

Case No: HT-2016-000306

Neutral Citation Number: [2017] EWHC 17 (TCC)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2017

Before :

MR ALEXANDER NISSEN QC

(sitting as a Deputy High Court Judge)

Between :

SURREY AND SUSSEX HEALTHCARE

NHS TRUST

- and -

LOGAN CONSTRUCTION (SOUTH EAST) LIMITED

Gideon Scott Holland (instructed by **Capsticks**) for the Claimant

Alexander Hickey QC (instructed by **Berwin Leighton Paisner**) for the Defendant

Hearing date: 20 December 2016

Judgment

Mr Alexander Nissen QC:

Introduction

1.

By these proceedings, Surrey and Sussex Healthcare NHS Trust (“the Trust”) seeks declaratory relief pursuant to a Part 8 claim issued against Logan Construction (South East) Limited (“Logan”). The two declarations sought relate respectively to the invalidity of an alleged Interim Payment Notice and the validity of an alleged Pay Less Notice. The Trust failed in its respective contentions before an adjudicator who decided that, as the Interim Payment Notice was valid but that the Pay Less Notice was not, the Trust was liable to pay Logan the sum of £1,015,557.95 plus interest. The parties are agreed that the questions raised by these proceedings are amenable to consideration by the Court by way of a Part 8 claim. By consent, no separate enforcement proceedings were necessary as the Trust has agreed to respect the adjudicator’s decision within 7 days if the Court concluded that its applications for both heads of declaratory relief should fail.

The Contract

2.

The Trust owns and operates the East Surrey Hospital near Redhill in Surrey. Logan is a building contractor. Pursuant to a Building Contract (“the Contract”) in the form of a JCT Intermediate Building Contract with Contractor’s Design 2011 the Trust employed Logan to refurbish various operating theatres, a recovery ward and associated works for the sum of £4,388,000.

3.

The following were express provisions of the Contract:

“4.7 Interim Payments - due dates and certificates

.1 Subject to any agreement between the Parties as to stage payments, the due dates for interim payments by the Employer are:

.1 for the period up to the date of practical completion of the Works, the monthly dates specified in the Contract Particulars;

.2 a date not later than 14 days after the date of practical completion;

.3 thereafter, the specified dates at intervals of 2 months; and

.4 the date of expiry of the Rectification Period or, if later, the date of issue of the certificate of making good (or, where there are Sections, the last such period or certificate).

.2 The Architect/Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate, stating the sum that he considers to be or have been due at the due date to the Contractor in respect of the interim payment, calculated in accordance with clause 4.8, and the basis on which that sum has been calculated.”

“4.10 Contractor’s Interim Applications and Payment Notices

.1 In relation to any interim payment the Contractor may not less than 7 days before the due date make an application to the Quantity Surveyor (an ‘Interim Application’), stating the sum that the Contractor considers will become due to him at the relevant due date in accordance with clause 4.8 and the basis on which that sum has been calculated.

.2 If an Interim Certificate is not issued in accordance with clause 4.7.2, then:

.1 where the Contractor has made an Interim Application in accordance with clause 4.10.1, that application is for the purposes of these Conditions an Interim Payment Notice; or

.2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.7.2 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or have been due to him at the relevant due date in accordance with clause 4.8 and the basis on which that sum has been calculated.”

“4.11 Interim Payments - final date and amount

.1 Subject to clause 4.11.4, the final date for payment of an interim payment shall be 14 days from its due date.

...

.3 If the Interim Certificate is not issued in accordance with clause 4.7.2, but an Interim Payment Notice has been given under clause 4.10, the sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.11.5, be the sum stated as due in the Interim Payment Notice.

.4 Where an Interim Payment Notice is given under clause 4.10.2.2, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after expiry of the 5 day period referred to in clause 4.7.2 that the Interim Payment Notice is given.

.5 If the Employer intends to pay less than the sum stated as due from him in the Interim Certificate or Interim Payment Notice, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.12.1 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice."

"4.12 Pay Less Notices and general provisions

.1 A Pay Less Notice:

.1 (where it is to be given by the Employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated, and may be given on behalf of the Employer by the Architect/Contract Administrator or Quantity Surveyor or by any other person who the Employer notifies the Contractor as being authorised to do so;"

"4.14 Final Certificate and final payment

.1 The Architect/Contract Administrator shall issue the Final Certificate not later than 28 days after whichever of the following occurs last:

.1 the end of the Rectification Period in respect of the Works or (where there are Sections) the last such period to expire;

.2 the date of issue of the certificate of making good under clause 2.31 or (where there are Sections) the last such certificate to be issued; or

.3 the date on which the Architect/Contract Administrator sends to the Contractor copies of the statement and computations of the adjusted Contract Sum under clause 4.3.2.

