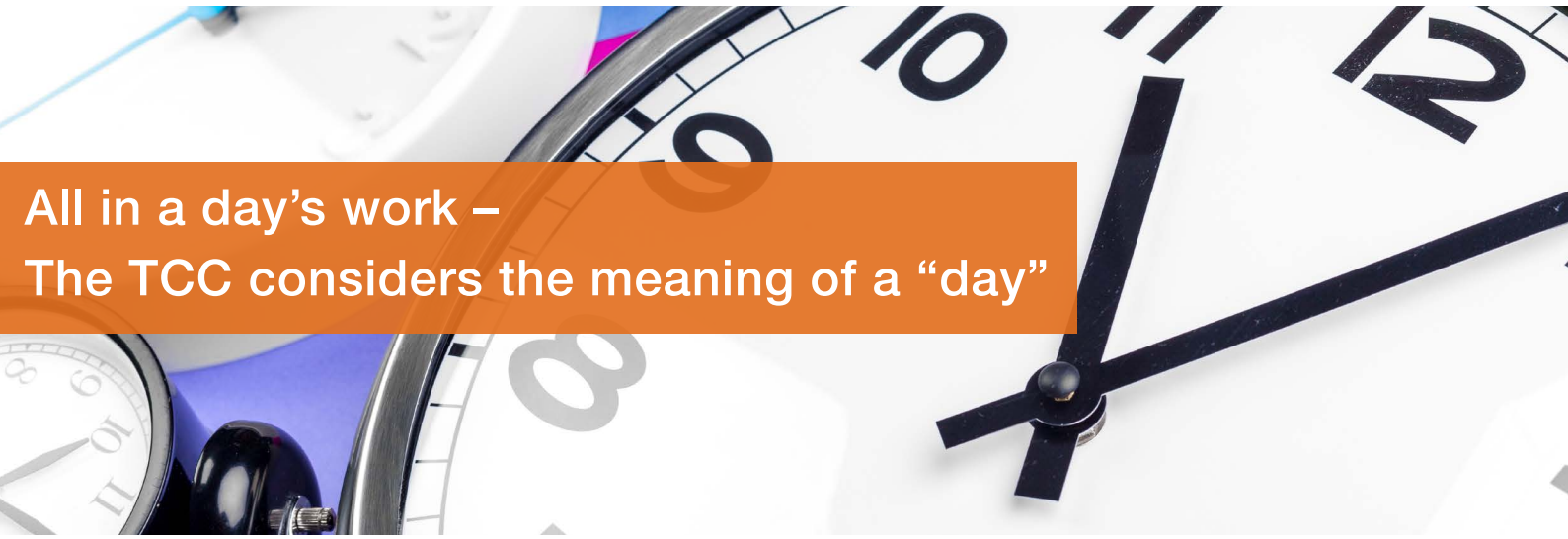

All in a day's work – The TCC considers the meaning of a "day"

A recent decision on the meaning of a word in a JCT contract serves as a reminder to parties to construction contracts to ensure that they understand the mechanics of the agreements they enter into.

The TCC opines on an important point

In this briefing, Construction Partner Kathryn Kligerman considers the judgment handed down last week by the Technology & Construction Court ("TCC") in a case in which Kathryn and her team at Devonshires acted for the claimant sub-contractor.

The TCC decision is important as it considers the wording used in a payment clause in a JCT building contract. Given that the payment provisions form a constituent and essential part of any construction agreement, the TCC ruling gives an important steer to anyone involved in construction contract procurement, the administration of building contracts and the resolution of any disputes that may arise concerning the clauses in question.

The decision also endorses guidance provided in recent (2023) case law and the 2002 revision of the TCC Guide.

The case concerned two related claims: *Elements (Europe) Limited v FK Building Limited and FK Building Limited v Elements (Europe) Limited [2023] EWHC 726 (TCC).*

Two related claims

The sub-contractor, Elements (Europe) Limited ("Elements"), applied to the TCC to enforce an adjudicator's award by way of a summary judgment.

The adjudication in question commenced before Christmas 2022 and, in January 2023, having rejected the main contractor's arguments, the adjudicator delivered his decision and determined that Elements was entitled to the sum of £3,950,190.52, plus interest and costs arising out of the adjudication.

The main contractor, *FK Building Limited (FK)*, disputed that sums were due pursuant to one of the sub-contractor's applications for payment on the basis of five reasons.

The adjudicator rejected FK's arguments. FK did not dispute the enforceability of the award: its Part 8 application concerned two points which it contended related to the validity of the payment application upon which the adjudicator's award rested. FK's Part 8 claim was issued in defence of Element's enforcement proceedings.

The issues in dispute

The judgment considers two arguments raised by the main contractor – (1) whether a particular application for payment was made late and (2) whether "4 days" meant "4 clear days".

The main contractor contended that the sub-contractor's application for payment was invalid because it was received late. In the very first paragraph of his judgment, the judge (The Honourable Mr Justice Constable) said *"… 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"*.

Court intervention where there is a legitimate public interest

In his judgment, the judge refers to the decision in *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826 in which the Court of Appeal stated that, in circumstances where a case raises a point which "is in the public interest to ventilate in a judgment", the courts would have a valid reason to proceed to give judgment, despite the matter in dispute between the parties having been resolved.

