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THE GUTTING OF SECTION 106 OF THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996 PART 2.

This is the second part of a two-part article considering the unfortunate approach which the courts have adopted to the interpretation and application of the residential occupier exemption contained in section 106 of the of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). The first part considered the overly restrictive interpretation placed on the term "residential occupier" and it demonstrated that the approach adopted by the courts was contrary to parliament's intention in enacting the residential occupier exemption as part of Section 106.

This second article will consider the difficulties which are caused by the interpretation placed on the requirement that the relevant construction operations must be to a dwelling which one of the parties to the contract occupies or intends to occupy.

Section 106 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."*

Section 106 defines a dwelling by reference to the intention of one of the parties to a contract viz. a building constitutes a dwelling if one of the parties to the contract intends to occupy the dwelling as a residence. It expressly excludes from the definition of a dwelling house a building containing a flat but adds a definition for a flat viz. a 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 which falls within the definition of a dwelling.

What was eventually to be Section 106 was considered on the second reading of the Act and in debate in committee. The legislative purpose of the section was clearly elucidated on behalf of the government in the House:

(i) Hansard 28 March 1996 Volume 570 Column 1872 in committee in the House of Lords:

Earl Ferrers speaking for the government:

"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."

(ii) Hansard 22 April 1996 Volume 571 Column 949 on second reading in the House of Lords:

Lord Lucas speaking on behalf of the government:

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.

(iii) Hansard 23 July 1996Volume 574 Column 1336 on a third reading in the House:

Earl Ferrers speaking for the government:

"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." (Emphasis added)

Parliament's intention was clear. It intended the residential occupier exemption to apply to any residence, including second homes or holiday cottages, which one party to the contract intended to occupy.

In more general terms, as the court accepted in *St Peter Total Building Solutions Ltd v Michelle Rhodes* [2020] EWHC 2036 (TCC) *"the overall intention of section 106 appears to be to concentrate adjudication upon commercial disputes and to leave out of account, as it were, disputes which relate to ordinary members of the public"* [1].

In this context difficulties have arisen regarding the application of Section 106 in three scenarios:

(i) The construction works comprised works to areas or buildings which one of the parties intended to occupy and part which it intended to sell or rent out.

(ii) The construction works comprised works to areas or buildings which one of the parties to the contract intended to occupy and part which it intended for occupation by third parties such as family members and guests on a non-commercial basis.

(iii) The construction works were to a single building which had been sub-divided into separate living areas partially horizontally and partially vertically with the separate living areas to be occupied by members of the same family on a non-commercial basis.

Each of these scenarios is illustrated by a decision of the TCC. The first scenario is probably the easiest to resolve and is represented by the decision in *Samuel Thomas Construction v J. & B. Developments,* unreported, January 28, 2000. In that case the contract related to the conversion of two barns, one for residential occupation by the defendants and the other for sale by them, as well as the conversion of a garage block. Disputes arose between the claimant and the defendants, as a result of which the claimant's invoices went unpaid. The claimant referred the dispute to adjudication, and was awarded £48,826.84. The defendants contended that the claimant was not entitled to refer the dispute to adjudication, since the contract between them was not a construction contract for the purposes of the Act, because it was a construction contract with a residential occupier which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

1 Paragraph 9 of the judgment.

HHJ Overend sitting in the TCC in Exeter found on the facts that although the works related to both barns, the works principally related to the barn and associated garage block which were to be sold, therefore the contract did not fall within the residential occupier exemption and was therefore not excluded from the application of the Act. It is submitted that on the facts this case was correctly decided albeit that the outcome was arguably harsh on the defendants. In hindsight the defendants would have been best advised to have split the works into two contracts; one contract for their residence and another for the works related to the parts which they intended to sell.

The second scenario is represented by the decision in *Shaw v Massey Foundation and Pilings Ltd* [2009] EWHC 493 (TCC). In *Shaw v Massey* the applicants (the Shaws) had engaged the Respondent (Massey) to carry out building works at a cottage separate to the main house and which was some distance away from the main house where they resided. The contract did not contain a provision for the reference of disputes to adjudication and following disputes arising between the parties Massey commenced adjudication proceedings and was successful. It was successful in the County Court in enforcing the decision and the Shaws brought an appeal to the TCC arguing inter alia, that the adjudicator lacked jurisdiction because they were residential occupiers within the meaning of the Act.

In finding against the Shaws the court expressly recognised that there was no commercial element to the contract (and it distinguished the decision in *Samuel Thomas Construction* on this basis). However the court found that the cottage constituted a separate building and as there was no indication that the Shaws intended to occupy the cottage themselves, they did not qualify as residential occupiers.

In finding against the Shaws the court dismissed the definition of dwelling in Section 101 of the Act which provides that:

"101. Minor definitions: Part I In this Part- 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it"

The court held that the definition in Section 101 was irrelevant because (a) it only applied to Part I of the Act and had no application to adjudication and (b) Section 106 contained its own definition of dwelling.

