Hilary Term
[2025] UKPC 6
Privy Council Appeal No 0088 of 2023

JUDGMENT

Woodford Construction Ltd (Appellant) *v* Readymix (West Indies) Ltd (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Hamblen
Lord Burrows
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
6 February 2025

Heard on 19 November 2024

Appellant
Daniel Feetham KC
Rowan Pennington-Benton
(Instructed by Freedom Law Chambers (Trinidad))

Respondent
Jason Mootoo SC
Tamara Toolsie
(Instructed by Edwin Coe LLP (London))

LADY SIMLER:

1. Introduction

1. This appeal is concerned with the termination of a contract that entitled Woodford Construction Limited ("Woodford") to excavate and remove raw gravel (known as pitrun) from a gravel quarry operated by Readymix (West Indies) Limited ("Readymix"). The contract was terminated by Readymix in June 2015, with one month's notice, for reasons that were ultimately not relied on by Readymix and which Readymix accepted gave rise to no contractual right to terminate. Rather, Readymix's case at trial was that there was an implied term that they were entitled to terminate the contract if Woodford breached an agreed verification procedure; that Woodford had taken pitrun from the quarry without complying with the checking and verification procedure; and that this was theft of pitrun from the quarry, an express ground for termination in the contract.

2. Woodford brought proceedings for breach of contract, contending that the termination was a wrongful repudiation, causing it loss and damage. Its claim was dismissed at trial. The trial judge, Quinlan-Williams J, held, among other things, that there had been theft of pitrun entitling Readymix to terminate the contract. The Court of Appeal upheld the finding of theft of pitrun and dismissed the appeal. These judgments are addressed in more detail below.

3. Woodford now appeals to the Board. It accepts that it cannot challenge concurrent findings of fact but, in summary, contends that it was unfair for the trial judge to allow Readymix to run a case of theft that had not been pleaded, and that both courts erred in law by misunderstanding the requirements necessary to prove a case of theft. Theft requires dishonesty but neither court referred to dishonesty at all. The trial judge wrongly elided two different forms of conduct: on the one hand removing pitrun without complying with the verification procedure and, on the other hand, theft. The two are not the same. The judge held, only, that there had been removal of pitrun without verification and this in turn and without more, meant there was theft; but she ignored the requirement of dishonesty. The result is that the judge made no sustainable finding of theft and found only a failure to follow the verification procedure.

4. Before addressing these contentions, it is first necessary to describe the relevant contractual provisions relating to termination, the verification procedure agreed by the parties and, by reference to the judge's findings of fact, explain the circumstances that led Readymix to terminate the contract with Woodford.

2. The contract between Woodford and Readymix

5. The contract at the centre of this dispute is dated 25 November 2013. It provides for Woodford to enter, excavate, and remove up to 1,000,000 cubic yards of pitrun from the quarry owned and operated by Readymix. Under the contract, Woodford agreed to prepay for all excavated pitrun before it was removed or hauled, and it would then pay for each load removed on a drawdown basis against that prepaid sum until the complete order for pitrun was exhausted.

6. Haulage from the site was controlled in terms of the hours when it could be carried out and the haulage trucks that could be used to transport the pitrun, which had to be measured by a Readymix technician, and the measurements approved.

7. The contract expressly provided (with references to Readymix as "RML"):

(i) "Absolutely no material is to be sent from the mining site(s) without the presence of an RML checker. Any breach of this would result in immediate termination of the contractor."

(ii) "Reasons for termination of contract:

- Equipment down time in excess of 85%.
- Mining outside of RML's requirements.
- Non-compliance to rehabilitation of exhausted mines.
- Theft of RML's pitrun supply.
- Breach of RML's rules and procedures mentioned with this contract."

8. So far as the reason in the last sub-paragraph is concerned, there were in fact no rules and procedures mentioned within or attached to the contract.

3. The verification procedure

9. There was, however, as the trial judge later found, an agreed procedure governing the excavation and removal of pitrun which included "checks and balances to safeguard against theft". As the judge held at para 25:

