JUDGMENT : MR. JUSTICE RAMSEY: TCC. 8th November 2006

Introduction

1. The Claimant and his wife wished to carry out extensive building works to Perching Sands Farm, Fulking, Henfield to create a home which they intended to live in for a substantial period of time. They saw an advert in Country Life by the respondent M.A. Cherrington Limited ("MAC") and entered into negotiations for MAC to be employed to carry out the work. By an agreement in writing dated 24 November 2004 ("the Contract"), MAC agreed to construct a building at the farm as described in the "Plans and Specifications" for the Contract sum of £1,999,999.

2. Towards the end of 2005 the work was incomplete and the relationship between the Claimant and MAC had deteriorated. In early 2006 the parties each contend that the other party repudiated the Contract and that the Contract was terminated by the acceptance of that repudiation. The parties subsequently agreed upon the appointment of an arbitrator to determine the issue of repudiation.

3. In its statement of case on the repudiation issue MAC alleged there was an "implied agreement" and there were implied terms as follows. First, that there was an implied agreement between the parties at 25 November 2004, when the agreement was executed, that matters of design and specification other than contained in the Plans and Specifications attached to the Contract ("the more detailed designs") were to be agreed between the parties in the course of the Building Works. Secondly, they also alleged that there were implied terms as follows:
   (1) That the Claimant would not hinder or prevent MAC from performing its contractual obligations in a regular and orderly manner to enable completion of the Building Works to be achieved on or before the Completion Date.
   (2) That the Claimant would do everything reasonably necessary to cooperate with MAC to enable MAC to perform its contractual obligations in a regular and orderly manner to enable completion of the Building Works to be achieved on or before the Completion Date.
   (3) That the Claimant would provide or arrange for the provision to MAC of such full and correct information concerning the Building Works 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.

4. The question of the existence of implied agreement and implied terms was referred to the arbitrator as a preliminary issue. He held in relation to design that the Contract was a contract to build a bespoke building and the Claimant had commissioned MAC to design what he described as "the home for my wife and I, probably for the rest of our lives". The arbitrator continued: "These are the surrounding circumstances, the backdrop, within which the Contract is set. It was open to Mr. and Mrs. Gort-Barten by way of the Contract to deprive themselves of "more detailed design" choice in an unparticularised specification. The 'surrounding circumstances' however point overwhelmingly in the opposite direction. In the circumstances of a purpose built dwelling as the primary home of Mr. and Mrs. Gort-Barten and where the specification has yet to be particularized then the choice 'final detail' is for Mr. and Mrs. Gort-Barten."

5. In considering the factors *in* ***BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*** (1978) 52 ALJR 20 the arbitrator said:
   (1) that it was reasonable in the circumstances which he had set out to imply a term that the detailed design was to be a matter for the Claimant;
   (2) that it was necessary to imply that term to give business efficacy, because without the term it "makes no sense in the circumstances of a bespoke house";
   (3) that it was so obvious that it went without saying because it would be plainly at odds with the "house of a life time"
   (4) that it was capable of clear expression and
   (5) that it did not contradict any express term of the Contract because it applied where the Contract was silent about design details.

6. Under "Points of Clarification" the arbitrator stated that:
   "(1) 'More detailed designs' is understood to mean that where and when the extant 'Plans and Specification' require particulars such as which manufacturer or preference or design or finish shall apply, then it is for the builder to offer a choice to Mr. and Mrs. Gort-Barten. Alternatively, Mr. and Mrs. Gort-Barten make their own reasonable proposals, i.e. choice. But 'more detailed design' is not understood to mean that Mr. and Mrs. Gort-Barten would participate in the more detailed design of engineering solutions to be ordinarily undertaken by professionally qualified persons, i.e. architect, engineer, consultant under the Design Build Contract.
   (2) 'To be agreed' is understood to mean that the 'choice' was a matter for Mr. and Mrs. Gort-Barten, their choice was agreement."

