

Elements (Europe) Limited v FK Building Limited

Citation: [2023] EWHC 726 (TCC)

Key Terms: *Clear Days, Part 8 Adjudication, Payment Notice Timing, Adjudication Enforcement, CPR in Adjudication, Deemed Receipt.*

In the recently decided case of [Elements \(Europe\) Limited v FK Building Limited \[2023\] EWHC 726 \(TCC\)](#), Mr Justice Constable provided clarification and reminder with respect to a number of legal definitions and contractual interpretations which have significant bearing in the technical minefield of payment notices under construction contracts.

Background

By way of an amended form of JCT Standard Building Sub-Contract (SBCSub/C 2016 Edition) ("**the Contract**") FK Construction Limited ("**FK**") engaged Elements (Europe) Limited ("**Elements**") to carry out construction works.

The Contract provided for the issue of payments applications by Elements, provided that such applications were submitted "*not later than 4 days prior to the Interim Valuation Date for the relevant payment*".

25 October 2022 was an Interim Valuation Date, and by email on 21 October 2022 at 22:07, Elements issued its payment application ("**the Application**"), purportedly with respect to that Interim Valuation Date.

Elements was not paid the sum claimed in the Application, and on 05 December 2022 served a notice of adjudication seeking to enforce payment. It was successful, obtaining an award in its favour.

Unhappy with the decision of the adjudicator, FK did not make payment and instead issued a Part 8 application seeking a determination that the adjudicator had wrongly recognised the Application as valid, when it was in fact issued too late. Meanwhile, Elements sought to enforce the adjudicator's decision.

FK's Part 8 claim and Elements' application for summary judgment (enforcement) were heard together on 21 March 2023, before Mr Justice Constable.

Part 8 and Enforcement

Practitioners will be familiar with the sanctity of adjudication enforcement; the Court will not generally open up an adjudicator's decision for re-determination and will instead expect a dissatisfied party to issue fresh proceedings for re-determination *after* it has complied with the award in issue.

One exception to this principle however is dealt with at Paragraph 9.4.5 of the [TCC Guide](#) as follows:

“...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”*

FK relied on this provision to pursue its Part 8 application, however Elements argued that it could not do so on the basis that - read in conjunction with the words of Coulson J (as he then was) in the case of [Hutton Construction Ltd v Wilson Properties \(London\) Ltd \[2017\] EWHC 517 \(TCC\)](#) - there is implied the additional condition that the point or points raised by Part 8 application must also be shown to be ‘*obviously wrong*’ or ones to be taken ‘*on any view*’.

Mr Justice Constable rejected Element’s contention, providing:

1. A reminder as to the scope of Paragraph 9.4.5 of the TCC Guide, and the circumstances under which it may be successfully relied upon; and
2. Confirmation that the factors set out at Paragraph 9.4.5 in the TCC Guide are comprehensive, and – for the moment at least – unqualified.

Calculation of Days and Part Days

In contending that Elements issued its application too late, FK made two main points:

1. Reference to ‘days’ ought to be read as ‘clear days’, and as such the application was due on 20 October 2022, not 21 October 2022.
2. In any event, it was implicit in the Contract that reference to an act to be done on a day was reference to that act being done within ‘working hours’ on that day (in this case, hours identified in a contractual specification as site opening hours).

The Court found against FK on both points, having significant regard to the well established legal principle that, when interpreting contracts, “*a day is treated as an indivisible whole and fractions of a day are ignored*” as a starting point.

In the absence of specific reference in the Contract to days as 'clear days', or to specific times by which applications were to be received for deeming purposes, the Court was unwilling to 'interpret out' of the above principle. The effect of this is that:

1. If reference to days as 'clear days' is not made in a contract, then where it is required that an act be done not later than a specific number of days prior to an identified date, the act may also be done on that number of days.
2. Where an act is required to be done on a particular day, there is no requirement it be done by a specific time on that day, unless (i) the relevant contract provides it must be, or (ii) there has been some incidence of waiver or estoppel.

The CPR and Notices Under Construction Contracts

Interestingly, Element referred to the case of [Cubitt Building & Interiors Ltd v Fleetglade Ltd \[2006\] EWHC 3413 \(TCC\)](#) in its submissions, averring – implicitly - that the principle established therein (that that ideas found in the Civil Procedure Rules like deemed service should not be read into construction contracts ***in the context of construction adjudication***) ought also to apply – by analogy - in the context of provisions relating to the issue of notices.

This submission – whilst referred to by Mr Justice Constable – was not definitively addressed in so far as it makes that distinction, however it was given positive treatment, and as such one may take the view that this case is authority for the proposition that the provisions of the CPR have no place in the context of payment notices; so far as authority for such an obvious proposition is necessary.

[James Rooney](#)

17 April 2023