Neutral Citation Number: [2018] EWCA Civ 490

Case No: A1/2016/2198

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
MR JUSTICE EDWARDS-STUART
[2016] EWHC 357 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2018

Before:

Lord Justice Davis
Lord Justice Lindblom
and
Lord Justice Flaux

- -

Between:

Jean-François Clin	**Appellant**
- and -	
Walter Lilly & Co. Ltd.	**Respondent**

- -

Mr Vincent Moran Q.C. and Mr Tom Coulson (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr Sean Branningan Q.C. and Mr Thomas Crangle (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 16 January 2018

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. At a hearing of preliminary issues in a construction dispute, was the judge right to hold that a term should be implied into the building contract to provide for the employer's obligations as to planning permission or conservation area consent, was he right to frame the implied term as he did, and, if so, what were the consequences for the allocation of risk between the parties under the contract? These questions arise in this appeal.

2. The appeal is against the order made by Edwards-Stuart J. sitting in the Technology and Construction Court on 5 May 2016, after a hearing of preliminary issues in the proceedings on 19 January 2016. The judgment was handed down on 24 February 2016, and clarified in the judge's order. The appellant, Jean-François Clin, is the owner of two adjoining mid-Victorian terraced houses at 48 and 50 Palace Gardens Terrace in Kensington, which are unlisted buildings in the Kensington Palace Conservation Area. The respondent is Walter Lilly & Co. Ltd., a contractor specializing in the refurbishment, alteration and extension of such buildings. On 25 September 2012 Mr Clin as "Employer" and Walter Lilly as "Contractor" entered into a building contract – a JCT Building Contract with Quantities, 2005 edition, incorporating Revision 2 (2009), with "Contractor's Designed Portion", and various bespoke amendments. Under the contract Walter Lilly were to carry out works of demolition, reconstruction and refurbishment to the buildings to create a single dwelling-house.

3. The dispute between the parties arose after the local planning authority, the Royal Borough of Kensington and Chelsea Council, sent a letter to Walter Lilly on 17 July 2013, asserting that the intended work to the rear wall of the buildings would amount to "substantial demolition" requiring conservation area consent. Activity on site was then suspended for more than a year. Although Mr Clin maintained throughout that conservation area consent was not required, an application for such consent was submitted to the council on 2 August 2013, only to be withdrawn two months later. The design of the scheme was then changed and an application for planning permission for the revised proposal submitted in December 2013. Planning permission was granted on 19 June 2014, and work began again on 26 August 2014. Walter Lilly's claim was issued on 22 May 2015, seeking declarations that a "Relevant Event" and "Relevant Matters", as defined in the contract, had occurred, and that it was entitled to an extension of time of 53.2 weeks. Mr Clin defended the claim. On 18 December 2015 the judge ordered that six issues, which the parties had identified, be determined as preliminary issues. Mr Clin appealed against the judge's order on 25 May 2016, and Walter Lilly filed a respondent's notice on 30 August 2016. Christopher Clarke L.J. granted permission for Mr Clin's appeal on 16 August 2016 and for Walter Lilly's cross-appeal on 27 October 2016.

The issues in the appeal and cross-appeal

4. The submissions made to us ranged widely across the still contentious preliminary issues. But I think it is sensible to limit our consideration of the arguments on either side to the main questions in issue. This is for three reasons. First, we are concerned only with preliminary issues, which have to be dealt with before the facts have been established on the evidence given at trial – a "fundamental difficulty" in this case, as the judge recognized (in

paragraph 82 of his judgment). Secondly, in these circumstances it is both unnecessary and unwise to try to resolve a number of hypothetical questions, some of which may in the end have little, if anything, to do with the facts that will in due course emerge from the evidence. And thirdly, the preliminary issues put before the judge were more elaborate than they needed to be to refine the parties' dispute at this stage of the litigation.

5. There are four issues that are in my view sufficient to dispose of the appeal and cross-appeal justly and in accordance with the "overriding objective" in CPR Part 1. They embrace Mr Clin's grounds of appeal, which are directed only at the judge's "amplification" of his judgment, and also the matters raised in the cross-appeal. They are:

    (1) Was the judge right to hold that a term was to be implied into the contract to provide for Mr Clin's obligations as "Employer" in applying for any relevant and requisite planning approvals?
    (2) If so, how should that implied term be framed?
    (3) How does the implied term affect the allocation of risk between the parties under the contract?
    (4) What was the status and significance of the council's letter of 17 July 2013?

The building contract

6. The judge set out in full (in paragraphs 11 to 28 of his judgment) the provisions of the contract he regarded as relevant to the preliminary issues. I need only refer to those that bear most obviously on the issues in the appeal and cross-appeal.

7. The First Recital to the contract describes the work that the Employer "wishes to have … carried out", namely the "Part demolition, extensive ground works, refurbishment, reconstruction, extensions to a pair of terrace houses to form a single house on completion … ('the Works') and has had drawings and bills of quantities prepared which show and describe the work to be done". The Ninth Recital provides that "the Works include the design and construction of" the works comprising "the Contractor's Designed Portion". The Tenth Recital states that "the Employer has supplied to the Contractor documents showing and describing or otherwise stating his requirements for the design and construction of the Contractor's Designed Portion ('the Employer's Requirements')".

8. In section 1 of the contract, "Definitions and Interpretation", clause 1.1 defines a "Statutory Undertaker" as "any local authority or statutory undertaker where executing work solely in pursuance of its statutory obligations, including any persons employed, engaged or authorised by it upon or in connection with that work". The definition of "Requisite Consent" in the "Schedule of Amendments" is:

    > "those permissions, consents, approvals, licences, certificates and permits as may be necessary to carry out and complete the Works, including without limitation any approval of reserved matters in respect of the planning permission granted for the Development, Building Regulation consent and bye-law approvals and the requirements of all competent authorities regarding the Development."

    The definition of "Statutory Requirements", as amended, is:

> "any directly applicable provisions of the EU Treaty or any EU Regulation, any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Works or performance of any obligations under this Contract and any approvals, requirements, codes of practice, regulation or bye-law of any local authority, competent authority or statutory undertaker which has any jurisdiction with regard to the Works or with whose systems the Works are, or are to be, connected."

The "Works" are defined as:

> "the works briefly described in the First Recital (including, where applicable, the CDP Works), as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with this Contract".

9. In section 2, "Carrying out the Works", clause 2.1.1 states:

> "The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and other Statutory Requirements, and shall give all notices required by the Statutory Requirements … ."

Clause 2.3.7 states:

> "The Contractor warrants that the Works when completed shall comply with the Requisite Consents and Statutory Requirements."