7. In relation to the implied term that the Employer would not hinder or prevent MAC from performing its contractual obligations, the arbitrator said that *"in so far as providing detailed design it is plainly incumbent upon the Employer to indicate that information neither unreasonably distant nor unreasonably close to the date which it was necessary for the Contractor to receive the same."*

8. In relation to the implied term that the Employer would do everything reasonably necessary to cooperate with MAC to enable MAC to perform its contractual obligations, the arbitrator said that in relation to providing detailed design there was such an implied term.

9. In relation to the implied term to provide information, the arbitrator said that the implication of the term to provide information in respect of detailed design was an obligation on the Employer.

10. The Claimant applied to this court for leave to appeal against the arbitrator's award under section 69 of the Arbitration Act 1996. Jackson J directed that there should be an oral hearing of that application followed by the appeal if leave were given. The oral hearing of this matter took place on 7 November 2006 and I gave leave to appeal against the arbitrators' award. I now deal with the substantive appeal.

The Contract

11. The Contract consists of an agreement with twenty clauses and with "Plans and Specifications" attached to it. The recital sets out that MAC had designed or caused to be designed the Building Works and had prepared or caused to be prepared the Plans and Specifications. Under clause 3 of the Contract the Building Works were to be undertaken by MAC in accordance, in all material respects, with the Plans and the Specifications.

12. Clause 6 provided that any amendments to the Plans and Specifications required by either party should be made in writing and the other party should respond stating whether or not the request was agreed. There was then a provision to refer the request to an adjudicator in default of agreement.

13. There was no separate general provision in the Contract dealing with the question of which party was to carry out detailed design, that is complete the design either by particularising an existing obligation under the Plans or Specifications or carrying out the necessary structural or other design to complete the Building Works set out in the Plans or Specifications. There were, however, some express provisions dealing with certain specific areas. There was no dispute, however, between the parties that MAC had the obligation to carry out the necessary structural or other design to complete the Building Works. I accept that this is the position. Such design was, in my judgment, a necessary part of the obligation under Clause 3.1 of the Contract which provided that MAC would carry out and complete the Building Works.

14. That this is so is also demonstrated by the fact that the specification identified specific persons or organizations as the Contractor's Architect, the Contractor's Quantity Surveyor, the Contractor's Structural Engineer, the Contractor's Heating Engineer, the Contractor's Electrical Consultants and the Contractor's Health and Safety Adviser. In the absence of anything to the contrary the fact that the Contractor was engaging those consultants points strongly to the detailed design being carried out by the Contractor. It was therefore, in my judgment, an express obligation of the Contractor to carry out the detailed design in terms of the necessary structural or other design to complete the Building Works and this forms part of the Contractor's obligation on a true construction of Clause 3.1.

15. The dispute between the parties however relates to that element of detailed design which consisted of particularising an existing obligation under the Plans and Specifications. The Claimant contends that this element of detailed design is part of MAC's obligations and there is no reason to imply a term which involves an obligation on the Claimant, given the other express terms of the Contract. MAC contends, as submitted at the hearing, that except for the element of structural or other design necessary to complete the Building Works, there was an implied term that the Contractor would present a choice to the Employer as to design details not specified by the Contract Plans and Specifications and that the Employer would decide upon the relevant details within a reasonable time.

The Detailed Design Obligation

16. It will be seen that MAC no longer contends that the implied term should be those contended for in the statement of case. In relation to the first term it is difficult to see how a term which provided that detailed design was "to be agreed" could possibly form the basis for an implied term. This would be a pure agreement to agree and would be too uncertain. Any implied term would have to give certainty to obligation: see the judgment of Rix LJ in ***Okta Crude Oil Refinery AD v Mamidoil-Jetoil*** [2001] 2 LLR 76 at 79.

