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Residential occupiers

"106 Provisions not applicable to contract with residential occupier.

(1) This Part does not apply –
  (a) to a construction contract with a residential occupier...
(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."

When the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act") was first introduced it was felt to be unsuitable for unwary homeowners who were having perhaps a conservatory or extension added to their home, to be ambushed into the fast and furious world of construction adjudication. Thus the ambit of the Construction Act excluded "residential occupiers" and adjudication was to be the preserve of construction industry gladiators. Just as well, you may say, as adjudication has not turned out to be the cheaper alternative to litigation that it was intended to be. Moreover a raft of case law has built up over the decade and more since the Construction Act came into force, and the Act itself was amended in 2011 which will no doubt lead to new cases over how to interpret the statute. There is no doubt that the Act has spawned a new generation of adjudication claims consultants and "wannabe" adjudicators.

Yet, some homeowners will enter into a contract using a standard industry form, which will include agreement to the right to submit any dispute to adjudication under the Act. This contractual agreement supersedes the statutory exclusion, and thus the homeowner in dispute with his/her builder finds that adjudication is a real option. It may be, depending upon the deep pockets of the particular owner and the type of dispute, that adjudication is an attractive and viable method of dispute resolution. However it can come as something of a disadvantage and shock for a private individual suddenly to find him or herself on the wrong end of a 28 day referral period.

The 2013 case of Westfields Construction –v- C Lewis contains a useful summary by the Honourable Mr Justice Coulson, of the relevant law on what constitutes a "residential occupier". In Westfields the contract was not on a standard form, and the Judge had to decide whether the s106 exclusion applied. If it did the adjudicator's decision against Mr Lewis would be unenforceable. The builder contended that Mr Lewis did not occupy the property at the time the contract was made and/or that his intention was always that the property was being refurbished so that it could be let for commercial purposes.

Prior to Westfields there had been only three known cases on residential occupiers:

Samuel Thomas Construction –v- anor. (2000) (unreported)

Edenbooth Ltd –v- Cre8 Developments Ltd (2008)

Shaw –v- Massey Foundation and Piling Ltd (2009)

In Samuel Thomas a barn was being refurbished so that the employers could live in it, and another barn and associated buildings were being refurbished for sale. There was only one contract for the works. The Judge upheld the adjudicator's view that where one dwelling was to be occupied and the other was not, the contract did not "principally relate to operations on a dwelling which one of the parties...intended to occupy".

In Edenbooth Ltd it was a company trying to rely on the "residential occupier" exclusion. Coulson J said it was difficult to imagine how a company could ever be a residential occupier, the word "residential" conveying a requirement for a real person to be living in the home.

In Shaw –v- Massey the works were to a lodge within a country estate. The Shaws did not occupy the lodge themselves, nor at the time of formation of the contract had they intended to occupy it so the exception was found not to apply.

The Westfields case reviewed the question of at what point in time should the court assess whether the employer occupies the residence – is it at the date of formation of the contract, or is occupation a continuing operation, and not a snapshot in time? The facts were that the employer had moved out of the property to his Knightsbridge flat. At the time of the contract he was not living in the property nor did he move back there. To assess occupation on one date only would lead to the anomalous result that an employer could claim occupation even if the works were expressly to permit refurbishment for the rental market. Further one cannot physically occupy more than one property at the same time. The Judge found that occupation was an ongoing process, needing a common sense approach, not something to be tested by a snapshot.

There was evidence that the employer had talked about letting the property, and the Judge found on the evidence that the employer intended to let out the property.

What is curious about the Westfields judgment, is the Judge's final comments, which appear to have been made in the context of a frustrating case, one which was disproportionately time-consuming for the judiciary, and presumably disproportionately costly for a relatively small disputed sum under £20,000 where an extremely wealthy individual was, in the words of the Judge "evasive", "condescending" and "cavalier with the truth". The Judge concluded that the s106 exception, some fifteen years or so on, was difficult to justify and should be done away with.

Personally I disagree. There are many homeowners who would be significantly disadvantaged by the ambush of an unfamiliar process, which may not enable them to counterclaim, and where the time limits for a defence are incredibly short. Homeowners need to be advised by whoever is procuring

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their contract, as to the pros and cons of adjudication and whether it should be excluded from a standard form, if they fall within the definition of a residential occupier.

However, the issue as to whether a person who owns more than one home, and lives at each at different times of the year, constitutes a "residential occupier" under s106, has yet to be answered. Based on a common sense approach I would suggest that he/she would be and would fall within the s106 exclusion to the Construction Act. And what about joint employers where one party lives at the property as their main residence but their partner often resides elsewhere – how would that be assessed? Watch this space!

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