Clause 2.4 states:

> "On the Date of Possession possession of the site or, in the case of a Section, possession of the relevant part of the site shall be given to the Contractor who shall thereupon begin the construction of the Works or Section and regularly and diligently proceed with and complete the same on or before the relevant Completion Date … ."

Clause 2.17.3 states:

> "… the Contractor shall not be liable under this Contract if the Works (other than the CDP Works) do not comply with the Statutory Requirements to the extent that the non-compliance results from the Contractor having carried out work in accordance with the documents referred to in clauses 2.15.1 to 2.15.4 ["Notice of discrepancies etc."] (other than an instruction for a Variation in respect of the Contractor's Designed Portion)."

Clause 2.28.1 states:

> "If, in the Architect/Contract Administrator's opinion, on receiving a notice and particulars under clause 2.27 ["Notice by Contractor of delay to progress"];
> .1 any of the events which are stated to be a cause of delay is a Relevant Event; and
> .2 completion of the Works or of any Section is likely to delayed thereby beyond the relevant Completion Date,

then … the Architect/Contract Administrator shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."

Clause 2.29 states:

"The following are the Relevant Events referred to in clauses 2.27 and 2.28:
.1 Variations and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Variation;
…
.6 any impediment, prevention or default, whether by act or omission, by the Employer, the Architect/Contractor Administrator, the Quantity Surveyor or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's Persons;
…
.13 force majeure."

The provision in clause 2.29.7, which would have included "the carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work" as one of the "Relevant Events" was deleted. In the provisions for "Practical Completion, Lateness and Liquidated Damages", clause 2.32 provides for the payment of "liquidated damages" by the "Contractor" to the "Employer" where a "Non-Completion Certificate" has been issued. Clause 2A.2.1 states:

"During the Pre-Construction Period:
…
3. … The Contractor will remain wholly responsible for the carrying out and completing of the Pre-Construction Services."

Clause 2A.6.2 states:

"The Contractor in submitting the Contractor's Proposals for the Contractor's Designed Portion … thereby confirms that it is satisfied that:
…
.4 any of the Works designed by the Contractor will fully comply with the Statutory Requirements and in accordance with the Employer's Requirements and this Contract."

And clause 2A.6.3 states:

"The Contractor shall assume responsibility for the Employer's Requirements in all respects pursuant to the terms and Conditions of this Contract."

10. In section 4, "Payment", clause 4.23 states:

"If in the execution of this Contract the Contractor incurs or is likely to incur direct loss and/or expense for which he would not be reimbursed by a payment under any other provision in these Conditions … because the regular progress of the Works or any part of them has been or is likely to be materially affected by any of the Relevant Matters, the Contractor may make an application to the Architect/Contract Administrator. … ."

Clause 4.24 states:

> "The following are the Relevant Matters:
> .1 Variations (excluding those where loss and/or expense is included in the Confirmed Acceptance of a Variation Quotation but including any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Variation);
> …
> .6 any impediment, prevention or default, whether by act or omission, by the Employer, the Architect/Contractor Administrator, the Quantity Surveyor or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's Persons."

11. In section 5, "Variations", clause 5.1 states:

> "The term 'Variation' means:
> .1 the alteration or modification of the design, quality or quantity of the Works including:
> .1 the addition, omission or substitution of any work;
> .2 the alteration of the kind or standard of any of the materials or goods to be used in the Works;
> .3 the removal from the site of any work executed or Site Materials other than work, materials or goods which are not in accordance with this Contract;
> … ."

12. In Annexure 4, the "Pre-Construction Services" are defined in this way:

> "This is the list of items of services that are intended to be dealt with during the pre-commencement period.
> 1. Obtain consent relating to the planning condition in respect to highway and construction management.
> 2. Obtain consent relating to other relevant planning conditions that require discharging prior to commencement of works in respect to SUDS, Rainwater Harvesting and pool backwash system.
> … ."

13. So far as is relevant here, the "Revised Qualifications" document states:

> "…
> 2. No fee allowance has been made for any Planning, Party Wall Agreements or Council Rates.
> 3. Working hours will be … as stipulated in the *Planning Consents* …
> 4. PTP will submit the necessary applications to discharge planning conditions, negotiate and manage the process. Walter Lilly will provide necessary documentation and information relating to any CDP works to satisfy the planning conditions in connection with the SUDS, rainwater harvesting and pool back wash system.
> … ."

14. The "Notice to Proceed", in a letter from Mr Clin to Walter Lilly dated 15 February 2013, said this:

> "…
> 2. In accordance with the terms of the Contract, the Date of Possession in the Contract shall be deemed to be 19 February 2013 and the commencement date for the Works shall be deemed to be 18 March 2013. The Date for Completion for the Works shall be deemed to be 9 November 2014."

The pleadings

15. In their Particulars of Claim Walter Lilly contended that "the risk and responsibility for ensuring that all necessary consents (including but not limited to planning consents) were applied for and obtained prior to the Works being carried out lay with Mr Clin", and that "Walter Lilly's obligations under clauses 2.1.1 and 2.3.7 were limited to carrying out the Works in accordance with those consents once they had been obtained" (paragraph 24).

16. In his Defence Mr Clin contended that "[he] was not under an absolute obligation to obtain all (or indeed any) of the consents necessary for the Works to be carried out" (paragraph 56.1); that "[rather], it was an implied term of the Contract (implied to give it business efficacy and/or so as to give effect to the intentions of the parties) that (save in respect of the CDP and temporary works) Mr Clin would use all due diligence to obtain the planning consents necessary for the lawful completion of the Works" (paragraph 56.2); that "[that] obligation did not amount to an implied warranty that no third party would assert that all the necessary planning consents had not, in fact, been obtained, or that no third party would otherwise interfere with Walter Lilly's performance of the Works in respect thereof" (paragraph 56.3); and that "… whatever the nature of Mr Clin's obligation in relation to obtaining the required consents, it is averred that Walter Lilly were obliged, pursuant to an implied term arising on the basis of business efficacy, to obtain all required consents arising out or as a result of the CDP and temporary works" (paragraph 56.4).

