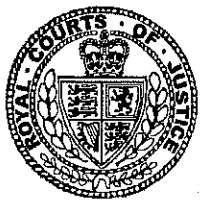

Neutral Citation Number: [2015] EWCA Civ 712

Case No: A1/2014/1684

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION,
TECHNOLOGY AND CONSTRUCTION COURT
THE HON. MR JUSTICE AKENHEAD
HT-12-63

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2015

Before :

LORD JUSTICE JACKSON
LADY JUSTICE GLOSTER
and
LORD JUSTICE FLOYD

- -

Between :

OBRASCON HUARTE LAIN SA	**Claimant/ Appellant**
- and -	
HER MAJESTY'S ATTORNEY GENERAL FOR GIBRALTAR	**Defendant/ Respondent**

- -
- -

Mr Stuart Catchpole QC and **Mr Andrew Fenn** (instructed by **Pinsent Masons Llp**) for the **Claimant/Appellant**
Mr Nicholas Dennys QC and **Ms Fiona Parkin QC** (instructed by **Corbett & Co International Construction Lawyers** and by **Triay Stagnetto Neish**) for the **Defendant/Respondent**

Hearing dates : Tuesday 19th May 2015, Wednesday 20th May 2015 and Thursday 21st May 2015

- -

Approved Judgment

Lord Justice Jackson:

1. This judgment is in nine parts namely:

Part 1. Introduction

2. This is an appeal by a Spanish civil engineering contractor, which was engaged upon constructing a road around Gibraltar Airport, against a decision of Mr Justice Akenhead ("the judge") that the employer effectively terminated the contract under clause 15 of the FIDIC Yellow Book Conditions. The contractor also challenges the judge's decisions that the amount of ground contamination was reasonably foreseeable by an experienced contractor and that certain documents issued by the Engineer did not constitute variation instructions.

3. The principal issues in this appeal are (i) whether the judge's decision about the actual and foreseeable amounts of contamination are open to challenge; (ii) whether the employer was entitled to terminate in circumstances where the contractor had

embarked upon an unnecessary re-design, obtained approval in principle for the re-design, but did no work while waiting for others to certify the re-design.

4. The contractor was Obrascon Huarte Lain SA ("OHL"). OHL is claimant in the action and appellant in this court. The employer was the Government of Gibraltar ("GoG"). GoG, represented by Her Majesty's Attorney General for Gibraltar, is defendant in the action and respondent in this court.

5. Other organisations which will feature in the narrative of events are:

Agua Y Estructura SA ("Ayesa"), a Spanish firm of structural Engineers; Donaldson Associates Ltd ("Donaldson"), a British firm of structural Engineers;
Environmental Gain Ltd ("Engain"), a British firm of environmental engineers;
Gifford Ltd ("Gifford"), a British firm of civil engineers;
Gibraltar Land Reclamation Ltd ("GLRC"), a company registered in Gibraltar;
Laboratorios Himalaya SL ("Himalaya"), an Andalusian company specialising in occupational hygiene and environmental analysis;
Sergeyco, a Spanish firm which carries out geotechnical investigations.

6. In this Judgment I shall use the following abbreviations:
"AIP" means approval in principle.
"CEMP" means construction environmental management plan.
"FIDIC" means Fédération Internationale Des Ingénieurs-Conseils.
"EI" means Engineer's instruction.
"MOD" means Ministry of Defence.
"PAH" means polycyclic aromatic hydrocarbon.
"PEE" means pavement exposed excavation, an operation explained in paragraph 44 below.
"STVs" means Soil Target Values.
"TAA" means Technical Approval Authority.

7. Anyone seeking a full narrative history of events should read the comprehensive judgment of the judge, which can be found on the Bailii website as *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC). That judgment spans 170 pages. My own précis of the story is focused upon matters which are relevant to the appeal.

8. After these introductory remarks I must now turn to the facts.

Part 2. The facts

(i) Background history and the contract

9. In 1713 Spain ceded Gibraltar to the United Kingdom under the Treaty of Utrecht. The UK and the local population have occupied Gibraltar continuously since that date. The territory was attacked and besieged by Spain during the eighteenth century. It became an important naval base for Britain during the Napoleonic Wars, the Crimean War and the two World Wars. The long military history of the territory has an impact on the issues in the present litigation.

10. A relatively narrow isthmus at the northern end of the territory connects Gibraltar to the mainland of Spain. Gibraltar Airport sits on the flat part of the isthmus. A main road called Winston Churchill Avenue leads southwards from the Spanish border to the centre of Gibraltar. That road runs over the airport runway. This means that the road has to be closed whenever aircraft are landing or taking off. That in turn causes congestion.

11. In 2005 GoG decided to resolve this problem by constructing a new dual carriageway road which would skirt round the side of the airport and run down the east coast of the isthmus. The plan was for the road to pass through a twin bore tunnel under the eastern end of the runway.

12. In 2006 GoG retained Gifford as consulting engineers to advise on the project. GoG retained GLRC as project manager for the design and construction of the new road and tunnel.

13. In April 2007 Gifford produced a contaminated land desk study ("the desk study"), which reviewed the history of the site and the degree of contamination likely to be present. A plan annexed to the desk study shows the site divided into six areas forming a semi-circle around the north, east and south sides of the airport. Area 1 is a strip along the south of the airport. Area 2 is at the south east corner. Areas 3 and 4 run up the east side of the airport to the north east corner. Areas 5 and 6 form a strip along the north side of the airport. The desk study outlines the history of each area. Previous uses of the site include a racecourse, a rifle range at the east end of the racecourse and much military activity. The butts of the nineteenth century rifle range were in Areas 3 and 4. The Royal Navy established an emergency landing base on the site in 1939. After the Second Word War the airfield was put to civilian use. The desk study identifies a wide range of likely sources of contamination. The desk study also identifies the need to protect the groundwater passing beneath the site. This is a source of drinking water for the population of Gibraltar.

14. GoG engaged Sergeyco to carry out a ground investigation at the site. Sergeyco sunk a number of boreholes and trial pits. They extracted samples which they tested for contamination. Sergeyco set out the results of their investigations in a report dated July 2007.

15. In order to proceed with the project, GoG was required to carry out an environmental impact assessment and obtain planning permission. Like any other developer GoG had to comply with the Town Planning (Environmental Impact Assessment) Regulations 2000 and the EC EIA Directive 85/337/EEC (as amended by Directive 97/11/EC). For this purpose GoG engaged Engain to prepare an Environmental Statement.

16. Engain produced its Environmental Statement in November 2007. The Environmental Statement is essentially an interpretation of, and commentary on, the information which had been gathered concerning the site. The Environmental Statement estimates that the project will require excavation of approximately 200,000m^3 of spoil. This will come principally from two sources, namely stripping the surface of the site and excavation for the tunnel together with ramps leading down to the tunnel at each end. The Environmental Statement estimates that approximately 10,000m^3 of the spoil

excavated will be contaminated. The Environmental Statement uses the STVs set out in an appendix as the criteria for contamination.

17. The Environmental Statement describes the 200,000m^3 of spoil as "not significant". This means that, if all the material is transported to landfill sites in Spain, it will not have a significant environmental impact. That is because 200,000m^3 is a relatively small quantity compared to the total volume of material disposed of in Spain every year.

18. Paragraphs 3.5 and 3.6 of chapter 10 of the Environmental Statement say:

> "3.5 Wherever possible construction waste will be re-used on site or on other development projects in Gibraltar. Where construction waste has to be disposed of it may be taken to registered landfill in Spain. This will be based on the most commercially and environmentally advantageous option.
>
> 3.6 The predicted limited quantity of contaminated material may be left *in-situ* and capped with a boundary layer (based on good practice guidance) to prevent contamination spread. However, the contaminated waste may also be disposed of at approved facilities in Spain. These options are assessed in the Land Contaminated Chapter (Volume 2: Technical Reports)."

The phrase "may be left *in-situ*" in paragraph 3.6 is shorthand for removing and subsequently re-using on-site.

19. In November 2007 GoG invited a number of contractors to tender for the design and construction of the Gibraltar Airport and Frontier Access Road, including the tunnel under the eastern end of the runway. The invitation to tender included copies of the desk study, the Sergeyco report and the Environmental Statement. Tender Bulletin number 1 informed tenderers that the contractor would be responsible for disposing of spoil and that no off-site storage area had been identified. In other words it was expected that all or most waste materials from the site would be removed to landfill sites in Spain.

20. OHL emerged as the successful tenderer. On 21st November 2008 GoG and OHL entered into a written agreement, under which OHL would design and construct the Gibraltar Airport and Frontier Access Road for the sum of £30,231,068.36. The time for completion was two years after the commencement date, 1st December 2008. The contract documents included an Illustrative Design prepared by Gifford. The contractor was not obliged to adopt the Illustrative Design.

