Case No: HT-2023-000043

Neutral Citation Number: [2023] EWHC 726 (TCC)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/03/2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

In Claim No HT-2023-000043

ELEMENTS (EUROPE) LIMITED **Claimant**

- and –

FK BUILDING LIMITED **Defendant**

And in Claim No HT-2023-000022

FK BUILDING LIMITED

Claimant

- and -

ELEMENTS (EUROPE) LIMITED **Defendant**

- -
- -

Mr Jonathan Lewis and Gideon Shirazi (instructed by **Devonshires**) for Elements (Europe) Limited
Mr Andrew Singer KC (instructed by **Beyond Corporate Law**) for FK Building Limited

Hearing date: 21 March 2023

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Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. A copy of the

judgment in final form as handed down should be available on The National Archives website shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk). The deemed time and date of hand down is 10.30am on Thursday 30th March 2023.

MR JUSTICE CONSTABLE:

Introduction

1. This is an application for summary judgment brought by Elements (Europe) Limited ('Elements') against FK Building Limited ('FK'). There is a related Part 8 claim brought by FK. Elements seeks summary judgment in the sum of £3,950,190.52 plus interest and costs arising out of an adjudication decision dated 17 January 2023 ('the Award'). FK does not dispute that the Award is enforceable. FK's Part 8 application relates to what it contends are two short points relating to the validity of the payment application upon which the Award rested. FK argues (as it did before the Adjudicator) that the application was invalid because it was received late. It is said that it is permissible and appropriate for me to consider these points; and that if I consider that FK is correct as a matter of law, it is submitted that it would be unconscionable for this to be ignored and the Award should not be enforced in these circumstances.

2. The dispute between the parties (which was broader than just the matters in dispute in front of me) settled following the handing down to the parties a draft of this Judgment. However, given that the issue considered relates to the proper construction of an important element of a JCT standard form widely used in the construction industry and which has not, as far as Counsel were aware, been the subject of judicial consideration before, it is appropriate to hand down the judgment notwithstanding the resolution of the underlying dispute (see *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826 at [74]-[78]). I have come to this decision having considered the communications from the parties in this respect. It is of course important to note that, by reason of the settlement, this matter has been resolved by a Consent Order reflecting the fact of the parties' agreement and no (summary) judgment has in fact been entered by the Court against FK notwithstanding my conclusion at paragraph 44.

The Contract

3. By a Sub-Contract in writing incorporating the JCT Standard Building Sub-Contract Conditions SBCSub/C 2016 Edition with bespoke amendments ("the Sub-Contract"), FK as main contractor engaged Elements as subcontractor to carry out remediation works to 312 bi-split apartment modules as part of the design and construction of three buildings to comprise a 156 residential apartment scheme at Uptown Riverside, Springfield Lane, Salford. On or around the same date as the Sub-Contract, Elements and FK entered into a Deed of Variation, which varied various terms of the Sub-Contract, including increasing the scope of works and the Contract Sum to £7,405,272.78.

4. Clause 4.6 (page 68.30) of the Sub-Contract Conditions provides:

> *"4.6.1. During the period up to the due date for the final payment fixed under Clause 4.22.1 … the monthly due dates for interim payments shall in each case be the date 12 days after the relevant Interim Valuation Date …"*

4.6.3. Where Clause 4.6.2 does not apply, the Subcontractor may make a payment application in respect of an interim payment to the Contractor either:

4.6.3.1. so as to be received not later than 4 days prior to the Interim Valuation Date for the relevant payment …"

5. Sub-Contract Particulars Item 10 provides that:

> *"The first Interim Valuation Date is 25th June 2021 and thereafter the same date every fortnight [sic] for a period of two months following which the date shall be the same in each month or the nearest business day in that month."*

6. Clause 4.7.1. provides that:

> *"Subject to Clause 4.7.4 the final date for payment of any payment shall be 21 days after the due date as fixed in accordance with Clause 4.6.1 …"*

