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Adjudication Caselaw Update

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Introduction

The courts continue to adopt a robust approach to the enforcement of adjudicators' decisions. As per previous update seminars, there have again been a number of important recent developments in adjudication case law. The purpose of this paper is to outline the key issues that have been considered by the courts over the last six months under the following headings:

1. Injunctions to restrain adjudications;
2. Fraud;
3. The adjudicator's obligation to review material;
4. Stay of execution on the basis of insolvency;
5. Stay of execution because of subsequent proceedings;
6. The slip rule; and
7. Jurisdictional reservations.

Injunctions to restrain adjudications

In the recent decision of *Mentmore Towers Ltd, Good Start Ltd, Anglo Swiss Holdings Ltd v Packman Lucas Ltd,*[1] Packman Lucas were granted injunctions to restrain three adjudications respectively commenced by the three claimants. In previous adjudications Packman successfully claimed its outstanding fees. The Claimants did not pay the adjudication decisions and Packman successfully brought enforcement proceedings. The Claimants still refused to pay. The Claimants then commenced TCC proceedings[2] which were stayed as the Claimants had not honoured the adjudicator's decisions. The Claimants had then commenced adjudications seeking to recover overpaid fees.

The court granted the injunctions which would remain until the Claimants complied with the previous court orders ordering compliance with the adjudication decisions. In relation to the court's power to order an injunction to restrain adjudications, Mr Justice Edwards-Stuart stated:[3]

> *[T]here is no difference in principle between the approach to be adopted by the court when considering whether or not to order a claim brought by way of litigation to be stayed on the grounds that it is being brought unreasonably and oppressively, and the approach to be adopted when considering whether or not to restrain the further pursuit of an identical claim by way of adjudication on the same grounds. However, the application of those principles may differ according to the circumstances. It does not follow that because a court would order the stay of a particular claim brought by way of litigation, that it would automatically restrain the pursuit of the same claim by way of adjudication.*
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> . . .

1 [2010] EWHC 457.

2 *Anglo Swiss Holdings Limited & Anor v Packman Lucas Limited* [2009] EWHC 3212. At paragraph 21 of his judgment, Mr Justice Akenhead held that the court had the power and discretion to stay any proceedings if justice requires it. In exercising that power and discretion, the court must very much have in mind a party's right to access to justice and to issue and pursue proceedings. The power is one that is to be used sparingly and in exceptional circumstances. Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably. His Honour held that there was some oppressive and unreasonable behaviour and some elements of bad faith involved in the claimants pursuing their claims without first honouring the adjudicator's decisions and the court judgments.

3 At paragraphs 22 and 36 respectively.

> *... The current referrals are simply another attempt to circumvent the machinery and policy of the HGCRA. It is unreasonable and oppressive for the Defendants to be subjected to further proceedings by way of adjudication when the Claimants have still failed to honour the first awards and the subsequent judgments of the court. It is not enough for the Claimants to make, for example, offers to pay money into court, even if such payment were to be made tomorrow. The Defendants are and were entitled to have a cash award paid in cash. That is the purpose of adjudication.*

In contrast, injunctions were not granted in the case of *Ericsson AB v EADS Defence and Security Systems Limited*.[4] The contract provided that Ericsson could refer a matter to both mediation and adjudication. It stated that the parties "may" refer the matter to mediation or adjudication, not that it "shall" refer a dispute to one or the other. Ericsson could pursue remedies in adjudication even though they had sought such remedies via mediation. The contract also stated that adjudicators' decisions shall be valid and enforceable by the court, subject to manifest error. In this case, Mr Justice Akenhead considered the applicable test for an interim injunction. While Ericsson had a real prospect of success in obtaining the injunction at full trial the court was not concerned with determining the final rights of the parties at this stage and damages would be an adequate remedy between two very substantial commercial parties that had freely negotiated their own contract. In addition, any damage to reputation that Ericsson may have suffered would be for a relatively limited duration. Therefore, it was not appropriate to restrain Ericsson from pursuing adjudication, even though it had also instituted mediation. Further, the effect of an injunction to restrain termination of the contract by EADS would be to require two parties who had fallen out with each other to continue to work together in circumstances where they had a sophisticated contract that purported to provide commercial solutions or remedies when a lawful or unlawful termination occurred.

