

A man in a dark suit and tie is walking from right to left through a grand, classical building hallway. He is carrying a black rolling suitcase and talking on a mobile phone. The hallway features high ceilings, large columns, and arched doorways. Light streams in from an arched window at the end of the hallway. The overall image has a teal color overlay.

How is the Court interpreting pay less notices under NEC3 and JCT?

How is the Court interpreting pay less notices under NEC3 and JCT?

Seb Oram

Agenda

1. The function of a pay less notice (a recap)
2. The legal tests for effectiveness
3. PLNs under JCT and NEC

1. The function of a pay less notice (a recap)

- Pay Less Notices (“**PLNs**”) as one part of the statutory payment scheme

What the 1996 Act requires

- The construction contract must determine:
 - What payments become due
 - When they become due
 - A final date for payment
- Statutory obligation to pay “*the notified sum*”: s.111(1)
- A PLN reduces “*the notified sum*”: s.111(3)

1. The function of a pay less notice (a recap)

Important consequences

- A (contractual) distinction between when a payment is due, and when it is payable; particularly important on insolvency
- Applies to all payments not just interim (Adam Architecture Ltd v Halsbury Homes Ltd [2018] 1 WLR 3739 (CA))
- The PLN is a creature of statute, not contract (Grove Developments Ltd v S&T (UK) Ltd (2018) 181 ConLR 66 (CA), at [42])
- A PLN has to comply with the statute

1. The function of a pay less notice (a recap)

Fitting PLNs into the contractual scheme

- Complication about PLNs arises because contracts also use notices to set “*the notified sum*”
- Particularly if that is under a *payer’s* notice

1. The function of a pay less notice (a recap)

Fitting PLNs into the contractual scheme (e.g. JCT Standard)

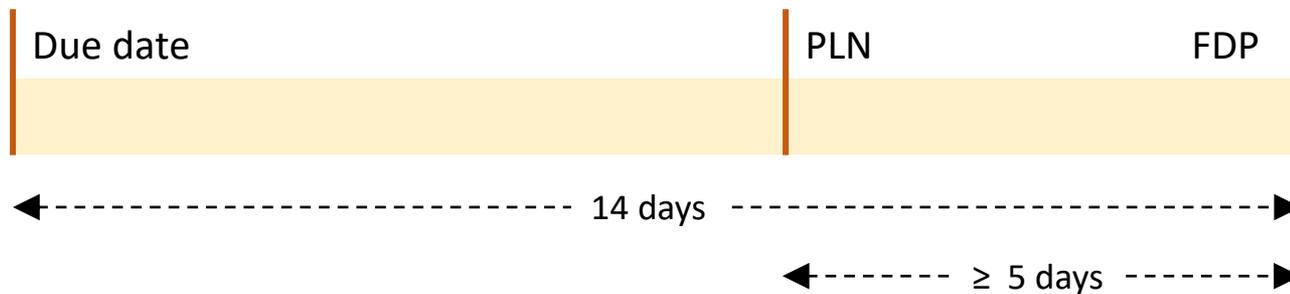


PLN = Pay Less notice

FDP = Final date for payment

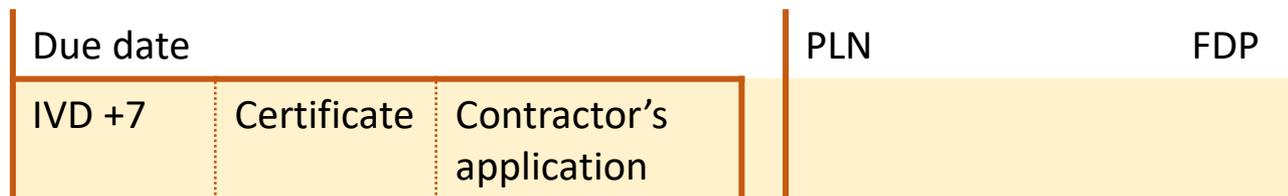
1. The function of a pay less notice (a recap)

Fitting PLNs into the contractual scheme (e.g. JCT Standard)



1. The function of a pay less notice (a recap)

Fitting PLNs into the contractual scheme (e.g. JCT Standard)



JCT dates:

IVD: Interim Valuation date; specified in Particulars – latest date by which contractor may issue an ordinary application

