FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Vesting certificates and payless notices

VVB M&E Group Ltd v Optilan Ltd LG Ltd

[2020] EWHC 4 (TCC)

The question of when title to goods vests or transfers from a contractor to an employer can be of some importance especially if one of the parties is (or is likely to become) insolvent. A vesting clause is a contractual term in a construction contract dealing expressly with the passing of ownership of goods and materials between the parties. Title to goods often transfers when goods are delivered to the (employer's) site. However, the position can be more complex when, as in the case here, the issue in question relates to goods that have been manufactured off site. Something which happens with increasing regularity and importance on many projects.

Here the scheme of the contract was for the vesting of ownership in goods in VVB before they were delivered to site. Optilan was required to issue vesting certificates to confirm the transfer of ownership. However, in fact Optilan added a condition in the certificates by stating "*... that property in the materials shall unconditionally vest in [the transferee] upon receipt of the interim payment referred to above*". Optilan duly made a claim for the goods which was met by VVB issuing a payless notice in respect of Optilan's claim for payment. The notice took into account gross valuations for the materials which were largely similar to the values stated in Optilan's application for payment. VVB considered that even though, as set out in the payless notice, no net amount was due to and no actual payment had been made to Optilan, title to the goods had transferred.

VVB became insolvent. The issue for HHJ Russen QC was whether the materials had vested in VVB? Was an actual "payment" of some monies to Optilan (rather than the "nil payment" provided for by both the payment certificate and payless notice) required to trigger the unconditional vesting of the materials? The Vesting Certificates provided for an unconditional vesting "upon receipt of the interim payment". VVB said that it was sufficient to trigger the vesting of the materials for the value of the materials to be included within the gross certification (by the payless notice) for the next interim payment. The vesting took place upon the provision of the payless notice determining that no payment was due. Optilan said that neither the payment certificate nor the subsequent payless notice could constitute a "receipt" by Optilan of any "payment" upon which vesting might occur.

HHJ Russen QC noted that the drafting of the vesting certificates was "confusing" and "ambiguous". The language of an unconditional vesting upon a future event (receipt of the next interim payment) conflicted with other provisions which were couched in language consistent with an immediate vesting. The Judge noted that when faced with ambiguity the court is entitled to prefer the interpretation which is consistent with business common sense and to reject any other meaning. On this basis he found in favour of VVB.

The concern of the Judge was that Optilan appeared to be saying that the express language of the vesting certificates somehow "quarantined" the sums payable in respect of the to-be-vested materials from other matters that might serve to undermine sufficient credit being obtained for their value if a full operation of the interim payment process was allowed to follow its normal course. The Judge understood that the insolvency of VVB provided a real incentive to Optilan to argue that the payless notice was of no effect but, given the content and appropriate timing of that notice, such an argument involved "an unwarranted focus upon form over substance".

The promise by VVB was not to make a payment of those values but to "include [the relevant sum] in the next interim payment". Optilan's belief of an entitlement to be paid a sum by reference to those included values did not and could not override the assessment by VVB of what in their opinion was due for the purpose of responding with the interim payment certificate. The language of the vesting certificates therefore confirmed that the inclusion of the relevant sum was only the first step in working though the interim application, certification and payment process. The Judge agreed that what the vesting certificates recorded was an agreement by VVB to include the identified values within the "Gross Certification" column of the payment certificate which would then be addressed alongside other certified items and against payments previously made.

Applying the payment process, the interim payment due to Optilan was "nil". The provision of the payless notice was sufficient to trigger the vesting of the goods in VVB. No actual receipt of payment by Optilan was required.

Arbitration, adjudication & approbation

MPB v LGK

[2020] EWCH 90 (TCC)

This was an application to set aside an award, pursuant to s.67 of the Arbitration Act 1996, on the grounds that there was no arbitration agreement, and so the Tribunal did not have jurisdiction over the dispute. Deputy Judge Buehrlen QC had to consider whether the contract incorporated clause 11 of LGK's standard conditions which made provision for adjudication and then arbitration under the Construction Industry Model Arbitration Rules ("CIMAR").

The Judge described the evidence surrounding the formation of the contract as being incomplete. There were three adjudications; two started by LGK, and the third by MPB which was commenced by reference to clause 11 of LGK's Terms. LGK commenced arbitration proceedings in relation to the decision made in this third adjudication.

MPB submitted that whilst LGK's Terms were included with the Quotation they did not form an integral and indivisible part of it in that they were additional to the 4 page quotation itself. LGK said that on proper construction of the contract, the Order incorporated LGK's Terms. Both the description of the work and the value were "based on" the various contractual documents

listed in the Order. You could not sever LGK's Terms from the first 4 pages of the Quotation; they were relevant to both the scope of work and the price. LGK's Terms formed part of the Contract but they accepted that MPB's terms took precedence in the event of incompatibility. But LGK also relied on the deletion by LGK of the words "It is required that you withdraw any of your conditions which are at variance with the conditions contained therein" as a refusal on the part of LGK to withdraw any of its T&Cs. As MPB's Terms were silent as to dispute resolution, the arbitration agreement in LGK's Terms applied.