17. In their Reply Walter Lilly adhered to the contention that "… [as] between Walter Lilly and Mr Clin it was Mr Clin's responsibility to obtain all necessary planning consents (including in relation to works included in the Contractor's Designed Portion) regardless of which elements of the Works caused them to involve demolition" (paragraph 6.b); that "… Walter Lilly's revised tender qualifications [specifically, qualifications 2 and 4] expressly made clear that responsibility for planning applications and resolving planning issues lay with Mr Clin …" (paragraph 6.c); that the assertions in paragraphs 56.1 and 56.2 of the Defence were "denied", but "[without] prejudice to that denial, even if Mr Clin's obligation was limited in the manner alleged, he failed to comply with that more limited obligation …" (paragraph 36.a); that, as to paragraph 56.3, Walter Lilly's case was "that in the event that [the council asserted that all necessary planning consents had not been obtained], that was a matter of which Mr Clin bore the risk and/or one which would amount to a Relevant Event and/or a Relevant Matter" (paragraph 36.b); and that the implied term contended for in paragraph 56.4 of the Defence "would be inconsistent with the express term pleaded at [paragraph 6.c] which made no distinction between CDP works and other works" (paragraph 36.c).

The preliminary issues contentious in the appeal and cross-appeal

18. The preliminary issues contentious before us are these:

"1. Did [the council's] communication in its letter dated 17 July 2013:
…
1.2 amount to a requirement of a local authority or competent authority to halt the works within the meaning of the definition of "Requisite Consents" and/or "Statutory Requirements" set out at Clause 1.1 of the Building Contract?

2. If so, was Walter Lilly obliged and/or entitled pursuant to clause 2.1.1 and/or clause 2.3.7 of the Building Contract to halt the relevant works until either that consent had been obtained, or [the council] changed what it required?

…

4. As between Walter Lilly and Mr Clin, did the risk and responsibility for ensuring that all planning consents in fact required by RBKC (whether lawfully necessary or not) were applied for and obtained prior to the Works being carried out lie solely with Mr Clin?

5. Was there an express or implied term of the Building Contract to the effect that Mr Clin was obliged:
5.1 to ensure that:
5.1.1 the Works had the required planning consents, including <u>any</u> consent subsequently required by [the council] (whether lawfully necessary or not) in relation to the proposed demolition works? And/or
5.1.2 RBKC was satisfied that all necessary consents and approvals for the Works (whether lawfully necessary or not) had been obtained prior to their commencement?
…

6. Was Mr Clin obliged under the Building Contract:
6.1 prior to the Works commencing, to ensure that RBKC was satisfied that all necessary consents and approvals for the works had been obtained? …
… ."

19. By his order of 5 May 2016, in the light of his judgment and the subsequent amplification of it, the judge answered those questions in this way:

"1. Subject to the terms of the Judgment as a whole the preliminary issues are answered as follows:
…
ii. Issue 1.2: No
iii. Issue 2: This depends on whether or not the relevant conservation area consent had been obtained. If it had, the answer is No. If it had not been obtained, the answer is Yes.
…
vi. Issue 4: No, as explained at paragraph 65-69 of the Judgment and the amplification handed down on 5 May 2016.

vii. Issues 5.1.1, 5.1.2, … and 6.1: No, as explained at paragraphs 51-64 of the Judgment. The obligation to be implied is the one set out at paragraph 58 of the Judgment.

… ."

2. For the avoidance of doubt and by way of clarification of the judgment dated 24 February 2016:

2.1. The words "unreasonable", "unreasonably" and "capriciously" in paragraph 61 of the Judgment and "capricious" in paragraph 67 of the Judgment refer to conduct that is unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and the line of cases that have followed it);

2.2 The references in paragraph 61 and 67 to the loss or risk lying where it falls, mean that in the event of delay caused by the unreasonable conduct of the local authority, neither party is to have any claim against the other in respect of such delay. Thus, for example, the Claimant cannot recover from the Defendant any loss and expense occasioned by such delay and the Defendant, likewise, cannot recover damages (whether liquidated or otherwise) from the Claimant in respect of such delay. This does not mean the Claimant is entitled to an extension of time, even if in some circumstances the result is the same."

Issue (1) – should a term as to planning permission be implied?

20. As the judge acknowledged (in paragraphs 24 and 52 of his judgment), except for the provisions in paragraphs 1 and 2 of Annexure 4, the contract contains no reference to "planning" approvals of any kind. It does not expressly impose on either party any obligation to apply for, let alone to obtain, planning permission or conservation area consent. The approvals referred to in paragraphs 1 and 2 of Annexure 4 are not approvals of that kind. They are approvals of matters required to be dealt with under conditions attached to a grant of planning permission.

21. The judge also concluded (in paragraph 53) that under clause 2A.6.2 of the contract Walter Lilly, as "Contractor", confirmed that any works they designed would comply with the "Statutory Requirements". This meant "either that such works would comply with existing planning permission or conservation area consent, or that any necessary consents would be obtained". In his view, however, that clause did "not transfer the general risk of obtaining planning permission or conservation consent to Walter Lilly, but makes it responsible for obtaining consent for any work that goes beyond that set out in the Employer's Requirements". I agree.

22. Before the judge, and again before us, there was no dispute that there is an implied term in the contract to the effect that each party is not to prevent the other from discharging its obligations, as well as the usual implied term to the effect that each is to co-operate with the other so far as is necessary for the other's obligations to be discharged (see the judgment of Bingham L.J., as he then was, in *Rosehaugh Stanhope Plc v Redpath Dorman Long Ltd.* (1990) 50 B.L.R., at p.87). The judge did not doubt that those terms should be implied (see paragraphs 58 to 62 of his judgment). Again, I agree.

23. Both parties also accept, in principle, that an appropriate term should be implied into the contract to allocate responsibility for the making of applications for any requisite planning permissions or conservation consents. This seems clear on the pleadings. And before us it was acknowledged on behalf of Mr Clin by his counsel, Mr Vincent Moran Q.C., that "a term should be implied in to the Contract which makes Mr Clin responsible to some extent for obtaining planning permission" (paragraph 23 of Mr Moran's replacement supplementary skeleton argument).

24. As the judge said (in paragraph 51 of his judgment), from 1 October 2013 – on the coming into effect of paragraph 12 of Schedule 17 to the Enterprise and Regulatory Reform Act 2013 – work that had previously required conservation area consent under section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 no longer did so, though it would still require planning permission. But neither side suggested that anything turned on that.

25. The general law on the implication of contract terms is mature and, at least for the purposes of the appeal and cross-appeal in this case, not controversial. A fundamental principle is that a term may only be implied into a contract if it is necessary (see *Liverpool City Council v Irwin* [1977] A.C. 239 – in particular, the speech of Lord Wilberforce at p.256F-H, and the speech of Lord Edmund-Davies at p.269B-D). The judge referred (in paragraph 35 of his judgment) to the speech of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd.* [2009] 1 W.L.R. 1988 recalling (in paragraph 19) Lord Pearson's in *Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601 (at p.609). He went on to say (at paragraph 21) that "in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean". In *Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd.* [2015] UKSC 72, Lord Neuberger confirmed (in paragraphs 22 to 24 of his judgment) that the test for the implication of a term to give business efficacy to a contract remains one of strict necessity. He acknowledged that "the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication" (paragraph 27). He added that "[in] most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered" (paragraph 28). He recalled the observation of Sir Thomas Bingham M.R. in *Philips Electronique Grand Publique SA v British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472 (at p.481) that "[it] is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power" (paragraph 29). Lord Carnwath emphasized that "the object remains to discover what the parties have agreed or … "must have intended" to agree" (paragraph 69).

