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BRIEFING

BEWARE OF VARIATIONS TO SECTIONAL COMPLETION PROVISIONS – PRECISION IS KEY

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- CAUTION SHOULD BE TAKEN WHEN MAKING VARIATIONS TO SECTIONAL COMPLETION AND LIQUIDATED DAMAGES PROVISIONS
- CONSISTENCY OF SECTIONAL COMPLETION PROVISIONS ACROSS RELATED AGREEMENTS IS VITAL

In a recent case of significance for the construction industry, *Vinci Construction UK Ltd v Beumer Group*[1], the Technology and Construction Court found that varied sectional completion and liquidated damages provisions were sufficiently identifiable and certain to be enforceable. However, the case highlights the need for caution when drafting sectional completion provisions and when making variations to them subsequently. The case also demonstrates the importance of consistent sectional completion provisions across related agreements.

"THE SUBCONTRACT PROVIDED FOR THE WORKS TO BE COMPLETED IN SECTIONS, EACH WITH A DIFFERENT COMPLETION DATE AND A CORRESPONDING LIQUIDATED DAMAGES RATE FOR DELAY."

The facts

Vinci Construction UK Ltd ("Vinci") was contracted to renovate elements of Gatwick Airport's South Terminal. Vinci subcontracted out the replacement of the baggage handling systems (the "Subcontract") to Beumer Group UK Ltd ("Beumer").

The Subcontract provided for the works to be completed in sections, each with a different completion date and a corresponding liquidated damages rate for delay. Section 5 was entitled "Baggage" and Section 6 "Remaining Works".

The subcontracted works were delayed and the parties agreed to extend the completion dates for Sections 5 and 6 (the "Settlement Agreement"). However, a dispute arose between the parties over the operation of the sectional completion dates and the delay damages in light of amendments made by the Settlement Agreement.

[1] [2017] EWHC 2196 (TCC)

Beumer argued that it was impossible to determine whether work disconnecting the redundant temporary baggage equipment fell into Section 5 or Section 6, so the corresponding delay damages provisions should be void for uncertainty. The dispute was referred to adjudication and decided in Beumer's favour; the provisions for delay damages were uncertain, inoperable and unenforceable.

Vinci then commenced the TCC proceedings, seeking declaratory relief that the sectional delay damages provisions were sufficiently certain and valid.

"O'FARRELL J REITERATED THE COURTS' RELUCTANCE TO HOLD A PROVISION IN A CONTRACT VOID FOR UNCERTAINTY, PARTICULARLY WHERE THE CONTRACT HAS BEEN PERFORMED."

The decision

O'Farrell J reiterated the courts' reluctance to hold a provision in a contract void for uncertainty, particularly where the contract has been performed (*Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries*[2]). However, the Judge stated that a "provision in a contract will be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings".

On the facts of the case, O'Farrell J was swayed by the parties having negotiated separate rates of delay damages for Sections 5 and 6, suggesting that the parties had an understanding of the works within each section that would attract the different agreed rates of delay damages.

Having reviewed the descriptions of works in the Subcontract, O'Farrell J summarised Section 5 works as those 'necessary to provide the new operational baggage system' and Section 6 works as those 'necessary to remove redundant facilities and provide associated infrastructure following completion of the new operational baggage system'. The Judge concluded that it would be illogical to disconnect existing or temporary baggage equipment before a new operational system was in place. This assisted O'Farrell J in consigning the contested disconnection works to Section 6. Consequently, on a proper construction of the Subcontract as amended by the Settlement Agreement, the works falling with the different sections were held to be sufficiently identifiable and delay damages to be operable and enforceable.

Commentary

Avoiding ambiguous descriptions of works in sectional completion provisions, both at the outset and on any variation, will minimise the risk of a dispute. Also, separate related agreements (such as the Settlement Agreement in this instance) which seek to amend parties' obligations must be clear in terms of their relationship with provisions in the underlying contracts. As always, clear and consistent drafting is critical.

One of the main benefits of liquidated damages provisions is that they provide certainty to the parties, reducing the time and financial cost of arguing over quantum. However, this case illustrates that this key benefit can be obviated by unclear and contradictory variations. It is imperative that the works comprising any and all sections are clearly defined and identifiable, both at the time of contract and in the event of any amendments to the contract. Similarly it is crucial that corresponding changes are made to the liquidated damages regime so that a clearly stipulated liquidated damages rate applies to each defined section. For example, splitting a milestone without adjusting and/or splitting the liquidated damages rate

[2] [1990] 2 Ll Rep 526

so that a separate and distinct rate applies to each section of "split" milestone may render the liquidated damages regime inoperable.

FOR MORE INFORMATION

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