THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2014-01058

BETWEEN

DIPCON ENGINEERING SERVICES LIMITED

Claimant

AND

URBAN DEVELOPMENT CORPORATION OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. T. Bharath instructed by Mr. A. Le Blanc for the claimant

Mr. R. Nanga instructed by Ms. A. Bissessar for the defendant

Judgment

1. The claimant ("Dipcon") and the defendant ("UDeCOTT") entered into an agreement dated the 15th April, 2004 ("the said contract") under which Dipcon was to execute certain infrastructural works at the Oropune Gardens Phase II project ("the project") situate at the Churchill Roosevelt Highway, Piarco Junction ("the site"). The following documents were deemed to form, be read and construed as part of the contract;

    i. The contract;
    ii. The Conditions of Contract Part I being the FIDIC Conditions of Contract for Works of Civil Engineering Construction Edition (1987) ("part I of the FIDIC conditions");
    iii. The Conditions of Contract Part II- Particular Conditions; ("part II of the FIDIC conditions")
    iv. The Technical Specifications;
    v. The Drawings;
    vi. The Letter of Acceptance;
    vii. The Bills of Quantities;
    viii. The Schedule of rates and prices (if any)
    ix. The Tender; and
    x. Any other document forming part of the Contract.

2. By the contract, Dipcon accepted the sum of $25,904,180.20 plus VAT to execute the infrastructural works ("the contract price"). The works on the project were completed in July, 2006.

3. By Claim Form filed on the 26th March, 2014, Dipcon sued for sums allegedly due and owing by UDeCOTT on the basis of what it claims was an oral contract made in or about the 1st April, **2010**, some four years after completion of the works. According to Dipcon, it made a request to UDeCOTT to consider an additional claim in the sum of $11,255,800.00. That sum represented an increase in cost of equipment usage between the period 2003 to

2006. Dipcon claims that pursuant to Clause 70.1 of part I of the FIDIC conditions, the additional claim could have been added to the contract price. Dipcon avers that after several meeting with UDeCOTT, UDeCOTT indicated that it had completed the quantification of the additional claim and provided Dipcon with a spreadsheet which quantified the said additional claim in the sum of $11,686,956.15. Subsequently, the servants and/or agents of UDeCOTT represented to the servants and/or agents of Dipcon that the sum quantified in said spreadsheet was being forwarded for payment. However, UDeCOTT failed to pay Dipcon the agreed sum of $11,686,956.15 or any additional sum at all.

4. By Defence filed on 25th July 2016, UDeCOTT claims that it held meetings with Dipcon to discuss the additional claim out of courtesy to Dipcon. However, UDeCOTT denies that it agreed and/or acknowledged Dipcon's additional claim for increased cost of equipment usage. UDeCOTT further denies that it quantified Dipcon's additional claim in the sum of $11,686,956.15 and that it provided Dipcon with the said spreadsheet. UDeCOTT avers that there was never any agreement to pay Dipcon an additional sum and further denies that there was any oral agreement made on or about the 1st April, 2010, or at all. Moreover, UDeCOTT claims that Dipcon is not entitled to make a claim under clause 70.1 as there was no basis for its calculation under part II of the FIDIC conditions.

5. Additionally, UDeCOTT claims that by letter dated the 8th February 2010, Dipcon agreed to accept the sum of $18,816,233.94 in full and final settlement of all claims under the said contract, which included a compromised sum of $3,500,000.00 for the additional claim. According to UDeCOTT, Dipcon by letter prior to the February 2010 letter, dated the 8th October, 2009 made a claim for the additional costs which was considered and compromised to the sum of $3,500,000.00 during negotiations prior to arriving at the sum $18,816,233.94.

Issues

6. The issues for determination are as follows;

i. Whether Dipcon departed from its pleaded case;

ii. Whether Dipcon accepted the sum of $18,816,233.94 by letter dated the 8th February, 2010 as full and final settlement of all its claims under the contract; and

iii. Whether there was an oral agreement to pay Dipcon's additional claim for increased costs by UDeCOTT in or about the 1st April, 2010 or at all.