Therefore, presently, it seems that a party will be successful in seeking an injunction to restrain adjudications when the other party has not complied with previous adjudicators' decisions. However, an injunction will not be granted simply because there are other forms of dispute resolution available under the contract which the other party is also seeking to utilise.

Fraud

Over the past six months the courts have considered the possibility of fraud as a defence to the enforceability of an adjudicator's decision. The first case to consider this was *SG South Limited v (1) King's Head Cirencester LLP (2) Corn Hall Arcade Limited*.[5] In this case, King's Head argued that there was a strong prima facie case that SG South had behaved fraudulently on both this project and another project. After the adjudicator had stated that to decide on the issue of fraud went beyond his jurisdiction, the matter came before Mr Justice Akenhead.

Mr Justice Akenhead identified the following basic propositions regarding fraud in the context of adjudication enforcement decisions.[6]

> (a) *Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence ...*
>
> (b) *If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.*

4 [2009] EWHC 2598.

5 [2009] EWHC 2645.

6 At paragraph 20. These propositions were later approved by the Court of Appeal in *Speymill Contracts Limited v Eric Baskind* [2010] EWCA Civ 120.

(c) *A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.*

(d) *Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it. Examples of the first category are where it is later discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims… fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement.*

However, King's Head's argument was rejected as there was no clear and unambiguous evidence that the adjudicators' decisions were procured by fraud. Both decisions related to allegedly unpaid certificates; the first adjudication was a case of SG South being unable to prove that it had not been paid; the second was that the unpaid certificate had to be honoured because so-called "abatements" to the amounts certified had not been raised by way of an appropriate withholding notice. Furthermore, the allegations of fraud that were made were not in relation to, nor did they impact on, the claims allowed by the adjudicators.

Fraud was again considered in *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd.*[7] In this case, Ringway attempted to resist enforcement, *inter alia*, on the basis that GPS had not been deliberately dishonest, but had been reckless as to the figures it claimed, and that these figures had been upheld by the adjudicator. Mr Justice Ramsey held that the adjudicator's decision was not obtained by fraud. Whilst there had been mistakes by GPS in the figures claimed, these amounted to a significant undercharging in favour of Ringway, and therefore this could not be taken to be fraudulent behaviour. Further, even if this was wrong, the adjudicator had decided on the point and therefore there would be an error of fact or law which would not, in this case, prevent enforcement.

The principles set out in *SG South* in determining the relevance of fraud for enforcement have been approved by the Court of Appeal.[8] If a party has raised fraud in the course of an adjudication and the allegation has been taken into account in the course of the decision, it cannot be raised again at enforcement.[9] When raising fraud, there are the usual difficulties of proof: clear evidence is required. This must be more than the submission of bills or invoices that the employer believes "overstates" the contractor's entitlement.[10]

The adjudicator's obligation to review material

One of the more interesting developments in the past six months has been the decisions of *GPS Marine Contractors Limited v Ringway Infrastructure Services Limited*[11] and *AMEC*

7 [2010] EWHC 283.

8 *Speymill Contracts Limited v Eric Baskind* [2010] EWCA Civ 120.

9 Ibid.

10 *SG South Limited v King's Head Cirencester LLP* [2009] EWHC 2645 at paragraph 21 per HHJ Akenhead
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11 [2010] EWHC 283.

Group Ltd v Thames Water Utilities Ltd[12] concerning the adjudicator's obligation to consider material.

In *GPS Marine*, Ringway argued that there had been a breach of natural justice as the adjudicator had failed to consider a rejoinder submitted by Ringway two days before the adjudicator's decision was due. This argument was rejected as not being a breach of natural justice by the adjudicator. Ringway had served a rejoinder despite prior indications that this would not, and could not, be allowed. The adjudicator had disregarded this submission when reaching his decision. Mr Justice Ramsey held that the adjudicator was, in the context of a rapid summary procedure leading to a temporary binding decision, entitled to, and needed to, limit the number of rounds of submissions, which is what he had done. Therefore it was not a breach of natural justice.