.2 The Final Certificate shall state:

.1 the Contract Sum as adjusted in accordance with clause 4.3.1; and

.2 the sum of amounts already stated as due in Interim Certificates plus the amount of any advance payment paid pursuant to clause 4.6 and (where relevant) any sums paid in respect of any such Interim Payment Notice as is referred to in clause 4.8,

and (without affecting the rights of the Contractor in respect of any interim payment not paid in full by the Employer by its final date for payment) the final payment shall be the difference (if any) between the two sums, which shall be shown in the Final Certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor, as the case may be. The Final Certificate shall state the basis on which that amount has been calculated.

.3 The due date for the final payment shall be the date of issue of the Final Certificate or, if that certificate is not issued within the 28 day period referred to in clause 4.14.1, the last day of that period and, subject to clause 4.14.6, the final date for payment shall be 28 days from its due date”.

4.

The well known background to the interim payment provisions set out above is that they were introduced in order to comply with the mandatory requirements of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy etc. Act 2009. It is agreed that the contractual provisions are statutorily compliant. In operation, they have the following agreed effect:

(a)

At the times prescribed by the Contract, the Contractor is entitled to make periodic Interim Applications for payment and the Employer is entitled to issue Interim Certificates for payment.

(b)

If the Contractor does not make a valid Interim Application and the Employer does not issue an Interim Certificate, the Contractor can issue an Interim Payment Notice after the fifth day after a due date for an interim payment.

(c)

If no Interim Certificate is issued, the sum stated as due in a valid Interim Payment Notice becomes the sum due to be paid to the Contractor, unless a valid Pay Less Notice is given stating a different sum.

(d)

A valid Pay Less Notice must be issued by the fifth day before the final date for payment, namely 28 days from the due date. That date is postponed by the number of days that an Interim Payment Notice is made after the fifth day after the due date. A Pay Less Notice must state the sum considered to be due to the Contractor at the date of the notice and the basis upon which that sum has been calculated.

5.

This dispute arises because Logan contends that it issued a valid Interim Payment Notice pursuant to Clause 4.10.2.2 in respect of which it says the Trust failed to serve a valid Pay Less Notice. The Trust challenges both of these contentions. The Trust does not dispute the fact that Logan had an accrued contractual right to issue an Interim Payment Notice when it did on 20 September 2016. Equally, Logan does not dispute the fact that the document now relied on as a Pay Less Notice dated 21 September 2016 was served in time if it was in fact a valid Pay Less Notice. Thus, the dispute centres on the content of each document rather than the timing of its issue.

6.

If Logan is right, the sum identified in the Interim Payment Notice, namely £1,015,557.95, automatically became the sum due to it under Clause 4.11.3. The final date for payment of this amount was 29 September 2016. By contrast, if the Trust had issued a valid Pay Less Notice, Logan was entitled to be paid a mere £14,235.43, subject to any substantive adjudication on the correct value of the work.

Factual Background

7.

The works were certified as having been practically completed on 25 August 2015. Logan made no applications for interim payment in the following successive months. However, Interim Certificates were issued every two months as required by the Contract.

8.

Not later than 6 months after practical completion, pursuant to Clause 4.3.1, the Contractor was required to provide the Quantity Surveyor with all documents reasonably required for the adjustment of the Contract Sum. Following practical completion Logan began the process of providing such information but there were issues over its adequacy. Pursuant to Clause 4.3.1, not later than 3 months after receipt of the Contractor's documents, the Quantity Surveyor was required to provide his computation of the adjusted Contract Sum. Accordingly, on 25 May 2016, the Quantity Surveyor named in the Contract, namely Richard Stone of BWA, issued his computation of the adjusted Contract Sum. He said that once Logan had had the opportunity to consider it he would be happy to run through his evaluation. The gross value he allowed was £4,901,308.70.

9.

In June 2016, Logan proffered a new quantity surveyor, Mr Crook, who was tasked with the role of leading the final account discussions with Richard Stone of BWA. There were eight meetings to discuss the final account between Mr Crook and Mr Stone from June to September 2016.

10.

In the meantime, the Certificate of Making Good Defects was issued by Mr Stone on 24 August 2016. This was the same date as the expiry of the Rectification Period. Two consequences flowed from these events. Firstly, the date of expiry of the Rectification Period (or, as is the case here, the issue of the certificate of making good) was the occasion of a due date for another interim payment cycle pursuant to Clause 4.7.1.4. Accordingly, as is common ground, either Logan could have applied for an interim payment no later than seven days beforehand or the Contract Administrator should have issued a Certificate for an interim payment pursuant to Clause 4.7.2. Neither of these things happened. Secondly, the 28 day period for the issue of the Final Certificate under Clause 4.14.1 was triggered. That provision requires the issue of such a Certificate no later than 28 days from the latest of the end of the Rectification Period, the date of issue of the Certificate of Making Good Defects and the date of sending of the statement containing the adjusted Contract Sum which, as I have said, occurred on 25 May 2016. Absent any agreement to extend time, the Final Certificate therefore had to be issued by 21 September 2016.