7. The Specification provides:

> *"The site will be open for the Sub-Contractor to carry out the Sub-Contract Works from 7.30 a.m. to 6.00 p.m. Monday to Friday except on any dates stated in item 2.2. On Saturdays the site will be open from 8.00 am to 1.00 pm"*

Factual Background

8. It is agreed between the parties, at least for the purposes of this hearing, that Elements issued its Payment Application No. 16 ('the Application') by email on 21 October 2022, timed at 22.07. The relevant emails indicate that the Application was sent on behalf of Elements by a Mr Walters of Socotec Advisory Ltd (trading as Base Quantum). He had been retained by Elements to prepare interim applications for payment. The email was sent to Mr Corns of FK and copied to a number of other FK employees, namely Mr. Warhurst, Mr. Bentley and Mr. Brown. Mr. Walters' email attached via a link a 17 page PDF valuation which stated that there was an amount due to Elements of £3,950,190.53. There is no dispute that Mr. Walters' email and its attachment was received into the recipients' email inboxes on the same date it was sent at between 22.07 and 22.08.

9. During the adjudication, Elements adduced factual evidence in support of the following propositions:

(a) Quantity surveying, management and administrative teams deal with payments and not site staff;

(b) Quantity surveying, management and administrative teams generally do not work site hours but instead work late hours;
(c) Quantity surveying, management and administrative teams generally work late hours, not restricted to business hours;
(d) It is common practice in the construction industry for payment notices under construction contracts to be sent out of site hours and out of business hours;
(e) On 21 October 2022, at least some of the individual recipients of the e-mail serving Application No.16 were checking emails on or after 22.08;
(f) On 21 October 2022, at least some of the individual recipients of the e-mail serving application #16 saw that the e-mail had landed and opened the e-mail and its attachments and all understood that a payment application had been served.

10. This evidence was served responsively to FK's position in its Response in the Adjudication that factual evidence of both specific site practice and 'usual' practice was relevant to the question, which FK contended was the relevant one, of whether the recipient could reasonably be expected to have read the email (see paragraphs 4.10 to 4.12 of the Response).

11. Elements relied upon the same factual evidence supporting the propositions set out in paragraph 7 above in defence to the Part 8 claim, and no responsive evidence was served by FK. Mr Singer KC, on behalf of FK, did not put the case the same way in this Court, contending that the right answer turned on the proper construction of the Sub -contract, accepting that this question was to be resolved as at the date of the contract and would not be assisted by what in fact happened. Whilst accepting that Element's evidence before the Court was unchallenged in substance, he contended therefore that it was simply not relevant.

The Adjudication

12. On 5 December 2022, Elements served a notice of adjudication on FK referring the dispute to adjudication. On 17 January 2023, the Adjudicator delivered his decision to the parties. FK disputed that sums were due pursuant to Application No.16 for five reasons in the adjudication, all of which the Adjudicator rejected. Two of those reasons are the matters of law relating to the validity of the Application which the Court is invited by way of Part 8 proceedings to determine today.

13. Having rejected FK's arguments, the Adjudicator determined that FK was required to pay Elements the sum of £3,950,190.53 ex VAT; £44,155.55 (ex VAT) in interest until the date of the Decision plus interest thereafter at a daily rate of £865.80 (ex VAT) until payment; and to the Adjudicator's fees of £11,074.50 including VAT (and, if Elements paid first, to reimburse Elements for those fees).

These Proceedings

14. On 24 January 2023, FK indicated that it intended to issue Part 8 proceedings seeking a final determination and, on 25 January 2023, it emailed the Part 8 claim form to Elements' solicitors. FK did not indicate whether it intended to comply with the Adjudicator's Decision.

15. On 26 January 2023, not having received payment as required by the Decision, Elements' solicitors sent correspondence to FK's solicitors requesting that FK make payment of the Adjudicator's fees. FK did not do so and, on 27 January 2023, Elements served a notice of intention to suspend the Sub-Contract Works if payment was not received within 7 days.

