Neutral Citation Number: [2020] EWHC 4 (TCC)

Case No: HT-2019-BRS-000016

IN THE HIGH COURT OF JUSTICE
THE BUSINESS & PROPERTY COURTS AT BRISTOL
TECHNOLOGY & CONSTRUCTION COURT (QBD)

2 Redcliff Street
Bristol BS1 6GR

Date: 07/01/2020

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

(1) VVB M&E GROUP LIMITED **(2) VVB ENGINEERING (UK) LIMITED**	**Claimants**
- and -	
OPTILAN (UK) LIMITED	**Defendant**

- -
- -

Justin Mort QC (instructed by **Lewis Silkin LLP**) for the **Claimants**
Marc Lixenberg (instructed by **Freeths LLP**) for the **Defendant**

Hearing date: 11 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HH JUDGE RUSSEN QC

His Honour Judge Russen QC:

Introduction

1. This is my judgment on the Claimants' application for delivery up of goods which came on for a one-day hearing on 11 December 2019 and was argued before me by Mr Justin Mort QC for the Claimants (together "**VVB**") and Mr Marc Lixenberg for the Defendant ("**Optilan**").

2. For reasons I summarise below, the outcome of the application turns upon the true meaning and effect of two documents, described as Vesting Certificates, which are in materially identical terms and which made provision for a transfer of ownership of the goods or materials in question ("**the Vesting Certificates**").

3. The Vesting Certificates are in materially the same form. In the Appendix to this judgment I have set out the terms of the document relating to the materials now said by VVB to be vested in Network Rail. The other one was also between the same parties but related to materials to be vested in a company then known as VVB Engineering Limited whose position I explain below. It related to £784,066.17 worth of materials (compared with the £636,655.25 in the one I have replicated in the Appendix).

4. Save where I highlight below any point of detail on the figures, what I say about that one certificate holds good for the other. Each was dated 20 September 2018 but was delivered by Optilan the following day, 21 September. The essential question I have to decide is whether the Vesting Certificates have operated to vest in the relevant transferee the ownership of the materials identified by the schedules to them.

5. I am grateful to counsel for their clear written and oral submissions upon the effect of the documents. The latter occupied a full court day and left no time for me to give an oral judgment. Although I had started the hearing in the hope that it might be possible to deliver one, the intricacy of counsel's submissions on the detail of the other contractual documentation, together with their joint position as to the hoped-for finality of any judgment (subject of course to any viable appeal), indicated that the proper course was to reserve judgment having reflected further upon the arguments. However, there is a degree of urgency behind the application, which I outline below, and I indicated to the parties that my reserved judgment would focus upon the key issues between the parties – as they came to be further narrowed by the time of the hearing – and would not attempt to explain fully the background to the litigation as that emerged from the 5 witness statements filed on the application. In fact, the parties were agreed that the outcome of the application turned upon issues of construction which were entirely a matter for legal submissions.

6. Indeed, it is on that basis that the parties further agreed that I should decide the application on the basis that my decision would dispose of the entire Claim, either in favour of VVB or in favour of Optilan. As issued, VVB's Application Notice dated 10 October 2019 sought a "*final or interim order for delivery up of goods or alternatively damages pursuant to Sections 3 and 4 of the Torts (Interference with Goods Act) 1977 as set out more fully in the attached Draft Order*." The draft Order

contemplated both that there would be a trial, if no further interim order in the meantime, and that VVB would provide a cross-undertaking in damages as the price of it. It therefore clearly contemplated the grant of *interim* relief (compare CPR 25.1(1)(e)) even if the effect of that would be that the value presently attached to Optilan's current possession of the materials in question was to be replaced, once and for all, by the value of the said undertaking. But at the hearing each side subscribed to the view that I should go further and decide, once and for all, the question of VVB's alleged unconditional entitlement to the materials.

7. At this point it is appropriate for me to mention one slight wrinkle in that position adopted by the parties.

8. Certainly the emphasis of Mr Mort's submissions on behalf of VVB was that the Vesting Certificates provided for a *future* vesting of ownership of the materials covered by it, some time after the date of the certificates. During counsel's submissions I referred to some of its terms which (subject to ambiguity created by other wording) perhaps supported the notion of an *immediate* vesting of ownership. Mr Lixenberg then courteously indicated that the court would be going too far in finally deciding the claim against his client on the basis that they did provide for an up-front transfer of ownership when that had not been the thrust of VVB's argument. That prompted me to say two things and Mr Mort QC to say two more.

9. My observations in response were to the effect that the parties were inviting me to reach a final conclusion upon the meaning of the Vesting Certificates, a question of mixed fact and law, and that exercise necessarily involved the court considering (in the light of the clearly established approach to interpreting commercial documents) all potential meanings that a textual and contextual approach to its interpretation might reasonably support. And that whereas Mr Lixenberg's objection *might* perhaps steer the court back on to the safer course of concluding only that VVB had established the existence of a triable issue that the goods had by now vested under the terms of the Vesting Certificate, so that *interim* relief might be granted in their favour, I had noted that there was no evidence before me as to the value of the cross-undertaking in damages which had been proffered by VVB as the price of such relief. As the giving of a cross-undertaking is the default position in any order for interim injunctive relief (see CPR PD25A para. 5.1) such evidence would obviously have been relevant to the exercise of the court's discretion, if it came to that stage of things, in determining where the balance of convenience came to rest.

10. Mr Mort QC made two observations on the point. The first was to say that his client had been in the process of preparing evidence in relation to the value of the cross-undertaking in damages, with a view to serving it early in the week of the hearing, but had been dissuaded from doing so by Optilan's indication that the Claim should be finally determined for or against them. Secondly, and with more impact in my view given that the need for such evidence at an earlier stage should perhaps have been prompted by the terms of the Application Notice, Mr Mort pointed out that the parties were inviting the court to determine his client's pleaded case which (as appears from paragraphs 19 and 27 of the Particulars of Claim) was to the effect that ownership of the materials either "*had vested or were to be vested*" under the terms of the Vesting Certificates.

11. By the conclusion of the hearing before me the parties were both still of the view that I should dispose of the Claim by either granting or refusing the (final) remedy of delivery-up. As I observed at the hearing, it appeared to me that the most obvious way forward was to treat VVB's interim application as if it sought summary judgment on the Claim. Mr Mort QC suggested that the better approach might be to treat this Part 7 Claim as akin to a Part 8 Claim suitable for determination on the first return date. The TCC is of course amenable to granting declaratory relief on Part 8 Claims on an expedited basis where the circumstances justify it. Mr Mort briefly raised a concern about the threshold to be satisfied by an applicant for summary judgment but, the point being one over the true construction of the Vesting Certificates and Optilan in effect (and in the absence of any formal application of their own) inviting the court to dismiss the Claim, my view was and remains that nothing really turns on the burden of proof. I have therefore proceeded as if each party was respectively applying for summary judgment for and against the Part 7 Claim.

12. Counsel's submissions were directed to points of construction. It is apparent from what I say below that the issue as to whether the materials in question belong "to VVB" (expressing the point loosely) or belong to Optilan is important because of the insolvency of a company now called Value Realisations Limited ("**VRL**", formerly incorporated under the name VVB Engineering Limited and therefore having a name very similar to the second claimant's). VRL, by that former name, was a subcontractor of the contractor Costain Limited on the Crossrail project, on which Network Rail is the ultimate employer. Optilan contracted with VRL as a sub-subcontractor under a Sub-subcontract dated 10 September 2015 ("**the Sub-subcontract**"). The materials which are the subject matter of the Vesting Certificates were obtained for the purpose of performing the Sub-subcontract. Within just over a month from the issue of those certificates VRL had gone into administration.

