

Making Things Tolerably Clear

*Discussing the Court of Appeal's decision in
RBH v. James*

Presenters



Oli Worth

Partner, Anchor

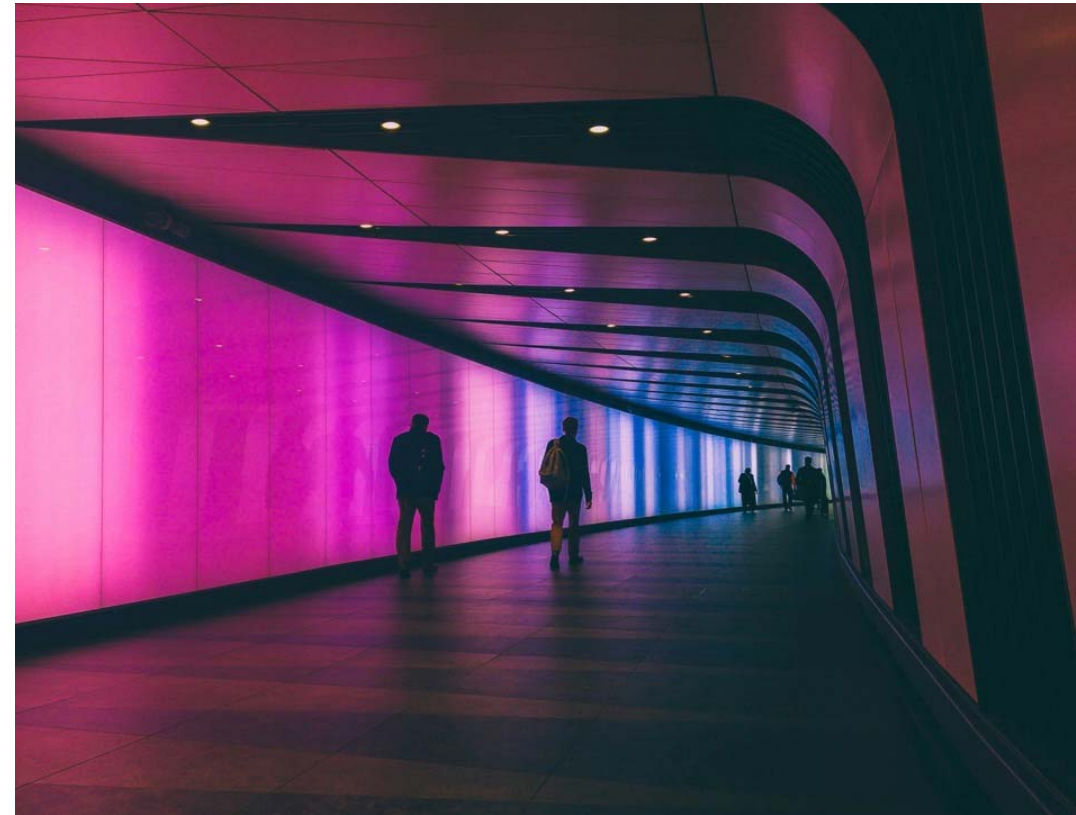


James Frampton

Barrister, Keating Chambers

Summary

1. Case background
2. The residential occupier exception
3. Pay less notices
4. Adjudicator's fees
5. Q&A



Background

Background facts

- Contractor – RBH
- Employers – Ashley James and Tracy James
- Property – Ferndown – bought 2019

Background facts

- RBH employed in 2022 – “site and project management services”
- Weekly/monthly fees plus costs and fee
- Paid £1.3m up to April 2024



NEW HOME

Saunton, Braunton, Devon, EX33

Guide Price

£5,500,000 ⓘ



Background facts

- Application in November 2024 –
 - Total sum owing was £1,973,055.20
 - £1,310,039.04 received,
 - Balance of £663,016.16.
 - “The Excel spreadsheet provided a detailed breakdown”
- Pay less notice - £nil

