Hilary Term
[2026] UKPC 2
Privy Council Appeal No 0062 of 2024

JUDGMENT

Uniform Building Contractors Ltd (Respondent) *v* The Water and Sewerage Authority of Trinidad and Tobago (Appellant) (Trinidad and Tobago)

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

before

Lord Hamblen
Lord Leggatt
Lady Rose
Lord Richards
Sir Peter Coulson

JUDGMENT GIVEN ON
22 January 2026

Heard on 17 November 2025

Appellant
Anand Ramlogan SC
Kate Temple-Mabe
(Instructed by Ganesh Saroop, Freedom Law Chambers (San Fernando, Trinidad))

Respondent
Irshaad Andre Ali
Adam Razack
(Instructed by Invictus Law Chambers (Port of Spain, Trinidad))

SIR PETER COULSON:

1 Introduction

1. This is an appeal from the decision of the Court of Appeal dated 24 November 2023, which itself overturned the earlier decision of the High Court. The dispute arises out of a pipelaying contract dated 23 May 2007 made between the appellant, the Water and Sewerage Authority of Trinidad and Tobago ("WASA"), and the respondent, Uniform Building Contractors Ltd ("UBC"). Pursuant to that contract, UBC agreed to design, supply and install a total of 28.43 km of pipeline from Rio Claro to Mayaro. The contract comprised two separate packages: package 1 relating to 14.4 km of pipeline in the sum of TT$15,928,924, and package 2 relating to 14.03 km of pipeline in the sum of TT$12,642,701.50.

2. Disputes arose between the parties, and the two packages were the subject of termination notices from WASA to UBC dated 28 May and 4 June 2009. UBC commenced proceedings against WASA in May 2013, almost at the end of the applicable four-year limitation period. WASA counterclaimed. Before Kangaloo J, the trial judge, both UBC's claim and WASA's counterclaim were dismissed. UBC appealed the trial judge's decision; WASA did not appeal the dismissal of the counterclaim. The Court of Appeal allowed UBC's appeal in the sum of TT$13,915,215.46, together with interest and costs.

3. Although there were a number of claims and disputes before the trial judge, the claim before the Court of Appeal (and therefore the Board) was limited to four items of work which UBC said they were instructed to carry out by the Engineer as variations, and which entitled them to additional payment under the contract. Those four items of work were:

(i) Laying pipework in the roadway, as opposed to the verges, which required the cutting of the asphalt surface;

(ii) The removal of excavated material deemed to be unsuitable as backfill; and consequently

(iii) The importation of suitable backfill;

(iv) Night work.

It was WASA's case that these were not variations and that, even if they were, UBC failed to comply with the procedural requirements of the contract (at least one of which was unarguably a condition precedent), so was not entitled to any additional sums in any event.

2 The Factual Background

4. WASA's invitation to bidders for the contract was sent out to UBC in August 2006. UBC's tender was prepared and returned at the end of October 2006. Letters of Award were sent by WASA to UBC on 14 March 2007. UBC started work on or around 15 May 2007. The contract was signed and dated 23 May 2007.

5. The contract comprised a large number of documents. Of particular importance to this appeal were the General Conditions of Contract, which were in the FIDIC Yellow Book Form (1999 Edition), for use on design and build projects. There were also Conditions of Particular Application (which were amendments and additions to the FIDIC conditions); the Employer's Requirements (which included technical specifications); and the Bill of Quantities. The Engineer appointed by WASA in accordance with the contract was Mr Barry Paul. The relevant contract terms are set out and analysed below, by reference to the particular issues on appeal.

6. The works that were carried out included the four disputed items noted above. The Engineer, Mr Paul, subsequently gave evidence on behalf of UBC to the effect that he considered that these items were variations. There was, however, an almost complete absence of contemporaneous documents dealing with how those four items of work had come about.

7. Subsequent disputes about testing and an alleged failure to provide a method statement for a bridge crossing led to the termination of the contract in 2009. UBC originally raised separate claims in respect of that termination but those were not pursued on appeal. However, an element of the TT$13m-odd awarded by the Court of Appeal included a claim for loss of profit due to the termination. That element of their decision therefore appears to be an error.

3 The Judgments Below

8. Following a two-day trial, the High Court judgment was delivered on 17 February 2017. Having set out the evidence (including that of Mr Paul) in some detail, the trial judge's conclusions began at para 112. She held that the contract conditions "catered for all eventualities, unforeseen circumstances and delays that could be anticipated in a project such as this. The contract would have provided for supervision, notifications, and approval processes and for variations." She went on to find that UBC "chose to deviate

from the express terms of its contract with WASA, for example, with the night works engagement and did so at its own risk and for its own account outside of the fixed price of the contract. In fact, this court accepts that the fixed price agreed upon by the parties took into account some, if not most, of the eventualities and circumstances which occurred during the course of the project", para 114.

9. As part of her analysis of whether there were implied terms, she found at paras 121 and 122 that the contract was "complete and effective", and that the sums claimed by UBC were based on terms that did not form part of the contract. She dismissed the claim in its entirety.

10. Following an appeal hearing, in a judgment delivered on 24 November 2023, the Court of Appeal overturned the trial judge's decision. They found at para 42 that her judgment "was against the weight of the evidence and the judge misunderstood the significance of important aspects of the evidence and did not take account of relevant evidence which was placed before her". They went on to summarise the evidence at trial and, at para 43, described the evidence of Mr Paul as "the clincher to the case for UBC".

11. The heart of the Court of Appeal's judgment can be found in the following paragraphs:

> "47. In this context, when one looks at the evidence as a whole and objectively, it is clear that although the parties signed the agreement with the FIDIC terms incorporated, the management of the contract demonstrated some flexibility in its actual day to day operation. Hence, the approach of, after the fact, returning to the strict literalist language of the contract, without examining the evidence of how the contract was in fact performed, leads to an unfair outcome and not one that can be justified on the evidence.
>
> 48. There was strong evidence that the changes made to the project as detailed by UBC's witnesses were in fact variations. The pipes were being laid on the roadway and not the verge. The excavated material was being removed instead of being reused. Significantly larger amounts of new material had to be sourced and brought in. Mr Thomas explained the change in quantities which resulted from this. Night work was being done instead of solely day work due to congestion and complaints of the residents. Most importantly, WASA's site engineer approved these as variations.

49. Even if the contract provided for one method in the execution of the contract, the contract itself allowed for variations to be made. Parties are entitled to mutually agree a different method of performance. This is clearly what took place here based on the evidence before the judge. This is different from what clause 3 of the general FIDIC contract provided for, that the engineer had no authority to amend the contract. This was not an amendment of the contract. Variations and adjustments were contemplated by the contract.

