Neutral Citation Number: [2025] EWHC 100 (TCC)

Claim No. HT-2024-MAN-000056
Claim No. HT-2024-MAN-000057

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 24 January 2025

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

PLACEFIRST CONSTRUCTION LIMITED	**Part 8 Claimant/ Part 7 Defendant**
- and -	
CAR CONSTRUCTION (NORTH EAST) LIMITED	**Part 8 Defendant / Part 7 Claimant**

- -

Justin Mort KC (instructed by **Hill Dickinson LLP, Liverpool**) for Placefirst Construction
Simon Arnold (instructed by **Weightmans LLP, Liverpool**) for CAR Construction

Hearing dates: 20 December 2024
Draft judgment circulated: 6 January 2025

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10am on Friday 24 January 2025 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

HHJ Stephen Davies:

Introduction and summary of decision

1. These two claims arise out of a decision of an adjudicator (Mr Neil Boothroyd, of Gateley Vinden, Manchester) made on 18 October 2024 in which he decided that the respondent to the adjudication, Placefirst Construction Limited ("**Placefirst**") should pay the referring party, CAR Construction (NE) Limited ("**CAR**") £867,031.36 plus VAT. He decided that this was due to CAR under its interim payment application on the basis that Placefirst had failed to serve either a payment notice or an effective payless notice.

2. On 8 November 2024 CAR issued the above Part 7 enforcement proceedings, seeking to obtain a summary order for payment of the amount due as decided by the adjudicator.

3. Three days earlier, on 5 November 2024, Placefirst issued the above Part 8 claim, seeking an expedited final determination that, on a proper analysis of the communications in question, it had served a valid payment notice and/or an effective payless notice, so that it would be unconscionable to enforce the decision. Placefirst did not contend that there were any other defences to CAR's enforcement claim.

4. This is a case where Placefirst is based in the North West (in Salford), where CAR in based in the North East (Durham), where the location of the relevant construction project is sited in Durham and where both parties are represented by national solicitor practices operating from their respective Liverpool offices. In the circumstances, I am satisfied that the Manchester TCC was an appropriate location in which to issue the claims by reference to the factors identified in paragraph 2.3(1) of *Practice Direction 57AA – Business and Property Courts*.

5. CAR's application for summary judgement was listed, in accordance with conventional directions given by HHJ Bever (sitting as a High Court Judge) on 14 November 2024, for a 2 hour hearing on 20 December 2024.

6. Upon Placefirst's Part 8 claim being put before him for his consideration, Judge Bever further directed on 28 November 2024 that a case management hearing should take place on 13 December to decide whether or not the Part 8 claim could and should be determined on 20 December 2024, on the basis that the TCC had availability for a full day's hearing on that date if it was appropriate to determine both claims at the same hearing. In that way he ensured that the 2 hour hearing on 20 December 2024 was not hijacked by such arguments and by either party potentially incurring a procedural advantage, or costs being unnecessarily incurred, through that occurring.

7. CAR made clear that it objected to the Part 8 claim being determined at the hearing on 20 December 2024, on the basis that it was wrong in principle not to enforce the adjudicator's decision by reason of the outstanding Part 8 claim, and on the further basis that the Part 8 claim required the determination of potentially disputed factual evidence.

8. In response, Placefirst applied for permission to amend its Part 8 claim to withdraw those points which, at least arguably, required the determination of potentially disputed factual evidence.

9. At the hearing on 13 December 2024 I decided, in accordance with the principles summarised by Coulson LJ in *A&V Building Solutions v J&B Hopkins* [2023] EWCA Civ 54, at pars 34 – 40 (referring to the TCC Guide at sections 9.4.4 to 9.4.5) that:

    a. Since the court was in a position to determine the Part 8 claim on 20 December 2024 without delaying the resolution of the enforcement proceedings, there was no reason in principle why it should not do so.

b. This was because, if Placefirst was correct in its analysis of the notices, and if it was indeed a short, crisp point requiring little, if any, factual evidence beyond the relevant terms of the contract and the notices in question, with no need for disclosure or witness evidence, it would be unconscionable to enforce the adjudicator's decision.

c. On a proper analysis, CAR had failed to articulate any defence in relation to the points maintained by Placefirst which required any evidence to be adduced above and beyond reference to the contract and to the notices in question and – if necessary - to some undisputed correspondence.

