Neutral Citation Number: [2016] EWHC 357 (TCC)

Case No: HT-2015-000219

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2016

Before :

MR JUSTICE EDWARDS-STUART

- -

Between :

WALTER LILLY & CO LIMITED	**Claimant**
- and -	
JEAN FRANCOIS CLIN	**Defendant**

- -
- -

Mr Sean Brannigan QC (instructed by **Pinsent Masons LLP**) for the **Claimant**
Mr Vincent Moran QC (instructed by **DLA Piper**) for the **Defendant**

Hearing date: 19th January 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE EDWARDS-STUART

Insert Judge title and name here :

1. The Claimant ("Walter Lilly") is a building contractor that specialises in the renovation of prime residential properties. The Defendant, Mr Jean-François Clin ("Mr Clin"), is the owner of Nos. 48 and 50 Palace Gardens Terrace ("the Property"), which is in the Royal Borough of Kensington and Chelsea ("RBKC"). This is a judgment following the hearing of certain preliminary issues that were set out in an order of the court made on 18 December 2015.

2. On 25 September 2012, the parties entered into a JCT Building Contract with Quantities, 2005 Edn, incorporating Revision 2 (2009), with Contractor's Designed Portion incorporating bespoke amendments ("the Contract"). Under the terms of the Contract, Walter Lilly was to carry out demolition, refurbishment and reconstruction works at the Property to form a single residence.

3. On 17 July 2013, whilst the works were underway, RBKC wrote to Walter Lilly and Mr Clin's Architect stating that it considered the extent of proposed demolition to amount to "*substantial demolition*" under section 74 of the Planning (Listed Building and Conservation Areas) Act 1990 and that as a result, conservation area consent was required. Accordingly, the critical demolition works were suspended by Walter Lilly following receipt of that letter. They were not resumed until about a year later. Walter Lilly claims an extension of time in respect of this delay.

4. Mr Clin and those representing him, which, according to Walter Lilly, included an architect, city solicitors, a specialist planning consultant and leading and junior specialist planning counsel, then engaged in vigorous correspondence with RBKC asserting that RBKC's position was incorrect and unjustified and that conservation area consent was not required on the basis that Works did not involve "*substantial demolition*".

5. In the course of that correspondence Mr Clin made an application for conservation area consent on 26 July 2013, which was then withdrawn a few months later in September. That application, as I understand the position, was made on the basis of the development as it was then designed. Mr Clin's case is that at all material times the Property benefited from a lawful development certificate and numerous planning permissions which gave the permission required for the Works to be undertaken (Mr Moran's skeleton argument, paragraph 12). The suspension of work was, according to Mr Clin's case, because Walter Lilly gave RBKC the impression that the extent of the proposed demolition work went beyond the existing conservation area consent (at paragraph 18).

6. Eventually, Mr Clin and his professional team decided to revise the design of the development with a view to, amongst other things, carrying out reduced demolition work (according to Walter Lilly's case), and so a further planning application was submitted on 19 December 2013. Planning permission was eventually granted in June 2014.

7. At the hearing Walter Lilly was represented by Mr Sean Brannigan QC, instructed by Pinsent Masons LLP, and Mr Clin was represented by Mr Vincent Moran QC, instructed by DLA Piper UK LLP.

The preliminary issues

8. These were settled by an order of the court made on 18 December 2015. They are as follows:

1. Did RBKC's communication in its letter dated 17 July 2013:

1.1 mean that it required conservation area consent for the Works then ongoing to be obtained before it would allow those works to continue; and

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 RBKC changed what it required?

3. If so did that obligation to halt the Works amount to:

3.1 an alteration or modification to the design, quality or quantity of the Works in accordance with clause 5.1.1 of the Building contract? And/or

3.2 the imposition by the Employer of any obligations or restriction in regard to (i) access to the site or use any specific parts of the site, (ii) limitations of working spaces, (iii) limitation of working hours or (iv) the execution of the work in any specific order in accordance with clause 5.1.2 of the Building Contract?

