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Insights

COURT OF APPEAL GUIDANCE ON PAY LESS NOTICES AND FIRST RULING ON THE RESIDENTIAL OCCUPIER EXCEPTION

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Summary

In RBH Building Contractors Limited v James [2026] EWCA Civ 511, the Court of Appeal looked at two issues: the "residential occupier" exception under s.106 of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act) and, more importantly for most construction payment disputes, the proper form and content of a pay less notice under s.111(3) and s.111(4) of the Construction Act. This is the first reported Court of Appeal decision to consider the "intends to occupy" limb of the s.106 exception, and it also confirmed that, when considering the validity of a pay less notice, the real question is whether it makes clear in substance what is (or is not) being paid. In this BCLP Insight, Shy Jackson and Yorkie Fong consider the key takeaways from this case.

Background

RBH Building Contractors Limited (**RBH**) was engaged by Mr and Mrs James under an oral contract to provide site and project management services in relation to the construction of a large luxury house on a site at Ferndown, Saunton, in North Devon. To pay for the project, Mr and Mrs James had taken out a development loan, which contained declarations that the property would not be used as a dwelling by the borrowers and that the loan was for business purposes.

Construction work started in about January 2022 but, after the relationship broke down, RBH ceased work in about April 2024 when the works were incomplete. Several months later, on 18 November 2024, RBH served a payment application on Mr and Mrs James in the sum of £663,016.16, attaching a spreadsheet running to 527 individual line items. No part of the net sum said to be outstanding had been previously invoiced to Mr and Mrs James.

On 27 November 2024, Mr and Mrs James replied with a letter saying they intended to withhold the full amount and would pay £0, setting out 11 bullet points identifying specific elements of the

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application which were challenged (**27 November Letter**).

Adjudication and First Instance Decision

RBH commenced adjudication on 6 December 2024. Mr and Mrs James took a preliminary objection to the adjudicator's jurisdiction on the basis that they were residential occupiers, so that the statutory payment scheme could not apply. The adjudicator rejected that submission and made a non-binding decision that he had the necessary jurisdiction. The adjudicator then concluded that the 27 November Letter was not a valid pay less notice, so he ordered payment of the £663,016.16 claimed.

In the TCC, however, the judge refused to enforce the adjudicator's decision because Mr and Mrs James had a real prospect of establishing the residential occupier defence, and he also held in the Part 8 proceedings that the 27 November Letter was a valid pay less notice. The judge found that the 11 bullet points gave an adequate agenda of what was disputed and why, and that the notice did not need to spell out a separate arithmetical exercise to reach the nil assessment. RBH then sought to appeal the decision and enforce the adjudicator's decision.

What the Court of Appeal held

Ground 1: Residential Occupier Exception

The Court of Appeal upheld the judge's decision that Mr and Mrs James had a real prospect of establishing the residential occupier exception. Coulson LJ set out the applicable principles: the court should look at intention at the date the contract was made, ask whether there was a genuine intention to live there (which is largely subjective), and also ask whether there was a realistic rather than fanciful prospect of that actually happening within a reasonable time after completion of the works.

The court rejected two of RBH's arguments. First, the development loan documents and declarations were not a decisive point. While those documents were part of the evidence, they were not a "trump card" that automatically overrode everything else pointing the other way. Second, the plan to rent out the property for approximately 13 weeks a year would not stop Mr and Mrs James from being a residential occupier. Noting that it is not uncommon for people to occupy their homes as residential occupiers but still rent them out as AirBnb's, this does not mean they forfeit their right to be called residential occupiers.

Ground 2: Pay Less Notice

The Court of Appeal confirmed that the right approach is a practical one: the pay less notice must be read objectively, in context, and through the eyes of a reasonable recipient who already knows the contract and the payment application to which the notice is responding.

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Coulson LJ summarised the existing cases and restated the key principles. These include: a valid pay less notice must clearly set out the sum that is due, which may be zero, and explain the basis of that figure; the notice must be construed in context and assessed by reference to the standard of a reasonable recipient; and that there is no requirement for a particular label or title. The question can therefore be reduced to the following:

"*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?*"

Applying that approach, the Court of Appeal agreed that the 27 November Letter was a valid pay less notice. It clearly said the employers intended to pay £0, and the 11 bullet points identified the parts of RBH's claim they disputed and why.

Further, the court was critical of the quality of RBH's payment application itself, describing it as essentially "*just a list of invoices*" that did not in fact explain why the sums were due and owing. The application required the recipient to do all the work in trying to identify what was due and why. It was a poor presentation of what was a final account claim and "*barely limped over the threshold*" of a payment notice. Against that backdrop, the court said RBH could not complain that it had to work through its own spreadsheet to understand what the employers were disputing.

The court also commented on the timing of RBH's payment application. Its payment application arrived without warning months after it ceased work, and looked very much like an attempt to set up a "smash and grab" made in the hope that there would be no proper pay less notice served in time. Coulson LJ made clear that payment notices and pay less notices should not become a technical battleground where one party tries to exploit the short time periods applicable to payment and pay less notices to recover or withhold sums that could not be justified on a detailed analysis.

Thoughts

This decision confirms the existing line of authority on pay less notices and the understanding that courts will take a substance-over-form approach. The fundamental purpose of a pay less notice is to inform the payee of the sum the payer considers to be due and to explain the basis of calculation. Provided that the message is communicated clearly enough for a reasonable recipient to understand it, in the context of both the contract and the payment application to which the notice responds, the notice will be considered valid. Parties should resist the temptation to analyse notices with excessive technical precision: the question will be whether the commercial substance of the notice is sufficiently clear, not whether it has been drafted to a particular formula.

The decision also serves as a clear warning on two related points. First, parties should not seek to exploit the short timescales of the Scheme as a tactical weapon. In this case, Coulson LJ found

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that RBH had been trying to do precisely that, giving a clear signal that courts will take a dim view of such conduct. Second, a poorly evidenced or vaguely described payment application is not merely a presentational failing, but may be relevant to any subsequent argument that the responding pay less notice was inadequate. Payment applications should be carefully prepared, properly itemised, and supported by sufficient explanation of the basis on which each sum is claimed.

On the residential occupier exception, the decision establishes useful guidance for self-builders and individuals having construction works carried out on their own home or intended future home. The court will take a holistic approach to the evidence when assessing the "intends to occupy" limb, looking at all circumstances pointing to the genuine subjective intention of the party seeking to invoke the exception. However, the Court of Appeal made no final determination on the point, leaving the question open for a full trial.

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