16. On 3 February 2023, seven days having passed and no payment made, Elements issued its adjudication enforcement Part 7 claim. On 10 February 2023, Elements served the evidence in response to the Part 8 Claim referred to above. On 13 February 2023, the court made an order giving directions and listing the adjudication enforcement and Part 8 proceedings together. Further to correspondence between the parties and its submission to the Court, on 27 February 2023, the court directed that "*The parties can raise issues about the appropriateness of the Part 8 claim at the hearing currently fixed for both claims – no change to the current order.*"

The Parties' Contentions

17. Mr Singer submits that the Application No 16 was submitted late. If it was submitted late, it was contractually invalid. Mr Singer then states, and this was not in dispute as a matter of principle, that in order to rely upon the lack of a Pay Less Notice, a payee (here, Elements) needs to demonstrate that its application for payment was contractually valid. Thus, the failure to serve a timely Pay Less Notice would not lead, in these circumstances, to any obligation upon FK to make payment of the sum (invalidly) applied for irrespective of a 'late' Pay Less Notice.

18. In order to found this argument, Mr Singer contends that, upon its correct construction, Clause 4.6.3.1 means that the Application:

    (1) needs to be received on or before the end of site working hours on 20th October 2022; alternatively

    (2) needs to be received on or before the end of site working hours on 21st October 2022.

19. In relation to both propositions, Mr Singer places particular emphasis on the fact that the word 'received' is used in Clause 4.6.3.1. This, it is said, is different to that used in other JCT Forms, and indeed other parts of this JCT form. A contrast is made, for example, with use of the word 'give' in paragraph 4.7.2 when referring to the requirement on the Contractor to 'give a notice' not later than 5 days after the due date which shall specify the sum that he considers to be or have been due at the due date. Mr Singer argues that the use of different language must be considered to have been intentional, and meaning must be given to the fact that 4.6.3.1 is focussing on actual receipt by FK.

20. In relation to first the argument, relating to 20th October 2022, it is said that this is the effect of requiring the Application to be received not later than 4 days prior to the Interim Valuation Date (here, agreed as 25th October 2022). If some time on 21st sufficed, that would, it is said, only amount to between three and four days prior to

25th October 2022. It is argued by Mr Singer that such a construction meets 'the reasonable commercial expectations of the parties'.

21. Mr Lewis, for Elements, submits that this argument amounts to a contention that Clause 4.6.3 requires the notice to be served 4 'clear' or 'full' days, and that no such language is used. He relies upon the rule in English law that, when interpreting contracts, a day is treated as an indivisible whole and fractions of a day are ignored. Mr Lewis cites *Lester v Garland* (1808) 15 Ves 248, Sir William Grant MR held:

> *Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to anyone, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed.*

22. He also refers to *Cartwright v MacCormack* [1963] 1 WLR 18 by way of example, where this principle was applied in the context of an insurance policy. He also relies upon *Lewison on the Interpretation of Contracts* 7th Edn at 15-11 to 15.15. At paragraph 15.11, *Lewison* says:

> '*There are many different ways of reckoning a day. As a period of time a day is the time occupied by the earth in one revolution on its axis, in which the same terrestrial meridian returns to the sun; a period of 24 hours reckoned from a definite or given point. A solar or astronomical day is reckoned from noon to noon, while the civil day in most civilised countries is reckoned from midnight to midnight. 20 A calendar day is reckoned from midnight to midnight.In its ordinary sense, the word "day" in a contract refers to a calendar day. Thus where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it (midnight).*'

23. The text goes on to state that the context of a particular contract may show that the word 'day' means a period of 24 hours reckoned from some other time of day, and the case of *Cartwright v MacCormack* considers the meaning of 'working day', and identifies that in this context, the House of Lords considered (in in *Afovos Shipping Co SA v Pagan* [1983] 1 W.L.R. 195) that once a working day had been identified the whole of the day counts as a working day. This is consistent with the general principle stated that the law does not generally deal in fractions of a day.

