Neutral Citation Number: [2025] EWCA Civ 380

Case No: CA-2024-001874

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Justice Constable
[2024] EWHC 1185 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2025

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE SNOWDEN

- -

Between:

Disclosure and Barring Service	**Appellant**
- and -	
Tata Consultancy Services Limited	**Respondent**
(A company registered in Mumbai, India)	

- -
- -

Simon Croall KC, Andrew Carruth and William Mitchell (instructed by **Bristows LLP**) for the **Appellant**
Stephen Cogley KC, Matthew Lavy KC and Iain Munro (instructed by **BCLP LLP**) for the **Respondent**

Hearing Date: 13 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1.Introduction

1. On 4 December 2012, the appellant, the Disclosure and Barring Service ("DBS") entered into a written agreement with Tata Consultancy Services Limited, the respondent ("TCS"), to take over the manually intensive business-as-usual Disclosure and Barring processes, whilst building in parallel a new system to modernise those processes and replace its previous paper-based regime with a digital one. As is often the case with IT modernisation projects, this one did not go well.

2. TCS brought a claim against DBS for £125 million odd. DBS defended the claim and maintained a counterclaim which at one point was said to be worth over £100 million. The various disputes between the parties took a full term to try, in the Autumn of 2023. In a judgment running to 824 paragraphs ([2024] EWHC 1185 (TCC)), Constable J ("the judge") decided a large number of issues which eventually led to a net payment by DBS to TCS of just under £5 million[1]. When granting leave to appeal on the single issue identified below, I described the judgment as "magnificent". The closer acquaintance with it necessitated by this appeal has not led me to modify that description.

3. DBS sought permission to appeal on two grounds. The first was concerned with a short issue of construction, namely whether clause 6.1 of the Agreement created a condition precedent, breach of which prevented DBS from being able to recover £1.592 million by way of what were called Delay Payments (akin to liquidated damages). The second was concerned with the calculation of the Volume Based Service Charges ("VBSC"). I concluded that DBS had no real prospect of success on the VBSC issue and refused permission to appeal on that ground. Accordingly, this appeal is concerned solely with the proper construction of clause 6.1 of the Agreement.

2.The Relevant Clauses of the Agreement.

4. For present purposes it is only necessary to set out the relevant parts of clauses 5 and 6 of the Agreement. They deal primarily with the parties' rights and obligations in the event of delay. Clause 5 was in these terms:

> "5. IMPLEMENTATION DELAYS - GENERAL PROVISIONS
>
> 5.1 If, at any time, the CONTRACTOR becomes aware that it will not (or is unlikely to) Achieve any Milestone by the relevant Milestone Date it shall as soon as reasonably practicable notify the AUTHORITY of the fact of the Delay or potential Delay and summarise the reasons for it.
>
> 5.2 The CONTRACTOR shall then submit a draft Exception Report to the AUTHORITY for its approval not later than five (5) Working Days (or such

[1] At [100] of his Consequentials Judgment of 23 July 2024 ([2024] EWHC 2025 (TCC)), the judge described TCS's claim as "largely unmeritorious" and DBS's counterclaim as "large and unmeritorious". As a result of the amount of time spent on issues on which neither party could be said to have been successful, the judge awarded TCS just 20% of their costs.

other period as the AUTHORITY may permit and notify to the CONTRACTOR in writing) after the initial notification under clause 5.1.

5.3 The draft Exception Report shall give the AUTHORITY full details in writing of:

5.3.1 the reasons for the Delay;

5.3.2 the actions being taken to avoid or mitigate the Delay;

5.3.3 the consequences of the Delay;

5.3.4 if the CONTRACTOR claims that the Delay is due to an AUTHORITY Cause, the reason for making that claim.

5.4 The AUTHORITY shall not withhold its approval of a draft Exception Report unreasonably. If the AUTHORITY does not approve the draft Exception Report it shall inform the CONTRACTOR of its reasons in writing, promptly following its decision to withhold approval and the CONTRACTOR shall take those reasons into account in the preparation of a further draft Exception Report, which shall be resubmitted to the AUTHORITY within five (5) Working Days of the rejection of the first draft.

5.5 Whether the Delay is due to an AUTHORITY Cause or not, the CONTRACTOR shall make all reasonable endeavours to eliminate or mitigate the consequences of the Delay.

5.6 Where the CONTRACTOR considers that a Delay is being caused or contributed to by an AUTHORITY Cause the AUTHORITY shall not be liable to compensate the CONTRACTOR for Delays to which clauses 7 or 8 apply unless the CONTRACTOR has fulfilled its obligations set out in, and in accordance with, clauses 5.1, 5.2 and 5.3…"

5. The second part of clause 5, between sub-clauses 5.8 - 5.12 was concerned with TCS's obligation to serve a draft Correction Plan either when it became aware that it would not achieve a Milestone Date, or if it had failed to achieve a Milestone Date. An express link to DBS's Non-Conformance Report ("NCR"), explained in greater detail in clause 6, was provided by clause 5.10. That said:

> "5.10 The draft Correction Plan shall be submitted to the AUTHORITY for its approval as soon as possible and in any event not later than eight (8) Working Days (or such other period as the AUTHORITY may permit and notify to the CONTRACTOR in writing) after the initial notification under clause 5.1 or the issue of a Non-conformance Report."

6. Clause 6 was in these terms:

> "6. DELAYS DUE TO CONTRACTOR DEFAULT
>
> 6.1 If a Deliverable does not satisfy the Acceptance Test Success Criteria and/or a Milestone is not Achieved due to the CONTRACTOR's Default, the AUTHORITY shall promptly issue a Non-conformance Report to the CONTRACTOR categorising the Test Issues as described in the Testing Procedures or setting out in detail the non-conformities of the Deliverable

> where no Testing has taken place, including any other reasons for the relevant Milestone not being Achieved and the consequential impact on any other Milestones. The AUTHORITY will then have the options set out in clause 6.2.
>
> 6.2 The AUTHORITY may at its discretion (without waiving any rights in relation to the other options) choose to:
>
> 6.2.1 issue a Milestone Achievement Certificate conditional on the remediation of the Test Issues, or the non-conformities of the Deliverable where no testing has taken place, in accordance with an agreed Correction Plan; and/or
>
> 6.2.2 if the Test Issue is a Material Test Issue, refuse to issue a conditional Milestone Achievement Certificate as specified in clause 6.2.1 then escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved exercise any right it may have under clause 55.1 (Termination for Cause by the AUTHORITY); and/or
>
> 6.2.3 require the payment of Delay Payments, which shall be payable by the CONTRACTOR on demand, where schedule 2-3 (The Charges and Charges Variation Procedure) identifies that Delay Payments are payable in respect of the relevant Milestone. The Delay Payments will accrue on a daily basis from the relevant Milestone Date and will continue to accrue until the date when the Milestone is Achieved in accordance with the Correction Plan.
>
> 6.3 Where schedule 2-3 (Charges) does not identify the payment of Delay Payments in respect of a Milestone the AUTHORITY reserves its rights. Otherwise Delay Payments are provided as the primary remedy for the CONTRACTOR's failure to Achieve the relevant Milestone Date and it shall be the AUTHORITY's exclusive financial remedy except where:
>
> 6.3.1 the AUTHORITY is otherwise entitled to or does terminate this Agreement for the CONTRACTOR's Default or for Force Majeure; or
>
> 6.3.2 the failure to Achieve the Milestone exceeds a period of six months."