11.

Against that backdrop, a final account meeting was arranged to take place between Mr Crook and Mr Stone on 21 September 2016. At shortly before midnight on 20 September 2016 Mr Crook sent an email to Mr Stone in the following terms:

"Subject: East Surrey Hospital - Theatre Refurbishment 724 - Account Meeting 21st September 2016

Attachments: ESH 724 - Logan Interim Payment Notice - Valuation No 24 - 20092016.xlsx

Importance: High

Dear Richard,

I hope you had a good break.

Please see the attached ahead of our meeting tomorrow. I look forward to seeing you then.

Kind regards,

Richard.”

12.

One of the worksheets in the attachment to the email was entitled Interim Payment Notice issued with Logan’s logo on it. It contained the following:

“INTERIM PAYMENT NOTICE

(Clause 4.10)

...

Due Date 24 August 2016

Valuation No. 24

Project No. 0724

Re: East Surrey Hospital - Theatres 5-10 remodelling

SERVICE DESCRIPTION

To collection: £5,961,465.46

Less Retention @ 0% (completion of 12 months DLP) £ 0.00

Balance £5,961,465,46

Less Previously Paid (as BWA Interim Certificate Nr 23)

-

main works -£4,887,073.27

Less Previously Paid (as BWA Interim Certificate)

- asbestos works - £48,834.24

Less Previously Paid (as BWA Interim Certificate)

-

Design Co-ordination and Planning for one Phase -£10,000.00

Balance £1,105,557.95”

13.

Another worksheet in that attachment to the email comprised a valuation summary which explained the detailed back up to the gross total fee of £5,961,465.46 which appeared on the worksheet entitled Interim Payment Notice. The valuation summary repeated the due date of 24 August 2016. There were multiple pages which supported the calculation.

14.

Unsurprisingly given its timing, Mr Stone did not have much opportunity to review this email and its attachments before the meeting. He says, and I accept, that he did not appreciate what lay behind the description of the attachment titled “ESH 724 - Logan Interim Payment Notice - Valuation No 24 -

20092016.xlsx". Noting the reference to Valuation No.24, he assumed that the primary purpose of the document was to convey Logan's position in respect of the final account, as Logan had been promising such a document for some time and that was the purpose of the scheduled meeting. The payment in respect of the final account would have been No.24. He did not give any thought to the fact that the attachment included the words "Logan Interim Payment Notice" in its title or that it referred to Clause 4.10. Read on its own, the substantive message in the covering email would certainly have justified the conclusion that the document was to be treated as Logan's position on the final account valuation at the meeting due to take place that morning.

15.

At the meeting, Mr Crook was accompanied by Mr Hart, Logan's senior contracts manager for the project. During the meeting, the final account valuation was discussed at high level. Mr Crook says that he began the meeting by directing Mr Stone to the summary page. Mr Stone accepts that was the case but points out that the summary page did not make any reference to it being an Interim Payment Notice. This is only apparent from the cover sheet (set out above) which appears as a separate tab in the excel document. Mr Stone says, and I accept, that at no time in the meeting was there any discussion about the issuing of an Interim Certificate or that the document issued the night before was intended to be an Interim Payment Notice.

16.

Thereafter, the parties reviewed the one-page valuation summary, the one-page breakdown of loss and expense and the one-page basis for the calculation of uneconomic working. None of the other 100 or so pages were reviewed.

17.

Accordingly, there was no discussion about the fact that Logan had issued a document entitled Interim Payment Notice. Nor was there any request by Mr Crook for the issue of an Interim Certificate. I find that the discussion during the entire meeting was about the final account.

18.

The substantive outcome of the meeting was that the parties were unable to bridge the gap between them. Having regard to the contractual deadline, Mr Stone therefore confirmed that he would issue the Final Certificate later that day based on the adjusted Contract Sum which he had previously identified. This was understood by Mr Crook. The parties also agreed that it would be preferable to mediate the final account dispute rather than for Logan to issue adjudication proceedings in respect of it. Under Clause 1.9 of the Contract, the amount set out in the Final Certificate would be conclusive evidence of the adjusted Contract Sum unless adjudication, arbitration or other proceedings were commenced within 28 days. The proposal was that there should be a standstill agreement in respect of this time limit whilst the parties mediated the issue between them.

19.