> "The undisputed evidence of this procedure is as follows:
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> i. Measurement—before Woodford trucks were allowed to leave the quarry with pitrun, the trucks were measured at Readymix's head office. The load capacity for each truck was determined. A list of trucks was identified by their registration numbers and haulage capacity. That information was transmitted to Readymix's checker. The information was then used to determine and record how much pitrun was leaving the quarry.
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> ii. Prepayment—Readymix was required to prepay for pitrun before it was mined and excavated. An invoice, for the amount of the prepayment, would be sent to Readymix's personnel at the quarry. Woodford's trucks were then allowed to enter and remove pitrun and the amounts removed were drawn down from the prepaid totals.
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> iii. Verification—after the truck was loaded with excavated pitrun, the truck driver stops at the entry and exit point where the Readymix and Woodford checkers would be stationed. The Readymix checker would then verify its contents by a physical inspection to ensure that the truck was not overloaded and was carrying the correct amount of pitrun. Once satisfied, a confirmation slip (also referred to as 'verification slip', 'a docket' or 'inter plant transfer slips') in duplicate, is issued. One to Woodford's driver and Readymix's checker retained the copy. The Readymix checker would also fill out the drawdown sheet and summary sheet which provides details of haulage, the truck driver, the quarry pitrun is being taken from and the truck's registration number (which is also recorded on the confirmation slip). The amount of pitrun removed by Woodford's truck is then subtracted from the original record of the quantity prepaid for by Woodford. This is done until the prepayment is exhausted. Woodford then makes another prepayment and the process is followed."

10. It is clear from the evidence in the case that a significant number of employees called to give evidence by Woodford had previously been employed by Readymix. The peculiarly high number (as she described it) caused the judge to question the motivations of some of these witnesses (para 64). The judge also found that there was "agreement and co-operation between [the Woodford and Readymix checkers] which resulted in unaccounted loads of pitrun leaving the quarry" (para 52).

4. The events leading to termination of the contract

11. The immediate events leading to termination of the contract started on 20 March 2015, when the Readymix acting general manager, Ms Gooljar-Singh, visited the quarry and remained (conspicuously) present on site for some time. There is no dispute that the amount of pitrun recorded as removed by and sold to Woodford for that day came to 472.75 cubic metres. This recorded amount was 80% higher than the average daily sales recorded to Woodford's account during the first quarter of 2015.

12. That hike in recorded sales led Ms Gooljar-Singh to visit the site again on 26 March 2015. As the judge recorded at para 42 of her judgment, Ms Gooljar-Singh described noticing approximately 11 Woodford trucks leaving the quarry without verification documents despite the presence of a Readymix checker and security. Ms Gooljar-Singh was cross-examined about this visit on the basis that nothing untoward occurred. She maintained that she observed the 11 trucks, all filled with pitrun, leaving without checking with security. On her insistence, the security officer then stopped all 11 trucks, they returned to the checker, and they then complied with the verification procedure.

13. Again, it is not disputed that the daily recorded sales to Woodford for 26 March 2015 were 65% higher than the average daily sales recorded for the first quarter of 2015.

14. Woodford's pleaded case, and evidence at trial, was that there was no removal without accounting on 26 March 2015 or at any other time. It offered no other explanation, innocent or otherwise, for the conduct alleged against it on 26 March 2015. It did not call any of its drivers as witnesses. It did not advance a case that 11 trucks leaving without accounting for the pitrun was a simple mistake or that some other method had been used to ensure that the value of the amount removed was in fact deducted from their prepayment. Its sole answer was that relevant practice and procedure were fully complied with. In other words, 11 trucks did not leave the quarry without their haulage being checked and accounted for on that day.

15. On 10 April 2015, Ms Gooljar-Singh visited the quarry for a third time. Her evidence was that she arrived with Darryl Boynes, a production engineer for Readymix, and noticed a Woodford truck with the registration number TBW 9125 leaving the quarry

without the requisite documents. In her presence Mr Boynes stopped the driver of the truck and demanded that he return to Readymix's checker for the appropriate documentation. Ms Gooljar-Singh also spoke to the driver and demanded that he return to Readymix's checker. The driver returned to the Readymix checker (who was Allan Liverpool) and the verification process was completed. She was uncertain who stopped the truck. However she was certain that the truck passed the Readymix checker and the Woodford checker (who was Lorne Quintero) and subsequently returned, on instructions, to comply with the verification process. Ms Gooljar-Singh subsequently emailed the Readymix finance officer, Diane Warwick, on 29 April 2015 to alert her to the events of 10 April.

16. Woodford did put forward an explanation for the events of 10 April 2015. In short, Woodford maintained that two trucks were leaving the quarry at the same time, driven by a father and son and the father presented accounting documentation for both trucks, but otherwise the verification procedure was fully complied with.

