

## **How To Change Employer Mid-Stream**

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With several employers recently facing difficulties, what should a contractor look out for if an employer goes into administration and – in order to salvage the project – a new employer is proposed?

### **Assignment or Novation?**

Firstly, you need to consider how the contract is being transferred from the original developer to the new one. This is typically achieved by either assignment (or assignment in England and Wales) or novation. Which of these methods of transfer is the most appropriate and which are legally competent?

In Scotland, obligations and rights can be assigned at common law, sometimes without consent. No particular wording is required to constitute an assignment, as long as it effects a transfer. To be effective, however, notice of an assignment of rights must be given to the other (in this case, the Contractor). Novation may be the more suitable route, involving the substitution of a new party for an existing party under the contract. A novation effectively extinguishes the contract and replaces it with another, on the same terms, and requires the consent of all of the parties to the original contract. The parties should specifically consider how pre-novation liabilities are dealt with and be aware of the possibility of “black holes” and “no loss” arguments – in other words, make sure the novation agreement correctly allocated responsibility between the existing and new employers for claims and payments, etc.

### **The position in England**

In England it is only possible to assign the benefit of a contract. If you want to transfer obligations this has to be by novation; at least it requires documented agreement of the third party affected. The most robust form of assignment is a legal assignment, which must be in writing and unconditional, and can only be done on notice to the other party. Of course, the assigning employer will still be liable for performance of any remaining obligation (for example any remaining payment obligations) and, as such, novation may be more appropriate. Consent to novation is required (this can be inferred, so if you object, say so!)

### **Practicalities**

Whether novation or assignment is chosen, and whether the contract are under Scots or English law, best practice suggests that the relevant agreement should be documented as between the old and new employers and the contractor.

Before proceeding always check the terms of the contract. An express provision that prohibits assignment, or only permits assignment with consent, will override the common law. Remember that an entitlement to assign the contract may just mean the employer’s rights, and not the employer’s obligations as well. It is common for assignment clauses to have an impact on the number of permitted assignments, the method of assignment, whether consent is required, the class of the persons to whom the assignment may be made, and whether it can be assigned at all. Even if

the assignment clause does not specifically refer to novation, it can, in the absence of an express term to the contrary, be interpreted to limit the right to novate.

Finally, before legals are all tied up, don't forget to consider:

- Checking the finances of the new employer – does it have the resources to make the necessary payments under the contract?
- Are all of the contract documents being assigned/novated? – in a complex project it is easy to overlook some.
- Are all of the contract documents capable of transfer? E.g. a performance bond may not be capable of assignment, and if a new bond is required may be incurred.
- Does the assignment/novation increase risk/liability in terms of duration or amount?
- Consider the impact of any assignment of the Building Contract on collateral warranties, novated appointments, payment guarantees etc.
- If you are asked to give consent, ask to see the assignment/novation itself – if not, you will be consenting to something you have not seen.
- Who pays your legal costs?

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