4. As between Walter Lilly and Mr Clin, did the risk and responsibility for ensuring that all planning consents <u>in fact required</u> 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 RBKC (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?

Or

5.2 Only to take due diligence (or, alternatively, reasonable skill and care) to obtain the planning consents necessary for the lawful completion of the Works?

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? And/or

6.2 following receipt of the 17 July Letter, to make a prompt and compliant application for the necessary conservation area consent (prior to 1 October 2013) and/or planning consent (post 1 October 2013)? And/or

6.3 to apply to RBKC for a Lawful Development Certificate and, if such a certificate was not granted, to seek to appeal that decision and/or their failure to apply for declaratory relief?

7. Note: The Claimant may apply to reinstate paragraph 3.3 of its proposed Preliminary Issues at the Hearing of 19 January 2016, provided that notice of such application is given not later than 7 days before the Hearing."

9. Walter Lilly did give notice 7 days before the hearing to reinstate paragraph 3.3 in accordance with paragraph 7 above. That application was opposed.

The terms of the contract

10. I set out below the terms of the contract principally relied on by the parties but, for ease of reference, I have retained the emphasis added by Mr Moran.

11. The Ninth Recital to the Contract provided that the works included, amongst other things, the design and construction of "shoring/facade retention" and "Temporary support works". The work described in the Ninth Recital was defined as "the Contractor's Designed Portion". The Tenth Recital stated that the Employer had supplied the Contractor with documents showing and describing his requirements for the Contractor's Designed Portion ("the Employers Requirements").

12. Clause 1.1 included the following definitions:

Employer's Persons:

"…all persons employed, engaged or authorised by the Employer, excluding the Contractor, Contractor's Persons, the Architect/Contract Administrator, the Quantity Surveyor and any Statutory Undertaker but including any such third party as is referred to in clause 3.22.2"

Statutory Undertaker:

"Statutory Undertaker: 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."

Pre-Construction Services:

"the services set out in Annexure 4 and those referred to in clause 2A"

Requisite Consent (added by the Schedule of Amendments):

"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 requirements of all competent authorities regarding the Development."

Statutory Requirements (amended by the Schedule of Amendments):
"*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 obligation 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."

(Words in italics added by amendment)
(Mr Brannigan added the emphasis to the concluding words)

13. By clause 2A.1:

> "Upon execution of this Contract and for the consideration mentioned in clause 2A.5 the Contractor will collaborate with the Consultant Team and shall commence the Pre-Construction Period and carry out and complete the Pre-Construction Services in accordance with clause 2A.4.1."

14. By clause 2A.2.1:

> "During the Pre-Construction Period:
> 1…
> 2…
> 3…The Contractor will remain wholly responsible for the carrying out and completing of the Pre-Construction Services."

15. By clause 2A.6.2:

> "The Contractor in submitting the Contractor's Proposals for the Contractor's Designed Portion and the Contract Sum Analysis in accordance with the terms and conditions of this Contract 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".

16. By clause 2A.6.3:

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

17. By clause 2.1.1:

> "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 and the Contractor shall forthwith supply to the Architect/Contract Administrator copies of all such notices and of all documentation relating thereto."

18. By clause 2.3.7:

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

19. By clause 2.19 (as amended):

> "Where there is a Contractor's Designed Portion:
> 2.19.1 insofar as the design of the Contractor's Design Portion is comprised in the Contractor's Proposals and in the Employer's Requirements and in what the Contractor is to complete under clause 2 and in accordance with this Contract (including any design which the Contractor is to carry out as a result of a Variation in the Employer's Requirements), the Contractor warrants and undertakes to the Employer that:
> .1 . . .
> .2 The Works will, when completed, comply with the Statutory Requirements and with any performance specifications or requirements included or referred to in the Employer's Requirements and will be adequate for the purposes of the Development, for the avoidance of doubt this excludes any fitness for purpose obligation;"

20. By clause 2.29:

> "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."

21. By clause 4.24:

> "The following are the Relevant Matters:
> . . .
> .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."