24. Mr Lewis contends that the effect of this is that, unless provided for explicitly otherwise, 'day' simply means 'day' and should be distinguished from 'full' or 'clear' days.
He also relies upon *Cubitt Building & Interiors Ltd v. Fleet Glade Ltd* [2006] EWHC 3413 (TCC) above, in which HHJ Coulson QC (as he was then) rejected an argument that ideas found in the civil procedure rules like deemed service should be read into construction contracts in the context of construction adjudication. Mr Lewis argues that, by analogy, the civil procedure practice that "days" mean "clear days" is equally inapplicable.

25. In relation to the second argument, Mr Singer contends that the Clause should be construed such that the payment application needs to be received on or before the end of site working hours on whichever is the correct day (following his first argument) because this best meets the reasonable commercial expectations of the parties. He argues that being able to submit a document at 11.59pm on 21st October 2022 is commercially unworkable and unbusinesslike, particularly in light of the potential consequences of failing to serve a Pay Less Notice in response to an application for payment. Mr Singer also seeks to draw some support from the observations of the learned Judge in *Cubitt* where, at paragraph 39, the learned Judge decided that effective date of service of a Notice of Adjudication was on the day Cubbitt in fact served the document, notwithstanding it was served at 4.42pm. Cubitt had argued that, by reference to the CPR rules, the effective day of service was in fact the following day. This was rejected for three reasons. The third of these reasons was :

> "*It was not as if the document was served late at night. It was served at 4.42 pm*."

26. In *Cubitt*, Mr Singer points out that the Judge saw no practical reason to impose any sort of deeming provision, but that had the document been served late at night (as he contends is the case here), it is implicit that the learned Judge would, or may, have reached a different decision.

27. In response, Mr Lewis points out that the Sub-contract imposes no restriction on the time of day in which a Payment Application may be made and received. He relies upon the 'fractions of a day' principle as equally applicable for defeating this second argument Mr Lewis argues that the Specification referring to site opening times is irrelevant, and draws attention to the fact that the provision when read in full relates to the time during which the sub-contractor was entitled to carry out its work. Indeed, he relies upon the absence of any cross-reference between 4.6.3.1 and this part of the Specification if the parties had intended it to be determinative of the times permitted for service of a payment application. It was also contended that FK's construction would lead to uncertainty: what was to define the hours within which a payment notice could be validly served? Mr Lewis therefore contends that that Element's construction of the contract means simply that, in the case of a Payment Application made by email, it is received when it arrives in the inbox of the intended recipient, which is to be determined as a matter of fact.

28. Finally, in answer to the contention from Mr Singer that Element's construction was commercially unworkable and unbusinesslike, Mr Lewis contends primarily that the construction should be determined by reference to the words of the Sub-contract itself. However, to the extent necessary, he contends that the only evidence before the Court is the unchallenged evidence submitted by Elements in support of its defence to the Part 8 Claim, and in respect of which no evidence in response has been served. In his written submissions, Mr Lewis contends that this shows that the payment mechanism was operated by both parties outside of site opening hours. Examples given by the witness evidence include , (i) Payment Application No. 11, sent by Elements at 20:19 on Friday 20 May 2022 (ii) FK's Pay Less notice No 21 sent at 23:31 on Friday 22 July 2022, and (iii) Payment Application No, 14, sent on behalf of Elements at 20:59 on Sunday 21 August 2022. Mr Lewis also argues that

this shows that it was normal for members of the QS team and for senior management to work long hours including evenings and weekends as part of their normal work schedule, and to receive emails at those times.

Is Part 8 Appropriate?

