By Abdul Jinadu

THE GUTTING OF SECTION 106 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 PART 1.

Despite the clarity of parliament's intention, unfortunately a series of decisions in the TCC have effectively rendered Section 106 redundant as it relates to adjudication. The assault on Section 106 has come in two forms. The first is the series of cases in which a residential occupier has been found to have submitted to the jurisdiction of an adjudicator and is therefore not entitled to rely on the provisions of Section 106. The second is the line of cases concerning the limits which have been placed on the definition of dwelling under Section 106, when the works are commissioned by an individual but the works included, or wholly related to, work to premises, which were separated physically from the area which is, or is to be, occupied by the employer as his or her residence. In this article which is part 1 of 2, the first of these two lines of cases will be considered.

Background to the HGCRA

1. When it passed the Housing Grants, Construction and Regeneration Act in 1996 ("the Act") parliament included Section 106 which provides as follows:

   "Provisions not applicable to contract with residential occupier.

   (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.

   In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose—

   "dwelling-house" does not include a building containing a flat; and

   "flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally."

2. The policy basis and legislative purpose of the section was clearly elucidated on behalf of the government in the House of Lords where in the parliamentary consideration of the Housing Grants Construction and Regeneration Bill ("the Bill") Earl Ferrers speaking for the government said as follows[1]:

   "I am glad to say that none of the amendments in this group is at odds with the principle of having an exclusion for contracts with residential occupiers. We believe that such an exclusion is needed for two reasons. First, there is already in place considerable legislation to protect the right of the consumer. In this case, the client will be a consumer as it is a household contract. Secondly, there is a small but significant risk that unscrupulous contractors may try to browbeat those unfamiliar with the new law into paying for shoddy work. The noble Baroness, Lady Hamwee, asked whether "residence" means main residence. When the Bill refers to "residence", it means any residence. So it would include a second home or a holiday cottage."

3. Subsequently in the parliamentary consideration of the Bill Lord Lucas speaking on behalf of the government said as follows[2]:

   "My Lords, we heard in Committee that the noble Baroness, Lady Hamwee, was concerned that the reference to a residence in Clause 104(1) might be construed as a reference to a main residence. My noble friend Lord Ferrers reassured her on that occasion that when the Bill referred to a residence it meant any residence. I do not believe that there is any more that I can say or that can be added to the Bill to make that clearer."

4. On further debate of the Bill in the House of Lords Earl Ferrers, again speaking for the government, said as follows[3]:

   "Turning now to Amendment No. 76, there are two main changes here, and I will look at the issue most familiar to noble Lords first. Clause 105 excludes from Part II contracts with a residential occupier, and the House will recall that, in Committee, both the noble Lords, Lord Williams of Elvel and Lord Howie of Troon, proposed amendments in the search for the most effective way of achieving this. During the Bill's passage in another place there were still concerns that a client who was building an office block or a factory might include a dwelling so that the whole contract could be exempted from fair contract provisions. Although the Government felt that this was rather unlikely, since the exemption could only apply to an individual owner and not to a company, we were persuaded to bring forward an amendment to make sure that no such loophole existed.

   Having looked at this carefully, we decided that the most equitable and generally satisfactory way of proceeding was to restrict the exemption to contracts whose primary purpose related to a dwelling for one of the parties. This would still allow the exemption to cover contracts on second homes, which I know was a concern of the noble Baroness, Lady Hamwee, at Report, and also to cover contracts where some of the work applied to a separate flat, a garage or an outhouse. It would not, however, allow rich individuals to avoid the Bill by adding penthouse flats to their office blocks."

5. Parliament's intention in passing Section 106 of the Act could not have been expressed more clearly:

   (i) It sought to exclude from the provisions of the Act contracts in which one of the parties was acting as a consumer rather than in the course of business and in so doing it intended to avoid the need to spell out the legislative protections available to consumers in other legislation by simply excluding contracts with consumers from the provisions of the Act.

   (ii) The intention was clearly expressed to protect the consumer from "unscrupulous contractors [who] may try to browbeat those unfamiliar with the new law into paying for shoddy work".

   (iii) The term "residence" was deliberately used so as to include residences other than the employer's primary residence. Parliament's intention was to "restrict the exemption to contracts whose primary purpose related to a dwelling for one of the parties" however the section was broad enough *"to cover contracts where some of the work applied to a separate flat, a garage or an outhouse"*.

   In summary, the overall intention of Section 106 was to concentrate the provisions of the Act on commercial disputes and to leave out of account disputes which relate to ordinary members of the public.

