# Variations Claims Under FIDIC: No Notice, No Payment? Lessons from *UBC v WASA* [2026] UKPC 2

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## Introduction

Are the financial effects of a Variation subject to a Sub-Clause 20.1 [*Contractor's Claims*] procedure?

The Privy Council's decision in *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago* [2026] UKPC 2[1] has reignited debate on one of the most contentious issues in FIDIC contracts: whether entitlement to additional money for variations depends on strict compliance with the claims procedure in Sub-Clause 20.1.

The judgment delivers a stark message: under FIDIC Yellow Book lump-sum design and build contracts, variations with financial implications require a Sub-Clause 20.1 notice. Without it, even strong claims will fail, however commercially unbalanced the result.

The decision will surprise many FIDIC users. Should it be treated as a principle of general application, or as a fact-specific anomaly within the law of Trinidad and Tobago, arising from the amendments to the standard form contract, particular facts, and the manner in which the case was argued and presented?

## UBC v WASA [2026]

Uniform Building Contractors Ltd ('UBC') was the Contractor, and the Water and Sewerage Authority of Trinidad and Tobago ('WASA') was the Employer.

### The Claim

The case arose under an amended FIDIC Yellow Book (1999) design-and-build lump sum contract for pipeline

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works. The Contractor alleged four[2] elements of its works constituted variations (instructed orally by the Engineer) and therefore justified additional payment. The Engineer had not issued a determination on the issue before the Contract was terminated in June 2009, but the Contractor submitted it would not be right for the Employer to benefit from expensive variations without being paid a reasonable price for them.

The Employer resisted the claim on two principal bases: first, the works were not variations at all but fell within the Contractor's original scope; and second, even if they were variations, the Contractor had failed to comply with mandatory contractual procedures depriving itself of any additional payment. The Employer relied on the Contractor's design and the lump sum price[3]. It was keen to protect the public authority's funds[4]. Counsel for the Employer argued that the evidence regarding how the alleged variations came about was vague; it was not clear whose idea they were, why they were needed, why they had not

[1] https://www.jcpc.uk/cases/jcpc-2024-0062#judgment-details
[2] The 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; (iii) the importation of suitable backfill; and (iv) night work.
[3] Counsel for the Employer suggested that the Contractor was intentionally using variations to correct errors in its own design in order to increase a strategically low (bid winning) Contract Price, although no fraud or deliberate default was expressly pleaded.
[4] There was a contingency included in the Bill of Quantities to cover the cost of any variations.

been appreciated earlier, and when impact on cost had been communicated.

The Contractor brought its claim in May 2013, shortly before a 4-year limitation period was due to expire.

## Court Decisions

The dispute followed a protracted procedural journey. The High Court[5] rejected the claim outright, finding no valid variations. It found the Contractor chose to deviate from the express terms of the Contract and did so at its own risk and for its own account outside of the fixed price of the Contract.

The Court of Appeal[6] took a more sympathetic approach to the Contractor. It found, following the termination of the Contract, the process for resolution of disputes during the Contract had been bypassed and the Contractor could not go back to the Engineer for a determination. Therefore, the Contractor's claims ought not to have been dismissed.

Ultimately, however, the Privy Council[7] reinstated a strict interpretation of the Contract, concluding both that no variations existed and, in any event, the Contractor's claim was barred by procedural non-compliance.

## What Constitutes a Variation?

A central issue was whether the disputed works met the contractual definition of a 'Variation'. Under FIDIC, a *'Variation'* is defined as *'any change to the Employer's Requirements or the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments]'*.

The Privy Council placed significant weight on the nature of the FIDIC Yellow Book (1999) as a lump sum design-and-build contract. It considered in such contracts the Contractor assumes responsibility for design development and bears the risk of foreseeable events and circumstances. After reviewing the contract documents, the Privy Council concluded the works relied upon by the Contractor were not variations at all but matters which fell within the Contractor's original obligations and risk allocation.