Similarly, in the case of *AMEC Group Ltd*, Thames argued that the Adjudicator breached the rules of natural justice by failing to take into consideration its further response, served three days before his decision was due. The further response consisted of 28 pages with 15 appendices. Mr Justice Coulson rejected this argument:[13]

> *First, I consider that the Adjudicator was not obliged to consider the further response in any detail. I do not go as far as to say that he could ignore it altogether, principally because of his letter … which invited 'final submissions'. However, it seems to me that, in view of the fact that the further response was provided just over two days before he had to complete his final decision, the Adjudicator was not acting in breach of natural justice if he simply glanced at the material that it contained, to see its general nature and to see if it contained anything of real significance.*
>
> *I say that because, in my judgment, in an adjudication with a tight timetable, an Adjudicator is not obliged to consider in detail a second round submission or pleading, served very late in the adjudication process. His overriding obligation is to complete his decision within the time limit. If that means that he cannot read or digest in detail a document provided just over two days before that decision had to be finalised and provided to the parties, then that is simply one of the consequences of the adjudication process. In adjudication, a requirement to consider every round of the parties' submissions in detail, which might be required of a judge or an arbitrator pursuant to the rules of natural justice, will always be tempered by the Adjudicator's overriding obligation to comply with the time limits.*
>
> *As has been pointed out elsewhere, it is becoming very common for parties in adjudication to believe that they are in some way entitled to respond to every submission put in by the other party. In my view, unless the contract or the relevant adjudication rules expressly permit it, they do not have such an entitlement. Adjudication is not intended to resolve disputes by reference to innumerable rounds of submissions or pleadings.*

In both of these cases, submissions had been received approximately two days before the adjudicator's decision was due. Whilst in *GPS Marine*, the adjudicator had indicated that a rejoinder would not and could not be allowed, the Adjudicator in *AMEC* actually had invited parties to submit submissions. However, the Adjudicator was not obliged to consider the submission received in detail. These decisions give support to Adjudicators[14] and serve as a reminder to parties to make their points in good time during the adjudication.

12 [2010] EWHC 419.

13 Paragraphs 63 to 65 of the judgment.

14 However, this support is not un-conditional. For example, in *Enterprise Managed Services Limited v Tony McFadden Utilities Limited* [2009] EWHC 3222, Mr Justice Coulson criticised the way in which the adjudicator had conducted the adjudication: "In my judgment, the Adjudicator ought to have taken more of a grip on this adjudication at the start, and reached early views both as to jurisdiction and as to whether it could be dealt with fairly in the time period. Had he done so, I think it likely that for one, or maybe even both, of these reasons he would have concluded that the adjudication could not be properly or fairly progressed and that the right course was resignation. That would have obviously saved a good deal of time and money, not least the costs of these Part 8 proceedings"

Stay of execution on the basis of insolvency

In an unreported decision of *Anrik Limited v AS Leisure Properties Limited,*[15] the court considered on what date it should assess a party's financial position in relation to a stay of execution. The parties had entered into a contract in 2006 and a further ad hoc adjudication agreement six weeks prior to the Adjudicator's decision. AS Leisure applied for a stay of execution on the basis that there was a real risk that Anrik would be unable to repay the judgment sum, if ordered to do so, as there had been a significant deterioration in its financial position since the date the contract was entered into (i.e. since 2006). However, Mr Justice Edwards-Stuart considered that the relevant date to assess the change in Anrik's financial position was the date the ad hoc adjudication agreement was entered into. This agreement created the contractual mechanism for the judgment debt and, as there had been no change in Anrik's financial position since the date of the ad hoc agreement, the application for a stay of execution was dismissed.

When judging whether to attempt to resist enforcement on the basis of insolvency, consideration must always be given to the appropriate time frame in which to judge the deterioration in the claimant's position. This decision potentially extends the time frame laid down by Mr Justice Coulson in his decision in *Wimbledon Construction Co 2000 Ltd v Vago,*[16] albeit in limited circumstances.

