construction Plc v Brookside Syston Ltd* [2006] EWHC 3637 (TCC) ("***Thomas Vale***"), *Henia Investments Ltd v Beck Interiors Ltd* [2015] BLR 704 ("**Henia**"), *Jawaby, Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] BLR 189 ("***Surrey and Sussex***"), *Grove Developments Ltd v S&T (UK) Ltd* [2018] BLR 173 ("***Grove Developments***") and *S&T (UK) Ltd v Grove Developments Ltd* [2019] BLR 1 *("**S&T**")* (in which the Court of Appeal upheld the reasoning of the Judge on this issue at [57]). There is no need to set these out at length; the principles that they establish and which I must apply in this case are uncontroversial.

47. In summary, the approach to be taken by the court as gleaned from these authorities is as follows:

i) In considering the true construction of a contractual notice (including notices under the payment regime in the Act – see *Grove Developments* per Coulson J at [21]-[22] and *S&T* in the Court of Appeal at [58] per Sir Rupert Jackson), 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", i.e. a reasonable recipient "circumstanced as the actual parties were" (see *Mannai* at 767 G-H and 768B-C per Lord Steyn).

ii) 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" (see *Mannai* at 767H and 768A-B). This means that, amongst other things, the reasonable recipient will be credited with knowledge of the relevant contract (see *Mannai* at 768B-C).

iii) The purpose of the notice will be relevant to its construction and validity (*Mannai* at 768E).

iv) 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" (*Thomas Vale* per HHJ Kirkham at [43]; *Grove* at [26]). Instead, as Sir Peter Coulson says in paragraph 3.36 of his book on *Construction Adjudication* (4th ed. 2018), 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".

v) There is no principled reason for adopting a different approach to construction in respect of different kinds of payment notices (for example because some may give rise to more draconian consequences than others) as that would be contrary to the guidance in *Mannai* (see *Grove* at [27]). However:

> "the particularly adverse consequences for an employer that follow from, say, a contractor's unanswered application/payment notice are relevant to the test of the reasonable recipient".

vi) To qualify as a valid notice, any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form (*Henia* per Akenhead J at [17]). 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. Beyond that, the question of whether a notice is or is not a valid notice is "a question of fact and degree" (*Grove* at [29] and *S&T* at [53]).

vii) 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 that is alleged to constitute a valid notice was in fact intended to be such and whether it is "free from ambiguity" (*Henia* at [17] and *Grove* at [42]). The sender's intention is a matter to be assessed objectively taking into account the context. (*Jawaby* at [43], [59] and [63]).

viii) Although in *Grove*, Coulson J observed that payment notices must make plain what they are, 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: "[t]he question is whether, viewed objectively, it had the requisite intention to fulfil that function" (*Surrey & Sussex* at [65]).

ix) 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…" (*Henia* at [32] and *Grove* at [26]).

DISCUSSION

48. I agree with Mr Nissen that 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.

49. Mr Stansfield admits as much in relation to payment notices under section 110(B)(4) of the Act, which specifically provides that a payment notice is to notify the payer of "the sum that the payee considers will become due on the payment due date in respect of the payment", thereby expressly requiring the payment notice to be referable to the due date in the relevant payment cycle. Hence the decision in *Henia*, where both the relevant contract and the Act required identification of a sum that was due "at the relevant due date". However, he contends that the Act deals with pay less notices in a different way. In particular, that section 111(4)(a) merely requires a pay less notice to identify the sum that the payer considers to be due "on the date the notice is served". In other words, when it comes to pay less notices, the Act is concerned only with time limits.

50. I was initially attracted to this submission, but on reflection it appears to me to be important to bear in mind the wording of section 111(3) of the Act to the effect that "[t]he payer…may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum". Whilst I accept that a pay less notice need only identify the sum that the payer considers to be due for payment "on the date the notice is served" (and to this extent serves a different function from a payment notice under section 110(B)(4)), the reference to "the notified sum" in 111(3) appears to me to root the giving of a pay less notice firmly in the payment cycle represented by the payment notice which (in the absence of a payment certificate) will identify "the notified sum". Put another way, the pay less notice (which is expressing an intention to pay less than the notified sum) must be referable to the payment notice in which the notified sum is identified.

