

A MAGIC BULLET or A BOTCHED SHOT?

Using Part 8 to Resist Adjudication Enforcement Proceedings



Brenna Conroy considers the use of Part 8 proceedings and adjudication in light of the recent criticisms from the TCC, and the guidance to be followed when seeking a final determination of an issue arising out of the underlying dispute by way of declaratory relief.

Introduction

The use of Part 8 in relation to adjudication enforcement proceedings has become increasingly popular over the past few years as parties try to avoid the pitfalls of having to pay now and argue later by seeking a final determination of “a short, self contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing”¹ on an expedited timetable.

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The problem that has been identified in recent authorities is that there are very few cases which have a point suitable for determination using Part 8 proceedings, and in a number of recent decisions the TCC has set down a clear warning to parties attempting to use the procedure to avoid the consequences of an adjudicator’s decision.

Issuing a Part 8 claim in inappropriate circumstances is seen as an abuse of process, with the consequence that a defendant who unsuccessfully raises this sort of challenge on enforcement “will almost certainly have to pay the claimant’s costs of the entire action on an indemnity basis.”² Therefore, parties are advised to consider carefully the merits and propriety of the proposed Part 8 claim before issuing proceedings.

Part 8 and Adjudication

Paragraph 9.1.2 of the TCC Guide recognises that in addition to enforcement applications, declaratory relief by way of a

Part 8 Claim can be sought in the TCC at the outset of or during an adjudication in respect of matters relating to the jurisdiction of the adjudicator or the validity of the adjudication. Paragraph 9.4.1 of the Guide lists three such examples: disputes over the jurisdiction of the adjudicator; whether there is a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 (as amended); and disputes over the permissible scope of the adjudication.

In relation to claims for declaratory relief properly considered as ‘Other Proceedings Arising Out of Adjudication’, paragraph 9.4.2 of the TCC Guide contemplates abridged directions akin to those given in adjudication enforcement cases, see *Merit Holdings Limited v Michael J Lonsdale Limited*³ at [18], where Jefford J stated “[t]he point here is that the Court will act quickly where there is an issue that goes directly to the proper constitution of the adjudication at its commencement.”

The type of dispute expressly referred to in the TCC Guide is in keeping with the general rule that, ordinarily, the fact that one of the parties thinks that the adjudicator’s decision was wrong is irrelevant to any enforcement decision.⁴ However, this general rule has two narrow but important exceptions, as identified by Coulson J in *Hutton Construction Ltd v Wilson Properties (London) Ltd*:

“The first, exemplified by Geoffrey Osborne Ltd v Atkins Rail Ltd [2010] BLR 363, involves an admitted error... The second exception concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice, and could be said to date from Caledonian Modular Ltd v Mar City Developments Ltd (2015) 160 Con LR 42.”⁵

As to the second exception, in the case of *Caledonian v Mar City*, the defendant had raised one simple issue in defence of enforcement proceedings, which was that a small group of documents could not have

constituted a valid payment application; if that was right it was agreed that the claimant was not entitled to summary judgment. Coulson J stated at paragraph 12 that:

“If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration.”

Therefore, it is possible to use Part 8 proceedings to seek a final determination of an issue arising out of the underlying dispute, so long as it satisfies the relevant criteria.

Procedural Requirements

In *Caledonian v Mar City*, Coulson J stated that paragraph 9.4.3 of the TCC Guide envisaged that separate Part 8 proceedings will not always be required in order for such

an issue to be decided at the enforcement hearing (i.e. it could be pleaded in a defence and counterclaim). However, in *Hutton v Wilson*, Coulson J made clear that a “prompt Part 8 claim is the best option” and expressly stated that paragraph 9.4.3 of the Guide must be taken to have been superseded by the guidance in the judgment.⁶

In *Hutton*, Coulson J stated that if there is a dispute between the parties as to whether or not the defendant is entitled to resist enforcement on the basis of its Part 8 claim, the Defendant must be able to demonstrate that:

“(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; (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.”⁷

¹ *Caledonian Modular Ltd v Mar City Developments Ltd* (2015) 160 Con LR 42 at [12].

² *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [21]–[22].

³ [2017] EWHC 2450 (TCC).

⁴ *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con L.R.1. [1999] BLR 93 at pp.98–99.

⁵ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [4] to [5].

⁶ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [11]–[12] and [15]–[16].

⁷ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [17].

At paragraph 18, Coulson J continued,

*“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 the *Macob Civil Engineering Ltd case 64 Con LR 1*.”*

Additionally, due to the inevitable time restraints associated with enforcement hearings, Coulson J considered it *“axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut.”*⁸

“...the real benefit of Part 8 proceedings issued before or at the outset of an adjudication is that they provide parties with certainty as to matters which could otherwise derail a decision on enforcement.”

