

Liquidated damages for sectional completion

September 2017

Authors: [Julian Bailey](#), [Michael Turrini](#), [Luke Robottom](#), [Sarah Hudson](#)

In the recent English High Court case of *Vinci Construction UK Ltd v. Beumer Group UK Ltd*, the court considered whether liquidated damages were enforceable under a construction contract which provided for sectional completion, but did not define the relevant sections with great clarity.

Introduction

It is common for construction projects to be completed and handed over in pre-defined sections, at pre-determined times (otherwise known as sectional completion). More often than not, under such structure, a separate completion is agreed in relation to each section, and separate liquidated damages apply to each section in the event of delay. Although this is a common arrangement, it is vital to ensure that the construction contract covers all aspects of this structure in sufficient detail.

There are several considerations which must be borne in mind when drafting a construction contract on the basis of sectional completion, and sectional liquidated damages. By way of example, the contract should contain:

- the necessary mechanisms for effecting sectional completion (for example, provisions which allow sectional completion certificates to be issued);
- descriptions of each section, which make it clear which aspects of work will fall under each section;
- clearly defined dates for completion of each section;
- mechanisms to govern the award of extensions of time for each section, and any necessary extensions of time to related sections; and
- clearly defined liquidated damages figures for each section.

Vinci Construction UK Ltd v. Beumer Group UK Ltd [2017] EWHC 2196 (TCC) highlights the kinds of issues that can arise where there is a lack of clarity in the drafting of a contract providing for sectional completion.

Vinci Construction UK Ltd v Beumer Group UK Ltd

The case concerned a subcontract, let by Vinci Construction UK Ltd (“**Vinci**”) to Beumer Group UK Ltd (“**Beumer**”), for the performance of a package of works relating to the baggage handling system at Gatwick Airport’s south terminal.

The facts of the case are set out briefly below.

- The subcontract provided for sectional completion. There was a distinct completion date and agreed liquidated damages figure for each section.

-
- Beumer's works in relation to two sections (Sections 5 and 6) fell into delay and Vinci therefore sought to levy liquidated damages under the subcontract against those sections.
 - Beumer argued that it was unclear from the subcontract technical documents which specific elements of the delayed work fell into Section 5, and which fell into Section 6. Beumer claimed that, due to the inability to determine, with certainty, which works were encompassed in each section, the liquidated damages clause should be deemed void for uncertainty.
 - Vinci disagreed with Beumer and sought declaratory relief from the TCC as to enforceability of the provisions relating to sectional completion dates and liquidated damages.

In the High Court

In the High Court, the judge noted that:

- the courts would always strive to avoid a finding of uncertainty, but advised that it would not always be possible to reach a clear conclusion as to the parties' intentions at the time of drafting, particularly where several equally possible interpretations or meanings exist;
- a disagreement between parties regarding interpretation of a provision is not, without more, sufficient to justify a finding of fatal uncertainty; and
- parties are regularly in disagreement as to the meaning and effect of contractual provisions, and they resolve such disputes via litigation and arbitration.

Guided by these established principles, the judge held that the technical and contractual documents made it possible (albeit challenging) to sufficiently allocate the works between the sections. The provisions relating to sectional completion dates and liquidated damages were therefore enforceable. She also noted that if there was still uncertainty or disagreement over the allocation of certain items as between the two sections, such uncertainty was capable of being resolved by factual and/or expert evidence.

Whilst this case confirms that the courts are generally reluctant to hold freely agreed terms void for uncertainty, previous case law demonstrates that the courts will deem sectional liquidated damages provisions uncertain and inoperable in circumstances where the relevant sections are not properly defined. For example, in the case of *Taylor Woodrow Holdings Limited v. Barnes & Elliott Limited* [2004] EWHC 3319 (TCC), the judge held that the absence of a sensible mechanism in the contract for determining each section resulted in the inoperability of the liquidated damages provisions.

Comment

Hypothetically, had the judge found it impossible to allocate the work between the two sections, Vinci would have been left without liquidated damages, and possibly without a claim for general damages - at least until the expiry of the final date for completion, due to the resulting uncertainty around the completion dates for each element of the works. Careful consideration is therefore required when drafting, so as to ensure that all of the necessary mechanisms are in place to give effect to the agreed regime.

English courts have the ability to review and consider the factual and commercial context behind a contract, as well as all of the contractual documents, where the meaning or effect of the words used in the contract are not clear. Although Vinci was fortunate in this case, the judge made it clear that it will not always be possible for the courts to resolve ambiguous, incomplete or unclear drafting.

Sectional completion is widely used in construction contracts, especially where parts of the works will be taken over and used as-and-when they are completed. Sometimes sections of the works are easy enough to define, for example in a residential development where there may be house 1, house 2 etc. But where the boundaries between parties of the works are less clear, so that to some extent they form an integrated whole, sectional completion may be more difficult to use. In such cases, the traditional, singular, completion date (which calls for fewer lateral considerations than sectional completion), and a right for the employer to, at its option, take possession of completed elements of the works (as a form of "partial possession") may, therefore, often be adequate. This would avoid the potential pitfalls highlighted by the cases discussed above, whilst still allowing the employer access to the works before the scheduled completion date.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 1000

White & Case LLP
16th Floor, Al Sila Tower,
Abu Dhabi Global Market Square
PO Box # 128616, Abu Dhabi
United Arab Emirates
T +971 2 611 3400

White & Case LLP
Level 6, Burj Daman, Happiness Street,
Dubai International Financial Centre
PO Box 9705, Dubai
United Arab Emirates
T +971 4 381 6200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.