10. On 17 December 2024 CAR made an application to adduce some correspondence preceding and postdating the relevant notices which it contended was relevant. Acting sensibly and pragmatically, Placefirst did not oppose the admission of this correspondence, which was thus put before me.

11. I had the benefit of full and helpful written skeleton arguments from counsel for Placefirst and from counsel for CAR, both of whom argued the case persuasively in oral submissions.

12. The two key issues for determination are as follows.

a. First, whether Placefirst did serve what was, on an objective analysis, intended and understood to be a payment notice in accordance with Part 2 of the *Housing Grants, Construction and Regeneration Act 1996* (as amended) ("**the Act**") and the subcontract. This involves an application of established principles to the particular facts of this case.

b. Second, whether Placefirst's payless notice was invalid because it was served (on CAR's case) in advance of the date when it could properly have been served under the Act and the subcontract. This is a point on which I am told there is no authority.

13. Placefirst only needs to succeed on one of these points to succeed. This is because, as is clear from the provisions of the Act, and as is common ground, in the circumstances of this case it is only necessary for Placefirst to have served a valid payment notice or a valid payless notice, not both.

14. CAR accepts, rightly, that Placefirst did send a notice which was described as, and which was compliant with the requirements for, a payless notice. It is therefore most sensible in my view for me to address the issue of its validity first. Having reflected on the rival submissions I am satisfied that Placefirst is correct that it did serve a valid payless notice.

15. As to the second issue, I am also satisfied, although I have found the arguments on this point more finely balanced, that if I was wrong on the first issue and if Placefirst thus needed to prove that it also served a document which was a payment notice, it did so.

16. It follows in my judgment that the adjudicator's decision to the contrary was wrong, and that his decision that Placefirst should pay the amount of CAR's interim payment application as a result ought not to be enforced.

17. I should emphasise that I have decided the case on the basis of the arguments placed before me, which are not necessarily the same arguments as were advanced before the adjudicator, so that I intend no criticism of the adjudicator's careful and detailed reasoning on this point by reaching a decision which is contrary to his decision.

The subcontract

18. Placefirst was the contractor and CAR was the subcontractor on a construction project at Ridding Road, Esh Winning, Durham.

19. They entered into a subcontract on 26 October 2022 under a JCT design and build 2016 form of subcontract as modified by a schedule of amendments.

20. The contract terms as regards interim payments, including the form and timing of interim payment applications, payment notices and payless notices, are to be found in clauses 4.6 to 4.10 of the JCT design and build contract, as amended by the schedule of amendments in certain respects. It is unnecessary to lengthen this judgement by referring to these contract terms in detail. It is common ground that they substantially followed the payment provisions to be found within the Act, which are set out below. I shall refer to them specifically only where necessary. They can be summarised as follows.

21. Interim payments became due 16 days after the interim valuation date, which was the last calendar date of each month, with the final date for payment being 12 days after the due date.

22. CAR was required to submit an interim payment application by no later the 25th day of each month. Clause 4.6 as amended included a number of requirements with which the interim payment applications needed to comply, but nothing turns for present purposes on these requirements, because it is not argued that the interim payment application in question was not a valid application.

23. Placefirst was required to give a payment notice not later than five days after the due date. The content of the payment notice was as provided for by the Act. There were no specific requirements as to the format of the payment notice.

24. Placefirst was 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. That obligation was subject to its giving a payless notice no later than two days before the final date for payment, in which case its obligation was to pay the amount specified in the payless notice. Again, the content of the payless notice was as provided for by the Act and there were no specific requirements as to the format of the payless notice.

25. The contract also provided, again in accordance with the Act, that in relation to the requirement to give notices it was immaterial that the amount considered to be due may be zero.

26. The calculation of the gross valuation for each interim payment was the subject of detailed provision in clause 4.9 which, as amended, permitted Placefirst to deduct any amounts which it was entitled to withhold, deduct or set off under the subcontract.