50. Further, while the contract may have provided for notice in writing for changes, it is clear that WASA, through the site engineer, waived these requirements as explained by the witnesses. Discussions occurred on an on-going basis on site and adjustments were made. These were detailed by the witnesses in their evidence. As Mr Paul explained, his priority was in getting the project done. There was also clear evidence that WASA was given notice of the change of the prices for materials from the bill of quantities and that no objection was taken to those changes and in fact approval was given by Mr Paul. It would be fundamentally unfair in the circumstances after the engineer had approved the works being done and agreed they were variations for which additional payments were to be made later on, for WASA to seek, after the fact, to dispute that these additional payments did not arise…

…

58. Mr Paul's evidence was to the effect as well that the additional works were approved with the payments to be made later. The 28-day period for submission of claims was therefore waived. It is clear from the evidence that the FIDIC terms were varied and waived in several instances based on the stated intention to have the project proceed as quickly as possible. In particular, provisions for notices in writing and for specific periods for submissions were put aside. Decisions were taken onsite after discussions and instructions were given. Neither WASA nor UBC insisted on the procedures for notice of variations or the time frame for claims being complied with. The evidence was that instructions were given by the site engineer Mr Paul who was aware of the terms of the contract. The manner in which the contract was terminated also informed the submission of the claim at the time and in the manner it was done."

12. In answer to the point made by WASA that UBC had failed to comply with clause 20.1, which provided a strict time limit for making claims under the contract and a clear statement of the consequences of non-compliance, the Court of Appeal indicated at paras 51-53 that this provision did not apply once the contract had been terminated.

4 The Board's Task

13. On behalf of WASA, Mr Ramlogan SC urged the Board to conclude that the Court of Appeal had wrongly interfered with the findings of fact by the trial judge, and that those should be reinstated. He relied on the cases that warn appellate courts against interfering with findings of fact, such as *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48. He also relied on the Board's recent decision in *Christo Gift v Dr Keith Rowley* [2025] UKPC 37 for the proposition that the Court of Appeal should only interfere with findings of fact when it is satisfied that the trial judge was plainly wrong. It was not enough to say, as the Court of Appeal did here, that the trial judge's decision was against the weight of the evidence.

14. Whilst Mr Ramlogan was right as a matter of principle, that approach can have no application in the present case. That is because, on analysis, the trial judge's findings of fact were negligible. Although she concluded that the FIDIC conditions encompassed most of the subsequent events, she did not go on to explain how or why she had reached that conclusion. She did not address the four disputed items of work, beyond the comment noted at para 8 above, concerning the night works. Accordingly, the Court of Appeal was entitled to consider for itself whether or not the four items were variations, and the consequences of UBC's failure to comply with the relevant contractual requirements.

15. But in the Board's view, there are three particular difficulties with the Court of Appeal's own approach. First, although they concluded that the four items were variations, they did not refer to the terms of the contract itself. Whether or not an item of work is a variation is primarily a function of the contract terms, so the absence of contractual analysis was, with respect, a fundamental flaw in their reasoning. Secondly, the Court of Appeal's conclusion that, on the one hand, the Engineer's conduct did not amount to an amendment of the contract (which he was prohibited from agreeing) but that, on the other, that same conduct waived the relevant contractual requirements, fails to give full effect to the terms of the contract and is contradictory. Thirdly, there are problems arising out of the Court of Appeal's approach to the issue of waiver and estoppel (or what they called "fairness"), an issue which had neither been pleaded, nor addressed in the evidence, nor raised in any form before the trial judge.

16. Accordingly, the Board's task is fourfold. First, it must consider the nature and scope of the general terms of the contract between the parties, to see what might have been expressly or impliedly included in the agreed lump sum. Secondly, against that

background, and by reference to certain of the specific terms of the contract, an analysis is required of whether or not the four disputed items were variations, as defined in the contract. Thirdly, it is necessary to analyse the procedural failings on the part of UBC and the extent to which they bar UBC from making any claim for the four disputed items in any event. Finally, the Board will consider the general issue of fairness and, in particular, how and to what extent the question of waiver and estoppel arose, or could have arisen, in this case.

5 The Nature and Scope of the General Terms of the Contract

17. The principal conditions of contract were the FIDIC Yellow Book (1999 Edition). That is a standard form for a civil engineering project where the contractor is responsible for both the design and the construction of the works. It is a lump sum contract: clause 14.1 (a) of the FIDIC conditions stated that "the Contract Price shall be the lump sum Accepted Contract Amount". This form therefore envisaged that the contractor had allowed for all foreseeable risks in its rates. It is designed to provide as much financial certainty as possible for both sides. That is of particular importance where, as here, the contracting authority is a publicly funded body.

18. There were numerous provisions within the contract documents which defined the broad extent of the risks being taken on by UBC. Some of the most significant are identified below.

19. Clause 4.11 of the FIDIC conditions provided:

> "The Contractor shall be deemed to:
>
> (a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and
>
> (b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10 [*Site Data*] and any further data relevant to the Contractor's design.
>
> Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor's obligations under the Contract (including those under Provisional Sums, if any) and

all things necessary for the proper design, execution and completion of the Works and the remedying of any defects."

20. The contract included various additions and amendments to the FIDIC conditions, contained in the Conditions of Particular Application. Amongst those additional conditions were the following:

(i) Sub-clause 1.1.6.13, which provided:

"The Contractor shall be responsible for preparing and taking full responsibility for his own preliminary design and final design."

(ii) Sub-clause 4.10, which provided:

"Site Data (General Conditions of Contract)

The Contractor shall be deemed to have inspected and examined the Site, its surroundings, and other available information, and to have satisfied himself before submitting the Tender, as to:

(a) The form and nature of the Site, including the sub-surface conditions through borehole data,

(b) The hydrological and climatic conditions including environmental aspects,

(c) The extent and nature of the work and materials necessary for the execution and completion of the works, and the remedying of any defects, and

(d) The Contractor's requirements for access, accommodation facilities, personnel, power transport, water and other services

(e) The laws, procedures and labour practices of the Country

The Contractor shall be deemed to have obtained all necessary information as to risks, contingencies, and all other circumstances, which may influence or affect the Tender. The Contractor shall carry out, at his own cost, any additional investigations and shall obtain during and/or after the Tender price, any further information which the Contractor considers to be necessary for the proper design and execution of the works or which the Contractor considers may influence or affect his tender."

(iii) Sub-clause 5.1, which provided:

"General Obligations

The Contractor shall carry out, and be responsible for, the design of the Works. Design shall be prepared by qualified designers who are professional engineers registered as such in their home countries, and eligible for registration in Trinidad and Tobago and who comply with criteria (if any) stated in the Employer's Requirements…

The Contractor holds himself, his designers, and design sub-contractors as having the experience and capability necessary for the design. The Contractor undertake that designers (whether or not part of a consortium) shall be available to attend discussions with the Employer's Representative at all reasonable times during the contract period and extending to the defects liability period.

No action or inaction on the part of the Employer and/or the Employer's Representative will transfer the responsibility for the design, construction and execution of the works to the Employer or the Employer's Representative"

21. The Employer's Requirements included the Civil/Sitework Design Guidelines. These provided at clause 1.3:

"…Limited ground investigation work has been carried out and the available information is issued from these documents and shall not form part of the Contract. The Contractor is responsible for drawing his own conclusions from the

information provided in so far as they may affect the works and for the determination of any existing services.

