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Issue 311 – May 2026

Dispatch

Adjudication: residential occupiers

RBH Building Contractors Ltd v James & Anor

[2026] EWCA Civ 511

We reported on this case in Dispatch, Issue 302. RBH sought the summary enforcement of a "*smash and grab*" adjudicator's decision in its favour for £665k. Mr and Mrs James said that the contract in question was a construction contract with a residential occupier, so the adjudicator lacked jurisdiction to determine the dispute. They also sought a Part 8 declaration that their pay less notice was valid. At first instance, the judge found in favour of Mr and Mrs James. RBH appealed.

Under section 106 of the HGCRA, the adjudication legislation does not apply to a construction contract with a residential occupier, namely: "*a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence ...*".

Section 106 was intended to protect ordinary householders, not otherwise concerned with property or construction work and without the resources of even relatively small contractors, from what was, back in 1996 when the adjudication legislation was introduced under the HGCRA, a new, untried, and swift system of dispute resolution.

Mr and Mrs James had never occupied the house, but their case was that, from 2019 until about November 2022, it was their *intention* to occupy the house when it was completed. The contract was dated January 2022. When Mr and Mrs James' financial position changed, they were compelled to alter their plans and decided that, on completion, the property would have to be sold.

Coulson LJ, having reviewed the relevant authorities and legislation, set out seven principles to be applied when determining whether a person "*intends to occupy*" the property as their residence for the purposes of s.106 of the HGCRA.

1. The burden of proof must always be on the party seeking to trigger the residential occupier exception.
2. Determining the necessary intention to occupy is a matter of fact. It may be capable of being determined on a summary basis because the threshold is not high; but if there is credible evidence both ways, it may not be.
3. The determination must be made as to the existence (or otherwise) of the intention to occupy at the time that the contract was made.
4. There are two elements to the test. The first is whether there is a *bona fide* intention to occupy in the future. This is largely a matter of subjective intent, but any evidence of subjective intention can be accompanied by evidence which, viewed objectively, supports the existence of that subjective intention. Coulson LJ noted that contemporaneous material expressing or acknowledging the intention to occupy when the works are complete may be of particular value.
5. The second element is whether the person who wishes to occupy has a realistic, rather than fanciful, prospect of bringing that occupation about.
6. There must be an intention to occupy within a reasonable time after the completion of the works.

Applying those principles, Coulson agreed with the judge at first instance. The question for the court was whether there was a realistic prospect that, on the evidence, Mr and Mrs James could show that they intended to occupy the property on completion. This was a summary enforcement application, not a final determination.

Here, there was subjective evidence from Mr and Mrs James as to what they intended to do at the time that the contract was made. Their statements were clear and unequivocal: at the time the contract was entered into, they intended to live at the property upon completion of the works. This evidence was supported by their architect. There was other evidence as well; for example, the fact that they lived in a caravan on site during the works because they had no other home and were on the electoral register. Further, there were specific elements of the house which were designed to provide particular facilities, like the lap pool and the kite space, which Mr James wanted for personal use.

Further, the plan to rent out the property for part of the year was not fatal to their claim. The judge noted that: "*Plenty of people occupy their homes as residential occupiers, but rent them out for some of the year as AirBnBs. Others swap homes for the whole of the summer with people in other countries for holiday purposes. They do not forfeit their right to be called residential occupiers*".

Finally, whilst following the approval of a development loan, both Mr and Mrs James had signed undertakings saying that the charged property would not be used as a dwelling. However, this was not fatal to the residential occupier claim. Mr James had explained that the development loan was taken out because conventional consumer mortgages were not available for the construction of a new home. His intention was to repay those loans once the build was complete and to replace them with a conventional consumer mortgage. As Mr James understood the position, the language in the undertakings simply meant that he could not live in the house until the loan was paid off.

Whilst this was a point which favoured RBH's position, and suggested that there was no intention to occupy, it was simply one element of the overall evidence. The explanations provided by Mr and Mrs James were "*at least plausible*" but whether or not they would be made out was a question for a final determination of the issue.