17. The checkers, Lorne Quintero and Allan Liverpool, were both called to give evidence on behalf of Woodford about these events. Mr Quintero maintained that no breaches had occurred on the 20 and 26 March 2015. As for 10 April 2015, two trucks left the quarry at the same time, and he received slips for both trucks from Mr Liverpool, Readymix's checker, and handed both to one driver, the father, who always operated in this way and collected the slips for both him and his son. Allan Liverpool gave similar evidence.

18. The judge found that the agreed verification procedure described by each checker was not followed on 10 April. Further, evidence given by Mr Boynes established that Mr Liverpool received a written warning from Mr Boynes about the 10 April 2015 incident. It referred to the truck "TBW 9125 leaving with material (pitrun) without the corresponding RML interplant transfer docket (RML IPTD) to evidence the material dispatched". The warning letter also said that the guidelines had been communicated to Mr Liverpool on several occasions prior to 10 April 2015, but he continued to disregard the company's procedures and policies which were directly linked to his job function.

19. Readymix gave Woodford one month's notice to terminate the contract on 23 June 2015. The notice stated that Readymix "has embarked on a comprehensive review of its operations … the company has decided that it would be in the best interest of all stakeholders to discontinue the current structure … the company is constrained to terminate your current arrangement". This was not, in itself, a valid ground for termination. No other reason for termination was given at the time. After Woodford instituted proceedings, Readymix responded to a pre-action letter citing three new grounds for termination, including that Woodford removed pitrun without complying with the verification procedure so that pitrun was removed without having been measured or paid for by Woodford. At the start of the trial, the other two unrelated grounds were

abandoned, and the termination issue was narrowed to whether Woodford removed pitrun without complying with the verification procedure. It was at this stage that Readymix expressly relied on theft of pitrun as a reason for termination.

5. The judgments below

20. Woodford's claim was tried in the High Court before Quinlan-Williams J: CV2015-03254. The judge dismissed Woodford's claim in her judgment dated 22 November 2018. She held that the well-established general principle (see, eg, *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339) that a contracting party can justify their refusal to perform a contract on a ground that was not relied on at the time of termination applied in this case, and this conclusion has not been challenged on appeal. This meant that Readymix were entitled to rely on the non-verification and theft grounds alleged to the extent that they were proved, as capable of supporting the termination of the contract notwithstanding that they were not specified in the notice of termination. This in turn meant that there were two questions to be answered according to the judge: "did Woodford remove excavated pitrun from the quarry without first presenting for verification?"; and "did Woodford thief pitrun from the quarry?"

21. The judge expressed herself as being satisfied that:

> "32. … it was the common understanding between the parties, that if the verification procedure was not complied with and the trucks bypassed the Readymix checker, the load of pitrun being removed by that driver would not be recorded and subsequently deducted from the prepaid amount. Therefore, Readymix would not have received payment for the truckload of unverified, unchecked pitrun. Clearly and without equivocation, that would amount to theft within the meaning of the contract. It was expressly stated that theft would be a ground for termination of the contract.
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> 33.Whether or not Woodford complied with the verification process for the removal of pitrun, is a matter of fact, to be determined by the evidence and any reasonable inference the court can make from the evidence.
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> 34. In circumstances where allegations of theft and fraud are made, the evidential burden shifts to the party responsible for the allegations, in this case Readymix. The standard of proof is on the balance of probabilities and the more outrageous the allegation, the more evidence is required to uphold [it]: Civil

> Appeal No 276 of 2012 *Dr Rohit Dass v Rosemarie Marchand* at para 49–50."

22. The judge was faced with starkly conflicting accounts of what happened in March and April 2015 and as to whether the agreed verification procedure was properly operated at the quarry by Woodford.

23. Woodford's case was that the verification procedure was always properly operated and there was an outright denial of failings by its staff in operating the agreed verification procedure or any wrongdoing. Moreover, Woodford challenged the evidence of Ms Gooljar-Singh as inaccurate, based on fabricated emails, blatant inconsistencies, and unsupported by contemporary documents believed to exist but not disclosed by Readymix. The judge rejected these challenges, finding that Ms Gooljar-Singh was a credible witness without any motive to make up the allegations against Woodford and she also accepted Readymix's explanations for such inconsistencies in the evidence as were established.