29. Mr Singer argues that his two contentions are short points and capable of being determined by the Court on a Part 8 application heard at the same time as summary judgment, in line with the principles which have been recently affirmed by the Court of Appeal in *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2023] 2023 EWCA Civ 54. It is said that the limited agreed factual background corresponds with the factual basis of the Adjudicator's Decision, and that the disputed facts are not relevant to the exercise of construction. The construction of the contract is not to be decided by the way in which the parties may have operated on site (absent any plea of waiver or estoppel, which it is pointed out has not been made). It is submitted by Mr Singer that the Court can and should simply construe Clause 4.6.3.1 of the Sub-Contract to determine what it meant and how it was to operate in light of the agreed factual position as to the date and time when Application No.16 was sent and received by email.

30. Mr Lewis contends that the Part 8 Claim does not fall within the exception set out in *Hutton Construction Limited v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC). The Court of Appeal in *A&V Building Solutions* effectively endorsed the decision, as had the wording of the recent TCC Guide published in October 2022. *A&V Building Solutions* encapsulates the position as follows:

> *'38. The proper approach to parallel proceedings was outlined by O'Farrell J in Structure Consulting Limited v Maroush Food Production Limited [2017] EWHC 962 (TCC). The judge should usually give judgment on the claim based on the adjudicator's decision and then – to the extent possible – endeavour to sort out the Part 8 proceedings. The same point was made in Hutton Construction Limited v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] BLR 344, where the judge said that the Part 8 claim should be dealt with after the enforcement, unless the point raised was straightforward and self-contained, and the parties were agreed that it could be dealt with at the enforcement application without adding to the time estimate.*
>
> *39. Warnings have continued to be given as to the over-liberal and inappropriate use of Part 8 in adjudication cases: see Jefford J in Merit Holdings Ltd v Michael J Lonsdale Ltd [2017] EWHC 2450 (TCC); [2017] 174 Con LR 92, and Ms Joanna Smith QC (as she then was) in Victory House General Partner Linted v RGB P&C Limited [2018] EWHC 102 (TCC).*
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> *40. These concerns are reflected in the clear words of the TCC Guide dated October 2022. The relevant paragraphs say this:*

> *"**9.4.4** It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly, there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and should be raised in a single action.*
>
> ***9.4.5** However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision. In the light of this guidance, a practice had grown up of applications to enforce an adjudicator's decision being met by an application for a declaration that the adjudicator had erred often without proceedings under Part 8 being commenced. This approach was disruptive and not in accordance with the spirit of the TCC's procedure for the enforcement of adjudicator's decisions. It is emphasised, therefore, that such cases are limited to those where:*
>
> *a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;*
>
> *b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement; and*
>
> *c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore; and further that there should in all cases be proper proceedings for declaratory relief."*

31. However, Mr Lewis relies explicitly upon paragraph 18 of *Hutton* in which Coulson J (as he then was) set out the factors which now are set out at the end of paragraph 38 of *A&V Building Solutions* and the end of section 9.4.5 of the TCC Guide, and continued:

> *'18. What that means in practice is, for example that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in **Macob**, **Bouygues** and **Carillion**.'*

32. He contends that this is authority for the proposition that in addition to the factors identified, there is a requirement that the point or points raised by way of Part 8 have to be shown to be 'obviously wrong' or one to be taken '*on any view*'. This was disputed by Mr Singer, who contended that *Hutton* did not impose a higher burden on the Part 8 applicant (perhaps equivalent to that which must be demonstrated to appeal from the decision of an arbitrator under Section 69 of the Arbitration Act 1996).