Background facts

"Dear RBH Building Contractors Ltd

Notice of intention to withhold payment in respect of an Application for Payment dated 18 November 2024

*We write in connection with the Application for Payment dated 18 November 2024 sent by email by Edward Rams at 11:58 (the "**Application**") and hereby notify of you of our intention to withhold payment of the sum claimed. We intend to withhold payment of £663,016.16 and accordingly intend to make payment of £0.*

The reasons for withholding the sums claimed are that:

- o Payment application for Sheldon South West of £94,083.67, insufficient evidence has been presented to confirm what sum (if any) might be due to RBH Building Contractors Ltd.*
- o Payment application for Longcross Scaffolding of £19,720, insufficient evidence has been presented to confirm what sum (if any) might be due to RBH Building Contractors Ltd.*
- o Payment application for 50% roof access of £5,839 is an unpaid invoice and therefore is not due to RBH Building Contractors Ltd.*
- o Payment application for CES Engineering for glass balustrade of £45,450 is an unpaid invoice and therefore is not due to RBH Building Contractors Ltd.*
- o Payment application for Easy Bathrooms tiles of £9,582.28, insufficient evidence has been presented to confirm what (if any) sum might be due to RBH Building Contractors Ltd.*
- o Regarding Contract Welding Services, insufficient evidence has been presented to confirm what sum (if any) might be due to RBH Building Contractors Ltd.*
- o Regarding payment application for Bespoke Timber of £43,149.50, insufficient evidence has been presented to confirm what sum (if any) might be due to RBH Building Contractors Ltd.*
- o Regarding PGR Timber insufficient evidence has been presented to confirm what (if any) sum might be due to RBH Building Contractors Ltd.*
- o RBH Building Contractors Ltd is not entitled to overheads and profit of £77,798.52.*
- o Share of rental income was agreed as a project/performance related bonus. No such bonus is due including but not limited to given that the project ran significantly over time.*
- o Regarding VAT, it was our understanding that this would remain in the build fund.*

In accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (the "Scheme") the due date cannot be before 18 November 2024 (the date of the Application) and may be calculated to be a later date in accordance with paragraph 2 of Part II of the Scheme. In the event that the due date is 18 November 2024, the final date for payment of the Application (absent this notice of intention to withhold payment) would be 5 December 2024."

Background facts

- Adjudication in December 2024 / January 2025
- Jurisdictional challenge on residential occupier refused
- Pay less notice found invalid
- James to pay RBH £663,016.16 plus interest “forthwith” plus adjudicator’s fees and expenses

The Residential Occupier Exception

The exception

Section 106 of the Construction Act

“(1) This Part does not apply—

(a) to a construction contract with a residential occupier (see below) ...

(2) A construction contract with a residential occupier means 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...”

Summary judgment

CPR 24.3

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

Summary judgment

Westfields Construction Ltd v Lewis [2013] EWHC 376

"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, in 1996, a new and untried system of dispute resolution. It was felt that what might be the swift and occasionally arbitrary process of construction adjudication should not apply to a domestic householder."

Summary judgment

Westfields Construction Ltd v Lewis [2013] EWHC 376

""Occupies" must carry with it some reflection of the future: it indicates that the employer occupies and will remain at (or intends to return to) the property. Thus the evidence about the position at the date that the contract was made has to be considered in the context of all of the evidence of occupation and intention, both before and after the agreement of the contract. Above all, s.106 needs to be approached with commonsense: it ought to be plain, on a brief consideration of the facts, whether the employer is or is not a residential occupier within the terms of the exception."

Summary judgment

Westfields Construction Ltd v Lewis [2013] EWHC 376

"Adjudication in construction contracts is generally thought to have worked well, and it has certainly reduced costs. Is it not time for s.106, and the other exceptions to statutory adjudication, to be done away with, so that all parties to a construction contract can enjoy the benefits of adjudication?"