24. The judge went on to find that Woodford did not comply with the contractual obligation for verification of pitrun quantities that were excavated and removed. She held that the "only reasonable inference is that Woodford was removing pitrun without accounting for it, as the contract described, [and] there was theft of pitrun" (para 63). The judge continued:

> "66. The contract terms requiring 'Absolutely no material is to be sent from the mining site(s) without the presence of an RML checker' and that the contract can be terminated for 'theft', are naturally related. Leaving the quarry without a checker verifying the load can be a good indication that there is theft.
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> 67. Based on the evidence, the court is satisfied that Readymix did discharge the burden, to the requisite standard, of on a balance of probabilities, proving that Woodford did remove pitrun from the site without presenting for verification and also proving theft of pitrun. Consequently, the court finds that Woodford's contract with Readymix was not prematurely and wrongfully terminated. The court is satisfied on a balance of probabilities that Readymix had good cause to terminate the contract."

25. Woodford appealed. The Court of Appeal described Woodford's grounds of appeal as falling under two main headings: those concerned with the alleged breach of the verification procedure and those concerned with alleged theft. As to the former,

Woodford argued that it could not be responsible for the verification procedure and if the Readymix checker gave the trucker permission to leave, Woodford and the trucker could not be faulted in doing so. Essentially, the verification issue was more an administrative problem between Readymix and its staff than a matter for Woodford. Moreover, it was neither reasonable nor fair for the court to imply a term that breach of the verification procedure naturally translated into theft and was a ground for automatic termination of the contract. In relation to theft, Woodford complained that the issue of theft had not been pleaded and was raised for the first time at trial. Furthermore, the judge wrongly placed a technical meaning on the word theft. Theft was not the same as failure to verify.

26. By a judgment dated 31 January 2023, the Court of Appeal (Dean-Armorer, Kokaram and Holdip JJA), CA P-414/2018, dismissed the appeal. Woodford's challenge to the judge's findings of fact (including that there had been theft of pitrun) was dismissed as unsustainable. In addressing the two grounds found for terminating the contract, the Court of Appeal observed that they were independent of each other, and each, if accepted as correct, entitled the judge to dismiss Woodford's claim.

27. As for breach of the verification procedure, although the judge did not use the words "implied term" the Court of Appeal (para 137) concluded that the substance of her decision at para 66 (see para 24 above) amounted to a conclusion that there was an implied term which merged the prohibition against sending mining material from the site without a checker with theft of pitrun. The Court of Appeal held that the judge had erred in accepting that breach of the verification procedure alone could give rise to an implied right to terminate the contract (paras 143–144). It continued that such a breach "would not automatically be translated into theft" (para 144) and in its view, a "prolonged incidence of breached verification procedures might be a good indication of theft. It would however seem unfair to infer theft from an isolated incident, or from a few incidents on isolated days" (at para 145). This finding was therefore overturned.

28. However, the Court of Appeal upheld the judge's finding of theft as a proper ground for termination. Although theft had not been pleaded before trial, the Court of Appeal considered that it had been "extensively explored both in cross-examination and in submissions" to the extent that it "became a live issue both at trial and on appeal" (para 149). The Court of Appeal observed that "there is nothing technical about the term theft. The phenomenon of theft is as old as the hills. It means, in a non-technical way, taking the property of another, without their consent" (para 156). The parties had agreed a system of prepayment and drawing down on Woodford's account, and in that context, "the act of removing pitrun without adjusting the account could properly be regarded as theft" (para 157). The judge had "meticulously considered the evidence which was led before her" and concluded that Readymix had proved theft (para 154). She had tested her view of the witnesses against the documents (paras 159–160). Based on Ms Gooljar-Singh's evidence (which was accepted as accurate), there would have been theft of the pitrun had the trucks not been sent back on 26 March and 10 April 2015. By an express term of the contract, this provided a good ground for the contract to be lawfully terminated (para 183).

6. The issues before the Board

29. Woodford has raised several grounds of appeal seeking to challenge the trial judge's finding and the Court of Appeal's decision to uphold the conclusion that there was theft of pitrun entitling Readymix to terminate the contract. These grounds give rise to the following principal issues:

> (i) Whether the courts below erred in their approach to the concept of theft as a ground for termination of the contract between Readymix and Woodford. Woodford contends that the judge erroneously conflated breach of the verification procedure and theft and failed to make proper findings of theft in consequence because she made no express finding of dishonesty. While breach of the verification procedure might be an indication of theft, it would be unfair to infer theft from an isolated incident, or from a few incidents on isolated days in the absence of any finding of dishonesty.

> (ii) Whether the case based on theft was properly entertained by the court notwithstanding the procedural unfairness in the shifting case advanced by Readymix and the fact that theft was never pleaded. Woodford contends that it had no proper opportunity to answer the case of theft.

