

Is Anyone Home? ‘Smash and Grab’ Hits the Brick Wall of the Residential Occupier Exception

In *RBH Building Contractors Ltd v James* [2025] EWHC 2005 (TCC), the Court considered whether to enforce an adjudicator's decision obtained by the contractor on the ‘smash and grab’ basis or whether the defendant employers were able to invoke the little-used ‘residential occupier’ exception in order to resist the claim for summary judgment.

The exception is that contained in section 106 of the Housing Grants, Construction and Regeneration Act 1996 (the “**Act**”). It holds that the payment and adjudication provisions of Part II of the Act do not apply to a construction contract with a residential occupier.

The case examined whether, on the facts, the contract satisfied the relevant test set out in s.106(2); as well as interesting points pay less notices and adjudicator's fees.

Key takeaways:

- **The Act does not apply to construction contracts where, at the time the contract is formed, the employer intends to live in the property, even if their plans later change.**
 - **While each case turns on its own facts, signs of a commercial purpose won’t displace a clear personal intention to use the property as a home.**
 - **The courts take a straightforward, practical approach to the construction of pay less notices; as long as the intention and scope are clear, minor technicalities won’t invalidate the notice.**
 - **An adjudicator’s decision as to their fees will stand even if their award is not enforceable.**
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Factual Background

In around January 2022, Mr and Mrs James engaged RBH Building Contractors Ltd (“**RBH**”) under a verbal contract to demolish and rebuild a luxury house in North Devon (the “**Property**”). Works began shortly after, but ceased in April 2024 when the parties’ relationship broke down.

In November 2024, RBH issued a payment application in the sum of £663,016. Mr and Mrs James’ response was to reduce this sum to zero, for various reasons cited in an informal letter which they later maintained was effective as a pay less notice. RBH argued the purported pay less notice was invalid and referred the matter to adjudication on the smash and grab basis that will now be familiar to most readers.

Mr and Mrs James argued that, since they were residential occupiers of the Property, the Adjudicator lacked jurisdiction by virtue of section 106 of the Act. Alternatively, that the pay less notice was valid in any event.

The Adjudicator rejected both arguments and found in RBH’s favour.

RBH applied for summary judgment to enforce the Adjudicator’s decision; and Mr and Mrs James responded with a Part 8 claim seeking declarations on jurisdiction and validity of the pay less notice. The parties at least agreed that their respective applications should be heard together, and the matter was brought on for hearing before the TCC.

Held

The Judge, HHJ Neil Moody KC, declined to enforce the Adjudicator’s decision. He found that:

1. Mr and Mrs James had a real prospect of establishing residential occupier status, and this defence raised issues that needed to be

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determined at a full trial rather than a summary judgment hearing.

2. The pay less notice was in any event valid, with no further sums due to RBH.
3. Despite this, Mr and Mrs James were still liable to pay the Adjudicator's fees.

On the residential occupier exception:

Under section 106 of the Act, if a construction contract principally relates to operations to a dwelling (as defined by the Act) that one of the parties to the contract occupies or intends to occupy as their residence, the payment and adjudication provisions contained in Part II of the Act do not apply, unless the contract expressly states otherwise.

The exception is intended to protect ordinary homeowners who may be better served by a less formal approach to dispute resolution such as that offered by expert determination.

The court held that for the exception to apply, the employer must have intended to occupy the property as a home *at the time the contract was made*, even if those plans later changed.

In this case, the evidence showed that at the time of contract formation, Mr and Mrs James intended to occupy the house as their main residence. They sold their previous home, lived on site in a caravan whilst the works were underway, registered locally for healthcare and electoral purposes, and commissioned personal design elements for the build, amongst other things.

Despite this, RBH argued there was an underlying commercial purpose to the contract. Mr and Mrs James planned to let out the property as an "Airbnb" for about 13 weeks a year, and Mrs James took out a commercial loan to finance the project. As a part of the loan agreement, Mrs James gave an

undertaking that the property would not be used as a dwelling by the borrower.

After reviewing the evidence, the Judge felt that these facts did not outweigh the primary residential intention, and that Mr and Mrs James had a real prospect of defending the claim under the residential occupier exception. However, since these issues required further investigation, the Court decided that a full trial would be more appropriate, not summary judgment, and dismissed RBH's application.

On the pay less notice:

The pay less notice expressly stated Mr and Mrs James's intention to pay £0 and was accompanied by an informal, 11-bullet-point letter setting out the reasons for withholding all sums. The points ranged from "lack of evidence" to the rejection of entire heads of claim, and cross-referenced entries in RBH's payment application spreadsheet.

RBH argued the purported pay less notice was invalid because deductions were not set out arithmetically or sufficiently itemised, and the combined bullet points did not account for the full £663k claimed.

The Judge disagreed with RBH. Favouring a commonsense, objective approach, he held that a reasonable recipient, armed with knowledge of the contract and the application for payment, would have understood the notice and could readily identify how and why sums were being withheld. In his view, the pay less notice provided an "*adequate agenda for adjudication*."

The Adjudicator had decided the point incorrectly.

On the Adjudicator's fees:

Although the Court found for Mr and Mrs James on the substantive dispute, it refused to interfere with the Adjudicator's decision on fees. Citing

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established case law, the Judge confirmed that, unless a contract specifically provides otherwise, liability for adjudicator's fees – as determined by the Adjudicator – remains final, even if the adjudication outcome is later overturned.

Despite the best efforts of the Mr and Mrs James' Counsel, the Judge refused to imply any term into the verbal contract that would allow the Court to alter or reverse an adjudicator's fees award.

As a result, even though Mr and Mrs James won the main dispute, they were left in the unsatisfactory position of still having to pay the Adjudicator's fees.

Comment

This unusual case provides a rare insight into how the Court will apply the residential occupier exception, and how fact-dependent it can be. The surest way for contractors to avoid any uncertainty in this respect is to see that the contract contains an express adjudication clause – otherwise, there is a risk that statutory payment and adjudication rights might not be available against private individuals potentially able to engage the relevant exception.

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