The case for the exception

- Additional stamp duty
- Only house – caravan
- Local GP and electoral register
- Personal specification
- Friends
- Architect
- Airbnb

The case against the exception

- Companies involved – Trilogy
- Airbnb

The case against the exception

- "The lender has received and is satisfied with the written undertaking signed by the borrower that the charged property is not used as and will not be used as a dwelling by the borrower or a related person of the borrower".
- "We declare, confirm and certify that neither myself, ourselves or any of my/our family or close relatives nor my/our partners reside nor have any intention to reside at the property".

The case against the exception

- "The lender has received and is satisfied with written undertakings signed by the borrower that the loan will be used for business purposes".
- "I am entering this agreement wholly or predominantly for the purposes of a business carried on by me or intended to be carried on by me".

The TCC

- “I do accept that the loan documents and the Trilogy documents, in particular, require explanation and very clearly raise the possibility that the house was being constructed as a development for onward sale”
- “But, in my judgment, this is part of the picture and has to be set against the James' own evidence”

The Court of Appeal

- Burden of proof on ‘residential occupier’
- Factual test at time contract made
- Adjudication enforcement doesn’t affect summary judgment threshold

The Court of Appeal

- Two elements to the test:
 1. Bona fide intention to occupy in the future
 2. Realistic rather than fanciful
- Temporal aspect

The Court of Appeal

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- Temporal aspect

The Pay Less Notice

Section 111

“(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served,
and

(b) the basis on which that sum is calculated.”

The notice

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Adjudicator

“To the matter of compliance with the additional obligation under S.1114(b) whilst the total deduction is stated as being £663,016.16 the basis of the calculation cannot be found in the notice. Rather the bullet point reasons total £295,622.97 with some bullet points setting out complaints without figures.

The Responding Party has tried to justify the basis of their calculation by taking me to bullet points 1,2,5,6,7 and 8 of their pay less notice. Those bullet points set out no calculation of figures,...

[Continued on next slide]

Adjudicator

“I have a problem with this rationale by the Responding Party. The text at bullet points 1, 2, 5, and 7 does refer to figures claimed, and it might therefore be reasonable to interpret the sum being deducted. However, bullet points 6 and 8 make no reference to any figures and the basis of the calculation is not clear. In any event bullet points 1,2,5,6,7 and 8 all simply tell the Referring Party that the Responding Party considers insufficient evidence has been provided and as a consequence the Responding Party cannot determine what sum if any is due. This is not a deduction of a sum with a basis of calculation rather it is a statement that based on what is received the Responding Party is not clear how much is payable which is not what a pay less notice is required to communicate to the payee. The failings of these bullet points alone cause the totality of the pay less to fail to satisfy the requirement of S.1114(b), as noted above.”

TCC

“54. I consider that how the bullet points in the letter related to the payment application would have been understood by any reasonably objective reader who had knowledge of the contract works, and I consider that those bullet points set an adequate agenda for an adjudication by identifying specifically which elements of the payment application were not accepted and, briefly, why they were not accepted. I do not accept that the letter had to set out an arithmetical calculation in order to amount to a valid payless notice. That would be to read into the statute an additional requirement that does not appear in section 111 and would be to take an overly prescriptive approach to the contents of a notice which would be contrary to the case law as summarised in Advance JV and also by reference to the comment in Sir Peter Coulson’s book.”

Court of Appeal

- Principles at [78] to [85]:

First, 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

Secondly, the notice must be construed in context, ... If the notice in question is a payless notice, the recipient will be taken to know the detail of its own payment notice, to which the payless notice is a response.

Thirdly, a payment notice or a payless 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 But the court will be "unimpressed by textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis" ...

Fourthly, whilst there is no principled reason for adopting a different approach to the construction of different kinds of payment notices merely because some may give rise to more draconian consequences than others...

Fifthly, 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: .

