Case No: HT-2015-000207
Neutral Citation Number: [2015] EWHC 1855 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29 June 2015

Before:

MR JUSTICE COULSON

- -

Between:

CALEDONIAN MODULAR LTD **Cla**

- and –

MAR CITY DEVELOPMENTS LTD **Defe**

- -

- -

Mr William Webb (instructed by **Hawkswell Kilvington Ltd**) for the **Claimant**

Mr Christopher Lewis (instructed by **Fenwick Elliott LLP**) for the **Defendant**

Hearing Date: 19 June 2015

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Judgment

Mr Justice Coulson:

1. INTRODUCTION

1.
Pursuant to a Letter of Intent dated 19 December 2013 and subsequently amended on 11 February 2014, the defendant engaged the claimant to carry out extensive construction works at a site at Greenpoint, in Colindale, North London. Following the non-payment of interim application 12, in November 2014, the claimant subsequently suspended works at the site, although those works were already largely completed.

2.
The non-payment of interim application 12 gave rise to the first adjudication between the parties. By a written decision dated 11 March 2015, the well-known adjudicator, Mr John Riches, decided that the total sum of £642,394.23 was due from the defendant to the claimant. This amount included interest, late payment compensation, and his fees and expenses. The defendant made two stage payments of £100,000 each in respect of that decision but failed to pay the balance, namely £442,394.23.

3.

Subsequently, in March 2015, the claimant said that the defendant had again failed to pay sums due under the contract. That dispute was also referred to Mr Riches. In that second adjudication, by a decision in writing dated 1 May 2015, he again found for the claimant, and decided that the net sum of £908,695.61 (having taken into account the balance outstanding on adjudication 1) was due from the defendant to the claimant. Again this amount included interest, late payment compensation and the adjudicator's fees and expenses.

4.
The defendant does not deny that the balance due in respect of the first adjudication decision, namely £442,394.23, is due and payable to the claimant. It was admitted as such in the defendant's defence in these proceedings. Accordingly, at the hearing on 19 June 2015, the parties agreed – and I ordered – that the total sum of **£452,555** inclusive of interest, was due from the defendant to the claimant in respect of the claim arising out of that first adjudication.

5.
In respect of the second adjudication, the defendant denies liability for any part of the amount awarded by the adjudicator. The adjudicator's decision of 1 May turned on the date on which the claimant had notified the defendant of the sum due. On the claimant's case, the relevant application was made on 13 February 2015. If that was right, it was common ground that the defendant's payless notice of 25 March 2015 was out of time and invalid. But the defendant said that the documents of 13 February were not a claim for or notice of the sum due for payment, and that the claimant's claim was not made until 19 March 2015. On that basis, it was common ground that the payless notice of 25 March was within time and provided a complete defence to the claim.

6.
The claimant now seeks to enforce the decision in the second adjudication. The defendant resists enforcement, maintaining that the adjudicator was wrong and arguing that, since the issue between the parties is a short point of construction, the court could grant a final declaration as to the status of the documents of 13 February as part of these enforcement proceedings. There is a counterclaim to that effect. Following the crisp submissions of both counsel at the hearing on 19 June, I reserved judgment, with the promise that I would endeavour to provide the answer as soon as I could.

2. THE CONTRACT

7.
It was common ground that the Letter of Intent was intended to have contractual effect and was therefore a construction contract within the meaning of the Housing Grants (Construction and Regeneration) Act 1996, as amended. It was also common ground that, because the Letter of Intent did not include for any express payment provisions, nor any express agreement to adjudicate, the Scheme for Construction Contracts, as amended, was implied into the contract.

8.
The relevant sections of the 1996 Act, as amended by the Local Democracy Economic Development and Construction Act 2009, provide as follows:

"**110A Payment notices: contractual requirements**

(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 contact 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.

110B Payment notices: payee’s notice in default of payer’s notice

(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 sub-section (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 notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

111 Requirement to pay notified sum

(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 a period as the parties may agree, or

b)
In the absence of such agreement, the period provided by the Scheme for Construction Contracts."