30. As already indicated, Woodford does not and cannot challenge concurrent findings of fact. More generally, there is no reason for the Board to go behind the judge's findings of fact on the evidence before her. Despite this, at times Mr Feetham KC's submissions (for Woodford) strayed beyond the broad issues identified above and sought to go behind the facts found by the judge. In the Board's view this is plainly impermissible. Woodford has not advanced any ground of appeal suggesting that there was *no* evidence to support any of the judge's findings and the Board will not entertain a challenge based on a perceived inadequacy about the weight of the evidence in this case.

7. The grounds for termination of the contract and the meaning of theft

31. The contract expressly provides three potential grounds for termination that are relevant to this case (see para 7 above). The first states that absolutely no material is to be sent from the site without the presence of a Readymix checker and that breach of this requirement would entitle Readymix to terminate the contract. A fair reading of this express term is that the parties agreed that a single breach of this requirement would give Readymix the right to terminate the contract immediately, but the breach had to involve the physical absence of a Readymix checker. In the face of this clear express term, it is not possible to read this clause as referring to the "presence of a [Readymix checker] who properly discharged his duties" as Mr Mootoo SC (for Readymix) suggested in writing. Had that been the intention of the parties, they could easily have said so. Further, since

there is no suggestion that a Readymix checker was other than physically present on site on both dates in question, this ground simply does not apply. Nor is it possible to imply a term that any other breach of the verification procedure was sufficient for the purpose of this clause. That would be to rewrite the contract.

32. That leaves two other potential express grounds for termination: first, breach of the rules and procedures mentioned in the contract and secondly, theft. Since it is common ground that there were no rules and procedures mentioned in the contract or notified to Woodford, Readymix accept this ground is inoperative and they must succeed on the theft ground to succeed at all.

33. Despite the contractual context, it was and remains common ground between the parties that theft has its ordinary meaning in this contract rather than some technical or different meaning. In other words, when the parties referred to theft of pitrun as a ground for termination of the contract, they are to be taken to have been referring to the ordinary meaning of theft as dishonestly taking property belonging to another, and so as including an element of dishonesty. This was the basis on which the trial proceeded and the appeal to the Board also proceeded on this agreed basis.

8. Did the judge fail to make proper findings of theft because dishonesty was ignored?

34. Mr Feetham contends that the judge failed to direct herself on the need for dishonesty, made no findings of dishonesty and instead simply equated non-verification of the pitrun load with theft so that the only factual question she resolved was whether Woodford complied with the verification process. In his submission, the closest the judge came to a finding even relating to state of mind is para 52 of the judgment in which she said of the Woodford and Readymix checkers: "There was agreement and co-operation between them which resulted in unaccounted loads of pitrun leaving the quarry". In his submission, this does not come close to proper or reliable consideration of the question of theft. Moreover, she failed to explain what she meant by "co-operation" or "agreement" so that the high point of the judge's findings is an unreasoned suggestion of some sort of "agreement and co-operation". Otherwise, the judge's conclusions are limited strictly to breaches of the verification procedure, and do not extend to sustainable findings of theft.

35. The Board does not accept these submissions for the following reasons.

36. First, while it is true that neither the trial judge nor the Court of Appeal used the words "dishonest" or "dishonesty" in their judgments (and the Court of Appeal referred erroneously to the definition of theft as taking the property of another without their consent), the judge did not conflate the two different forms of conduct, breach of the verification procedure on the one hand, with theft on the other. She plainly treated these

as separate issues: see, for example, para 4 where she listed them as separate issues on which separate findings were required:

> "ii. did Woodford remove excavated pitrun from the quarry without first presenting for verification;
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> iii. did Woodford thief pitrun from the quarry;
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> iv. if yes to (ii) or (iii), was Readymix entitled to terminate the contract on those grounds".

37. Para 24 of her judgment is to similar effect. This separate treatment is confirmed by para 67 (which is set out in para 24 above) where, when she came to reach her conclusions, she did so, recognising these as separate issues, disaggregating them, and making separate findings that Readymix had proved "that Woodford did remove pitrun from the site without presenting for verification and also proving theft of pitrun".

38. Secondly, it is implicit in her judgment that a finding of dishonesty was made. The judge recognised that theft involves a heightened evidential burden and expressly equated it with fraud. Fraud necessarily involves dishonesty. Her equation of theft with fraud reflects her implicit appreciation that dishonesty was required for a finding of theft (see para 21 above). As she explained:

> "34. In circumstances where allegations of theft and fraud are made, the evidential burden shifts to the party responsible for the allegations, in this case Readymix. The standard of proof is on the balance of probabilities and the more outrageous the allegation, the more evidence is required to uphold [it]: Civil Appeal No 276 of 2012 *Dr Rohit Dass v Rosemarie Marchand* at paras 49–50."