21. Subject to some amendments, the General Conditions of Contract were the Conditions of Contract for Plant and Design-Build, published by FIDIC, first edition, 1999. This is sometimes known as the FIDIC Yellow Book. The Conditions included the following:

"1.1.6.8 **"Unforeseeable"** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.

...

4.10 Site Data

The Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer's possession on sub-surface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Base Date. The Contractor shall be responsible for interpreting all such data.

To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):

(a) the form and nature of the Site, including sub-surface conditions,

(b) the hydrological and climatic conditions,

(c) the extent and nature of the work and Goods necessary for the execution and completion of the Works and the remedying of any defects,

(d) the Laws, procedures and labour practices of the Country, and

(e) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and other services.

4.11 Sufficiency of the Accepted Contract Amount

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-Caused 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.

4.12 Unforeseeable Physical Conditions

In this Sub-Clause, "physical conditions" means natural physical conditions and man-made other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.

If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.

This notice shall describe the physical conditions, so that they can be inspected by the Engineer, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Engineer may give. If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustment*] shall apply.

If any to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

(a) an extension of the time for such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and

(b) payment of any such Cost, which shall be included in the Contract Price.

After receiving such notice and inspecting and/or investigating these physical conditions, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) whether and (if so) to what extent these physical conditions were Unforeseeable, and (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

However, before additional Cost is finally agreed or determined under sub-paragraph (ii), the Engineer may also review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted the Tender. If and to the extent that these more favourable conditions were encountered, the Engineer may proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the reductions in Cost which were due to these conditions, which may be included (as deductions) in the Contract Price and Payment Certificates. However, the net effect of all adjustments under sub-paragraph (b) and all these reductions, for all the physical conditions encountered in similar parts of the Works, shall not result in a net reduction in the Contract Price.

The Engineer may take account of any evidence of the physical conditions foreseen by the Contractor when submitting the Tender, which may be made available by the Contractor, but shall not be bound by any such evidence.

...

5.1 General Design Obligations

The Contractor shall carry out, and be responsible for, the design of the Works. Design shall be prepared by qualified designers who are engineers or other professionals who comply with the criteria (if any) stated in the Employer's Requirements. Unless otherwise stated in the Contract, the Contractor shall submit to the Engineer for consent the name and particulars of each proposed designer and design Subcontractor.

The Contractor warrants that he, his designers and design Subcontractors have the experience and capability necessary for the design. The Contractor undertakes that the designers shall be available to attend discussions with the Engineer at all reasonable times, until the expiry date of the relevant Defects Notification Period.

The Contractor shall be responsible for the design of the Works. The Contractor will take responsibility for the Employer's Requirements as if they were Contractor's Documents. The Contractor is deemed to have checked that the Employer's Requirements are free of errors, omissions and inaccuracies and will have no claim in respect of anything contained in the Employer's Requirements. Any data or information received by the Contractor, whether from the Employer or otherwise shall not relieve the Contractor from responsibility for the design and execution of the Works.

5.2 Contractor's Documents

The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, and the documents described in Sub-Clause 5.6 [*As-Built Documents*] and Sub-Clause 5.7 [*Operation and Maintenance Manuals*]. Unless otherwise stated in the Employer's Requirements, the Contractor's Documents shall be written in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel. The Employer's Personnel shall have the right to inspect the preparation of all these documents, wherever they are being prepared.

If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Engineer for review and/or for approval, they shall be submitted accordingly, together with a notice as described below. In the following provisions of this Sub-Clause, (i) "review period" means the period required by the Engineer for review and (if so specified) for approval, and (ii) "Contractor's Documents" exclude any documents which are not specified as being required to be submitted for review and/or for approval.

Unless otherwise stated in the Employer's Requirements, each review period shall not exceed 21 days, calculated from the date on which the Engineer receives a Contractor's Document and the Contractor's notice. This notice shall state that the Contractor's Document is considered ready, both for review (and approval, if so specified) in accordance with this Sub-Clause and for use. The notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply.

The Engineer may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this Sub-Clause, at the Contractor's cost.

For each part of the Works, and except to the extent that the prior approval or consent of the Engineer shall have been obtained:

(a) in the case of Contractor's Document which has (as specified) been submitted for the Engineer's approval:

  (i) the Engineer shall give notice to the Contractor that the Contractor's Document is approved, with or without comments, or that it fails (to the extent stated) to comply with the Contract;

  (ii) execution of such part of the Works shall not commence until the Engineer has approved the Contractor's Document; and

  (iii) the Engineer shall be deemed to have approved the Contractor's Document upon the expiry of the review periods for all the Contractor's Documents which are relevant to the design and execution of such part, unless the Engineer has previously notified otherwise in accordance with sub-paragraph (i);

(b) execution of such part of the Works shall not commence prior to the expiry of the review periods for all the Contractor's Documents which are relevant to its design and execution;

(c) execution of such part of the Works shall be in accordance with these reviewed (and, if specified, approved) Contractor's Document; and

(d) if the Contractor wishes to modify any design or document which has previously been submitted for review (and, if specified, approval), the Contractor shall immediately give notice to the Engineer. Thereafter, the Contractor shall submit revised documents to the Engineer in accordance with the above procedure.

If the Engineer instructs that further Contractor's Documents are required, the Contractor shall prepare them promptly.

Any such approval or consent, or any review (under this Sub-Clause or otherwise), shall not relieve the Contractor from any obligation or responsibility.

...

8.1 Commencement of Work

...

The Contractor shall commence the design and execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

...

13.1 Right to Vary

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificates for the Works, either by an instruction or by 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, ...

...

15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

(a) Fails to comply with Sub-Clause 4.2 [*Performance Security*] or with a notice under Sub-Clause 15.1 [*Notice to Correct*],

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8 [*Commencement, Delays and Suspension*], or …

…

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. …

…

15.3 Valuation at Date of Termination

As soon as practicable after a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

15.4 Payment after Termination

After a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Employer may:

(a) proceed in accordance with Sub-Clause 2.5 [*Employer's Claims*],

(b) withhold further payments to the Contractor until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or

(c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [*Valuation at Date of Termination*]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor."

22. The Employer's Requirements also formed part of the contract documents. Volume 3 of the Employer's Requirements included a number of provisions relevant to this appeal. Paragraph 3 of Part 1 of Volume 3 required the contractor to comply with the Environmental Statement. This meant, among other things, that the STVs set out in the appendix to the Environmental Statement became the contractual criteria for determining contamination. Paragraphs 8 to 11 of Part 1 of Volume 3 of the Employer's Requirements provided:

> "**8 DESIGN DATA**
>
> Contractor's Documents to be submitted for review in accordance with the Contract shall include, without limitation, the following:
>
> a. Approval in Principle (AIP) forms as described in Volume 3 Part 2, applications for Departures from Standards, Geotechnical Report, Stage 2 (Detailed Design) and Stage 3 (Construction) Safety Audits and associated Contractor's responses;
>
> b. Drawings, plans, schedules, specifications, Numbered Appendices and the like necessary to define the Works and for their construction, maintenance and operation;
>
> c. Other calculations, sketches and graphs necessary to support the Contractor's design, including: drainage computations (flows, velocities, times of concentration), pavement calculations and Mechanical & Electrical design,
>
> d. The Contractor's proposals for testing;
>
> e. Design and Construction Quality Plans, Environmental Management Plans, Construction Phase Health and Safety Plan;
>
> f. Health and Safety File.
>
> Requirements for As-built Documents and Operation and Maintenance Manuals are given in Volume 3 Part 2.
>
> **9 CONTRACTOR'S SUBMISSION PROCEDURE**
>
> The Contractor shall submit the Contractor's Documents listed in Section 8 to the Engineer for review. No data shall be submitted without the relevant Certificate in accordance with the Review and Certification Procedure.
>
> A minimum of 21 days, from receipt of hard copies, shall be allowed in the Programme for the Engineer to review each submission. The period given in Volume 3 Part 2 shall be allowed for Approval in Principle submissions.

The Contractor shall ensure that all submissions are given to the Engineer in such a form as shall enable the Engineer to perform the review without delaying completion of the Works.

10 REVIEW & CERTIFICATION PROCEDURE

The Contractor shall operate a design certification procedure. The format of such Certificates shall be agreed with the Engineer. Certificates shall be signed by both the Contractor and the relevant design organisation, Road Safety Auditor or Checker as appropriate. Certificates produced under this procedure shall constitute the Contractor's notice required under Clause 5.2 of the Contract.

All Certificates shall unless stated otherwise be submitted to the Engineer in duplicate.

Execution of any part of the Works shall not proceed until either all relevant Certificates have been accepted under Section 11 below or all relevant review periods have expired.

11 ACCEPTANCE OF PROPOSALS

The Engineer shall return one copy of each Certificate to the Contractor endorsed as appropriate and with any relevant comments attached: -

a. "Accepted" means that the Contractor may proceed with the relevant work;

b. "Accepted with comments" means that minor comments need to be incorporated. The Contractor shall revise the submission and resubmit to the Engineer with the relevant Certificate, but may then proceed with the relevant work as if the Certificate were "Accepted";

c. "Returned not accepted" means that the submission fails (to the extent stated) to comply with the Contract. The Contractor shall revise the submission and resubmit to the Engineer with the relevant Certificate. A new review period will commence on receipt of the resubmission."