Stay of execution because of subsequent proceedings

In the case of *SG South Limited v Swan Yard (Cirencester) Limited,*[17] the TCC were asked to consider if, because there were separate ongoing final account proceedings, the enforcement proceedings should be stayed. In addition, the Court considered whether the Adjudicator had the necessary jurisdiction.

Swan Yard employed South to construct and fit out a retail shopping arcade and hotel at two sites near Cirencester. The parties had not concluded a written contract but proceeded on the basis of a JCT Management Contract. Swan Yard did not challenge the jurisdiction of the Adjudicator on the basis of the lack of a written contract. However, the Adjudicator investigated the matter of his own volition and decided that there was no written contract between the parties but that, "a contract arose either by oral agreement or by conduct or by a combination of oral agreement or conduct". Despite this, he concluded that he had the necessary jurisdiction to act as Adjudicator. The Adjudicator found in SG South's favour.

In the pleadings for the enforcement hearing Swan Yard, again, did not allege that the lack of a contract in writing should render the decision unenforceable. However, Mr Justice Coulson firstly considered whether, despite Swan Yard not raising the issue of the lack of a written contract in either the adjudication or the enforcement hearing, the Adjudicator's decision could be enforced. After considering section 107(5) of the HGCRA, the Judge found that an agreement should be implied and that this would not prevent the Court from enforcing the decision.

Mr Justice Coulson then considered Swan Yard's two defences:

1. That, because there were separate ongoing final account proceedings in the Bristol District Registry, the enforcement should be stayed.

   The Judge held that the ongoing final account proceedings had no effect on the

15 Unreported, TCC, 8 January 2010, HHJ Edwards-Stuart.

16 [2005] EWHC 1086.

17 [2010] EWHC 376.

enforceability of the Adjudicator's decision. He emphasised that the point of adjudication was that it was a temporarily binding decision unless and until the dispute was determined by arbitral or legal proceedings. The facts of this case encapsulated the intention of the statutory adjudication scheme; and

2. South should have made further concessions due to mistakes made by the Adjudicator.

   The Judge considered the individual mistakes alleged by Swan Yard, but again found that these had no effect on the enforceability of the Adjudicator's decision. He described this defence as unarguable and found that the Adjudicator had not made any obvious errors. In any event, following the established case law, the Adjudicator had answered the right question, and was entitled to make errors of fact or law so long as they didn't breach the rules of natural justice.

Accordingly, the decision was enforced (even though there was no contract in writing). Therefore, a stay will not be granted if there are other ongoing proceedings. This follows existing caselaw such as *Herschel Engineering Ltd v Breen Property Ltd.*[18]

The slip rule

The parameters of the slip rule were considered in *O'Donnell Developments Limited v Build Ability Limited.*[19] In this case, Build Ability was the main contractor of a mixed retail and leisure development in Birmingham. O'Donnell was engaged as a concrete framework contractor.

This case considered two adjudications. The first adjudication concerned the value of the subcontract works up to Interim Valuation 25. The Adjudicator decided the value that O'Donnell was entitled to, less retention, valid Build Ability deductions and payments to date. A day after the Adjudicator's decision O'Donnell notified the Adjudicator of two errors: (1) that he had incorrectly included in the payments to date a sum which had been awarded in a previous adjudication between the parties (i.e. after the date of Valuation 25); and (2) that the retention was miscalculated.

Build Ability objected to the correction of these errors on the grounds that they did not fall within what was permitted by the slip rule. The Adjudicator considered that he had power to correct the errors and revised his decision.

In a subsequent adjudication the Adjudicator awarded O'Donnell further monies. Build Ability declined to pay the sums awarded in the two adjudications.

Build Ability contended that the Adjudicator's calculations were based on figures provided by O'Donnell and that he was induced by those figures, therefore this fell outside what could be defined as a slip. O'Donnell argued that it did fall within the slip rule because the incorrect adjudication decision did not accurately reflect his true intentions. Mr Justice Ramsey agreed.