22. By clause 5.1:

> "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;
>
> .2 the imposition by the Employer of any obligations or restrictions in regard to the maters set out in this clause 5.1.2 or the addition or

alteration or omission of any such obligations or restrictions so imposed or imposed by the Employer in the Contract Bills or in the Employer's Requirements in regard to:

.1 access to the site or use of any specific parts of the site;
.2 limitations of working space;
.3 limitations of working hours; or
.4 the execution or completion of the work in any specific order"

23. A document headed "ANNEXURE 4 Pre-Construction Services", which formed part of the Contract Preliminaries, contain the following provisions:

> "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.
>
> . . .
>
> 10. Identify if any other outstanding or missing or unknown or such issues that require clarification or further input so as to mitigate any delays."

24. Apart from the references in Annexure 4 which I have quoted above, the Contract contained no express reference to the obtaining of planning permission or conservation area consent. The reference at paragraph 1 to the planning condition in respect to highway and construction management has nothing to do with the issues in this case and can be ignored. The reference to the other planning conditions "*that require discharging prior to commencement*" also seems to me to be of no relevance. In my view, this refers to certain conditions that had to be discharged prior to the commencement of work: that is to say that Walter Lilly had to obtain RBKC's confirmation that the relevant obligations had been met.

25. Mr Moran relied also on various terms which had been deleted, in particular clause 2.29.7, which provided as follows:

> "the carrying out by the Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work."

Mr Moran submitted that had this provision not been excluded from the contract it would "*have covered the key eventuality in the present case, namely the intervention of RBKC - whether lawful or not*".

26. Mr Moran relied also on the deletion of clause 2.29.12 from the standard printed form. This provided that the following was a Relevant Event:

> "the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the execution of the Works."

27. What was provided in its place was this:

> "the exercise after the Base Date by the United Kingdom Government, Olympic Delivery Authority and Transport for London of any statutory power relating to the London 2012 Olympics which directly affects the execution of the Works where such effects were not reasonably foreseeable."

Mr Moran submitted that this change to the normal printed form supports his case that the risk of foreseeable actions (including unjustified interventions) by statutory authorities that it including RBKC) was assumed by Walter Lilly.

28. I am not persuaded that either of these alterations is of great significance. As to the first, it seems to me that this refers to works of the type statutory undertakers typically carry out, which does not include granting planning permission. As to the second, this rather begs the question which is at the heart of one of the issues, namely the consequences of an unlawful exercise of a statutory power.

The scope of the existing conservation area consent

29. There appears to be a fundamental issue as to whether or not consent had been obtained for the demolition works that were necessary to execute the Works and thereby achieve the Employer's Requirements. At paragraph 26.1 of the Particulars of Claim it appears to be asserted by Walter Lilly that the necessary consent had not been obtained. However, at paragraph 26.2, Walter Lilly goes on to complain of a failure by Mr Clin and his agents to ensure that RBKC "*was satisfied that all necessary consents and approvals for the Works had been obtained*", which seems to be saying something rather different, although it is not pleaded in the alternative.

30. At paragraph 59.3 of the Defence it is averred that the planning consents that RBKC could, as a matter of law, require for the execution of the Works prior to the Works commencing were in place in July 2013. Alternatively, it is pleaded that if the planning consents in place were in some way inadequate, that was not the result of any breach of contract by Mr Clin.

31. The position is further complicated because in the Reply (at paragraph 14) Walter Lilly asserts that there were various discrepancies between the architect's drawings showing the extent of the demolition required and other more detailed Contract Drawings. In any event, Walter Lilly denies that the demolition of the rear elevation was included in or formed part of the Contractor's Designed Portion.

32. I suspect that Walter Lilly's real case is that, irrespective of whether the existing consents covered the scope of the demolition works proposed, RBKC's letter of 17 July 2013 constituted a requirement of a local authority with which Walter Lilly was contractually bound to comply. This is what is pleaded at paragraph 25.1 of the Particulars of Claim.

