On 16 March 2018, the Court of Appeal (CA) handed down a decision in the case of Jean-Francois Clin v Walter Lilly & Co Ltd (2018) confirming that a term should be implied into a JCT form of contract providing for an obligation by the Employer to use all due diligence to obtain consents and approvals in relation to the works, including planning permission.

We review the background to this decision and its implications.

Background

The factual background to the dispute in summary:

- Mr Clin owns two adjoining houses in Kensington and, in September 2012, appointed Walter Lilly to carry out extensive building and alteration works to create one single house.
- The contract used was JCT 2005 with Quantities incorporating Revision 2 of 2009 including certain design and build obligations - with bespoke amendments (the Building Contract)
- Problems arose when in a letter of 17 July 2013 to Walter Lilly, the local planning authority (LPA) stated that the intended work would need conservation area consent (the July 2013 Letter). Whether or not the LPA was correct in that assertion remains in dispute.
- In any event, as a result, work on site was suspended for over a year.
- After various steps were taken, the design was altered and in June 2014, planning permission
was granted for the revised proposal. Work on site restarted in August 2014.

- Walter Lilly applied for an extension of time of 53.2 weeks, a dispute arose and these proceedings were commenced in May 2015.

**The issues considered by the Court of Appeal**

The procedural background to the CA decision is convoluted. In short, there were hearings of preliminary issues in the Technology and Construction Court (TCC) in 2016 resulting in this appeal by Mr Clin and cross-appeal by Walter Lilly.

The CA distilled the various arguments into the (preliminary) issues to be considered which were as follows:

1. Was the TCC Judge right to hold that a term was to be implied into the Building 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 Building Contract?
4. What was the status and significance of the July 2013 Letter?

**Issue 1 - should a term as to planning permission be implied?**

Did Mr Clin have an obligation under the Building Contract to ensure that all requisite planning consents were obtained prior to the commencement of the works?

The TCC at first instance decided that it was necessary to imply into the Building Contract a term identifying whose responsibility it was to make and pursue an application for planning permission or conservation area consent - and that it was the Employer, Mr Clin who had that responsibility.

As part of its consideration, the TCC concluded that it was "obvious that the parties must have intended that someone should have the responsibility for applying for planning permission..." and recapped on the considerations before implying a term into a contract:

"...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..."
The CA agreed with this analysis, that such an implied term was required in these particular circumstances, and that responsibility for seeking planning permission should be attributed to Mr Clin as Employer.

**Issue 2 - how should that implied term be framed?**

How wide should the obligation be - should it be absolute, limited to the use of reasonable endeavours or something in between?

The CA agreed with the TCC that the term to be implied should be to oblige the Employer to undertake responsibility for seeking planning permission, but there was a balance to be struck - the obligation should go beyond taking all reasonable steps to obtain planning permission but would not equate to an absolute obligation (as this would make no sense as it was beyond the Employer’s control).

The CA then explicitly set out the planning permission term to be implied:

> "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 CA further described the obligation as comprising (in summary):

1. making a timely application for permission (one that assists each party in the performance of its obligations under the Building Contract, and with a view to avoiding any delay);
2. ensuring that sufficient information was provided to the LPA in support of the application; and
3. co-operating with the LPA in the statutory process.

**Issue 3 - the allocation of risk under the Building Contract**

This in the CA’s opinion was the pivotal issue between the parties in the appeal: what effect if any did the implied term have on the allocation of risk under the Building Contract. So, in this particular scenario, who bore the risk of delay arising from the July 2013 Letter from the LPA?
At first instance, in an amplification to the original judgment, the TCC had decided that the loss "lay where it fell"; the implied planning permission term resulted in an implied term that neither party took this risk (of the delay flowing from the July 2013 Letter) meaning that there could be no claim by Walter Lilly for loss and expense and no damages claim by Mr Clin.

For Mr Clin, it was asserted that the TCC had been in error on this point and that on a true construction of the Building Contract, the delay in question was at Walter Lilly's risk.

The CA however stated as follows:

"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... Neither of them insisted on an amendment [to the Building Contract] to cater specifically for the consequences of such an application [for planning permission] being refused. In these circumstances it is not the court's role to improve their agreement.

"The implied [planning] 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... 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"."

So, in the CA's analysis the implied planning term did not directly alter risk under the Building Contract - in order to get an extension of time, Walter Lilly would need to follow the stated contractual route in the Building Contract. Amongst other requirements therefore, Walter Lilly would need to establish that the consequences of planning permission not having been granted in time would fall within the definition of "Relevant Events" or "Relevant Matters" under the clauses in the Building Contract relating to extensions of time.

**Issue 4 - what was the status and significance of the July 2013 Letter from the LPA?**

The CA concluded that the exact contractual status of the July 2013 letter would depend on whether or not the LPA was correct in its assertion that conservation area consent or planning permission was needed - this however was not a matter that could be dealt with as a
Analysis and practical considerations

This is the latest in a long line of significant judgments on where terms will or will not be implied into contracts by the courts. As ever, this decision arose from the specific terms of this contract but in the wider context, it clearly demonstrates that courts will be willing to imply terms into contracts to "make them work" but they will not go so far as to "correct" what might transpire to be a bad bargain.

Whilst this decision does not mean that such a term will be implied into all construction contracts (in the absence of an express provision), it does highlight the fact that (in accordance with common sense) the courts will take the view that the employer will generally bear the responsibility for obtaining any statutory consents required.

Ongoing projects

In terms of the allocation of responsibility in the context of a building contract, check contracts relating to ongoing projects where relevant in order to be sure of stated obligations and any risk allocation arising from statutory consents such as planning permission. You can limit exposure by simply knowing the contract and the extent of your obligations, so key steps are not overlooked.

Contract formation

When negotiating contracts, keep in mind that if you have essential requirements in terms of which party will be responsible in any specific context, this will need to be set out clearly in the wording of the contract. Risk allocation is central to negotiations and is essentially a commercial issue - if the risk of any particular event is pushed to the contractor or service provider, this will be reflected in the contract sum. At this stage, the important point is to know what you want and then to ensure that this is reflected in the contractual provisions.

If we can assist in relation to contractual or other issues, please contact Ashley Pigott.
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