The Contractor shall be deemed to have satisfied himself that he has sufficient information on the nature of the ground on which to base his rates and prices.

The Contractor shall verify by trial hole the location, depth and nature of existing underground services indicated and where none are indicated to verify same prior to construction. Prices are to include for all excavations, backfilling, reinstatement and all other related aspects of carrying out these works."

22. Finally, the Preambles to the Bill of Quantities provided:

(i) "P4 The contract shall be a lump sum fixed price Contract and not subject to variation. A tender submitted with an adjustable price quotation will be treated as non-responsive and rejected."

(ii) "P8 The Contractor shall provide any additional breakdown of his total Tender price as may be necessary to be used as a basis for establishing the amounts to be paid to the Contractor in Interim Payment Certificates in accordance with their procedures defined in the Conditions of Contract. The further breakdown in itself does not identify the amounts to be paid to the Contractor in individual Interim Payment Certificates. The further breakdown may be a different format but will be at least to the same level of details as shown on the Bill of Quantities.

Notwithstanding any limits which may be implied by the wording of the individual items and or the explanations in the preamble, it is to be clearly understood by the Contractor that the rates and sums which he enters in the Bill of Quantities are to be for the work finished complete in every respect; he will be deemed to have taken full account of all requirements and obligations, whether expressed or implied, covered by all parts of the Contract and to have priced the items herein accordingly. The rates and sums must therefore include for all incidental and contingent expenses and risks of every king [sic] necessary to construct, complete and fulfil all obligations during the Defects

Liability Period the whole of the Works in accordance with the Contract…"

23. In the Board's view, these various provisions can have left UBC in no doubt as to the comprehensive nature of their contractual obligations, and the need for them to take all such matters into account when pricing the works. An underestimate of the work required to meet the contractual requirements of a lump sum contract cannot be a variation: it will be "precisely the thing which [the contractor] took the chance of": see *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597, 607. As the editors of *Keating on Construction Contracts*, 12th ed (2025), put it at para 4-044, a useful test to determine whether an item of work constitutes a variation in a lump sum contract is whether it is "expressly or impliedly included in the work for which the lump sum is payable". Any analysis of what was expressly and impliedly included in this contract must therefore be undertaken in the light of the comprehensive contractual provisions set out above.

24. In that context, it is appropriate to address here the point raised by UBC at paras 22 to 34 of their Written Case. This implicitly acknowledged the difficulties for UBC posed by the contract terms. It boldly sought to avoid them by arguing that, because UBC commenced work before the contract was finalised, and that neither they nor WASA had had sufficient time to carry out site investigations before the start of the works, the full effect of the contractual provisions should not be enforced against them. This has an echo of the first claim that UBC ever made, on 22 September 2010, when they suggested that, because they did not have time to undertake a detailed design, the contract should be interpreted on the basis that 90% of the design liability belonged to WASA, not UBC.

25. That argument must fail at every level. First, it is not correct on the facts: UBC had two months, between receiving the tender invitation (August) and putting in their tender (October), in which to satisfy themselves as to the conditions on site. There was then another period of in excess of four months (end of October to mid-March), after tender but before award, in which UBC could have carried out further investigations. Such a process is expressly envisaged by clause 4.10, set out at para 20(ii) above. What is more, by the time the works commenced in May 2007, UBC were in receipt of the Letter of Award which made plain that the contract conditions were those of which UBC had been notified the previous August. Those included all the terms set out at paras 19-22 above. UBC were required to produce written confirmation of acceptance, and a Performance Bond, on receipt of the Award, giving a further potential opportunity to withdraw. Instead, UBC signed the contract incorporating those terms only a fortnight after starting work. There was therefore no question of UBC having limited time to assess, or being taken by surprise by, the conditions on site.

26. Secondly, this argument seeks to rewrite the contract into which UBC freely entered on 23 May 2007. The attempt to make WASA liable for 90% of the design, noted above, is only the most obvious example of the radical nature of this submission. But, as

noted above, pursuant to sub-clause 1.1.6.13, UBC were contractually responsible for 100% of the design, namely both the preliminary design and the final design. WASA had no design liability at all. There is no legal basis for UBC's attempt at such a comprehensive re-allocation of risk and reward as between the parties.

27. Thirdly, although this argument was included in UBC's submissions to the Court of Appeal, there is nothing in their judgment which could be read as any sort of acceptance of it. On the contrary, it appears that the Court of Appeal did not consider it well-founded, because they assumed that the written contract applied unless or until parts of it were waived by the Engineer.

28. For these reasons, therefore, the Board rejects UBC's argument that they should not be held to the terms of the contract that they freely agreed. That conclusion has one significant consequence: it removes the only basis on which Mr Ali, on behalf of UBC, sought both orally and in writing to distinguish the *Sharpe v San Paulo Railway Co* line of authorities.

6 Were the Four Disputed Items Variations?

29. As noted above, the question whether one or more of the four disputed items is or is not a variation is a function of the contract terms. The Court of Appeal did not address either the general contract terms noted above, nor the specific contract terms identified below as relevant to the four disputed items. Instead, they determined that the items were variations because Mr Paul considered them to be so. Although that approach found strong support in the submissions of Mr Ali during the hearing before the Board, it is wrong in principle. The Engineer's view may be of some potential relevance, but it cannot displace the proper application of the terms of the contract.

30. A variation was defined at sub-clause 1.1.6.9 as "any change to the Employer's Requirements or the Works which is instructed or approved as a variation under clause 13." Both "the Employer's Requirements" and "the Works" were defined terms in the contract. Neither the trial judge nor the Court of Appeal analysed whether the four claimed items fell within that definition. It is the Board's view that none of the four items were variations as defined. That is partly because the general terms of the contract noted in paras 19–22 above meant that these items were or should have been included in UBC's lump sum price; and partly because the specific terms of the contract, analysed in paras 31–44 below, expressly covered each of the four items.

Item (i) Cutting and Excavating the Asphalt Roadway

31. There was a suggestion in both the trial judge's judgment and WASA's written case that the cutting and excavating of the asphalt roadway gave rise to unsuitable excavated material, which then necessitated the importation of materials for backfilling. But that is not how the claims were put or sequenced in UBC's statement of case, which were pleaded on the basis that this item was entirely distinct from the excavation and backfilling claims.