33. If the true position is that the existing consents did not permit the full extent of the demolition work shown on the plans to which Walter Lilly was working, then there is an issue as to whether or not Mr Clin complied with his contractual obligation - whatever it was - in relation to the obtaining of appropriate conservation area consent.

34. However, if the true position is that the existing consents did cover the proposed demolition work, then Mr Clin cannot have been in breach of any duty in relation to the obtaining of the necessary consent for the simple reason that it was in fact obtained. In this scenario, the issue is whether or not the letter of 17 July 2013 was a requirement of a local authority with which Walter Lilly had to comply notwithstanding that it was based on a false premise. If the answer to this is yes, then it may in turn raise the question of what that requirement consisted. With the benefit of hindsight, it is unfortunate that this important distinction does not emerge very clearly from the preliminary issues as currently framed.

The authorities

35. Until recently it appeared to have become clear from the authorities that the process of implying a term into a contract was just one aspect of the exercise of construing the contract as a whole: see *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988, where Lord Hoffmann said:

> "17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
>
> 19. The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> > "[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

20. More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said:

> "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."

21. It follows 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. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

36. Mr Moran relied in particular on paragraph 17. However, this approach by Lord Hoffmann to the construction and the implications of terms was revisited very recently in the judgments of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, an authority that was mentioned in Mr Moran's skeleton argument but to which I was not taken in detail (although the relevant paragraphs were mentioned). At [26] to [30] of his judgment, Lord Neuberger, with whom Lords Sumption and Hodge agreed, said:

> "26. I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in *Belize Telecom* could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.
>
> 27. Of course, it is fair to say 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. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.
>
> 28. 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. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases

> it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.
>
> 29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:
>
> > "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."
>
> 30. It is of some interest to see how implication was dealt with in the recent case in this court of *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SLT 205. At para 20, Lord Hope described the implication of a term into the contract in that case as "the product of the way I would interpret this contract". And at para 33, Lord Clarke said that the point at issue should be resolved "by holding that such a term should be implied rather than by a process of interpretation". He added that "[t]he result is of course the same".”

37. Lord Neuberger then went on to consider the observations of Lord Hoffmann in the *Belize Telecom* case. He concluded by saying that those observations should be treated as a “*characteristically inspired discussion rather than authoritative guidance on the law of implied terms*”.

38. Lord Carnwath took a slightly different approach. He started with the *Belize Telecom* case on the basis that it represented “*the most modern treatment at the highest level*” of the topic (at [58]). He went on to reject emphatically the submission that it involved any watering down of the traditional tests for the implication of terms (at [59]), a point with which Lord Clarke agreed (at [77]). Lord Carnwath said that whilst he accepted that more stringent rules applied to the process of implication, it could be a useful discipline to remind oneself that “*the object remains to discover what the parties have agreed or (in Lady Hale’s words)”must have intended” to agree”* (at [69]).

39. I shall therefore approach Lord Hoffmann’s observations in *Belize Telecom* in the light of the qualifications made by Lord Neuberger in *Marks & Spencer*. However, 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.

40. But I must bear in mind also that the court is concerned only to with 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. 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.

41. Although the court has been referred to other authorities, including extracts from Keating on Construction Contracts, 9th Edition, in my view those authorities are either decisions that turn on their own particular facts or are expressions of view unsupported by any direct authority. In these circumstances I do not find it necessary or helpful to say any more about them.

The course of the hearing

42. At the hearing each side called evidence. Walter Lilly called Mr Andrew Postlethwaite, its construction director. Mr Clin called Mr Satish Patel, a director or partner of Mr Clin's architects. Their witness statements were exchanged on 7 December 2015. However, on 8 January 2016 Mr Patel produced a supplemental witness statement in response to the statement by Mr Postlethwaite, which then led to a further statement by Mr Postlethwaite dated 13 January 2016, some three working days before the hearing. This provoked a third witness statement from Mr Patel, which was served the day before the hearing, 18 January 2016. This state of affairs was highly unsatisfactory and gave rise to indignant protests by each side at the conduct of the other.