The case for Dipcon

7. In summary, the case for Dipcon is that it was awarded the said contract by UDeCOTT to perform certain infrastructural works. It completed the works in or about July, 2006 but was not paid in full for its services immediately thereafter. Prior to arriving at a settlement of the sums then due and owing, Dipcon made a claim for additional costs by letters dated the 7th and 8th October, 2009. The sums set out in those letters were estimates. According to Dipcon, the claim for additional costs were made pursuant to clause 70.1. By letter dated the 8th February, 2010 Dipcon agreed to $18,816,233.94 (which included a sum of $3,500,000.00 under the heading of additional claim) in full and final payment. Notwithstanding Dipcon's *prima facie* agreement to accept the sum of $3,500,000.00 as full and final payment of its additional claim, it asked UDeCOTT to reconsider its additional claim as a matter of courtesy. Thereafter, meetings were held between UDeCOTT and Dipcon to examine the matters raised by Dipcon on that additional claim. In the courts' view, this exercise in substance would have amounted to essentially a re-assessment of the additional claim. UDeCOTT completed the re-assessment of the additional claim and gave Dipcon a spreadsheet which quantified and assessed the claim in the sum of $11,686,956.15. It is the case for Dipcon that although UDeCOTT agreed to pay the re-assessed additional sum and assured Dipcon that payment of same was being processed, UDeCOTT failed to pay the sum.

8. Dipcon called one witness, its Managing Director, Wayne Gieowar Singh ("Singh"). Singh has been Dipcon's Managing Director since 1991. According to Singh, the time period for the completion of the works under the said contract was fifteen months. However, the time for completion was extended to July, 2006 because UDeCOTT requested Dipcon to

perform extra works. Singh testified that part II of the FIDIC conditions varied a number of part I FIDIC conditions such as Clause 60.1 which concerned monthly payments and Clause 60.2 which concerned time for payment.

9. Singh is familiar with the FIDIC conditions. He testified that as an Engineering Construction company, Dipcon has worked constantly and extensively with the FIDIC conditions on numerous projects since 1980. The FIDIC conditions are used internationally by Consulting Engineers, Contractors, Employers, Governments and Government Agencies in civil engineering construction contracts worldwide and in Trinidad and Tobago. These conditions form an integral part of the contract between Employer, Consulting Engineers and Contractors. Clause 70.01 of part I of the FIDIC conditions provides as follows;

   "There shall be added to or deducted from the Contract Price such sums in respect of rise or fall in the cost of labour and/ or materials or any other matters affecting the cost of the execution of the works as may be determined in accordance with Part II of these Conditions"

10. According to Singh, at the conclusion of the said contract, Dipcon was not immediately paid in full. Outstanding sums were paid over a two year period from May, 2010 to April, 2012. This was some four to six years after the completion of works. Singh testified that many meetings were held between UDeCOTT and Dipcon in an attempt to settle the final account of outstanding sums then due and owing. One of those meetings took place on the 25th August, 2009. Singh and Harold Narinesingh ("Narinesingh") on behalf of Dipcon and Mr. Brandon V. Primus ("Mr. Primus"), Atiba De Souza ("De Souza") and Janelle Smith on behalf of UDECOTT were in attendance of this meeting. Singh testified that at this meeting, Mr. Primus asked him to provide details and supporting documentation for Dipcon's additional claim for the increased cost of equipment usage between 2003 and 2006. Singh testified that this increased cost was to be added to the contract price in accordance with the terms of clause 70.1 (supra).

11. By letter dated the **7th October, 2009**, Singh wrote to Mr. Primus and provided the requested documents and particulars of Dipcon's additional claim in the sum of $11,255,800.00. During cross-examination, Singh accepted that this letter did not make reference to clause 70.1 but he testified that the claim by this letter was made pursuant to clause 70.1. The letter read as follows;

"…As per discussion and as requested by you we submit our additional claim for the monies outstanding on the said contract which is broken down in terms of the documents hereto attached. The additional claim is in the sum of $11,255,800.00 as stated in the attached documents and particularised therein. We therefore claim this amount plus the undisputed contract sum due in the sum of $14,566,076.82 plus interest of $4,062,080.60 to settle this matter.