As he indicated to Mr Crook that he would, later that day Mr Stone sent out an email which contained the Final Certificate. The email was sent at 18:18 to Mr Chris Limpus of the Trust but was copied to Mr Crook. As I have said, Mr Crook would have been anticipating its issue. It read as follows:

"Subject: Theatre Refurbishment Logan Construction Final Certificate

Attachments: Logan Payment Certificate No24 pdf; Theatre Refurbishment Contract Sum Adjustment
xlsx

Chris,

In accordance with Clause 4.14.1 of the Intermediate Building Contract with contractor's design 2011, I attach the Final Certificate for works undertaken by Logan Construction in connection with the Theatre Refurbishment project. For ease of reference, I also attach a copy of the Adjustment of Contract Sum which was issued on 25 May 2016.

Please note that on 20 September 2016 I received an Interim Payment Notice dated 24 August 2016 from Logan Construction. The last due date for an Interim Payment Notice under Clause 4.7.1.4 of the Building Contract was 24 August and as such the application issued by Logan Construction yesterday is out of date and void. In any event, the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued.

...

Regards

Richard Stone"

20.

As the email had explained, attached was a pdf copy of the Final Certificate for Payment which identified a valuation date of 21 September 2016, instalment no.24 (FINAL) and a gross valuation of £4,901,308.70. After taking into account previously certified sums, the balance certified as payable was £14,235.43. Mr Stone also attached his breakdown of the adjusted Contract Sum which explained the detail of the valuation of £4,901,308.70.

21.

On 23 September 2016, Mr Crook acknowledged receipt of the Final Certificate sent under cover of the email on 21 September 2016. He reminded Mr Stone of the proposed standstill and invited him to clarify the position by 30 September 2016. Mr Stone replied the same day to say that Mr Crook should contact the Trust to discuss the mediation process rather than adjudication.

22.

If Logan's Interim Payment Notice was validly issued on 20 September 2016, it is common ground that the expiry date for service of a Pay Less Notice was 24 September 2016. No communication other than the email of 21 September 2016 was sent before the expiry of this time limit.

23.

On 28 September 2016, Mr Crook emailed Mr Stone to challenge his prior assertion that the Interim Payment Notice was out of date and void. He noted that no Pay Less Notice had been issued by 24 September 2016 and that, for that reason, Logan was expecting to be paid £1,105,557.95.

24.

There were subsequent exchanges in which the consequences of this contention were debated and discussed but it is not necessary to refer to them. On 19 October 2016, Logan issued a Notice of Adjudication claiming payment of the sum set out in the Interim Payment Notice. The Trust defended the claim on the basis it maintains in these proceedings. In a carefully reasoned and thoughtful decision dated 25 November 2016, the adjudicator rejected those defences and upheld Logan's claim. He decided that the Trust should pay Logan the sum of £1,015,557.95 together with interest.

25.

In anticipation of this potential outcome, the Trust issued its Part 8 claim on 11 November 2016.

The First Declaration

26.

The first declaration sought by the Trust is that the attachment to the email from Mr Crook on 20 September 2016 was not issued a valid Interim Payment Notice.

27.

I will briefly summarise the arguments raised by the parties in respect of this issue.

The rival contentions

28.

On the Trust's case, as articulated by Mr Gideon Scott Holland, I should construe the email of 20 September 2016 and its attachments against the factual background which I have summarised above. In particular, I should have regard to the fact that the parties were engaged in a resolution of the final account and that, save for what is apparent on the face of the document itself, there was no reference to or prior discussion about Logan seeking an interim payment. Mr Crook had only ever been involved in the final account process. The email was sent by Mr Crook without drawing attention to the interim payment regime and, instead, diverted the Trust's attention towards the final account meeting. Nothing was said about any interim payment at the meeting on 21 September 2016. It was of note that Logan waited until expiry of the time for service of a Pay Less Notice before making its position clear.

29.

Mr Scott Holland submitted that, as there are draconian consequences which flow from a failure to serve a compliant Pay Less Notice in response to an Interim Payment Notice, it was important that a contractor had to be open and transparent about its intentions. The notice itself must be unambiguous. These principles were said to have been derived from Caledonian Modular Ltd v Mar City Developments Ltd [2015] BLR 694, Henia Investments Inc. v Beck Interiors Ltd [2015] BLR 704 and Jawaby Property v The Interiors Group Ltd [2016] BLR 328. In the present case, it was submitted that Logan had not been open and transparent about its intentions. Mr Crook was aware that Mr Stone was expecting a further document reflecting Logan's final account position. However, the covering email message was unclear and Logan had not been transparent in respect of its true intentions to pursue a concurrent claim for an interim payment. That intention had been buried away. True it was that the attachment was described as an Interim Payment Notice but the document itself only said so in faint type. It also described itself as No.24 in a series which was wrong because there had been no prior Interim Payment Notice. The valuation summary which accompanied the notice did not cross refer to or make any reference to an Interim Payment Notice.