43. I have to confess that I did not really understand how this evidence was relevant to the preliminary issues. Mr Postlethwaite said, as I would have expected him to say, that Walter Lilly took RBKC's letter of 17 July 2013 very seriously. I would have been astonished if he had said anything else. He said that Walter Lilly understood that the effect of the letter was telling Walter Lilly to stop the demolition work.

44. Mr Patel was cross examined at some length about inconsistencies in various drawings, which he accepted there were, but again I did not really understand the relevance of this to the preliminary issues. Quite apart from anything else, the size or quality of the drawings in the bundles in many cases did not permit detailed examination (for example, notes and revision dates were not always legible). Mr Patel said that RBKC was asking about the extent of the proposed demolition works so that it could be compared with the consents that had been given.

45. In this context he was shown an e-mail from RBKC to his firm dated 19 September 2013, the relevant part of which was as follows:

> "1. You will provide us with three drawings:
>
> - Drawing 1 will show us the rear elevations of buildings before any of your files works commence i.e. The buildings in their "existing" state.
> - Drawing 2 was show us the rear elevations of both building (sic) before any of your clients works commenced but with all parts of both buildings which have been demolished and which are to be demolished clearly shaded or coloured so there can be no misunderstanding about what parts of the buildings are removed as part of your clients proposals.
> - Drawing 3 was shows the rear elevations of both buildings in their proposed final state following completion of all your clients works . . ."

46. The e-mail went on to say that, assuming the drawings were satisfactory, they would serve the purpose of proving that no further planning permission for the rear elevation was required and that the demolition proposed was not "substantial". This would

enable RBKC to close the "enforcement case". Mr Patel said that Mr Clin had the necessary consents. He said that the application made in December 2013 reverted to the original consent.

47. An issue was raised by Walter Lilly about the differences between the work for which planning permission was sought in December 2013 and the original proposals. Walter Lilly relied on Architect's Instructions ("AIs") that were issued in August and September 2013 and April 2014. These were said to reflect revisions to the Works which were the subject of a revised application for planning consent. The argument based on these AIs was the subject of supplemental skeleton submissions produced by Mr Brannigan. Mr Brannigan suggested that the court should approach this aspect of the dispute on the basis of assumed facts: (1) that the AIs did change the design in order to achieve planning permission by reducing the extent of the demolition proposed or, (2), that they did not. Mr Moran objected to this proposal and I consider that he was fully justified in doing so. This type of question goes well outside the scope of the preliminary issues as formulated and I am not prepared to address it.

48. Mr Brannigan sought to argue that "the obligation to halt the Works" amounted to the imposition by the employer of restrictions on access to the site or working hours, but I fail to see where this went. In my analysis, if Mr Clin was in breach of an express or implied term of the Contract in relation to the obtaining of conservation area consent, with the result that the contractor could not reasonably be expected to continue with the demolition work, I consider (for the reasons I give below) that would have amounted to an act of prevention and therefore a Relevant Event under clause 2.29. I do not understand why the analysis has to be any more sophisticated than that.

49. Similarly, Mr Moran made submissions to the effect that the approach of RBKC was completely misconceived because "substantial demolition" is not a concept that has any relevance to conservation area consent. I am prepared to accept, without deciding, that this is correct, but 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. If it did not, then any reasonable contractor would be expected to stop the demolition work until the issue of consent was resolved.

50. I now turn to the preliminary issues. I propose to take them in chronological sequence, rather than in the sequence set out in the order of 18 December 2015. This involves taking issues 5.1, 5.2 and 6.1 first.

The issues about obtaining planning permission or conservation area consent

51. Issues 5.1, 5.2 and 6.1 concern the responsibility for obtaining planning permission or conservation area consent. For the sake of completeness I should point out that, as from 1 October 2013, conservation area consent no longer existed as a separate form of consent and so thereafter conservation matters formed part of the application of the planning permission. Neither party has suggested that anything turns on this.

52. Although I have mentioned that, apart from the express references in Annexure 4 to which I have referred, the Contract contains no express term that imposes on either party the obligation to obtain planning or conservation area consent, that observation needs some elaboration.