13. Although the first claimant then acquired the business and assets of VRL, in administration, it did not take over the company's liabilities (if and to the extent undischarged) under the Sub-subcontract with Optilan. Establishing ownership of the materials covered by Vesting Certificates is likely to be considerably more valuable to Optilan than any right to prove in the administration of VRL in respect of any established liabilities on the part of VRL under the Sub-subcontract, and indeed would presumably enable Optilan to claim from VVB a separate price for them even if there is no such unsatisfied liability.

14. It was because certain provisions of the Vesting Certificates (in particular the indicia of ownership provided by their numbered points 3 and 6) resonated with the kind of situation sometimes encountered in the insolvency of a business acting as a depositary (or similar) that I raised with counsel the possibility of them having effected an immediate vesting. Of course, here it was VRL not Optilan (who has not suffered any insolvency process and still holds the materials in dispute) which went into administration but those particular provisions might have been said to be hallmarks of an immediate proprietary interest in VRL. Although I did not then mention any specific authority, I had in mind the kind of issue that sometimes arises where an insolvent company holds goods or investments which, ostensibly at least, have been earmarked for the customer who has paid for them: compare *In re Goldcorp Exchange Ltd* [1995] 1 AC 75, 107A-C.

15. Despite what I have said above about the claim turning upon points of construction, it is necessary to provide some background to the proceedings.

16. In doing so, I need not dwell on what Mr Mort QC observed to have been Optilan's willingness to take a number of points against VVB's claim which had since been abandoned. He was correct to point out that previously, in mid-October 2018, Optilan had chased VRL to move materials from their storage in Coventry on the basis that VRL (prior to the asset sale) was entitled to them. And also that by a letter dated 5 February 2019 their solicitors, Freeths LLP, had written in terms which recognised that many of the materials "*would appear to be in the ownership of Network Rail*" and that they would deal with VVB in relation to them as and when VVB produced evidence to show they had the authority to act on behalf of Network Rail. Although VVB's evidence in support of the application and Mr Mort's skeleton argument had addressed the question of VVB's standing to recover the materials, including those said by VVB to have vested in Network Rail under the relevant one of the Vesting Certificates, by the time of the hearing Optilan had abandoned any challenge based upon a lack of authority.

17. However, as Mr Mort accepted, what might otherwise be regarded as "merits points" do not assist the court on what is essentially an issue of pure construction.

Background

18. I summarise as briefly as I can the background to the remaining issue of contractual interpretation as follows.

19. On 10 September 2015, VRL (by the company's former name) entered into the Sub-subcontract with Optilan for the provision of telecommunications services for the North East Spur of the Crossrail project. The Sub-subcontract was a construction contract for the purposes of Part II of the Housing Grants, Construction and Regeneration Act 1996, as amended ("**the 1996 Act**"). The works covered by it included the procurement, manufacture, assembly and delivery to site of plant and materials for installation in the works on the Eastern Crossrail project. They were part of VRL's Phase 1 works on the Eastern Crossrail project. VRL was responsible for the design and construction of mechanical, electrical and public health works for the 13 stations on the eastern section (from Stratford to Shenfield) and their related infrastructure. Optilan's works related to telecommunication systems upgrades to 12 of the stations so as to provide a Station Infrastructure Surveillance System ("**SISS**") that was joined up with other sections of the Crossrail network.

20. The evidence on the application contained a flavour of how the Eastern Crossrail project suffered from significant design delay and that elements of the concept design were either missing, or of poor quality, or late. This meant that VRL was often without full design information. Mr Warren Reynolds was VRL's nominated Subcontractor's Representative for the purposes of the Sub-subcontract. He explained in his witness statement how VRL was only able to install about 20% of the SISS works prior to the cessation of their works in August 2018.

21. Phase 1 came to an end on 31 August 2018 as a result of Costain, acting on the instruction of Network Rail, giving an instruction on 31 May 2018 for the cessation of VRL's works under their Subcontract with Costain. The instruction was passed down to Optilan on 29 August 2018. By that stage VRL had processed numerous applications for payment by Optilan. On 16 July 2018 Optilan had submitted their Application for Payment number 37 to VRL.

22. Although the SISS works suffered from the design delays touched on above, that did not hold up the early procurement of specific (and sometimes unique) SISS materials by Optilan. In order to mitigate the effect of such delays Costain instructed VRL in May 2017 to secure procurement of long-lead telecommunications items. VRL passed on this instruction to Optilan so that materials could be procured in the absence of any 'approved for construction' design in June and July 2017

23. The terms of the Sub-subcontract made provision (at clauses 54.4 to 54.7) for the vesting in VRL of goods and materials before they were delivered to the relevant SISS delivery location. This could be either at the request of Optilan or at the direction of VRL (acting through the Subcontractor's Representative) and was to be "*with a view to securing payment under clause 60.1*". I will refer to these provisions further below. The instruction given by VRL in June and July 2017, to "*procure quantities from the AFC submissions and tendered quantities where the AFC design has not yet been issued*" brought those provisions into play.

24. Optilan's Application for Payment No. 37, dated 16 July 2018, had identified to the total value of "Vested Material" as being £1,856,808.70 of which the materials with a value of £1,005,123.92 were stated to be at Optilan's Coventry premises. VRL's Payment Certificate No. 37 was issued in response to that application, on 14 August 2018. Although Optilan had sought a payment in excess of £1.8m, VRL certified the sum of £274,366 as being due.

25. However, the difference was attributable to the certification of figures other than the £1,005,123.92. Both in relation to that sum and the amount said to have been previously paid in respect of vested materials at Coventry - £929,807.01, so as to leave a balance of £75,316.91 in respect of the period covered by number 37 – the Application for Payment and the Payment Certificate were in accord.

26. On 17 August 2018, Optilan issued vesting certificate number 12 (in place of an earlier one that had referred to the combined value of materials both at Coventry and already on site) in respect of the "*Materials as scheduled embedded in Interim Application No. 37*" in consideration of VRL agreeing to include in the next interim payment under the Sub-subcontract the sum of £1,005,123.92 in respect of those materials. Its wording was materially the same as that of the Vesting Certificate set out in the Appendix. It also stated: "*We declare that property in the Materials shall unconditionally vest in Network Rail upon receipt of the interim payment referred to above*". That was a reference to "*the next interim payment*" mentioned at the beginning of vesting certificate number 12. On 18 September 2018, VRL made that next interim payment by paying Optilan under Payment Certificate No. 37. That payment was late but VVB's evidence is that it included an element of interest for late payment. The payment also reflected Optilan's application for £1,005,123 in respect of vested materials.

