

Construction contracts: who bears the risk of obtaining statutory approvals?

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In *Clin v Walter Lilly & Co Ltd* [2018] EWCA Civ 490, the English Court of Appeal held that, in the absence of express provisions, a term should be implied into an amended JCT contract to require the Employer to use “all due diligence” to obtain statutory approvals. Importantly, this highlighted that the obligation on part of the Employer was limited, as opposed to absolute.

In construction projects, the requirement to obtain third-party permissions, consents and approvals from authorities (“**Statutory Approvals**”) can be essential for construction works to commence and proceed, and their timely procurement is often critical to progress. The allocation of responsibility for obtaining Statutory Approvals differs between standard form contracts.

Delays are a common problem that are caused by the time taken by the relevant authority to conduct its approvals process. In this situation, even if an Employer does have an express contractual responsibility to obtain Statutory Approvals, is it under an absolute obligation to obtain those approvals, even if it cannot compel the authority to give the necessary approval? The question arising out of *Clin v Walter Lilly* is how far such an obligation on the Employer should extend.

Clin v Walter Lilly & Co Ltd

In *Clin v Walter Lilly & Co Ltd*, a dispute arose between the parties as to who was responsible for project delays arising out of obtaining Statutory Approvals for a residential development in Kensington, London.

- The underlying contract was an amended Standard Form JCT Building Contract which did not contain any express provisions dealing with responsibility, including for delay, relating to obtaining the relevant Statutory Approvals.
- A delay was triggered by a letter sent from the planning authority which stated that the planned demolition works for the development constituted “substantial demolition”, and therefore went beyond the scope of the planning permission that had previously been obtained by the Employer.
- Following receipt of the letter, the Contractor halted its demolition works entirely and did not restart any work on the project for about a year.

The issue before the court was whether the Employer or the Contractor took contractual responsibility for the delay. This, in turn, depended upon which party had responsibility for obtaining the approvals for the works to proceed, and the nature of its obligation.

Although the contract was silent as to such matters, the Court held that:

- the contract contained an implied term that the Employer use “all due diligence” to obtain the relevant Statutory Approvals;
- the implied term was a limited obligation rather than an absolute one, and that “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.

The Court therefore rejected the contractor’s case that, as a matter of principle and contract, all risks associated with obtaining the Statutory Approvals (including delays on the part of the planning department in dealing with the same and any unlawful or capricious steps taken by the local authority that may delay a project) were carried by the Employer.

The limited implied obligation of the Employer to use “all due diligence” in obtaining approvals therefore may not extend the time and cost risk to an Employer in situations where an authority acts unreasonably and which has in turn caused project delays and associated costs.

FIDIC Red Book (2nd edition 2017)

The allocation of responsibility for obtaining Statutory Approvals differs between standard form contracts. Under the *FIDIC Red Book* (2nd edition 2017), the allocation of responsibility under GC 1.13 provides that:

- (a) The Employer is responsible for obtaining “planning, zoning or building permit or similar permits, permissions, licenses and/or approvals” for the Permanent Works and any other permissions specified in the contract document.
- (b) The Contractor is responsible for obtaining “all other permits, permissions, licenses and/or approvals as required by the Laws in relation to the execution of the Works.”

The Employer’s obligation to obtain such Statutory Approvals under GC 1.13(a) is therefore absolute. The *FIDIC Red Book* does, however, allow for exceptions to the general principles for the allocation of responsibility to be made in the Specification.

It should be noted that the provisions concerning Statutory Approvals under the 2017 *FIDIC Red Book* (2nd edition) represent an amplification of the basic position under the 1999 *FIDIC Red Book* (1st edition). Under the 1999 *FIDIC Red Book*, GC 2.2 requires the Employer to provide “reasonable assistance” to the Contractor in obtaining Statutory Approvals, but there is no reciprocal obligation on the Contractor. GC 1.13(c) of the 2017 *FIDIC Red Book* not only requires that the Contractor provides the Employer with “assistance” and “documentation” required for Statutory Approvals, but GC 1.13 also provides the Contractor an entitlement to an Extension of Time (“EOT”) and additional payment (cost plus profit) “as a result of the Employer’s delay or failure to obtain any permit, permission, licence or approval”. The 2017 *FIDIC Red Book* requirements for reciprocal assistance between the Employer and Contractor, and the Contractor’s potential entitlement to EOT and additional payment therefore comprise expansions of the 1999 *FIDIC Red Book* basic obligations and indemnities.

Commercial Considerations

There are several key commercial considerations for Employers and Contractors to bear in mind when contracting following the decision in *Clin v Walter Lilly*.

- For Employers, this decision highlights that while in the absence of express provisions, the Employer may bear the time and cost risk for obtaining Statutory Approvals, the absence of express provisions does not mean that the Employer takes on all delay and cost risk. In order to provide greater certainty of contractual risk allocation, Employers can include a detailed schedule in the contract which sets out expressly the permits required and which party has the responsibility for obtaining each permit. The consequences of delays caused by third parties may also be dealt with in the express terms of contract, such as the EOT and cost entitlement provisions of a contract.
- For Contractors, they may seek to amend a contract to ensure an absolute obligation on the Employer to obtain Statutory Approvals, regardless of its due diligence, in light of the decision in *Clin v Walter Lilly*. It is important for Contractors to conduct a thorough review of the tender documents with legal

advisors and thorough negotiations with Employers to provide for, or to amend, terms dealing with time and cost risk allocation in circumstances where third parties cause delays. Contractors may also seek confirmation from Employers that the relevant Statutory Approvals are in place before works start in order to make sure there are no delays on account of the approvals process.

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