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VARIATIONS AND PROCEDURAL REQUIREMENTS UNDER THE FIDIC YELLOW BOOK

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SUMMARY

What happens under a FIDIC Yellow Book 1999 when the Engineer approves a variation and the varied work is carried out but both Engineer and Contractor fail to follow the relevant contractual procedures? Is the Contractor still entitled to payment?

These are the tricky questions which faced the Judicial Committee of the Privy Council (Board) in the case of Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago (Trinidad and Tobago) [2026] UKPC 2.

WHAT HAPPENED?

The Water and Sewerage Authority of Trinidad and Tobago (WASA) entered into a lump sum contract (an amended FIDIC Yellow Book 1999) with Uniform Building Contractors Ltd (UBC) to design, supply and install a pipeline.

When carrying out the work, the Engineer approved certain variations which the Employer was aware of and did not object to. However, both the Contractor and the Engineer failed to follow the procedural requirements in the contract set out in clause 3 (The Engineer), clause 13 (Variations and Adjustments) and clause 20 (Dispute Resolution).

Various disputes arose and WASA issued termination notices. UBC issued proceedings against WASA for various claims and WASA duly counterclaimed.

ISSUE

The core question for the Board was: was compliance with conditions precedent to payment in a FIDIC contract essential in order to enable a contractor to recover payment for variations?

On behalf of UBC, the Engineer gave evidence that he considered the work items in dispute to be variations. WASA countered that these items were not variations and that, even if they were, UBC had failed to comply with the procedural requirements of the contract and therefore was not entitled to any additional sums.

The High Court ruled in favour of WASA stating that the contract "*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*." UBC had chosen "*to deviate from the express terms of its contract with WASA…and did so at its own risk and for its own account outside of the fixed price of the contract… 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…*"

The Court of Appeal disagreed and overturned the judgment ruling in favour of UBC describing the evidence of the Engineer as "*the clincher to the case for UBC*".

It stated, "*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 different from what clause 3 of the…contract provided for, that the engineer had no authority to amend the contract. This was not an amendment of the contract… while the contract may have provided for notice in writing for changes, it is clear that WASA, through the site engineer, waived these requirements…Discussions occurred on an on-going basis on site and adjustments were made… 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 [the engineer]. 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… to dispute that these additional payments did not arise…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...*"

JUDGMENT

The Board reversed the decision of the Court of Appeal and ruled in favour of WASA on the basis that UBC had freely entered into the contract, the items alleged to be variations were not in fact variations as defined by the contract, the contract had not been varied to allow an alternative route to approve work and the Contractor had failed to follow the contractual procedures and so was not entitled to payment.

Key points from the judgment included:

- *What counts as a variation under a lump sum contract?*

The Board emphasised that under a lump sum contract such as the FIDIC Yellow Book, an underestimate of the work required to meet contractual requirements is not a variation. The test to determine whether work is a variation is whether an item of work is "*expressly or impliedly included in the work for which the lump sum is payable*".

- *Can the Engineer determine what a variation is under the FIDIC Yellow Book?*

The answer to this was: No. The Board held that the Court of Appeal erred in determining that items were variations simply because the Engineer considered them to be so. While the Engineer's view might be of some relevance, it could not displace the proper application of the contractual terms which defined a variation as "*any change to the Employer's Requirements or the Works which is instructed or approved as a variation under clause 13*". Applying this definition, the Board concluded that none of the four items were variations, partly because the general terms meant these items should have been included in UBC's lump sum price, and partly because specific contract terms expressly covered each item.

- *Procedural failures*

The Board identified two key procedural failures by UBC:

- UBC had failed to give early or correct notice of the likely increase in costs caused by the disputed work items under clause 3.6, and failed to seek a determination from the Engineer under clause 3.5. Even if the Engineer could have orally instructed a variation, the next contractual step required UBC to notify the Engineer of additional costs and seek a determination setting out the value of the extra work. The need for a determination by the Engineer under clause 3.5 was key because it was that which gave rise to an entitlement on the part of UBC to be paid additional monies. Without such determination, there was no entitlement to additional sums.

- UBC had also failed to make a claim under clause 20.1, which provided recourse if the Engineer failed to operate the variation process properly. The Board noted that clause 20.1 requires notice to be given within 28 days of the contractor becoming aware of events giving rise to a claim. The language of clause 20.1 is a clear condition precedent: "*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…*". UBC knew about the disputed work items shortly after works began yet the 28 day period had expired long before the contract was terminated in 2009.

- *Does clause 20.1 survive termination?*

The Court of Appeal had suggested that because the contract was subsequently terminated, clause 20.1 did not apply. The Board rejected this, holding that termination operates prospectively rather than retrospectively. Rights and obligations that have been unconditionally acquired remain unaffected by termination. The eventual termination could not legally revive claims that had not been made in time.

- *Waiver and Estoppel*

UBC argued that it would be unfair for the employer to benefit from additional works without paying for them, relying on principles of waiver and estoppel. The Board rejected this argument for three reasons.

First, waiver and estoppel never formed part of the issues before the trial judge. Second, clause 3.1 expressly provided that the Engineer "*shall have no authority to amend the Contract*" and "*has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract*". The Engineer therefore had no authority to waive procedural requirements. Third, a contract can only be amended, or a contractual requirement waived, by the parties to that contract and not by the Engineer, who was expressly prohibited from releasing UBC from their contractual obligation to comply with the agreed procedures.

FINAL THOUGHTS

The key takeaways from this case are nothing new and not specific to FIDIC users but applicable to all construction contracts. The message is simple: if you enter into a contract to carry out construction works be very clear on what you have signed up to. Make sure that if there are procedures to be followed for example, to approve variations, then follow them to the letter paying particular attention to what has to be done and by when. Do not assume that oral agreements on site will formally vary the contract terms. If you want to vary the contract, then follow the contractual procedures to do so.

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