



LEGAL BRIEFING

Going into detail

Mr and Mrs Gort-Barten v M A Cherrington Ltd

TCC, HHJ Ramsey [2006] EWHC 877

The Facts

Mr and Mrs Gort-Barten (“Gort-Barten”) entered into a contract with M A Cherrington Ltd (“MAC”) on 24 November 2005 (the “Contract”). Pursuant to the Contract, MAC was to construct a building for Gort-Barten as described in the “Plans and Specifications” for the sum of £1,999,999. In early 2006 the parties each contended that the other party had repudiated the Contract and that the Contract was terminated by the acceptance of that repudiation.

There was no separate provision in the Contract dealing with the question of which party was to carry out the detailed design, but there were some express provisions dealing with certain specific areas. Pursuant to the Contract MAC had the obligation to carry out the necessary structural or other design to complete the building works.

The parties agreed to arbitrate the issue of repudiation. MAC alleged that a number of terms should be implied into the Contract. The arbitrator held that there were implied terms that detailed design would be a matter for Gort-Barten, that Gort-Barten would not hinder or prevent MAC from performing its contractual obligations, that Gort-Barten would do everything reasonably necessary to cooperate with MAC in providing the detailed design and that Gort-Barten would provide or arrange for the provision to MAC of such full and correct information as was or ought reasonably to have been known by the claimant to be required by MAC and in such manner and at such times as was reasonably necessary to enable MAC to fulfil its obligations in terms of the Contract. Gort-Barten was given leave to appeal these findings under section 69 of the Arbitration Act 1996.

The Issue

Which party was obliged to carry out the element of detailed design that consisted of particularising an existing obligation under the Plans and Specifications attached to the Contract?

The Decision

The Judge held that MAC had the obligation to carry out the detailed design. It was difficult to see how a term which provided that the detailed design was “to be agreed” could form the basis of an implied term as it would be an agreement to agree and therefore too uncertain. Implied terms dealing with hindering/prevention and cooperation are terms which customarily are implied, but the question of the scope of these implied obligations depends on the underlying detailed design obligations. That is, they do not impose obligations in relation to design unless there is already an obligation on the employer in that respect.

The arbitrator had suggested that it was for MAC to offer a choice to Gort-Barten, or alternatively Gort-Barten was to make a reasonable proposal by way

of choice. As a general principle the Judge did not consider that an implied term relating to design could provide for such alternative obligations. If there were an implied term on this basis it would lead to uncertainty.

It was common ground that MAC and Gort-Barten had an obligation to complete the detailed design in respect of such matters as structural engineering necessary to complete the Building Works. In a similar way, the Judge was of the view that if there were aspects of the Plans and Specifications which required particulars such as the name of the manufacturer or a preference or design or finish, including a colour or size of the component, then this is still a matter of detailed design necessary to complete the Building Works. The imposition of design responsibility on an employer would require some express provision that clearly defined the area of exception, particularly where the contractor had carried out the design set out in the Plans and Specifications and has had to carry out further design to complete the Building Works.

Comment

Proposed implied terms must satisfy a number of tests before they will be implied. It is clear from this judgment that the Judge was of the view that a contract, which was otherwise a design and build contract, would not impose an implied design obligation by reservation of choice to the employer. This would create uncertainty and be contrary to the underlying obligation of the contractor. Such a term would not be implied into the contract as it is not reasonable nor necessary nor obvious nor capable of clear expression.

In order to avoid these situations arising, parties to a contract should be clear and unambiguous about each party's respective obligations under the contract. Where design is to be developed after the date of the contract, the parties should set out who is responsible for that design and whether the employer's approval of the developed design is required.

Charlene Linneman
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