23. Paragraph 1.2 of Part 2 of Volume 3 of the Employer's Requirements provided:

> "The Contractor shall carry out any further ground investigation necessary to produce an acceptable design for the new works that takes account of the risks indicated by the ground investigation information collated to date. The Contractor shall also carry out such investigation, testing, and research as is necessary to ensure that waste materials are

disposed of in the appropriate manner according to local and EU regulations."

24. Paragraph 2.2 of Part 2 of Volume 3 of the Employer's Requirements provided:

> " 'Technical Approval Authority' (TAA) means the office nominated by the Employer as responsible for reviewing any proposal in respect of a Structure and granting AIP."

That paragraph then allocated the tunnel under the runway to category 3.

25. Paragraphs 2.3-2.4 of Part 2 of Volume 3 of the Employer's Requirements provided:

> "2.3 APPROVAL IN PRINCIPLE
>
> All proposals relating to the adoption of the Illustrative Design or the submission of an alternative proposal, whether concerning the design of new Structures or Temporary Works, shall be subject to the technical appraisal of a Technical Approval Authority (TAA) in accordance with BD 2 / 05. The appraisal entails a review of the proposals within the framework of the relevant Approval in Principle Form (AIP). The Tunnel, Subway and Tunnel Service Building shall be appraised together using one structural and one M & E AIP form. A separate form shall be prepared for each other Structure or Temporary works.
>
> Any submission of an AIP shall be made to the Engineer in accordance with the Review and Certification Procedure (see Volume 3 Part 1). The AIP shall be signed on behalf of both the Contractor's Designer and the Contractor. The time periods set out in the table below shall apply in relation to any such submission and take account of the requirement for the relevant TAA to be involved in the review.
>
> ...
>
> The Engineer may raise comments in respect of an AIP submitted under the Review and Certification Procedure only on the grounds that: -
>
> a. the AIP is incomplete;
>
> b. the AIP is not in accordance with the corresponding AIP (if any) included in the Illustrative Design or as part of the Contractor's tender;
>
> c. the proposals in the AIP are otherwise not in accordance with the Contract;
>
> d. the proposals in the AIP are not in accordance with good industry practice.

Acceptance of each AIP shall be confirmed by countersignature of the AIP by the TAA.

Any variation that the Contractor wishes to make to an AIP which has been accepted as part of the Contractor's tender, or has been subject to review under this Section, shall be submitted as an addendum or revised AIP in the same manner as agreed with the Engineer.

2.4 CHECKING

The Category of Structure shall determine the degree of independence of checking required for that Structure. Contractor's Documents relating to each Structure (including without limitation drawings and bar schedules) shall be checked as follows: -

...

c. Category 3 Structures require a check to be carried out by a Checker, namely an independent design organisation.

When submitting an AIP for a Category 3 structure, the Contractor shall at the same time submit to the Engineer a proposed Checker for that Structure. The proposal shall be supported by a CV for each member of the Checking Team. The Category 3 Checker is subject to Engineer approval and may be rejected. ..."

26. The "Contractor's Designer" referred to in these provisions was Ayesa. The checker whom OHL appointed and the Engineer approved pursuant to paragraph 2.4 was Donaldson.

27. Paragraph 3 of Part 2 of Volume 3 of the Employer's Requirements provided:

"**3 ENVIRONMENTAL REQUIREMENTS**

3.1 GENERAL REQUIREMENTS

The Contractor shall demonstrate good practice through adopted company policies regarding supply chain management, environmental management and sustainability.

An Environmental Statement (ES) has been produced for the project. The ES provides an assessment of the potential effects of the project upon the environment, and recommends mitigation measures that shall be incorporated into the Works. The Contractor shall use the ES in conjunction with the information provided in Volume 6 to guide the design development and to prepare

a site specific Constructions Environmental Management Plan (CEMP) for the construction activities.

...

3.5 LAND CONTAMINATION

The history of the Site and the investigations carried out to date show that there is the potential for contaminated land and unexploded ordnance. The Contractor shall take precautions to manage these hazards, including without limitation the following measures: -

- The Contractor shall conduct detailed contamination testing where required;
- Personal Protective Equipment shall be used in areas identified with contamination;
- The Contractor shall agree with the MoD measures to manage the risk of potential unexploded ordnance;
- Any material in landscape areas containing elevated copper shall be removed or appropriately capped;
- Checks for ground gas shall be made in all confined spaces e.g. deep excavations;
- Measures shall be taken to prevent accidental chemical releases, e.g. bunding, spill clean-up methods and covering of spoil;
- Contaminated material to be removed off-site shall be disposed of to a licensed site;

The Contractor shall consult with the regulatory authorities and develop a plan to monitor areas of land contamination.

...

3.11 WASTE AND MATERIAL RESOURCES

Where economically viable, resources shall be taken from identified sustainable sources and brought to the Site using sustainable modes of transport.

The Contractor shall develop a Waste Management Plan to be agreed by the Engineer. The Plan shall, without limitation: -

- Identify the type and quantity of waste to be generated by the Works;
- Provide the preferred options for storage, re-use and disposal (where necessary) of waste;
- Provide opportunities for re-use and recycling of waste on site, particularly excavated sand from tunnel works;
- Apply the principles of the Waste Hierarchy;
- Where waste is to be disposed of off-site, identify options for re-use for other developments;
- State that landfill will be the final option and identify landfill sites that have sufficient void capacity and are as close to the site as possible.

The Contractor shall obtain all relevant licensing for waste management.

3.12 WATER RESOURCES

The Contractor shall adopt good working practice to limit the risk of pollution to receiving waters, including groundwater (particularly the protected aquifer resource) and marine waters. The Contractor's chosen construction methods must take into account the risks to the local groundwater aquifer identified in the Environmental Statement and include appropriate mitigation measures to ensure that groundwater quality is not affected.

...

Where there may be excavation into the groundwater (i.e. the aquifers) the Contractor shall agree monitoring and mitigation to protect potential effects to the resource, as far as practicable, with the Engineer and appropriate regulatory authority.

Where dewatering is required the Contractor shall agree a recharge management plan with the Engineer and regulatory authorities (including AquaGib) to protect the groundwater aquifer resource."

28. The appendices to Volume 6 of the Employer's Requirements included the Sergeyco report dated July 2007, the Environmental Statement and the desk study.

29. The Contractor's Proposals were incorporated into the contract. Paragraph 9.2 of the Proposals stated that OHL intended to carry out an additional geotechnical investigation. Paragraph 11 stated that OHL would prepare a Construction

Environmental Management Plan ("CEMP") as a tool for ensuring compliance with the Environmental Statement.

30. OHL's "Answers to Clarifications Questions" were incorporated into the contract. In one of these answers OHL said that they intended:

> "to carry out a full geotechnical study in order to verify the design parameters [and that this] study must also include a detailed hydrogeological study".

(ii) The course of events from contract to termination

31. In December 2008 OHL duly embarked upon the design phase of the works. They planned to construct the tunnel by the following means:

(i) Dig three trenches along the line of the tunnel. Lower reinforcement cages into the trenches and then pump in concrete. In that way the two outside walls of the tunnel and the central dividing wall will be constructed whilst embedded in the ground. Those three walls are often referred to as "diaphragm" walls.

(ii) Cut down the tops of the diaphragm walls to the height of the future roof. Excavate earth down to the same level.

(iii) Cast the reinforced concrete roof on top of the three walls. The earth in which the three walls are embedded will take the load of the roof while the concrete is curing.

(iv) Once the concrete has cured, excavate the soil from underneath the roof. When all soil has been removed, the structure of the tunnel is complete.

32. Whilst doing the design work OHL also prepared a CEMP, which they revised to meet concerns expressed by Engain. OHL also retained Sergeyco to carry out a further borehole investigation. Sergeyco carried out this exercise in January 2009. It sunk three boreholes which revealed made ground to 1.6 metres, 3.6 metres and 4.5 metres respectively. Sergeyco was not asked to, and did not, take any samples for contamination testing. Neither Sergeyco nor anyone else on behalf of OHL carried out a "detailed hydrogeological study", as required by the contract.

33. Unfortunately there were shortcomings in the tunnel design which OHL submitted to the Engineer. The programmed date for AIP was 20th May 2009, but OHL were unable to obtain such approval at any time during the summer or autumn of 2009. Despite that circumstance OHL commenced work on site in October 2009. This comprised initial demolition and then excavating the top 2 metres of ground across the whole site.

34. In November 2009 OHL engaged Sergeyco to carry out a further ground investigation. Sergeyco took three samples from the tunnel and ramp areas at depths of 3.5 to 4 metres below existing ground level. The sample taken from the centre of the tunnel line was contaminated with lead above the STV. OHL did not disclose this report to GoG or the Engineer until March 2010.