Notwithstanding the above if no settlement is arrived at, as between us for the payment of the sums claimed herein, we reserve our right to pursue the settlement of the full amount of the said claim that is $14,566,076.82 plus $4,062,080.60 and the further sum of $11,255,800.00, if UDECOTT does not settle the matter with DESL…"

12. By letter dated the **8th October, 2009**, Mr. Singh wrote to UDeCOTT's then Civil Engineer, De Souza submitting Dipcon's revised claim for the increased cost of equipment usage in accordance with clause 70.1. During cross-examination, Singh testified that De Souza was the Engineer's Representative not the Engineer. By this letter, Singh explained that the basis for Dipcon's additional claim stemmed from the fact that when the project was tendered for in 2003, the cost of equipment usage for carrying out the works was based on the existing rates at that time and that those rates increased exponentially during the period of the contract between 2003 and July, 2006. Further, Singh set out the calculation of the additional claim in detail at page two of the letter. He determined the basic rates of pay under the contract for the different pieces of equipment deployed by Dipcon at the commencement of the project in 2003. Given the increase in operational costs of this equipment over the duration of the performance of the contract, he then determined the actual costs for the different pieces of equipment deployed by Dipcon on the project over the duration of the contract. He then applied the sum of $22,700.00 being the difference

between the actual and basic rates of pay per day and multiplied it by six hundred and seventy-four which was the number of days worked between April, 2004 and July, 2006. As a result, Dipcon's additional claim amounted to the sum of $15,299,800.00. During cross-examination, Singh testified that this revised claim was made because some of the equipment costs were inadvertently left out in the previous claim. UDeCOTT is challenging Dipcon's method of calculating the additional claim as it is UDeCOTT's case that no provision was made via the contract for the calculation of such a claim. Having regard to the findings made later on in this judgement, the court does not have to determine this as an issue.

13. Sign testified that in the construction industry it is customary to have increases in equipment operation costs. He further testified that the increase in equipment usage costs were a direct result of the time the project took to complete (three years).

14. During cross-examination, Singh also testified that Dipcon's additional claim was based on both an oral agreement and the said contract. That the additional claim fell within the purview of the conditions of the contract as Dipcon had to substantiate its claim by following the conditions of the contract. Singh agreed that part II of the FIDIC conditions provided no basis for the calculation of the additional claim under clause 70.1 but disagreed that the claim was unjustified. He referred to Clause 5.2 of part II of the FIDIC conditions which provides that part I of the FIDIC conditions takes priority over part II. Singh further testified that there were other clauses which provided a procedure for the calculation of the additional claim. Counsel for UDeCOTT referred Singh to paragraph 3 of Dipcon's Reply filed on the 7th October, 2016. This paragraph referred to Clauses 55.1 and 56.1 of part I of the FIDIC Conditions. Singh was then asked if those were the other clauses he was referring to as providing a basis for the calculation of the additional claim. Singh testified that those two clauses in addition to other clauses can be used to calculate the claim.

15. **Clause 55.1** provides as follows;

"The quantities set out in the Bill of Quantities are the estimated quantities for Works, and they are not to be taken as the actual and correct quantities of Works to be executed by the Contractor in fulfilment of his obligations under the Contract."

16. **Clause 56.1** provides;

"The Engineer shall except as otherwise stated, ascertain and determine by measurement the values of the Works in accordance with the Contract and the Contractor shall be paid that value in accordance with Clause 60. The Engineer shall, when he requires any part of the Works to be measured, give reasonable notice to the Contractor's authorised agent, who shall:

a) *Forthwith attend or send a qualified representative to assist the Engineer in making such measurement, and*
b) *Supply all particulars require by the Engineer."*

17. Further during cross-examination Singh was asked as to his understanding of the meaning of the word *"works"* as set out in clause 55.1. He testified that works means the entire project including equipment. At part I of the FIDIC conditions under the rubric of definitions and interpretations, the term *"works"* is defined as follows;

"(f)(i) "Works" means the Permanent Works and the Temporary Works or either of them as appropriate.
(ii) "Permanent Works" means the permanent works to be executed (including Plant) in accordance with the Contract.
*(iii) "Temporary Works" means all temporary works of every kind (**other than Contractor's Equipment**) required in or about the execution and completion of the Works and the remedying of any defects therein."*

18. During cross-examination, Singh agreed that the permanent works would have been the infrastructure works done at the site. When asked if the definition of works excluded equipment, Singh accepted that it did not.

19. By letter dated the **27th January 2010**, Mr. Primus proposed to make a payment to Dipcon in the amount of $18,816233.94 VAT inclusive in full and final settlement of all of Dipcon's claims relative to the works and services it performed on the project. This letter stated as follows;

"Re: Oropune Phase 2 – Final Account

Reference is made to the several meetings relative to the captioned matter between your Messrs Wayne Singh, Andre Singh and Harold Narinesingh; and UDeCOTT's Messrs Winston Chin Fing, Atiba De Souza and the undersigned.