39. Thirdly, Woodford's argument must be understood in the context of the case it presented at trial. Woodford's case at trial was a straightforward binary case. It argued that there was no factual or evidential basis for the allegations made by Readymix. Rather, Readymix had fabricated the account of theft based on unverified removal of pitrun to extricate the company from the contract with Woodford. Indeed, Woodford went so far as expressly to accept (in written closing submissions to the judge) that if Woodford was in breach of the verification procedure for removal of pitrun, "such a breach leads to the unavoidable conclusion that [Woodford] was guilty of stealing pitrun from Readymix" (para 104 of Woodford's closing submissions). In other words, it accepted that if the evidence of breach of the verification procedure described by Ms Gooljar-Singh was

accepted, then the taking of pitrun in this way would amount to stealing. No alternative case was run by Woodford based on the taking of pitrun without verification by mistake; nor did it seek to explain any substantiated unverified removal on some other innocent basis. In that sense, dishonesty was not put in issue. Woodford effectively accepted that if the judge rejected Woodford's case and found that there was unverified taking of pitrun, there would be nothing to rebut the inevitable inference that this was deliberate taking and dishonest.

40. Fourthly, removal of pitrun without following the verification procedure would bypass the accounting process and mean that there would be no payment for pitrun so removed. The verification procedure was not a mere administrative process for which Readymix were solely responsible, as Woodford has suggested. It was fundamental to the operation of the contract. Removal of pitrun without verification was no different to a customer with a credit account at a supermarket taking a full supermarket trolley out of the store without first presenting the items in the trolley at the till and having them checked off. On the face of it, this is dishonest taking or stealing absent an alternative innocent explanation.

41. Fifthly, and closely linked to the last point, the verification procedure was of central importance. It was the only means by which payment for the pitrun could be effected under the contract. Without the proper operation of the verification procedure, Readymix had no means of knowing how much pitrun was being excavated and removed, and no means of ascertaining the amount of drawdown to take against Woodford's pre-paid amount. The parties must have known that if pitrun was removed from the quarry without following the verification procedure, Readymix would not receive payment for that pitrun. This cannot but have been well understood by Woodford.

42. Sixthly, in this context it is both relevant and significant that it was accepted by Woodford that daily sales of pitrun for 20 March 2015, when Ms Gooljar-Singh first visited the site, were 80% higher than the average daily sales recorded for Woodford for the first quarter of 2015; and on 26 March 2015, when she visited again, were 65% higher than the average daily sales recorded for that quarter. The judge was entitled to infer that the conspicuous presence of Ms Gooljar-Singh at the site had deterred the employees from removing unverified loads that day and that it was likely that in fact similar volumes of pitrun had been removed on other days with the apparent disparity in amounts removed and paid for being the result of an under recording of the volumes in fact leaving the site.

43. Against that background, the judge's finding, in the context of the contract between Woodford and Readymix, that there was deliberate taking of pitrun without following the verification procedure, and therefore without payment on the dates alleged, carried with it a finding of dishonesty. Indeed, it was Readymix's case that the removal of pitrun past the Readymix checker without first stopping to have the pitrun quantity inspected and verified, would carry an unmistakable stamp of dishonesty and would, absent any

justification, appropriately be described as theft by the ordinary commercial man (para 20 of the Readymix written closing submissions at trial). The judge accepted Readymix's case. It might have been better spelled out by her, but the Board is in no doubt that dishonesty is implicit in her findings. The judge's conclusion that the deliberate taking was the result of co-operation and agreement between the parties reinforces that conclusion.

44. Accordingly, in relation to the events of the 26 March, the judge's finding that there was theft of pitrun by means of the trucks leaving the quarry without following the verification procedure, was a finding of dishonest taking and therefore theft of pitrun. Although there was a legal burden on Readymix to prove dishonest taking without payment, having rejected Woodford's case of no breach whatever of the verification procedure, and in the absence of any evidential basis for an alternative non-dishonest taking in breach of the procedure, it was entirely open to the judge to conclude that Readymix had discharged the burden of proving that Woodford engaged in theft of pitrun which was by implication dishonest. The same is true of the events of 10 April 2015 notwithstanding the evidence of the two checkers.