7. At trial, it was DBS's case that, by reason of the wording of clause 5.6, TCS had to comply with clauses 5.1 to 5.3 in order for TCS to claim compensation for Delays attributable to an 'AUTHORITY Cause'. By the same token, it was TCS's case that DBS's entitlement to recover Delay Payments pursuant to clause 6.2.3 was conditional on DBS's compliance with the substance of clause 6.1, and in particular the obligation to provide NCRs.

8. During the course of argument, we were also taken to schedule 2-3, because there was a suggestion by Mr Croall KC that they showed that DBS's entitlement to Delay Payments was unqualified by reference to clauses 6.1 and 6.2. However, since (as he accepted) the only way to those schedules was via clause 6.2, and therefore clause 6.1, the schedules added nothing to the argument as to whether clause 6.1 was a condition precedent or not. I do not therefore set out the schedules.

3. The Judgment

9. Having set out the authorities on conditions precedent, and summarised the relevant principles at [74], the judge found (at [75]-[81]) that TCS's potential entitlement to

claim both loss and expense pursuant to clause 7.4, and general damages at common law for delays, as defined, was subject to their compliance with the regime at clauses 5.1 - 5.3. Those paragraphs of the judgment explained what claims were precluded by TCS's failure to comply with this condition precedent, and what claims remained unaffected by that non-compliance.

10. Similarly, the judge found that DBS's right to claim Delay Payments pursuant to clause 6.2.3 was conditional on DBS's compliance with clause 6.1. He rejected the claim because DBS had failed to comply with clause 6.1: in particular, they had failed to serve any NCRs at all ([82]-[99]). In more detail:

(a) The judge explained why an NCR was not, as DBS had submitted, "largely redundant in that it need only identify that the Milestone Date had been missed." [84].

(b) He identified the utility of the NCR in these terms:

> "85. To understand the clause it is necessary to set it in the context of TCS's obligations and how a Milestone is achieved. TCS had certain 'Deliverables' These are defined as 'an item, feature or service associated with the provision of the Services or a change in the provision of the Services which is required to be delivered by [TCS] at a Milestone Date or at any other stage during in the performance of this Agreement [sic]' A Deliverable must be tested before an Acceptance Test Certificate can be issued. Pursuant to Clause 3.4 of Schedule 2-5 of the Agreement ('Test and Acceptance Procedures'), TCS 'shall use reasonable endeavours to submit a Deliverable for Testing or re-Testing by or before the date set out in the Implementation Plan for the commencement of Testing in respect of the relevant Milestone'. Pursuant to Clause 3.3 of the same Schedule, TCS 'shall not submit any deliverables for AUTHORITY Testing' until various criteria had been met, which interfaced with DBS. For example, pursuant to Clause 3.3.2, the parties were required to have agreed the Test Plan and the Test Specification relating to the relevant Deliverables before they could be submitted for testing."

(c) In the light of that explanation, the judge said:

> "86. In this context, the scope of the clause becomes clear. The first words of Clause 6.1 expressly contemplate non-satisfaction of the Acceptance Test Success Criteria. This applies therefore in circumstances where the Deliverable has been tested, but where there are Test Issues preventing some or all of the Acceptance Test Success Criteria from being Achieved. A (prompt) Non-conformance Report is required to be issued by DBS in these circumstances, whether or not the non-satisfaction has also led to the additional failure to have Achieved a Milestone. This is clear from the words 'and/or'. The clause then expressly refers to its application where 'a Milestone is not Achieved'. The words 'due to the Contractor's Default' apply to either situation.
>
> 87. As becomes clear from the words which then follow, the reason why a Milestone has not been achieved may not be that the Testing has failed, but may also occur where no Testing has taken place at all as at the date of the Milestone. The wording of the clause is very clear that in each of these situations, DBS is required ('shall') to 'promptly issue a Non-conformance Report'. The Non-

conformance Report is to deal either/both with (a) the situation where the Deliverable has been tested, in which case the Non-conformance Report must categorise the Test Issues as described in the Testing Procedures; and/or (b), where no Testing has taken place, in which case the Non-conformance Report must set out in detail the non-conformities of the Deliverable, including any other reasons for the Milestone not-being Achieved. Whilst clearly the Non-conformance Report will be limited to such matters as are properly within DBS's knowledge, it is improbable that a Non-conformance Report which simply says 'TCS has not achieved the Milestone by the Milestone Date' would comply with the requirements of the clause."

(d) Turning to the words of clause 6.1, the judge said:

"90. Bearing in mind the factors I have identified following my review of the law above, I start with the ordinary language of the clause. The word 'then' in the last sentence of Clause 6.1 makes clear, at the very least, that the entitlements in Clause 6.2 happen after the matters dealt with in the preceding words of Clause 6.1 have been engaged. 'Then' is a word which is often used in conditional sentences, but generally in sentences where the conditionality itself is derived from the words 'If' or 'Unless' or 'Provided that…'. That conditionality is also present in Clause 6.1, which starts with 'If'.

91. As a matter of normal usage of language, therefore, the entitlements in Clause 6.2 are clearly linked to Clause 6.1, through the conditional phrasing of 'If…then'. Construed naturally, the 'If' trigger in Clause 6.1 gives rise to two matters which are conditional on the 'If…' trigger: the first is an obligation (as set out in the remainder of Clause 6.1), and 'then' the second is an entitlement (in Clause 6.2). In other words, the requirement to carry out the obligation (service of a Non-conformance Report) is conditional on the 'If…' happening, just as the entitlement is conditional on the 'If' trigger happening. In my judgment, it makes no sense (either linguistically or commercially) to apply the conditional link between Clause 6.2 (the entitlement) and just the first part of Clause 6.1, effectively leapfrogging the second part of Clause 6.1 (the obligation).