The application and notices in question

27. On 24 July 2024 CAR emailed its interim payment application for the month ended 31 July 2024 to Placefirst.

28. On July 31 2024 Placefirst sent an email which is, together with its attachments, at the heart of this case.

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

30. The two attachments were identified as “Valuation 30 - Payless Notice.pdf” and “Valuation 3O.xlsm”.

31. The email read: “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)”.

32. The attached pdf was a letter dated July 31 2024, which read as follows:

"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."

33. The letter then provided a summary as to how the gross amount had been calculated and how the amount due of minus £22,812.15 was arrived at. It was apparent from these details that Placefirst had deducted an amount of £141,501.43 for loss and expense to arrive at that negative amount.

34. The attached excel workbook contained a number of different tabs which, when selected, opened the relevant worksheets. 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" and is a worksheet upon which Placefirst places heavy reliance.

35. The worksheet is headed "subcontract payment certificate" and identifies 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 subcontract). It then contained a more detailed breakdown of the summary already referred to, concluding with the "amount now due" as an "interim, payment" as being minus £22,812.15. The worksheet ended by making provision for signature by the quantity surveyor and by the commercial manager or commercial director of Placefirst but, in the electronic version in question, neither is signed.

36. The other worksheets simply provide more backup for the summary and the subcontract payment certificate, so that it is not necessary to refer to them in this judgment.

The statutory provisions

37. The relevant payment provisions of the Act read as follows:

"*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) ..

(9) .."

38. These provisions were the subject of very helpful analysis by Joanna Smith J in *Advance JV v Enisca Limited* [2022] EWHC 1152 (TCC) at paragraphs 36 to 40, where she said this:

"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."

39. In the same case Joanna Smith J also set out an equally extremely helpful summary of the law on interpretation of notices at paragraphs 46 and 47, which I shall set out in full.

"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]).

Issue 1 – was the payless notice a valid payless notice

40. As already stated, although this was the second point pleaded and argued, I address it first because no issue was taken by CAR that it did not, in its format and content, comply with the requirements for a payless notice, so that if it is a valid payless notice that is determinative of the case in Placefirst's favour. Issues 1 and 2 are interrelated because, if Placefirst served a valid payment notice, then it does not also need to serve a valid payless notice, given that the two were identical in terms of their substance and the amount identified as being due.

41. As I have already indicated, it is CAR's case that Placefirst's payless notice was invalid because it was served before the date when it could validly have been served under the Act and/or the subcontract.

42. I have already set out above s.111(5) of the Act. There is no dispute that the payless notice complied with the requirement in sub-paragraph (a) that it must be given not later than the prescribed period before the final date for payment. The dispute relates to the further requirement in sub-paragraph (b) that "in a case referred to in subsection (2)(b) or (c), it may not be given before the notice by reference to which the notified sum is determined".

43. Subsection 2(b) applies 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.

44. Subsection 2(c) applies in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2).

45. The sole purpose of subsection 111(2) appears to be to specify the meaning of a "notified sum" for the purpose of the definition of a payless notice in subsection 111(3).

46. Section 110A(1) is which stipulates that construction contracts must require either the payer to give a notice complying with subsection (2) not later than five days after the due date or the payee to give a notice complying with subsection (3) not later than 5 days after the payment due date.

47. Subsection 110A(2) thus applies only to notices required to be given by a payer or a specified person and, hence, is not relevant on the basis under which I am considering this argument.

48. Subsection 110A(3) applies to notices required to be given by a payee and specifies the requirements with which it must comply to be a valid payment notice.

49. In my draft judgment I had continued by stating in paragraph 49 that "contrary to Mr Mort's submission, this subsection [110A(3))] does not apply directly to this case, because it does not

allow CAR to give a payment notice; it requires CAR to give an application for an interim payment, which is different. It follows in my judgment that s.111(2)(b) does not apply". That conclusion was not fatal to Placefirst's case, because of my further conclusion in (what is now) paragraph 53 below.

50. However, in his proposed corrections Mr Mort submitted that this statement was not only unclear in certain respects but also wrong and that it should be clarified and, if appropriate, reconsidered.

51. I accept that the paragraph could have been clearer and, upon reflection, it seemed to me that in the particular circumstances of this case Mr Mort might well be right, hence I permitted Mr Arnold to make supplemental submissions on the point and Mr Mort to respond.