30.

In response to these submissions, Mr Alexander Hickey QC on behalf of Logan submitted that the Interim Payment Notice was clear on its face. It identified itself as an Interim Payment Notice and made particular reference to Clause 4.10. He did not accept that the printed title was faint and pointed out that the key words were in capital letters and underlined. The Notice made reference to Valuation No.24 because it was the 24th payment cycle. It also correctly identified the due date of 24 August 2016 which was the appropriate date for the valuation of an interim payment as it was the expiry of the Rectification Period. The same date also appeared in the accompanying valuation summary, thereby connecting the two documents. That date would not have been the correct date to take had the documents been concerned with the final account since the due date for the final payment would have been the date of issue of the Final Certificate: see Clause 4.14.3.

31.

Whilst Mr Hickey accepted that the covering email which enclosed the Notice was not as clear as it might have been, he submitted that there was sufficient clarity from the Interim Payment Notice itself. All that had happened in this case, he said, was that the Contract Administrator had taken his eye off the ball, not having read the Contract properly, and as a result, was not aware that Logan was entitled to issue an Interim Payment Notice when it did. The factual background relied on by the Trust was wholly irrelevant to the question of the validity of the notice. The essential question was whether Logan had issued a notice which was in substance, form and intent an Interim Payment Notice. If so, then it qualified as such. In this case, the attachment was an Interim Payment Notice in substance (because it contained a valuation up to the applicable date); form (because it so described itself); and intent (because Logan intended to issue an Interim Payment Notice). As to the suggestion that the Trust had not understood what had been issued, Mr Hickey pointed out that Mr Stone's email of 21 September 2016 said, in terms, that he had received an Interim Payment Notice. The fact that he wrongly assumed it to have been out of date and void was not to the point.

Decision

32.

It is appropriate to begin by considering the recent authorities in this area. In Caledonian Modular Ltd v Mar City Developments Ltd [2015] BLR 694, Coulson J had to consider whether a purported application for payment by a contractor qualified as a valid application for an interim payment in circumstances where, if it did, the contractor would have become contractually entitled to the sum claimed. At paragraphs 34 to 37 he said:

"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 studiously 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.”

33.

I also observe that, at paragraph 42 of Caledonian, Coulson J construed the document in issue against the relevant factual background.

34.

In Henia Investments Inc. v Beck Interiors Ltd [2015] BLR 704, Akenhead J said this at paragraph 17:

“There is some very real importance in being able to ascertain whether a document filed by the Contractor is an Interim Application under Clause 4.11.1: it stands as an Interim Payment Notice (Clause 4.11.2.1) if no Interim Certificate is issued in accordance with Clause 4.10.1 (for instance, issued more than 5 days after the payment due date), and the "sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.12.5, be the sum stated as due" in that Interim Application (Clause 4.12.3). That could be way over what the CA would otherwise have certified or what is actually due to the Contractor. Although fraud would probably unravel a fraudulently prepared Interim Application, no fraud is alleged here and there is often room for sometimes widely differing assessments of value and proportions of work completed. Although it is not apt to talk in terms of conditions precedent, I consider that the document relied upon as an Interim Application under Clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when.”

35.

Carr J referred to both of these cases in Jawaby Property Investment Ltd v The Interiors Group Ltd [2016] BLR 328. At paragraph 43 she said:

“The requirement for "form", "substance" and "intent" has often been repeated in the authorities (see for example Token Construction v Charlton Estates [1973] BLR 48). In construing the document or documents relied upon, the exercise is to assess it against its contextual setting how it would have informed a reasonable recipient - see Mannai Ltd v Eagle Star Ass. Co. Ltd [1997] AC 749 (per Lord Steyn at 772H).”

36.

At paragraph 59 she added:

“Whether or not this conclusion can be said to lead to a harsh result for TIG, this is an area where, as the authorities make clear, there is little scope for latitude. If a contractor wishes to have the benefit of the interim payment regime such as that contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity.”

37.

The principles identified in these three cases are not in dispute. There is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer's notice is not served.

38.

In light of the comments in Caledonian (paragraph 42) and Jawaby (paragraph 43), I accept that it is appropriate to construe the document relied on as a notice against both the contractual and factual setting in which it was issued. I therefore agree with the Trust that it is relevant to have regard to the background matters described above.

39.