> *'USB's written case suggested that the contract only referred to "dayworks", so the nightwork carried out by UBC must be a variation. That is a misapprehension.'*[8]

This finding alone disposed of the claim. However, the Privy Council went further and addressed the procedural framework governing variations and claims. These additional comments went beyond that strictly necessary to the decide the case. In legal terms they were made *obiter dicta*. Consequently, these comments are not binding but may still be persuasive, and shape the development of the law, particularly when coming from senior appellate courts such as the Privy Council.

## The Procedural Framework: The First Procedural Failure

The Privy Council stated[9]:

> *'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 … (contrary to clause 3.6 …), 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'.*

The Privy Council emphasised entitlement to additional payment under FIDIC depends not simply on substantive merit, but on adherence to a structured contractual process. That process typically involves several interconnected steps.

### Step 1: Initiation

Under the FIDIC Yellow Book (1999), a Variation (as defined) may be initiated by the Engineer at any time prior to the issue of the Taking-Over Certificate (Sub-Clause 13.1) or proposed by the Contractor as value engineering (Sub-Clause 13.2). Where a Variation is contemplated, Sub-Clause 13.3 requires the Contractor

[5] The High Court, Trinidad and Tobago, judgment dated 17 February 2017.
[6] The Court of Appeal, Trinidad and Tobago, judgment delivered on 24 November 2024.
[7] The Privy Council heard the parties' submissions on 17 November 2025 and gave its judgment on 22 January 2026.
[8] At paragraph 43.
[9] At paragraph 59.



to submit a proposal addressing the scope of the work to be performed, programme implications, and proposed adjustment to the Contract Price.

In this case, the Contractor sought to rely on (oral) instructions issued under Sub-Clause 13.1. The Employer argued the Contractor's failure to submit a proper proposal under Sub-Clause 13.3 meant there was no basis upon which the Engineer could make a determination under Sub-Clause 3.5 (which would stand unless and until revised under Clause 20).

It is not apparent from the judgment whether the Contractor drew the Privy Council's attention to the absence of any explicit reference to Sub-Clause 20.1 in Clause 13 (for financial consequences) as there is, for example in Sub-Clause 8.4 (for time consequences). If the Contractor did raise this, it was not addressed by the Privy Council.

### Step 2: Early Warning

The Contract in this case included an additional early warning provision (Sub-Clause 3.6 - which is not in the FIDIC standard form), requiring the Contractor to notify the *'Employer's Representative'*[10] of any events likely to increase cost or delay completion. The Contractor did not provide such notice or any estimate of the financial consequences. This omission, the Privy Council found, deprived the Employer and Engineer of the opportunity to address the issue contemporaneously.

It is not apparent from the judgement whether the Contractor drew the Privy Council's attention to the absence of any time-bar in Sub-Clause 3.6 which read[11]:

*'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.'*

If the Contractor did raise this, it was not addressed by the Privy Council.

### Step 3: Engineer's Determination

The Contractor did not seek a determination from the Engineer under Sub-Clause 3.5 in respect of the extra work[12]. The Privy Council regarded this step as fundamental, stating that it is the Engineer's determination that crystallises any entitlement to additional payment and that without it, no contractual right arises.

The Privy Council stated (with emphasis added)[13]:

> *'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.'*

The Privy Council did not offer an explanation as to why an Engineer's determination is, essentially, a condition precedent to recovery. Usually, clear language is required for a condition precedent[14], but Sub-Clause 13.3 does not state that every variation in the Contract (of which there will be many) must be evaluated by the Engineer failing which there is no entitlement to additional payment.