52. In the end I am satisfied that Mr Mort is right and that s.110A(3) does apply directly. In short, this is for the following reasons:

    a. Under the amended form of subcontract CAR was required by clause 4.6 to submit an interim payment application which was to include "a statement of the sum that [CAR] considers to be due to him … *at the date when the relevant interim payment shall be calculated* and the basis on which that sum is calculated" (emphasis added). This was subtly different to clause 4.6.2 of the standard form which, where the subcontract particulars state that it applies, the sub-contractor is required to submit an application "stating the sum the sub-contractor considers *will become due to him at the due date* and the basis on which that sum is calculated" (emphasis also added).

    b. The wording as amended complies with s.110A(3)(a), whereas the unamended wording does not, because it refers to a sum the sub-contractor considers *will become due* at a future date. In my judgment s.110A(3)(a) cannot properly be read as if it said "the sum that the payee considers to be or to have been due or that will become due at the payment due date" (underlining added).

    c. It follows that the interim payment application given by CAR in compliance with the contract as amended met the requirements of a payment notice under s.110A(3), even though it would not have the effect of a payment notice unless and until Placefirst had failed to give a valid payer's payment notice.

    d. It also follows that on the hypothesis identified in paragraph 40 above, i.e. that Placefirst did not serve a valid payment notice, then s.111(2)(b) applied, because the interim payment application was the relevant notice, and it thus follows that Placefirst's payless notice was not given "before the notice by reference to which the notified sum is determined".

53. However (and in any event, in case I am wrong in my above conclusion), ss. 110A(3) does apply indirectly via s.111(2)(c). This is through section 110B, which deals with payee payment notices in default of a payer's payment notice. This section applies to this subcontract, because it requires Placefirst to give a compliant payment notice not later than 5 days after the payment due date and, on CAR's analysis, it did not do so. Thus, the requirements of subsection 110B(1) are satisfied and, thus, s.110B applies.

54. Subsection 110B(2) allows the payee in such a case to give a s.110A(3) compliant notice "at any time after the date on which the payment notice was required to be given". This, however, is expressly made subject to subsection (4).

55. Subsection (4) applies where, as here, the contract permits or requires the payee to give an advance payment notification and the payee does so. In such a case 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)".

56. It is common ground that this subsection does apply in this case. The key question is: what is the date (or deemed date) of such a notice?

57. Mr Mort's submission is that subsections 110B(4) and 111(5)(b) read together simply have the effect that the interim payment application is regarded as a payee notice which takes effect as such on the date when it was in fact sent.

58. Mr Arnold's submission is that because subsection 110B(2) only permits a payee notice to be given "at any time *after* the date on which" the payer's payment notice must be given (i.e. five days after the payment due date), it follows that the "deemed" notice under subsection 110B(4) must be regarded as having been given no earlier than after five days after the payment due date. His submission is that, since unless and until that date arrives and the payer fails to serve a valid payment notice, it is unknown as to whether or not the interim payment application will or will not become a deemed payee notice, it must follow that it is only on that date that it can become an effective payless notice.

59. Whilst ingenious, in my judgment there are two reasons why Mr Arnold's submission is wrong.

60. The first reason is that there is nothing in the express wording of these clauses which dictates such a conclusion. They do not say that the notice is either *deemed* to have become a payment notice or treated as having been given six days after the payment due date. They simply say that the notice is to be *regarded* as being a section 110A(3) notice and that a payless notice must not be given *before* the date of such notice. As a matter of literal interpretation this does not state that the interim payment application given on [X] date is to be later transmuted into a payee payment notice given on [Y] date; it simply: (a) provides that the interim payment application given on [X] date is to be regarded as a payee payment notice; and (b) requires that any payless notice is not to be given before the same [X] date.

61. The second reason is that there is no compelling reason in my judgment which requires this provision to be read in the way contended for by Mr Arnold because that reading is plainly consistent with its intended purpose whereas the literal reading is not. Whilst it is true that the interim payment application will only become a payment notice after the time for the payer to give a payment notice has elapsed, there is no compelling reason why it should have been intended that the payer should be unable to give a payless notice before that date.

