

Construction Law Update

Is Payment Required for the Vesting of Materials Under a Vesting Certificate?

In the recent case of *VVB M&E Group Limited & Anor v Optilan (UK) Limited*, the court considered the terms of two ambiguously worded vesting certificates to determine whether ownership of materials had vested in the transferee.

Background

In 2015, Value Realisations Limited (“VRL”) engaged Optilan (UK) Limited (“Optilan”) under a sub-sub-contract for the provision of telecommunications services in connection with the Crossrail project. The sub-sub-contract provided for goods and materials to be vested in VRL prior to delivery to the relevant delivery location “with a view to securing payment” under the sub-sub-contract.

In 2018, Optilan issued two vesting certificates relating to the materials it intended to include in its application for payment no. 39 which stated “... that property in the materials shall unconditionally vest in [the transferee] upon receipt of the interim payment referred to above.”

Optilan then submitted application for payment no. 39 which included the materials valued at approximately £1.5m. VRL subsequently issued payment certificate no.39 and a pay less notice which both certified the net payment due to Optilan at nil, although they did include gross valuations for the materials largely similar to the values stated in Optilan’s application for payment.

Soon thereafter, VRL entered into administration and VVB M&E Group Limited (“VVB”) bought the business and assets of VRL.

The dispute

A dispute arose as to whether the materials had vested in VRL. VVB, therefore, began the current proceedings claiming that it was sufficient to trigger vesting of the materials for the value of the materials to be included

within the gross certification for the next interim payment. Consequently, vesting had taken place upon the provision of the pay less notice determining that no payment was due.

Conversely, Optilan argued that vesting had not occurred because neither payment certificate no.39 or the pay less notice constituted receipt of any payment as envisaged by the wording of the vesting certificates.

The court’s decision

The court found the vesting certificates to be ambiguous as they contained language consistent with both unconditional vesting upon a future event and immediate vesting. By applying the principles of contractual interpretation, the court decided in favour of VVB on the basis that Optilan’s argument effectively “quarantines the sum payable in respect of the to-be-vested materials” which would undermine VRL’s ability to assess the amount due for the purposes of its interim payment certificate.

Analysis

The court’s judgment in this case serves as a helpful reminder that where vesting of materials relates to payment under a construction contract, the interim payment process provided for by the Housing Grants, Construction and Regeneration Act 1996 (as amended) entitles the payer to make deductions against the sum applied for, taking into account matters outside of the value of the materials to be vested, which may result in a net nil amount.

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