9.
The relevant parts of the Scheme were as follows:

"Part II

Payment

Entitlement to and amount of stage payments

1. Where the parties to a relevant construction contract fail to agree -

(a) the amount of any instalment or stage or periodic payment for any work under the contract,

(b) the intervals at which, or circumstances in which, such payments become due under that contract, or

(c) both of the matters mentioned in sub-paragraphs (a) and (b) above, the relevant provisions of paragraphs 2-4 below shall apply.

2(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with paragraph (3).

…

Dates for payment

…

4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later –

(a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or

(b) the making of a claim by the payee…

Interpretation

12. In this Part of the Scheme for Construction Contracts –

'Claim by the payee' means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated…

'Relevant period' means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days…"

3. PROCEDURE

10.

As noted, the issue before me at the hearing on 19 June concerned the legal effect of the documents sent by the claimant to the defendant on 13 February 2015. I accept the proposition that, in order to reach a conclusion on that question, I must have regard to both the contractual terms and the factual context in which those documents were sent. Authority for that proposition, if it is required, can be found in the decision of Lord MacFadyen in **Maxi Construction Management Ltd v Mortons Rolls Ltd**[2001] CILL 1784-1787; (2001) Scot (D) 12/8.

11.
However, a more fundamental question of procedure could be said to arise here. It may be asked: why is the judge dealing on enforcement with an issue which has already been decided by the adjudicator? Surely, in accordance with **Bouygues (UK)Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522, and the myriad cases thereafter, it is not open to a defendant to seek to avoid payment of a sum found due by an adjudicator, by raising the very issue on which the adjudicator ruled against the defendant in the adjudication?

12.
That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration. That is what happened, for example, in **Geoffrey Osborne v Atkins Rail Ltd** [2010] BLR 363. It is envisaged at paragraph 9.4.3 of the TCC Guide that separate Part 8 proceedings will not always be required in order for such an issue to be decided at the enforcement hearing.

13.
It needs to be emphasised that this procedure will rarely be used, because it is very uncommon for the point at issue to be capable of being so confined. But in the present case, it is common ground that the proper meaning and interpretation of the documents of 13 February is a straightforward matter for the court. No other evidence of any kind is required. It is also common ground that, if the adjudicator was wrong, and those documents do not constitute a proper claim for payment or a payee's notice, then the defendant's payless notice was valid and there is no entitlement to summary judgment. Accordingly, this is one of those rare cases where the substantive point in issue can be determined at the enforcement hearing. During the course of his clear submissions on the substantive issues, Mr Webb properly did not suggest to the contrary.

4. THE RELEVANT FACTUAL BACKGROUND

14.
The claimant's interim applications 1-14 inclusive all followed the same format. They were accompanied by a letter which attached the detail of the interim application and set out the total amount due, the amount previously certified, and the net payment due. The letter also identified the date on which a payment notice was to be received by the claimant (from the defendant) and the date for final payment. The interim applications were made towards the end of each successive calendar month.

15.
The document attached to the letter was called an 'application summary'. In addition to providing a detailed breakdown of the sums, it also identified the 'change in the amount due', in other words the net sum being claimed in this application. The detail made plain that it was based on monthly evaluations 'in line with JCT standard terms of contract' and was 'based upon 28 day payment terms'.

16.
On 30 January 2015, the claimant issued application for payment number 15. This was in the same form as all the previous applications. It identified the total sum due at £7,086,412.91 less the total sum previously paid of £5,568,152.79, giving a net payment due of £1,518,260.12. It identified the date for the relevant payment notice as 5 February 2015 and the final date for payment as 28 February 2015. The attached application summary was also entirely consistent with what had previously been supplied.

17.
On 5 February 2015, Mr Gareth Waton, the senior surveyor with the defendant, emailed Mr James Stimpson, a senior QS with the claimant, enclosing a number of documents, comprising "our certification, payless notification and supporting documentation". The defendant's payless notice identified very different figures from those claimed by the claimant in application 15, which left a sum due from the defendant to the claimant of just £6,317.07. There is no dispute that this was a valid payless notice, and it had the effect of all but wiping out the sum claimed by the claimant in application 15.