62. After all, the payer may be perfectly happy with the interim payment application as such, but may also wish to make a specific deduction from the valuation in his payless notice. Why should the payer not be perfectly free to do so at any time after receiving a valid interim payment application? The reason why a payless notice should not be given before the interim payment application is given is fairly obvious, because otherwise there would be no known sum from which a deduction could be made.

63. By contrast, there is no logical reason why a payless notice should not be given before the time for giving a payment notice has elapsed. As is apparent from the description in the Act (and in the subcontract), and as is considered further below, there is no difference of substance between the content of a payment notice and a payless notice. Thus, the decision whether or not to serve a payment notice <u>and</u> a payless notice, or just to serve only one or the other, rests entirely with the payer. Its choice does not prejudice the payee one way or another. Indeed, if the payer had to wait until the interim payment application was deemed to have become a payee notice, that would potentially prevent the payee from obtaining an earlier payment of the amount which the payer included in its payless notice. Given that the object of the Act was to improve cashflow that would be an odd result. Further, it would surely also increase the risk of the payer being required, but failing, to serve the payless notice in what may well be a very narrow time window. There is no compelling reason in my view to adopt an interpretation which has such unhelpful consequences to one or other of the parties.

64. Finally, as Mr Mort submits, whilst it is possible (albeit unlikely in the real world) that the payer would serve a payless notice and then change its mind and serve a later payment notice, followed (perhaps) by a second and different payless notice, by doing so it does not obtain any obvious advantage. In particular, doing so does not extend the time for the payless notice to be served or otherwise place the payee in any worse position that if the payer had simply exercised his rights to serve a payment notice on the last day for doing so anyway. If the payer was ever to adopt this course, an adjudicator and/or the court might have to decide whether or not it was permissible to do so, probably by reference to well-established principles relating to estoppel, but any uncertainty in this hypothetical scenario is not in my judgment a compelling reason to reach a different interpretation.

65. In the circumstances, I am satisfied that Placefirst's payless notice given on 31 July 2024 was a valid payless notice.

Issue 2 - Did Placefirst give a payment notice on 31 July 2024?

66. It is a curious feature of the Act in its amended form that the substance of what is required to be contained in a payment notice and what is required to be contained in a payless notice is precisely the same. Although the Act introduces the concept of a "notified sum" (s.111(2)) as being, in effect, the amount specified in a payer or payee payment notice, and identifies what is colloquially referred to as a payless notice as "a notice of intention to pay less than the notified sum", in fact both a payment notice and a payless notice are required to do the same thing, i.e. to state the sum that the payer or payee considers to be due and the basis on which that sum is calculated.

67. It follows that if, as commonly occurs, they both include the valuation of the works at the relevant date and any deductions to be made from that valuation, they can be precisely the same in their content. A payment notice and a payless notice can both include a valuation of the works and deductions from that valuation and both, therefore, will be perfectly effective to achieve the payer's overall purpose and will comply with the requirements of the Act if they do so. In short, under the Act as amended there is no need to serve both a payment notice and a payless notice.

68. Nonetheless, it appears to be the case that one notice cannot operate as a payment notice and as a payless notice. This is the conclusion reached by Sir Peter Coulson (writing extra-judicially) in *Construction Adjudication* at paragraph 3.28, where he identifies the fifth critical element of the amended Act as being that: "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". (In referring to serving both a payer's notice and a payless notice I do not read him 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.) There appears to be no judicial determination on this point (as I noted in paragraph 33 of my judgment in *Lidl v 3CL* [2023] EWHC 2243 (TCC)), however this extra-judicial observation commands respect and, in my respectful view, is correct. The contrary has not been argued by Mr Mort before me. I therefore proceed on this basis.

69. Equally, however, as Mr Mort submitted, there is no reason in principle why a payment notice and a payless notice cannot be served at the same time under cover of the same letter or email or other communication.

70. Although Mr Mort submitted (out of an abundance of caution) that in this case the payment notice comprised *either* the email itself, *or* the email read with the summary worksheet *or* with the sub-contractor payment certificate, *or* the summary worksheet by itself, *or* the sub-

contractor payment certificate worksheet by itself, it seems to me that his best case is plainly that it was the sub-contract payment certificate worksheet which, read in the context of these other communications, comprised the payment notice.