The starting point for any such consideration is that an Interim Certificate should have been issued by the Contract Administrator on 24 August 2016 in accordance with Clause 4.7.2. In fact, he never issued any such Interim Certificate. This undoubted breach of contract is not a promising backdrop for consideration of the Trust's first ground of declaratory relief. Mr Scott Holland accepted that there had been a breach of contract but submitted that the existence of this breach did not alleviate the need for clarity in respect of the Interim Payment Notice. In light of the authorities, of course I agree that in order for it to be valid, the Notice should be clear and free from ambiguity. But in my view, it is a relevant consideration that the present dispute would never have arisen had the Contract Administrator issued an Interim Certificate in accordance with his contractual obligations. It is no answer to say by way of mitigation that the parties were operating the final account process and that this overtook the need for any consideration of the interim payment regime. The Contract provides for and permits the continued receipt of interim payments until the issue of the Final Certificate, whether the issue of that Certificate takes the time contemplated by the Contract or longer, by agreement. Indeed Clause 4.14.2 specifically contemplates that the Final Certificate should not affect the rights of the contractor in respect of any interim payment not paid in full by its final date for payment. That is a part of the background which should be taken into account.

40.

Applying the test as to whether the attachment to the email was an Interim Payment Notice in substance, form and intent I am satisfied that it was. It is common ground that, in the absence of a Certificate, Logan was entitled to issue an Interim Payment Notice. The document which it issued was called an Interim Payment Notice. Though it was not a necessary prerequisite, it actually made specific reference to Clause 4.10. In circumstances where there had been no prior Interim Application, that reference could only have been to Clause 4.10.2.2. The supporting information contained a detailed assessment of the sum said to be due to Logan. The Notice and the supporting information described a valuation date of 24 August 2016 which was consistent with its contractual entitlement and inconsistent with any claim based on the final adjusted Contract Sum.

41.

Whilst I agree that the typeface of the title of the Notice was of a grey colour, not a black colour, I do not accept it was either faint or illegible. In addition, the font was large in size relative to the other text and the key words were in capitals and were also underlined. It is of significance that Mr Stone himself described it as an Interim Payment Notice in his email the following day so there can be no question that he could not read what it said.

42.

Viewed on its face, the Interim Payment Notice was both clear and free from ambiguity. Unlike the application in Caledonian, this document said, in terms, that it was an Interim Payment Notice. The Employer was therefore provided with reasonable notice as to its content.

43.

In my view, nothing turns on the fact that the Notice was described as referable to Valuation No.24. The next payment cycle was No.24 so the description was entirely appropriate. It would have been most odd to describe the notice as Interim Payment Notice No.1.

44.

At one point I was attracted to Mr Scott Holland's submission that, when read together and viewed objectively, the whole package of material sent by email, including the Notice itself, was not clear and free from ambiguity because its issue formed part of the process of the on-going final account discussions and was not specifically heralded as an Interim Payment Notice either in the text of the covering email or in the meeting that followed it the next day. However, I have concluded that, viewed objectively, there were sufficient indications both on the face of the document itself and in the description of the attachment to the email to make clear that Logan intended to issue an Interim Payment Notice. The objective reader would also have been aware that the Contract provided a right to issue such a Notice by reason of the prior failure by the Contract Administrator to have issued an Interim Certificate.

45.

In those circumstances, I refuse the Trust's request for declaratory relief in respect of the Interim Payment Notice. In my view it was a valid Interim Payment Notice.

46.

In those circumstances, Logan will have been entitled to the sum set out in the Notice unless the Trust had issued a valid Pay Less Notice. That is the subject matter of the second declaration to which I now turn.

The Second Declaration

47.

The second declaration sought by the Trust is that the email and attachments dated 21 September 2016 constituted a valid Pay Less Notice.

48.

Once again, I will briefly summarise the arguments raised by the parties in respect of this issue.

The rival contentions

49.

Mr Scott Holland submitted that, in contrast to the position which applies to contractor's notices, the law adopts a different, less prescriptive, standard when it comes to considering whether a document constitutes a valid Pay Less Notice. He submits that is because of the draconian consequences which flow from a failure to have issued such a notice. In reliance on Thomas Vale Construction plc v Brookside Syston Ltd [2006] EWHC 3637 he submits that any complaints about the form of a notice which are artificial or contrived should be rejected. He points out that this view is supported by Sir Peter Coulson's book on Construction Adjudication, 3rd edition at paragraph 3.30. Applying the common sense, practical view encouraged in that book he submits that the email, when read alongside the Final Certificate, is sufficient to amount to a Pay Less Notice. Although he accepts that

the email was addressed to the Trust, and only copied to Mr Crook of Logan, he submits that this was sufficient service of it. After all, Mr Crook acknowledged receipt of the email on 23 September 2016. Although, of course, the primary function of the email was to issue the Final Certificate, the email itself explained that the details were the same as would have been stated in any Interim Certificate that would have been issued. He submitted that it was possible for one document to serve two different purposes at the same time. In substantive terms, the email contained all the information that would have been necessary to put Logan on notice of how much the Employer proposed to pay and the basis upon which that sum had been calculated.