35. On 4th December 2009 OHL submitted revision D of their tunnel design to the Engineer. On 21st December the Engineer granted AIP. OHL pressed on with developing the detailed design.

36. In December 2009 OHL started excavating the trenches for the diaphragm walls. In March 2010 OHL began constructing the diaphragm walls inside the trenches. In the same month OHL engaged Sergeyco to take and test further soil samples for contamination. One sample from the tunnel area contained lead above the STV.

37. By April 2010 the Engineer was seriously concerned about the level of contamination on site. Both the Engineer and GoG appear not to have appreciated that they were only at risk in respect of "unforeseeable" contamination. GoG commissioned and paid for further testing.

38. On 27th April 2010 GoG sent OHL a draft document entitled "Guidelines for the assessment on the use of non-hazardous fill for land reclamation and general backfilling purposes within Gibraltar". All parties referred to this document as the "draft fill guidelines" and I shall follow suit. This required OHL to assess contamination by reference to stricter criteria than the STVs which had been incorporated into the contract.

39. On 7th May 2010 OHL secured the Engineer's approval of its detailed design for the tunnel pursuant to clause 5.2 of the Conditions, paragraphs 8 to 11 of Part 1 of Volume 3 of the Employer's Requirements and paragraphs 2.3 to 2.4 of Part 2 of Volume 3 of the Employer's Requirements. By now OHL were running 295 days late. The programmed date for securing approval of the detailed design was 16th July 2009.

40. By May 2010 there were large amounts of excavated material stockpiled on and near the site. The spoil came from two sources, namely (i) a general site strip by OHL down to a depth of 2 metres and (ii) excavation from the trenches for the diaphragm walls. OHL had carried out the site strip and trench excavations without any attempt to differentiate between areas which were contaminated and areas which were free from contamination. The resultant stockpiles contained a random mixture of contaminated and uncontaminated soil.

41. In July 2010 the parties entered into an agreement, known as "The Stockpile Agreement", under which OHL were to remove excavated materials to landfill sites in Spain with the cost being apportioned 77% to GoG and 23% to OHL. The parties operated under this agreement from 6th July until 30th September 2010. During that period some 31,000m^3 of excavated material were removed to Spain.

42. During the summer of 2010 there were further negotiations between the parties. GoG proposed that excavated material be separated into three categories: (i) contaminated above contract levels, which would have to go to landfill sites in Spain; (ii) contaminated below contract levels, but above the levels specified in the draft fill guidelines; (iii) clean. GoG engaged a firm called Befesa to de-contaminate the category (ii) material. GoG made available Aerial Farm, which was just south of the site, to be used for these operations. The plan was that clean material would be deposited on Gibraltar's beaches, although in the event that plan was not fulfilled.

43. On 30th September 2010 the Stockpile Agreement came to an end. Subsequently GoG notified OHL that Aerial Farm was available for stockpiling excavated material. Befesa set up their equipment at Catalan Beach, a separate area of land to the south of the site, for the purpose of decontaminating category (ii) material.

44. On 16th November 2010 OHL commenced pavement exposed excavation ("PEE") works. This meant excavation of the ground between the diaphragm walls down to the level of the future roof.

45. By the autumn of 2010 OHL appreciated that they were in serious difficulties. Their work had fallen far behind programme. They were facing major losses on the project. They started to look for ways to extricate themselves from this predicament. OHL gave notice of a claim for extension of time and for extra payment in respect of unforeseeable physical conditions pursuant to clause 4.12 of the Conditions. They also developed an argument that because of the amount of contamination in the tunnel area, it was unsafe for their men to proceed with implementing the original design, for which they had received full approval on 7th May 2010.

46. In support of their contention that it was unsafe to proceed with the original design, OHL instructed Himalaya to inspect, carry out tests and prepare a report. Himalaya advised that it would be unsafe for OHL's workmen to excavate all soil under the tunnel roof from inside the tunnel owing to the high level of contamination present. On 20th December 2010 OHL provided a copy of Himalaya's report to the Engineer and requested an instruction to suspend works.

47. During the week commencing 20th December 2010 OHL completed the construction of the diaphragm walls. On 22nd December the Engineer informed OHL that they should perform their disposal obligations under the contract by placing excavated materials on Aerial Farm. On 23rd December OHL suspended PEE excavation work.

48. After 23rd December 2010 OHL did very little work on site, although they continued cutting and repairing the diaphragm walls until 21st January 2011. OHL concentrated their efforts on re-designing the tunnel. It has been a matter of controversy between the parties whether OHL's suspension of work was necessary and whether any re-design of the tunnel was required.

49. On 10th February 2011 OHL informed the Engineer that they were working on a re-design of the tunnel, which would involve excavating between the diaphragm walls to a depth of 4 metres below roof level before installing the roof. For obvious reasons, this meant that the roof would have to be pre-cast, rather than cast in situ.

50. On occasions the Engineer sent letters to OHL, stating that OHL were failing to proceed with the works "with due expedition and without delay", as required by clause 8.1 of the Conditions. The Engineer also pressed OHL to provide details and AIP documents relating to the proposed re-design.

51. At a design review meeting on 13th April 2011 OHL stated that the cut off levels of the outer diaphragm walls would not change as a result of the re-design. The Engineer asked OHL to resume the task of cropping the diaphragm walls. OHL did not do so.

52. On 19th April 2011 OHL submitted documentation on the re-design, seeking the Engineer's approval in principle. On 20th April OHL submitted to the Engineer the full detailed design package for the proposed re-design of the tunnel.

53. One big problem was that since the tunnel was a "Category 3" structure, Donaldson as checker was required to certify the detailed design: see paragraph 10 of Part 1 of Volume 3 of the Employer's Requirements. Donaldson was not prepared to provide this certificate, because it had concerns about the stability of the diaphragm walls once 4 metres of soil had been excavated. This issue was the subject of ongoing discussions between Donaldson and Ayesa. OHL did not alert the Engineer or GoG to this problem concerning the re-design.

54. On 4th May 2011 the Engineer wrote to OHL as follows:

> "We refer to your submission for the Tunnel Roof Redesign submission received on 20 April 2011.
>
> We take this submission as a submission under clauses 5.2(d), namely a modification desired by you for your own reasons and/or convenience. For the avoidance of doubt, this submission is not a variation under clause 13, as it has not been instructed nor is it a value engineering proposal nor is it in response to a request for a proposal by the Engineer. The original design for the tunnel roof as submitted by you and accepted by the Engineer was and remains capable of being constructed in full compliance with your obligations under the contract, including those relating to health and safety.
>
> On review, we find your redesign accepted with comments (as attached). However, we note that you have still not provided us with check certificates for the redesign of the tunnel structure, as required by the Contract.
>
> Once again, we point out that the redesign process has provided no good reason for the demolition of the diaphragm wall heads to cut-off level to have stopped."

55. OHL responded to this letter that the suspension of work would not be lifted until there was complete approval of the re-design.

56. On 16th May 2011 the Engineer sent a notice to correct to OHL pursuant to clause 15.1 of the Conditions. The notice set out the breaches relied upon and the rectification steps required as follows:

No	Breach	Rectification steps	Deadline (2011)

1	Clause 8.1, failing to proceed with due expedition and without delay:		
	(a) suspending tunnel excavation work on 20 December 2010	(a) resume tunnel excavation work	(a) 30 May (14 days)
	(b) suspending cutting and repairing outer diaphragm walls on 21 January 2011	(b) (i) Proceed with the cropping and repairs to the diaphragm walls unaffected by standing water	(b)(i) 30 May (14 days)
		(ii) Complete this work	(ii) 11 July (8 weeks)
	(c) failing to commence, temporary sheet piling of the subway	(c) Proceed with this work	30 May 2011 (14 days)
	(d) failing to start underwater trenching and ducting work for the Western Simple Approach Lighting System (SALS)	(d) Start these works	(d) 6 June 2011 (21 days)
2	Clauses 3.3, 4.1 and 8.1 in failing to provide acceptable details of methods which OHL proposed to adopt for tunnel excavation work.	Proceed with bulk excavation works for the tunnel	27 June (6 weeks)

3	8.1 for failing to proceed with dewatering with due expedition	Commence the de-watering of the Site with a water treatment facility	30 May (14 days)
4	3.3, 8.3 and 8.6 in failing to comply with instructions by the engineer to produce a revised programme.	Provide a revised programme	30 May (14 days)
5	4.1 and/or 5.2 in failing to provide the Engineer with appropriate signed certificates for various components of the Works.	Provide these certificates	31 May (14 days)

57. On 20th May 2011 the Engineer sent to OHL his approval in principal of the proposed re-design. On 31st May Mr Gil, as Technical Approval Authority, signified his acceptance of the approval in principle, pursuant to paragraph 2.3 of Part 2 of Volume 3 of the Employer's Requirements.