53. By clause 2A.6.2 of the Contract (see paragraph 15 above) Walter Lilly confirmed that any works that it designed would comply with the Statutory Requirements, that is to say either that such works would comply with existing planning permission or conservation area consent, or that any necessary consents would be obtained.[1] In my view, this clause does not transfer the general risk of obtaining planning permission or conservation area 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. One example of this could be temporary works: if, for example, the contractor wished to demolish a wall in order to gain access to the site with a view to reinstating it later, the contractor may well be responsible for obtaining any necessary consent to that demolition. For the purposes of this judgment, I will assume that the demolition works referred to in RBKC's letter of 17 July 2013 formed part of the Employer's Requirements. Whether or not that assumption is correct is not a question that I can decide at this stage on the basis of the material before the court.

54. The reasonable man in the position of the parties would, in my view, 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 applies to conservation area consent where the property is in a conservation area.

55. In principle, planning permission needs to be obtained in advance: it can be obtained retrospectively, but this is obviously risky. But even when applied for well in advance, everyone knows that planning permission cannot be taken for granted. For example, the prospects of planning permission being given may depend to a large extent on the attitude of owners of neighbouring properties. Similar considerations may apply to conservation area consent.

56. In this case it seems to me to be obvious that the parties must have intended that someone should have the responsibility for applying for planning permission. This is not a case where, because nothing is said expressly in the contract, the parties could have intended that nothing should happen about planning permission: planning permission had to be obtained in order for the development to go ahead. In addition, it seems to me 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. 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. 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 is prepared to take the risk of carrying out the work without that permission or consent).

57. It appears to be common ground that the primary responsibility for applying for planning permission rests with the employer. The essential point at issue between the parties is 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

---

[1] It seems to me that the wording of clause 2A.6.2 is wide enough to include the situation where the contractor submits proposals that he knows are not covered by the existing consent(s) but is confident that the necessary consent can be obtained ("*<u>will</u> fully comply* . . .).

obligation - for example, to exercise reasonable diligence to obtain the necessary planning permission.

58. In a slightly different context, it is well accepted that, in the absence of any relevant express term, there will generally be implied into a construction contract a term that the employer will give the contractor all necessary information required in good time: see Hudson's Building and Engineering Contracts, 13th Edition, 3-129. It is not merely an obligation to take reasonable steps to see that this happens. Similarly, I consider that in this contract there must be an obligation that, in order to make the contract work effectively, the employer will provide in good time to the local authority the information that its planning officers require in order to grant the necessary consents. In fact, that is very similar to the obligation that Mr Clin imposed on the architect in this case, which was to "*make where required application for planning permission*". However, clause 1.12 of the architect's Basic Services, which contained this obligation, also made it clear that the permission itself was beyond the architect's control and therefore the architect could not guarantee that permission would be granted.

59. I should add, for the avoidance of any doubt, that by "*information that its planning officers require*" I mean information that those planning officers are lawfully entitled to expect, not that which they may unreasonably demand.

60. I therefore agree with Mr Moran that the employer should not be under an absolute obligation to secure planning permission, essentially for the reason given in the architect's Basic Services. However, I see no justification for limiting the obligation to that of taking reasonable steps to obtain planning permission. Whilst it may be arguable whether or not there is any such limitation on the obligation on the architect under the Basic Services, there is no such limitation on term usually implied by law that the employer is to provide information required by the contractor in good time. I think that the hypothetical reasonable man would say to himself: "*of course the parties cannot expect the contractor to take the sole risk of the employer's architect not doing his job properly*". It is not much comfort to the contractor to be told that the employer took reasonable steps to engage a competent architect and thereafter took reasonable steps to chase him to do what he was required to do if in the end the architect failed to make the necessary application in time.

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.

62. But a corollary of this is that, as part of Walter Lilly's implied obligation to cooperate with Mr Clin, I consider that it would be required to provide to Mr Clin (or to his architects) in due time any necessary information which only Walter Lilly was in a

position to provide in order to enable Mr Clin (or his architects) to make any applications for conservation area consent in accordance with the implied term.