92. It is true that the parties have chosen to express the condition precedent nature of compliance with Clause 5.1 to 5.3 in a different way, in the context of TCS's entitlement to relief. This is potentially a factor weighing against construing Clause 6.1 as a condition precedent, when considering Lord Wilberforce's second limb. However, it could equally be said with justification that when the delay provisions are considered as a whole, the existence of some symmetry in relation to the requirement upon both parties to provide a form of notice/information to the (other) party responsible for the delays as a condition of claiming compensation weighs in favour of TCS's construction. This is particularly so where the rationale for the imposition of a notice regime as a condition precedent is to know where a party stands contemporaneously, and to allow the defaulting party to rectify its default. Whilst it is right that the parties will know when a Milestone has not been achieved, the Non-conformance Report must, in circumstances where the Milestone has passed but no Testing has been carried out, set out (insofar as within the knowledge of DBS) the non-conformances which have prevented Testing and any other

> reasons the Milestone has not been achieved (for example, the failure to have submitted a Test plan capable of agreement). In these circumstances, the conditionality created by the clear 'If…then' language attaching to the Non-conformance Report serves a useful purpose.
>
> 93. Whilst I also take account of the fact that the time period by which the Non-conformance Report has to be given is expressed by the word 'promptly' rather than a specified number of days, this does not in my judgment preclude the condition-precedent nature of compliance. Whether a report has been given 'promptly' is a question of fact and is sufficiently certain in meaning to be given effect to (as was the case in *Merton, WW Gear Construction* and *Steria*).
>
> 94. In the circumstances, as a matter of language, there is a clearly expressed intention to impose conditionality. 'If' certain CONTRACTOR Default occurs, DBS 'shall' comply with its obligation promptly to issue a Non-conformance Report in accordance with Clause 6.1. The last sentence of Clause 6.1 has an ordinary and natural meaning: that it is only 'then' that DBS have the options set out in Clause 6.2. The language should be given its ordinary and natural meaning, the effect of which is that compliance with the obligations imposed upon DBS in Clause 6.1 is necessary in order then for DBS to have the options set out in Clause 6.2".

4. The Issue on Appeal

11. The issue on appeal is essentially a rerun of the issue before the judge at trial which he identified at [89]: does clause 6.1 have the effect of making the prompt issue by DBS of an NCR a condition precedent to recovering Delay Payments? In addition to the main judgment, because DBS rightly sought permission to appeal on this issue first from the judge, his Consequentials Judgment at [109] and [110] contained a detailed exposition of why he thought the point was unarguable. Mr Cogley KC was therefore right to observe that this was the third time that this narrow construction argument had been ventilated in court.

12. I propose to set out the applicable principles of law in Section 5 below. In Section 6, I set out my own construction of the relevant provisions. That is because, in any appeal about contract interpretation, it is inevitable that, although this court will pay due deference to the judge's construction, it will inevitably have its own views. Thereafter, in Section 7, I address the specific matters raised by Mr Croall KC on behalf of DBS as to why the judge was wrong to conclude that clause 6.1 was a condition precedent. There is a short summary of my conclusions at Section 8.

5. The Applicable Principles

13. The leading case on the principles of interpretation in the context of a condition precedent remains *Bremmer Handelsgesellscheft Schaft m.b.H v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109. Lord Wilberforce said:

> "Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law."

14. The clause in question was in the following terms:

> "21. Prohibition
> In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/arc situate, preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers of the reasons therefor. If required, sellers must produce proof to justify their claim for cancellation."

15. Lord Wilberforce had no difficulty in concluding that this clause was not a condition precedent. He said:

> "As to (i), the clause is not framed as a condition precedent. The "cancellation" effected by the first sentence is not expressed to be conditional upon the second sentence being complied with: it operates automatically upon the relevant event. Learned Counsel for the buyers invited your Lordships to read cl. 21 as if the first sentence were linked with the second by such words as "provided that" - an argument which must surely support the view that without such words, the second sentence does not attain condition status."

16. Lord Wilberforce also thought that the generality of the words "without delay" in respect of the notification by the sellers told against the clause being a condition precedent because if it was, a definite time limit would be likely to be set. However, it should be noted that the words "without delay" did not appear in the clause at all: they appear to come from the judgment of Lord Denning MR in the earlier case of *Tradax Export SA v Andre & Cie SA* [1976] 1 Lloyd's Rep 416. Presumably such a provision would have had to have been some sort of implied term: the basis for this part of the discussion is a little opaque.

17. We were referred to a number of cases concerned with *Force Majeure* clauses, including *Mamidoil-Jet Oil Petroleum Company SA & Anr v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm); [2002] 1 Lloyds's Rep 1 and, in the Court of Appeal at [2003] EWCA Civ 1031; [2003] 2 All ER (Comm) 640, where the clause was held to be a condition precedent; and *Great Elephant Corporation v Trafigura Beheer & Ors* [2012] EWHC 1745 (Comm); [2013] 1 All ER (Comm) 415 and *Scottish Power UK PLC v BP Exploration Operating Co. Limited & Ors* [2015] EWHC 2658 (Comm); [2016] 1 All ER (Comm), where similar clauses were held not to be a condition precedent.

18. Speaking for myself, I did not find these cases very helpful in the present context. The clauses were different; the contracts were different; and their background and context were different too. As Leggatt J (as he then was) said in *Tartsinis v Navona Management Co.* [2015] EWHC 57 (Comm) at [62] it is:

> "…seldom, if ever, helpful in deciding how to interpret particular contractual provisions to refer to a case in which a court has interpreted different provisions of a differently worded contract made in a different factual context."

He made the same point at [204] of his judgment in *Scottish Power.*

19. It is perhaps worth taking the provisions in the *Scottish Power* case simply as a means of illustrating a clause or a series of clauses that were not held to be a condition precedent. They were articles 15.2 and 15.4 of the Agreement in the following terms:

> "15.2 The Parties shall, except where otherwise specified in this Agreement, be relieved from liability under this Agreement:
> (1) In the case of the Seller, to the extent that owing to Force Majeure it has not delivered the quantities of Natural Gas which it should have delivered under this Agreement or has not performed any one or more of its obligations under this Agreement …
>
> 15.4 A Party, when claiming relief under Clause 15.2 shall: –
>
> (1) within ten (10) Days of the failure or inability to fulfil in [sic]obligation hereunder for which relief is sought, notify the other Party thereof and shall within five (5) Working Days of such notification provide an interim report which shall furnish such relevant information as is available appertaining to the event including the place thereof, the reasons for the failure and the reasons why obligations under this Agreement were affected, and give an estimate of the period of time required to remedy the failure
>
> (2) within twenty (20) Working Days of such notification, if requested, provide a detailed report which shall amplify the information contained in the interim report and contain such further explanation and information relevant to the event causing the failure as may be reasonable [sic] required;
> (3) upon request, as soon as is reasonably practicable, give or procure access at the risk of the Party seeking access, for a reasonable number of representatives of the other Party to examine the scene of the vent causing the failure and/or the installation, machinery or equipment which has failed, provided that the reasonable costs of transportation to the scene shall be at the expense of the Party seeking access, if such event is agreed or adjudged to give rise to relief from liability under Clause 15.2, and shall otherwise be at the expense of the Party seeking relief;
> (4) subject in the case where the Seller or the Buyer is seeking relief under Clause 15.2(1) or Clause 15.2(2) (as the case may be) to the provisions of Article 7, take as soon as reasonably practicable all reasonable steps to rectify the cause of the failure and to recommence performance of its obligations under this Agreement …;
> (5) keep the other Party informed, on an ongoing basis, of the actions being taken under Clause 15.4(4)."