Sixthly, one way of testing whether the payless notice was a valid notice is to see whether "it provided an adequate agenda for adjudication as to the true value of the In this way, it will be insufficient for the notice merely to identify a figure and state, without more, that that is the relevant amount of the payment notice or the payless notice

Court of Appeal

- Summary at [85]:

“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.”

Court of Appeal

- Decision: valid pay less notice.
- Reasons:
 - Payment application was “unsatisfactory”.
 - Letter "expressly said that Mr and Mrs James intended to withhold payment of the entirety of the sum claimed”.
 - Bullet points were sufficient.
 - The amount of work required in a short timetable was considerable.
 - Provided an agenda for adjudication.

Court of Appeal

- Lessons?
 - Court is adopting a more lenient approach to notices (see also *Jaevee v Fincham*).
 - Wider commentary against “smash-and-grab” at [93]:

“RBH's payment notice had clearly taken some time to prepare. But it came to Mr and Mrs James without warning and, despite the fact that the £663,000 had apparently never been invoiced to them before, it gave them just over a fortnight to prepare a response. **That was, objectively, an unreasonably short period to consider and respond to a final account claim, although it was in accordance with the Scheme.** So that leads me to conclude 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.”

Court of Appeal

- Lessons (cont.)?

"Finally, 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. That is contrary to the principles I have noted at paragraphs 79 – 85 above."

Adjudicator's fees

Issue

- If the adjudicator decides that A wins the adjudication and orders B to pay his fees, if B wins in Court can B's claim include the sums paid for the adjudicator's fees or can B avoid paying the fees?

Historic view

- No: Adjudicator's decision on his or her fees was final. *Castle Inns (Stirling) Ltd v Clark Contracts* [2005] Scot CS CSOH 178 at [16]:

“First, there is no contractual mechanism in clause 41A that would allow such reconsideration to take place.

Secondly, ... the contractual scheme is that an indirect challenge, through court or arbitral proceedings, is possible but only in respect of the underlying dispute. That seems to exclude any challenge to ancillary findings, such as a finding on liability for the adjudicator's fee and expenses.

Thirdly, because the adjudicator's decision on liability for his fee and expenses is essentially ancillary in nature, there is no commercial necessity that it should be capable of reconsideration.

The fourth reason indicates an obvious rationale underlying that conclusion; it is the practical difficulty of reconsidering the adjudicator's decision on such a matter.”

A change of view?

- *Aspect Contracts v Higgins* [2015] UKSC 38. Supreme Court:

“In my view, it is a necessary legal consequence of the scheme implied by the 1996 Act into the parties’ contractual relationship that Aspect must have a directly enforceable right to recover any overpayment to which the adjudicator’s decision can be shown to have led once there has been a final determination of the dispute”

- *A&V Building Solution v J&B Hopkins Ltd (No.4)* [2024] EWHC 2295 (TCC), Roger Ter Haar KC at [48]:

“It seemed to me when considering this matter on the papers that there may be arguments to suggest that Castle Inns should be reconsidered. However, upon reflection, I have decided that this is not the case to do so.”

Scheme for Construction Contracts

- Paragraph 25:

“The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. F26[F27Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination.”

- Paragraph 9(4):

“Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination.”

- Paragraph 11(1) – similar terms.

Answer

- Neil Moody KC:

“I am not persuaded that I have the power to alter the adjudicator’s decision in relation to his fees.”

- Why?

- Prior authorities “all one way”.
- Difficulty of review: “If the position were otherwise then, when deciding whether to alter the adjudicator’s decision as to fees, the Court would have to review the reasons for the decision on fees in light of the arguments presented to the adjudicator, the way in which they were presented and compare them with the position of the Court hearing.”
- The implied term in *Aspect* would not cover the adjudicator’s fees. Entitlement to fees is ancillary (see Scheme) and the adjudicator’s decision on fees may “depend upon a number of considerations”.

Questions