63. Issues 5.1.2 and 6.1 raise the question of whether or not Mr Clin was required to satisfy himself, prior to commencement of the Works, that RBKC was satisfied that all necessary consents and approvals for the Works had been obtained. I am unable to see why such a term is necessary in order to make the contract work. By the time that the works are due to start the contractor will already have committed himself to carrying them out during the agreed period. Suppose that, shortly before the works are due to begin, the employer asks the local authority whether or not it is satisfied that all necessary consents have been obtained. If, mistakenly, some officer of the local authority says yes, then what is to happen? If in truth there is no consent, then the work cannot lawfully proceed. For the reasons that I have already given I can see no basis on which the risk of that eventuality should lie solely with the employer. Alternatively, if the local authority responds by saying that the relevant consents have not been obtained, but is again mistaken, then what is to happen? Again, it seems to me that business efficacy does not dictate that it should be the employer who takes the sole risk of that mistake. The same considerations would apply if it were the contractor who made the enquiry and received the wrong answer. In my view this is a classic case where, the contract having made no relevant provision, no intention to have such a provision should be imputed to the parties.

64. Accordingly, for the reasons that I have given above my answer to each of issues 5.1.1 and 5.2 is No. The obligation to be implied into the Contract is the one that I have set out at paragraph 58 above. But for the reasons that I have given in the previous paragraph, my answers to issues 5.1.2 and 6.1 are also No.

Issue 4

65. Although I have taken this separately, it is really answered by my conclusions on the previous issues. In my view, Mr Clin did not assume the risk that planning permission would be given: as I have said, his obligation was to ensure that the information reasonably required by the local authority was provided in good time.

66. But for the reasons that I have already given, the information which Mr Clin had to provide was that which was reasonably necessary for the planning officers to make their decision. If he provided such information in good time, both initially and then subsequently, in response to any reasonable requests, then he would have discharged the duty.

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: see *Belize Telecom,* at [17].

68. Many of the submissions advanced by Mr Moran refer to the responsibility for obtaining consent for work that forms part of the Contractor's Designed Portion ("CDP"), but I am not satisfied that this assists. The CDP is, by definition, work that must comply with the Employer's Requirements and, as I have explained above, the consents for those parts of the work ought to be obtained by Mr Clin. The real

difficulty is that there has been no agreement or determination of the underlying facts and, consequently, as to the nature or extent of the work (if any) for which there may have been an obligation on Walter Lilly to obtain conservation area consent (or to provide any information required in order that such consent could be obtained).

69. Accordingly, but subject to the caveats in the previous paragraph, my answer to issue 4 is No.

Issues 1-3: RBKC's letter of 17 July 2013

70. This was in the following terms:

> "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 above Act 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 of 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.
> . . ."

71. In my view, this letter is saying three things. The first is that the proposed demolition as shown on the plans seen on site (in other words those to which Walter Lilly was working) does not have conservation area consent, and that such consent is required. Second, if it is intended to proceed with the demolition works shown in those plans, then an appropriate application for conservation area consent must be made (which the

writer would wish to receive within 28 days). Third, if the works proceed without the necessary consent RBKC will consider prosecution.

72. It is, I think, implicit in the final paragraph in the passage quoted above, that prosecution will be considered only if (a) the demolition work proceeds and (b) it continues beyond the extent of demolition permitted by the existing consent. I do not know how much further demolition work remained to be carried out that was covered by the existing conservation area consent, but it may have been the case that further demolition within the scope of the existing conservation area consent could be carried out without attracting any sanction. Indeed, it may be that all the proposed demolition work was within the scope of the existing conservation area consent - that is an issue that I cannot resolve.

73. In my view, this letter had the following consequences:

    (1) It was not an instruction to stop either the Works generally or the demolition work specifically.

    (2) The letter contained an unequivocal expression of RBKC's view that the extent of the demolition work shown on the plans seen on site went beyond the scope of the existing conservation area consent.

