
UK case law emphasises need for clear drafting in descoping and vesting of goods

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By Julian Bailey

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One case concerned the limits of a descoping power under an NEC contract, and the other addressed the often complicated issue of when title to goods transfers in a construction project.

Descoping

A Scottish case in late 2020 considered the contractual power to omit works, and highlighted key principles applicable to the question of whether omitted works can be transferred to another contractor.

The descoping or omission of works, which is sometimes referred to as a 'negative variation', relates to the removal of part or all of the works awarded to a contractor or subcontractor, and is a common feature of construction contracts.

The contractual right to omit works grants employers and contractors flexibility over the scope of works in main contracts and subcontracts, respectively. However, it may also deprive the contractor or subcontractor of the 'right' to make a profit on the omitted works.

The omission of work from one contractor for the purpose of giving the work to another contractor is a particularly problematic issue, especially where the contract does not expressly permit an omission to be made for this purpose or does not provide for adequate compensation to the contractor whose work has been descoped.

Standard form contracts

The framework governing the right to descope works varies across the standard form contracts. Contract forms typically place some form of limitation on the extent to which works may be omitted.

The FIDIC Red Book 1999 and the FIDIC Red Book 2017 permit omissions to the work, but prohibit

the employer from omitting work where the employer intends to hand over the work to another contractor.

Similarly, the FIDIC Red Book 1999 provides that after terminating the contract for convenience, the employer shall not execute the works themselves or arrange for any part of the works to be executed by another contractor. The 2017 edition permits the employer to do so only after the contractor has been properly compensated for its losses, including loss of profit.

Not all standard form contracts expressly provide for the omission of works for the purpose of giving the work to another contractor. Although the JCT Design and Build 2016 permits 'the addition, omission or substitution of any work', it does not provide for the provision of the omitted work to other contractors.

This raises the question of whether omitted work can be given to another contractor if a contract does not clearly provide for the right to do so. This was the issue that arose recently before the courts of Scotland.

The claim was brought by subcontractor Van Oord UK against Dragados UK, the main contractor in a project for the design, management and construction of the Aberdeen Harbour Expansion Project (*Van Oord UK Ltd v Dragados UK Ltd* [2020] CSOH 87).

The subcontract between Dragados and Van Oord incorporated standard form NEC3 subcontract conditions, and the subcontracted works included soft dredging works and the filling of caissons. However, Dragados from time to time transferred omitted work falling within the scope of the subcontract to one of two other subcontractors.

The subcontract said the contractor could give an instruction to the subcontractor which changed the works, and enabled the contractor to omit any provisional sum or other work in these circumstances. Under the terms of the subcontract, the subcontractor had no claim for loss of revenue, opportunity, profit or indirect



loss or damage against the contractor in relation to this.

The court followed the guidance provided in a similar English case which involved a similar omission of work from one subcontractor and the engagement of an alternative subcontractor to carry out the omitted work.

The applicable principles derived from this case law are that a contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.

A clause permitting variation to the works must be construed carefully, so as not to deprive the contractor of its right to complete the work and realise profit from completion. Clear words are needed to grant an entitlement to omit work from one contractor and to transfer it to another.

The motive or reason for the omission of the work is irrelevant. The test is whether the clause relied upon is wide enough to permit the change.

After applying these principles, the court held that Dragados did not have a clear contractual entitlement to omit works and to transfer them to another subcontractor in these circumstances.

Commercial implications

Descoping work, whether by a negative variation or even a termination for convenience, may be an uncomplicated matter where the employer simply wants to omit the work in question. But, where an employer wishes to descope work to give it to another contractor, the employer's conduct is often treated far more seriously in law, and may constitute a breach or even a repudiation of the contract in question by the employer.

Drafting clarity is therefore needed. Contract clauses dealing with variations and termination for convenience should indicate either way whether work may or



1999 FIDIC Red Book

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may not be descoped and given to another contractor. Doing so is highly desirable, to prevent there being disputes over the proper scope and exercise of a variations or a termination power.

Secondly, if work is permitted to be descoped and given to another contractor, the mechanism for valuing the omission of work must be as straightforward as possible. Commonly, an omission will involve the deduction of the relevant part of the contract price for the omitted work, whilst compensating the contractor for costs it may have incurred prior to the work being omitted, including overheads.

The recoverability of any loss of profit for the contractor on the omitted work may be controversial, and should therefore be addressed in the contractual mechanism for valuing omitted works.

Vesting of title to goods

The issue of when title to goods transfers from a contractor to an employer can be a critical issue, especially when a party to a project has become insolvent. An English case in early 2020 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 or unfixated materials from the contractor to the employer. 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 to the other.

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, given the recent rise in off-site manufacturing.

In the 2020 case of *VVB M&E Group Ltd v Optilan Ltd*, the English Technology and Construction Court considered a dispute between a subcontractor, 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 the site of materials for installation.

The contract contained certain provisions for vesting ownership of goods in VVB before they were delivered to the site. Optilan was to issue vesting certificates to confirm the transfer of ownership.

However, Optilan placed an additional condition on the certificates by stating that the transfer of ownership would occur upon 'receipt of the interim payment' for the goods, and it duly made a claim for the goods.

VVB had a countervailing claim against Optilan's claim for the value of the goods and therefore issued a 'pay less' notice in respect of Optilan's claim. In VVB's view, as set out in the pay less notice, no net amount was due from it to Optilan, but title to the goods had transferred despite the fact that it had not made an actual payment of money for the goods.

Complicating matters, VVB became insolvent. The dispute as to ownership



Vesting clauses and certificates play a critical role in determining who owns what under construction and engineering contracts, and must clearly reflect the parties' mutual intention as to when title transfers

of the goods therefore turned on the construction of the contract and the vesting certificates. The question before the court was whether the transfer of ownership could occur without the 'receipt' of payment as provided in the certificates, given that no further payment was due. In 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.

The case highlights the critical role that vesting clauses and certificates play under construction and engineering contracts in determining who owns



2017 FIDIC Red Book

permits the employer to execute the works itself or arrange for any part of the works to be executed by another contractor only after the contractor has been properly compensated for its losses, including loss of profit. contractor.

what. In practice, there is some variety in the details of these clauses.

For instance, the FIDIC Red Book 2017 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. The 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.

The NEC4 Core Clause 7 provides for the transfer of ownership of plant and materials to the employer upon delivery to 'working areas'; where plant and materials are outside such areas and are identified in the contract for payment, transfer of ownership happens when the plant and materials are 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 these widely used forms of 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.

As is evident, the operation of vesting clauses will often turn on fine distinctions which distinctions highlight 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.