32. How and why this alleged change came about was unclear, even on UBC's own evidence. As Ms Temple-Mabe demonstrated in her oral submissions on behalf of WASA in reply, the UBC witnesses gave tentative evidence about any instruction emanating from the Engineer which triggered this alleged change. The closest they came was Mr Paul's evidence at paras 13 and 14 of his witness statement, where he said that it came to his knowledge "that it was necessary for the asphaltic roadway to be cut in order for excavation of the trench and for the pipe to be installed" and that, because it was necessary, he instructed it to be done. He said in cross-examination that this is what he observed on site. The other UBC witnesses also appeared to treat the cutting of the roadway as a *fait accompli*: they did not identify any instruction from Mr Paul that triggered this work, and did not suggest that, without the instruction, they would have done the work in another way. This ambivalence was reflected at times in UBC's written case, which repeatedly referred to WASA allowing this, and the other disputed items, to be carried out "without objection" (see by way of example para 129(b)). But that misses the point: under a design and build, lump sum contract, it is not for the employer to object to any particular element of the work being undertaken unless there is a concern about how that work is being carried out, or the employer has received notice from the contractor that the work is said to be a variation, and the employer disagrees. Neither happened here.

33. During the course of the hearing before the Board, there was a faint suggestion that the original drawings, which had been sent out with the tender invitations, showed pipelines in the verge rather than in the roadway, and that this was the basis of the alleged change. Those drawings were not included in the court documents, so it was not possible to ascertain whether or not that was right. But it could make no difference anyway, because the invitation to the tenderers said expressly that "the pipe routes shown in the attached drawings are indicative only and that it is the responsibility of the contractor to confirm the final routes with site investigation and field surveys." It has never been pleaded or submitted that those indicative drawings formed part of the Employer's Requirements or the Works, as defined in the contract. There was no evidence to that effect either.

34. The position appears to be this. UBC's preliminary design showed the pipelines in the verge and subsequently they realised – for whatever reason – that the pipelines would have to go in the roadway. That was therefore a change between the preliminary design and the final design. But both were the responsibility of UBC under the contract (see sub-clause 1.1.6.13 at para 20(i) above) so could not be a variation under clause 13. Mr Ali's

submission that "where the pipe went was not for the Contractor" was wrong; it was contrary to the whole scheme of this design and build contract.

35. Furthermore, the specifications which comprised the Employer's Requirements made plain that cutting through the asphalt, and the excavation of the roadway beneath, were expressly envisaged as part of the contract works. That can be seen from clause 3.1 of the specification, under the heading "Excavation and Backfilling for Pipelines and Appurtenances". With relevant parts emphasised, that provided:

> "The mains are to be laid to the routes and grades shown on the Drawings.
>
> *All excavation shall be carried out in whatever material may be found.*
>
> Surplus sub-soil and excavated material unsuitable for reuse as backfill shall be disposed of to the Contractor's tip unless otherwise directed by Employer's Representative.
>
> *When excavation trenches in carriageways or surfaced footpaths the Contractor shall first cut through the surface asphalt* etc, to a straight accurate edge, by a method to be approved by the Employer's Representative, excavated material, for re-use in reinstatement or disposal as directed by the Employer's Representative.
>
> *The Contractor shall not, without the express permission of the Employer's Representative or his Representative, at any time excavate along excessive or unreasonable lengths of highway as appropriate to the site location*. As a section of main is laid along such section, backfilling and reinstatement shall be completed and all excavated materials surplus to the requirements of the Contract removed from the proceeds, with the intent that the minimum of delay. The contractor must take all precautions that are necessary to prevent the breaking away of the trench edges and no extra payment will be made for either excavations or reinstatement in excess of the standard trench widths where this is as a result of 'overbreak' of the trench edges…

> *When excavating trenches other than carriageways* the Contractor shall first remove all turf and topsoil for re-bedding or, if the turf is non-existent, all topsoil to the width of the trench and deposit clear of general trench excavated material for use in reinstatement.
>
> All excavated material shall be deposited so that it is not stockpiled on topsoil and will do as little damage and cause as little inconvenience as possible."

36. In addition, clauses 5.4 through to 5.11 of the same specification were concerned with the obligation on the part of UBC, following excavation and pipe-laying, to reinstate the three layers of the roadway, namely the sub-base, the base and the bitumen. That reinstatement work therefore presupposed that the asphalt and roadway had first been cut and excavated.

37. The Preambles to the Bill of Quantities were to similar effect. Although Mr Ali relied on P19, which talked about excavating in any material "other than rock, concrete, reinforced concrete, asphalt or bituminous macadam", that has to be read with the previous provision, P18, which expressly envisaged excavation in "rock, concrete, reinforced concrete or tarmac". In other words, those two paragraphs of the Preamble were complementary: P19 cannot be read in isolation. Furthermore, the actual Bill itself did not envisage excavating in verges only: instead it identified separate items for excavating in mass concrete, reinforced concrete, and asphalt paving, and the reinstatement of roads. Those items had quantities which were priced by UBC as part of their lump sum tender.

38. For all those reasons, the Board concludes that the contract expressly envisaged the cutting of asphalt and the excavation and reinstatement of the roadway. It fell within the scope of the Employer's Requirements and/or the Works and therefore was not a variation.

Item (ii) Disposal of Unsuitable Material and Item (iii) Importation of Suitable Fill

39. It is convenient to take these two items together. Although it was suggested to the Board that the unsuitable material was the concrete and road base excavated from beneath the asphalt, that was not the basis of UBC's pleaded claim. The claim in the statement of case at paras 7-8 had nothing to do with the excavation of concrete and road base; instead it was said that the material that was excavated was "clayed silt" which was unsuitable for compaction. There was no proper evidence as to why clayed silt was not suitable as backfill, after processing if necessary. But in any event, the Board considers that the claim for these items was bound to fail, because excavation in any kind of material, and the

need to import proper backfill if the excavated material was considered unsuitable, were both part of UBC's obligations pursuant to the specifications and the Bill of Quantities, as noted below.

40. As to the specification, clause 3.1 has already been set out at para 35 above. That stated that the excavation was to be carried out "in whatever material might be found", and that excavated material unsuitable for use as backfill was to be disposed of by UBC. Clauses 3.8-3.12 envisaged the importation and use of Class I, Class II, Class III and Class IV types of fill, depending on their precise placement. Furthermore, clause 3.14 reiterated that, where the excavated material was considered unsuitable for backfill, UBC was obliged to import backfill instead. The first part of clause 3.14 provided:

> "Backfill to trenches, other than Class 1 fill, shall in general be obtained from trench excavation, after processing if necessary. Where backfill of the specified class is not available as dug and processing is, in the opinion of the Employer's Representative, impracticable, the Contractor shall import the appropriate backfilling material."

41. The Bill of Quantities also envisaged that material may need to be imported for backfilling purposes and that the material excavated from the trenches would not necessarily be suitable for backfill. That is apparent from a number of the Preambles, which refer to the importation of various classes of backfill material. It is also apparent from the Bill itself, which (amongst other things) expressly included an item for the importation of Class II material. That item was again priced by UBC and included in the lump sum.

42. For these reasons, the Board concludes that, even accepting for this purpose that the clayed silt was unsuitable and could not be processed, both the disposal of unsuitable material and the importing of suitable material for backfilling were included in the lump sum contract. They could not be variations.