The cases of *Hutton v Wilson* and *Merit Holdings v Lonsdale* also provide clear guidance on the way in which the Part 8 claim should be framed. In *Hutton*, the defendant’s failure to seek specific declarations in the Part 8 claim and its attempt to re-run the entirety of the issues in the adjudication were two of the reasons given as to why the Part 8 claim would not be considered at the enforcement hearing.⁹ In *Merit Holdings v Lonsdale*, Jefford J stated that it was *“implied in the rules that the question [to be determined] should be framed with some degree of precision and/or be capable of a precise answer.”*¹⁰

Suitability to Part 8 Proceedings

In the case of *Caledonian v Mar City* itself, Coulson J emphasises that the procedure would rarely be used *“because it is very uncommon for the point at issue to be capable of being so confined”*.¹¹ In *Merit Holdings*, Jefford J identified the risk of

*“the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions.”*¹²

In the past six months there have been two further cases that have considered the use of Part 8 in relation to adjudication enforcement proceedings. In *Actavo UK Ltd v Doosan Babcock Ltd*,¹³ Doosan sought, *inter alia*, a declaration that Actavo was not entitled to interest under the Late Payment Act. O’Farrell J considered that it was not appropriate for the court to determine the point by way of Part 8 as Doosan had raised a course of dealing argument that would require further oral and/or written evidence before it could finally be settled.

In *Victory House General Partner Ltd v RGB P&C Ltd*,¹⁴ Joanna Smith QC determined that the matters raised in the Part 8 Claim, which included matters of disputed fact, were not suitable for resolution under the Part 8 procedure. The Judge did not accept that the Part 8 claim could be determined on the basis of assumed facts which could later be challenged as *“in the event of a subsequent challenge to such a decision, there will be no saving of cost and resources and no advantage in permitting determination of the issues to be expedited.”*¹⁵

An Expedited Timetable?

Following *Merit Holdings v Lonsdale*, it also remains unclear as to whether a *Caledonian v Mar City* point properly constitutes ‘Other Proceedings Arising Out of Adjudication’ so as to justify an expedited timetable. The issue is that the *Caledonian v Mar City* exception relates to a point arising out of the underlying dispute rather than a matter that goes to the proper constitution of the adjudication. At paragraph 20 of the Judgment, Jefford J stated *“It should not be assumed that some relationship to an adjudication and an adjudication label means that it is automatically appropriate for a case to be dealt with in this way.”*

The simple answer may be that if the defendant meets the *Hutton* criteria set out above, this warrants the imposition of an abridged timetable to allow the Part 8 claim to be heard at the enforcement hearing. However, in circumstances where Part 8 proceedings are issued pre-emptively (i.e. before a threatened adjudication) or during the adjudication itself, it remains

to be seen whether the Courts will adopt an expedited timetable for disputes based on other factors such as the avoidance of unnecessary cost and expense as referred to in *Merit Holdings v Lonsdale*.¹⁶

Concluding Remarks

Where there are issues in dispute which go to the proper constitution of the adjudication, the real benefit of Part 8 proceedings issued before or at the outset of an adjudication is that they provide parties with certainty as to matters which could otherwise derail a decision on enforcement. The use of Part 8 in these circumstances is expressly endorsed by the TCC Guide, and parties should give serious consideration to the proceedings knowing that *“the Court will act quickly where there is an issue that goes directly to the proper constitution of the adjudication at its commencement.”*¹⁷

As to Part 8 proceedings relating to the underlying dispute, the type of case envisaged by Coulson J in *Caledonian v Mar City* as suitable for such determination is colloquially known as a *“smash and grab”* dispute, where the outcome will usually depend upon the Court construing a series of documents to determine whether there has been a valid payment application and/or pay less notice. Whilst the recent decision in *Grove Developments Ltd v S&T (UK) Ltd*¹⁸ has clearly diluted the potency of a *“smash and grab”* adjudication, the case itself makes clear that the paying party will still be expected to pay the sums due in a payee’s notice. Faced with that situation, a well-considered Part 8 claim may still be an appropriate tactical choice to determine the validity of a payment application/pay less notice, particularly if a party is not ready to adjudicate the actual value of the interim application.

As to issues relating to the underlying dispute more generally, parties are well advised to ensure that any declaration sought by way of Part 8 proceedings can properly be determined without the need for oral evidence and the relief sought is *“framed with some degree of precision”* and *“capable of a precise answer.”*¹⁹ An application for an expedited timetable pursuant to paragraph 9.4 of the TCC Guide should also identify why the expedited procedure is sought, particularly if the point raised does not go to the constitution of the adjudication itself.

⁸ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [19].
⁹ *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus. L.R. 908 at [32]–[34].
¹⁰ *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [21].
¹¹ *Caledonian Modular Ltd v Mar City Developments Ltd* (2015) 160 Con LR 42 at [13].
¹² *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [22].
¹³ [2017] EWHC 2849 (TCC).
¹⁴ [2018] EWHC 102 (TCC).
¹⁵ *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 102 (TCC) at [6].
¹⁶ *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [20].
¹⁷ *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [18].
¹⁸ [2018] EWHC 123 (TCC).
¹⁹ *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC) at [21].