27. That earlier vesting certificate number 12 does not feature in the parties' respective pleaded cases and I have already noted that, although Payment Certificate No. 37 was for a sum considerably less than the Application for Payment No. 37, Optilan cannot complain that, by that certificate, VRL somehow treated application in relation to vested materials at Coventry otherwise than as had been proposed by Optilan. The only reason I therefore mention that earlier vesting certificate is because the evidence served in reply by VVB on the application (in the form of the second witness statement of Aldous Smewing) made the point that:

> "*Many of the materials included in Vesting Certificate 12 were also included in the Vesting Certificate in favour of Network Rail dated 20 September 2018 (and so had already vested in Network Rail under Vesting Certificate 12)*"

28. In his witness statement, Mr Smewing went on to explain that the point related to some £496,680.51 of materials which had been included in vesting certificate number 12 and then included again in the later Vesting Certificate for the benefit of Network Rail. He exhibited a document identifying by item number and value the materials in question and the duplication between the two certificates.

29. Mr Lixenberg said it would be wrong for me to rely and act upon this evidence when the point had not been pleaded. As with the point about the potential grounds for concluding that the Vesting Certificate provided for an immediate transfer of ownership (see paragraph 14 above) that objection falls to be considered in circumstances where both parties have urged me to reach a final decision on the claim. Any objection in principle to me relying on the evidence in reply must be viewed in that light and cannot, in my judgment, survive the encouragement to decide the case summarily either for or against VVB. Obviously, the court would not be bound to act upon the parties' expectations if it concluded that the objection in principle appeared to be backed by the existence of a dispute of fact which militated against a summary disposal of the case; though I note that Mr Lixenberg did not make any complaint about the adequacy of VRL's payment on 18 September 2018 (from the point of view of it "feeding" vesting certificate number 12) or suggest that Mr Smewing's analysis was worthy of further investigation at a trial.

30. Later on the same day that Optilan issued vesting certificate number 12, namely 17 August 2018, Optilan submitted Application for Payment No. 38. The sum applied for in respect of "Vested material – Coventry" had risen from the £1,005,123.92 certified by Payment Certificate No. 37 to the sum of £1,270,443.03. The application claimed a total net amount due of £2,057,685 for the period ending 18 August 2018 in respect of all items covered by the application. VRL responded to that application by Payment Certificate No. 38 which was issued on 7 September 2018 and certified a significantly lower sum due of £668,081.50. However, the certificate (issued at a time when VRL had not made payment under Payment Certificate No. 37) gave a slightly higher gross certification value in respect of the materials at Coventry: £1,397.317.71. It assumed that the value of £1,005,123.92 included within Payment Certificate No. 37 was an "*amount previously paid*" (even though the payment under that previous certificate was not in fact made until 18 September).

31. It is part of Optilan's argument against the present claim under the Vesting Certificates that VRL's payment under that Payment Certificate No. 38 was both late and inadequate. VRL only paid the sum of £334,00 (half the sum certified) on 1 October 2018. It should have been paid in full on 22 September 2018. As Payment Certificate No. 38 had in fact more than met Optilan's expectations in respect of the sum applied for in respect of vested materials at Coventry, no complaint is made about the terms of the certificate itself.

32. On 13 September 2018, Optilan submitted Application for Payment No. 39, being "*the next interim payment*" contemplated by the Vesting Certificates (issued a week or so later). This sought payment in the sum of £1,744,350.20. The total value for the "Vested materials – Coventry" had increased to £1,549,304 (compared with the values of £1,005,123 and £1,270,443 respectively contained in the two earlier applications for payment and the total amount of £1,397.317.71 in Payment Certificate No. 38).

33. By the time Optilan made their Application for Payment No. 39 on 13 September they obviously knew the terms of VRL's Payment Certificate No. 38 issued on 7 September 2018 and that VRL were proposing (at least) to pay £668,081.50 under it. The evidence also shows that, by September 2018 and the instruction for the cessation of VRL's works by then having been passed on to Optilan, the parties were working towards a final valuation of Optilan's account. It was common ground between the parties that this included the exercise of collating a comprehensive list of materials at Optilan's Coventry premises with a view to identifying the materials at the Coventry premises which either had already vested, and needed to be released, or in respect of which Optilan had applied for an interim payment and which needed to vest.

34. The evidence before the court included photographs which showed sealed boxes of materials located at Optilan's Coventry premises and marked prominently with labels stating as follows:

> "VESTED
>
> Property of Network Rail for Crossrail NES Project"

35. The photographs in question had been sent through by Optilan in support of their Application for Payment No. 38 which was submitted on 17 August 2018.

36. With a view to the working towards a final valuation, the parties arranged for VRL's Project Quantity Surveyor, Mr Ikenna Ezendiokwele, to take an inventory of the materials at Coventry during his visit to the premises over the 3 days between 10 and 12 September 2018. Mr Ezendiokwele used the schedule of materials in support of Optilan's Application for Payment No. 38 as the template for his inventory. For two days of his visit he was accompanied by Mr Lawrence Port who, in a consultancy role, was acting as Optilan's quantity surveyor. It was later email exchanges between Mr Ezendiokwele and Mr Port, at the time when the Vesting Certificates were issued, which led to the agreed schedules of materials being attached to the Vesting Certificates. As I mention below, their exchanges on 21 September 2018 show that they clearly had the split in value between the two Vesting Certificates and the need

to reconcile them with the earlier vesting of £1,005,123 under vesting certificate number 12 firmly in mind.

37. On 18 September 2018, Costain and VRL entered into a final account settlement agreement under the terms of which VRL agreed to accept a sum in full and final settlement of their Final Account payable under the terms of their Subcontract with Costain. That agreement included a schedule of materials that had been delivered to Optilan but which had not yet been delivered either to VRL or to any of the Crossrail sites. The agreement took the form of a "Final Account Statement" under the terms of which VRL was:

> *".... to provide the materials detailed on the schedule in Appendix A (Attached to this statement). These materials shall be delivered to a location to be agreed with Network Rail. [VRL] shall ensure that the materials are adequately insured, protected, stored and transported so that they are not damaged or lost. In the event of any loss or damage to these materials then [VRL] shall rectify such loss or damage so that the materials conform in every respect with the provisions of the Subcontract*."

38. The said Appendix A comprised a list of materials (identified by part number and with a specified value) which was headed "Materials to be vested for Network Rail". Those identified as "Coventry Stock" and "In Coventry Stores" had a value of £645,452.92. It also had a total figure of £307,019.52 for items "in build" at Coventry.

39. The Vesting Certificates bore the date 20 September 2018 but were not signed and submitted by Optilan to VRL until the following day. It was common ground between the parties that the form of the Vesting Certificates was proposed by VRL. Mr Ezendiokwele had sent the form of Vesting Certificate in relation to VRL to Mr Port on the morning of 21 September for signature and return. At the hearing of the application, I referred to the terms of clause 54.4.4 of the Sub-subcontract which referred to a vesting by entry into "*a vesting agreement (in the form in Appendix – Part 13 of the Sub-Subcontract Agreement)*" when no such form appeared in the copy of the contract in the bundle. Counsel confirmed to me their belief that none existed. They did point out that paragraph 11 of Part 1 of the Appendix instead stated that "*The Subcontractor shall confirm to the Sub-subcontractor those items or goods that are to be vested and the form of vesting agreement to be used*." That is essentially what Mr Ezendiokwele did.