20. Between [205] and [223] of his judgment, Leggatt J rejected the submission that these articles amounted to a condition precedent. His principal reason can be found at [206] as follows:

> "[206] First and most simply, there are no words in the contract which say that the consequence of failure to comply with any of the requirements of art 15.4 is to preclude a claim for relief under art 15.2. Article 15.4 requires a party to do various things 'when claiming relief under Clause 15.2'. It does not say, as it easily could have, that a party must do those things in order to claim relief

> under Clause 15.2. Nor is there any other language which indicates that the right to claim relief from liability under art 15.2 is conditional on doing the things set out in art 15.4. The absence of any such language seems to me to be all the more significant in the context of what is a very detailed and elaborate contract that has obviously been professionally drafted."

In addition, at [213], Leggatt J found that there was nothing in the language of article 15.4 which provided any basis for treating any of its sub-clauses differently from any of the others, such that some of the requirements specified were conditions precedent to a successful claim for relief and yet others were not. He said, "either all the requirements [in article 15.4] are conditions precedent or none of them is". The point he was making was that, in relation to those provisions, the consequences for failing to comply with some would be trivial, whereas a breach of others could be significant. That militated against article 15.4 being a condition precedent[2].

21. The judge in the present case referred to *London Borough of Merton v Stanley Hugh Leach Limited* [1986] 32 BLR 51. The argument between the parties about a condition precedent (which was Issue 14 in that case) concerned clause 23 of the JCT 1963 edition, 1971 revision. That referred to the need for a notice if it became apparent to the contractor that there was a delay, and the duty on the architect to extend time for completion. As Vinelott J noted, there was nothing in the clause which obviated the need for the architect to extend time if he or she was aware of delay due to one of the specified causes, regardless of the absence of a notice from the contractor. The right to an extension of time, therefore, was not conditional on the provision of a notice.

22. In his judgment in the subsequent case of *WW Gear Construction Limited v McGee Group Limited* [2010] EWHC 1460 (TCC); 131 Con.L.R.63, at [15] and the beginning of [17], Akenhead J referred to pages 95-96 of Vinelott J's judgment in *Merton v Leach*, and his reference to "if" provisions. The "if" provisions to which Vinelott J was referring there were sub-clauses 24(1) and 11(6), which were concerned with contractor's claims for loss and expense, triggered by a notice from the contractor. That was the source of Akenhead J's remark, quoted below, that 'if you don't ask, you don't get'. There was, however, no specific issue before Vinelott J as to whether those provisions were conditions precedent.

23. Although I am mindful of the danger of reading across too enthusiastically from one set of provisions in a reported case to the provisions of the case in question, it is appropriate to refer to three other cases involving contracts and clauses rather more similar to the one with which we are concerned, and which were referred to in argument. In *Steria Limited v Sigma Wireless Communications Limited* [2007] EWHC 3454 (TCC); 118 Con. L. R. 177, HHJ Stephen Davies found that the provision he was considering was a condition precedent. That was a sub-clause with a formulation that identified step one as "**if** by reason of any circumstance…", and step two as "**then** in any such case provided the sub-contractor shall have given within a reasonable period written notice…" (my emphasis). That is perhaps the closest to the present clause in the authorities. I note that the fact that the notice had to be provided within a reasonable

[2] There was similar sort of reasoning and result in *Tullow Uganda Ltd v Heritage Oil and Gas Ltd* [2014] EWCA Civ 1048.

period was not said to be a reason why the clause in *Steria* could not be a condition precedent.

24. In *WW Gear*, referred to above, Akenhead J demonstrated that the clause in issue was a condition precedent, because there was an "if" to identify the first step and a "provided always that" to cover the second step. The necessary conditionality was therefore present. The "if" provision covered the written application by the trade contractor to the construction manager for loss and expense. That highlighted the importance of the application because, as the judge put it, "the maxim is presumably that he or she who does not ask does not get. There is nothing in clause 4.21 which suggests that the construction manager or the employer has any obligation to ascertain loss and expense let alone adjust the contract sum for loss and expense which has not been applied for." That accorded with Vinelott J's analysis of clause 24 in *Merton v Leach*. In addition, Akenhead J was satisfied that the "timely" provision of a notice was sufficient for the clause to operate as a condition precedent.

25. Finally, we were referred to *Yuanda (UK) Company Limited v Multiples Construction Europe Limited & Ors* [2020] EWHC 468 (TCC); 189 Con.L.R. 26. In that case the clause had the necessary first step ("if the sub-contractor fails…") but there was no second step: there was no "then", or anything like it. Moreover the condition precedent argument in that case appears to have arisen as something of an afterthought. Fraser J (as he then was) noted at [84] that the point had not even been pleaded. He said that "the wording of the clause suggests that it is not a condition precedent", without analysing the point further.

26. As the judge in the present case rightly said at [74], it is a futile exercise to endeavour to articulate an exhaustive checklist of the factors that fall to be considered in any investigation into whether a particular clause was a condition precedent or not. From the authorities, I would identify the general principles as follows:

(a) Whether or not a party has to comply with one or more stated requirements before being entitled to relief will turn on the precise words used, set within their contractual context;

(b) As Lord Wilberforce made clear in *Bremer*, to be framed as a condition precedent, a clause needs something that makes the relief conditional upon the requirement;

(c) As with exclusion clauses or clauses which seek to limit liability, clear words will usually be necessary for a clause to be a condition precedent (see by analogy, *TriplePoint Technology Inc v PTT Public Company Ltd* [2021] UKSC 29 at [108]-[111]). That said, it is not necessary for the clause to say in terms "this is a condition precedent": none of the clauses in the authorities noted above, which were found to be conditions precedent, used those words;

(d) In addition to conditionality, it will usually be necessary for the link between the two steps to be expressed in the language of obligation (i.e. *shall*) but that will not on its own be sufficient to amount to a condition precedent: see for example *Scottish Power*;

(e) It is not necessary for the step one condition to be expressed in a finite number of days or weeks. More flexible periods – "timely", "within a reasonable time" etc - have

been included in clauses which courts have found to be a condition precedent (see for example *Steria* and *WW Gear*).