26. In the context of building contracts, it is not the law that, in the absence of an express term dealing with the obtaining of planning permission for the contract works, a term is always to be implied that the employer is responsible for obtaining the necessary planning approvals, or ensuring that all such approvals have been obtained, before work is begun. But some support may be found in the authorities for the proposition that the employer will generally bear the responsibility of obtaining the necessary planning permission, given that the execution of the work would otherwise be unlawful (see, for example, the judgment of Lord

Evershed M.R. in *Townsend (Builders) Ltd. v Cinema News and Property Management Ltd.* (1958) 20 B.L.R. 118, at p.142; the judgment of Buckley L.J. in *Porter v Tottenham Urban District Council* [1915] 1 K.B. 776, at p.785, and that of Pickford L.J., at pp.795 and 796; and the judgment of O'Leary J. in the Supreme Court of Ontario in *Ellis-Don Ltd. v Parking Authority of Toronto* (1978) 28 B.L.R. 98, at pp.109 to 111). In its commentary on the normal implied term of co-operation, Keating on Construction Contracts (tenth edition), states (in paragraph 3-063) that "[the] employer may be obliged to obtain planning permission … in sufficient time to enable the contractor to proceed without delay", but points out that "[this] will depend on the facts and the express terms of the contract" (footnote 193). A later passage (in paragraph 6-080), dealing specifically with the obtaining of necessary consents, cites *Ellis-Don v Parking Authority of Toronto* and says that "[where] consents, e.g. of the local authority, must be obtained to make a contract lawful it depends on the particular contract whether the contractor or the employer must obtain them, and whether, if they are not obtained, the parties are discharged from further obligations under the contract". It adds that "… in the absence of express words the party who has to obtain the consent or licence does not give an absolute warranty that they will obtain it, but a warranty to use all due diligence". In a building contract there is usually no implied warranty by the employer that the contractor will not suffer delay caused by the fault of a local authority or statutory undertaker, "since such delays are a well-known hazard of certain classes of construction work" (see Hudson's Building and Engineering Contracts, at paragraph 3-140). Generally, it may be said, there is no implied warranty that a third party will refrain from interfering with a contractor's work (see the judgment of Buckley L.J. in *Porter v Tottenham Urban District Council*, at pp.784 and 785).

27. The judge directed himself (in paragraph 39 of his judgment) that "the overriding point to be borne in mind is that before implying any term the court must conclude that the implication of that term is necessary in order to give business efficacy to the contract or, to put it another way, it is necessary to imply the term in order to make the contract work as the parties must have intended", and (in paragraph 40) that "the court is concerned only to … ascertain the objective intention of the parties, it is not to have regard to the private intention of either party or to imply a term that the court considers to be fair and reasonable", and "[the] search is to find the meaning which it would convey to a reasonable person having all the background knowledge that the parties to the contract could reasonably be expected to possess". There is no criticism of those self-directions here – in my view rightly so. They align with the relevant principles in the authorities.

28. In reaching his conclusion that it was necessary to imply into the contract a term identifying whose responsibility it was to make and pursue an application for any requisite planning permission or conservation area consent, the judge made three observations, all of which seem well justified. First, "[the] reasonable man in the position of the parties would … have in mind that, in general, a person who wishes to develop his land will know either that he is likely to need planning permission or, in the case of a residential development, that he must satisfy himself that the development proposed is exempt from the requirement for planning permission". The same applied to conservation area consent (paragraph 54 of the judgment). Secondly, "… even when applied for well in advance, everyone knows that planning permission cannot be taken for granted" (paragraph 55). And thirdly, it was "obvious that the parties must have intended that someone should have the responsibility for applying for planning permission"; that "planning permission had to be obtained in order for the development to go ahead"; that "it would be equally obvious to an informed bystander that the party best placed to obtain planning permission is the employer, not least because he is the party who knows well in advance what he wants to do" and "[the] contractor does not

find that out until he is invited to tender, by which time it may be too late for planning permission or conservation area consent to be obtained in time"; and that "[any] reasonable person would know that a failure to make a timely application for the necessary permission or consent might well result in delay (unless of course the contractor has indicated that [it] is prepared to take the risk of carrying out the work without that permission or consent)" (paragraph 56).

29. The judge said it appeared to be "common ground that the primary responsibility for applying for planning permission rests with the employer …" (paragraph 57). This remained common ground before us. Neither the judge's conclusion that an implied term was necessary to establish whose responsibility it was, under the contract, to seek any requisite planning permission, nor anything he said in support of that conclusion has been challenged in this appeal. And in my view, in the circumstances of this case and having regard to the express terms of this building contract, his conclusion was sound.

30. As the parties also agree – and, once again, at least in the circumstances of this case and having regard to the express terms of this contract – the judge was, I believe, right to attribute responsibility for the seeking of planning permission to Mr Clin as "Employer". It is a basic principle in planning law that an application for planning permission may be made by anyone, whether or not he owns an interest in the land to which the proposal relates (see the note on section 65 of the Town and Country Planning Act 1990 in Volume 2 of the Encyclopaedia of Planning Law and Practice, at paragraph P65.05). But in this case, under this contract, I think the onus of applying for planning permission for the "Works", or ensuring that planning permission was applied for, clearly lay with Mr Clin. And in view of the provisions of the contract that effectively include the "Contractor's Designed Portion" within the "Works", as defined, I do not think the "Contractor's Designed Portion" should be excluded from that obligation. This all seems to reflect the realities of the situation – not least the fact that it was Mr Clin who knew at every stage what his project actually involved. And as the judge said (in paragraphs 58 and 60), it is also consistent with Mr Clin's architect's obligation under clause 1.12 of the architect's "Basic Services" to "[make] where required application for planning permission".

Issue (2) – how should the implied term be framed?

31. The judge identified the essential point at issue between the parties as being "whether a term should be implied to the effect that the employer will <u>ensure</u> that planning permission is obtained, or whether there should be a more limited obligation – for example, to exercise reasonable diligence to obtain the necessary planning permission" (paragraph 57 of the judgment). In the appeal and cross-appeal this issue remained live.