I write to advise that following internal review, UDeCOTT proposes to make a payment to Dipcon Engineering Services Ltd ("Dipcon") in the amount of TT$18,81,233.94 VAT inclusive ("the Final Account Payment") in full and final settlement of all claims relative to works/services performed by Dipcon on the Oropune Phase 2 Project. The Final Account Payment is based on a proposed Final Account Certificate to be compromised of the following:

Item	*Amount*
Preliminaries	*$1,784,200.00*
Measured Works	*$31,790,234.00*
Variations	*$11,250,402.46*
Sub-Total	*$44,824,836.46*
Less Liquidated Damages	*($132,528.00)*
Less Omitted Works- Capping of Drains	*($89,000.00)*
Add'n Claim: Eqm. Cost Increase	*$3,500,000.00*
Amount Payable	*$48,103,308.46*
Less Previous Payment	*($31,741,365.90)*
Amount Due	*$16,361,942.56*
VAT	*$2,454,291.38*

Amount Due per Certificate	*$18,816,238.94*

Following you written agreement with the Final Account Payment and proposed Final Account Certificate, the Final Account Payment will be processed within 90 days from the date of receipt of your agreement.

In the circumstances, we look forward to receiving your written agreement with the above within 14 days from the date hereof."

20. Singh noted that in the abovementioned letter, there was an included sum of $3,500,000.00 for what UDECOTT stated to be an *"Additional Claim: Equipment Cost Increase".* During cross-examination, Singh testified that he did not treat the abovementioned letter as the final account because he had asked that his additional claim be considered.

21. By letter dated **8th February, 2010** Singh on behalf of Dipcon accepted UDeCOTT's offer of $18,816,233.94 but asked UDeCOTT to consider Dipcon's additional claim of $11,255,800.00. During cross-examination, Singh testified to arrive at a final account, an Engineer Certificate needed to be completed and that it was never completed. This letter stated as follows;

"…We thank you for your letter dated January 27th, 2010 which proposes the sum of Eighteen Million Eight Hundred and Sixteen Thousand Two hundred and Thirty-three dollars and Ninety-four cents ($18,816,233.94) to be paid by Udecott to Dipcon Engineering Services Ltd as full and final payment on the captioned project.

We wish to state that we accept this amount and offer of payment and will forward to you our final certificate/invoice and look forward to receiving payment within ninety (90) days of the date herein ie February 8th, 2010.

We look forward to your remission of the sum of TT$18,816,233.94 in full and final payment.

Notwithstanding our agreement to accept the sum of TT$18,816,233.94 in full and final settlement, we ask as a matter of courtesy that you please consider our extra claim for TT$11,255,800.00 as this represents costs that were incurred by our company to complete this project of national importance.

We feel as a matter of commercial fairness that you should so consider the same as we would have sustained a major loss on the project. We understand that a decision by you in this matter in the affirmative is to your prerogative.

We appeal to you to use your good sense of judgement in this matter.

Please find attached our invoice number 2537 dated February 8th, 2010 as requested for Oropune Phase 2 Final Account."

22. During cross-examination, Singh testified that the word courtesy was used in the abovementioned letter because Dipcon did not want to be aggressive towards UDeCOTT. He further testified that the claim made for $11,255,800.00 was an error as the sum was supposed to be $15,299,800.00 as per its revised claim by letter dated the 8th October, 2009. Thereafter, Singh testified that Dipcon was no longer claiming the sum of $15,299,800.00 as this figure was simply an estimate which was obtained prior to the calculation of the precise figure of the claim. That the representatives of UDeCOTT when they did their assessment and quantification arrived at the precise figure of the claim which was $11,686,956.15.

23. According to Singh, Mr. Primus subsequently agreed to pay Dipcon's additional claim subject to Dipcon's ability to substantiate the claim by submitting all daily site records and all other pertinent records. Singh testified that Mr. Primus informed him that UDeCOTT's team would have to undergo a full evaluation and verification of the documents submitted prior to any payment. Singh was informed both by Mr. Primus and Chin Fong that De Souza and Gareth Pollard ("Pollard") was tasked with the evaluation exercise. By Fax dated the 19th February, 2010 Singh indicated to Mr. Primus that it was taking longer than expected to retrieve all documents pertaining to the equipment usage and that he will have

to prepare a summary from the actual records. Singh also indicated that he would be in a position to submit the information by the first week in March, 2010 and requested a meeting at that time to discuss same.