51. Whilst Mr Stansfield is right to say that *Bexheat* was not directly concerned with the interpretation of pay less notices, nevertheless it does appear to me to reinforce the submissions made by Mr Nissen, primarily because it emphasises the difference between payment cycles, including the differing valuation periods applicable to those cycles.

52. Application 25 depended upon a valuation being undertaken on 19 November 2021 (as opposed to 22 October 2021 for Application 24). It was an application for a different amount from that previously applied for in Application 24, albeit not by a significant margin, but that does not appear to me to affect the principle that these applications were, and were intended to be, substantively different and assessed at different dates.

53. Mr Stansfield has a further string to his bow. He contends that there is nothing in the Act, or the Contract, to preclude a pay less notice from responding to two applications (as he says the Pay Less Notice here does). The key requirement, he submits, is that the Pay Less Notice is served within the contractually stipulated time envelope. If that happens, and if the parties have in fact provided for an overlap in the time envelopes applicable to two consecutive payment cycles (as is the case here), then there is no reason why a pay less notice cannot serve two functions – i.e. it can be referable to both applications.

54. This is a novel proposition for which no support can be found in the Act or the Contract. It is difficult to see how one notice referable to only one assessment date could possibly be said to be responsive to two applications for payment.

55. It seems likely (although it was not conceded by Mr Nissen) that the Pay Less Notice was a valid pay less notice in respect of Application 25; this appears to be part of Mr Stansfield's positive case when he says in his skeleton argument that "a reasonable recipient would therefore understand that Advance did not intend to make any further payment, either in respect of Interim Application 24 **or Interim Application 25**" (**emphasis added**). The Pay Less Notice referred to Application 25, was provided together with the Payment Certificate which expressly related to Application 25 and carried out a comparison between Application 25 and the sum that was said to be due by Advance. I do not consider the erroneous reference to either application 17 or to sections 109 and 110 of the Act likely to affect this position, albeit the point was not fully argued and there is no need for me to decide it for the purposes of this hearing.

56. However, the key question for present purposes is whether the Pay Less Notice was also (or, if Mr Stansfield is wrong about Application 25, only) in substance, form and intent, a pay less notice in respect of, or referable to, Application 24.

57. Notwithstanding Mr Stansfield's skilful arguments, I do not consider that it was. I say that for the following reasons:

    i) Looked at objectively, the use of the words "Application No 25" and the acronym "AFP25" point clearly to an intention that the Pay Less Notice was to relate to Application 25, as does the fact that it was provided under cover of the Payment Certificate for Application 25 which identified the assessment date of 19 November 2021 and described the Payless Notice as

"Application 25 – Payless Notice". I am inclined to agree with Mr Nissen that it is somewhat surprising that Advance's evidence in support of its Part 8 claim neither referred to, nor exhibited, the Payment Certificate.

ii) There is nothing expressly on the face of the Pay Less Notice (or anywhere else) which points to it being a response to Application 24 or AFP24, still less anything which indicates that it is intended to be responding to a valuation provided as at the assessment date for Application 24 of 22 October 2021. On the contrary, it is clear from the Pay Less Notice that it was comparing Advance's own assessment of the sum due with Enisca's valuation as at the assessment date of 19 November 2021, i.e. the assessment date for Application 25.

iii) Whilst it may be argued that the provision of the Pay Less Notice one day before the end of the period for service of a pay less notice in respect of Application 24 pursuant to the Contract supports an intention that it be referable to Application 24, I consider this factor to be no more than neutral in circumstances where the Pay Less Notice was also within the (overlapping) period for service of a pay less notice under Application 25.

iv) If the Pay Less Notice was intended to remedy the failure to serve a payment certificate in relation to Application 24, it did not make that clear.

v) In the circumstances, I agree with Mr Nissen that the Pay Less Notice was not in substance or form a Pay Less Notice relating to Application 24. On its face it was in substance and form a response to Application 25. It did not give notice of an intention to pay less than the notified sum in Application 24.