[10] The judgement does not clarify whether the Employer's Representative is the Engineer or another person/entity.
[11] At paragraph 53.
[12] The FIDIC Yellow Book (1999) contains little guidance on the valuation of variations and numerous arguments and disputes arise in this respect.
[13] At paragraph 56.
[14] See: https://internationalconstructionknowledgehub.com/no-notice-no-claim-conditions-precedent-in-fidic-contracts/



## The Procedural Framework: The Second Procedural Failure

The Privy Council stated[15]:

> *'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 variations procedure properly. In such circumstances, UBC was entitled to bring a claim under clause 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'.*

The Employer argued that if the contractual machinery for variations is not properly followed, FIDIC provides a fallback mechanism in Sub-Clause 20.1. This clause permits the Contractor to bring a formal claim for additional time or money, provided notice is given within 28 days of becoming aware of the relevant event.

Sub-Clause 20.1 is expressly drafted as a condition precedent. Failure to comply with the notice requirement results in the Contractor losing any entitlement to additional payment or extension of time, and the Employer being discharged from liability.

In this case, the Contractor did nothing. It did not invoke Sub-Clause 20.1 at any stage. The Privy Council held, by the time the Contract was terminated, any potential entitlements had already been extinguished by this failure.

It is not apparent from the judgement whether the Contractor questioned how Sub-Clause 20.1 could apply if the entitlement to additional payment had not crystalised and so did not otherwise exist (because of the lack of a Sub-Clause 3.5 determination – see above). If the Contractor did raise this, it was not addressed by the Privy Council.

## Termination and its Limits

The Contractor argued termination of the Contract rendered the procedural requirements inapplicable or revived its claims. The Privy Council firmly rejected this argument. Termination operates prospectively: it releases parties from future performance but does not undo accrued rights, obligations, or procedural defaults. Accordingly, once a claim has been time-barred under Sub-Clause 20.1, termination cannot resurrect it.

## Waiver, Estoppel and Fairness

The Court of Appeal had been receptive to arguments based on fairness and informal project practices. The Privy Council was not. It rejected suggestions the Engineer's conduct or general informality on site could override the contractual procedures.

To the extent the Engineer exceeded its authority by adopting a flexible or informal approach to the variation procedure, counsel for the Employer contended (in summing up) the Contractor had several options available:

(i) to insist upon strict compliance with the contractual procedure;

(ii) to proceed in accordance with Sub-Clause 3.5;

(iii) to raise its concerns directly with the Employer;

(iv) to invoke Sub-Clause 3.6; or

(v) to pursue a claim under Sub-Clause 20.1.

Counsel for the Employer stated, on the evidence, there was no indication the Employer encouraged, or was complicit in, any departure from the procedures prescribed by the Contract. In summing up, it further submitted there was no evidence the Employer had made any clear and unequivocal overt assurances to the Contractor, or that it had knowledge of, or acquiesced in, any non-compliance. In particular, it was unclear what, if anything, the Employer was said to have knowingly failed to object to.

The Contractor did draw the Privy Council's attention to the fact that the Engineer is defined within the definition of *'Employer's Personnel'*, is expressly deemed to act for the Employer, and is essentially the Employer's agent[16].

[15] At paragraph 60.

[16] Except when required to make a determination under Sub-Clause



However, there appear to have been some particular conditions and/or other amendments to the FIDIC standard form which were not clear from the judgement, causing the Privy Council to address this as follows[17]:

> *'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'.*

The Privy Council concluded that only the Employer can waive compliance with contractual provisions, and waiver or estoppel must be clearly established on the evidence. Mere acquiescence or failure to enforce procedures at the time is insufficient.

Counsel for the Contractor referred to the case of *Gordon Winter Co Ltd v NH International (Caribbean) Ltd* [2025] UKPC 52[18]. The Privy Council distinguished that case which it said, *'focussed on sub-clause 12.3 of the FIDIC 1999 Form (Silver Book)'.*

It continued: *'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'*[19].

## The Consequences of Procedural Non-Compliance

The Privy Council considered the governing theme of the FIDIC regime to be certainty. Both the Contractor and the Employer are required to raise and articulate claims promptly, enabling informed decisions and orderly contract administration. The Contractor, it said, failed at every relevant procedural stage: it did not give early warning under Sub-Clause 3.6; it did not seek a determination under Sub-Clause 3.5; and it did not issue a claim under Sub-Clause 20.1.