24. However, the retrieval of the documents took Singh longer than expected. By letter dated the **18th May, 2010,** Singh provided Mr. Primus with all the documents to substantiate Dipcon's additional claim of $11,255,800.00. Those documents included actual site records and daily equipment time sheets. By this letter the additional claim was summarized as follows;

    "1. April 1st, 2004 to December 31st, 2004
    Amount claimed – TT$4,071,000.00
    2. January 1st, 2005 to December 31st, 2005
    Amount claimed - TT$6,232,200.00
    3. January 1st, 2006 to May 31st, 2006
    Amount claimed – TT$1,524,900.00
    Total amount of extra claim is TT$11,828,100.00 plus 15% VAT."

25. Between the **27th May, 2010** and **22nd June, 2010** at least four meetings were held at UDeCOTT's offices, in order for Dipcon to justify, substantiate and prove the additional claim. The meetings were also held for UDeCOTT to analyze, assess and evaluate the additional claim. The meetings were attended by De Souza, Pollard, Andre Singh, Narinesingh and Singh.

26. Singh testified that on or about the 22nd June, 2010, De Souza indicated that UDeCOTT's assessment of the additional claim was complete. De Souza then handed Singh a spreadsheet by which he (De Souza) quantified and assessed the additional claim in the sum of $11, 686,956.15. Upon receipt of the spreadsheet, Singh enquired as to the absence of UDeCOTT's letterhead on the spreadsheet and he was assured by De Souza that internal formalities were being complied with and that the spreadsheet was being forwarded to Mr. Primus who would take the necessary steps to process payment to Dipcon. Even though

UDeCOTT admitted that it assessed the additional claim, summarized and entered it into a spreadsheet, it denied that this spreadsheet was theirs.

27. Under **Clause 1.1(a)(iv)** of the said FIDIC Conditions, the Engineer is defined as *"the person appointed by the Employer to act as Engineer for the purposes of the contract and named as such in Part II of these conditions"*. Appendix A of part II of the FIDIC conditions identified Ian Telfer ("Telfer") as the Engineer. By letter dated the 3rd August, 2005, UDeCOTT informed Dipcon that Chin Fong had replaced Telfer as Engineer.

28. By virtue of **Clauses 2.2 and 2.3** of part I of the FIDIC conditions, UDeCOTT's Engineer had power to delegate his duties and authorities to the Engineer's Representative. Over the course of the contract, Singh dealt with Chin Fong or his designated representative, De Souza when it came to certifying Dipcon's payment. Singh never dealt with the Board. He did not concern himself with the internal features of UDeCOTT's organization. As such, Singh testified that De Souza had the power to quantify, assess and approve Dipcon's additional claim as he was the Engineer's Representative and that De Souza did in fact do so by reducing the claim unto a spreadsheet.

29. According to Singh, the Engineer's power to quantify claims under the contract is found at clauses 60.1 and 60.2 of part I of the FIDIC conditions. He testified that clause 60.1 required Dipcon to submit to the UDeCOTT's Engineer monthly statements inclusive of any adjustments under Clause 70, and Clause 60.2 vested in the Engineer the power *"certify to the Employer the amount of payment to the Contractor which he considers due and payable in respect thereof."* However, clause 60.1 was amended and in its amended form no reference is made to clause 70.1. The **un-amended clause 60.1** provided as follows;

"The Contractor shall submit to the Engineer after the end of each month six copies, each signed by the Contractor's representative approved by the Engineer in accordance with Sub-Clause 15.1, of a statement, in such form as the Engineer may from time to time prescribe showing the amounts which the Contractor considers himself entitled up to the end of the month in respect of ...

(d) adjustments under clause 70…"

30. During cross-examination, Singh testified that it may have been an oversight on his part when he referred to the un-amended clause 60.1. The **amended clause 60.1** provides as follows;

"The Contractor will be paid monthly, on the certificate of the Engineer, the amount due to him on account of the estimated contract value of the permanent work executed up to the end of the previous month, together with such amount (if any) as the Engineer may consider proper on account of materials for permanent work delivered by the contractor on the Site and, in addition, such account as the engineer may consider fair and reasonable for any Temporary Works or Construction Plant, for which separate amounts are provided in the Bills of Quantities, subject to a retention of the percentage named in the Tender, until the amount retained shall reach the Limit of Retention Money named in the Tender (herein after called "the retention money"). Provided always that no interim certificate shall be issued for a lesser sum than that named in the Tender at one time."

