RISK *and* RESPONSIBILITY *for Obtaining Planning Consents*

The decision in Clin v Walter Lilly & Co Ltd[1] is the first occasion on which an appellate Court in this jurisdiction has considered an issue of potentially wide-ranging significance: does a term fall to be implied into building contracts to the effect that the employer is to be responsible for obtaining planning permission and similar consents and, if so, what is the scope of its obligation to do so?

***Vincent Moran QC** and **Tom Coulson** (who acted for the successful appellant in this case) discuss the Court of Appeal's approach.*

Introduction

Mr Clin appealed against that part of the first instance Judgment of Mr Justice Edwards-Stuart ("the Judgment"), as clarified and expanded upon in a further decision handed down subsequently to amplify or clarify the Judgment ("the Amplification").

The Judgment concerned the trial of six Preliminary Issues concerned with (i) the contractual significance of a letter dated 17 July 2013 from the local authority requesting a cessation in the Works (Issues 1-3), and (ii) the nature of Mr Clin's obligations and the sharing of risk in relation to obtaining planning permission for the Works (Issues 4-6).

Background

Walter Lilly is a building contractor that specialises in the renovation of prime residential properties and Mr Clin is the owner of a substantial residential property ("the Property"), which is located in the Royal Borough of Kensington and Chelsea ("RBKC").

1 [2018] EWCA Civ 490

"...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."

On 25 September 2012, the parties entered into a building contract (in the JCT Building Contract with Quantities, 2005 Edn form and including a Contractor's Designed Portion) by which Walter Lilly was to carry out demolition, refurbishment and reconstruction works at the Property to form a single residence ("the Contract").

On 17 July 2013, whilst the works were underway, RBKC wrote to Walter Lilly and to Mr Clin's Architect stating that it considered that the proposed works would amount to *"substantial demolition"* for which specific Conservation Area Consent was required under the Planning (Listed Building and Conservation Areas) Act 1990, but which had not been obtained. Walter Lilly duly suspended the Works pending resolution of the issue as to whether such consent was required.

Mr Clin's position was that RBKC's stance was incorrect, unjustified and unlawful because, at all material times, the proposed works did not amount to *"substantial demolition"* within the meaning of the relevant legislation – and therefore the Property benefited from all of the requisite planning permissions and consents necessary for the lawful execution of the Works.

Ultimately, in order to assuage RBKC and to resolve the impasse, but without prejudice to his position that it was unnecessary to do so, Mr Clin made a further application for planning permission specifically relating to the removal of various of the Property's internal floors and partitions.

That application was finally granted by RBKC in June 2014. Walter Lilly did not resume the Works until this time. Walter Lilly then brought proceedings seeking declarations to the effect that the intervention of RBKC amounted to a breach of contract and/or Relevant Event and/or a Relevant Matter under the Contract entitling it to an extension of time and loss/expense.

The Decision at First Instance

In summary, Mr Clin's case was that (i) the Contract did not impose the wide-ranging and onerous contractual obligation on him to ensure that any planning consents in fact required by RBKC *(whether lawfully or not)* would be obtained (as contended for by Walter Lilly), and (ii) only delay caused by a Relevant Event under clause 2.26 of the Contract entitling Walter Lilly to an extension of time was 'at his risk'.

The Judge found that:

1. The Contract contained an implied term that Mr Clin would provide in good time to RBKC the information that its planning officers required in order to grant the necessary consents.

2. Mr Clin did not assume the risk that planning permission would be given. He had only to discharge the obligation imposed by the implied term.

3. For the Contract to work it was not necessary that either Mr Clin or Walter Lilly alone should bear the risk of the consequences of unreasonable or capricious conduct by RBKC. The Contract could work just as well if the risk was left to lie where it fell.

4. There was nothing inequitable about that result by analogy with other situations arising from the unreasonable actions of a third party such as in *Porter v Tottenham UDC* [1915] 1 KB 776.

"I can see no justification for imposing on either party sole responsibility for the consequences of capricious conduct by the local authority."

Specifically, it was also decided (initially at least) as part of this conclusion in respect of Issue 4:

At paragraph 61:

"However, by analogy with other situations, there is 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: see Porter v Tottenham UDC [1915] 1 KB 776 (where a third party unreasonably and wrongfully threatened to sue to prevent the contractor from using an access road). It seems to me that commercial necessity does not require the employer to undertake the entire risk of the vagaries of obtaining planning permission. Imposing such an obligation on the employer will not necessarily make the contract work because it cannot prevent a local authority from behaving unreasonably or capriciously. If the necessary planning permission has not been obtained at the time when the contractor puts in his tender, he must decide whether or not to accept the risk that planning permission might not be granted. It is, after all, always open to him to protect his position by stipulating for an appropriate term."

And at paragraph 67:

"As I have already said, I can see no justification for imposing on either party sole responsibility for the consequences of capricious conduct by the local authority. For the contract to work it is not necessary that either Mr Clin or Walter Lilly alone should bear that risk. In my view the contract can work just as well if that risk is left to lie where it falls. It is, I think, a situation where, since the contract has not provided how the risk should be borne, no provision should be made..."

Following the handing down of the Judgment, the Judge made two potentially significant additions to or clarifications by way of the Amplification. First, he decided that where he had referred to RBKC acting "unreasonably" and "capriciously" he intended to refer to conduct that was unreasonable in the '*Wednesbury*' sense. Second, he declared that the effect of his statement that "the loss lies where it falls" was that:

"...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 that the Claimant is entitled to an extension of time, even if in some circumstances the result is the same."