40. By a later email on the morning of 21 September 2018 (sent at 11:54) Mr Port appears to have contemplated that there might be a single vesting certificate for the combined amount of £1.471m and that it should either state that it superseded any previously issued vesting certificates or explain how it is to be reconciled with the previous vesting certificate number 12 in relation to the vested materials with a value of £1,005,123. As appears from the terms set out in the Appendix to this judgment, neither proposal was acted upon. That probably accounts for the point that it is only by reference to a witness statement that VVB now say that £496,680.51 worth of materials covered by the certificate in favour of Network Rail had already vested: see paragraph 27 above.

41. From the terms of the Vesting Certificate set out in the Appendix it can be seen that the vesting of ownership for which the certificates provided was not to be in return for

an immediate payment of the value of the materials covered by each one. Payment of such a "price" really would have required the parties to address Mr Port's point about overlap with the earlier vesting certificate number 12 and the amount of any credit to be attributed to VRL for the fact that it had paid under Payment Certificate No. 37 two days previously.

42. Instead, the consideration given by VRL in return for the proposed vesting was their agreement "*to include in the next interim payment under the Contract the sum of [£636,655.25* or *£784,066.17]*". Although it cannot be said that the language of the Vesting Certificates followed any prescribed form of the kind contemplated by clause 54.4.4 of the Sub-subcontract, the documents were clearly otherwise issued in accordance with the vesting provisions of that contract in mind. The essential difference between the parties' positions, as I explain them below, is over the extent to which the issuing of the Vesting Certificates in that context requires them not to be read (in accordance with the thrust of Optilan's case) as free-standing contractual documents but instead as being subject (so far as the stated values within them are concerned) to the full implications of the interim payment certification process contained in clause 60 of the Sub-subcontract.

43. Clause 54.4 of the Sub-subcontract made provision for the transfer of ownership ("*property*") in certain materials to VRL before they were delivered to site. Apart from being the subject of a vesting agreement (sub-clause 54.4.4), any such materials to be vested had to meet certain criteria specified in sub-clauses 54.4.1 to 54.4.3. The language of paragraphs 1 to 4 of the Vesting Certificates reflect those criteria. Although not material to the dispute between the parties, their paragraph 5 might be read as an express qualification of the right of VRL (under clause 54.6 of the Sub-subcontract) to reject any materials approved for transfer (as being not in accordance with the provisions of the contract so that they would immediately re-vest in Optilan) were it not for the penultimate un-numbered paragraph of the certificates. Paragraph 6 of the Vesting Certificates (and the final un-numbered paragraph) reflects clause 54.6.2 of the Sub-subcontract and Optilan's continued responsibility for any loss or damage to the materials prior to delivery and the need to effect such additional insurance as might be necessary to guard against the same. Paragraph 8 of the Vesting Certificates is consistent with clauses 54.6 and 54.7 of the Sub-subcontract which provided that Optilan's possession of the vested materials would be for the sole purpose of delivering them to VRL and that Optilan disclaimed any lien over the vested materials in respect of any sum due under the Sub-subcontract.

44. The Vesting Certificates do not expressly refer to clause 60 of the Sub-subcontract (headed "Certificates and Payment") but any vesting in accordance with clause 54.4 would, as the introductory words of that clause make clear, be "[*W]ith a view to securing payment under clause 60.1*". The Vesting Certificates did refer to the inclusion of the stated value "*in the next interim payment*". Clauses 60.1 to 60.11 of the Sub-subcontract contained the provisions in respect of applications for interim payments, certification of such payments and pay less notices.

45. Under the terms of clause 54.6 of the Sub-subcontract, ownership of the materials to be vested would have passed "[*U]pon the Subcontractor's Representative approving in writing the transfer in ownership*". Upon that written approval being given they would "*vest in, and become the absolute property of*" VRL. I have already noted that Warren Reynolds was the nominated Subcontractor's Representative. Although Mr

Ezendiokwele was closely involved in compiling and approving by email the schedules of materials which accompanied the Vesting Certificates, the parties were agreed that there was no document that might be regarded as significant on the timing of any vesting beyond the Vesting Certificates themselves.

46. The issue between the parties has essentially arisen because the Vesting Certificates used language that does not appear in the Sub-subcontract when they stated on behalf of Optilan that:

> "*We declare that property in the Materials shall unconditionally vest in [VRL] upon receipt of the interim payment referred to above.*"

47. Even when read alongside the clauses of the Sub-subcontract identified in paragraphs 43 and 44 above, the language of the Vesting Certificates is confusing. That is because their paragraph 3 contained a warranty and undertaking by Optilan that the materials had been set aside and marked with a notice to the effect that they were *already* vested in VRL or Network Rail (as any of them covered by vesting certificate number 12 – see paragraph 26 above – were no doubt already vested). And, as I remarked to counsel, paragraph 6 appears to contemplate that they had an insurable interest as if risk, with ownership, had indeed passed upon the provision of the certificates.

48. I recognise that paragraph 4 of the Vesting Certificates is then again capable of being read as inconsistent with my last observation, because it refers to property in the materials presently being with Optilan ("*is vested*") but, taken as a whole, that paragraph can be read as a warranty of unencumbered title on the part of the transferor. Its confirmation of an ability to "*pass title in the Materials absolutely*" is not necessarily inconsistent with the conclusion that the document as a whole operated to effect an *immediate* transfer of ownership. Clause 54.4.2 of the Sub-subcontract contained a proviso that any materials to be vested in VRL would be ones in which Optilan either already had title or, if not, in respect of which Optilan's title (as transferor) would be "fed" by the act of vesting in VRL.

49. As I have already noted, Optilan's Application for Payment No. 39, dated 13 September 2018, sought what would be the "*the next interim payment*" referred to in the Vesting Certificates and, therefore, "*the interim payment referred to above*" in the wording of the Vesting Certificates quoted in paragraph 46 above.

50. On 4 October 2018, VRL issued Payment Certificate No. 39. This certified the net payment due to Optilan at nil. Three days earlier VRL had made the payment under Payment Certificate No. 38 in a sum which was only half the amount certified. That payment was made late and included contractual interest. Optilan's Defence stated that the remaining half was paid on 9 November 2018.

51. VRL's Payment Certificate No. 39 (in respect of the interim payment expressly identified by the Vesting Certificates) falls to be considered in the light of VRL's agreement to include within the next interim payment the sums of £636,655.25 and £784,066.17, respectively, in consideration of which Optilan provided the Vesting Certificates. [The schedules attached the Vesting Certificates show that those stated

values included Optilan's 16% mark-up charged in accordance with the Sub-subcontract.] Instead of those previously identified sums, the payment certificate identified, under the heading "Gross Certification", the sums of £632,027.43 (for the materials in the Coventry "stores" intended for Network Rail) and £667,993.56 (for the materials in the Coventry "workshop" intended for VRL). Mr Ezendiokwele's witness statement explained that the difference in valuation was attributable to his removal of certain software items that Optilan had not yet provided. And (at least on the basis that the previous Payment Certificate No. 38 was taken at face value) it said that amounts of £665,644.14 and £731,673.57 had been "previously paid" against those values.

52. Payment Certificate No. 39 was issued under clause 60.2.1 of the Sub-subcontract. Its effect was to certify that no payment was due to Optilan. In part, this reflected a contra-charge (said to be justified by a deduction for handover documentation which had not been supplied) which, unlike in the case of previous payment certificates, had been charged at 5% of the gross certification (before contra-charges) rather than at 5% of the additional value for the 28 day period under certification.