17. In relation to the three implied terms the first two dealing with hindering/prevention and co-operation are terms which customarily are implied, see Keating on Construction Contracts, 8th edition at 3-052 and 3-054. However, as is common ground in this case, the question of the scope of these implied obligations depends on underlying detailed design obligation. They do not impose such obligations in relation to design unless there is already an obligation upon the Employer in that respect.

18. Equally the last implied term is one aspect of the implied term as to co-operation and is imposed on an Employer under a traditional form of contract where the Employer is responsible for design, see ***Neodox Limited -v- The Mayor Alderman & Burgesses of the Borough of Swinton and Pendlebury*** (1958) 5 BLR at 38.

19. The issue, therefore, depends on the underlying design obligation to which I now turn. In this case, although the arbitrator did not in terms set out what term he found was implied, his clarification indicates that he drew a distinction between the Contractor's obligation to carry out the necessary structural and other design to complete the Building Works and an obligation on the Employer when the Plans and Specifications required particulars such as which manufacturer or preference or design or finish should apply. Equally the arbitrator evidently was concerned about the words "to be agreed" in the implied terms and his clarification indicates that the choice was to be a matter for the Employer, rather than for agreement.

20. The arbitrator in his clarification suggests that it was for the Contractor to offer a choice to the Employer, alternatively the Employer was to make a reasonable proposal by way of choice. As a general principle I do not consider that an implied term relating to design can provide for such alternative obligations. Rather, the alternatives are that the builder carries out the design or the Employer carries out the design. As phrased, if the contractor did not offer a choice and the Employer did not make a reasonable proposal there would be uncertainty as to who would have the obligation to carry out this aspect of design or choice. I consider that this uncertainty is the reason why such alternatives cannot form the basis for an implied obligation. In phrasing the implied term on which MAC now relies, the uncertainty in this respect is resolved by placing an initial obligation on the Contractor.

21. The Contract in this case contained a number of express provisions which related to individual items and set out that certain matters which were expressed to be "Contractor's choice" or "to be confirmed" or to be "approved by client". In the absence of there being any such provision in relation to an item, the question arises as to what role the Contractor and Employer had for the element of detailed design where items in the Plans and Specifications required further particularisation.

22. MAC contends that two aspects of background are relevant when construing the Contract. They are referred to in the witness statement provided by the Claimant where he says:
(1) that it was understood by all concerned that he and his wife could have significant input into the project;
(2) that he entered into the Contract virtually straightaway even though full and final detailed Plans and Specifications had not yet been prepared.

23. I accept that these matters are relevant background, as is the fact emphasised by the arbitrator, that this was to be a bespoke dwelling in which the Claimant and his wife intended to live for a substantial period of time. In relation to design it is common ground that the Contractor had an obligation to complete the detailed design in respect of such matters as structural engineering necessary to complete the Building Works.

24. In my judgment, in a similar way, if there are aspects of the Plans and Specifications which required particulars such as the name of manufacturer or a preference or design or finish, including a colour or size of the component, then I do not consider that this is any less a matter of detailed design necessary to complete the Building Works than the structural or other design element. The process of design is essentially a matter of choosing a solution. The structural details for a foundation or a roof truss depend on a matter of choice by the designer. Equally the size or colour of a component is a matter of choice for the designer of that component.

25. In particular where the Contractor has carried out the design set out in the Plans and Specifications and has to carry out further design to complete the Building Works the imposition of a design responsibility on the Employer would, I consider, require some express provision which clearly defined the area of exception. In this case the implied term now contended for by MAC gives the Contractor an element of design or choice and then provides for the Employer to have an element of choice in deciding on the details. An implied term cannot, in my view, impose such an obligation. It is not reasonable or necessary or obvious or capable of clear expression to adopt the test in ***BP Refinery v. Hastings***.