vi) I also consider that there is some force in Mr Nissen's submission that, having regard to the background context evidenced in Mr Hampsey's statement (which was not challenged by Advance), it is plain that in the recent past, pay less notices have always been served alongside payment certificates, and were referable to those certificates. This was the case for the four payment certificates provided prior to the Payment Certificate of 25 November 2021 (i.e. those provided in respect of Applications 14, 15, 16 and 17). The Pay Less Notice was no different in also being attached to the Payment Certificate and there was no indication that it was intended to be regarded as something else. The reasonable recipient would be aware of the history and there would have been nothing to alert her to the fact that a different approach was being taken in this instance or that it was intended that the Pay Less Notice should be responsive to Application 24.

vii) Viewed objectively, I do not consider that the reasonable recipient in Enisca's shoes would have understood that the Pay Less Notice was intended to be responsive to Application 24. There was nothing on the face of the Pay Less Notice or the Payment Certificate to which it was attached to indicate that that was intended to be the case.

viii) Mr Stansfield argued that in view of the contents of the Pay Less Notice, Advance's gross valuation of £2.1 million, and the sum already paid to

Enisca, a reasonable recipient would not consider that Advance intended to accept Enisca's gross valuation of about £5.13 million in Application 24 and pay over £2.7 million to Enisca in respect of that Interim Application; on the contrary, a reasonable recipient would consider that Advance did not intend to make any payment. However, whilst I accept that these figures might have given a reasonable recipient pause for thought as to the purpose of the Pay Less Notice, in my judgment, in light of the clear form and substance of that Notice and the absence of any suggestion that it was designed to plug the gap left by the failure to issue a payment certificate in relation to Application 24, the reasonable recipient would have taken it at face value. As it happens, and although not strictly relevant to the exercise with which I am concerned, it would appear from Mr Hampsey's evidence that this is exactly how Enisca did in fact take it.

ix) Even if the Pay Less Notice had been intended to respond to Application 24, I cannot see that it was either clear or unambiguous in that intention for all the reasons I have already identified. Furthermore, having regard to the alternative test articulated in *Henia* by Akenhead J, I agree with Mr Nissen that the Pay Less Notice could not have provided an agenda for an adjudication in respect of the sum due on 12 November 2021 because there was a mismatch: the Pay Less Notice was responsive to a different application, assessed upon a different date and due for payment on a later date.

x) I do not consider the arguments raised by Enisca to be either artificial or contrived; nor are they "unduly technical" as Mr Stansfield contends. In my judgment they go well beyond setting out the basis for the calculation in a different document (*Grove*) or the application of fine textual analysis to the wording used in the notice (*Thames Vale*). True it is that the court must take a practical and pragmatic approach, but in circumstances where I have found that the Pay Less Notice was not in substance, form or intent a response to Application 24, and further that a reasonable recipient would not have understood it to be such a response, the right course must be to dismiss Advance's claim and to refuse to make the declaration sought.

58. During the course of his submissions, Mr Stansfield sought to place significant reliance upon the facts and decision in *Surrey and Sussex*. In that case, the judge decided that an email (which did not state on its face that it was a pay less notice, but instead referred to an attached Final Certificate) was nevertheless a valid pay less notice. In doing so, the judge focused at [58] on "the overall message and purpose which the email and attachments would have conveyed to a reasonable recipient", agreeing that whilst it is an essential requirement that the sender should have the requisite intention, "that intention must be derived from the manner in which it would have informed the reasonable recipient".

59. In my judgment, however, that decision is plainly distinguishable on the facts, which were far removed from those with which this court is concerned. It was conceded in that case that the email relied upon fulfilled the contractual requirements of stating the sum due and the basis on which it was calculated. The key question, however, was whether the email and attachment were intended to constitute a pay less notice at all. The judge held at [59] that, on the facts, the

reasonable recipient would have been aware that the sender was "completely mistaken about the contractual position", would have appreciated that a valid Interim Payment Notice had been issued and would therefore not have taken the wording of the email too literally (in particular the words "In any event the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued" – i.e. a conditional expression of the function of the notice). He considered that, "viewed on a broader level", one intention of the email and its attachments was that it should be responsive to the Interim Payment Notice.

60. There is no justification in the present case for viewing the Pay Less Notice "on a broader level" for all of the reasons I have given.

61. In all the circumstances, I dismiss the Part 8 Claim.