

Construction contracts: vesting of title to goods

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When does title to goods transfer from a contractor to an employer? This can be a critical issue, especially when a party to a project has become insolvent. A recent English case considered this issue, and the application of vesting clauses and certificates.

Vesting clauses in construction contracts provide for the transfer of ownership of a contractor's plant, equipment and/or unfixed materials from the contractor to the owner. One of the main purposes of these clauses is to give the parties clarity as to who-owns-what, and exactly when title will be transferred from one party (e.g. the contractor) to another (e.g. the employer). Vesting clauses sometimes use a complementary device in the form of "vesting certificates," issued by a contractor or supplier, which denote the transfer of title to identified goods.

Construction contracts often provide that title to goods will transfer to an employer when the goods are delivered to the employer's site. The position is more complicated in relation to goods that are manufactured or held off-site, where the employer may not have sight or control of them. To this end, "vesting certificates" are deployed to give the employer comfort that title to the goods listed in the vesting certificate has been, or will be, transferred to it. Vesting certificates have assumed an increasingly important role to play, given the recent rise in off-site manufacturing.

VVB M&E Group Ltd v Optilan Ltd [2020] EWHC 4 (TCC)

In *VVB v Optilan*, the English Technology and Construction Court considered a dispute between a sub-contractor, VVB, and its sub-subcontractor, Optilan, on the Crossrail project. Under the contract between VVB and Optilan, Optilan was responsible for providing telecommunication services, including the procurement and delivery to site of materials for installation.

The contract contained certain provisions for vesting ownership of goods in VVB before they were delivered to site. To that end, Optilan was to issue vesting certificates to confirm the transfer of ownership. Optilan, however, placed an additional condition in the certificates by stating that the transfer of ownership would occur upon "receipt of the interim payment" for the goods. Optilan duly made a claim for the goods. However, VVB had a countervailing claim against Optilan's claim for the value of the goods. VVB therefore issued a "pay less" notice in respect of Optilan's claim.¹ On VVB's view, as set out in its "pay less" notice, no net amount was due from it to Optilan, but title to the goods had transferred notwithstanding that it had not made an actual money payment for the goods.

Complicating matters, VVB became insolvent. The dispute as to ownership of the goods therefore turned on the construction of the contract and the vesting certificates. The question before the court was whether the

¹ A "pay less" notice is a notification from a payer to a payee of the payer's intention to pay less than the value stated in its payment notice or the payer's application. "Pay less" notices have been a feature of UK construction contracts since 2011, when the amended Housing Grants, Construction and Regeneration Act 1996 (UK) section 111 took effect.

transfer of ownership could occur without the “receipt” of payment as provided in the certificates, given that no further payment was due. On VVB’s view, it had already (in effect) paid for the goods, so title had passed to it.

The court held that, whilst the contract contemplated Optilan being paid for the goods, this did not mean that the transfer of ownership was dependent on Optilan’s actual receipt of a sum specified within the vesting certificates. The inclusion of a specified sum was only the first step required in the payment process and could not be read as “securing” payment of the stated values within them. Accordingly, the court held that the provision of the “pay less” notice was sufficient to trigger vesting of the goods. No actual “receipt” of payment by Optilan was required.

Comment

This case highlights the critical role that vesting clauses and certificates may play under construction and engineering contracts in determining “who-owns-what”. In practice, there is some variety in the details of these clauses. For instance:

- the FIDIC Red Book (2nd edition, 2017), Sub-Clause 7.7 provides for the transfer of ownership of Plant and Materials to the Employer upon the earlier of delivery to the Site or payment for the Plant and Materials in question.

The FIDIC form differs from the JCT and NEC forms, which expressly contemplate payment being made if materials are delivered off-site:

- JCT SBC 2016 contains provisions which contemplate the vesting of ownership of materials, whether on-site or off-site, upon payment of a sum for the materials which is included in an interim certificate (clauses 2.24 and 2.25).
- NEC4 Core Clause 7 provides for the transfer of ownership of Plant and Materials to the employer (the “Client”) upon delivery to the “Working Areas”, and where Plant and Materials are outside such areas and are identified in the contract for payment, upon the Plant and Materials being marked by the Supervisor. It is the marking of the off-site Plant and Materials which transfers title, as opposed to payment for them.

Given the differences between the contracts, parties wishing to rely on vesting clauses must give careful consideration as to how vesting certificates (where used) would operate relative to other provisions of the contract.

Conclusion

As is evident, the operation of vesting clauses will often turn on fine distinctions. This highlights the importance of ensuring that vesting clauses clearly reflect the parties’ mutual intention as to when title transfers, and that the parties understand when transfer will take place. In particular, it is important for construction and engineering contracts to be clear as to the act or event which effects the title transfer, whether that be delivery, marking, certification, the actual payment of money, or some other matter.

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