45. Woodford's attack on the judge's finding that there was theft of pitrun by Woodford was comprehensively rejected by the Court of Appeal. At paras 156 to 160 of its judgment, the Court of Appeal upheld the trial judge's finding of theft, stating:

> "156. In our view, there is nothing technical about the term theft. The phenomenon of theft is as old as the hills. It means, in a non-technical way, taking the property of another, without their consent.
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> 157. In the context of the written agreement before us, where there was a system of pre-payment and drawing down on Woodford's account, the act of removing pitrun without adjusting the account could properly be regarded as theft.
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> 158. If indeed theft was proved on a balance of probabilities, with the requisite uplift in evidence, having regard to the seriousness of the allegation, Readymix would have had good ground for termination.
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> 159. Ultimately, this was a matter of an assessment of evidence. After carefully examining the evidence, the judge preferred the evidence of Mrs Gooljar-Singh, who saw the truck bypass the checker without undergoing the process which would account for the removal of pitrun.

> 160. In the process of preferring the evidence of Mrs Gooljar-Singh, the judge relied on a contemporaneous document, being the warning letter to Mr Allan Liverpool and contemporaneous e-mails. It is our view that the judge's assessment of the evidence cannot be faulted."

46. Despite the statement by the Court of Appeal at para 156 which omits dishonesty as an essential ingredient of theft, it is apparent that the Court of Appeal had regard to the agreed system of prepayment under the contract and recognised that a taking without adjusting the account downwards in these circumstances could properly amount to theft. Again, the implication of dishonesty was obvious. Again, although it could have been better spelled out by the Court of Appeal, its approach cannot otherwise be faulted. It found no basis upon which to interfere with the judge's assessment of the evidence, or of her assessment of the credibility of Ms Gooljar-Singh or of her reliance on contemporaneous documents. The Court of Appeal's agreement with the finding of the judge that Readymix had proved on a balance of probabilities that there was theft, was in context and by implication, an agreement that the judge's finding carried with it the stamp of dishonesty.

47. For all these reasons, neither the judge nor the Court of Appeal made any error of law that vitiates the findings of fact made by the judge that Woodford removed pitrun without accounting for it, in circumstances importing dishonesty and that this justified termination of the contract. The grounds of appeal relating to the finding of theft as a ground established by Readymix for terminating the contract must therefore fail.

9. The Board's practice where there are concurrent findings of fact

48. As the Board recently re-affirmed, its practice is not, save in exceptional cases, to undertake a review by way of second appeal against concurrent findings of fact by the courts below: see *Sancus Financial Holdings Ltd v Holm (Practice Note)* [2022] UKPC 41; [2022] 1 WLR 5181. A consequence of this settled practice is that where (as is the position here in light of the Board's conclusion on the first issue) there are concurrent findings of fact, the Board requires an appellant to demonstrate exceptional circumstances which justify a departure from the practice. As the Board observed in *Sancus* (para 8):

> "It is not enough just to assert without giving specific reasons that the case is exceptional, or to describe the alleged miscarriage of justice as gross. Nor will it be enough to say, as did Mr Chaisty [counsel for the defendants] in the present case, that by raising as a separate ground of appeal a claim that there were serious departures from fair procedure, that will simply lie outside the reach of the practice, if the object of raising that

> ground is to sustain an attack on concurrent findings of fact. Of course, such a ground may go towards establishing a sufficiently exceptional basis for disapplying the practice, but not for treating it as simply inapplicable. Finally, it is just as much a challenge to concurrent findings of fact to ask for them to be re-tried as it is to ask for them to be reversed."

10. Has Woodford established an exceptional basis for challenging the concurrent findings of fact?

49. Woodford's alternative ground for challenging the judgments below is based on an argument that the trial was fundamentally unfair, and that this is an exceptional basis for challenging concurrent findings of fact in these proceedings.

50. Mr Feetham complains that the issue of "theft" was not only not referred to in the pleadings or pre-action correspondence, but these failings came on top of an already shifting case. He suggested in writing that Woodford was:

> "wrong footed by the respondent's constant twisting and turning in respect of the grounds for termination. By the time of the trial (in fact, just one day before it) the respondent dropped most of its pleaded case (itself different from its original notice of termination) and proceeded solely on the ground of non-verification (see further, below). This morphed into a new point 'theft'. The appellant perhaps should have sought a ruling from the judge that the issue of 'theft' was *not* part of the case. However, because of everything else that was going on (including last minute applications for disclosure arising from the respondent's change in case) the appellant was effectively 'bounced into' dealing with the point."