58. OHL did not agree with the assertions in the notice to correct that they were in breach of contract. They did not proceed with PEE excavation works or the cropping of diaphragm walls. OHL did, however, start excavations for MOD drainage diversion works. OHL stated that they intended to deposit the material from this excavation at Aerial Farm.

59. On 1st June 2011 the Engineer wrote to OHL as follows:

> "As you are well aware, owing to your failure to avail yourselves of the facility instructed in our letter of 22 December 2010 and referred to in our letter of 11 January 2011, the contractor Befesa, who the Employer had arranged to handle the excavated material, has demobilised and the land has been put to other temporary uses. The failure to proceed with the excavation and utilise the excavated material facility is entirely attributable to Contractor-risk reasons as we have made clear in numerous letters.
>
> Accordingly the instruction of 22 December 2010 is withdrawn and you are instructed to proceed in accordance with the contract and, as per Employer's Requirements Volume 3, part 2 at paragraph 3.5, you are required to remove contaminated material off-site for disposal at a licenced site. No doubt you will keep in mind that your claim under clause 4.12 in relation

> to contamination has been rejected but that you are nevertheless required to maintain full records of costs incurred. You will also recall that the rates for disposal previously quoted by you were far in excess of reasonable market rates.
>
> A proportion of the excavated material will be "clean" by which we mean material from areas of the site identified as not contaminated by the site investigation surveys and which upon inspection during excavation appears not to be contaminated. This material will be disposed of by you in Spain unless directed by the Engineer to dispose of it in Gibraltar. The degree of contamination is to be verified by tests in accordance with method statements to be submitted by you and reviewed and accepted by the Engineer.
>
> Meanwhile, we will discuss with the Employer the possibility of arranging a disposal facility in Gibraltar of the sort arranged last year. However, you should not assume that it will be possible or that there will be any other change to your strict obligations under the contract in this regard. "

60. The Engineer followed this up with a letter on 8th June, stating:

> "We have observed that excavated soils from your recent MOD drainage diversion works at the site are being stored in the southern site area near the batching plant. Inspection of the excavations indicates that both Made Ground soils and natural ground deposits have been encountered, excavated and stockpiled. We are concerned that you are apparently not undertaking segregation of the different soil types encountered but that different soil arisings are being mixed.
>
> Your method of waste handling is not considered to be best practice, and is not in accordance with your CEMP, method statement and contractual obligations. Further, and at worst, your operations may be considered to be illegal by the Environmental Agency, if they consider that a party is diluting hazardous waste soils with non-hazardous waste soils."

61. On 8th June 2011 the Engineer wrote a second letter to OHL drawing attention to defects in the diaphragm walls, namely exposed reinforcement and lack of concrete cover on two panels. On 16th June the Engineer issued EI 20 requiring OHL to excavate and expose four diaphragm wall panels, so that the extent of the problem could be determined.

62. On 24th June 2011 OHL notified the Engineer that they could not comply with EI 20, unless additional land was provided for stockpiling excavation materials.

63. In late June 2011 an oily scum appeared on the surface of standing water which had accumulated on site as a result of the MOD drainage diversion works. The Engineer

wrote to OHL expressing his concerns about this. On 29th June the Engineer instructed OHL to stop de-watering and remove the standing water.

64. On 5th July 2011 the Engineer issued a second notice to correct. This required OHL to comply with EI 20.

65. On 13th July 2011 OHL wrote a letter (misdated 13th June) to GoG about the risk of contamination affecting the aquifers. OHL stated that there was need for a hydrogeological study before construction works continued.

66. Meanwhile the debate between Ayesa and Donaldson continued. On 18th July Donaldson emailed Ayesa as follows:

> "We write following the checking work that we have carried out on the proposed revised construction method for the tunnel and confirm that unfortunately we cannot sign off the check for this submission, as our analysis indicates that the walls will be overstressed at both SLS and ULS conditions."

GoG remained unaware of this dialogue, since OHL had not disclosed that there was any problem about getting the checker's certificate.

67. On 28th July 2011 GoG served a notice of termination on OHL. The operative part of the notice was as follows:

> "This letter constitutes the notice required by clause 15.2 of the Conditions that the Contract will be terminated on 12th August 2011 as a result of:
>
> (i) Your failure to comply with notices issued to you by the Engineer pursuant to sub-clause 15.1 of the Conditions (per sub-clause 15.2(a)), and/or;
>
> (ii) Your having plainly demonstrated an intention not to continue performance of your obligations under the Contract (per sub-clause 15.2(b)), and/or;
>
> (iii) Your failure, without any reasonable excuse, to proceed with the Works in accordance with Clause 8 of the Conditions (per sub-clause 15.2(c))."

The notice went on to spell out the details of GoG's case under each of the three limbs. In relation to the first limb, GoG made clear that it was not relying upon OHL's failure to carry out the rectification work required by item 3 of the notice to correct ("commence the de-watering of the site").

68. OHL maintained that the sending of that notice constituted a repudiation. They left site on 12th August 2011.

69. The two parties blamed each other for the termination. They both claimed that they were entitled to recover substantial damages under, alternatively for breach of, the contract. In those circumstances OHL commenced the present proceedings.

Part 3. The present proceedings

70. By a claim form issued in the Technology and Construction Court on the 21st February 2012 OHL claimed against Her Majesty's Attorney General for Gibraltar (representing GoG) sums due under the contract, damages for breach of contract and a range of other remedies. GoG (represented by its Attorney General) served a defence and counterclaim denying all OHL's claims and claiming damages, sums due under the contract and related relief.

71. Obviously a crucial question in the litigation was which party was liable for the termination of the contract. Very sensibly, the court ordered that this question and a number of related questions should be tried as preliminary issues. A consent order made on 29th November 2012 defined the preliminary issues as follows:

> "1 (a) Which of the parties (Claimant or Defendant) lawfully terminated the Contract and on what date did that termination occur?
>
> (b) What are the correct principles to be applied to the quantification of each party's loss as a consequence of termination?
>
> 2. In respect of the question in paragraph 1(b) above, the purpose is to examine the bases each party has pleaded for quantifying its claims for termination and determine which of those bases are correct. It is not intended to include an examination of the actual quantification itself or any matters regarding betterment, mitigation or any other factors that may limit or reduce the quantum of any damages payable."

72. The court ordered the parties to prepare a list of sub-issues which were "central" to the determination of those two questions. The lawyers set about that task with gusto. They produced a list of thirty eight sub-issues which they regarded as central to the two questions before the court.

73. The trial of the preliminary issues and sub-issues took place before Mr Justice Akenhead in November and December 2013. There was a final day for oral closing submissions in January 2014.

74. OHL called the following factual witnesses: Mr Doncel, OHL's project manager; Mr Garcia, the construction manager; Mr Castellano, the technical manager; Mr Portal, design manager; Mr Alcazar, a technical architect who was concerned with occupational health and who commissioned the Himalaya report; Mr Mojon, a partner of Himalaya; Mr Hernandez, a director of OHL.

75. GoG called seven factual witnesses namely: Mr de la Paz, who was Engineer under the contract from December 2009 onwards; Mr Gil, who was GoG's Chief Technical Officer and the TAA under the contract; Mr Soiza, GoG's Senior Environmental Officer; Mr Cahill, an environmental engineer with Clarke Bond, a firm which assisted GoG in the later period; Mr Nuijten, an aeronautical engineer, who was concerned with the safety of the airport; Mr Orciel, the managing director of GLRC;

Mr Pardo, a property developer who assisted GoG on the project. GoG relied upon the witness statement of Mr Garratt, who was the Engineer under the contract until December 2009. Mr Garratt was unable to attend the trial due to illness.

76. The judge heard expert evidence in five disciplines namely design, geotechnical engineering, contamination, health & safety and programming. For present purposes I need only refer to the contamination experts. They were Mr Wouters for OHL and Mr Hall for GoG. The judge found Mr Wouters to be an unsatisfactory witness in several respects. The judge found Mr Hall to be an excellent witness, who was well prepared and proffered well-reasoned views. The judge preferred the evidence of Mr Hall to that of Mr Wouters on all points where they disagreed.

77. The judge handed down his reserved judgment on 16th April 2014. He found in favour of GoG on the preliminary issues. I would summarise the judge's findings and conclusions as follows:

(i) The amount of contaminated soil which OHL encountered was not more than an experienced contractor should have foreseen. Therefore OHL is not entitled to an extension of time or additional payment under clause 4.12 of the Conditions in respect of contamination.

(ii) There was no health and safety problem which necessitated abandoning the original tunnel design. It was neither necessary nor reasonable for OHL to undertake the re-design.

(iii) In relation to the notice to correct dated 16th May 2011, GoG was entitled to rely upon the matters identified in paragraph 56 above as 1(a), 1(b), 2 and 3. OHL failed to take the rectification steps required. Those matters were sufficiently serious to justify termination.

