

Insights

NOVATION AND SOME ALTERNATIVES

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SUMMARY

A common scenario we are asked to advise on is this: a client acquires a building where several consultants have been engaged to carry out services but the building is sold before the services are completed. The client then wants the same consultants to continue to carry out those same services.

Normally when a client acquires a site in this way provision will be made for the appointments to be novated to the new client. But what if those appointments don't make provision for novation? This blog takes a look at some options.

Some options...

DEEMED NOVATION?

Novation is where the new owner steps into the shoes of the old owner taking on its obligations under the existing contracts as well as the benefits. But how does it work when the contract to be novated contains no novation provisions? Does this mean novation is off the table?

Let's go back to basics.

For novation to take place:

- all parties (so the old owner, the consultant and the new owner) must consent to the novation; and
- a new contract (between the new owner and the consultant) must be entered into which takes the place of the old one (between the old owner and the consultant).

So even if the contract is silent about novation, it doesn't necessarily mean that the contract can't be novated. Assuming all parties are in existence and agreeable, it just means that more time and effort (and probably cost) will be required to effect the novation.

In our scenario, we know that the new owner wants to enter into the appointment with the existing consultants so assuming the new owner has already reached out to the relevant consultant and it is willing to do this, the old owner will need to be contacted and asked if they will give the relevant consent and comply with the necessary formalities, ideally entering into a deed of novation similar to Practical Law's *standard document*. If the parties prefer to enter into a simple contract of novation, this is fine, but care must be taken to ensure adequate *consideration* is included.

But what about circumstances where, for whatever reason, the old owner does not respond to the request for novation to take place?

This is a bit more tricky but novation can still take place. However, it will take the form of a "deemed" or "implied" novation.

For *deemed novation*, robust evidence is required that all the relevant parties (so the old owner, the new owner and consultant in our scenario) consent or impliedly consent to the novation. If the parties decide to go down this route then a paper trail is key.

So deemed novation is another option but is it a good option? The answer to that will depend on the individual project and parties but as a general rule of thumb, best practice is to avoid it.

Why? Well, the problem is that while deemed novation may replace the old contract with a new contract it does not stop liabilities under the old contract transferring to the new contract unless the parties expressly agree otherwise. That means the new owner could face claims from the consultant, for example, for unpaid invoices that the old owner should have paid.

ENTERING INTO A NEW APPOINTMENT?

So let's imagine that for whatever reason the old owner has not agreed to the request to enter into formal deed of novation and deemed novation is deemed (pardon the pun) too risky... what then? Are there any other options?

Yes: a common solution in this instance is to enter into a *new appointment* with each consultant. The key when doing this is to consider including the following provisions in the new appointment:

- a statement that the appointment supersedes any previous agreement or arrangement between the parties in relation to the services (whether oral or written) and represents the entire understanding between the parties in relation to the services;
- a warranty from the consultant to the new owner that it has not entered into the appointment in reliance on any antecedent or collateral representations, undertakings or promises made by the new owner;
- an acknowledgement from the consultant that any services carried out by it in relation to the project are deemed to have been carried out under this appointment;

- make clear what services will be carried out under the new appointment;
- a statement that notwithstanding the date of the appointment, it shall have effect as if it had been executed on the actual commencement of the services by the consultant;
- a statement that notwithstanding the date of the appointment, any services carried out by the consultant in relation to the project whether on behalf of the new owner or on behalf of any other party prior to the date of the appointment (here reference should be made to include the services provided under the appointment with the old owner) shall be deemed to form part of the services and carried out under the terms of the appointment;
- an indemnity from the consultant to the new owner against any reasonably foreseeable damage, expense, liability, loss, claim or proceeding whatsoever arising out of, or in the course of, or by reason of the services provided by the consultant under the appointment; and
- a statement that the new owner shall not be liable for any damage, expense, liability, loss, claim or proceeding sustained or suffered by the consultant arising out of or in any way connected with the appointment.

This solution is a neat option. It manages the risk of liabilities under the old appointment passing to the new owner. It allows for continuity in the provision of the services in question so that knowledge and experience already gained of the project is retained. It also provides the parties with flexibility to include additional services and to negotiate specific terms to apply to this new appointment if they so wish.

FINAL THOUGHTS

We are seeing clients favour the new appointment route more often these days. There is a reluctance to continue a project on “inherited” terms and conditions and this approach allows the parties to reset the clock without losing the valuable understanding incumbent consultants have of a project.

Novations certainly still have their uses; keeping the transfer from one client to another neat and efficient. I do not expect them to disappear anytime soon but it’s always helpful to explore several options with clients to find the right solution for them on a particular project.

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