32. The judge did not spell out the implied term in precise words, either in his judgment or in his order. But it seems clear what he intended. In this contract, he said, there must be an obligation, "to make it work effectively", that the employer would "provide in good time to the local [planning] authority the information that its planning officers require in order to grant the necessary consents" (paragraph 58 of the judgment). This meant "information that those planning officers are lawfully entitled to expect, not that which they may unreasonably demand" (paragraph 59). The judge accepted Mr Moran's submission that the employer should not be under an absolute obligation to secure planning permission. He saw no justification for limiting the obligation to that of taking reasonable steps to obtain permission (paragraph 60). In his view there was "nothing inequitable about leaving the loss

caused by the unreasonable actions of a third party, the third party in this case being the local authority, to lie where they fall …". But he was not persuaded that commercial necessity required the employer to take on himself "the entire risk of the vagaries of obtaining planning permission". Such an obligation could not prevent a local planning authority from behaving "unreasonably or capriciously". If the necessary planning permission had not been obtained by the time the contractor put in his tender, he must decide whether to accept the risk that planning permission might not be granted. It was always open to him to protect his position by "stipulating for an appropriate term" (paragraph 61). There was no need for a term requiring the employer to be sure that, before the "Works" were begun, the council, as local planning authority, was satisfied that all necessary consents and approvals had been obtained. By the time the "Works" were due to start, the contractor would already have committed himself to carrying them out during the agreed period (paragraph 63). The judge therefore concluded that preliminary issues 5.1.1, 5.1.2 and 6.1 should all be answered in the negative (paragraph 64).

33. On preliminary issue 4, he concluded – essentially for the same reasons – that Mr Clin did not assume the "risk that planning permission would be given", but an "obligation … to ensure that the information reasonably required by the local authority was provided in good time" (paragraph 65). If he did that, "both initially and then subsequently, in response to any reasonable requests", he would have "discharged the duty" (paragraph 66). Though the contract had not provided for the consequences of "capricious conduct" by the council, it could "work just as well if that risk is left to lie where it falls". Since it had "not provided how the risk should be borne, no provision should be made: see *Belize Telecom*, at [17]" (paragraph 67). As for work within the "Contactor's Designed Portion", the judge said that, "by definition", such work had to comply with the "Employer's Requirements" and "the consents for those parts of the work ought to be obtained by Mr Clin". The difficulty at this stage was that the facts had yet to be determined, and it was impossible to know the nature and extent of the work, if any, for which Walter Lilly might be obliged to seek conservation area consent (paragraph 68). Subject to that caveat, the answer to preliminary issue 4 was "No" (paragraph 69).

34. As I understand it, the judge's amplification of his judgment in paragraphs 2.1 and 2.2 of his order was meant only to clarify what he had said in paragraphs 61 and 67, in two respects: first, the concept of "unreasonable" or "capricious" behaviour by the council as local planning authority, and secondly, the concept of "loss" or "risk" being "left to lie where it falls". It was not intended as a gloss on the implied term to which he had referred in paragraphs 58 and 64.

35. Leaving aside Mr Clin's challenge to the amplification, his appeal does not challenge the implied term identified by the judge. Mr Moran did not put forward a different formulation. For Walter Lilly, Mr Sean Brannigan Q.C. submitted that the responsibility for obtaining any planning approvals, whether reasonably required by the council or not, lay solely with Mr Clin as "Employer". The judge was wrong to limit the obligation under the implied term to providing the council with the information it required. Mr Brannigan contended for an implied term whose effect was that the "Employer" was obliged to ensure, or at least to use all reasonable endeavours to ensure, that any planning permission required by the council would be in place in time to prevent any delay to the "Works", and that the council was satisfied this had been done.

36. I agree with the judge's conclusion that although the effect of the implied term should be to oblige the "Employer" to undertake responsibility for the seeking of planning permission

and conservation area consent for the work comprised in the "Employer's Requirements", it could not realistically extend to an obligation to ensure that planning permission or conservation area consent was in fact granted, or granted within a particular time – whether by the council as local planning authority, or, on appeal, the Secretary of State. This conclusion seems consistent with the principles in the case law. It would not have been realistic or reasonable to impose on the "Employer" an absolute requirement to secure planning permission or conservation area consent, or to do so by some specified date. Such approvals are the formal outcome of processes provided under the planning legislation, in which the local planning authority – or the Secretary of State on appeal – exercises an administrative discretion within statutory parameters, subject to review by the court on public law grounds. That administrative discretion involves questions of planning judgment, shaped by national and local policy, and matters of fact and degree (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780H and the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459D-G). While consistency and predictability in planning decision-making are worthy objectives of planning policy, the process is inherently uncertain. Without acting in any way "unreasonably" or "capriciously", a local planning authority determining an application for planning permission, whether the proposal be large or small, may reach a decision that is surprising or unwelcome to the applicant or others, or widely regarded as wrong. The essential point, however, is that neither the employer nor the contractor under a building contract is in control of the relevant statutory process, or its outcome. The parties to such contracts may be expected to know that.

37. With that in mind, and applying the principles in the case law to which I have referred, I think the appropriate implied term as to planning permission here would be this:

> "The Employer will use all due diligence to obtain in respect of the Works any permission, consent, approval or certificate as is required under, or in accordance with, the provisions of any statute or statutory instrument for the time being in force pertaining to town and country planning."

38. The concept of the "Employer" using "all due diligence" to obtain planning permission – or any other relevant planning approval – for the "Works" would extend to an obligation to make a timely application for any such permission or other approval or ensure a timely application was made on his behalf, to ensure sufficient information was provided to the local planning authority in support of the application, and to co-operate with the authority in the statutory process. A timely application would be one that assists each party in the performance of its obligations under the contract, and with a view to avoiding any delay to the "Works".

39. I see no need to introduce into the implied term any qualification or exemption for "unlawful", "unreasonable" or "capricious" behaviour on the part of the council as local planning authority. The obligation on the "Employer" to use "all due diligence" to obtain planning permission for the "Works" is an obligation on him to do, or to have done on his behalf, no more and no less than the statutory planning scheme requires of an applicant for planning permission, or other planning approval, and to do it without undue delay. Plainly, however, it is not – and could not be – an obligation on him to ensure that the council, as local planning authority, acts lawfully in accordance with its powers and duties under the statutory scheme, or that its decision on the planning merits of a proposal will be favourable

to the project. That is not within his control as "Employer". His responsibility here goes only to what he can control. The allocation of risk under the contract is a separate issue.