53. Later, on 11 October 2018, VRL issued a Pay Less Notice in respect of interim payment 39 ("Pay Less Notice 39"). In respect of the materials now in issue, the Pay Less Notice 39 contained gross certifications of £632,027.43 for "stores" materials and £789,947.37 for "workshop" materials (with same amounts for "previously paid" as those given in Payment Certificate No. 39).

54. The difference between the amounts in VRL's Payment Certificate No. 39 and those in their Pay Less Notice 39 (in relation to those materials) was referable to three matters, each going to the value of the workshop materials. The first was that, by the date of Pay Less Notice 39, VRL had received electronic copies of software licences, leading to the "certification" (see below) of an additional £120,700.43. The second was an increase of £5,881.20 and the third (to be offset against that increase) was a decrease of £4,627.82 reflecting the fact that there were only 2 not 3 items of a unit known as a CR121 IE4000 (each with a value of £3,989.50 to which the 16% mark-up had been applied). Optilan had confirmed in an email of 13 September 2018 (and therefore before the date of the Vesting Certificates) that there were only two such units.

55. Nevertheless, Pay Less Notice 39 still certified the payment due to Optilan at nil. As with Payment Certificate No. 39, this in part reflected the inclusion of a contra-charge on the basis of a 5% deduction from the overall account value. Mr Smewing's second witness statement on behalf of VVB said that this deduction was fully justified under the terms of clause 6.2.5 of Part 5 of the Appendix (the Sub-subcontract Works Brief) forming part of the Sub-subcontract and in circumstances where the delivery of documentation became important in the latter stages of the project, and where he had been pressing for it for some time.

56. That is the background to the dispute between the parties. Optilan point to the undervaluation of materials in Payment Certificate No. 39, what they say is the nullity of the subsequent Pay Less Notice 39 (when the Payment Certificate had already said that nothing was due) and to the later shortfall in VRL's payment under Payment Certificate No. 38 in saying that the trigger for the unconditional vesting of materials under the Vesting Certificates has not been met.

The Rival Contentions

57. The parties' arguments focused upon what was required for an unconditional vesting of the materials under the language of the Vesting Certificates quoted in paragraph 46 above.

58. Optilan has defended the claim by VVB that ownership in the materials has passed by reference to adjustments made by VRL (in response to Optilan's application for the interim payment mentioned) in their Payment Certificate No. 39. That certificate is said by Optilan to be the relevant document for testing whether or not a vesting took place, rather than the Pay Less Notice which followed it. However, as both stated that no payment was due, Optilan argued that neither was effective to produce a vesting upon "payment".

59. In addition, Optilan argued that it was an implied term of the Vesting Certificates that VRL would not take away what it had certified (on 7 September 2018 by Payment Certificate No. 38) to have been the value of Optilan's works by initially paying only half of interim payment 38 and doing so late. VVB's response was to say that the Vesting Certificates said nothing about interim payment 38, whether expressly or impliedly.

60. In his skeleton argument Mr Lixenberg had made the point that, even if Optilan were wrong in their argument about the irrelevance of Pay Less Notice No. 39 on the question of vesting, the certification in that notice was still inadequate to fulfil the term for unconditional vesting in favour of Network Rail. Whereas the Pay Less Notice certified a sum *greater* than the £784,066.17 stipulated for inclusion in the interim payment if the workshop materials were to vest in VRL, it had been submitted that Pay Less Notice was still inadequate to secure a vesting of the stores materials in Network Rail when it had certified the sum of £632,027.43 rather than the sum of £636,655.25 stipulated by the relevant Vesting Certificate. However, Mr Lixenberg did not press this point in his oral submissions. He was obviously right not to do so in circumstances where there was a clear, uncontroversial explanation for the difference in figures: see paragraph 54 above. As Mr Mort QC had observed in his earlier submissions, the Vesting Certificate could not sensibly operate in relation to an item which did not exist, either in terms of Optilan passing ownership of it or complying with their undertakings to insure against its loss and permit inspection of it prior to delivery.

61. That concession by Optilan about the adequacy of the Pay Less Notice (if, as a matter of principle, it is established that VVB were able to rely upon it in support of their argument on vesting) meant that the principal issues between the parties were:

    i) which of Payment Certificate No. 39 or Pay Less Notice 39 was the relevant document for the purposes of testing whether or not VRL had complied with their agreement (recorded in the Vesting Certificates) to include the stated values in the next interim payment;

    ii) whether an actual "payment" of some monies to Optilan (rather than the "nil payment" provided for by both Payment Certificate No. 39 and the Pay Less

Notice 39) was required to trigger the unconditional vesting of the materials; and

iii) whether it was a condition precedent to ownership passing under the Vesting Certificates that the sums certified by the Payment Certificate and the Pay Less Notice as having been paid (in reflection of what had previously been certified to be due by Payment Certificate No. 38) were in fact paid on time.

Payment Certificate or Pay Less Notice

62. The issue here between the parties is whether it is Payment Certificate No. 39 or Pay Less Notice 39 that is the reference point for determining whether or not VRL complied with its obligation under the Vesting Certificates to include the stated values within the next interim payment as the price of vesting.

63. Payment Certificate No. 39 responded to the Application for Payment No. 39 with different sums than those specified in the Vesting Certificates, in the case of the workshop materials a considerably lower one. Optilan contends that Payment Certificate No. 39 is the operative document and that its terms show that VRL clearly failed to comply with that obligation.

64. VVB, on the other hand, argue that the terms of the Pay Less Notice 39, is the operative document for testing whether or not VRL complied with their obligation under the Vesting Certificates, so far as the inclusion of the stated values was concerned. They say that notice was issued in accordance with the regime for interim payments in clause 60 and superseded the Payment Certificate; and its terms show that VRL fully complied with their obligation which triggered the vesting of the materials.

65. There was an issue between the parties over whether or not, as VVB argued, Optilan had, in effect, requested the issue of Pay Less Notice 39 by VRL after VRL had issued Payment Certificate No. 39. By a letter dated 9 October 2018, Optilan responded to that payment certificate saying that its contents were "*totally unreasonable and unacceptable*". A number of points were made against it, including the deductions against the materials and in respect of handover documentation. The letter concluded by saying it was "*evident that [VRL] have manipulated the certificate to result in a NIL payment*" and urgently requested a review of the certified amount prior to the payment due date. VRL wrote a detailed letter in reply on 11 October 2018 and concluded by saying *"[W]e will issue a Payless Notice, as you request, to correct any arithmetical errors and to incorporate new Information that has become available to us since the Issue of Certificate 39*".

66. There was no mention of this correspondence in the parties' pleaded cases on the basis that it might have some contractual significance. Nevertheless, to the extent that it has any bearing upon the question of interpretation of the Vesting Certificates, or Optilan's ability to run certain arguments in relation to that issue, I accept Mr Lixenberg's submission that this exchange of correspondence cannot be read as Optilan inviting the service of a Pay Less Notice. It is clear that Optilan were inviting

VRL to serve a corrective Payment Certificate which would produce something more favourable than the "nil" certification.

67. Whether or not the unrequested Pay Less Notice 39 (with its equally unfavourable punchline for Optilan) is nevertheless capable of being objectively read as an effective substitute for any such corrected payment certificate is, however, another matter.