6. The Words in Their Context

27. In my judgment, the words of clause 6.1, when seen in their context, are clear. On the occurrence of one or both of two different events ("*if*"), DBS "shall promptly issue" an NCR. Those two events are i) where a Deliverable does not satisfy the Acceptance Test Success Criteria; ii) where a Milestone is not achieved due to TCS's default. The words of clause 6.1 make plain that the NCR is not just a procedural box-ticking exercise: it provides that the NCR will categorise the Test Issues as described in the Testing Procedures or set out in detail the non-conformities of the Deliverable where no Testing has taken place. It will also include any other reasons for the relevant Milestone not being achieved, and the consequential impact on any other Milestone. Clause 6.1 goes on to state that DBS "will *then* have the options set out in clause 6.2", one of which (clause 6.2.3) was to require Delay Payments.

28. On their face, therefore, the words in clause 6.1 mean that, on the happening of one or both of those events, a detailed NCR must be provided promptly by DBS and then – and only then – can the clause 6.2 options, including the levying of Delay Payments, be exercised. On the face of it, the clause was therefore a condition precedent, and DBS's failure to comply, by failing to provide any NCRs at all, meant that they were not entitled to exercise the option at clause 6.2.3.

29. The judgment at [85]-[87], set out in paragraph 10 above, explains why the NCR was a significant step in the process. An NCR was required whether or not a Milestone had been achieved: it was also required in circumstances where the Deliverable had been tested, but where there were test issues preventing some or all of the acceptance test criteria from being achieved. The NCR had to identify those issues: the reasons why it had failed the testing. Similarly, an NCR was required where a Milestone had not been achieved and no testing had yet taken place; it had to set out in detail the non-conformities of the Deliverable, any other reason for the Milestone not being achieved, and the consequential impact on any other Milestones.

30. The NCR therefore served to make plain to both parties what the particular problems were in order that both parties might work together to see how they might be resolved. The "then" at the end of clause 6.1 clearly envisaged the happening of one or both of the events at the start of 6.1 and the performance of the critical next stage, namely the provision of an NCR. The entitlement on the part of DBS to levy Delay Payments was therefore an entitlement which only arose if the steps under 6.1 had been taken. If DBS had failed to provide an NCR, the entitlement did not arise.

31. In addition, it is plain to me that clause 6.2 could only be sensibly operated if clause 6.1 had already been complied with. The ability to levy Delay Payments is only one of three different remedies available to DBS under clause 6.2. The first, at clause 6.2.1, allowed DBS to issue a conditional Milestone Achievement Certificate. That would be conditional on the remediation of the Test Issues or the non-conformities of the Deliverable where no testing has taken place. Both the Test Issues and/or the non-conformities would be identified in the NCR. Without an NCR, therefore, clause 6.2.1 simply would not work.

32. Similarly, clause 6.2.2 permitted DBS to refuse to issue a conditional Milestone Achievement Certificate in circumstances where the Test Issue was a Material Test Issue. In those circumstances, DBS were entitled to escalate the matter in accordance with the Dispute Resolution Procedure. But again the Material Test Issue could only be identified in an NCR, and without it the scope of any dispute – and indeed whether there was even a dispute at all – would be unclear. There was no purpose in a Dispute Resolution Procedure if there was no dispute, or if the dispute was uncertain.

33. To be fair to Mr Croall, he came close to accepting that the options at clauses 6.2.1 and 6.2.2 would not work without an NCR. Although he shied away from accepting what seems to me to be the logical consequence of that acceptance (namely that, at least in respect of these options, clause 6.1 was a condition precedent), it would seem to me to follow. Accordingly, DBS's argument that clause 6.1 was not a condition precedent somehow has to differentiate between the three options in the "then" part of the regime. It was not at all clear to me how or why the court should adopt such a strained interpretation.

34. To the extent that Mr Croall suggested that the failure to provide an NCR was somehow irrelevant to the operation of clause 6.2.3, I disagree. The Delay Payments were payable by TCS on demand: that was an extremely onerous requirement. Before being liable for such on demand payments, TCS were entitled to the information which would have been in the NCR (including, for instance, whether there were "any other reasons" for the delay, which may have been in the singular knowledge of DBS).

35. In summary, therefore, I consider that the words in clauses 6.1 and 6.2 are sufficiently clear to amount to a condition precedent. They are expressed clearly in the conditional, and leave the reader in no doubt that the steps in clause 6.1 must be fulfilled before the particular options in clause 6.2 can be exercised. The provision by DBS of an NCR was not simply a procedural step, but an important element of the contract machinery. I would therefore conclude that, *prima facie*, the judge's conclusion as to the proper meaning of the clauses was correct. However, that conclusion is subject to a detailed consideration of the points made by DBS in their written and oral submissions.

7. DBS's Nine Submissions

36. DBS's helpful skeleton argument identifies nine separate complaints about the judge's approach. It is therefore convenient to address each in turn, although some can conveniently be dealt with together.

7.1 Complaints 1 and 3: The Language of Clause 6.1

37. The first complaint is that the words do not clearly suggest that the absence of an NCR prevented a claim under clause 6.2. It is noted that the words "condition precedent" were not used. The third complaint is that the judge over-relied on the words "if-then". It is said that, in this case, the condition that engaged clause 6.1 was the failure to achieve a Milestone, and that was not connected with the prompt provision of an NCR. It is therefore said that this was not a typical "if-then" clause. In this way, Complaints 1 and 3 are both arguments going to the language and structure of the clause.

38. On the point about the use or otherwise of particular words, as I have already noted in paragraph 26(c) above, it is not necessary to use the words "this is a condition

precedent" in order to create a condition precedent. What matters is whether the words, in their context, make it plain that there is a conditional effect: that unless step one is taken, you are not entitled to the relief envisaged at step two. Furthermore, arguments that, if the parties had intended to say X, then they should have said so in unequivocal terms, are almost always self-defeating when considered in the context of a dispute as to contract interpretation. As Sir Kim Lewison puts in the Eighth Edition of *The Interpretation of Contracts*, as the heading to his section 'Why Not Say It?':

> "Since almost any dispute about the interpretation of a contract involves meanings, it is seldom helpful to ask why the parties did not adopt one of those rival meanings in their contract."