Mr Clin's appeal challenged those two aspects of the Amplification. Walter Lilly cross-appealed in respect of the implied term, seeking to establish its wider strict obligation on Mr Clin's part.

The Decision of the Court of Appeal

The Court of Appeal considered the following questions:

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?

There was no dispute as to the first question. The Court of Appeal summarised the position as follows at [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..."

"It was not realistic or reasonable to impose a strict obligation on the Employer in relation to the outcome of the statutory planning processes in which the local authority exercises an administrative discretion involving questions of planning judgement."

As to the second question, Walter Lilly contended for the implication of a draconian term: namely, one obliging Mr Clin to *ensure* that any planning permission required by RBKC would be in place in time to prevent any delay to the Works, whether those consents were lawfully required *or not*.

However, the Court of Appeal agreed with Mr Clin's case that although it was an implied term of the Contract that the onus of applying for planning permission or ensuring that planning permission was applied for lay with the Employer, this was subject to certain important qualifications. The Employer's obligation "could not realistically extend to an obligation to ensure that planning permission...was in fact granted, or granted within a particular time" (para 36). The Court accepted that it was not realistic or reasonable to impose a strict obligation on the Employer in relation to the outcome of the statutory planning

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processes in which the local authority exercises an administrative discretion involving questions of planning judgement. The "essential point" was 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.*

Accordingly, the Court reasoned that the term which fell to be implied into this Contract was as follows:

> *"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."*

The Court explained that the Employer's obligation to use "all due diligence" would require him to make a timely application for the necessary permissions and approvals and to then co-operate with the local authority in that regard (para 38).

The Court explained that, having framed the implied term in that way, there was no need to introduce any qualification or exemption in respect of the "unlawful", "unreasonable" or "capricious" behaviour of the local authority (para 39). The Employer's obligation was to do *"no more and no less than the statutory planning scheme requires"*. Plainly, he could not be obliged to ensure that the council acted lawfully in accordance with its powers and duties under the statutory scheme, or that the decisions it took would be favourable to the project, but the Employer's responsibility could only encompass matters which he could himself control.

As to the third issue and the general question of allocation of risk under the Contract, the Court referred to the summaries of the principles in both *Keating* and *Hudson* to the effect that, independent of fault, the failure to complete by the completion date exposed the Contractor to a claim for liquidated damages and that, under the JCT forms, if a delay event was neither a "Relevant Event" nor a "Relevant Matter" then it was at the Contractor's risk entirely (para 43).

The Court recognised that, unsurprisingly, the intervention of the local authority and the delay to which that had given rise were not matters fully contemplated by the parties when entering into the Contract (para 45). However, it was 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"* to fashion a solution to the particular dispute that had arisen. In circumstances, where the parties have chosen not to safeguard themselves from their own or a third party's default, they must accept the consequences.

Meaning and Effect of 'the loss lies where it falls'

The Court of Appeal also decided that the Judge was wrong to decide in the Amplification that the risk of loss lying where it fell meant, in these circumstances, that Mr Clin was somehow prevented from recovering liquidated damages in respect of the relevant period of delay, even absent an extension of time entitlement in relation to the same on Walter Lilly's part. That was not an automatic consequence of either the implied term found by the Judge or by the Court of Appeal. The Court emphasised that the implied term did not *"neutralise or override any of the parties' other obligations in the contract"* which were left to operate as had been expressly agreed, whatever their practical and financial consequences (paragraph 47).

In doing so the Court of Appeal accepted Mr Clin's argument to the effect that the result of deciding not to imply a term into a contract to deal with the occurrence of a particular event is that its express provisions *"continue to operate undisturbed"* and, if the event has caused loss, that the loss lies where it falls: *Attorney General of Belize v Belize Telecom*.[1]

In this respect, it should be noted that previous authority concerning the allocation of the risk of delay under the Standard Form of Building Contract has only used the expression 'the loss lies where it falls' to refer to delay which was a Relevant Event (entitling the contractor to an extension of time) but not a Relevant Matter (entitling a contractor to loss and expense): *Henry Boot Construction Ltd v Central Lancashire New Town*.[2]

In such a situation, the loss 'lay where it fell' meant that the loss should be shared because, *given the express terms* generating an entitlement to an extension of time *in those cases*, neither party could recover or bear the whole of the loss suffered as a result of the delay.

Conclusions

The Court of Appeal rightly emphasised that its reasoning and conclusions were as to the implied term which fell to be implied into this particular contract between the parties. When considering whether the same or similar terms fall to be implied into other construction contracts, it will of course remain necessary to consider the express terms of the particular agreement together with the factual background relevant to those particular parties.

Having said that, there is little in the Court of Appeal's reasoning that was unique or particular to this dispute: relatively little turned on the admissible factual background common to Mr Clin and Walter Lilly or on the bespoke amendments to the JCT form they had used. Accordingly, in relation to those JCT forms at least, it is likely that a term in the form as found by the Court here will fall to be implied into the contract imposing on the Employer an obligation to exercise due diligence to obtain the necessary planning permissions.

1 [2009] UKPC 10; [2009] 1 W.L.R. 1988 at para. [17]

2 (1980) 15 BLR 1 at 12