> ***"This is a point of potential public importance because the creation of multigenerational homes is common and increasingly so due to economic factors and demographic change and such dwellings are particularly common in BAME communities."***

It is submitted that the decision in *Shaw v Massey* applied an overly restrictive interpretation to the definition of residential occupier based on the distance of the property, which was the subject of the works, from the main dwelling and that the decision ignored parliament's intention in passing the section 106 residential occupier exemption. The difficulties arising from the decision in *Shaw v Massey* can be demonstrated by a small adjustment to the facts. If, for example, the cottage had in fact been a garage which was connected to the main building, but which was its own substantial structure, and the intention had been to convert the garage into a "granny flat" or self-contained living quarters for one of the Shaw's children. Based on the reasoning in *Shaw v Massey*, arguably the Shaws would have qualified as residential occupiers because of the proximity of the building to the main dwelling. If it is maintained that because the Shaws themselves did not intend to occupy the converted premises then they still would not have qualified as residential occupiers, then it is submitted that this ignores the principal purpose of the Section 106 exemption as is clarified by the debate in parliament. The intention was to exempt from the application of the Act contracts which did not have a commercial purpose and if it intended to give effect to parliament's intention, the court should have placed emphasis on this factor.

This is a point of potential public importance because the creation of multigenerational homes is common and increasingly so due to economic factors and demographic change and such dwellings are particularly common in BAME communities. It is submitted that parliament's choice in applying the exemption principally not solely to operations on a dwelling which one of the parties occupies, or intends to occupy, makes allowance for multigenerational dwellings. This is consistent with the intent of the Act as recognised by the court *Shaw v Massey* which is to exclude disputes which relate to ordinary members of the public and contracts which contain no commercial element.

The third scenario is illustrated by the facts in *St Peter Total Building Solutions Ltd v Michelle Rhodes*. In that case the claimant had been contracted to carry out building works on the defendant's property. The purpose of the works was to convert one large dwelling into a building housing three separate living areas for the defendant, her mother and her daughter. Disputes arose between the parties to the contract which the claimant referred to adjudication. In seeking to set aside default judgment which had been entered by the claimant, the defendant argued that, as she was a residential occupier within the meaning of Section 106, the adjudicator lacked jurisdiction and there was no basis on which to enter judgment.

The issue of whether the defendant was a residential occupier led to debate as to the nature of the works which she had commissioned. The claimant contended that the works did not fall within the definition of works to a dwelling or a

flat because the works were intended to create three flats. The defendant disputed this. She contended that the works commissioned were to create three living areas for the three individuals who it was intended would live in the property, and that the works qualified as works to a single dwelling because:

(i) the living areas were not separate and self-contained premises because all three areas were freely accessible from each other and shared common services such as a single boiler, single megaflow tank and heating system, a single laundry room, supply and fit of internal doors only to all areas;

(ii) the living areas were not divided horizontally as the defendant's living area occupied the whole of the first floor and the rear of the ground floor;

(iii) planning permission was applied and granted for renovation to a single dwelling only as per approved planning application drawings;

The defendant contended in the alternative that if the separate living areas did constitute separate flats, the defendant would still qualify as a residential occupier because the contract with the claimant *"principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as [her] residence"*. The fact that other "flats" were created for a non-commercial purpose as part of the works did not deprive the defendant of the entitlement to rely on the exemption provided by Section 106.

Although the court acknowledged at paragraphs 9 and 10 of the judgment in respect of the definition of a dwelling house and flat in Section 106 that it *"seems to me that that section of the Act is capable of giving rise to some lively argument as to what is and is not intended to be comprehended within the exception"* and that the *"present case illustrates a potential difficulty in that the defendant's contention by reference to various plans which I have been shown is that this house was intended to be converted into a number of flats which were to be occupied by the defendant and members of her family but … not on a basis which meant that they were entirely self-contained. Exactly which side of the line that falls seems to me to be debatable…"* the court nevertheless found against the defendant without, it is submitted, grappling with this issue.

Conclusion

As with the scenario discussed above in respect of the facts in *Shaw v Massey*, the application or disapplication of the residential occupier exemption based on the definition of a dwelling house and a flat have the potential to have broad implications for the general public. The increasing number of multigenerational homes makes it more likely that facts of the type which arose in *St Peter v Rhodes* will become increasingly common with the effect that many consumers entering into contracts will find themselves unwittingly subject to the draconian provisions of the Act, not just in respect of adjudication but also as regards payment provisions.

The somewhat inexplicable hostility of the courts to the Section 106 residential occupier exemption is unfortunate because it has and will likely increasingly result in consumers being subject to the provisions of the Act, which is not what parliament intended. Unfortunately, it appears that the only solution will be legislative as there seems to be little appetite to course correct in the courts.