(iv) Night Work

43. Para 5(iv) of UBC's written case suggested that the contract only referred to "dayworks", so the night works carried out by UBC must be a variation. That is a misapprehension. "Dayworks" in a construction or civil engineering context has nothing to do with when work is carried out; it refers to rates for material, plant and labour, agreed in advance, in respect of any work that may need to be instructed urgently, and when any other means of pricing is not possible.

44. Para 17 of UBC's statement of case puts the claim for night work on the basis that it was an attempt to make up for the time lost due to "the unforeseen delays", a reference back to disputed items (i), (ii) and (iii). It therefore follows that if items (i), (ii) and (iii) were not variations, then the claim for item (iv) must fail in any event. If the night work was carried out as consequence of items of work which, on the Board's analysis, UBC were always obliged to undertake pursuant to the contract, then the night work could not itself be a variation.

45. For completeness, it is worth noting that, although the normal working hours were stated in the contract as being from 7am to 6pm, the Employer's Requirements at Part 12.10 (Site working arrangements) made clear at para 3.3.2 that work was envisaged from 6pm to 10pm, and also at night. The constraint during those other periods was solely in relation to the permitted decibel level. Thus it could be argued that night working was envisaged in the contract in any event.

(v) Contemporaneous Documents

46. As noted above, there is a paucity of contemporaneous documents that evidence the claims for items (i)-(iv). Those that do exist do not support the suggestion that these items were seen by UBC themselves as legitimate variations. Originally, UBC's claims appeared to proceed on the basis that this was some sort of cost-plus contract, pursuant to which UBC were entitled to pass on to WASA any increase in the cost of the works, howsoever those increases arose. That is the complete antithesis of the FIDIC Yellow Book. For example, the only claim letters in the bundle sent during the currency of the works were a letter from UBC to WASA dated 26 July 2007 (and a similar letter to Mr Paul dated 11 September 2007), which referred to the increased costs of backfill being charged to UBC by their various aggregate suppliers. Under a lump sum contract, such a claim could have no contractual basis: it was entirely a matter for the contractor. The subsequent production, in 2010, of invoices showing increased costs relating to disputed items (i)-(iv) took matters no further.

47. The same uncertainty was apparent in the first formal claims made by UBC in September 2010. As previously noted, those claims began with the suggestion that UBC were somehow prevented from undertaking a detailed design, the argument which the Board has dismissed at paras 24-28 above. As to the claim for items (i)-(iv), that was put on the basis that "the contractor had to vary works based on the need to comply with the specifications…". Since UBC were always contractually obliged to comply with the specifications, such work to comply could not be a variation.

48. Even in the statement of case, the claims (particularly in respect of items (ii) and (iii)), were primarily put on the basis of unforeseeable ground conditions, a claim under clause 4.12 of the FIDIC conditions. There is an echo of such a claim in para 78(i) of

UBC's written case: that "the changes were necessary due to site conditions". However, there was never any notice of such a claim by UBC under clause 4.12, whether "as soon as practicable" or at all. Moreover, in order to demonstrate unforeseeable ground conditions, a contractor must show that the conditions were "not reasonably foreseeable by an experienced contractor" (sub-clause 1.1.6.8). There was no evidence in this case as to how and why "clayed silt" was not reasonably foreseeable to such a contractor. Furthermore, because this is an objective test, a claim for unforeseeable ground conditions – if disputed – is routinely supported by expert evidence: what would an experienced contractor have reasonably foreseen? There was no such evidence here. The Board also notes that the statement of case uses the words "unforeseeable" and "unforeseen" interchangeably, whereas in fact they could not be more different: the former may trigger a claim, but the latter emphatically does not. Finally on this point, neither the trial judge nor the Court of Appeal suggested that any sort of claim for unforeseeable ground conditions had been made out.

49. Accordingly, on any fair reading of the contemporaneous documents, the claim for items (i)-(iv) as variations under the contract was unclear and tentative. That provides further support for the view that these were not, and were not seen at the time as being, legitimate claims for variations.

(vi) Conclusion

50. For all these reasons, the Board concludes that items (i)-(iv) were not variations to the Employer's Requirements or the Works. On that basis the Board would set aside the decision of the Court of Appeal and dismiss the claim in full. However, it is appropriate to go on to address two other elements of the Court of Appeal's judgment, that is to say their conclusions as to the procedural requirements of the contract, and as to fairness. For the reasons noted below, the Board has concluded that the Court of Appeal's judgment on these two aspects of this case was also erroneous.

7 UBC's Procedural Failures and their Consequences

51. The terms of the FIDIC contract dealing with variations can be found at clauses 13.1-13.3 as follows:

> "13.1 Right to Vary
>
> Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or a request for the Contractor to submit a proposal.

A Variation shall not comprise the omission of any work which is to be carried out by others.

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that (i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works, or (iii) it will have an adverse impact on the achievement of the Schedule of Guarantees. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

13.2 Value Engineering

The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor's opinion) will, if adopted (i) accelerate completion, (ii) reduce the cost to the Employer of executing, maintaining or operating the Works, (iii) improve the efficiency or value to the Employer of the completed Works, or (iv) otherwise be of benefit to the Employer.

The proposal shall be prepared at the cost of the Contractor and shall include the items listed in Sub-Clause 13.3 [Variation Procedure].

13.3 Variation Procedure

If the Engineer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:

(a) a description of the proposed design and/or work to be performed and a programme for its execution,

(b) the Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [*Programme*] and to the Time for Completion, and

(c) the Contractor's proposal for adjustment to the Contract Price.

The Engineer shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [*Value Engineering*] or otherwise), respond with approval, disapproval or comments. The Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs, shall be issued by the Engineer to the Contractor, who shall acknowledge receipt.

Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree to determine adjustments to the Contract Price and the Schedule of Payments. These adjustments shall include reasonable profit, and shall take account of the Contractor's submissions under Sub-Clause 13.2 [Value Engineering] if applicable."

52. As noted at the end of clause 13.3, regardless of whether the alleged variation arose under clauses 13.1 or 13.2, the process envisaged a determination by the Engineer under sub-clause 3.5, which was in the following terms:

"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [*Claims, Disputes and Arbitration*]."

53. The general requirement for UBC to warn of potential future cost increases was separately emphasised by clause 3.6 of the Conditions of Particular Application which provided:

> "The Contractor's Representative shall notify the Employer's Representative at the earliest opportunity of specific likely future events or circumstances which may adversely affect the work, increase the Contract Price, or delay the execution of the works. The Employer's Representative may require the Contractor to submit an estimate of the anticipated effect of the future events or circumstances and/or a proposal under Sub-Clause 13.3. The Contractor shall submit such estimate and or proposal as soon as practicable. The Contractor's Representative shall cooperate with the Employer's Representative in making and considering proposals to mitigate the effect of any such event or circumstances in carrying out instructions of the Employer's Representative."