18.
On 12 February 2015, Mr Terry Saunders, the defendant's commercial manager, sent Mr Stimpson an email concerned with the ongoing negotiations between the parties as to the value of the claimant's final account and, in particular, the value of certain variations claimed in respect of Combisafe, a system which provides edge protection for scaffolding. The email also noted that the defendant had taken over the hire of the Combisafe equipment as from 9 February. It went on:

"Please find attached a document detailing my figures deemed acceptable for the Variation Items 20,31,33,36 – This is strictly in regards exclusively to Final Account negotiations with Peter Martin and Stephen Wightman…

I believe Variations 20,31,33,36 to be worth a total value of £125,792.87 less retention in direct comparison to your valuation and application of £261,216.04 – Variance of (£135,423.17)"

These four variations were all connected with the Combisafe system.

19.
On the following day, 13 February, Mr Stimpson replied to Mr Saunders, arguing about the value of the Combisafe variations. The email acknowledged that the defendant had taken over the direct hire direct of the Combisafe edge protection from 9 February 2015 but did not accept Mr Saunders' valuation of the relevant variations. The email concluded:

"Given your interim assessment below, please amend/update the current payment notice issued by Gareth [Waton] to take into account the interim assessed figure for the Combisafe hire of £125,792.87.

We ask that you review the instruction given on the variation 020 as issued and we have updated our account as attached."

It is this email, together with its attachments, which is now said by the claimant to amount to a new claim for an interim payment (no 16) and/or a payee's notice to the same effect.

20.

The email enclosed three documents. The first was entitled “Greenpoint Colindale Final Account updated 13/2/2015”. This document set out exactly the same figures as interim application 15 of a few days previously, but with the addition of what was described as variation 39, described as “extra over extended Combisafe hire from 31/01/15 to PC date 8th February 2015 £6,643.”

21.
The second was a breakdown document in similar form to that attached to the previous interim applications, but with the words “Final Account” added immediately before the words “Application Summary”. It still bore the words ‘Application number 15’. Whereas the original application 15 had said that the change in the amount due was £1,518,260.12, this document said that the change in the amount due was £1,524,903.37. The increase was £6,643, the amount of the extra over for the Combisafe hire referred to in the previous paragraph. The rest of the document was in the same form as before with, amongst other things, the reference to it being based upon 28 day payment terms.

22.
The third document attached to this email was entitled “Variations to works after CSA Revision 10 December 2013”. It included as variation 39 the Combisafe hire extra over in the sum of £6,643.25. That was the only change. There was no document identifying a claim for £125,792.87 (the amount the defendant had indicated in respect of the Combisafe variations), a point that becomes relevant below.

23.
On 16 February 2015 Mr Martin, the development director of the defendant, emailed Mr Wightman of the claimant to refute in its entirety the claim in respect of the variations regarding Combisafe. As the earlier email from the defendant had indicated, these were the two men dealing with the final account negotiations.

24.
On the same day, Mr Saunders received by registered post the same three documents attached to the claimant’s email of 13 February (paragraphs 20-22 above). He was puzzled as to what they were, so he asked Mr Hudson, the claimant’s commercial director, by email: “Can you confirm who this was sent by and to what it pertains in regards to the standing of the account, is it just an update for information only?”

25.
Mr Hudson did not know the answers, because he sent a holding email to Mr Saunders saying he would look into it and get back to him. Four days later, on 20 February, he replied to say this:

“Re: posted update of the account, there is nothing in the paperfile but I can see from looking at the e-file that James [Stimpson] did an update on the upstream fa and appln as a result of the change of proprietary scaffold dates – previous summary went past 8th”

26.
Nothing further happened until 19 March 2015 when the claimant sent the defendant five different invoices. The invoice relating to Greenpoint Colindale was dated 19 March 2015, in the sum of £1,524,903.37. Attached was a breakdown, which was a copy of the ‘Final Account Application Summary’ sent on 13February (paragraph 21 above). The figures were precisely the same. A week later, on 26 March 2015, the defendant responded to that invoice and breakdown, attaching a payless notice, breakdown and supporting documents. It is common ground that, if that was a valid payless

notice, after taking into account the sum due in consequence of adjudication 1, no further sum was due from the defendant to the claimant.