The Judge agreed with MPB that one should be slow to conclude that the parties agreed that both of their standard terms should apply to the contract, given the inevitable risk of contradictions in those terms and resulting potential uncertainty. However, it is not uncommon for construction contracts to be set out in a number of different documents and to contain different sets of standard terms.

However, the Judge also agreed that, although not expressly referred to in the first 4 pages of the Quotation, MPB were given clear notice of LGK's Terms. The scope of work and price set out in the Quotation were based on, and to be read in conjunction with, LGK's appended terms and conditions. It followed that LGK's Terms formed part of the Quotation and were an integral part of it. The contract was negotiated and drawn up by two construction companies. It was not a document prepared by lawyers. In the Judge's view:

"*a reasonable person having all the background knowledge which would have been available to the parties would have understood the express reference in the Order to be "based on quotation Q17729 Rev B dated 11/04/2016 ..." as being a reference to the Quotation and as meaning that the Quotation was intended to form part of the Contract.*"

Here, the parties did expressly incorporate the Quotation into their agreement and LGK's Terms clearly formed part of that quotation.

It was also LGK's case that MPB elected to rely on LGK's Terms and clause 11 for the purposes of Adjudication no. 3 and subsequent enforcement proceedings and that as a result it was not now open to MPB to deny that LGK's Terms and/or clause 11 were incorporated into the Contract pursuant to the doctrine of approbation and reprobation. The Judge agreed that MPB "clearly and unequivocally" elected to rely on clause 11 as setting out the dispute resolution provisions governing the parties' relationship. Both the notice of adjudication and the Referral expressly relied on and referred to clause 11. In choosing to rely on clause 11 as the applicable dispute resolution mechanism for the purposes of the adjudication, MPB could not later challenge the second (arbitration) tier of that provision.

Adjudicators: use of assistants

Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd

[2019] ScotCS CSOH 110

In Issue 232, we discussed the case of *Dickie & Moore Ltd v McLeish & Others* where an adjudicator had been assisted by a quantity surveyor, described as a pupil. On the facts, the courts did not consider that there had been a breach of natural justice. Here the parties had entered into a contract for the re-preservation of shiplift docking cradles at HM Naval Base Clyde. The contract incorporated the NEC3 Engineering and Construction Short Contract (June 2005) with bespoke Z clause amendments. Disputes had arisen and on being appointed, the adjudicator wrote to the parties confirming acceptance of the appointment. Paragraph 14 of the "Terms and Conditions of Appointment" stated: "If I require quantity surveying input during the Adjudication I will utilise the resources of [...]. This matter is at my absolute discretion and I will not require the consent of the parties." The decision was issued on 22 March 2019. The accompanying fee note said: "QS assistance – 28 hours @ £95 £2,660."

HS brought proceedings in Scotland in July and at the end of September referred to the QS assistance saying that: "*To the extent that the defender was not advised of the appointment of the QS and the nature of the assistance provided by him, an opportunity has been afforded for injustice to be done.*" This was a breach of natural justice. Further, it would be necessary to inquire into the precise nature of the services provided by the QS to determine whether the breach of natural justice had in fact been material.

Babcock contacted the adjudicator who referred to paragraph 14 of his terms saying that the use of QS assistance had been entirely at his discretion and he did not need to advise the parties of it. The parties had known about this since March 2019 but no issue had been taken with it. He further noted that he thought that the assistance provided could have been of a clerical and administrative nature.

When it came to the QS assistance, it was agreed that the relevant test was not "Has an unjust result been reached?" but "Was there an opportunity afforded for injustice to be done?" However, immaterial breaches of natural justice would not render a decision unenforceable: the provisional nature of an adjudicator's decision justified ignoring non-material breaches.

The question for Lord Doherty was whether it could be said at this stage, without inquiry, that this defence was bound to fail; in the usual way this was an application for summary judgment not a full trial. The Judge did not think that paragraph 14 communicated an intention to employ QS assistance. It made provision for what would happen if it subsequently transpired that the adjudicator considered that he was going to need QS surveying input. It was also going "too far too fast" to infer at this stage that the assistance provided by the QS was of a type which did not require to be disclosed. It was arguable that clause 2.3 concerned matters which were likely to be material to the decision-making process ("help that he considers necessary in reaching his decision"), such as QS opinion or advice upon which an adjudicator proposes to rely. With material of that sort, fairness required that it be disclosed to enable the parties to comment on it.

The Judge "inclined" to the view that even if the assistance provided by the surveyor was merely clerical and administrative, natural justice required (i) that the adjudicator ought to have told the parties that the surveyor had been engaged; and (ii) that while detailed disclosure for comment would not have been necessary, the adjudicator ought to have indicated (in brief, broad terms) just what it was that the surveyor was doing. Here, the Judge could not, without inquiry, conclude that there had not been a material breach of natural justice. Therefore whilst the Judge observed that it was "highly regrettable" that HS took six months to raise the complaint, he concluded that it was in the interests of justice that there should be an inquiry or full hearing.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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