54. Just pausing there, this was not a situation in which UBC had made suggestions to vary the work in order to save money or otherwise improve efficiency. So clause 13.2 has no relevance; this is a case in which UBC seek to rely on an instruction issued under clause 13.1. Clause 3.3 required all such instructions to be given by the Engineer in writing. However, the Board would not be prepared to say that the mere fact that the relevant instruction (if there had been one) was oral, not written, meant that the instruction was automatically invalid. An oral instruction may not be in accordance with the contract, but if it was intended to bind the contractor, the breach could be waived by both parties. In truth, such debates are increasingly rare these days, because there are plenty of ways in which an oral instruction can be recorded in writing by the contractor. The most common is the contractor's use of a written form (usually called a "Confirmation of Verbal Instruction" (or COVI)), which the contractor sends to the Engineer. That allows the Engineer the opportunity to respond and to raise any issues there and then about the alleged oral instruction.

55. The absence or otherwise of a written instruction in this case is, however, immaterial. That is because, even on the assumption that the Engineer could have orally instructed UBC to carry out a variation, the next step in the process would have been for UBC to notify the Engineer of the additional cost under clause 3.6 and, as set out in clause 13.3, to seek a determination under clause 3.5 in respect of the value of the extra work. That would have required a proper proposal from UBC setting out what they said was the value of the variation. WASA would then have responded and the matter would have been determined by the Engineer. UBC's contractual entitlement was to recover the amount determined by the Engineer under clause 3.5.

56. In this way, the need for a determination by the Engineer under clause 3.5 was paramount, because it was that which gave rise to an entitlement on the part of UBC to be paid additional monies. If there was no determination by the Engineer because there had been no clause 3.6 notice and no request for a determination, there was no entitlement on the part of UBC to be paid additional sums. On the other hand, if a notice had been given under clause 3.6 and a determination had been requested by UBC, but neither had been acted on by the Engineer, the course available to UBC was to make a claim under clause 20.1.

57. The first and last parts of clause 20.1 (entitled "Contractor's Claims") were in these terms:

> "If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware of the events or circumstances.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply…
>
> The requirements of the Sub-Clause are in addition to those of any other sub-clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause."

58. Clause 20.1 is again designed to ensure certainty for both parties. If there has been no engagement by the Engineer at the clause 13.1 or clause 3.5 stage, clause 20.1 provided a route for the contractor to unlock the problem. For the contracting authority, it meant that there was an early warning of a claim (even if the situation that gave rise to the claim

was ongoing), with a clear statement of how and why a claim for additional monies had arisen, and an attempt to estimate the additional sums due.

59. For these reasons, the Board considers that the first procedural failure was the failure on the part of UBC to give an early – or any proper – notice of the likely increase in costs caused by disputed items (i)-(iv) (contrary to clause 3.6 of the Conditions of Particular Application), and the concomitant failure to seek a determination from the Engineer under clause 3.5. UBC never gave notice; they never sought a determination; and they never offered any material which could have been the subject of any such determination.

60. But the second and fatal procedural failure by UBC was the failure to make a claim under clause 20.1. That provided them with a complete remedy if, as they maintained, the Engineer had failed to operate the variation process properly. In such circumstances, UBC was entitled to bring a claim under cause 20.1 for the sum which it said was the additional value of the varied work. That claim could have been made irrespective of the Engineer's failure (if that is what it was) to issue a written instruction under clause 3.1 or to issue a determination under clause 3.5. It was the route to be followed by UBC if, as Mr Ali repeatedly submitted, WASA was complicit in the Engineer's non-compliance with the procedure under clause 13.

61. The language of clause 20.1 of the FIDIC conditions is in classic condition precedent form: "*if* the Contractor fails to give notice within 28 days of it becoming apparent that a claim had arisen…*the Contractor shall not* be entitled to additional payment and *the Employer shall be discharged* of any further liability…" (emphasis supplied). Clauses which require a specified provision to be fulfilled before a corresponding right or obligation arises are commonly construed as conditions precedent: *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2025] EWCA Civ 380; [2025] 4 WLR 42, para 26. The defining feature of a condition precedent is dependency between the requirement and the relief; one must be conditional upon the other: *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109. The link between the two contractual steps must usually be expressed in terms of obligation, that X must necessarily lead to Y: *Scottish Power UK plc v BP Exploration Operating Co Ltd*[2015] EWHC 2658 (Comm); [2016] 1 All ER (Comm) 536, para 206. The Board considers that all those features were present in clause 20.1.

62. Clause 20.1 of the FIDIC 1999 Form was treated as a condition precedent to payment by Akenhead J in *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC); [2014] BLR 484. In addition, at para 20-014 of their book *Understanding the FIDIC Red and Yellow Books*, 3rd ed (2018), Jeremy Glover and Simon Hughes KC describe clause 20.1 as a condition precedent, correctly noting that "parties must understand that compliance with the notice provisions is intended to be a condition precedent to recovery. Non-compliance therefore potentially provides either

party with a complete defence to any claim that is commenced outside the prescribed time period." Although that comment is in respect of the version of clause 20.1 in the 2017 FIDIC Form, the structure and much of the wording of clause 20.1 remains the same as the 1999 Form: although the 2017 version has a slightly more flexible series of provisions than those with which this appeal is concerned, it is still a condition precedent.

63. Finally, in support of the conclusion that clause 20.1 was a condition precedent, there is the Board's own decision in *NH International (Caribbean) Ltd v National Insurance Property Development Co Ltd* [2015] UKPC 37; [2015] BLR 667. That was concerned with clause 2.5 of the FIDIC 1999 Form (Red Book) which deals with claims by the employer against the contractor. Its language and format are designed to reflect closely the provisions in clause 20.1 relating to claims by the contractor. The Board concluded at paras 38- 42 that, in the absence of a claim by the employer made promptly and in the specified form, there could be no claim, set-off or cross-claim. Clause 2.5 was therefore treated as a condition precedent. The attempt by Mr Ali to distinguish this authority turned not on the wording of the clause itself, but on various alleged factual differences which, on the Board's analysis set out above, do not arise.

64. UBC themselves relied principally on two authorities which, they said, pointed the other way. The first was the decision of the Appellate Division of the High Court of Singapore in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2, which UBC said supported the proposition that procedural provisions were not necessarily conditions precedent to payment. But that was not a case concerned with the FIDIC conditions at all. Moreover, the provision in issue was simply a requirement for written instructions and, as the court there noted, that was not a "stringent" clause requiring strict compliance. The court went on to observe at para 33 that the relevant clause "does not state that if there are no written instructions for variations from Deluge's project manager, Vim will forfeit the right to any payment or is otherwise barred from claiming payment for work that it considered a variation". That reiterates the point the Board has already made in para 61 above, that a condition precedent usually needs an "if X, then Y" formulation. The clause in *Vim Engineering* did not have such words, but clause 20.1 does.