68. Mr Lixenberg said that Payment Certificate No. 39 was the touchstone against which compliance or otherwise with the trigger for vesting of ownership was to be tested. It was by the Payment Certificate that VRL had, in accordance with clause 60.2.1 of the Sub-subcontract the "*amount which in [its] opinion*" was due to Optilan. The Pay Less Notice 39, which in the light of the concession mentioned above was adequate to meet the expectation of the Vesting Certificates in relation to both the stores materials and the workshop materials, did not operate to "certify" sums as VVB alleged. Mr Lixenberg said that that the Sub-subcontract (at clause 60.6.1.3) did not contemplate the service of a Pay Less Notice where VRL had made a certification under clause 60.2.1 and that, even if did, the Pay Less Notice could only be of effect *"[I]f a payment is due from the Sub-contractor to the Sub-Subcontractor*": see clause 60.11. Mr Lixenberg referred to section 111 of the 1996 Act which, in providing the statutory basis for a pay less notice, referred to it being "*a notice of the payer's intention to pay less than the notified sum*": section 111(3).

69. As VRL's Payment Certificate had certified that no payment was due, Optilan argued that the Pay Less Notice was best regarded (at least in relation to the impact of the Vesting Certificates) as a nullity. The Pay Less Notice did not give notice to pay a sum less than the zero sum notified by Payment Certificate No. 39. There was nothing for it to bite on.

70. The competing submissions of Mr Mort QC also relied upon the 1996 Act. He said that, as the parties were subject to sections 110A and 111 of the 1996 Act, VRL were entitled (and, if they considered themselves entitled, then obliged) to serve the Pay Less Notice if their calculations justified that step. Mr Mort said that a Pay Less Notice could be served either in response to Optilan's application for payment (clause 60.6.1.3) or in respect of a payment notice issued by VRL (clause 60.11). The language of section 111(3) and (4) showed that that notice should specify the basis on which the proposed sum had been calculated and expressly contemplated (as did section 110(A)(4) in relation to payment notices) that it might specify that the sum due was zero.

71. Mr Mort QC referred to the format of Payment Certificate No. 39 and the Pay Less Notice 39 and correctly observed that that latter was just as much a calculation as the former, and in the same format, but with a different heading. He referred to the first instance decision of Coulson J, as he then was, in *Grove Developments Limited v S&T (UK) Ltd* [2018] EWHC 123 (TCC), [70, fn 9] where the judge said that the focus of the 1996 Act upon "notices" and "applications", as opposed to "certificates", made no essential difference to the fact that such notices are part of the process by which interim applications are made. See also the observation of Sir Rupert Jackson in giving judgment on the appeal in *Grove*: [2018] EWCA Civ 2448, at [92].

72. I note that the provisions of clause 60.10 of the Sub-subcontract are entirely in keeping with that later judicial observation in equating certificates under the contract with notices under the 1996 Act.

73. As I have explained in paragraph 54 above, there were three reasons for the difference in calculation between the Payment Certificate and the Pay Less Notice, so far as the materials were concerned. Arguing the point at the level of principle, Mr Mort said it would be astonishing if the paying party who had served a payment notice was not thereafter entitled to serve a pay less notice saying that, still, nothing was due to the applicant but for different reasons than those previously given. The now unchallenged correction made in the Pay Less Notice in respect of the missing third unit CR121 IE4000 in the workshop perhaps serves to illustrate the point.

"Payment"

74. The Vesting Certificates provided for an unconditional vesting "*upon receipt of the interim payment*".

75. Mr Mort QC submitted 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 Pay Less Notice) for the next interim payment. The vesting took place upon the provision of the Pay Less determining that no payment was due. Mr Lixenberg argued that neither Payment Certificate No. 39 nor the subsequent Pay Less Notice could constitute a "*receipt*" by Optilan of any "*payment*" upon which vesting might occur.

76. Mr Lixenberg did not go so far as to contend that the effect of the Vesting Certificates was such that, whatever other adjustments fell to be made in the Payment Certificate (or the Pay Less Notice if significant) there must have been a payment in favour of Optilan of at least the combined values stated in the Vesting Certificates. Instead he said that there had to be some payment. Only by such a payment could it be said that Optilan was in "receipt" of the stated sums.

77. In relation to the contra-charge based upon the 5% deduction of the gross certification (see paragraphs 52 and 55 above) Mr Lixenberg referred to the provision of the Sub-subcontract under which the deduction had been made: clause 6.1 of Part 5 of the Appendix. The contractual provision referred to a right to "*withhold*" that percentage from any Application for Payment. He submitted that a payment *withheld* is necessarily not a payment *received* for the purpose of satisfying the Vesting Certificates.

78. Mr Mort QC contended that Optilan's argument offended the general rule that clear words are required if a party is to be held to have abandoned a contractual right such as a right of set-off: see *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717H. Clause 76 of the Sub-subcontract conferred a right of set-off upon VRL which extended to the right to deduct any sum recoverable from Optilan under the contract. Mr Mort referred to the decision of the Court of Appeal in *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501 which referred to *Gilbert Ash* in concluding that a tenant's covenant to pay rent "without any reduction" was not sufficient to exclude their right of equitable set-off.

Payment Certificate No. 38

79. Optilan argued that it was a condition precedent to title passing under the Vesting Certificates that there had been full and prompt payment under Payment Certificate No. 38. This was said to follow from the assumption made in both Payment Certificate No. 39 and Pay Less Notice 39 that full payment ("*Amount Previously Paid*") in respect of that earlier certificate had been made.

80. Mr Lixenberg said that VRL could not "take away" what had previously been certified. He submitted that such condition precedent was both so obvious it went without saying by the parties and necessary to give the Vesting Certificates business efficacy. Accordingly, it met the test for being implied into the Vesting Certificates as a matter of fact.

81. In his submissions in reply, Mr Mort QC made a passing reference to what Lord Hoffmann had said in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, at [17]. Although Mr Mort recognised that the decision had subsequently been qualified (he must most obviously had in mind the decision of the Supreme Court in *Marks & Spencer v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72); [2016] A.C. 742) he submitted that Lord Hoffmann's observation was a healthy reminder of this basic point:

> "The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss will lie where it falls."

Decision

82. The meaning of the Vesting Certificates is ambiguous. The language of an unconditional vesting upon a future event (receipt of the next interim payment) conflicts with those other provisions which are couched in language consistent with an immediate vesting.

83. The Vesting Certificates therefore fall to be construed in accordance with the approach to interpretation summarised by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and *Wood v Capita* [2017] AC 1173, at [8] to [14]. Where the language of a document admits of more than one meaning, each must be tested against other provisions in the document and its commercial consequences. Faced with ambiguity the court is entitled to prefer the interpretation which is consistent with business common sense and to reject any other meaning(s). The exercise of interpreting the document involves consideration of its language against all the background reasonably available to the parties at the time they contracted with each other. Deference to such "contextualism" may in an appropriate case exceed the respect to be accorded to any literal analysis of the document (including careful parsing of words or phrases within it) that may otherwise be compelled by the bedfellow of "textualism": see *Wood v Capita*, at [13], per Lord Neuberger. His lordship mentioned such factors informality, brevity or lack of consistency throughout the document where the contextual approach might prevail.

84. The Vesting Certificates suffer from inconsistency in the respect I have mentioned. Arguably, they also suffer from ambiguity-generating brevity in expressing the concept of "receipt" of an interim payment under the Sub-subcontract.