# Commentary

It is almost inevitable that, however well thought through a construction project is at design stage, when it comes to be built, there will be a need for some variations. This is equally true for FIDIC Yellow Book and FIDIC Red Book contracts. It is common for contractors to claim as variations work they had not foreseen and allowed for in their price.

Under English law, and many other governing laws, the Employer is not entitled to vary the works unilaterally unless the Contract contains an express right to do so. The purpose of a variation clause is to enable the Employer to avoid having to enter into a new contract with the same contractor, or perhaps another contractor, to have it perform a variation. If the Employer were to approach a new contractor, it would face re-tendering costs, possible increases in prices, delay and clashes between the original and new contractors on site. If on the other hand the Employer is able to vary the original contract, costs and inconvenience may be kept to a minimum.

## Would the position be different under the FIDIC Red Book?

The case highlights structural differences between the FIDIC Yellow Book and Red Book forms. Under the Red Book, Variations (as defined) are valued through a well-defined measurement and valuation regime (Clause

3.5, it is obliged to make it a fair determination, and when it is obliged to issue an Interim Payment Certificate under Sub-Clause 14.6, or a Final Payment Certificate under Sub-Clause 14.13, it must fairly determine the amount due. See: https://internationalconstructionknowledgehub.com/the-employers-agent/

[17] At paragraph 81.

[18] At paragraph 65.

[19] The subcontract incorporated certain terms of the main contract which was a FIDIC Red Book 1999.



12), with the Engineer determining the price under Sub-Clause 3.5. In that context, adjustments are often treated as part of the ordinary contractual machinery rather than as standalone 'claims' for payment.

The FIDIC Yellow Book lacks this detailed valuation framework, reflecting its lump sum nature. As a result, the procedural route to payment is less clearly articulated, and greater reliance is placed on the claims process.

## Time Consequences

The procedural route for the *time consequences* of a Variation under the FIDIC Yellow Book (1999) and the FIDIC Red Book (1999) is the same. The requirement to proceed via Sub-Clause 20.1 is explicit – which it is not in respect of financial consequences.

| Clause | FIDIC Yellow Book | FIDIC Red Book |
|---|---|---|
| 8.4 | *'The Contractor shall be **entitled subject to Sub-Clause 20.1 [Contractor's Claims]** to an extension of the Time for Completion if and to the extent that completion … is or will be delayed by one of the following causes: (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or such other substantial change in the quantity of an item of work included in the Contract …'* **[emphasis added]** | Same |

## Financial Consequences

The procedural route for the *financial consequences* of a Variation under the FIDIC Yellow Book (1999) and the FIDIC Red Book (1999) is not the same. There is no explicit requirement to proceed via Sub-Clause 20.1.

| Clause | FIDIC Yellow Book | FIDIC Red Book |
|---|---|---|
| 13.3 | *'Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine adjustments to the Contract Price and Schedule of Payments'* | 'Each Variation shall be evaluated in accordance with Clause 12 [Measurement and Evaluation], unless the Engineer instructs or approves otherwise in accordance with this Clause' |
| 12.3 | N/A | *'Except as otherwise stated in the Contract, **the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations]** to agree or determine the Contract Price by evaluating each item of work, applying the measurement agreed or determined in accordance with the above Sub-Clauses 12.1 and 12.2 and the appropriate rate or price for the item'* **[emphasis added]** |
| 3.5 | *'Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]'* | Same |
| 20.4 | *'If a dispute (of any kind whatsoever) arises between the* | Same |



| | | |
|---|---|---|
| | *Parties in connection with, or arising out of, the Contract or the execution of the Works, including any disputes as to any … determination … of the Engineer … either Party may refer the dispute in writing to the DAB …'* | |

Under the FIDIC Red Book (1999), the route is clear and structured. Variations are valued pursuant to Clause 12 [*Measurement and Valuation*]. Under Sub-Clause 12.3 the Engineer *'shall'* proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the Contract Price. There are no ifs, buts, or conditions precedent. If it does not do so, as the Employer's agent, the Employer is responsible.