The Courts' Interpretation

6. As regards the line of cases concerning the submission by the employer to the jurisdiction of the adjudicator despite qualifying as a residential occupier pursuant to Section 106, the decision of the TCC in *ICCT Ltd v Sylvein Pinto*[4] ("ICCT v Pinto") illustrates the undermining of the protections provided by Section 106. In that case, Mr Pinto had engaged the contractor to undertake work in relation to his basement and to stop leaks. The work was not paid for. In April 2018, the contractor sent a notice of intent to refer to adjudication. Neither party had engaged with adjudication before. The contractor applied to the Chartered Institute of Building (CIB) for an adjudicator. In May 2018, the CIB president nominated an adjudicator. Mr Pinto was given a deadline by which to reply, however he requested an extension which was granted and he provided the adjudicator with pictures of the leaking basement and subsequently served further documents. The adjudicator found in favour of the contractor and made an award of £6,456 including VAT.

7. Mr Pinto resisted enforcement, inter alia, by seeking to invoke the provisions of Section 106, however the application to enforce was granted. In his judgment Mr Justice Waksman said, inter alia, as follows:

   36 These are perhaps subtle points but I am quite satisfied Mr Pinto's argument is wrong here. There is no blanket ban against adjudications for work done to residential premises and they are quite often agreed in the context of residential construction contracts. It is simply the fact that the mandatory scheme will not cover such disputes. So it does all turn on whether there has been full engagement in the process without any suitable reservation of rights.

FOOTNOTES

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37 *All of that is set out in some detail in the Promet case to which I have been referred, which is a decision of Mr Nissen QC who undertakes a comprehensive review of the authorities. That is dated 17 July 2015. There is no difficulty about reservation here because there was not any reservation at all.*

38 *It is right to say that in relation to the party who is said to have waived the jurisdictional point, one has to look at what the party did or did not do objectively. In this particular context, what that means is that the jurisdictional point is capable of being waived and will be waived where it is one that was in the actual or constructive knowledge of the parties seeking to invoke the jurisdictional point, i.e. Mr Pinto. Mr Pinto says, subjectively, he was not, in fact, aware of the residential dwellings exception, as it were, prior to entering into the adjudication. I rather suspect that the claimant was in the same position since it appears to be the first time it has used this process and did so on the basis of the suggestion from somebody else, but I am afraid the fact that Mr Pinto was not aware of it himself does not help him. The general principle is that ignorance of the law is no excuse. He came to this point very recently, in fact I think yesterday, when he submitted points on jurisdiction for the first time but Mr Pinto, who is a professional albeit going into this adjudication process for the first time, is, I am afraid, deemed to know what the law is and this is not some arcane jurisdictional point. Therefore, subject to anything else which he might raise, Mr Pinto has fully engaged with this process and, on that basis, an ad hoc adjudication came into being and any jurisdictional point was waived."*

8. The basis for the court's rejection of Mr Pinto's submissions regarding the application of the Section 106 exemption was that he had not reserved his position regarding the adjudicator's jurisdiction[5] and he had participated in the reference, therefore he was deemed to have submitted to an ad hoc reference to adjudication[6] despite the entitlement to rely on the Section 106 exemption.

9. The court dismissed Mr Pinto's argument that he was unfamiliar with the details of adjudication as a process and he was specifically ignorant of Section 106. An observation made by judge at paragraph 2 of the judgment suggests, at least in part, the basis for the court's dismissal of Mr Pinto's argument:

"2. He has at in this hearing presented his arguments succinctly and politely, and with not a little sophistication. That is perhaps unsurprising because he is a professional person, being a certified accountant. As some of his emails make plain, he has obviously had some experience of the legal process including, for example, tribunals……

It appears that the court was of the view that Mr Pinto was a relatively sophisticated party with experience of the legal process. This consideration appears to have influenced the court's decision.

Opinion on the Decision

10. However, in the author's view, the decision in *ICCT v Pinto* flatly contradicts parliamentary legislative intent and deprives Section 106 of much, if not all, of its efficacy. Parliament's express intent was to exclude residential occupiers from the provisions of the Act on the grounds that they should be afforded the protections provided to consumers. Such individuals cannot reasonably be expected to be aware of the provisions of the Act as it relates to adjudication or at all and such individuals cannot reasonably be expected to be aware of the existence of the provisions of Section 106. It cannot have been parliament's intention that the right of an exemption to the provisions of the Act on the basis that the individual was a consumer would be lost if such individual did not assert that right immediately on being joined as a party to an adjudication. It is unlikely that given the truncated timescales, which are a preeminent feature of statutory adjudication, the individual residential occupier would even have the opportunity to obtain competent legal advice as to his or her rights. It is the author's view that, while it may be appropriate in the context of statutory adjudication between commercial entities to require a party joined to adjudication to raise any jurisdictional objection at the outset or to set the bar for conduct which would be characterised as amounting to participation in the adjudication at a low level, it is not appropriate to adopt the same position in respect of an individual who is entitled to rely upon the residential occupier exemption.