40. My answer to preliminary issue 4, therefore, is this:

> "The obligation for the obtaining of planning permission and other relevant planning approvals under the contract lies with Mr Clin as "Employer" under the implied term as to planning permission. The consequent allocation of risk is addressed in the relevant express terms of the contract."

And my answer to each of preliminary issues 5.1.1, 5.1.2 and 6.1 is:
> "No. See the answer to preliminary issue 4."

Issue (3) – the allocation of risk under the contract

41. The focal question in the appeal, in my view, is whether the judge's amplification of his judgment was correct. For Mr Clin, Mr Moran did not challenge the implied term to which the judge referred in paragraphs 58 and 64 of his judgment. But, he submitted, the judge was in error in concluding that the contract, with the implied term, did not provide for the allocation of risk between the parties if the council behaved unreasonably. If this happened, risk would not simply be shared. On a true construction of the contract, the judge ought to have found that delay caused by the unlawful, unreasonable or wrongful conduct of the council was at Walter Lilly's risk – subject to any entitlement they had to an extension of time. He was wrong to hold that the loss "lying where it fell" meant Mr Clin was not entitled to liquidated damages for the relevant period of delay.

42. Mr Brannigan opposed that argument. He submitted, in effect, that the implied term as to planning permission did not disturb the operation of the express provisions of the contract bearing on the allocation of risk, but worked in synergy with them, as would normally be so with a building contract of this kind. In accordance with those provisions, it was Mr Clin as "Employer" who bore the risk of any delay consequent upon the council asserting that a requisite planning permission was not in place.

43. The broad principles of law relevant here are well established. Hudson states (at paragraph 6-006) that "[the] law in common law countries is uncompromising in insisting that, independent of fault, failure to complete by an unequivocal promised date will expose the Contractor to a claim for damages for that failure …". In the absence of a liquidated damages clause, certain basic principles apply. As Hudson puts it (ibid.), "[events] over which the Contractor may genuinely have no control, such as weather, strikes, labour or material shortages, or damage or obstruction by third parties for whom the Employer is not responsible, will afford no excuse or defence, in the absence of express provision, unless they are such as to frustrate the contract entirely …". As to the apportionment of risk between the parties in most standard form construction contracts, H.H.J. Edgar Fay Q.C. observed in *Henry Boot Construction Ltd. v Central Lancashire New Town Development Corporation* (1980) 15 B.L.R. 1 (at p.12):

> "There are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also cases which do not fall within either of these conditions which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor. But in the cases where the fault is not that

> of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category, where the employer has to compensate the contractor, should, one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility."

Commenting on the JCT 2011 Contract, Hudson says (at paragraph 6-016) that an event that is neither a "Relevant Event" nor a "Relevant Matter" will be "at the Contractor's risk if it causes delay", but adds that "[if] any of the factors which are classified as "Relevant Events" but not reflected in the list of "Relevant Matters" give rise to loss, then the loss lies where it falls, unless of course one or other party can establish a material breach of contract on the other party's part".

44. In my view, if the judge had framed the implied term as to planning permission as I would frame it, paragraph (1) of the amplification of his judgment would have been unnecessary. The concept of the "Employer" using "all due diligence" to obtain planning permission does not bear on the lawfulness or reasonableness of the actions of the local planning authority. If the law required planning permission or some other planning approval to be sought and granted for any part of the "Works", the onus would be on Mr Clin as "Employer" to use "all due diligence" to obtain that permission or approval. If either party to the contract maintained that such permission or approval was not lawfully required, or that, if lawfully required, it had been wrongly refused by the local planning authority, and any consequences for the performance of a relevant obligation under the contract were then the subject of dispute between the parties, it would ultimately be for the court to resolve that dispute.

45. It may be said that such consequences were not fully contemplated by the parties when they negotiated and entered into the contract. One would not expect every conceivable eventuality to have been foreseen at that stage. This is not to say, however, that the terms of the contract, both express and implied, including the implied terms as to co-operation and planning permission, must be regarded as inadequate or deficient, or that it is necessary for the court in this litigation to set about enhancing or refining those terms. It is not the court's task, retrospectively, to craft a specific allocation of risk under the contract to deal with the ramifications of the implied term, as if the parties had anticipated the dispute that has now arisen between them. And the submissions made on either side in the appeal and cross-appeal do not lead me to conclude that the contract requires any further implied term beyond those to which I have already referred. The implied term as to planning permission must be taken together with the existing terms of the contract in which the parties' respective obligations and responsibilities, and their respective risks, are expressly provided for. This is a substantial and carefully drafted contract, freely negotiated between the parties, and subject to bespoke amendments to embody the particular arrangements they had agreed for this project. Neither party insisted on any amendment to the standard form contract to provide explicitly for the consequences of the council requesting the submission of an application for planning permission or conservation area consent while the "Works" were in progress, regardless of whether that request was lawful or not. Neither of them insisted on an amendment to cater specifically for the consequences of such an application being refused. In these circumstances it is not the court's role to improve their agreement.

46. Before he considered what term as to planning permission should be implied, the judge offered a straightforward analysis with which I think it is hard to disagree. He said (in paragraph 48 of his judgment) that "if Mr Clin was in breach of an express or implied term

of the Contract in relation to the obtaining of conservation consent, with the result that the contractor could not reasonably be expected to continue with the demolition work … that would have amounted to an act of prevention and therefore a Relevant Event under clause 2.29"; and (in paragraph 49) that "the real issue is whether or not the conservation area consent sought and given covered the extent of the demolition work shown in the plans that were currently being used by Walter Lilly", and that "[if] it did not, then any reasonable contractor would be expected to stop the demolition work until the issue of consent was resolved".

47. Where I part company from the judge is in what he said in paragraph (2) of his amplification, where he explained his concept of "the loss or risk lying where it falls" in paragraphs 61 and 67 of his judgment as meaning "that in the event of delay caused by the unreasonable conduct of the local authority, neither party is to have any claim against the other in respect of such delay …". At the hearing on 5 May 2016 he seemed to go further. He said he had "found … an implied term that neither party takes the risk of the unreasonable conduct of the local authority", and "[therefore], the contractor cannot claim against the employer for loss and expense, and the employer cannot claim from the contractor damages arising out of it" (see p.5, lines 21 to 25 of the transcript, and also p.6, lines 1 to 4). But that, in my view, was not the automatic effect of the judge's implied term as to planning permission. Nor is it an automatic effect of the implied term I have proposed. The implied term does not neutralize or override any of the parties' other obligations in the contract. Nor does it modify the balance of risk between them under the relevant express terms. It works together with those express terms. It leaves the relevant provisions as to responsibility and risk to operate as the parties explicitly agreed, with the resulting consequences for each of them – practical and financial – if any requisite grant of planning permission, or other planning approval, is withheld or delayed.