5. ADJUDICATION No 2

27.
The claimant pursued the claim in the invoice of 19 March. It was their case that this was a default notice and that their original interim payment claim had been made on 13 February 2015. If that argument was right, then the payless notice of 26 March 2015 was out of time. The defendant, who represented themselves in the second adjudication, argued that the documents of 13 February 2015 were not, and did not purport to be, a valid application for payment.

28.
The adjudicator decided this point against the defendant. By now, the claimant was referring to the documents of 13 February 2015 as application for payment number 16, saying that the reference to application 15 on its face was an error. At page 19 of his decision the adjudicator found that the documents of 13 February were a valid application for payment. His reasons were expressed as follows:

“40. I accept that this Application for Payment was early. It is common ground that the payment cycle is 28 days and this Application was made only 13 days after the previous Application.

41. Caledonian says it did not receive any Payment Notice in respect of this Application and on the 19th March 2015 it issued a Default Notice in the form of an invoice with an accompanying copy of the Application for Payment dated 13 February 2015.

42. The invoice itself referred to Application number 16 and the supporting documentation was still headed Application number 15.

43. On 26th March 2015 Mar City issued a Payless Notice. The covering letter sought to unravel the discrepancies on dates of application numbers.

44. I cannot see how Mar City can argue here that the Application was not valid because it was issued too early when they treated it as a valid application and issued a Payless Notice against it.”

29.
Now, in consequence of the procedure to which I have referred in **Section 3** above, the same issue falls for my decision on this application to enforce the adjudicator’s decision.

6. WERE THE DOCUMENTS SENT OF 13 FEBRUARY 2015 A VALID APPLICATION FOR INTERIM PAYMENT?

30.
I have no hesitation in concluding that the documents sent on 13 February 2015 were **not** an application for an interim payment or a valid payee’s notice. I find that, following application number 15 on 30 January, which was the subject of a valid payless notice (see paragraph 16 above), the claimant’s next application for an interim payment was made by the invoice and supporting documents served on 19 March 2015. That too was the subject of a valid payless notice. Accordingly, there was no valid application for payment by the claimant, and/or no payee’s notice, that was not the subject of an equally valid payless notice. The reasons for that conclusion are set out below.

31.

First, neither the covering email of 13 February 2015, nor the three documents enclosed with it, stated that they were a new application for an interim payment. The documents said variously that they were a ‘final account application summary’ and an ‘updated account’. The interim application number itself (15) was the same as the one which had been the subject of a valid payless notice served just 8 days before, on 5 February.

32.
Secondly, the invoice of 19 March 2015 did not say that it was in some way a default payment notice or that the payee’s notice had originally been provided on 13 February 2015. If that had been the claimant’s position, they would have said so in clear terms.

33.
Thirdly, in between the email of 13 February and the invoice of 19 March, the defendant expressly asked the claimant what the 13 February documents were. Entirely unsurprisingly, the defendant was confused as to what, if anything, they were supposed to do with those documents. I have set out the critical part of the response of 20 February in paragraph 25 above. That purported explanation does not begin to suggest that the documents of 13 February were in fact an entirely new interim application 16, or that a fresh claim had been made less than a fortnight after the last, in the middle of the month and not at the month’s end.

34.
Accordingly, in all three documents where the claimant had the opportunity to say clearly that these documents were what they now say they were, namely a new application for an interim payment and/or a payee’s notice, the claimant failed to do so. I consider that this omission is significant. It suggests that the claimant’s case now, that the documents were in fact a fresh claim, is something of an afterthought. The only other alternative is that the claimant believed that it was in its best interests to be studiedly vague about the nature of the documents, so as to set up precisely the argument they advanced successfully in the adjudication. On any view, if they intended to serve a valid payee’s notice on 13 February, they could and should have said that that was what they were doing. They were even asked a question which, if that had indeed been their intention, required only that simple answer. It was not provided.