50.

For Logan, Mr Hickey relied on obiter dicta of Carr J in Jawaby that, in order for it to be valid, the sender must objectively intend that the document should stand as a Pay Less Notice. He submitted that the email and attachments could not constitute a valid Pay Less Notice because the writer plainly had no intention for it to stand as such. On the contrary, the email wrongly asserted that the Interim Payment Notice was out of time and void. On that basis there cannot have been an intention on the part of the sender to issue a Pay Less Notice in response to it. He points out that by writing that the details in the Final Certificate were the same as would have been stated in any Interim Certificate, Mr Stone was openly admitting that he did not intend the Final Certificate to stand as an Interim Certificate or any other notice. Mr Hickey also pointed out that the email was not addressed to Logan but, instead, Logan was merely copied in on its issue. Echoing further observations from Carr J in Jawaby he pointed out that the Final Certificate was issued for a different purpose under a subsequent payment cycle and under an entirely different clause, namely Clause 4.14, not Clause 4.12.

51.

Mr Scott Holland sought to distinguish the dicta in Jawaby from the facts of the present case. Whereas in that case there had been an established format for notices, there was no such format in the present case. In respect of the requirement for an objective intention, the material question was whether the Contract Administrator intended to provide the information required by Clause 4.12.1. Jawaby did not impose any requirement that a Pay Less Notice should contain any specific form of words or reference to the particular clause. Finally, if necessary, I was invited to depart from Jawaby on the grounds that the comments were obiter dicta and not part of the ratio decidendi.

Decision

52.

I can deal with a very technical point at the outset. In my view, nothing turns on the fact that the email including the Final Certificate was not specifically addressed to Logan. It was sent to Logan. It was not as if Logan had merely been copied into the email by way of information. On the contrary, it was obviously intended that, by the email, Logan should be the direct recipient of its contents. On its face, the Final Certificate is addressed to both parties and the pro forma has been crossed in the relevant box to say that it had been issued to the contractor. Mr Crook, who was also anticipating its issue following the meeting, acknowledged receipt of the email and certificate as a direct recipient of it.

53.

Beyond that, the next point is to consider the contractual requirements for a Pay Less Notice. Clause 4.12.1 states that a notice must specify the sum which the employer considers to be due to the contractor at the date of the notice and the basis upon which that sum has been calculated. Mr Hickey rightly conceded that the documents relied on by the Trust as the Pay Less Notice fulfilled both of

these requirements. The recipient of the email of 21 September 2016 would have been aware that the Trust considered that £14,235.43 was due at 21 September 2016. The recipient would also have been aware of the basis for that calculation since it was appended to the Final Certificate. Thus, in my judgment, the contractual purposes of the notice had been fulfilled.

54.

At paragraph 3.30 of his book on Construction Adjudication, Sir Peter Coulson says:

“The courts will take a common sense, 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.”

55.

As I have said, the Trust relies both on this passage and observations from HHJ Kirkham in Thomas Vale to support a submission that, as a matter of over-arching principle, Pay Less Notices should be construed more generously than notices emanating from a contractor. I accept that they do provide some support for that proposition. However, both of these observations concern the proper construction of an employer’s notice in order to determine whether, as a matter of its substantive content, it was compliant with the contractual requirements. As I have said, that is not really the key issue in the present case. The question in the present case is whether the email and attachment when read together were intended to constitute a Pay Less Notice at all.

56.

In light of the concession that the email and attachment conveyed all the material necessary to comply with Clause 4.12.1 Logan’s submission therefore comes to this: a document which, it is accepted, contains all the material information which should be conveyed by a Pay Less Notice cannot serve as a Pay Less Notice because, viewed objectively, the sender did not intend it to be a Pay Less Notice and did not describe it as such.

57.

At paragraph 63 of Jawaby, Carr J said:

“Whatever arguments there may be about the appropriateness of fine textual analysis to such a notice (see Thomas Vale Construction v Brookside Syston Ltd [2009] 25 Const LJ (at paragraph 43)), it is, as set out above, an essential requirement for the service of a contractual notice that the sender has the requisite intention to serve it. The senders' intention is a matter to be assessed objectively taking into account the context.”

58.