Due date: IVD + 7 days

Payment certificate: \leq due date + 5

Date of contractor's default application (cl. 4.10.2)

1. The function of a pay less notice (a recap)

- Pay less notice operates outside the contract terms
- It reduces “the notified sum”; sets what the payer needs to pay (**1996 Act, s.111(6)**)

1. The function of a pay less notice (a recap)

- Since it is usually given by the payer, it gives him necessary control
- That sum is temporary; does not override the due date/amount
- Timing of notice is set by reference to the final date for payment

2. The legal tests for effectiveness

- The PLN must “*specify the sum that the payer considers to be due on the date the notice is served*” (1996 Act, s.111(4))
- And “*specify the basis on which that sum is calculated*” (1996 Act, s.111(4))

How to construe a PLN

“

A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. 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. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.

”

Grove Developments Ltd v S&T (UK) Ltd (2018) 177 ConLR 30 (TCC), at [26], *per* Coulson J.

How to construe a PLN

“

Provided that the notice makes tolerably clear what is being [with]held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective.

”

Surrey and Sussex Healthcare NHS Trust v. Logan Construction (South East) Ltd [2017] EWHC 17 (TCC), at [54] *per* Alexander Nissen QC.

2. The legal tests for effectiveness

- How would a reasonable recipient have understood the PLN?
- Does the PLN provide an adequate agenda for an adjudication?
- Do not apply ‘fine textual analysis’
- Can take into account the relevant ‘objective contextual scene’

2. The legal tests for effectiveness

- In Grove Developments (CoA), the court emphasised that “*what matters are the statutory provisions*”
- To identify whether a PLN is effective “*we must concentrate on... section 111*” (at [42],[45])
- But it would be wise to ensure that PLN also complies with the contract

3. PLNs under JCT and NEC

NEC3

- Option Y(UK)2: the paying party *“notifies the other Party... by stating the amount considered to be due and the basis on which that sum is calculated”*

NEC4

- Substantially the same

JCT Standard

- Cl. 4.12: A PLN given by either party *“shall specify the sum he considers to be due to the other party at the date the notice is given and the basis on which that sum has been calculated”*

3. PLNs under JCT and NEC

The ideal case

- The PLN must identify what sum is considered to be due (a gross valuation is not enough: Systems Pipework Ltd v. Rotary Building Services Ltd (2017) 176 ConLR 65 (TCC))
- Set out payer's own valuation
- Set out separately each deduction being applied
- Can do that in the notice itself, or in an attached valuation

3. PLNs under JCT and NEC

The amount of detail needed to ‘specify’

- In Grove Developments the valuation was not attached to the PLN
- Still effective, because it would have been understood by reference to earlier email
- *“There can be no possible objection in principle to a notice referring to a detailed calculation set out in another, clearly-identified document”* (Coulson J.)
- *“It is a question of fact and degree in each case whether the purported PLN achieved the requisite degree of specificity”* (Jackson L.J.)
- Best practice: attach the valuation to the PLN

3. PLNs under JCT and NEC

What if you don't know the amount of a deduction?

- The PLN needs to be able to “set the agenda”
- If it does that, it will be effective even if the deduction itself is unsustainable
- Applying ‘nil’ against every head of claim is perfectly valid
- But it does increase the likelihood of adjudication

3. PLNs under JCT and NEC

Using the 'objective contextual scene'

- A PLN that is unclear, may be saved by looking at the context in which it is given
- e.g. Surrey & Sussex Healthcare NHS Trust v. Logan Construction (South East) Ltd (PLN was not *stated* to be a PLN because employer challenged validity of application)
- PLN was valid because its overall purpose was clear
- No difficulty in serving a PLN without prejudice to argument that the initial application is ineffective

Conclusions

- 2 essential requirements for a PLN
- It must specify the sum that the payer considers to be due on the date the notice is served
- It must also specify the basis on which that sum is calculated
- Does it provide an appropriate agenda for adjudication?

A man in a dark teal suit is seen from behind, looking thoughtful with his hand on his head. The background is a dark grey wall covered in various styles of white question marks. A dark teal triangular shape is in the bottom left corner.

It's time for *Questions & Answers*

Questions welcome

The Speaker

Seb Oram, *Barrister*



e: seb.oram@3pb.co.uk



t: 020 7453 9216

