NEC3: UNCERTAINTY OF TERMS - ARE YOU SURE?

ALEX EDWARDS

Senior Consultant, Leeds

From time to time, contracts are drafted and entered into, where some of the terms are uncertain and, unfortunately, often lead to significant disputes between the parties. The agreed terms for sectional completion and the associated application of liquidated damages are just a couple of such terms that need more attention.

In ***Vinci Construction UK Limited v Beumer Group UK Limited [2017] EWHC 2196 (TCC***), the adjudicator decided that the Sectional Completion and delay damages provisions of the Subcontract were uncertain, inoperable and therefore unenforceable. Under a Part 8 application to the Technology and Construction Court for a declaration as to the proper construction of the Subcontract, Mrs Justice O'Farrell was tasked with providing an interpretation of the disputed contract terms.

In brief, the facts of the case were that Vinci was engaged by Gatwick Airport to develop the South Terminal. Vinci appointed Beumer under the NEC3 Engineering and Construction Subcontract for the design, manufacture, and installation of the new baggage handling facility, the scope of which was spread over 6 sections within the Contract.

The subcontract works included inter alia; (a) baggage handling facilities for the new pier building; (b) baggage handling facility works required to make the new facility operational; (c) operational readiness trials; and (d) disconnection of the redundant baggage handling equipment (the Works).

The Contract provided sectional completion dates for access to, and completion of, each element of the Works. Each of the six sections had its own Completion Date and its own delay damages attached. Subsequent to elements of the Works being delayed, the Parties entered into a Settlement Agreement, which extended the Completion Dates for Sections 5 (baggage) and 6 (remaining works). Following the implementation of the Settlement Agreement, the Works fell into further delay, giving rise to delay damages that Vinci alleged were properly due.

Vinci sought declaratory relief that; the adjudicator's decision was wrong, in that the contract terms are clear, and damages can be imposed. Whereas, Beumer's position was

that the Subcontract terms were uncertain as to which part of the Works was allocated to the respective section; 5 and/or 6. In particular, whether any of the Works fell into "the remaining works" of section 6. Beumer further submitted that, because of this uncertainty the delay damages provision was inoperable and, therefore, unenforceable.

It was undisputed that items (a), (b) and (c) were allocated to Section 5, whereas the dispute concerned item (d) and whether this was allocated to Section 6.

The issue for O'Farrell J, was to interpret the sectional completion and delay damages clauses, coupled with the Settlement Agreement, to determine whether they were sufficiently identifiable, certain and operable in relation to each associated element of the Works to the requisite Section (5 and/or 6) in the Subcontract. If O'Farrell J found in favour of Vinci; delay damages could then be enforced.

O'Farrell J, when interpreting the Subcontract for uncertainty, applied the test set out by Lord Neuberger in Arnold[i], which was later bolstered by Lord Hodge in Wood[ii]. At paragraph 45 in her judgment O'Farrell J reiterates Arnold[iii] in that:

"When interpreting a written contract, the court must ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would be available to the parties, would have understood them to be using the language in the contract to mean. The court does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context."[iv]

The test was supplemented by six limbs for consideration, in that; the meaning must be assessed in the light of (i) the natural ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and the circumstances known or assumed by the parties, and (v) commercial common sense, but (vi) disregarding subjective evidence of any parties' intentions.[v]

O'Farrell J was able to satisfy the test set out above and ruled in favour of Vinci, in that the contract terms were certain, operable and could be enforced. O'Farrell J further stated at paragraph 46; when construing the contract as a whole, each clause must be interpreted so as to bring them into harmony with the others[vi].

O'Farrell J's conclusion was focussed on Schedule 12 of the Subcontract, where a brief scope of works is attached to each section in the Contract; expressly demonstrating that item (d) falls within Section 6 of the works.[vii]

WHAT CAN BE TAKEN FROM VINCI...?

It is clear from ***Vinci*** that the Courts, wherever possible, will maintain the integrity of the contact and will strive not to find a contract term void for uncertainty.