85. In my judgment these ambiguities are to be resolved in favour of VVB.

86. Saying that does not mean, however, that the Vesting Certificates can be read as providing for an *immediate* vesting in accordance with VVB's primary case as (see paragraph 14 above) I had initially thought might be the position. That would in my view effectively involve the impermissible striking through of the words which the parties expressly chose to include in relation to a vesting upon a future event. Although the structure of clause 54.4 of the Sub-subcontract contemplated Optilan committing to the passing of ownership as the price of "securing" a later payment for the value of the materials passed - (i.e. procuring such payment, without retaining any unpaid vendor's lien, or the like, that would offend clause 54.7 with the timing of the vesting ordained by written approval of VRL given in accordance with clause 54.6) - the words they chose to include plainly indicate otherwise. The vesting was to come later.

87. The language of postponed vesting, upon the occurrence of a different event from that of written approval under clause 54.6, is inconsistent with the unvarnished operation of clause 54.

88. However, in my judgment, it does not also follow that one can sufficiently divorce the interpretation of the Vesting Certificates from the provisions of clauses 54 and 60 of the Sub-subcontract in a way that success on Optilan's argument would require.

89. The essence of Optilan's argument appears to me to come close to saying that that the express language of the Vesting Certificates somehow quarantines 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 clause 60 interim payment process is to be permitted. In my judgment, that cannot be done when the Vesting Certificates:

    i) did <u>not</u> specify that the materials would vest in return for payment of the stated value within them. As I remarked to counsel, they cannot be treated as bills of sale at a specified price; but

    ii) instead, were plainly issued with that interim payment process in mind. In other words, although the language of the Vesting Certificates cannot be compared with any standard form of the kind contemplated by clause 54.4.4, they were plainly issued in accordance with clause 54.4 (and the purpose behind it). The introductory language of the Vesting Certificates confirmed the obvious in stating that they related to the Sub-subcontract and the only provision in that contract governing the vesting of materials yet to be delivered to site was clause 54. In turn, the introductory language of that clause makes it clear that the payment which the vesting of such material was designed to produce was one under clause 60.1. Clause 60.1 governed the interim applications by stipulating for "*a detailed calculation and breakdown of the sum <u>the Sub-subcontractor believes</u> he is entitled to be paid for that period* ...." (my emphasis). Nothing in the language of the Vesting Certificates

operated to inhibit either Optilan or VRL in expressing their position in the interim payment process on matters other than the value of the materials.

90. Once those basic points are recognised, it must follow that the Vesting Certificates cannot be read as somehow "securing", come what may, payment of the stated values within them. Nor do Optilan go so far as to suggest they did, as opposed to saying that they did not become effective in the absence of a payment of some money by VRL on their Application for Payment No. 39.

91. The promise by VRL 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 (per clause 60.1) by reference to those included values cannot be taken to override the assessment by VRL of what in their opinion was due for the purpose of responding with the interim payment certificate under clause 60.2. 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. Not only did that language not aspire to meet the *Gilbert Ash* test for the exclusion of any right to challenge to the recoverability of an identified contractual sum but it instead expressly recognised that a process of certification would be required in order to determine what payment would actually fall to be made.

92. These observations serve to answer Optilan's point that the language of the Vesting Certificates made the transfer of ownership conditional upon the payment of some amount of money. Why should that be so when VRL might have included the full specified value of the to-be-vested materials in their own calculations, and certified their full amount as due for payment, but perhaps legitimately made a deduction (in respect of previous overpayments in respect of other matters applied for by Optilan) which not only impacted upon a receipt of that full value but in fact reduced the overall amount due to nil? As Mr Mort QC asked rhetorically, why should the transfer of £1m of materials depend upon whether there is a net certification of £1 or one of zero?

93. I therefore accept VVB's argument that what the Vesting Certificates recorded was an agreement by VRL to include the identified values within the "Gross Certification" column of Payment Certificate No. 39 which would then be addressed alongside other certified items and against payments previously made.

94. As to the issue between the parties as to whether VVB are now stuck with the non-compliant Certificate No. 39 (so far as the inclusion of those gross certified values are concerned) and cannot rely upon the (now recognised to be) full certification of the Coventry materials by Pay Less Notice 39, this too in my judgment involves Optilan arguing against the reality of the potential implications of the interim payment process. VRL was contractually entitled to serve the Pay Less Notice under clause 60.11 and the calculation within it was part of that process. If VRL had not become insolvent, so that Optilan's right to receive the next interim payment was not obviously less valuable than the right to retain ownership of the Coventry materials, I imagine that Optilan would have been content to have focussed less upon the form's appellation and instead treated the Pay Less Notice as superior to the Payment Certificate, at least so far as the materials valuation was concerned, and a legitimate step in the interim payment process.

95. Whether or not that is so, in my judgment it would be wrong to disregard it as somehow irrelevant now that the retention of title has become an issue. The insolvency of VRL clearly provides a real incentive to Optilan to argue that Pay Less Notice 39 is of no effect but, given the content and appropriate timing of that notice, the argument involves an unwarranted focus upon form over substance.

96. Nor do I accept that Optilan can impugn what would otherwise be the effectiveness of Pay Less Notice 39 to transfer ownership by reference to the suggested implied term requiring full and timely payment under the previous Payment Certificate No. 38.

97. As with the other points made above, which flow from considering the context in which the Vesting Certificates were issued and their subject matter and purpose, the argument based on an implied term falls foul of the basic point that the Vesting Certificates were concerned with the *next* interim payment. They said nothing about the previous one (nor, for that matter, the impact of earlier Payment Certificate No. 37 on vesting certificate 12). Obviously, that silence is not fatal to the implication of a term (to fill it in the way suggested by Optilan) but it is entirely consistent with the conclusion that the Vesting Certificates were concerned to regulate only one matter: the sums to be attributed to the Coventry materials in the next interim payment.

98. In my judgment, the case for saying there was an implied qualification to VRL's right to ownership of materials by reference to matters governed by past certification is not only uncompelling but, so it seems to me, would result in Optilan in effect obtaining belated security against those materials in respect of the previously certified sum. And this despite the point (see paragraph 101 below) that, as at the date of the Vesting Certificates, it was not obvious that such security would be required and, as things turned out, VRL would have had grounds for saying that, by 9 November 2018, any such "security" ought to be treated as redeemed.

99. As Mr Mort QC observed, even though VRL did all that was required in certifying the full value of the Coventry materials in Pay Less Notice 39, such an implied term would deprive VRL of ownership by reference to the non-payment of a previous payment with which the Vesting Certificates were not concerned. I recognise that the parties may have agreed to depart from the strict contractual position of an immediate vesting, accompanied by a disclaimer of any lien, in relation to interim payment 39 but there is simply no basis for concluding that the Vesting Certificates were aimed at also ensuring that Optilan received payment for interim payment 38 falling due the following day.

100. Section 110 of the 1996 Act required the Sub-subcontract to contain a mechanism found in clauses 60.1 to 60.11 for determining what interim payment, if any, fell due and when. By the date the Vesting Certificates were provided VRL had issued Payment Certificate No. 38. In my judgment, the Vesting Certificates no more regulated the payment of Payment Certificate No. 38 than they sought to inhibit VRL from introducing other matters, beyond the inclusion of the value of the Coventry materials, into the calculation that formed the basis of Payment Certificate No. 39 or Pay Less Notice 39.