If there were an express or implied term in the contract, an adjudicator could correct an accidental error or omission provided it was done in a reasonable time. Furthermore, an adjudicator exercising its powers erroneously did not mean it is acting outside of its jurisdiction. The distinction between disputes as to an adjudicator's jurisdiction, and disputes as to ways in which that jurisdiction should be exercised is not an easy one to draw:

18 (2000) BLR 272.

19 [2009] EWHC 3388.

> … *First if the Adjudicator were to exercise a slip rule when there was no express or implied slip rule, that would clearly be a decision which was outside his jurisdiction. Secondly, if the Adjudicator is asked by one party to correct a slip and he accepts that an error has been made within the slip rule then if the Adjudicator makes an error of fact or law in so doing, I consider that such an error does not take the exercise of the slip rule outside his jurisdiction. Finally, if the Adjudicator is asked by one party to correct a slip which the other party agrees is a slip within the slip rule but in operating the slip rule he makes an error of fact or law, then I do not consider that the court can interfere in that decision.*

Mr Justice Ramsey also said that courts should be careful not to mischaracterise a mistaken application of the slip rule as being outside of an adjudicator's jurisdiction. Therefore, in this case, the slip rule was an accepted implied term of the contract. The Adjudicator was asked to correct a slip and, though he had made an error within the slip rule, he was not acting outside of his jurisdiction.

Even if the Judge were wrong, he decided on the merits of the case that the Adjudicator had made an inadvertent slip, as by making a deduction which he had not intended to make this was within the slip rule. Notwithstanding that the mistake had been made as a result of erroneous information provided by O'Donnell, this was not uncommon and did not prevent an adjudicator from concluding that what he has done is not what he intended.

Jurisdictional reservations

We have already discussed the perils of not taking jurisdictional points in *SG South* when a party missed the chance to resist enforcement on the basis that there was no contract in writing. The importance of jurisdictional reservations was reviewed in *Allied P & L Limited v Paradigm Housing Group Limited*.[20] Paradigm reserved its position as to the adjudicator's jurisdiction. These objections were repeated in Paradigm's Response. It is trite law that parties must reserve their position clearly and appropriately if they wish to challenge a decision's enforceability on jurisdictional grounds in the court. However, Mr Justice Akenhead stated:

> *... there are many types of jurisdictional challenge and there can also be different types of reservation. One can reserve generally or specifically. I will leave open the issue as to whether a general reservation as to jurisdiction without any hint or suggestion as to what the grounds are can be effective … if a specific reservation was made on one ground and it was established that the ground in question was an invalid jurisdictional objection, the party in question must be taken to have acceded to the jurisdiction only subject to the specific failed ground; in those circumstances, the parties will be taken to have submitted to the jurisdiction even if there are other good grounds which existed but were not mentioned.*

On the facts there was no effective jurisdictional reservation. Paradigm's letter identifying that it had not received a letter of claim was not a jurisdictional point but a general complaint from Paradigm. That letter did reserve Paradigm's position on a different matter, which was no longer pursued, but the fact it did so on a specific point merely highlighted its awareness that it needed to reserve its position. This suggested that failing to reserve its position as to the non-crystallisation of a dispute was deliberate. Further, any jurisdictional objection in Paradigm's Response was similarly ineffective as it merely incorporated and cross-referred to the objection in the letter, which was in itself ineffective. There also was no jurisdictional requirement for a letter of claim to be submitted prior to commencing adjudication. So even if Paradigm were disputing jurisdiction on these grounds, such an

20 [2009] EWHC 2890.

objection was a bad point to make. Therefore, Paradigm had not only failed to make an effective reservation, but it acceded to the jurisdiction of the Adjudicator to resolve all the matters that were the subject of the Referral.

Parties must therefore be careful to ensure that, when reserving jurisdictional rights, the scope of that reservation is considered. In particular, is it intended to be a reservation of all jurisdictional rights or only in relation to specific issues?