35.
It is also important to remember that the claimant’s alleged entitlement to be paid £1.5 million odd as a result of the second adjudication does not stem from the underlying merits of their claim. Those have not been considered by the adjudicator. The alleged entitlement only arises because, if the documents of 13 February 2015 were indeed a fresh claim, no payless notice was issued in time, so the sum falls due automatically.

36.
One of the more baleful effects of the amendments to the 1996 Act has been a large increase in the number of cases before adjudicators (and thus before the TCC), in which the claimant contractor argues that the employer failed to serve its notices on time, and that therefore there was an automatic right to payment in full of the sum claimed. Although similar provisions existed in the 1996 Act, it is only since the amendments, with their emphasis on the sum being notified as the sum now due, that this point has become such a bone of contention.

37.
In the UK (unlike other jurisdictions with mandatory construction adjudication, such as Malaysia) the employer’s failure to serve a payless notice within a short period challenging the payee’s notice can

have draconian consequences. A failure to serve a notice in time will usually mean a full liability to pay. That is what the run of recent TCC cases on this topic, including **ISG v Seevic College**[2014] EWHC 4007 (TCC) and **Galliford Try Building Ltd v Estura Ltd**[2015] EWHC 412 (TCC), are all about. But it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place.

38.
In this case, all of the claimant's previous applications for interim payments, 1-15 inclusive, properly set out the sum due by way of interim payment. It was not therefore as if the claimant did not know how to meet the basic requirement of clarity. But on 13 February, they did not say, clearly or at all, that they were making a fresh application for an interim payment. Moreover, when asked what the documents were, they did not say that they amounted to a fresh claim for an interim payment or a payee's notice. It would therefore be quite wrong now to treat the documents of 13 February as if they were.

39.
The lack of any express claim for an interim payment, and the absence of anything within them that could amount to a payee's notice, explain why I reject the claimant's case as to the meaning and effect of the documents of 13 February (paragraphs 31-33 above). But there are other, free-standing reasons for my conclusion.

40.
First, I consider that it is a fair inference that the documents of 13 and 20 February 2015 did not say that this was a further application for interim payment because that is not how the claimant themselves viewed those documents at the time (see paragraph 34 above). By 13 February, they would have known that they had just made a claim for £1.5 million by way of interim application 15, which had been the subject of a valid payless notice. So all they were doing in these documents, all they could do, was arguing about the Combisafe variations and updating the overall value of their final account by reference to the additional Combisafe hire claim, worth just over £6,000.

41.
That this was an update of the final account, and not a new claim for an interim payment, or a new payee's notice, was confirmed by the claimant themselves, first in the covering email of 13 February ("we have updated our account as attached") and second in the email of 20 February, when the claimant described the three documents emailed on 13 February and sent by post as the "posted update of the account".

42.
Mr Webb argued that, even if this was an update and not a fresh application, it did not matter, because it was still a claim for a payment due. I disagree with that, not only on the basis of the words used (see above), but also because of the background: the final account negotiations that were ongoing between the parties in February. In such circumstances, it is quite common for the contractor's account to be regularly updated as part of those discussions, but that does not mean that each update is a new claim for an interim payment.

43.

In order to make good his argument that the 13 February documents were a claim for payment, Mr Webb expressly relied on the earlier part of the covering email of 13 February, which asked the defendant to “amend/update the current payment notice issued by Gareth”. As he put it at paragraph 31(iii) of his skeleton argument, “an amended or updated payment notice was being sought. There is no reason for stating this unless more money is being requested by the claimant”.

44.
But I consider that this submission is based on a misunderstanding. It ignores the fact that what the claimant was asking to be amended/updated here was not their application or their payee’s notice of 30 January, but the “notice issued by Gareth” [Waton]. That was the defendant’s payless notice of 5 February. In other words, the claimant was saying that, if the defendant was accepting a figure of £125,000 odd for the Combisafe variations, that figure should be added to the sum of £6,317 odd which the defendant accepted was due in that payless notice. That of course ignored the fact that the £125,000 figure was a part of the separate final account discussions, and was in any event the subject of Mr Martin’s uncompromising rejection of 16 February (paragraph 23 above). But the important point for present purposes is that, contrary to Mr Webb’s submission, what was sought was not an update of the claimant’s claim/notice, but a disputed attempt somehow to increase the sum admitted in the payee’s notice. That attempt was not further pursued and was not the claim in the second adjudication.