101. When the Vesting Certificates were issued the date for payment under Payment Certificate No. 38 had not fallen due. It should have been paid in full the day after they were issued, on 22 September 2018. As I have noted, only one half of the

payment was made, late, on 1 October 2018. The balance was only paid on 9 November 2018. Payment Certificate No. 39 and Pay Less Notice 39 were issued between those dates, and each certified as an "*Amount Previously Paid*" in respect of the Coventry materials the value of them previously certified by Payment Certificate No. 38. As that statement, taken at face value, was at best only partially true, Mr Mort QC is right to say that they must be taken as referring to the amount *previously certified as due* to be paid. That interpretation is compelled by the provisions of clauses 60.2 and 60.6 of the Sub-subcontract which make it clear that each interim payment deliberately addressed only its own 28 day period; and that it is no purpose of a later payment certificate in the payment cycle to "re-certify" sums due or falling due under an earlier one.

102. If Optilan had wanted to make the operation of the Vesting Certificates conditional upon the next day's payment of Payment Certificate No. 38 (I have mentioned above that they had received a late payment of Payment Certificate No. 37 only 3 days before the certificates were issued) they could have suggested as much to VRL. They did not do so and there is no basis for implying a term to the same effect by reference to what later transpired to be default in its payment.

103. The point that the Vesting Certificates were only forward looking, and directed at the next interim payment rather than entitlement under any earlier ones, is reinforced by a thought provoked by Mr Smewing's evidence in reply: see paragraphs 27 and 28 above. To the extent that paragraph 4 of the Vesting Certificates or the principle of *nemo dat quod non habet* do not operate to cover the point, I would have thought that – in relation to a document intended to pass ownership of materials – there was a strong case for an implied term that ownership in some of them had not already passed from Optilan by reason of an earlier interim payment. Yet, although Mr Port had raised the issue of a duplicated vesting, only for it not to be addressed by the Vesting Certificates which instead left open under paragraph 4 the possibility of a breach of the warranty of title in respect of some of the materials, the parties were simply not using the Vesting Certificates to address respective entitlement under earlier payment certificates.

104. It is important to emphasise that this judgment is concerned with the true construction of the Vesting Certificates, in relation to the passing of ownership, and not with the merits of the case in terms of the adjustments made by the Payment Certificate No. 39 or the Pay Less Notice 39, nor the belated payments under the earlier Payment Certificate No. 38. Any dispute over those matters would have been a matter for adjudication under the Sub-subcontract.

105. But the fact that the decision of the adjudicator would not, in the absence of agreement between the parties, provide a final resolution of any dispute over such matters – see section 108(3) of the 1996 Act and clause 66B.2 of the Sub-subcontract – in my judgment reinforces the conclusion that the only obligation upon VRL under the Vesting Certificates (pending the resolution of the final account between the parties, including by legal process if necessary) was to include the stated values as gross certified sums within the certification process. That the vesting of ownership also turned upon fulfilment of a further, interim "obligation" involving financial accountability sounding in (some) payment, which later legal proceedings *might* show to have been without any ultimate contractual basis, highlights the uncertain and precarious nature of the competing argument. The uncertainty over the existence of a

proper hook for such an obligation is in my view also demonstrated by the court's ability to later open up the sum shown to have been *immediately* due (but not necessarily *primarily* due as a matter of final contractual analysis) under an interim payment application which was not met at the time with a controversial payment certificate or pay less notice leading to an adjudication: see the judgment of Sir Rupert Jackson in *Grove*, at [86]-[90].

106. In relation to the adjustments made by VRL in Pay Less Notice 39, the Vesting Certificates expressly anticipated the interim payment process by which they might be made. That process could produce the result that a zero sum was said to be "due". The decision in *Connaught Restaurants* demonstrates that if VRL had a right to make deductions against the sum applied for by Optilan, by reference to wider matters than the gross certification of the sums in the Vesting Certificates, then the exercise of that right would be tantamount to payment (and "*receipt*" within the meaning of the Vesting Certificates) of the sum otherwise due.

107. I therefore determine the application and the claim in favour of VVB. I shall grant on a final basis the relief sought by the application notice save that there should be no mandatory relief requiring Optilan to deliver up the materials to a given address, as provided for in the draft Order. Instead, as counsel were agreed, the Order should provide for Optilan to make the materials available for collection at their Coventry premises and further provide for Optilan to retain them at those premises pending their collection.

108. Given the degree of urgency behind this relief, I intend to hand down this judgment as soon as practicable and without attendance by the parties. I invite them to agree and submit a minute of order addressing the relief on the Claim and with their proposals for resolution by me (either at a hearing or on paper) of any matter that is not agreed.

APPENDIX

"CERTIFICATE OF VESTING OF MATERIALS

This certificate is for the benefit of WB Engineering Limited whose registered office is Burgundy Court, 64-66 Springfield Road, Chelmsford, Essex, CM2 6JY ("VVB") and relates to the Materials and Contract described in the Schedule attached.

We, Optilan UK Limited of (registered office) Stonebridge Trading Estate, Sibtree Road, Coventry, CV3 4FD, in consideration of VVB agreement to include in the next interim payment under the Contract the sum of £636,655.25 in respect of the Materials warrant and undertake to VVB that:-

1. The Materials are intended for incorporation in Contract 116952 (6.2.1.) Crossrail North East Infrastructure Grip 5 – 8;

2. Nothing remains to be done to the Materials to complete the same up to the point of their incorporation in the Works;

3. The Materials have been set apart and stored at the Premises described in the Schedule attached and have been clearly and visibly marked as follows:

   "These materials are vested and in the ownership of Network Rail. For incorporation into Contract 116952 (6.2.1.) Crossrail North East Infrastructure Grip 5 – 8";

4. Property in the Materials (including but not limited to supplies received by us from a third party for incorporation in the Materials) is vested absolutely in us and the materials are free from all encumbrances and charges and we are able to pass title in the Materials absolutely;

5. The Materials are in every respect in accordance with the requirements of the Contract;

6. The Materials shall at all times after the date of this Certificate until the Materials are delivered to and placed on or adjacent to the Works be insured for their full reinstatement value under a policy of insurance protecting the interests of Network Rail and us against any loss or damage howsoever arising and we have provided to Network Rail and us against any loss or damage howsoever arising and we have provided to Network Rail evidence of the existence of the said insurance policy;

7. The Materials can be inspected at any time upon reasonable notice by Network Rail and/or any of Network Rail's consultants or duly authorised agents or any of them; and

8. We shall not, except for use on the Works, remove or cause or permit the Materials to be moved or removed from the Premises in the Schedule attached.

   We declare that property in the Materials shall unconditionally vest in Network Rail upon receipt of the interim payment referred to above.

   Nothing contained in this Certificate or the Contract or any payment that may be made to us in respect of the Materials shall be taken as any approval by Network Rail and/or any of Network Rail consultants that the Materials are in accordance with the Contract.

   We shall indemnify and save harmless Network Rail from all costs, claims, demands, losses and expenses of whatsoever nature arising from any loss or damage to Materials howsoever arising and any breach or non-observance of any of the terms contained in this Certificate.

   Dated 20th September 2018"