



## Fractions in a day: how do the Courts interpret a “day” under a construction contract?

In the recent case of *Elements (Europe) Ltd -v- FK Building Ltd* [2023] EWHC 726 (TCC), the TCC has provided helpful guidance concerning the proper construction of an important element of a JCT standard form.

### Contractual Background

FK Building Ltd (“FK”) engaged Elements (Europe) Ltd (“Elements”) to remediate apartment modules as part of the design and construction of a residential scheme in Salford. The contract incorporated the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 edition with bespoke amendments (the “Sub-Contract”).

### Background to the Dispute

On 21 October 2022, at 22:07hrs, Elements issued payment application no. 16 by email, seeking payment of c.£3.9m (“Application 16”).

On 5 December 2022, Elements served a notice of adjudication regarding unpaid amounts under Application 16 and, by a decision dated 17 January 2023, the adjudicator determined that Elements was entitled to the full amount applied for, plus interest and costs (the “Award”).

FK failed to pay and Elements asked the TCC to enforce the Award. FK brought a related Part 8 claim concerning the validity of Application 16 and submitted that as it had been submitted late it would be unconscionable for the Award to be enforced.

The TCC deemed it appropriate to hand down the Judgment notwithstanding that the parties had by that time settled the underlying dispute, as it related to the construction of widely-used JCT terms, which had not previously been considered judicially.

### The Parties’ Contentions

Clause 4.6 of the Sub-Contract stated that Elements could make an interim application to FK “so as to be received not later than 4 days prior to the Interim Valuation Date for the relevant payment...” The

specification forming part of the Sub-Contract prescribed specific site working hours “for the Sub-Contractor to carry out the Sub-Contract Works.” The relevant Interim Valuation Date was 25 October 2022.

FK alleged that Application 16 had been submitted late and was therefore invalid. As such, it maintained that Elements could not rely upon the lack of a valid pay less notice. FK argued that on a proper construction, Application 16 needed to be received on or before the end of site working hours on 20 October 2022 (“Point 1”) or, alternatively, on or before the end of site working hours on 21 October 2022 (“Point 2”).

In respect of Point 1, Elements submitted that this argument assumed the application had to be received 4 “clear” or “full” days before the deadline, but that no such language had been used. Elements argued that in the absence of clear words indicating otherwise, a “day” simply means “day” and should be distinguished from “full” or “clear” days.

In respect of Point 2, FK argued that the application needed to be received before the end of site working hours as this best met the parties’ reasonable commercial expectations and to allow a document to be received afterwards would be “commercially unworkable and unbusinesslike”, given the draconian consequences of failure to serve a pay less notice. In response, Elements submitted that the Sub-Contract imposed no restriction on the time of day by which a payment application might be made and received. The general principle that the law ignores “fractions of a day” defeated Point 2 and the specification referring to site opening times was irrelevant as it was concerned with a different matter, namely the times when Elements could carry out works. As such, there was no cross-reference from the specification to clause 4.6.

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The TCC was content the points of construction before it were straightforward and suitable for determination under Part 8.

## **Proper Construction of Clause 4.6 – Point 1**

In relation to Point 1, the TCC accepted that the term “clear days” was a well-known concept different to “days”, and that there was an important distinction between the two.

In the Sub-Contract, there was no express reference to “clear days” and therefore the Sub-Contract could not sensibly be construed as meaning “clear days” when that was not the language used. Point 1 was therefore rejected.

## **Proper Construction of Clause 4.6 – Point 2**

As to Point 2, the TCC held there was a long line of established authority that courts do not deal “*in fractions of a day*”. Generally, where a contract specifies a day for performance of an obligation, the party in question has until the end of that day to perform it. Therefore, unless the Sub-Contract provided otherwise, a payment application had to be received by FK at any time on 21 October 2022 up to 23:59:59hrs.

Whilst it is open for contracting parties to require documents/notices to be provided within defined time periods, the Sub-Contract in this instance did not stipulate that a payment application had to be received by a particular time on the relevant day.

The TCC was unimpressed by FK’s reliance upon the specification. The site opening times therein had nothing to do with the proper construction of the word “days” within the payment provisions of the Sub-Contract. There were no words in the Sub-Contract which meant that, just because the timing of actual receipt was late in the evening of the day in question,

that was ineffective for the purposes of the Sub-Contract.

In addition, actual receipt of the application on a particular day provided considerable certainty, and was plainly a more business-like construction as opposed to an unexpressed restriction relating to working hours which would necessarily be subjective, and differ from contract-to-contract. The TCC therefore rejected FK’s argument as to “*commercial unworkability*”.

## **Analysis**

This helpful decision illustrates the principle that the law does not deal with “*fractions in a day*”. As such, if contracting parties intend particular documents must be issued by a particular time of the day, express wording will be required. Although not addressed in the decision, we would observe that in that event, generic reference to ‘close of business’ should ideally be avoided, and a particular time specified e.g.17.00h.

Equally, if a document must be provided a given number of “clear days” before an event, express words to that effect will be needed.

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