71. Mr Arnold properly and correctly accepted that there was no basis for saying that the content of the sub-contract payment certificate worksheet did not comply with what is required by the Act and the contract.

72. Mr Arnold's submission was that the worksheet could not objectively have been intended and understood as a payment notice for a number of reasons, specifically that: (a) it did not describe itself as a payment notice (unlike the payless notice, which did describe itself as such) nor did it refer to the relevant section of the Act or clause of the subcontract providing for the giving of a payment notice (or the relevant paragraph of the Scheme - as the payless notice did, albeit incorrectly as the Scheme did not in fact apply) ; (b) instead, it described itself as a subcontract payment certificate, in circumstances where there is no such animal in the subcontract (even if there is the notice given by a specified person in s.110A(2)(b), which is what a certificate would be if the contract made provision for certificates); (c) it did not read as a payment notice, because it did not state the sum that Placefirst considered due at the payment due date; (d) it was not objectively intended to have an existence or function independent of the payless notice, since it was expressly described in the email as "valuation 30 to support" the payless notice and since it was expressly identified in the payless notice as being "enclosed for your information".

73. In conclusion, he submitted that it amounted no more than one worksheet in the excel workbook which: (a) provided more detail to support the payless notice; and (b) comprised no more than an internal authorisation in relation to the amount stated to be payable under the payless notice.

74. Mr Mort's submission was that: (a) it was plain from the email that Placefirst intended to submit and did submit two separate documents, one being a payless notice and the other being a valuation; (b) the worksheet was, in form and in substance, a valuation such as one would expect to see in a payment notice.

75. He submitted that there is no requirement that the communication in question needed to be expressly described as a payment notice, either on its face or in any covering or accompanying document, or to refer to the term of the subcontract under which it was intended to be sent. He submitted that: (a) anyone with familiarity with the terms of the subcontract and the payment provisions of the Act, and with familiarity with the administrative processes for interim applications, valuations and payments in construction contracts (including, therefore, both of the parties to this subcontract) would have known that, whilst there was no provision for a "certificate", there was provision for a payment notice, and that colloquially both were in substance the same thing; with (b) the only difference here being that the valuation and payment notice was intended to be certified by Placefirst's quantity surveyor and commercial director / manager rather than an independent contract administrator.

76. He also noted that the worksheet identified itself as a valuation ("val 30") with the date of 31 July 2024 being the contract interim valuation date and the payment due date of 28 August 2024 as being the final date for payment under the subcontract, and ended with the words "amount now due". He submitted that it thus followed that the worksheet was intended to have a contractual status separate and distinct from the payless notice, and which realistically could only have intended to be as a payment notice.

77. Further, addressing Mr Arnold's focus on the descriptors in the email and payless notice, he submitted that these were not inconsistent with the worksheet being a payment notice in its own right, as well as to "support" and provide "information" in relation to the payless notice,

in the sense that it did provide further detail to support the payless notice as well as amounting to a payment notice in its own right.

78. Finally, in support of his case that payment notices and certificates are essentially the same things, Mr Mort relied upon footnote 9 to paragraph 70 of the first instance decision in Grove, in which Coulson J noted that: "The older cases talk about certificates, because that was the method by which the financial relationship between the employer and the contractor was regulated. Now, largely due to the 1996 Act, the standard forms of contract focus instead on notices and applications. But there is no essential difference: they are simply the means by which interim payments (and the final payment) are made."

79. Before reaching my decision, I should also record that Mr Arnold made a number of further submissions which in my view did not add anything to his primary case.

80. First, he submitted that it was necessary for a communication to be a valid payment notice that it identified the sum the payer considered to be due at the due date, whereas the subcontract payment certificate did not state that this was its purpose and identified the valuation date as 31 July rather than 16 August. However, I am satisfied that there is no requirement that a payment notice has to state expressly that the sum stated was that which the payer considered due *at the due date*. In that respect, as Mr Mort submitted, in this case (as indeed in most cases) any valuation conducted by a payer is, in the same way as the preceding valuation conducted by the payee in an interim payment application, conducted as at the valuation date, even though the due date is a later date, so that it would be not only surprising but pointless for these to be an express requirement that it should state that it was considered due at a different later date. Finally, I also accept Mr Mort's submission that even if it ought to have stated that it had been conducted to a different date, its failure to do so would not affect its intended purpose or its essential validity.