48. Thus, for example, the provisions in clause 2.1.1 as to the carrying-out and completion of the works by the "Contractor" and in clause 2.4 requiring the "Contractor" to "regularly and diligently proceed with [the Works] and complete the same on or before the relevant Completion Date", and the provisions as to "[any] impediment, prevention or default … by the Employer" constituting one of the "Relevant Events" under clause 2.29 or one of the "Relevant Matters" under clause 4.24, encompass any relevant consequences of planning permission not having been granted in time. Whether such consequences do apply to one party or the other, and what they are, will depend on the facts.

49. I should say at this point that I see no significance for our purposes in the fact that clause 2.29.7, referring to the acts of a "Statutory Undertaker", as defined, was deleted from the list of "Relevant Events" – a point urged on us by Mr Moran. That deleted clause does not seem to me to be relevant to the functions of the council as local planning authority.

50. The implied term as to planning permission reflects commercial common sense, is enough to make the contract work as the parties must have intended, and requires no further terms to be implied to adjust the present allocation of risk between "Employer" and "Contractor". The parties must, I think, be taken to have contemplated the consequences of the "Employer" failing to comply with it. To the extent that they safeguarded themselves against their own or a third party's default, the relevant provisions of the contract will continue to protect each of them against potential liability to the other. In so far as they failed or chose not to do that, they must accept the consequences – which will be for the court to ascertain in the light of the relevant evidence. Taken together with the express terms of the contract, the requirement in the implied term that the "Employer" use "all due

diligence" to obtain planning permission serves to protect both parties: the "Employer" against the consequences of unlawful conduct by the council as local planning authority or its lawful refusal of planning permission, the "Contractor" against the consequences of delay or a failure to act on the part of the "Employer". Whether the council's conduct was indeed unlawful, or that of the "Employer" amounted to a relevant "impediment", "prevention" or "default" – or conceivably both – can only be established once all the relevant facts are known. That is not possible in an evidential vacuum.

51. It follows, in my view, that the judge's amplification of his judgment was inappropriate, and should not have been added to his order. The idea of risk or loss "lying where it falls" is apt, but not in the sense in which it was used by the judge. Rather, it means that the parties' existing allocation of risk under the contract is sufficient to address the various potential consequences of the implied term as to planning permission not being complied with.

Issue (4) – the council's letter of 17 July 2013

52. In the letter to Walter Lilly dated 17 July 2013 the council's "Team Leader, Planning Enforcement", Mr Bruce Coey, said this:

> "…
>
> I write further to my officer's visit to the above mentioned properties on 3rd July 2013 regarding demolition work undertaken. Whilst the extent of demolition at this time was not substantial demolition and a breach of [the Planning (Listed Buildings and Conservation Areas) Act 1990] had not occurred, my officer was shown plans from the on site engineer that indicated the following demolition works:-
>
> - rear elevation of both 48 and 50 to be demolished below the cill of the first floor windows,
> - the whole of the internal envelope of both buildings from third to lower ground level to be demolished
> - the removal of the roof from each property
> - the removal of the ground and lower ground front bay of 48 Palace Gardens Terrace
>
> You are advised that the extent of demolition proposed above is considered substantial demolition requiring Conservation Area Consent from the Council. I confirm that such an application has not been sought or obtained.
>
> I must also advise you that carrying out unauthorised substantial demolition works to a building in a conservation area is an offence under Section 9 of the Planning (Listed Buildings & Conservation Areas) Act 1990. Any person found guilty of such an offence is liable [to] a fine of up to £20,000 upon conviction in the Magistrates' Court [and an unlimited fine if convicted by the Crown Court]. Continued non-compliance can result in further prosecutions for a similar offence, incurring similar fines. The Council may also issue a conservation area consent enforcement notice, which is served on all parties having a material interest in the property. It is entered on the Local Land Charges records which could make the future sale or financing of the property more difficult.

> If it is your intention to proceed with the above demolition works, I would wish to receive an appropriate application within 28 days of the date on this letter. You will need to demonstrate why the above demolition works are structurally necessary and what temporary works you are proposing to secure the stability of the buildings. I would also wish to receive written confirmation of your intentions, within 21 days of the date on this letter.
>
> If you fail to do so, and the works proceed without the necessary consent, I will consider initiating formal prosecution proceedings in this matter.
>
> If you do not understand what you are being asked to do, please contact the case officer whose name is at the top of this letter. Even if you do so, the above deadlines and requirements must still be met.
>
> I confirm that I have also written to the architects, PTP Architects London Ltd in this matter.
>
> …".

Mr Coey signed the letter "For the Executive Director, Planning and Borough Development".

53. The judge accepted that the council's letter expressed its view that conservation area consent was required for the works of demolition referred to, requested an application for conservation area consent within 28 days, and made plain the council's intention to consider prosecution if an application was not received (paragraph 71 of the judgment). He found it impossible to tell how much, if any, of the demolition work already permitted was still to be carried out at that stage (paragraph 72). He concluded that the letter was "not an instruction to stop either the Works generally or the demolition work specifically" (paragraph 73(1)), but that if the council's view was correct, or at least not wrong on its face, "no reasonable contractor could be expected to continue with the demolition work for so long as [it] maintained that position (save to the extent that he was confident that further demolition was permitted by the existing consent)" (paragraph 73(3)). If the absence of an appropriate conservation area consent was caused by a breach of the implied term by Mr Clin, then, in these circumstances, or in the light of clause 2.1.1 of the contract – by which Walter Lilly was required to comply with the "Statutory Requirements" – or both, "such breach would amount to an act of prevention by the employer" (paragraph 73(4)). But if Walter Lilly had failed to provide relevant information to Mr Clin's architect in time, "the effective cause of the want of the appropriate conservation area consent would be Walter Lilly's failure to provide that information" (paragraph 73(5)). If Mr Clin had not been in breach of the implied term as to planning permission, he could not be liable for any acts of the council, whether that conduct consisted of "wrongly denying the existence of the necessary conservation area consent" or "purporting to give instructions that have no lawful basis or justification" (paragraph 74). If Walter Lilly had not failed to provide information to Mr Clin's architect, "any loss resulting from the wrongful or capricious conduct by [the council] must lie where it falls" (paragraph 75).

54. Mr Brannigan submitted that the judge erred in finding the letter was not a requirement of a "local authority" to halt the "Works" within the ambit of the "Requisite Consents" or the "Statutory Requirements" as defined in clause 1.1 of the contract. The judge ought to have

concluded that, once they had received the council's letter, Walter Lilly were obliged, or at least entitled, under clause 2.1.1 or clause 2.3.7 of the contract, or both, to halt the work until conservation area consent had been obtained, or the council had been satisfied that it was not required.