11. With the greatest respect to the learned judge, it is unrealistic to expect individuals entering into building contracts on their own residential dwellings to be aware of the provisions of Section 106 or indeed of the Act. It is therefore difficult to understand the basis for applying the requirement for the reservation of position, which the courts have developed in respect of non-residential occupier cases, to cases where a party would be entitled to rely on Section 106.

12. The reference to the *"general principle … that ignorance of the law is no excuse"*, with respect to the learned Judge, misses the point. Parliament intended to exempt residential occupiers from the provisions of the Act. An individual cannot be expected to assert or rely on rights of which he had no knowledge. Consumers are not expected to be fully cognisant of all the rights conferred by legislation. In order to waive the right, surely the residential occupier must be shown to have been aware of such rights.

13. In passing the Act and specifically the provisions in relation to adjudication, parliament was deliberately redistributing the commercial balance between the parties in order to achieve specific policy goals viz. those identified in the Latham Report. In adopting this course of action, parliament chose to specifically exempt residential occupiers and to limit the application of the provisions of the Act to contracts between two commercial entities. As it relates to adjudication, the rationale was that the speed and somewhat "rough and ready" nature of decisions obtained through the adjudication process was a desirable price to pay to ensure cashflow in the construction industry and that the "pay now argue later" philosophy would provide sufficient safeguards. In adopting this policy approach parliament exempted residential occupiers because it was of the view that the compromised timescales and summary processes involved in adjudication were not appropriate for contracts with consumers.

14. By imposing the requirement that in order to benefit from the provisions of Section 106 the residential occupier has to raise this as a jurisdictional objection at the outset of the process, the courts have failed to give effect to parliament's attempt to address the *"significant risk that unscrupulous contractors may try to browbeat those unfamiliar with the new law into paying for shoddy work."*

15. The decision in *ICCT v Pinto* was recently applied in *St Peter Total Building Solutions Ltd v Michelle Rhodes*[7], where the defendant property owner applied under CPR r.13.3 to set aside a default judgment entered in favour of the claimant building company. The claimant had been contracted to carry out building works on the defendant's property. It was the defendant's case that the intention was to convert the property into a number of flats which were to be occupied by herself and members of her family. A dispute arose between the parties, which the claimant referred to adjudication. On 24 September 2019, the adjudicator was appointed and the referral notice was issued shortly thereafter. On 11 October, the defendant, who had suffered from a number of health conditions since October 2018, was admitted to the accident and emergency department and subsequently underwent surgery. She informed the adjudicator that she was unable to deal with the adjudication due to her medical condition. On 18 October 2019, she asked the adjudicator to read a structural engineer's report which she had sent him and requested an extension of time in which to deal with the adjudication. The adjudicator informed her that he had to make his decision by 25 October. On 21 October, the defendant, having taken legal advice, proposed a 14-day extension for the submission of documents. When that proposal was rejected by the adjudicator, she sent a series of documents to him which she invited him to take into account. The following day, the adjudicator decided the dispute in the claimant's favour. The claimant subsequently commenced enforcement proceedings and, on 20 January 2020, obtained judgment in default when the defendant failed to serve an acknowledgement of service. In February the defendant instructed solicitors.

16. The learned judge addressed the applicant's application in part by holding that her attempt to resist enforcement of the adjudication decision had no hope of success, as she was not entitled to rely on Section 106, because she was deemed to have submitted to the adjudicator's jurisdiction. The facts in this case illustrate the difficulty which any residential occupier will have in relying on Section 106 unless he or she states at the outset that (a) he or she is not participating in the adjudication on the basis of Section 106; or (b) he or she asserts the right to rely on Section 106 and reserves his or her position, but participates in the adjudication strictly under protest, and subject to this reservation, making it clear that he or she does not accept the adjudicator's jurisdiction to determine his or her jurisdiction.

Conclusion

17. In conclusion, the courts have in effect removed the protection for residential occupiers, which parliament intended to provide by Section 106, by imposing a requirement for reliance on that right which parliament did not intend and which is not founded on principle. Unfortunately, it seems unlikely that the courts errant application of the provisions of Section 106 will be addressed by anything other than statutory action.

18. In the second part of this series the decisions which have had the impact of restricting the definition of a dwelling will be considered.

"It cannot have been parliament's intention that the right of an exemption to the provisions of the Act on the basis that the individual was a consumer would be lost if such individual did not assert that right immediately"