33. It is clear to me that in paragraph 18 of *Hutton*, the learned Judge was not seeking to impose a higher Part 8 'test' of any kind. In considering whether parallel Part 8 proceedings should be permitted to be heard at such a time as would, if successful, in practice affect the enforceability of the Award, the Court should be guided by those key factors identified in paragraph 38 of *A & V Building Solutions* and the TCC Guide, namely whether a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest; b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement; and c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore. It is plain that paragraph 18 of *Hutton* provided examples of obvious candidates of the types of situations where the guidance would easily be met. Plainly, the clearer an error of contractual construction on the part of the adjudicator, the more readily the Part 8 applicant may satisfy the required 'gateway' criteria. But the words in paragraph 18 of *Hutton* were not intended in themselves to impose a further substantive requirement which must be met in order for a Part 8 applicant, proceeding in parallel with adjudication enforcement, to succeed on that application. Indeed, it can be seen from *A & V Building Solutions* itself that the substantive point of construction considered by the Judge at first instance in the Part 8 application (who came to the same conclusion as the Adjudicator) was a somewhat 'nuanced' one.

34. Applying this *A&V Building Solutions* and the TCC Guide to the present case, I consider that the point of construction before me is a short and straight-forward one capable of determination by the Court. Had the evidence relied upon by Elements been disputed, and/or had the issue of waiver or estoppel been raised based upon the factual evidence of site practice, that self evidently would not have been a short point capable of determination on a Part 8 Claim (or certainly not a Part 8 claim associated with a related adjudication enforcement).

<u>The Proper Construction of the Clause 4.6.3.1</u>

35. The first issue is whether 4 days means '4 clear days', such that 4 full days are required in between the receipt of the payment application and the Interim Valuation Date. I accept the submission by Mr Lewis that the term 'clear days' is a well-known concept and is different from 'days'. According to the Oxford English Dictionary, 'clear day or days' means '*a day or days, with no part occupied or deducted*'. Thus, in my judgment, construing the words according to their natural language and usage, if it is necessary to do X not later than 4 'clear' days prior to date A, X must be done, at the latest, on the fifth day prior to date A. By contrast, it if X is merely to be done '4 days' prior to date A, X may be done on the fourth day prior to date A. There is important distinction between the two. In the Sub-contract, there is no reference to 'clear' days. The Sub-contract cannot be sensibly construed as meaning 'clear days'

when that is not the language used. As such I reject Mr Singer's first contention, which in fairness was not advanced with significant enthusiasm, that the relevant date '4 days prior to' 25th October is 20th October, rather than 21st October 2022.

36. Mr Singer placed significantly more emphasis on his second argument, that receipt at 22.08 was not received on or before the end of site working hours, and was therefore late.

37. There is a long line of established authority that the Court does not deal in fractions of a day. This is made clear in *Lester v Garland*, cited above. This principle is reflected in the text of *Lewison* as relevant to when, on the proper construction of contract, a contractual obligation is to be performed. Generally, where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it. The principle was also very recently the subject of consideration in the TCC in *Boxxe v Secretary of State for Justice* [2023] EWHC 533 (TCC), in which the Court referred to and applied the 'fraction of the day' principle in the context of whether a Decision Notice served at 4.55pm was to be considered served on the day itself, or the following day:

> *'In Trow v. Ind Coope (West Midlands) Ltd. [1967] 2 Q.B. 899, referred to by Chadwick LJ in the passage above, writs were issued at 3.05pm on September 10, 1965. They were served on the defendants on September 10, 1966, at 11.59 a.m. and 12.49 respectively. The Rules stated that 'a writ is valid for 12 months beginning with the date of its issue'. The first question related to whether account could be taken of the time of day on which the writs were served. The Court of Appeal unanimously determined that this was not the case. As Lord Denning MR put it,*
>
> > *'When we speak of the date on which anything is done, we mean the date by the calendar, such as: "The date today is May 2, 1967." We do not divide the date up into hours and minutes. We take no account of fractions of a date.'*
>
> *Thus, the relevant date was simply September 10, 1966. In the present case, therefore, the time that the Decision Notice was received is not relevant. The relevant date is simply 13 December 2022. The key question is whether that date (as a whole) should be included, or excluded from the calculation of time.'*

38. Applying these principles to present case, unless the Sub-contract provided otherwise, a payment application required to be made so as to be received by FK no later than 21st October 2022, could be made so as to be received at any time on 21st October 2022, up to 23.59.59, because the law does not count in fractions of a day.