Adjudication and pay less notices

RBH Building Contractors Ltd v James & Anor

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Although the decision on the residential occupier point was sufficient to deal with RBH's attempt to enforce the adjudicator's decision, Coulson LJ went on to consider the issues relating to the pay less notice. Once again, the judge summarised the relevant principles:

1. What matters is not how the recipient of the notice in fact understood it; the question is how a reasonable recipient would have understood the notice.
2. The notice must be construed in context. In other words, the reasonable recipient will be credited with knowledge of the relevant contract. If the notice in question is a pay less notice, the recipient will be taken to know the detail of its own payment notice, to which the pay less notice is a response.
3. Every payment notice or a pay less notice must comply with the contractual requirements or, in this case, the statutory Scheme. The notice must clearly set out the sum that is due and/or the sum to be paid (even if it is £0), and the basis on which that sum is calculated. Beyond that, it is a question of fact and degree. Coulson LJ noted that: "*the court will be 'unimpressed by textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis'*".
4. The adverse consequences that follow from an unanswered application or payment notice are relevant to the reasonable recipient test.
5. There is no requirement for a valid notice to have a particular title, or to make specific reference to a relevant contract clause or term of the Scheme, because the question is whether, viewed objectively, the notice had the requisite intention to fulfil that function.
6. One way of testing whether the pay less notice was a valid notice is to see whether "*it provided an adequate agenda for adjudication as to the true value of the works*". Coulson LJ said that it would be insufficient for the notice merely to identify a figure and state, without more, that it was the relevant amount of the payment notice or the pay less notice. A pay less notice would be invalid if it contained none of the information which could have allowed the reasonable recipient to work out the basis on which the zero sum had been calculated.

Coulson LJ concluded that:

> *"In summary, the content of payment notices and payless notices should be considered in a common-sense way. They should not be allowed to become tick-box exercises, or traps for the unwary. In reality, the question is a simple one. Does the payment notice explain in a tolerably clear way what is due and why? Does the payless notice explain, also in a tolerably clear way, what (if any) part of the payment notice is said to be due, and why less is being paid than has been sought? It is tempting to regard everything else as lawyerly over-complication."*

Here, the letter of 27 November was a pay less notice. The reason for this included the RBH payment application itself, which was described as an "*unsatisfactory document*" by Coulson LJ, who said that it was: "*in truth just a list of invoices... Many do not indicate the work done other than in very general terms ... and some are so vague as to be useless ... They do not explain why the sums are due and owing*".

The letter of 27 November expressly said that Mr and Mrs James intended to withhold payment of the entirety of the sum claimed. It could not, therefore, have been clearer that they were not paying any part of that sum. The only other thing that the notice needed to do, in accordance with the authorities set out above, was to make it "*tolerably clear*" on the figures *why* Mr and Mrs James said that nothing was due to RBH.

The letter did just that. Each of the 11 bullet points took issue with the 11 different features of RBH's claim. Five explained why nothing *at all* was due under each of those items. With the remaining six items, it was said that insufficient evidence had been provided to identify what sum, if any, might now be due. The judge noted that such "*disputes are all too common under construction management contracts where the employer is removed from any dealings with those actually carrying out the work*".

Timing, too, was a relevant element of the context. RBH's payment notice had taken some time to prepare, but it was sent without warning and Mr and Mrs James had just over a fortnight to prepare a response. Coulson LJ said that this was "*objectively, an unreasonably short period to consider and respond to a final account claim, although it was in accordance with the Scheme*". The judge further commented that:

> *"this was what is known in adjudication circles as a 'smash and grab' claim, made in the hope that there would be no proper payless notice in the short time allowed by the Scheme, thus entitling the contractor to payment in full of the large sum claimed. The content of the payless notice must be considered against that background too."*

The pay less notice provided a clear and unequivocal agenda for an adjudication: the eleven disputed items. It did exactly what it was supposed to do. The fact that the reasonable recipient would have to know the detail of its own claim, as set out in the payment notice, in order to understand the detail of the response is simply part of the context of this particular pay less notice.

Finally, Coulson LJ noted that:

> *"I would add this. It is very important that payment notices and payless notices do not become some sort of technical battleground where one or other party seeks a potentially unfair advantage by relying on the short time periods applicable to payment and payless notices in order to recover sums (or to withhold sums) that could not be justified on a detailed analysis."*

This is what happened here, but the pay less notice of 27 November was sufficient to prevent that from happening.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. Dispatch is a newsletter and does not provide legal advice.

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