51. Because the issue of dishonesty was never pleaded, he contends that the Woodford witnesses never agreed to give evidence and be cross-examined on this point. They did not draft and sign witness statements on the basis that they were going to be witnesses in a fraud or theft trial. Any finding of dishonesty should have been pleaded and put to them in advance so they could decide whether and if so how to address the point in their evidence. Moreover, there was fundamental unfairness in the failure to cross-examine on the question of dishonesty.

52. The Board is not persuaded that it is open to Woodford to base an argument of fundamental unfairness on the failure to cross-examine on dishonesty. This argument is not expressly pleaded as a ground of appeal to the Board, and it was not advanced in the

courts below. Nor is it capable of being read into Woodford's pleaded ground that the "court was wrong to uphold a finding that there was theft of pitrun in light of the fact that this [was] neither pleaded nor proven" (para 34 of the grounds of appeal). This is because para 35 of the grounds of appeal complains that the Court of Appeal "erred in holding that it was permitted to consider the issue of theft because the issue was extensively explored in cross-examination" and that this ignored the fact that the evidence filed by Woodford responded to a differently pleaded case. In other words, the complaint being made in the grounds of appeal was that the Woodford witnesses were unprepared to deal with a case of dishonesty. That is inconsistent with the argument now advanced that there was no cross-examination on the point.

53. In any event, even if pleaded, the Board does not consider that there is anything at all exceptional about the challenge Woodford seeks to make to the concurrent findings of fact made in these proceedings.

54. While it is certainly true that, in general, dishonesty (which is a question of fact not law) should be squarely put to witnesses in cross-examination as a matter of fairness and because it is good practice to do so, all depends on context. *Griffiths v TUI (UK) Ltd* [2023] UKSC 48; [2023] 3WLR 1204 is a recent authoritative restatement by the United Kingdom Supreme Court (Lord Hodge DPSC, with whom the other members of the court agreed) of the long-standing general rule in civil cases that a party is required to challenge by cross-examination the evidence of any witness (whether of fact or an expert) of the opposing party on a material point if he or she wishes to submit to the court that the evidence should not be accepted. However, as the court recognised, there are also circumstances in which the rule may not apply, and ultimately the question for an appellate court in a case where there is such a failure will turn on the question whether the trial, viewed overall, was fair.

55. Here, Woodford made no complaint before the trial judge about any perceived deficiency in Readymix's pleaded case and, as Mr Feetham has frankly acknowledged, it was not raised before the judge as an issue, whether orally or in writing. Rather, as senior counsel for Woodford made clear to the judge in presenting an application for disclosure and to call Mr Boynes as a witness on the first day of the trial:

> "Firstly, as my learned friend identified the sole issue on liability is a finding of fact as to whether we complied with procedures and whether we were, to use local parlance, t'iefin' [stealing] the pitrun. ….
>
> That negatives the allegation that we breached procedure and took pitrun out of the quarry without following proper procedure or that we were stealing."

56. In other words, the central issue seen by both parties to the proceedings, was whether the agreed verification procedure was breached and pitrun removed without accounting for it. Para 104 of the Woodford written closing submissions at trial reflects the high-risk strategy it adopted: Woodford invited the judge to proceed on the basis that a finding of breach of the verification process for the removal of pitrun from the quarry would lead to the unavoidable conclusion that Woodford was guilty of stealing pit-run from Readymix.

57. This is where the battle line was drawn by the parties by the time the case reached trial. It was by then clear and common ground that taking pitrun without following the verification procedure amounted to stealing it. Accordingly, the cross-examination was properly directed at whether the verification procedure was breached and Woodford engaged extensively with this issue at trial. This is clear from written closing and written reply submissions, as well as from the questioning of witnesses during the trial. These all demonstrate that from the first to the last day of trial Woodford not only proceeded on the basis that theft of pitrun in this way was a live issue but invited the judge to determine it.

58. In these circumstances it is also unsurprising that senior counsel for Woodford made no complaint about the failure to cross-examine about dishonesty at trial. Nor was this point raised in the Court of Appeal. Seen in this context, any failure there may have been to cross-examine expressly on the issue of dishonesty is not such a serious failure as to justify the conclusion that the trial was fundamentally unfair.

59. For all these reasons, the Board is not persuaded that the high threshold for establishing an exceptional basis for challenging concurrent findings of fact in these proceedings has been met. To the contrary, Woodford effectively invites the Board to revisit the issues considered at length by the trial judge and the Court of Appeal, in the hope of persuading the Board that those courts failed properly to evaluate the oral evidence in light of the documentary record. That is not an appropriate course to take on a second appeal to the Board.

11. Conclusion

60. It follows that this appeal is dismissed.