

# Important TCC case about payment provisions in JCT contracts and *Hutton v Wilson*

On 30 March 2023, the TCC (Constable J) handed down judgment in *Elements v FK Building* [2023] EWHC 726 (TCC). [Jonathan Lewis KC](#) and [Gideon Shirazi](#) acted for the successful subcontractor.

Elements was a subcontractor of FK Building for a modular construction project in Salford under a JCT SBCSub/C 2016 form (“the JCT Subcontract”). The form provided for interim valuation dates on the 25<sup>th</sup> of each month, and that payment applications should be received no later than 4 days before the interim valuation date. The parties had also agreed the hours that the site would be open for the subcontractor to carry out the works.

At 22:07 on 21 October 2022, Elements emailed a payment application to FK in an amount exceeding £3.9 million. It was common ground that the email was received almost immediately into the recipients’ email inboxes. No payment certificate or pay less notice was served by FK. FK did not pay, and Elements started and won an adjudication against Elements for the sum applied for. FK started a Part 8 claim arguing that (1) the requirement to receive a payment application no later than 4 “days” before a specified date meant clear days so that the payment application needed to be received no later than 20 October and accordingly was received late and invalid, and (2) a payment application could only be received for the purposes of the JCT Subcontract within business hours or site hours and so the application was invalid.

## The Timing Requirements

The TCC dismissed both of FK’s arguments. The court construed the meaning of “day” in the JCT Subcontract as not meaning clear or full days. It did not require a full 24 hour period to apply and any part of the day was sufficient for service.

It follows from the judgment that:

1. There is normally no restriction on the time in which a party can serve or receive a payment notice: a notice served or received any time until 23:59:59 would be valid.
2. Where the contract provides that a notice needs to be received 4 days before date X, that gives a deadline of day X-4 and does not require four full 24 hour periods for service to be valid.

## The *Hutton* exception

An unsuccessful party to an adjudication normally cannot resist adjudication enforcement on the basis that the adjudicator got it wrong. There is one narrow exception to this: an unsuccessful party can start a Part 8 claim which can be used to re-run a point raised in the adjudication in certain limited circumstances identified in *Hutton v Wilson*.

In *Hutton*, the court identified that a party can resist an adjudication enforcement using a Part 8 claim if it involves a short and self-contained point of law run in the adjudication which can be dealt with in the adjudication enforcement hearing and which it would be unconscionable for the court to ignore on the summary judgment application. *Hutton* also identified that this would normally apply only where the adjudicator's approach to the question in the Part 8 claim was "*beyond any rational justification*" or "*obviously wrong*".

In *Elements*, the TCC identified that the requirement that the adjudicator's approach be "*beyond any rational justification*" or "*obviously wrong*" was not an additional requirement for the *Hutton* exception to apply but rather an explanation of the test. This suggests that the TCC may be adopting a more liberal approach to the use of Part 8 claims to resist adjudication enforcement.

Read the full judgment [here](#).