

When not to use the CPR Part 8 procedure to thwart adjudication enforcement proceedings



In the recent case of *Breakshore Ltd v Red Key Concepts Ltd* [2022] WL 04656016, the TCC provided a helpful reminder of the strict requirements for using CPR Part 8 to resist adjudication enforcement proceedings, and the consequences (in costs) of using it inappropriately.

The hearing was an application by Breakshore for summary judgment of its claim to enforce an adjudicator's decision in its favour, by which it had been awarded liquidated damages for delay.

In response Red Key had commenced Part 8 proceedings in an attempt to have substantive issues in the adjudication, heard by the court at the same time as the summary judgment hearing for enforcement, in the hope that the Part 8 would go in its favour and defeat the enforcement.

Therefore Red Key was not resisting enforcement in the usual way, ie via a reliance on arguments as to an adjudicator's lack of jurisdiction or a serious breach of the rules of natural justice. Those being the well established grounds for resisting enforcement, and which are narrow grounds only, because the assumption is that the Court will enforce an adjudicator's decision whatever its merits.

Unusually Red Key's position was that the adjudicator's decision had obviously been wrong and it sought a determination of the substance of the dispute by way of a Part 8 claim.

By the time of the hearing however Red Key had conceded that some of the relief that it sought, should instead be dealt with via Part 7 proceedings, and hence that element would not operate as a means of thwarting enforcement. As regards the balance, there was no consent by Breakshore to use of the Part 8 procedure.

In those circumstances Coulson J as he then was, had set out the proper approach to take in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 TCC. He had said that it would only be "in very limited circumstances that it will be right to determine the substantive issues at an adjudication enforcement hearing". Those limited circumstances were 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 set aside for the enforcement; and*
- (c) *the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore."*

Furthermore, the consequences of the issue/s raised in the Part 8 proceedings must be clear cut, ie not disputed.

In Red Key's Part 8 proceedings however, the TCC decided that there was *"no clear-cut issue here from which it can be seen the adjudicator was obviously wrong to decide that liquidated damages were due for the period"*.

Therefore the Part 8 proceedings were not appropriate here and hence not suitable for hearing alongside the enforcement. As to costs, the Court went on to say this:

"I am going to assess the costs on the indemnity basis.....[because] there was an obviously inappropriate use of the Part 8 procedure for tactical advantage. All that conduct, having regard to the regime, is unreasonable to a degree which justifies an award for indemnity costs".

This case highlights how any attempt, inappropriately, to circumvent the outcome of an unfavourable adjudication decision, is likely to be stopped in its tracks and punished in costs by the TCC.

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