31. Further, Singh testified that clause 52.2 of part I of the FIDIC conditions, titled *"Power of Engineer to fix rates"* empowered UDECOTT's Engineer to fix rates in the event of any variations made in the contract work, upon consultation with the employer and where there is disagreement, according to what he believes to be appropriate. **Clause 52.2** provides as follows;

"Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the Works, is by reason of such varied work rendered inappropriate or inapplicable, then after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the contractor accordingly, with a copy to the Employer. Until such time as rates or prices are

agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or
b) by the Engineer to the Contractor of his intention to vary a rate or price."

32. During cross-examination, Singh testified that the term *"variations"* under clause 52.2 could mean either variations in quantities or costs.

33. By letter dated the 21st February, 2013 Dipcon's Attorneys at Law demanded that UDeCOTT enter into negotiations to settle Dipcon's additional claim for sum of $11,686,956.15. The letter further advised that failure to enter into negotiations would result in Dipcon commencing legal action against UDeCOTT to obtain payment of the said monies.

34. During cross-examination, Singh testified that the oral agreement made by UDeCOTT to pay Dipcon the additional claim was made between the 8th February, 2010 and the 19th February, 2010 and not on the 1st April, 2010.

The case for UDeCOTT

35. In summary, UDeCOTT's case is that although the FIDIC conditions did not permit the assessment of the additional claim, it nonetheless conducted such assessment and compromised the claim to a figure of $3,500,000.00. That Dipcon accepted the compromised figure as part of the $18,816,233.94 as full and final settlement but continued

to ask for more on account of the additional costs for equipment. As such, UDeCOTT as a matter of courtesy re-assessed the additional claim. However, although UDeCOTT re-assessed the claim, it denied that it provided Dipcon with a spreadsheet which quantified the additional claim in the sum of $11,686,956.15 and further denied that it agreed to pay any additional sum.

36. UDeCOTT called three witness, Atiba De Souza, Nalini Maharaj and Daniell Salandy.

37. De Souza is currently the Project Manager II of UDeCOTT and has been employed with UDeCOTT since October, 2002. As Project Manager II, his duties and functions include the provision of project management expertise to the projects assigned and supervision of subordinate staff. During cross-examination, De Souza testified that he is an Engineer by training.

38. De Souza's witness statement was made from facts within his own knowledge as well as from perusing UDeCOTT's file in this matter. According to De Souza, once a contract is awarded, a file is opened where all relevant documents and correspondence are kept. De Souza was one of the Project Managers on the said project, and as such was familiar with the contract documents.

39. De Souza testified that subsequent to July, 2006 Dipcon did no further works on the project and would have vacated the site. After the works were completed Dipcon and UDeCOTT met in order to agree to the final account. De Souza was part of UDeCOTT's team that met with the Dipcon.

40. According to De Souza, after many meetings between Dipcon and UDeCOTT the proposed figure of $18,816,233.94 (VAT Inclusive) was agreed upon as the final account. He testified that after the final account was agreed upon, no works were done by Dipcon. De Souza admitted that during the course of those meetings Dipcon made a claim for increased cost of equipment in purported accordance with clause 70.1 (as set out in Dipcon's letter dated 8th October 2009). According to De Souza, part II of the FIDIC conditions which

was necessary to evaluate such a claim was never filled out and agreed upon by the Dipcon and UDeCOTT.

41. Notwithstanding this, Dipcon and UDeCOTT still attempted to arrive at an agreement in respect of the additional claim. In arriving at the final account, the additional claim in respect of the increased cost of equipment was considered and compromised in the final account, with a value of $3,500,000.00 (as set out in UDeCOTT's letter dated the 27th January 2010). During cross-examination, De Souza testified that UDeCOTT did not perform an analysis like it performed in May, 2010 to come up with the $3,500,000.00 figure. In May 2010, Dipcon submitted boxes of documents to substantiate its additional claim which were perused by UDeCOTT after the $3,500,000.00 was arrived at. De Souza further testified that no formula was used to arrive at the sum of $3,500,000.00 but that the sum was agreed to after meetings were held between Dipcon and UDeCOTT.

42. Subsequent to Dipcon's agreement to accept the sum of $18,816,233.94 (VAT Inclusive) as the final account in full and final settlement of all claims relating to the contract, De Souza along with other employees of UDeCOTT met with representatives of Dipcon as Dipcon continued to raise the issue of the additional cost of equipment usage and attempted to persuade UDeCOTT to re-open this item.