(iv) OHL's failure to comply with the second notice to correct, dated 5th July 2011, was not sufficiently significant to justify termination.

(v) As at 28th July 2011 OHL was entitled to only one day's extension of time. That extension was due in respect of rock which was unforeseeable.

(vi) From 2009 onwards until 28th July 2011 OHL, in breach of clause 8.1, failed to proceed with due expedition and without delay.

(vii) GoG terminated the contract pursuant to clause 15.2(a), 15.2(b) and 15.2(c)(i).

(viii) Following that termination, GoG is entitled to the relief provided for by clauses 15.3 and 15.4 of the Conditions.

78. OHL was aggrieved by the judge's decision. Accordingly it appealed to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

79. By an appellant's notice filed on 28th May 2014 OHL appealed to the Court of Appeal on seven grounds. Those grounds were pruned to six in the appellant's skeleton argument.

80. In summary OHL's grounds of appeal are as follows:

1. The judge erred in holding that the quantity of contamination which OHL encountered was foreseeable by an experienced contractor. He wrongly rejected OHL's claim for unforeseeable physical conditions within clause 4.12 of the Conditions of Contract.

2. The issue of the draft fill guidelines constituted a variation instruction. The judge erred in failing to so hold.

3. The Engineer's letters dated 1st and 8th June 2011 concerning the disposal of excavated materials constituted variation instructions. The judge erred in failing to so hold.

4. The judge erred in holding that GoG had terminated the contract pursuant to clause 15.2(a) of the Conditions.

5. The judge erred in holding that GoG had terminated the contract pursuant to clause 15.2(b) of the Conditions.

6. The judge erred in holding that GoG had terminated the contract pursuant to clause 15.2(c)(i) of the Conditions.

81. The appeal was heard on 19th, 20th and 21st May 2015. Mr Stuart Catchpole QC, leading Mr Andrew Fenn appeared for OHL. Mr Nicholas Dennys QC, leading Ms Fiona Parkin QC appeared for GoG. I am grateful to all counsel for their assistance. I am also grateful to the solicitors on both sides for limiting the bundle to documents which we actually needed.

82. I must now address the individual grounds of appeal, starting with the issue of unforeseeable physical conditions under clause 4.12.

Part 5. Ground 1: Unforeseeable physical conditions within clause 4.12

83. The ground contamination arose from the military activities on the site over previous centuries and from the use of the site as an airfield in the twentieth century. Soldiers shooting on the rifle range in the nineteenth century would have discarded lead waste from bullets. Airfield activities would have generated further contamination, for example, aircraft fuel and substances used for de-icing runways. All these matters were clearly spelt out in the desk study provided to tenderers in 2008. Indeed one of the plans annexed to the desk study showed the rifle range at the north east corner of the isthmus, with the butts in Areas 3 and 4. That was where the tunnel was due to be built.

84. For the most part the contamination was confined to the made ground, although some of the hydrocarbons penetrated deeper. In the tunnel area (where the most significant

excavation was required) the depth of made ground varied between 1 metre and 5.4 metres, with an average depth of 2.5 metres: see paragraph 2.14 of the judgment.

85. It can be seen from the borehole logs that even the made ground was not uniformly contaminated. Some areas were free from contamination. Other areas were contaminated at levels in excess of the STVs. This is illustrated most clearly in the drawing jointly prepared by Mr Hall and Mr Wouters, which summarises the findings of all site investigations between 2007 and 2011.

86. The depth to which OHL initially stripped the site was a matter for their choice. In the event OHL chose to strip the top layer of the whole site to a depth of 2 metres. After that the principal area of excavation was the tunnel and the ramps leading down to the tunnel at both ends.

87. The CEMP which OHL prepared in July 2009 stated that there would be "correct separation of wastes" and that contaminated materials would be "removed off site, stored and dispersed to a licensed site". Unfortunately OHL did not adhere to the CEMP. Instead they stockpiled all excavated materials indiscriminately, without any attempt to differentiate between contaminated and inert materials. Inevitably there was cross-contamination. The result was that during the currency of the Stockpile Agreement all the stockpiled excavation materials were progressively being exported to landfill sites in Spain.

88. Against this background Mr Hall and Mr Wouters, the two contamination experts, faced no easy task when they came to prepare their reports. They both attempted to estimate the actual quantity of contamination on the site. Doing the best that he could on the evidence, Mr Hall calculated the total volume of contaminated soils to be 15,243m^3. Mr Wouters arrived at a much higher figure, but that may not be relevant, since on all points where the two experts differed the judge preferred the evidence of Mr Hall: see paragraph 32(c) of the judgment.

89. Turing to the question of what contamination was "reasonably foreseeable by an experienced contractor" at the date of tender (the test under clauses 1.1.6.8 and 4.12 of the Conditions), Mr Hall arrived at a figure of 15,000m^3. His reasoning was as follows. An experienced contractor would not slavishly accept the figure of 10,000m^3 in the Environmental Statement. Instead it would make its own assessment of the information contained in the desk study, the Sergeyco 2007 report and the Environmental Statement. Mr Hall conducted his own analysis of the data and arrived at the figure of 15,000m^3.

90. The judge accepted the approach of Mr Hall. He held that an experienced contractor would make its own assessment of all available data. In that respect the judge was plainly right. Clauses 1.1 and 4.12 of the FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information. The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable.

91. The judge approached the expert evidence critically. He also made his own assessment of the information contained in the desk study, the historical maps

annexed to the desk study, the Sergeyco 2007 report and the Environmental Statement. That was entirely appropriate. The Technology and Construction Court is a specialist court with long experience of cases such as this one. The judges are not prisoners of the expert evidence.

92. The judge set out his final conclusion on the contamination issue in paragraph 227 of the judgment as follows:

> "I am satisfied that OHL did not in fact encounter physical conditions in relation to contaminated soil over and above that which an experienced contractor could reasonably have foreseen by the date of submission of its tender. The primary contaminants encountered were lead and hydrocarbon, particularly PAHs, which were reasonably foreseeable at the date of tender as likely to be encountered particularly along the line of the tunnel and the tunnel ramps and within the made ground which extended down in places to over 5m below existing ground level. In terms of the quantities of contaminants to be foreseen, it is difficult to put any precise figure on what should have been foreseen but in my judgment the amount would be very substantially above 10,000m^3. It is similarly impossible to determine with any precision what quantities of contaminated materials were actually encountered or were present. I am not satisfied on a balance of probabilities that OHL (to apply the wording in the operative clause, Clause 4.12 of the conditions of the Contract) in fact encountered either in terms of type or quantities or location "Unforeseeable" physical conditions, namely contaminated materials in the soil. I find that the quantities actually encountered and present were likely to have been less than could have been reasonably foreseen by an experienced contractor and it has certainly not been established otherwise."

93. Mr Catchpole is strongly critical of this paragraph and the paragraphs leading up to it. He submits that the judge has failed in his duty to make findings about the amount of contamination present and the amount which was foreseeable. Therefore a retrial is required.

94. I do not agree. The evidence of Mr Hall (the judge's preferred expert witness on contamination) plainly forms a basis for holding that the amount of contamination actually present did not exceed that which was foreseeable. Unlike the expert witnesses, however, the judge was not prepared to put precise figures on the actual and foreseeable quantities of contamination. Furthermore he gave good reasons for his reluctance. OHL's method of excavation and disregard of the CEMP, obliterated much of the relevant evidence: see paragraph 225 of the judgment. Furthermore the historical material provided to the contractor made it clear that very extensive contamination was foreseeable across the site. The contractor needed to make provision for a possible worst case scenario; the contractor should have made allowance for a proper investigation and removal of all contaminated material: see paragraph 223 of the judgment.

95. For the reasons stated by Burnett LJ (with whom Arden and Pitchford LJJ agreed) in *Watson Farley and Williams v Itzhak Ostrovizky* [2015] EWCA Civ 457 the Court of Appeal is reluctant to overturn findings of fact made at first instance. This is particularly true in the case of appeals from the Technology and Construction Court for the reasons stated by May LJ (with whom Jonathan Parker LJ and Sir Peter Gibson agreed) in *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2005] EWCA Civ 894; [2005] BLR 395 at [28]-[32].

96. In my view the judge's findings of fact in paragraph 227 of the judgment were open to him on the evidence. It is not permissible for this court to interfere with those findings of fact.

97. Mr Catchpole in the course of his submissions took us through the Gibraltar legislation relating to Environmental Statements as well as the EU Directives with which GoG was obliged to comply. This was an interesting and well researched exposition of the law applicable in Gibraltar. It certainly shows that the author of the Environmental Statement was under a duty to make a proper assessment of the amount of contamination present and its likely impact. That, however, is not sufficient to establish OHL's case. The Environmental Statement set out certain obligations with which the contractor had to comply. For example, it specified the STV levels which were to be the criteria of contamination under the contract. But where the Environmental Statement contained statements of opinion, those were not binding upon the contractor. As Mr Dennys observed in his submissions, the estimate of 10,000m^3 of contaminated materials contained in the Environmental Statement was one person's interpretation of the data. Tenderers were bound to take that assessment into account, but they remained under a duty to make their own independent assessment of the physical conditions likely to be encountered.