39. So what is of primary importance is whether the words clearly convey the necessary conditionality. This can generally be done in two ways. The clause can be put in a positive mode, namely that, 'if you do X, you will get Y'. Alternatively, it can be put in a negative formulation: 'unless you do X, you cannot have Y'. On my reading of clause 6.1, as explained in Section 6 above, it falls into the former type, it achieves the necessary conditionality by using the positive formulation.

40. The complaint about the absence of that conditionality in the present case goes to the heart of the "if-then" structure. Mr Croall relies upon the fact that clause 6.1 is in two stages i.e. i) the failure at testing, and/or the failure to reach a Milestone date, and ii) the provision by DBS of an NCR. The suggestion is that it is only stage i) - the happening of the events - that is or may be conditional (and the subject of the "then" provision), and not the provision of the NCR. This argument has two strands. One is the alleged lack of utility of an NCR in circumstances of delay. The second is based on the language of the clause. On analysis, neither of these points stand up.

41. Mr Croall submitted that, in a case of simple delay, an NCR would be useless because all DBS would report was that TCS had failed to achieve the Milestone, which presumably TCS knew already. In support of this argument, Mr Croall took us in detail through clause 5, and the various obligations on the part of TCS in circumstances of delay. But I reject the submission that in some way an NCR would be of no utility in a case of delay. I have already explained its utility at paragraphs 29-30 above. Moreover, the statement of "any other reasons" for the delay, and the effect on "any other Milestones", may well be in the singular knowledge of the operator and client (DBS) and had to be stated in the NCR. Moreover, there is not a complete duplication of the provisions in clause 5: indeed, clause 5.10 (paragraph 5 above) shows that the provision by TCS of a draft Correction Plan may not happen until *after* the issue, by DBS, of an NCR.

42. As to the language, there were two unusual features of Mr Croall's interpretation. First, he put considerable stress on the comma immediately before the reference to the obligation to issue an NCR promptly. He said that "the proper interpretation of the comma" was that the provision of the NCR, although mandatory, was not a condition precedent.

43. I am not conscious of ever having been asked before to interpret a comma in a contract, but I can see no obvious reason why this particular comma should turn the ordinary meaning of the words on their head. It seems to me that the comma is simply there because the first part of clause 6.1 is a long sentence (13 lines in the original text). The

comma therefore breaks up the sentence when the subject changes from the events to the next stage, namely the NCR. I cannot see that the comma has any meaning or effect beyond that.

44. As the judge correctly said, on the happening of one or both of the relevant events, there was a requirement to serve an NCR. It therefore makes no sense, either linguistically or commercially, to apply the conditional link to clause 6.2 only on the happening of the event in the first part of clause 6.1, "effectively leapfrogging the second part of clause 6.1 (the obligation)". The happening of one or both of the events triggered the requirement for an NCR. Once that had happened, then clause 6.2 came into play. It would make a nonsense of the clause if the mandatory requirement to serve an NCR was in this way ignored.

45. The second odd consequence of DBS's submission was that Mr Croall was essentially rewriting clause 6.1 by deleting the sentence "The AUTHORITY will then have the options set out in clause 6.2" from the position where it comes at the end of clause 6.1, and reinstating it much further up the sentence, immediately after the comma. That DBS were seeking to rewrite this part of the Agreement can be seen from paragraph 17 of their skeleton argument which was in these terms:

> "17. The condition that engages clause 6.1 is therefore (for present purposes) the fact that "a Milestone is not Achieved due to the CONTRACTOR's Default". It is not the prompt provision of an NCR. To put it another way, the correct and natural construction of the clause is that if a Milestone is not achieved on time due to TCS' default, then DBS: (a) shall issue an NCR; and (b) shall have the remedies set out in clause 6.2."

46. I reject this approach to construction. It is simply not appropriate to rewrite the clause in this way. As in *Bremer*, the need to rewrite demonstrates the weakness of the unsuccessful construction. It is an unjustified means of taking the provision of an NCR outside the conditionality arrangement. I therefore reject the alternative interpretation put forward by DBS, and therefore reject Complaints 1 and 3.

7.2 Complaint 7: The Importance of Clause 6.2

47. DBS's Complaint 7 is that they say it is not clear why the other remedies in clause 6.2 should only be available to DBS where it has provided an NCR promptly. However, I have explained at paragraphs 28-34 above precisely why those remedies only work if DBS had provided the NCR. There is therefore nothing in Complaint 7.

7.3 Complaint 2: "Promptly"; and Complaint 4: "Shall"

48. These criticisms turn on individual words of Clause 6.1.

49. Complaint 2 is that, because there was no precise time limit within which DBS had to provide an NCR, that was inconsistent with the requirement that it was a condition precedent. It is said that, although the judge dealt with this point at [93], he failed to grapple with the fact that the absence of a precise time limit meant that the parties did not intend the requirement to be a condition precedent.

50. I reject that submission. The judge was plainly right to say that the word "promptly" was sufficiently certain to be given effect. The whole point of this part of the clause was to avoid a rigid straitjacket of 7 or 10 days, and allowed DBS some leeway to serve an NCR appropriate to the circumstances, provided that they did it promptly. DBS had to provide the NCR, so they would know when, in any particular circumstance, it was to be provided. A clear requirement to provide the NCR promptly was sufficient for the requirement to be a condition precedent.

51. On analysis, the authorities relied on by DBS do not support their contention. In *WW Gear*, because of various omissions in the text of the contract, the relevant notice had to be provided in a "timely" fashion. There is no difference between "timely" and "promptly" for these purposes. The clause was held to be a condition precedent. In *Steria* there was no fixed time limit and the notice had to be provided within a reasonable period. Again that did not prevent the relevant clause from being held to be a condition precedent.

52. Indeed, use of this sort of flexible language is apparent throughout this Agreement, even in provisions upon which DBS seek to rely. Thus, clause 5.1 requires a notice "as soon as reasonably practicable"; and clause 5.10 (concerned with when TCS have to submit a draft Correction Plan) gives one option as being "as soon as possible", and another as a fixed period which could be altered by DBS in writing. Flexibility therefore, and a certain amount of uncertainty, were built into clause 5. That did not prevent clause 5 from being a condition precedent, and in my view, it does not prevent clause 6 from being a condition precedent either.

53. Complaint 4 is to the effect that the judge put too much weight on the word "shall". Although they accept that the provision of an NCR was mandatory, DBS say that the word "shall" does not imply anything about the consequences of failing to comply with the requirement.

54. That submission on its own is of course right, but it misses the point. The importance of the word "shall" in the present case is because it creates a mandatory obligation linked to the "if" part of clause 6.1. It is therefore to be read as part of the conditionality. Nobody is saying that the word "shall" on its own gives rise to a condition precedent: it is the use of that word in the light of the remainder of the clause that has that effect.