Set-off between adjudicators' decisions

The ability to set off two different adjudicators' decisions was considered in *JPA Design and Build Ltd v Sentosa (UK) Ltd.*[21] In this case, there was an adjudication in relation to alleged incorrect deduction and a separate adjudication in relation to liquidated and ascertained damages ("LADs"). However, the LADs referral did not seek payment of any sum found due.

Mr Justice Coulson found that there was no reason why the decisions in the two adjudications could not be set off against one another. The Adjudicator had found that sums in respect of LADs were due, and contrary to JPA's assertions that as Sentosa could not withhold or deduct sums due it could not set them off either, there was nothing in the Adjudicator's decision precluding this.

In contrast, the decision of *Mr S G Hart t/a D W Hart & Son v Mr Dennis Smith and Mrs Jacqui Smith,*[22] held that a set-off could not occur. In this case, Hart commenced an adjudication ("Adjudication 1") for the outstanding amounts of applications 21 and 24. Subsequently, the Smiths commenced an adjudication seeking repayment of certificate 25, payment of the £138,185.79 and a declaration that they were entitled to a certificate of non-completion in respect of each section of work ("Adjudication 2").

Hart was awarded the full amount claimed in Adjudication 1. In Adjudication 2 the Smiths were awarded the amount of certificate 25, a payment of £4,112.04 and the Adjudicator made a declaration that the Smiths were entitled to certificates of non-completion, but did not allow the claims for LADs, refinancing charges or legal costs. He stated that until the certificates of non-completion were issued, and therefore any delays were confirmed, Hart could not be required to pay LADs or the refinancing charges.

Following the decision in Adjudication 2, the contract administrator issued certificates of non-completion stating that the deduction of LADs was at the Smiths' discretion. The Smiths then wrote to Hart claiming LADs pursuant to the certificates of non-completion but in doing so, differentiated between this claim and the amounts awarded in Adjudication 2.

Hart commenced enforcement proceedings for Adjudication 1 and offered to set off the specific sums awarded against Hart in Adjudication 2. However, the Smiths contended that they were entitled to set off their claim for LADs against the decision in Adjudication 1, as it was a natural consequence of: (i) the declaration made by the Adjudicator that they were entitled to non-completion certificates; (ii) the issuance of non-completion certificates by the contract administrator; and (iii) the notification of the claim for LADs made by the Smiths to Hart.

Judge Toulmin QC considered that two questions arose:

1. Did the specific sum of LADs follow logically from the decision of the Adjudicator in Adjudication 2?

21 [2009] EWHC 2312.

22 [2009] EWHC 2223.

2. Could that sum be set off against the Adjudicator's award in Adjudication 1?

In relation to the first question the Judge decided that the sum claimed did not follow logically from the Adjudicator's decision and consequently could not be set off. The Adjudicator had decided expressly that until the certificates were issued, the Smiths could not require Hart to pay LADs. Further, he did not give a clear indication about the financial consequences of issuing the certificates.

The Judge therefore held that the only issue that did flow logically was the issue of the non-completion certificates and no more. Even if it were possible to calculate the LADs owed to the Smiths, it would not be suitable for enforcement proceedings. The Judge also thought it relevant that the sum now claimed for LADs was different to the amount claimed for LADs in Adjudication 2.

Accordingly, the decision in Adjudication 1 was enforced, subject to the specific sum awarded in Adjudication 2 being deducted or set off.

From the above two cases, it can be seen that the circumstances in which a party is successfully able to set off LADs pursuant to the general rules in *Balfour Beatty Construction Ltd v Serco Ltd*[23] is limited.

Conclusion

The courts continue to generally enforce Adjudicators' decisions and it is becoming even more difficult to resist successfully the enforcement of a decision and/or set-off amounts against those awarded by an Adjudicator. Amendments to the HGCRA are due to come into force in 2011 and have the potential to reduce the number of issues raised, such as whether there is a contract in writing which led to challenges to the jurisdiction of adjudicators. However, we await to see if the parties and their representatives will seek new and different ways of resisting enforcement.

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23 [2004] All ER 348.