Carr J’s reference to “as set out above” is, I believe, a reference at least in part to the passage at paragraph 43 of Jawaby which I have cited in connection with the first declaration. As I have said, Mr Hickey’s short submission is that, viewed objectively, the sender did not intend the email to stand as a Pay Less Notice. The adjudicator accepted it. Attractively though it was put, in my judgment it cannot be right. In my view it focusses too much on the specific detail of the language used by the sender in the covering email, incorrect as it was, and not on the overall message and purpose which the email and attachments would have conveyed to the reasonable recipient. Whilst I agree that it is an essential requirement that the sender should have the requisite intention, that intention must be derived from the manner in which it would have informed the reasonable recipient.

59.

In this case, the reasonable recipient would have been aware that the sender was completely mistaken about the contractual position. The reasonable recipient would have appreciated that Logan had not issued a payment application at all but, instead, had issued an Interim Payment Notice properly so called. He would also have understood that, contrary to the views of the sender, it was not an out of date or void Notice. Logan was aware of all these matters and said so in its subsequent email of 28 September 2016. In those circumstances, it would be wrong for the reasonable recipient to take the final sentence of the second paragraph too literally. Instead, on a broader level, the overall message and purpose conveyed by that sentence of the email was that, if he was wrong about the contractual position, the Contract Administrator was valuing the work on the same basis as had been set out in detail in the Final Certificate and accompanying breakdown and that this was the only sum to which the contractor was entitled whether by way of final account or by way of interim payment. Viewed in that way, on a broader level, one intention of the email and its attachments was that it should be responsive to the Interim Payment Notice.

60.

By adopting the slightly different approach in *Henia*, I reach the same conclusion. At paragraph 32, Akenhead J said:

“The Pay Less Notice of 17 June 2015 (clearly served within time for the 29 May payment due date and the final payment date 28 days later) would have provided an adequate agenda for an adjudication as to the true value of the Works and the validity of the alleged entitlement to liquidated damages for delay.”

61.

In this case, the documents sent by email on 21 September 2016 provided an adequate agenda for an adjudication as to the true value of the Works on an interim basis for the purposes of Valuation No.24. Logan was contending for an entitlement to £1,015,557.95. The Trust was contending for a value of only £14,235.43. There was a detailed breakdown of the Trust’s position. There was nothing more which Logan needed to know.

62.

Mr Hickey was right to point out that the valuation date was different to that contained in the Interim Payment Notice but, as he accepted, this was not such as to invalidate it. The amount to be paid pursuant to a Pay Less Notice shall be the amount determined at the date the notice is given. Such valuation did not have to be made at the due date for payment.

63.

I also see no difficulty with the notion of serving a contingent Pay Less Notice. There are often cases in which a party wants to serve a notice without prejudice to his position that no such notice is required. On one view, it could be said in such a case that the notice would lack the requisite intent because the sender’s primary position was that no such notice was required. But the secondary intention to rely on the notice can be expressed as contingent on the primary position not being upheld. In this case the Contract Administrator can effectively be understood as saying that, if he was wrong about the invalidity of the Interim Payment Notice, the Final Certificate reflected everything he wanted to say in response to it.

64.

For these reasons I do not find myself in disagreement with the observations of Carr J in *Jawaby*. The email and attachment in this case had the requisite intention. It is true that the facts in *Jawaby* fell on

the other side of the line and led to an obiter conclusion that the document relied on was not a valid Pay Less Notice. But I accept Mr Scott Holland's submission that the facts in that case are distinguishable. In that case there had been an established format for notices and it was "highly significant" that the document relied on as a notice was in a completely different format from that which had previously been established. In the present case there was no such established format. Moreover, the email said to constitute a Pay Less Notice in that case was actually a mark up of the contractor's valuation, as explained at paragraph 33 of the Judgment. Both parties were aware it was not a Payment Certificate. The mark up of the valuation was therefore different in content from what should be contained in a Pay Less Notice. In the present case, as I have pointed out, Logan accepts that the content of the Final Certificate, with its supporting material, was capable of substantively fulfilling the requirements of a Pay Less Notice in respect of an interim payment.

65.

Mr Hickey observes that the words "Pay Less Notice" or "Clause 4.12" are conspicuously absent from the documents although he does not go so far as to submit that reference to either was a pre-requisite of its validity. I agree with Mr Scott Holland that it is not necessary for a Pay Less Notice to have that title or to make specific reference to the contractual clause in order to be valid. The question is whether, viewed objectively, it had the requisite intention to fulfil that function. As I have held, it did.

66.

For these reasons, I have concluded that I should grant the Trust its declaration that, when read together, the email and attachments dated 21 September 2016 together constituted a valid Pay Less Notice.

Summary

67.

I declare that the email and attachments sent at 18:18 on 21 September 2016 by Mr Stone of BWA constituted a valid Pay Less Notice in answer to Logan's Interim Payment Notice sent by Mr Crook of Logan by email on 20 September 2016 at 23:48.

68.

I will hear the parties on any consequential issues that arise.