55. In my view, the judge did not give the word "shall" undue weight. But he acknowledged, as he had to, that it was an important part of the mechanism. If the obligation to provide the NCR had been couched in discretionary language ("may provide"), clause 6 would almost certainly not be a condition precedent.

56. For these reasons, I conclude that there is nothing in Complaints 2 and 4.

7.4 Complaints 5 and 6: The Different Language of Clause 5.6 and the Symmetry With Clause 6.1

57. These two Complaints focus on clause 5 and compare the language of clause 5 with the language of clause 6. In respect of Complaint 5, DBS point out that clause 5.6 uses different words to convey what the judge found to be a clear condition precedent. DBS argued that, since clause 6.1 uses different phraseology, it is to be presumed that it means something different and sought to rely on what Diplock LJ (as he then was) said

in *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WR 89 at [97B-C]. Moreover, a similar submission was one of the reasons that led this court to reject the condition precedent argument in *Heritage Oil*.

58. Although it comes quite low down in DBS's batting order of complaints, Complaint 5 seemed to me to be their best point when I granted permission to appeal. Indeed, the judge rightly noted at [92] that this was potentially a factor weighing against construing clause 6.1 as a condition precedent. However the judge went on to explain why that point did not ultimately matter at [92], set out at paragraph 10(d) above.

59. I agree that the fact that different words have been used in clause 5 means that the wording in clause 6.1 should be the subject of careful scrutiny. I am doubtful, however, that there is any sort of presumption. Diplock LJ in *Prestcold* was talking about statutory construction, and a comparison between a statutory provision that is qualified, and a similar provision that is not. As a matter of statutory construction, he said that that would ordinarily mean that the second provision was not subject to the qualification. That makes perfect sense. But it is not a principle easily transferrable to the construction of a commercial contract, let alone one where the contract in question fills a lever arch file (as here) and when a certain amount of prolixity and duplication appears to be almost inevitable.

60. Thus, as in any such contractual comparison exercise, the court's principal task remains to give meaning to the words actually used. I have explained my interpretation above. But it is sometimes useful to ask, in such a comparison exercise, whether there is any rational explanation for treating one clause as a condition precedent and another as not if, despite their different language, that is what they both appear to be. Here there is none. The judge explained correctly the contemporaneous importance of an NCR. It allowed the parties to know where they stood and allowed the defaulting party to rectify its default. It was designed expressly to avoid arguments down the line. It was therefore as much a part of the regime as a notice and an Exception Report in clause 5.

61. In this way, this case is different to, say, *Scottish Power*, where there were numerous requirements said to be conditions precedent, and where any failure to comply with some of them could only be described as trivial. Here there was only one conditional obligation if either of the two relevant events occurred: to provide an NCR. The failure to do that was important for the reasons that I have explained. The failure to provide the NCR could not be described as trivial. In this way, the reasoning at [213] of the judgment of Leggatt J in *Scottish Power* is inapplicable to clauses 6.1 and 6.2 of this Agreement.

62. For these reasons, it seems to me that, even though the words are different, clause 6.1 ultimately has the same effect as clause 5.6: both are conditions precedent.

63. Complaint 7 is concerned with DBS's submission that the judge wrongly said that there was a form of symmetry between the two condition precedents: one in clause 5 applying to TCS's delay claims, and one in clause 6 applying to DBS's delay claims. This is criticised on the basis that clause 5.6 is clearer and, at least in one respect, narrower than the judge's interpretation of clause 6.2.

64. In my view, this criticism overstates the importance that the judge placed on this question of symmetry. In my view, all that the judge was saying was that each party's

entitlement to bring delay claims against the other was the subject of carefully worded conditions precedent. He was not saying that they had precisely the same effect: indeed, it is plain from his judgment that he was well aware that, although most of TCS's delay claims would fall at the clause 5 hurdle, (were it not for the judge's findings on estoppel) it was not a blanket provision for the reasons that he explained. But that was a function of the words of the Agreement and nothing more.

65. For these reasons, Complaints 5 and 6 must fail.

7.5 Complaints 8 and 9: The Authorities

66. Finally, DBS seek to rely on some of the cases in which different condition precedents have been considered, seeking to draw parallels with this case and, where the result is potentially unfavourable, seek to draw distinctions. As I have already said, I have doubts as to the utility of referring to different contracts made in different circumstances, where the disputes were very different to the dispute in the present case.

67. DBS rely on the result in *Yuanda* to say that, because that was not a condition precedent, neither is this. In my view that is a hopeless submission. Although DBS argue that the clause was similar, it was not: it was the provision of a standard box-ticking notice, not one that was supposed to contain the detail of the NCR in the present case. Moreover, there was no explanation of why the judge observed, almost in passing, that it was not a condition precedent; nor did it matter, because the point had not even been pleaded.

68. DBS seek to distinguish those cases such as *Merton v Leach, Steria* and *WW Gear Construction*, largely on the basis that this was a more complicated/less clear 'if-then' provision than in those cases. But in my view, they all provide some limited assistance to TCS. *Steria* is more like clause 6.1 than the clauses considered in any other case. I do not think there is any difference for present purposes between "provided", as in *Steria*, and "if", as here. *Merton v Leach* and *WW Gear* are also of some assistance, largely because of the explanation of 'if' provisions, and the need for a second step, which here is provided by the "then".

69. So whilst I agree that the authorities are of limited assistance, they provide a useful comparison with clause 6.1 here. I do not believe that the judge over-relied on any of them: he rightly trusted his own interpretation of the words and had regard to the authorities only by way of confirmation. I therefore reject Complaints 8 and 9.

8. Conclusion

70. For the reasons set out in Section 6 above, my own interpretation of clause 6.1 is that the clause was a condition precedent, and the failure to provide an NCR was fatal to the claim under clause 6.2.3. For the reasons set out in Section 7 above, notwithstanding Mr Croall's best efforts, none of the individual complaints raised in the appeal has led me to alter or modify that interpretation. I remain of the view that the judge was right to conclude that this was a condition precedent. Therefore, if my Lords agree, I would dismiss this appeal.

LORD JUSTICE SNOWDEN:

71. I agree that the appeal should be dismissed for the reasons given by Coulson LJ and Lewison LJ.

LORD JUSTICE LEWISON:

72. I agree that the appeal should be dismissed for the reasons given by Coulson LJ; but I add a short concurring judgment of my own highlighting a few of the relevant points. Coulson LJ has set out the relevant parts of the contract.

73. In *Aspden v Seddon* (1874-75) LR 10 Ch App. 394, 396 Sir George Jessel MR is recorded as saying:

> "No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result especially in some cases of wills, has been remarkable. There is, first, document A, and a Judge formed an opinion as to its construction. Then came document B, and some other Judge has said that it differs very little from document A—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C, and the Judge there compares it with document B, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."