98. Mr Catchpole submits that the judge erred in treating the figure of 10,000m^3 in the Environmental Statement as being an *in situ* quantity. He submits that when one reads the Environmental Statement in context, it is clear that the figure of 10,000m^3 relates to contaminated material and surrounding material which is bound to be excavated at the same time.

99. That is a good point. In my view the judge did misread the Environmental Statement in that respect: see paragraph 222 of the judgment. On the other hand, this slip by the judge does not invalidate his conclusions on the contamination issue. Since the judge held that OHL were obliged to make their own independent assessment, rather than simply adopt the 10,000m^3 estimate in the Environmental Statement, the precise scope of that estimate is immaterial.

100. Let me now draw the threads together. OHL cannot establish a claim for unforeseeable ground conditions on the basis of the incorrect estimate of 10,000m^3 of contamination in the Environmental Statement. The judge's findings of fact in paragraph 227 of his judgment were justified on the evidence and are not open to attack in this court. On the basis of those findings of fact OHL's claim for unforeseeable ground conditions under clause 4.12 of the FIDIC conditions must fail. I therefore reject the first ground of appeal.

Part 6. Grounds 2 and 3: The draft fill guidelines and the June 2011 letters.

101. I take these two grounds of appeal together, because they are of lesser importance and occupied relatively little time during the hearing. In each case the appellant contends that certain documents provided by the Engineer to the contractor constituted variation instructions within clause 13.1 of the Contract Conditions. The judge erred in failing to so hold.

102. So far as the draft fill guidelines are concerned, this was a document which proposed stricter criteria for contamination than the STVs which were incorporated into the contract. On the other hand the Engineer never required OHL to remove from site material which was contaminated by reference to the thresholds in the draft fill guidelines. During May and June 2010 OHL were stockpiling excavated materials on site. During July, August and September OHL were removing all excavated material (whether contaminated or not) pursuant to the terms of the Stockpile Agreement. GoG bore most of the costs of that exercise.

103. After the Stockpile Agreement came to an end OHL transported excavated material to Aerial Farm. But even during that period OHL were not required to remove to landfill sites material which was contaminated by reference to the draft fill guidelines.

104. It is quite correct, as OHL point out, that paragraph 3.5 of chapter 10 of the Environmental Statement envisaged the possibility that excavated material from the site might be re-used within Gibraltar. In the event that did not prove practicable. No-one suggests that GoG was under any obligation to make available sites in Gibraltar at which spoil from the Airport and Frontier Access Road Project could be deposited.

105. It is also correct, as OHL observe, that paragraph 3.6 of chapter 10 of the Environmental Statement permitted OHL to re-use contaminated material on site, provided that it was capped within a boundary layer to prevent the spread of contamination. This provision was permissive not mandatory. OHL chose not to take advantage of this provision. Their CEMP, produced in July 2009, stated that all contaminated material would be removed to a licensed landfill site.

106. At no time during the currency of the contract did OHL act upon the draft fill guidelines in conjunction with the CEMP so as to remove from site contaminated material defined by reference to the draft fill guidelines. Accordingly the issue of the draft fill guidelines did not constitute a variation instruction.

107. I now move on to June 2011. I have set out the relevant part of Engineer's letter dated 1st June 2011 in Part 2 above. OHL contend that this letter constituted a variation instruction. They also contend that this instruction prevented them from performing the contract during the final period when GoG had initiated termination procedures by serving a notice under clause 15.1 of the Contract Conditions.

108. The judge held that after the withdrawal of Aerial Farm, OHL still had sufficient space on site to stockpile materials arising from excavation: see paragraphs 303 to 304 of the judgment. Mr Catchpole submits that the judge's findings of fact in those two paragraphs are contrary to the evidence.

109. I cannot accept these submissions for three reasons. First, Aerial Farm was an area of land outside the site. The permission which GoG granted for OHL to use that land for stockpiling was a concession. Therefore the withdrawal of that concession could not be a variation instruction. Secondly, OHL ceased using Aerial Farm after they had suspended work in December 2010. OHL did not remove any excavated material to Aerial Farm during February, March, April or May 2011.

110. Thirdly, the judge's findings in paragraphs 303 and 304 of the judgment are findings of fact which are not open to challenge. The judge recounts that there was "heated discussion during the trial" about how much material could be stockpiled on site during the period June to August 2011. The judge reached his findings of fact after hearing vigorous cross-examination of the factual witnesses about the extent of available space on site. There is no question of this court re-opening those findings of fact.

111. Finally, there is the Engineer's letter dated 8th June 2011. I have quoted the relevant part of that letter in Part 2 above. That letter required OHL to comply with their own CEMP. That was their contractual obligation in any event.

112. Accordingly I reject the second and third grounds of appeal. The documents relied upon in those grounds of appeal did not constitute variation instructions, nor did they prevent OHL from performing the contract.

Part 7. Ground 4: termination under clause 15.2(a)

113. On 16th May 2011 the Engineer sent to OHL a notice to correct under clause 15.1 of the Contract Conditions. I have set out the terms of that notice in Part 2 above, using the same numbering and layout as the judge. The judge has held that the requirements set out in items 1(a), 1(b), 2 and 3 were proper requirements with which OHL failed to comply, thus entitling GoG to terminate under clause 15.2(a). OHL challenge each of these findings.

114. The judge reviewed the relevant authorities and set out the legal principles governing the operation of clause 15 of the FIDIC Conditions in paragraphs 317 to 325 of his judgment. There is no challenge to the correctness of that analysis.

115. Items 1(a), 1(b) and 2 in the notice to correct all relate to OHL's failure to proceed with the tunnel works. OHL had suspended tunnel excavation work since 20th December 2010. OHL had suspended work on the diaphragm walls since 21st January 2011.

116. Mr Catchpole submits that by May 2011 the parties were locked into the re-design process. The Engineer gave his approval in principle for the re-design on 20th May 2011. Mr Gil as TAA countersigned the approval in principle on 31st May. The next steps under the contractual procedure were:

(i) OHL to obtain and submit Donaldson's category 3 check certificate, as required by paragraph 10 of Part 1 of Volume 3 of the Employer's Requirements.

(ii) The Engineer, pursuant to paragraph 11, to consider Donaldson's certificate and, if satisfied, to endorse upon it "accepted".

117. Mr Catchpole submits that the effect of the last sentence of paragraph 10 in conjunction with paragraph 11(a) of Part 1 of Volume 3 of the Employer's Requirements is that OHL were not entitled to start implementing the re-design until then. Furthermore by May 2010 the original design had been superseded. Therefore OHL were entitled, indeed obliged, to continue doing nothing.

118. This is not an attractive submission, despite the dexterity with which it was advanced. The original design was perfectly satisfactory. The re-design was unnecessary. There was no certainty as to whether Donaldson would ever provide the required certificate. In June and July 2011 Donaldson was not prepared to do so because it was concerned that the diaphragm walls would be over-stressed in the serviceability limit state and the ultimate limit state.

119. I pressed Mr Catchpole in argument as to what would happen if Donaldson never issued the category 3 check certificate. Would the project simply remain in limbo forever? I understood Mr Catchpole's case to be that there might come a time when the re-design was ineffective, but that hypothetical state of affairs lay well in the future. The position in May 2011 was that GoG and the Engineer had elected to proceed with the re-design and reject the original design. Therefore at that stage OHL's obligation was to do nothing.

120. In relation to the issue of election, Mr Catchpole relies upon the judgment of Aikens LJ in *Tele2 International Card Company SA v The Post Office Ltd* [2009] EWCA Civ 9 at [49] to [58] as a convenient re-statement of the relevant principles. Richards and Ward LJJ both agreed with that judgment. In essence, a party makes an election when, with knowledge of the relevant facts, it acts in a manner which is consistent only with it having chosen one or other of two inconsistent courses of action.

121. When one applies those principles to the present case, it is clear that neither GoG nor the Engineer made an election which committed them to adopting the re-design and rejecting the original design of the tunnel. The Engineer made it plain that the original design was perfectly satisfactory and capable of being constructed without any risk to health or safety. The Engineer was simply considering the re-design as a modification put forward by OHL under clause 5.2(d) of the Contract Conditions, for their own reasons and/or convenience. See the Engineer's letter of 4th May 2011 set out in Part 2 above.

122. The position in May 2011 was that there was one design for the tunnel which had full certification and approval. There was another emerging design for the tunnel, which (i) did not yet have full certification and approval, (ii) may or may not achieve full certification and approval in the future. In those circumstances it is impossible to say that the Engineer's approval in principle of the re-design pursuant to paragraph 2.3 of Part 2 of Volume 3 of the Employer's Requirements constituted an election. Nor did the subsequent approval of the TAA pursuant to paragraph 2.3 have that effect.