26. I now elaborate on the reasons for that conclusion. The Contract, which is otherwise a design and build contract, is one where to impose an implied design obligation by reservation of choice to the Employer would create uncertainty and be contrary to the underlying obligation on the Contractor. The primary method by which the Claimant made his choice was by the Plans and Specifications contained in the Contract. In addition clause 230A of the specifications provided as follows:

"APPROVALS: Where and to the extent the products or work are specified to be approved or the Client instructs or requires that they are to be approved, the same must be supplied and executed to comply with all other requirements and in respect of the stated or implied characteristics either:

- *To the express approval of the Client or*
- *To match a sample expressly approved by the Client as a standard for the purpose."*

27. This gave the Claimant the ability in the Contract to specify products or work which he wished to approve but, more importantly, gave the Claimant a wide power to instruct or require that products or work were to be approved. If there were such a requirement in the Contract then the matter had to be expressly approved by the Claimant. Thus, for instance, in relation to kitchen units and sanitary appliances/fittings, clauses N10 and N13 of the Contract provided for approval by the Claimant.

28. It was equally open for the Claimant subsequently to require such matters as colour or size of component to be approved by him. In addition, if the Claimant wished to impose a requirement he could seek to amend the Plans and Specifications so that they included that requirement by using the provisions of clause 6 of the Contract. I consider that the provisions of the Contract, in particular the approval clause, provided the Claimant with the ability to have a significant input in a contract where the detailed design had not been completed.

29. In summary, I consider that the obligation of the Contractor to carry out detailed design included the element of design which related to unparticularised aspects of the Plans and Specifications and that the express provisions of the Contract define the extent of involvement by the Employer in that element of the design of the Building Works.

30. I therefore conclude that there was no implied term that any element of the detailed design was "to be agreed" or was to be a matter for the Claimant's "*choice or design or decision*". The scope of the involvement of the Claimant was instead a matter dealt with by the express terms of the Contract. In relation to the test for an implied term as set out in ***BP Refinery v. Hastings***:
    (1) It is not reasonable to impose a design obligation on the Employer in a Design and Build Contract where the design obligation rests on the Contractor.
    (2) Such a term is not necessary because the Contract contains express provisions which deal with the involvement of the Contractor and the Employer in the design process.
    (3) It is not obvious that in a Design and Build Contract the Employer has a design obligation.
    (4) It is not capable of clear expression as it would create uncertainty in terms of the division between the Contractor's and the Employer's obligation in respect of the design necessary to complete the Building Works.
    (5) It would contradict the express terms of the Contract including the design obligation on the Contractor and the right of approval given to the Employer.

31. I therefore allow the appeal and hold that there was no implied agreement and no implied terms which imposed a design obligation on the Claimant.

Costs of the Appeal

32. On the question of costs it is submitted on behalf of the Claimant that costs should follow the event. They have succeeded on the appeal and therefore they seek their costs. On behalf of MAC Mr. Godwin refers me to the arbitration agreement which was made by the parties expressly for this arbitration reference and which stated under clause 5 that: "The parties agree that the costs of the arbitrator and the arbitration (room hire etc.) shall be borne equally between the parties but that save as to that each party shall bear their own legal and professional costs incurred in and by reason of the arbitration."

33. In exercising my discretion as to the costs arising on this particular appeal it is a relevant matter that the parties have agreed that each party shall bear their own legal and professional costs incurred in and by reason of the arbitration. It seems to me that in all the circumstances, where the parties have made an agreement and have proceeded to arbitration on the basis that each party will bear their own legal and professional costs, any application which is made to the court in the course of that arbitration should be treated as coming within the agreement which they have made, alternatively that agreement should be a matter to be taken into account in exercising its discretion on costs.

34. In those circumstances I consider that although in normal circumstances in the absence of such agreement the Claimant would have its costs, in these circumstances the court should exercise its discretion having regard to the terms of the agreement and that the costs should be borne by each party and, therefore, there should be no order as to costs.

MR. RICHARD WILMOT-SMITH QC (instructed by Messrs. Bunkers) for the Claimant
MR. WILLIAM GODWIN (instructed by Paris Smith & Randall) for the Defendants