81. Second, Mr Arnold submitted that the gross valuation could not under the terms of the subcontract include deductions such as loss and expense and, hence, the valuation in this case could not have been intended as a payment notice. However, as to this, as Mr Mort submitted: (a) in this case the contract specifically allowed deductions to be made from the gross valuation, including loss and expense, even if strictly speaking these could not have been included unless agreed in the unamended JCT contract; (b) in any event, and even if they were wrongly included, that would not affect its essential validity, especially given the remedy afforded to payees under a relevant construction contract of immediate reference to adjudication of any dispute as to the amount included in any payment notice.

82. Third, Mr Arnold submitted that a payment notice could not state a negative sum due and, thus, again the worksheet could not have been intended as a payment notice. However, again, in my view there is no express prohibition on a payment notice being in a negative sum (regardless of whether that would create a contractual obligation on the payee to pay that amount). The reference to it being in a zero sum in the contract and the Act is plainly intended to make clear that the notice provisions must be complied with, even if the payer claims that the amount due is zero, and the same is plainly the case even if the payer contends that there is a negative sum due to it and, again, in my view stating a negative sum rather than a zero sum cannot affect the essential validity of the notice.

83. Finally, Mr Arnold referred to the evidence from the contemporaneous correspondence that the format used by Placefirst in this interim payment cycle was similar to that used in previous cycles, whereas after this cycle the format changed, and also to the evidence that in the communications following the 31 July 2024 email CAR referred to it as a payless notice without contradiction from Placefirst. However, since Mr Arnold also confirmed (in my view plainly correctly) that there was no basis for alleging any estoppel arising from the previous submissions and since, as Mr Mort submitted, it is difficult if not impossible to reach any firm

conclusions on what either party actually believed from the subsequent communications, which would be irrelevant anyway to the proper interpretation of the communications when sent and received, I do not consider that these points are relevant.

84. Thus, I return to the essential issue.

85. After consideration, I am satisfied that on balance Mr Mort's submissions are to be preferred for, essentially, the reasons he gave. In short, sending a payless notice and a separate document which: (i) is described as a valuation and a subcontract payment certificate; and (ii) is plainly intended to have a formal effect under the contract separate from the payless notice; and (iii) does amount in substance to a payment notice; and which (iv) is not obviously purely subsidiary to the payless notice, does, in my judgment, when read in the context of the Act and the subcontract and the context of how interim payments are commonly dealt with, make sufficiently clear on an objective analysis that it was intended to be a payment notice, separate and distinct from the payless notice with which it was sent.

86. Whilst I note that in some of the cases it is suggested that there must be no room for reasonable doubt as to whether the notice was intended to be a contractual notice of the nature contended for by its sender, by reference to the points made above I do not think that there was room for any such reasonable doubt on an objective basis in this case.

87. Finally, it is worth observing that in my view there is an inevitable element of inter-relationship between issues 1 and 2 in a case such as this. If the essential question is whether the subcontract payment certificate was, objectively, intended to be sent and understood as being a payment notice, then it may be a relevant consideration whether or not, on a proper interpretation of the subcontract and the Act, it was necessary to serve both.

88. If, it was unnecessary to do so, because it was necessary only to serve a valid payless notice, and the payless notice served in this case was, on a proper analysis of the requirements of the Act, a valid payless notice, then that might well be a factor militating against it being construed objectively as a payment notice in a case where its interpretation is uncertain. Conversely, if the payless notice was invalid because it was sent before the date when, on a proper analysis of the Act, it could have been sent, that might fortify the conclusion that the subcontract payment certificate was intended to have separate contractual effect as a payment notice.

89. In short, it seems to me that it would be an unfortunate outcome in a case such as this if a contractor who sent two communications, both of which were in substance effective as payment notices or payless notices, had to be treated as ineffective, because one was not properly described and the other was sent too late, due to the complexity of the Act and (in my view) an unduly legalistic interpretation of its requirements. I am happy to be able to reach a conclusion which does not have that effect.