55. Mr Moran supported the judge's conclusions here. The letter, as he submitted, did not constitute a requirement to halt work. It was a "shot across the parties' bows" – which I take to mean that it was a warning, but lacking in statutory effect. And under the contract, he submitted, it did not come either within the definition of "Requisite Consents" or that of "Statutory Requirements".

56. I think it is impossible to reach a concluded view on the status and significance of the council's letter without considering all the evidence as to the circumstances in which it came to be written – including any relevant preceding correspondence or meeting notes, the relevant drawings, any relevant previous grants of planning permission or conservation area consent or certificates of lawfulness, photographs of the buildings as they were before work began, and so forth. We were not invited to do that – rightly so, given the scope of the appeal and cross-appeal before us.

57. I can accept that the letter was, in effect, a request by the council that Walter Lilly refrain from further works of demolition at least until an application for conservation area consent had been submitted. I can also agree with the judge that, unless the assertions made in the letter were plainly wrong, no contractor could reasonably have been expected to go on with any works of demolition to the rear elevation of the buildings until the council was content for those works to proceed. Whether the council's position was, in law, a proper position for it to take is not a question we have to address in this appeal – or can. That would require the facts as found to be considered in the light of the relevant parts of the statutory scheme (as to which, see the authoritative discussion of the provisions relating to the unauthorized demolition of an unlisted building in a conservation area in Mynors and Hewitson's "Listed Buildings and Other Heritage Assets" (fifth edition) – in particular, at paragraphs 12-018, 12-049 to 12-059 and 21-029 to 21-032A). Whether it would have been possible for this impasse to have been avoided or removed sooner than it was, whether Mr Clin and his architects acted or reacted as swiftly and effectively as they should, and whether the contractual provisions for "Relevant Events" or "Relevant Matters" came into play and – if so – how, are also questions beyond the reach of this appeal and cross-appeal.

58. Did the council's letter "amount to a requirement of a local authority or competent authority to halt the works within the meaning of the definition of "Requisite [Consent]" and/or "Statutory Requirements"" in clause 1.1 of the contract? That is the question raised in preliminary issue 1.2. The letter itself could not, I think, be said to constitute a "Requisite Consent". It was a communication, written by a senior enforcement officer on behalf of the council, which said, in effect, that a "Requisite Consent", in the form of conservation area consent, had not been obtained, and that unless an application for such consent was promptly made, serious consequences were likely to follow. If conservation area consent, or planning permission, was lawfully required for the demolition work in question, this would presumably have been a "Requisite Consent" as defined in clause 1.1, and might also have come within the expanded definition of "Statutory Requirements".

59. Two possibilities arise. The first is that conservation area consent under section 74(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, or planning permission, was indeed required for the relevant works referred to in the council's letter, and had not yet

been granted. The second is that conservation area consent, or planning permission, was not required, or, if required, had already been granted. The effect of clauses 2.1.1 and 2.3.7 of the contract would appear to have been to compel the "Contractor" to carry out and complete the works in compliance with the statutory requirement for such consent or permission to be obtained. This could only lawfully be done once the requisite consent or permission authorizing the work had been granted. To have undertaken work in breach of the statutory regime for development control would also, it seems, have been inconsistent with the requirements in those two clauses. In those circumstances it might be said that Walter Lilly were not merely entitled to stop work when they did, but also obliged to do so.

60. The critical question therefore, as the judge recognized, is whether conservation area consent, or planning permission, was required and had not been granted for the works of demolition referred to in the council's letter. Mr Clin firmly contends that there was no outstanding requirement for conservation area consent, or any other planning approval, by the time the council's letter was received. In so far as this is disputed by Walter Lilly, it will be an issue at trial. It is not a preliminary issue.

61. The question in preliminary issue 1.2, however, is whether the council's letter itself falls within the ambit of the words "any… requirements… of any local authority… which has any jurisdiction with regard to the Works …" in the contractual definition of "Statutory Requirements". The judge's answer to this question was an unqualified "No". He may or may not have been right. However, I think a conclusive answer could only be given once the letter had been considered in its full factual context. In my view the reference to "any requirements … of any local authority" in the definition of "Statutory Requirements" must normally be taken to mean something more than a request or warning issued in a letter that, in itself, lacks any effect under statute, even if the request or warning, should it go unheeded, is likely to be followed by some formal, statutory action being taken against the recipient. The reference to "requirements" in the definition sits alongside the reference to "any approvals, … , codes of practice, regulation or bye-law of any local authority", which seems to connote a degree of formal control or compulsion that goes beyond a request or warning, however firmly expressed. Where the enforcement of planning control is concerned, the "requirements" of a local planning authority would harden, with legal effects, in the form of an enforcement notice or stop notice issued under the relevant statutory provisions (see Lord Hoffmann's speech in *R. (on the application of Reprotech (Pebsham) Ltd.) v East Sussex County Council* [2003] 1 W.L.R. 348, at pp.356 to 359). But the definition of "Statutory Requirements" in the contract is broadly framed, and I do not think it necessarily prescribes, in every case, a formal status of that kind, with all the statutory consequences entailed. I would not rule out the possibility that, in a particular factual context, the local planning authority's requirements for compliance with lawful planning control, set out in a letter to the landowner, might fall within it.

62. It follows that my answer to preliminary issue 1.2 is this:

> "The council's letter was not a "Requisite Consent" as defined in clause 1.1 of the contract. Whether it constituted a "Statutory Requirement" will depend on the full factual context established by the evidence."

And my answer to preliminary issue 2 is this:

> "Walter Lilly's obligation or entitlement under clauses 2.1.1 and 2.3.7 of the contract will depend on the court's conclusion, in the light of the evidence, as to

whether every permission, consent, approval or certificate lawfully required under the statutory scheme for town and country planning had been granted at the material time."

Conclusion

63. The answers I would give to the preliminary issues contested before us may not be what either party had hoped to achieve, but they are no more Delphic than at this stage they must be. For the reasons I have given I would allow both the appeal and the cross-appeal, but only to the limited extent I have indicated.

Lord Justice Flaux

64. I agree.

Lord Justice Davis

65. I also agree.

66. I appreciate that the outcome here means that not all the preliminary issues posed have been answered. But (as is clear from the Judge's own approach) it has become increasingly difficult, indeed unwise, to answer the preliminary issues in a factual vacuum; and this appeal has in many ways only confirmed that.