39. It is of course open to parties – as they often do – to require within a contract that particular documents or notices need to be provided within defined time periods

(whether loosely (e.g. 'within business hours') or specifically (e.g. 'between 9am and 5pm')). Just as the Sub-contract was not specific that there needed to be 4 'clear' days, neither did it stipulate that the application had to be received by a particular time period on the relevant day.

40. I do not accept Mr Singer's argument that the part of the Specification setting out when the Site would be open for Elements to carry out the works can be read as importing a restriction upon the words '4 days' in clause 4.6.3.1. Not only is there no wording within the Sub-contract to suggest it can be, it is obviously irrelevant when tested against other reference to 'days' within the Sub-contract more generally. For example, the final date for payment in clause 4.7.1 is '14 days' after the due date. This plainly does not mean 'days' calculated by reference to when the site is open: if so, it would be a period equating to 15.5 calendar days (the site being shut on Saturday afternoons and a Sunday). Put simply, the site opening times within the Specification have nothing to do with the proper construction of the word 'days' within the payment and notice provisions required for compliance with the HCGRA.

41. Moreover, as a matter of language, I do not regard Mr Singer's focus upon the word 'received' as undermining this conclusion. It is clear in my view that different words 'submit' or 'give' (assuming the two are synonymous, about which I have doubts) on one hand and 'receive' on the other will, within a contract, describe the act that needs to be established as having occurred in order to comply with the stated requirement, but do not relate to the timing of that act. In other words, the trigger may be different, but this does not affect the part of the clause which goes to the required timing of the trigger. In this case, actual receipt of the email took place when received in fact by FK's servers. As set out above, there are no words within the Sub-contract which mean that because the timing of actual receipt was late in the evening, that was not effective the same day for the purposes of determining the Application's validity.

42. Mr Singer submits that being able to submit a document at 11.59pm on 21st October 2022 is commercially unworkable and unbusinesslike, particularly in light of the potential consequences of failing to serve a Pay Less Notice in response to an application for payment. This submission comes perilously close to the type of submission which may require to be founded upon evidential footings. No such footings exist – indeed, in light of Elements' unchallenged evidence, it would be difficult for me to determine the proper construction of this clause against Elements based upon a purported unworkability in practice. Moreover, to the extent Elements' evidence was disputed, this would not be a matter for a Part 8 determination. However, setting that point aside for the moment, and dealing with the question as a matter of submission rather than evidence, Mr Singer's submission still fails. It is simply not unworkable in any way: as Mr Lewis points out, the certainty provided by Elements' contended for construction, which itself is consistent with long-established authority, makes the Sub-contract certain. Simply regarding actual 'receipt' on a particular day (whether early in the morning or late in the evening) as being effective receipt on that day provides considerable certainty, and is therefore plainly a more businesslike construction (should that be relevant at all) than effectiveness being dependent upon an unexpressed restriction relating to working hours which will necessarily be subjective to the parties, and differ from party to party and contract to contract.

43. Finally, I do not regard the observation of the learned Judge in *Cubitt* as in any way undermining this conclusion. That case related to the effective date of the service of a Notice of Adjudication where Cubitt wished to invoke the deeming provisions within the CPR that service after 4pm rendered effective service the following day. The learned judge rejected that conclusion for three reasons. It is not clear that any authorities relating to the 'fractions of a day' principle were cited in argument (none are referred to). If they had been, I have no doubt that the common law position (with which the learned judge's decision on this point was consistent) may well have constituted a fourth limb to the judge's rejection of Cubitt's argument on this aspect of its case.

44. In the circumstances, Payment Application No 16 was made so as to be received on 21st October 2022, which was not later than 4 days prior to the Interim Valuation date, and was therefore validly made. There was no error by the Adjudicator in this respect, and the Award should be enforced, and the Part 8 Claim is dismissed. For the avoidance of doubt, paragraph 2 is repeated.