If either Party disagrees with the Engineer's determination (which must be fair), the matter may be referred to dispute resolution under Clause 20, including to the Dispute Adjudication Board ('DAB') under Sub-Clause 20.4, as a dispute concerning an Engineer's determination.

Where the determination is to be revised under Sub-Clause 20, it is commonly thought Sub-Clause 20.1 does not apply because the valuation is treated as a simple adjustment to the Contract Price under the ordinary operation of the contractual machinery rather than a formal 'claim' for additional payment.

However, the procedural route for the *financial consequences* of a Variation under the FIDIC Yellow Book (1999) is not as clear cut as for the FIDIC Red Book (1999). There is no Clause 12 [*Measurement and Valuation*] as the Yellow Book is a lump sum contract, not a remeasurement contract. Instead, Sub-Clause 13.3 provides, upon instructing or approving a Variation, the Engineer shall proceed under Sub-Clause 3.5 to agree or determine adjustments to the Contract Price and the Schedule of Payments. Again, there are no ifs, buts or conditions precedent. If it does not do so, as the Employer's agent, the Employer is responsible. But, unlike in the FIDIC Red Book (1999), there is no guidance for the Engineer in respect of the adjustments to be made.

One commentator[20] has pointed out various oddities arising out of the Privy Council decision. For example, if a Variation results in a reduction to the Contract Price, Sub-Clause 20.1 [*Contractor's Claims*] would not apply. The Employer may need to rely on Sub-Clause 2.5 [*Employer's Claims*]. Where it is not clear whether there will be an increase or reduction in the Contract Price, should both Parties issue protective notices to preserve their respective positions?

### Evolving Position in FIDIC 2017 and 2022

Why would FIDIC have adopted a different approach for the time and financial consequences in the 1999 forms? It has been suggested that FIDIC prioritised early warning of delay (programme impact) over early financial quantification because delay affects project control and mitigation, while cost can generally be assessed and certified later withing the valuations / claims machinery.

In the FIDIC 2017/2022 form this has been changed. Under Sub-Clause 13.3.1 of both the FIDIC Red and Yellow Books (2017/2022), following an Engineer's determination, the Contractor is entitled to any resulting extension of time and/or adjustment to the Contract Price '…*without any requirement to comply with Sub-Clause 20.2 [Claims for Payment and for EOT]'.* In these newer editions, time-bar risk instead arises if the Contractor fails to issue a Notice of Dissatisfaction in response to the Engineer's determination or to refer a dispute to the Dispute Avoidance/Adjudication Board ('DAAB') within the prescribed time limits. This represents a more coherent and equitable solution and perhaps clarifies FIDIC's intention all along.

## Conclusion

The Privy Council's decision in *UBC v WASA* confirms that under FIDIC Yellow Book lump-sum design and build contracts, variations with financial implications require a Sub-Clause 20.1 notice, even where claims are substantively strong and the result appears commercially unbalanced.

It is uncertain whether this stringent approach has broader applicability or is limited to the specific facts

[20] Dr. Franco Mastrandrea, *'The Need for Variations Notices'*, published on LinkedIn 6 March 2026.



and legal context of Trinidad and Tobago.

The decision is heavily influenced by the amendments to the standard form contract, its particular factual background, and by the submissions both made and not made before the Privy Council. Much of the reasoning on the notice points may be characterised as *obiter* and is inconsistent with established industry practice and the underlying intent of the FIDIC framework.

Arbitral tribunals outside Trinidad and Tobago may be reluctant to follow it, particularly where disputes arise under different FIDIC forms or involve materially distinct facts. In those circumstances, the decision could be distinguished, allowing arbitral tribunals to reach a different conclusion.

**I would be happy to answer any questions you may have regarding these issues. Please feel free to contact me at victoria.tyson@howardkennedy.com.**