45.
Secondly, any suggestion that the documents of 13 February constituted interim application 16 would be wrong on the facts and wrong in law. It is wrong in fact for the reasons already noted, and because the document was still called application 15 when it was sent out on 13 February. This was not a typographical error, because no-one would have anticipated application 16 until at least the end of February. It was never in fact called application 16 until 19 March and, when it was, it was met with a valid payless notice.

46.
And it is wrong in law, because interim application 15 had been provided only a fortnight before 13 February, and had been the subject of a valid payless notice. No further interim application could validly be made here until the end of February, in accordance with the 28-day cycle that the parties had agreed and followed. If (which I reject for the reasons already noted) the 13 February documents were otherwise a valid claim for an interim payment, I do not accept that such a claim could be made ‘early’, without at the very least that fact being expressly drawn to the defendant’s attention.

47.
Thirdly, I consider that the suggestion that the documents of 13 February give rise to an undisputed entitlement to over £1.5 million defies common sense, and would be contrary to the purpose of the notice provisions in the 1996 Act. It is simply not permissible for a contractor to make a claim for £1.5 million (interim application 15 on 30 January); to have it knocked back through the payless notice mechanism; to update that same claim 8 days later by adding one small variation worth £6,000; and then, by reason of that update alone, miraculously to become entitled to the £1.5 million, despite the fact that the claim for the vast bulk of that sum had already been the subject of the valid payless notice.

48.
Such a sequence would make a mockery of the notice provisions under the Act and the Scheme. It would encourage a contractor to make fresh claims every few days in the hope that, at some stage,

the employer or his agent will take his eye off the ball and fail to serve a valid payless notice, thus entitling the contractor to a wholly undeserved windfall. The whole purpose of the Act and the Scheme is to create an atmosphere in which the parties to a construction contract are not always at loggerheads. I consider that the claimant's approach would achieve the opposite result.

49.
Finally, for completeness, I should say that, in my view, the adjudicator did not address any of these issues in his decision. He kept referring to the documents of 13 February as Application for Payment number 16 without explaining how or why that could be right. He agreed that it was 'early' but failed to deal with the consequences of an application for the same amount (plus £6,000) being made just 13 days after the last application, and just 8 days after a valid payless notice. In fact, he failed to deal at all with the making of application for payment number 15 on 30 January, and the payless notice that was served in consequence, which were on any view a critical backdrop to the documents of 13 February.

50.
Most important of all, he did not ask himself the question: were the documents on their face a valid claim for an interim payment or payee's notice? The closest he comes to addressing that issue is at paragraph 44 (set out at paragraph 28 above) but that is wrong as a matter of fact: the defendant never treated the documents of 13 February as a valid application. They issued their payless notices against the application number 15 of 30 January, and the subsequent application made by way of invoice on 19 March; they issued no such notice against the documents of 13 February because they concluded – rightly, as I have found – that that was not a payee's notice or a valid application for interim payment.

51.
Accordingly, for these reasons, I am in no doubt that the documents of 13 February did not constitute a fresh application for an interim payment, or a valid payee's notice. Since it is common ground that, if there was no valid application on 13 February, both the preceding and the following applications for payment were the subject of legitimate payless notices, no sums in addition to the £452,555 noted in paragraph 4 above, are due from the defendant to the claimant.

52.
I therefore grant a declaration that the documents of 13 February 2015 were not a valid application for an interim payment, or a valid payee's notice. I also declare that the adjudicator was wrong to conclude to the contrary and that no sums are due in consequence of adjudication number 2.

53.
I agreed with counsel that all consequential matters would be for the parties to discuss. If they cannot be agreed then I will deal with them either orally or on paper. I should repeat my thanks to both counsel for the genuine excellence of their written and oral submissions.