65. The second authority relied on by UBC was the recent decision of the Board in *Gordon Winter Co Ltd v NH International (Caribbean) Ltd* [2025] UKPC 52, which focussed on clause 12.3 of the FIDIC 1999 Form (Silver Book). Mr Ali relied on that decision to suggest that the absence of a clause 20.1 claim was not fatal to a claim for a quantum meruit. But that was a case on different facts. There, the contract was a remeasurement contract, where the scheme of payment is different to a lump sum contract. More importantly, on the facts in *Gordon Winter*, the Board concluded that there was no dispute that the works had been varied, and that the variation was evidenced by a letter of instruction from the project manager to the contractor. The process for payment had thereafter not been followed, but the Board held at para 13 that, on the facts, both parties had agreed not to adhere to the procedural provisions in the FIDIC form. In other

words, it was a case where waiver/estoppel had been established on the evidence. For the reasons set out in Section 8 of this judgment below, that is very different to the factual situation here.

66. In short, if UBC had wanted to make a claim for any of the disputed variations, and they could not make progress due to the Engineer's alleged failure to play his part in the variation process, it was up to them to make a claim under clause 20.1. They failed to do so. Items (i)-(iv) were all known to UBC shortly after the works began and certainly by the end of 2007. On any view, therefore, the 28 day period in which to bring a claim under clause 20.1 had expired long before the termination of the contract in June 2009. Having failed comprehensively to comply with the condition precedent, UBC were therefore prevented by the terms of the contract from making any claim in respect of these variations and/or WASA were discharged from any liability to pay for them.

67. The Court of Appeal indicated that the way round this problem for UBC was that, because the contract was subsequently terminated, clause 20.1 did not apply. The terms of clause 20.1 cannot, however, be so circumvented for two reasons. First, it is well-established law that the contract terms govern the conduct of the parties up to termination, and that termination does not wipe out those rights and obligations already accrued. This is because termination operates prospectively rather than retrospectively: *Johnson v Agnew* [1980] AC 367, 393; *Howard-Jones v Tate* [2011] EWCA Civ 1330; [2012] 2 All ER 369, para 15. Upon termination, both parties are discharged from any further performance of the contract, and the party in breach may be liable to pay damages for future non-performance: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849. But the consequence of termination having a forward-looking effect is that rights and obligations that have already been unconditionally acquired remain unaffected: *Hurst v Bryk* [2002] 1 AC 185, 199.

68. Secondly, the Court of Appeal's solution ignores the 28 day cut-off in clause 20.1, discussed in para 66 above. That critical element of clause 20.1 was not referred to by the Court of Appeal. Neither is it referred to, let alone dealt with, in UBC's written case. For the reasons previously given, the Board concludes that the time for making a claim under clause 20.1 had expired long before the termination of the contract. The eventual termination could not in law resurrect claims that had not been made in time and were therefore no longer open to UBC.

69. The purpose of the contractual regime was to ensure certainty so that, if there were claims for additional monies (whether under clause 2.5 for the employer, or clause 20.1 for the contractor), they were clearly set out and promptly made. In relation to UBC's claim for the four disputed items, neither of those things happened. That was UBC's responsibility: in particular, they failed to comply with the condition precedent set out at clause 20.1. In those circumstances, UBC had no entitlement under the contract to be paid for items (i)-(iv) in any event.

8 Waiver, Estoppel and Fairness

(a) Introduction

70. Where a contractor fails to comply with the procedural requirements of a contract, it is not uncommon for them to argue that it would be unfair or inequitable for the employer to have the benefit of additional works without paying for them. Such an argument is usually based on principles of waiver and estoppel. It appears that this was one of the arguments deployed by UBC which found favour with the Court of Appeal: see in particular para 47 of their judgment. In the Board's view, these concepts had no application on the facts of the present case for three separate reasons.

(b) The Pleadings and the Evidence

71. First, waiver and estoppel never formed part of the issues before the trial judge. There was no assertion of waiver or estoppel in UBC's pleadings, and Mr Ali confirmed to the Board that it was not a topic that either side addressed in their opening or closing submissions to the trial judge. Consequently, no evidence was adduced to support such a claim. So for example, there was no identification of any unequivocal representation made by or on behalf of WASA that additional monies would be paid for items (i)-(iv) or that, in some way, clause 20.1 would not be relied on; there was no evidence of any reliance by UBC on any such representations; and there was no evidence of any detriment to UBC in consequence of that reliance. It is right to note that UBC's failure to make a contemporaneous claim for these items at all, and their decision instead just to get on with the works, is much more consistent with the absence of representations, reliance and detriment than anything else.

72. UBC raised waiver and estoppel for the first time in their submissions before the Court of Appeal. That was much too late. If waiver and estoppel is to be an issue in a case, it must be properly pleaded so that the party against whom the point is being asserted (in this case WASA), knows the case they have to meet. It also affects disclosure: a plea of waiver and estoppel may make some documents relevant and disclosable which would not otherwise have been disclosable. There must also be clear evidence to support such allegations at trial. Since in the present case there was neither pleading nor evidence, this point should not have been allowed to be taken in the Court of Appeal.

73. UBC's only answer to this fundamental objection is to be found at para 136 of their written case on this appeal, where they attempt to blame that omission on WASA. They complain that WASA had never raised as a defence to the claim for disputed items (i)-(iv) that "the procedure for payment under the contract was not complied with and therefore UBC was not entitled to payment…", and say that this was first raised by WASA before the Court of Appeal. These submissions are factually incorrect. Para 7 of WASA's

defence sets out many of the FIDIC clauses dealing with written instructions, contract procedures, limits on the engineer's authority and the like, which have been addressed above. It then expressly pleads that UBC was required to comply with those procedures "as a condition precedent to any liability". The point was therefore plainly put in issue by WASA from the outset, and the absence of any responsive plea of waiver and estoppel prohibits UBC's attempt to raise that argument subsequently.

74. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119 is authority for the proposition that a party seeking to avoid the clear consequences of a term of a written contract must do more than simply assert waiver and estoppel. In that case, the Supreme Court was concerned with the validity of a clause which stipulated that there should be no oral modifications of the contract. The court concluded that there was no principled reason why parties could not agree to such a clause. At para 16 of his judgment, Lord Sumption went on to say that, in England, the safeguard against any injustice arising from such a provision lay in the various doctrines of estoppel:

> "This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."

75. In the Board's view, the same minimum requirements were necessary here, if UBC were to seek to avoid the consequences of their failure to comply with the contract procedures. In the absence of any pleading or any relevant evidence which might have supported a claim for waiver or estoppel, the Board considers that the Court of Appeal was wrong to overturn the trial judge's decision on this basis.

(c) The Scope of the Engineer's Authority

76. Secondly, the Board considers that the basis of the waiver and estoppel case identified by the Court of Appeal failed to give full and consistent effect to the contract terms. To explain this, it is necessary to look more closely at clause 3.1 of the FIDIC conditions.