123. Mr Catchpole submits that if the re-design was unnecessary, the Engineer should have rejected it because it was going to cause delay. I do not agree. When the Engineer is reviewing the contractor's design under clause 5.2 of the FIDIC Conditions, he is considering whether the design is technically acceptable and whether, if the design is implemented, the completed works will accord with that which the contract requires.

If the re-design is satisfactory in all those respects, it is not for the Engineer to reject the design because he thinks it will take too long to build.

124. I come now to the notice to correct contained in the Engineer's letter dated 16th May 2011. This letter required OHL to get on with the work which would have to be done in any event, regardless of whether the original design or the re-design was implemented. Either way, the PEE excavation work would need to be done and the diaphragm walls would need to be cropped and repaired.

125. Interestingly, in the course of their submissions both Mr Catchpole and Mr Dennys referred to the Engineer trying to "ride two horses". It seems to me that that is precisely what the Engineer was trying to do during May 2011, including when he wrote the letter dated 16th May containing the notice to correct.

126. When considering the May 2011 correspondence it is important to bear in mind the historical context. OHL had suspended work on the tunnel in December 2010 and they had suspended work on the diaphragm walls in January 2011. Since then OHL had effectively done no work, asserting that they had embarked upon a re-design. GoG believed, and the judge has subsequently held, that that re-design was unnecessary. The perimeter of the airport had become a disused building site. The runway had been temporarily shortened, in order to make room for tunnel works which were not proceeding. Both GoG and the Engineer wanted to see some action on the site. There was plenty of work available which would have to be done in any event. Accordingly items 1(a), 1(b) and 2 in the notice to correct were properly included. The time allowed for rectifying those matters was reasonable, as the judge has held.

127. OHL failed to carry out the rectification works required by items 1(a), 1(b) and 2 in the notice to correct. The fact that OHL had not obtained the category 3 check certificate or final approval of the re-design was not an excuse for this inaction, as OHL now contend. OHL should have proceeded with the tunnel work which was required in any event as specified in the notice to correct. OHL's non-compliance with the notice was a serious breach of contract.

128. I now turn to item 3 in the notice to correct. There has been some debate at the hearing as to whether or not OHL carried out the de-watering works required by item 3 of the notice to correct. It is beyond doubt that OHL did some de-watering works: see the cross-examination of the Engineer at day 11 page 53. In my view, however, there is a short answer to this point. In its letter of termination dated 28th July 2011 GoG made it clear that it was not relying upon OHL's non-compliance with item 3 of the notice to correct as a ground of termination: see the first line on the second page of that letter.

129. There was therefore a slip by the judge in paragraph 344 of his judgment, where he treated failure to proceed with de-watering as a relevant non-compliance with the notice to correct. In my view, however, this slip by the judge does not undermine his conclusion that GoG effectively terminated the contract for non-compliance with the notice. On any view OHL's principal breaches were their failures to proceed with the tunnel works. Those matters were sufficiently serious to justify termination of the contract.

130. For all these reasons I reject the fourth ground of the appeal. GoG was entitled to, and did, terminate the contract pursuant to clause 15.2(a) of the Contract Conditions.

Part 8. Grounds 5 and 6: Termination under clauses 5.2(b) and 5.2(c)(i)

131. These two grounds of appeal are closely linked and it is convenient to deal with them together.

132. The obligation under clause 8 of the FIDIC Conditions to "proceed with the works with due expedition and without delay" is not directed to every task on the contractor's to-do list. It is principally directed to activities which are or may become critical. See the reasoning of Stuart-Smith J in *Sabic UK Petrochemicals Ltd (formerly Huntsman Petrochemicals (UK) LTD) v Punj Lloyd Ltd (a company incorporated in India)* [2013] EWHC 2916 (TCC); [2014] BLR 43 in particular at [166].

133. Mr Catchpole submits that the critical activity in the period May to July 2011 was obtaining the category 3 check certificate from Donaldson and final approval of the re-design from the Engineer. Therefore other delays, in particular delays on tunnel works, were immaterial.

134. I do not agree. The tunnel was on the critical path of the whole project. The next stage of work on the tunnel was the PEE excavation, together with cropping and repairing of the diaphragm walls. These tasks were very much on the critical path.

135. OHL's lack of significant activity on site between 21st January and 28th July 2011 was in my view a failure "to proceed with the works with due expedition and without delay". That was a serious breach of clause 8.1 of the Conditions.

136. The next question to consider is whether there was "reasonable excuse", within the meaning of clause 15.2(c) of the Conditions, for OHL's failure to proceed with the works.

137. OHL rely upon the following as "reasonable excuses":

(i) Lack of space upon which to stockpile spoil as a result of the Engineer's instructions dated 1st and 8th June 2011.

(ii) The discovery of hydrocarbons in the groundwater and the need for a hydrogeological survey.

(iii) The need to comply with EI 20.

(iv) The Engineer's instruction to stop de-watering on 29th June 2011.

(v) The difficulties encountered by OHL in dealing with the contamination, even if that contamination was foreseeable.

(vi) The lack of Donaldson's category 3 check certificate and the lack of final approval for the re-design.

138. I shall refer to these matters as "excuse (i)", "excuse (ii)", and so forth.

139. As to excuse (i), the judge held that there was sufficient space for stockpiling. That decision stands as explained in Part 6 above.

140. As to excuse (ii), the likelihood of groundwater being contaminated must have been obvious to any experienced contractor for the reasons stated by the judge in paragraphs 229 to 235 of the judgment. The Environmental Statement expressly stated that heavy metals, toluene and PAH contaminants above the threshold levels had been found in groundwater. Unfortunately OHL failed to carry out a "detailed hydrogeological study" at the start of the works in accordance with their contractual obligation. In so far as the concerns set out in OHL's letter of 13th July 2011 were valid reasons for delaying work, OHL ought to have identified and resolved these matters long before excavation started.

141. It should also be noted that, as a matter of fact, the aquifers were not contaminated. The aquifers were regularly monitored and there was no evidence at trial to suggest that they had become contaminated.

142. As to excuse (iii), the instruction to expose areas of diaphragm wall in order to identify the extent of a construction defect cannot be a justification for doing no other work.

143. As to excuse (iv), the Engineer's instruction to stop de-watering on 29th June 2011 related to the MOD drainage diversion works: see paragraph 184 of the judgment. That was no reason to suspend any other works on site.

144. As to excuse (v), I have dealt with the contamination issue in Part 5 above. Save in so far as OHL had an approved scheme to re-use contaminated material (properly capped) on site, it was their obligation to remove all excavation material contaminated above the STVs to landfill sites in Spain.

145. As to excuse (vi), it is quite true, as OHL say in their skeleton argument, that "Donaldson was an independent engineering firm that was outwith the appellant's control". The fact remains, however, that if OHL wished to proceed with their (unnecessary) re-design, it was their obligation to produce a re-design which was sufficiently robust to satisfy the independent checker whom OHL had appointed. OHL's failure (after two and a half years of this two year contract had elapsed) to secure Donaldson's certification of the tunnel re-design, cannot be a valid excuse within the meaning of clause 15.2(c) of the FIDIC Conditions.

146. The conclusions reached in relation to clause 15.2(c)(i) of the Conditions are directly applicable to clause 15.2(b). OHL's failure over many months to proceed with the works (a failure which continued in defiance of the notice to correct dated 16th May 2011) did "plainly demonstrate" an intention not to continue performance of their contractual obligations.

147. I therefore conclude that GoG was entitled to, and did, terminate the contract under clause 15.2(b) and 15.2(c)(i) of the Conditions. I reject the fifth and sixth grounds of appeal.

Part 9. Executive summary and conclusion

148. On 21st November 2008 Obrascon Huarte Lain SA ("OHL") contracted with the Government of Gibraltar ("GoG") to design and construct a road around the perimeter of Gibraltar Airport including a tunnel under the east end of the runway. The contract incorporated the FIDIC Yellow Book Conditions.

149. The project fell behind schedule. In December 2010/January 2011 OHL stopped work and proposed to re-design the tunnel because of excessive and unforeseeable contamination. In July 2011 GoG served notice terminating the contract, essentially because of OHL's lack of progress and non-compliance with a notice to correct. OHL maintained that GoG had thereby repudiated the contract.

150. In litigation to determine which party had terminated the contract, Akenhead J held:

(i) The amount of contamination was no more than OHL should have foreseen.

(ii) Certain instructions given by the Engineer relating to treatment of contaminated materials and locations for stockpiles were not variation instructions.

(iii) GoG had terminated the contract under clause 15 of the FIDIC Conditions.

151. OHL appeals to the Court of Appeal. In my view the Judge was correct in all three matters identified in the previous paragraph. Accordingly, if my Lord and my Lady agree, this appeal will be dismissed.

Lady Justice Gloster:

152. I agree.

Lord Justice Floyd:

153. I also agree.