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Insights

RE-BASELINING CONSTRUCTION PROJECTS: DRAWING A LINE IN THE SAND

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SUMMARY

As construction disputes lawyers, we see our fair share of settlement agreements. And not just the traditional full and final settlements, but also one page final account settlements, and “line in the sand” agreements in which the parties seek to renegotiate elements of the contract while it is in progress. These “line in the sand” agreements seem to feature disproportionately in court judgments, and in this blog I will look at the reasons why this might be the case.

Setting the scene

These agreements typically take place where completion has been delayed for whatever reason, and the contractor has intimated that it has large claims for an extension of time and loss and expense. Generally the owner is strongly commercially motivated to get the project completed as soon as possible, so that it can start earning revenue. It is often faced with the choice of whether to fight the contractor in a series of adjudications, or to negotiate with the contractor to agree a mutually acceptable revised price and completion date.

What normally happens is that senior management go into a room together and reach a deal to “re-baseline” the project. The deal tends to be a high level commercial one which considers only time and money. The parties often want us to document this agreement in a one page document, which they want to get signed and sealed in short order. Our client’s objective is understandably to incur minimal legal fees and to get on with completing the project. But these agreements need to be carefully thought through.

What is being settled?

The most important thing to be clear about is the definition of what is being settled. The last thing the parties want is to end up in court arguing about what the agreement means. It is common for

the parties to do a deal that settles “everything known about” up to the date of the “deal” , including the consequences of any variations, events and other matters up to that date. It is essential to be clear both about what that date is, and exactly which variations, instructions (including confirmation of verbal instructions (CVIs) and other events and matters that it covers.

A fine toothcomb

These types of agreement are usually best drafted as a deed of variation to the existing building contract, and clients are often surprised when we tell them it is important to go through the building contract with a fine toothcomb to identify any consequential amendments that flow from the agreement.

For example, if the completion date has changed, what is going to happen to any claim for liquidated damages? If one part of the works has been completed and the client wants to get access to that part, the parties commonly agree to insert into the building contract a provision for sectional completion of the works (if sectional completion wasn’t initially part of the Contract) or change the sections. In that case, it is important to draft the sections clearly and comprehensively – this was the issue in *Vinci Construction UK Ltd v Beumer Group UK Ltd*.

It is necessary to ensure that the liquidated damages clause is amended to reflect the sections, and that the resulting calculation works. If the calculation mechanism is inoperable, the liquidated damages provisions will fail for uncertainty and the owner must fall back on general damages (which doesn’t always favour the contractor either). Other contract clauses that may require detailed drafting include the details of any remedial scheme, and any consequential amendments to take-over provisions and insurance. It is also a good idea to append a revised contract programme.

Commercial considerations

As well as considering the formalities, it is important to make sure the client stands back and considers the commercial position. Should the employer pay more to get the same project delivered later than planned, or is this just throwing good money after bad? Our job is to flag up any risks, and to ensure that the parties get what they bargained for. Sometimes the client wants to use this as an opportunity to reconsider the technical documents and to insert any changes that are required. On occasion, the contractual payment mechanism is no longer suitable and a new one is needed, such as a guaranteed maximum price, with a painshare/gainshare mechanism, which will incentivise the contractor to complete by the revised completion date.

Third parties

The parties also need to consider the effect of their agreement on third parties – not just in relation to the **Contracts (Rights of Third Parties) Act 1999**, but also those other entities who might have an interest in the deal and from whom approval might be needed, for example funders, insurers and guarantors.

A false economy?

We do sometimes get pushback from clients who don't want us to spend the time needed to complete this exercise thoroughly. Occasionally we see, or read about in the judgments, the results of failing to involve lawyers, where the "line in the sand" is not clear. Unfortunately this failure can end up costing the parties millions of pounds in damages and legal fees if they end up in court arguing about issues they thought they had settled.

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