77. Clause 3.1 of the FIDIC conditions provided:

> "The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. The Engineer's staff shall include suitable qualified engineers and other professionals who are competent to carry out these duties.
>
> The Engineer shall have no authority to amend the Contract.
>
> The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.
>
> However, whenever the Engineer exercises a specified authority for which the Employer's approval is required, then (for the purpose of the Contract) the Employer shall be deemed to have given approval.
>
> Except as otherwise stated in these Conditions:
>
> > (a) whenever carrying out duties or exercising authority, specified in or implied by the contract, the Engineer shall be deemed to act for the Employer;

> (b) the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and
>
> (c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances."

78. These provisions are designed to provide certainty for both sides: to ensure that events on site do not readily alter or amend the bargain agreed between the parties. Here, they provided particular protection for WASA (who were distant from the site, and only peripherally involved in the daily events there) from the risk that cooperation between the Engineer and UBC's site staff spilt over into detrimental and unexpected concessions from WASA's point of view.

79. The Court of Appeal acknowledged at para 49 that, as a result of this clause, the Engineer could not amend the contract. Clause 3.1 also provided that the Engineer had no authority to relieve either party of any duties, obligations or responsibilities under the contract. The Court of Appeal was therefore wrong to say in para 50 that the Engineer waived the procedural requirements in the contract, and in para 58 that "the FIDIC terms were varied and waived in several instances". Mr Paul had no authority to vary or waive those requirements: if he had said that, for example, UBC did not need to seek a determination under clause 3.5, or were not required to make a claim under clause 20.1, he would have been amending or varying the contract, which he was not permitted to do. He would also have been relieving UBC of their duty and obligation to comply with the contract procedure, which he was also prohibited from doing by clause 3.1.

80. In *Rock Advertising*, the clause at issue stipulated that all variations had to be set out in writing and agreed by both parties before they took effect. Lord Sumption said at para 10 that the law "does give effect to a contractual provision requiring specified formalities to be observed for a variation", and went on at para 12 to identify three reasons for such clauses:

> "The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily

> give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them. These are all legitimate commercial reasons for agreeing a clause like clause 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law."

81. The Board considers that the same reasoning applies to clause 3.1, and the express limits on the Engineer's authority. It is easy to justify a provision that the Engineer could not amend or waive the contractual terms, because he was not a party to that contract. Instead, the Engineer had a quasi-independent role, traditionally identified as "holding the ring" between the employer and the contractor, and is required to act fairly: *Sutcliffe v Thackrah* [1974] AC 727. Thus it made commercial sense for the parties to agree that the Engineer had no authority to act outside the contract. UBC's unqualified description of the Engineer as "WASA's duly authorised agent" (para 56 of their written case) was much too broad, because it ignored the express constraints on the Engineer's authority set out in the contract. There was no blanket appointment of the Engineer as WASA's agent, but rather a series of carefully calibrated provisions setting out the scope and the limits of his authority, and the extent to which he could and could not act on behalf of the Employer.

82. In answer to a question from the Board during the hearing, Mr Ali sought to rely on the fourth paragraph of clause 3.1, which provided that, where the Engineer exercised a "specified authority for which the Employer's approval is required", then that approval was deemed to be that of the employer. But that provision is concerned with where the contract terms expressly require the employer to approve a particular thing; it has no application to an amendment or waiver of contract terms, where there is not only no exercise of a specified authority by the Engineer, but also where the contract provided expressly that the Engineer had no authority to amend or relieve either party of their contractual obligations.

83. Finally on this point, UBC suggested that a variation to the contract works was not the same as a variation of the contract, and argued that the Engineer was permitted to instruct the former (regardless of form) but had no authority to authorise the latter (a point also made by the Court of Appeal at para 49). The Board considers that this proposition confuses two different things. A variation which is instructed in writing by the Engineer, the subject of a determination by the Engineer, and/or a claim under clause 20.1 would, when determined, be a legitimate variation to the works. It would not be a variation of the contract because the contract itself contemplates such variations to the works. But if the

agreed procedural requirements were ignored, and there was no claim under 20.1, then a claim for additional sums based on an oral amendment to (or waiver of) the relevant contract terms by the Engineer would be an attempt to vary the terms of the contract, which the Engineer had no authority to authorise. Moreover, as the editors of *Keating on Construction Contracts*, 12th ed (2025) rightly observe at para 4-075 in connection with *Rock Advertising*:

> "Whilst there is, in principle, a difference between a variation to the terms of a contract and a variation in the work to be carried out under a contract, a strict approach to a contractual provision as to the form of changes might consistently be applied to both."

For these reasons, therefore, there is nothing in this point.

(d) The Non-Involvement of WASA

84. Thirdly, a contract can only be amended, or a contractual requirement can only be waived, by the parties to that contract. One of the errors in the approach of both UBC and the Court of Appeal, as explained above, was to equate the Engineer with the employer. If there had been a pleaded case of waiver and estoppel in the present case, it could only properly have been based on the acts of a representative of WASA with authority to waive or amend the contract.

85. The Court of Appeal's conclusion that the FIDIC terms "were varied and waived in several instances" was based entirely on the acts and omissions of Mr Paul. That is doubtless because UBC had no case based on the acts or omissions of any authorised representative of WASA. At trial, the closest that UBC got was the evidence of Mr Paul that he reported the events up the line in his monthly reports to Mr Boyce, the WASA Project Director. But to translate Mr Boyce's receipt of routine reports into actions or representations on the part of WASA, which had the effect of amending or waiving contractual terms (including a condition precedent), is fraught with difficulty, particularly given that the monthly reports were never adduced in evidence, and it was unclear on what terms the information was passed on to the WASA management. Was there a detailed explanation of any oral instructions Mr Paul had given, the consequences of those instructions, and an estimate of the cost consequences? Or was it just a reference to where the trenches were, how much backfill had been imported, and the fact that Mr Paul had allowed UBC to work at night to make up for lost time? The absence of any answers to those questions is another fatal flaw in the "fairness" analysis.

86. Although Mr Ali sought to criticise WASA for not disclosing the monthly reports, the answer to that is clear: because it was not alleged that WASA themselves had ever

waived or amended the terms of the contract, those documents did not fall to be disclosed. Neither had they ever been expressly sought by UBC. That is also the answer to the complaint at para 95(c) of UBC's written case, to the effect that WASA elected not to call Mr Boyce to give evidence. Given the lack of any pleaded case or evidence from UBC as to waiver, reliance and detriment, there was no reason for WASA to call Mr Boyce.

87. For all these reasons, therefore, the Board concludes that there can be no basis for the submission that, if disputed items (i)-(iv) were legitimate variations but the failure to comply with the condition precedent barred the claim, a case of waiver and estoppel had been or could have been made out. On the contrary, it had been neither pleaded nor evidenced at trial, and the only person belatedly alleged to have waived the relevant terms – the Engineer – was expressly prohibited from so doing, and from releasing UBC from their contractual obligation to comply with the agreed procedure.

9 Conclusion

88. For these reasons, the Board would reverse the decision of the Court of Appeal and dismiss UBC's claim. In such circumstances, it is unnecessary to address WASA's separate arguments about causation and quantum.