O'Farrell J supports this statement in ***Vinci*** at

i Arnold v Britton and others [2015] UKSC 36 at paragraphs 15-23 (Also see Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 at paragraph 14)

ii Wood v Capita Insurance Services Ltd [2017] UKSC 24 at paragraphs 8-15

iii Ibid 1

iv Vinci Construction UK Limited v Beumer Group UK Limited [2017] EWHC 2196 (TCC) Paragraph 4

v Ibid

vi Vinci Construction UK Limited v Beumer Group UK Limited [2017] EWHC 2196 (TCC) Paragraph 46

vii Ibid: Paragraphs 55 & 57

paragraph 47, when citing Hirst J in ***Anangel Atlas*** [viii] and Lord Denning in ***Nea Agrex*** [ix]:

The Courts are reluctant to hold a provision in a contract void for uncertainty, particularly where the contract has been performed and that the Court will strive if possible not to find a contract or contractual provision uncertain and such a conclusion has been graphically described as a "counsel of despair". [x]

O'Farrell J further expresses the Court's disapproval of finding a contract provision uncertain by citing ***Whitecap*** [xi], where Moore-Bick LJ states:

"the conclusion that a contractual provision is so uncertain that it is incapable of being given a meaning of any kind is one which the courts have always been reluctant to accept, since they recognise that the very fact that it was included demonstrates that the parties intended it to have some effect."[xii]

O'Farrell J, in ***Vinci***, reiterates the Courts position in regard to finding contract terms void for uncertainty; by bringing to the surface the principles in ***Arnold*** and ***Wood*** and using ***Anangel*** and ***Nea Agrex*** as authority, to ensure the contract is considered as a whole and the parties intentions are considered before concluding a term void for uncertainty.

The Courts will seldom rule that a contract term is void for uncertainty, however O'Farrell J states at paragraph 49 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..."[xiii]

A key thread through these authorities, and similarly in ***RWE Npower*** [xiv] , is that when considering 'uncertainty', 'ambiguity' and/or 'conflict' in contract terms (again where the NEC contract applies); the contract must be considered as a whole and the parties intentions must be revisited before concluding that a dispute is afoot.

Vinci also imparts to the industry that when drafting contract terms, amendments, special conditions, settlement agreements and the like; to avoid uncertainty, the draftsman must have the parties' intentions in mind and carefully consider the contract as a whole, to produce an agreement that the parties can administrate in its entirety.

viii Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries [1990] 2 Ll.Rep. 526 per Hirst J pp. 545-546

ix Nea Agrex SA v Baltic Shipping Co Ltd [1976] 2 Lloyd's Rep. 47

x Ibid 5: Paragraph 47

xi Whitecap v John H Rundle [2008] EWCA Civ 429

xii Ibid: per Moore-Bick LJ at para.21

xiii Vinci Construction UK Limited v Beumer Group UK Limited [2017] EWHC 2196 (TCC) Paragraph 49

xiv RWE Npower Renewables Ltd v JN Bentley Ltd, [2014] EWCA Civ 150

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA GROUP HEADQUARTERS

33 Cavendish Square,
London
United Kingdom
W1G 0PW

Tel: +44 (0)207 182 4062

BIRMINGHAM Tel: +44 (0)121 698 2148
MANCHESTER Tel: +44 (0)161 932 1222
NOTTINGHAM Tel: +44 (0)1332 638 061
LEEDS Tel: +44 (0)113 251 5017
BRISTOL Tel: +44 (0)117 344 5023
MAIDSTONE Tel: +44 (0)1622 673 021

UNITED ARAB EMIRATES

Office 615
Park Lane Tower
Al A'amal Street
Business Bay
United Arab Emirates

Tel: +971 4 437 2470

SINGAPORE

20 Anson Road
#19-02
Twenty Anson
Singapore 079912
Singapore

Tel: +65 6291 2482
Tel: +65 62916208

CANADA

160 Quarry Park Boulevard SE
Suite 300
Calgary
Alberta
Canada
T2C 3G3

Tel: +1(403) 279-1603

HONG KONG

Suite 2802
Lippo Centre Tower 2
89 Queensway
Admiralty
Hong Kong

Tel: +852 2295 2678

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

Please note that DGA Group Hong Kong, Singapore and Dubai have all moved offices due to expansion. The new addresses for these offices are provided here.

DGA