74. Thus, as Leggatt J held in *Scottish Power UK plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm), [2016] 1 All ER (Comm) 536 at [204]:

> "I have reminded myself, however, that the issue for decision in this case is one of construction of a particular clause in a particular contract, and that consideration of how courts have

> construed differently worded clauses in different contracts is necessarily of limited assistance. It seems to me that, while taking note of the reasoning in the authorities cited, the correct approach is to focus on the precise terms of the Agreements with which the present case is concerned and ascertain their meaning applying the ordinary principles of contract interpretation."

75. The first point that DBS make is that there is no sufficient language of conditionality in clause 6.1. I disagree. Almost any sentence beginning with the word "if" is conditional. A sentence whose structure is "if-then" is the paradigm of conditionality. In grammatical terms the "if" part of the sentence which expresses the condition is called the protasis, and the "then" part of the sentence which expresses the consequence of the condition being satisfied is called the apodosis. That part of the sentence beginning with "then" is not reached until the condition introduced by "if" has been satisfied.

76. So the only real question is: what is governed by the protasis? Is it merely that a Milestone is not Achieved and/or a Deliverable does not satisfy the Acceptance Test Success Criteria due to the Contractor's Default? Or does it also include the prompt issue of a Non-conformance Report? In my judgment it includes both.

77. First, this is the natural reading of the clause. As I have said, the apodosis is not reached until the protasis has been satisfied. It is natural therefore to regard everything that precedes the word "then" as encompassed within the protasis.

78. Second, this reading is, in my judgment, reinforced by the fact that the opening part of clause 6.1 is split into two sentences. That, to my mind, emphasises the point that the first sentence must be satisfied before the second sentence takes effect. The word "then" also has a temporal connotation, namely that the steps in the first sentence must be taken before the second sentence takes effect. The interpretation for which DBS contends transposes the word "then" from the second sentence to the first, and also amalgamates the two sentences into one. That is not interpretation but rewriting; or as Oliver LJ put it in *Freehold and Leasehold Shop Properties Ltd v Friends Provident Life Office* [1984] 2 EGLR 133, 134K:

> "It is difficult, I feel bound to say, to resist the conclusion that this is not simply a matter of construction: it is demolition and reconstruction."

79. Third, in the cases on which DBS relied service of a notice led to only one outcome. In this case, by contrast there are multiple potential outcomes. The satisfaction of the protasis gives DBS three choices (which are not mutually exclusive and which DBS are entitled to combine). One of those choices is to issue a Milestone Achievement Certificate "conditional on the remediation of the Test Issues". The Test Issues are those identified in the Non-conformance Report. Unless, therefore, a Non-conformance Report has been issued, this remedy is unworkable. The second potential remedy is to refuse to issue a conditional Milestone Achievement Certificate, but instead to escalate the matter in accordance with the Dispute Resolution procedure. But that choice does not arise unless the "Test Issue is a Material Test Issue". Once again, the Test Issue is that identified in the Non-conformance Report. It follows that this remedy is also unworkable unless the Non-conformance Report has been issued.

80. Those two choices create a very strong context for concluding that the same requirements must be fulfilled before the third of the available remedies (namely the payment of Delay Payments) can come into effect.

81. DBS sought to gain some support from the different wording in clause 5. I do not consider that clause 5 detracts from what I consider to be the correct interpretation of clause 6. Clause 5 has a completely different structure. It also expresses conditionality. But it does so by use of the negative ("unless…not"), rather than by use of the positive ("if-then"). Both are in my judgment, simply different ways of expressing conditionality.

82. DBS also placed some reliance on the provision that the Non-conformance Report was required to be issued "promptly". The absence of a clear time limit, it was said, militated against the conclusion that the availability of the remedies laid down by clause 6.2 depended on the issue of a Non-conformance Report. Since DBS did not in fact issue a Non-conformance Report at all, this point does not arise directly for decision. But there are, in my view, a number of potential answers to it. First, as the judge held, it is only one feature of the clause and does not materially detract from the strong linguistic and practical context of the remainder of the clause. Second, the absence of a fixed time limit is not incompatible with a requirement being a condition of the contract (see, for example, *The Post Chaser* [1981] 2 Lloyd's Rep 695 where an obligation to declare a ship "as soon as possible" was held to be a condition of the contract; and *Towergate Financial Group Ltd v Hopkinson* [2020] EWHC 984 (Comm), [2020] 1 CLC 731 where a requirement that claims under a share purchase agreement be made "as soon as possible" created a condition precedent to the making of a claim; *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 TCC, 118 Con LR 177 provided that the Sub-Contractor gives notice "within a reasonable time" created a condition precedent to an extension of time). Indeed, in this very contract clause 5.6 exempts DBS from liability unless the Contractor has complied with its obligations under clauses 5.1, 5.2 and 5.3, the first of which is to give notice to DBS "within a reasonable time" after becoming aware that a Milestone Date has been or will be missed. DBS accepted that compliance with clause 5.1 was a condition precedent. It is, perhaps, also worth noting that under CPR 39.3 a person who fails to attend trial may apply to set aside a judgment entered against him but may only do so if he "acted promptly". Compliance with that condition is plainly required before the court will exercise the power to set judgment aside, even though there is some flexibility about what amounts to acting "promptly" on the facts of any particular case. Third, the contents of the Non-conformance Report must set out a number of different matters including, for example the consequential impact on other Milestones. This might require considerable investigation, such that a fixed time limit would be impractical. Fourth, the argument conflates two separate points: are the remedies available under clause 6.2 barred where a Non-conformance Report is in fact served, but is not served promptly; or are they barred only by a failure to serve a Non-conformance Report at all? Like Longmore LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery (No 2)* [2003] EWCA Civ 1031, [2003] 2 All ER (Comm) 640 at [34] I consider that there is considerable force in the proposition that until a Non-conformance Report is given the clause cannot be relied on; but once it has been served, it can be. If further damage occurs because the Non-conformance Report, although served, has not been served promptly, then that can be compensated in damages. But, as I have said, since DBS served no Non-conformance report at all, that point does not need to be decided.

83. DBS suggested in oral argument that there was a lack of precision about what a Non-conformance Report must contain, and that that militated against the conclusion that the issue of such a report was a condition precedent. I do not agree. It is common, for example, in claims for breach of warranty under share purchase agreements or claims under other contracts to require notification in a particular form. Notification clauses of this type differ; and the dispute between the parties often turns on whether the contents of the notification are sufficient to satisfy the contract. But that has not resulted in the courts holding that compliance with whatever the contractual requirements are is a condition precedent to making a claim for breach of warranty.