In this case, the dispute between the parties settled after the court issued a draft of its judgment. However,

given that a key issue in the case concerned the proper construction of a JCT clause, and the issue had not been the subject of judicial consideration before, the judge decided that it was appropriate to hand down judgment notwithstanding the resolution of the underlying dispute by way of settlement between the parties.

Payment Application No. 16

The sub-contractor emailed its Payment Application No. 16 ('Application 16') to FK on Friday 21 October 2022, at 22:07. This was done by a professional working for a company providing quantity surveying services in relation to the pre and post-contract commercial management of construction projects (including testing, inspection and certification services) which had been retained by Elements to prepare interim applications for payment. The email was copied to a number of FK employees.

There was no dispute that the email and attachment was received into the recipients' email inboxes on the same date it was sent (at between 22:07 and 22:08). In the adjudication, FK questioned whether the recipients could reasonably be expected to have read the email and stated that factual evidence of both specific site practice and 'usual' practice was relevant to that question.

FK argued that Application 16 was submitted late and, if its interpretation was correct, the application was contractually invalid. In order to rely upon the lack of a 'pay less notice' (as required by the Construction Act), Elements would need to demonstrate that its application for payment was contractually valid.

Was Application 16 late?

In support of its argument, FK noted that, in the JCT-based sub-contract entered into between the parties, Condition 4.6.3.1 (which deals with the sub-contractor making payment applications in respect of interim payments due to the main contractor) uses the word "received" – which can be contrasted with the word "give" Condition 4.7.2 (the requirement on the part of the main contractor to 'give a notice' not later than 5 days after the due date specifying the sum he considers to be or have been due at the due date). The argument raised was that Clause 4.6.3.1 is focused on actual receipt by FK.

In response, Elements stated that the main contractor's argument was in effect that the notice to be served under the JCT clause in question was 4 'clear' or 'full' days – but no such language was used in the contractual provision. Elements cited a number of sources that support the rule in English law that, when interpreting contracts, a day is treated as an indivisible whole and fractions of a day are ignored.

In addition, FK argued that Clause 4.6.3.1 should be construed such that the payment application needs to be received on or before the end of site working hours on the correct day as this best meets the reasonable commercial expectations of the parties. The sub-contract specification stated that "… the site *would 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."*

In response, Elements pointed out that the sub-contract imposed no restriction at all on the time of day in which a payment application may be made and received. Elements again relied on the 'fractions of a day' principle as being equally applicable to FK's second argument. When read in full, the specification relates to the time during which the sub-contractor was entitled to carry out its work.

Was the Part 8 claim appropriate?

A separate issue which the TCC considered was whether FK's Part 8 application was appropriate and could be heard at the same time as Element's application for summary judgment.

Both parties referred to a recent decision from January this year – *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2023] 2023 EWCA Civ 54. In that case, the Court of Appeal held that there was no basis in law for striking out the Part 8 claim as an abuse of process: although judges had been warned against the over-liberal and inappropriate use of Part 8 claims in adjudication cases, a parallel Part 8 claim would not necessarily be invalid or an abuse of process and Part 8 proceedings remained open to the parties to an ongoing adjudication.

Elements, however, contended that FK's Part 8 claim did not fall within the exception set out in *Hutton Construction Limited v Wilson Properties (London) Ltd* [2017] EWHC 517. *A&V Building Solutions* endorsed *Hutton*. In addition, the principle was reflected in last year's TCC Guide (§§ 9.4.4 and 9.4.5).

Judge Constable held that, in considering whether parallel Part 8 proceedings should be permitted to be heard (at such a time as would, if successful, affect the enforceability of the adjudicator's award), the Court should be guided by the factors identified in *A & V Building Solutions* and in the TCC Guide, namely whether:

- there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest
- 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
- the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore

Guided by a consideration of those factors, the judge permitted the Part 8 application.

Held

In relation to the proper construction of Clause 4.6.3.1, the judge stated that there is an important distinction between 4 'clear' days and 4 'days'. He rejected FK's argument and held that as there was no reference to 'clear' days in the sub-contract, the clause could not be construed as meaning 'clear days' when that language was not used.

In relation to the second argument, that receipt by the main contractor of Application 16 at 22:08 in the evening meant that the payment application was not received before the end of site working hours (and was therefore late), the judge noted the long line of established authority – most recently in a decision handed down just three weeks ago in *Boxxe v Secretary of State for Justice* [2023] EWHC 533, in which the TCC re-iterated the principle that the courts do not count in fractions of a day and, where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it. Applying these principles to present case, a payment application required to be made so as to be received by FK no later by a particular date, could be made so as to be received at any time on that date up to 23:59:59.

The judge concluded that:

- Application 16 had been validly made by Elements;
- the adjudicator made no error in this respect;
- the adjudicator's award should be enforced; and
- the Part 8 claim be dismissed.

To discuss the implications of the TCC decision or find out more about Devonshires' Construction Engineering & Procurement practice and the contract drafting, disputes management and resolution services we offer our clients (including mediation and adjudication), contact Kathryn:

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