    (3) If that 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 RBKC maintained that position (save to the extent that he was confident that further demolition was permitted by the existing consent).

    (4) In those circumstances if the want of appropriate conservation area consent was caused by a breach of the implied term by Mr Clin, then in the light of (3) above and/or clause 2.1.1 of the Contract (by which Walter Lilly was required to comply with Statutory Requirements), such breach would amount to an act of prevention by the employer.

    (5) If the extent of the demolition work shown on the plans was more extensive than that for which conservation area consent had been obtained, and if that state of affairs was the result of a failure by Walter Lilly to provide relevant information to the architect in time (or within any time reasonably requested), then the effective cause of the want of the appropriate conservation area consent would be Walter Lilly's failure to provide that information.

74. If there was no breach of the implied term by Mr Clin, then in my judgment he cannot be liable for any acts of RBKC, whether that conduct consists of wrongly denying the existence of the necessary conservation area consent or purporting to give instructions that have no lawful basis or justification.

75. If, in addition, there was no failure by Walter Lilly to provide information to the architect, then any loss resulting from the wrongful or capricious conduct by RBKC must lie where it falls.

76. Accordingly, my answers to issues 1, 2 and 3 are as follows:

    (1) Issue 1.1: this issue does not affect the contents of paragraph 25.1 of the Particulars of Claim (which refers to the demolition work, not to the Works), but otherwise see above.

(2) Issue 1.2: No.

(3) 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. (I note from the way in which this issue has been formulated that it seems to imply that the relevant consent had not been obtained.)

(4) Issue 3.1: upon the information available I am not in a position to answer this question. In any event, it may be largely a question of fact.

(5) Issue 3.2: I am not prepared to answer this issue upon the material available (because the answer would be either speculative or hypothetical); but if the want of relevant conservation area consent was the result of a breach of the implied term by Mr Clin, then I consider that such breach would have been amounted to an act of prevention.

Issues 6.2- 6.3: matters following RBKC's letter of 17 July 2013

77. In relation to issue 6.2, in my view Mr Clin would be obliged to comply reasonably promptly with the implied term set out in paragraph 58 above. I express no view as to what is intended by the expression "compliant application".

78. In relation to issue 6.3, I decline to answer the question. On the material before the court to do so would be to indulge in speculation. Indeed, Walter Lilly's own case appears to be that the appropriate course would have been to issue a prompt application for appropriate conservation area consent (or, if time did not permit, planning permission).

The former paragraph 3.3 of Walter Lilly's proposed preliminary issues

79. Since I have not found that there was an instruction to halt the Works, this issue does not arise. Even if it did, I would refuse permission to Walter Lilly to reinstate it because I am unpersuaded that it makes any useful contribution.

After note

80. I have to confess that I had some misgivings when I made the order of 18 December 2015. However, I was prepared to assume that the parties probably knew what would best advance the litigation. With the benefit of hindsight I consider that the order may not have been a wise one.

81. I think part of the difficulty is that the parties have been working on the basis that one or other side's approach must be right. That, I think, was a mistake. Rightly or wrongly, I have concluded that the correct formulation of the implied term is not one for which either side contended. This has meant that some of the other issues do not permit of a ready answer. I have done my best to deal with this by explaining my approach to the problem and then setting out the reasons for my conclusions.

82. Another and really more fundamental difficulty lies in the attempt to determine issues of principle without having established the underlying facts: in particular, in precisely what respects the work shown on the site plans fell outside the existing conservation area consent (if indeed it did). I have generally assumed that it was work within the scope of the Employer's Requirements for which the responsibility for applying for the necessary consent rested on Mr Clin, but in the absence of detailed findings of fact this has not been established. The result is that this judgment may prove to be of limited assistance to the parties.

83. Following the issue of this judgment in draft the parties may, if they wish, have an opportunity to address me further on the issues if either party (or both of them) considers that it has not had a proper opportunity to put its case on the other issues in the light of my conclusion about the implied term.

84. In any event, I will if necessary hear counsel on the appropriate form of relief and any questions of costs if these cannot be agreed.