43. During cross-examination, De Souza testified that in 2010 a final payment certificate was prepared for the sum of $18,816,233.94 by a member of the Quantity Surveying Department of UDeCOTT and that he saw the certificate when it was being processed. He further testified that the certificate would have been filed in UDeCOTT's file on Dipcon. A final payment certificate is a certificate which provides that final payment on a contract has been completed.

44. On the 20th May, 2010 a meeting was held at UDeCOTT's office between Mr. Primus, who was UDeCOTT's Chief Legal Officer and Corporate Secretary at the time and representatives of the Dipcon. De Souza was present at this meeting. During cross-examination, De Souza testified that in terms of UDeCOTT's organizational structure, Mr.

Primus had the most authority. Mr. Primus left the employ of UDeCOTT in or about July, 2010. At this meeting, Mr. Primus informed De Souza of a certain matter. During cross-examination, De Souza testified that the *"certain matter"* Mr. Primus informed him about was Dipcon's additional claim. Either during that meeting, or following same, De Souza expressed to Mr. Primus that based on the final account settlement Dipcon was not entitled to receive sums beyond the agreed $18,816,233.94. Notwithstanding De Souza's concerns, Mr. Primus issued him with an instruction, which he complied with.

45. During cross-examination, De Souza testified that the instruction that was given to him by Mr. Primus was to review Dipcon's additional claim as a matter of courtesy. Counsel for Dipcon pointed out to De Souza that the words he swore to in his affidavit filed on the 18th April 2016 (for the setting aside application) were as follows;

"Notwithstanding this, Mr. Primus directed the Construction Department to review and assess the claim."

46. When asked why he left the above words out of his witness statement, De Souza testified that he could not say.

47. Subsequent to the meeting that was held on the 20th May, 2010, De Souza, on behalf of the Construction Department by memorandum dated the 20th May, 2010 put their concerns raised in the meeting in writing to Mr. Primus. This memorandum was completed by De Souza in consultation with Chin Fong who was the Senior Manager of Development. De Souza was only able to recover a soft copy of the memorandum that was sent. This document was an un-agreed document but was put into evidence having been previously disclosed and subsequently exhibited to the witness statement. The memorandum stated as follows;

"…It is the understanding of the Construction and Development (C&D) Department that the Final Account matter with Dipcon was settled in November 2009, following agreement between both representatives of UDeCOTT and Dipcon. Following the Final Account Proposal in November 2009 a Board note (containing the Equipment Cost Increase claim)

was submitted to the UDeCOTT Board of Directors in December, 2009. UDeCOTT's Board of Directors subsequently agreed on the Final Account and approved the $18.8M recommendation for settlement with Dipcon.

During the meetings with Dipcon in November 2009, UDeCOTT noted that the equipment cost increase claim would only be considered in the Final Statement as:
1. The Interest Claim for Dipcon was not applicable as per the contract documents.
2. UDeCOTT's goodwill consideration regarding the extended period the Final Account settlement had taken to date.

Paragraph "d" of the Oropune Phase II- Infrastructural Works Board Note, re: Approval of the Final Account Certificate read as follows:
(d) In light of Interest Charges not being applicable to the contract Dipcon…has submitted an additional claim….however following negotiations between UDeCOTT and Dipcon…the claim has been reduced to the sum of $3.5M which represents the justifiable Equipment Cost increase over a period of 210 days instead of the claimed 674 days.

…The C&D Department is concerned with the legal ramifications of further adjudicating on a matter that was reviewed and approved by the Board. To date we have not received written instruction or correspondence requesting the C&D Department further engage in discussions or negotiations with Dipcon on the Increase Cost for Equipment Usage claim.

The C&D Department wishes to note that we officially reject this claim from Dipcon and are not in favour of UDeCOTT's further negotiations on this claim.

However based on your recommendations (as noted at the May 19 2010 meeting) that UDeCOTT must review the claim as submitted by Dipcon, the C&D Department would review and peruse the submission from Dipcon.

We wish to suggest that Dipcon be notified that UDeCOTT's continued negotiations on this matter should not be viewed, perceived or construed as UDeCOTT's acceptance or willingness to further financial settlement on the Increase Cost of Equipment Usage claim."

48. In or about May 2010, meetings were held between De Souza, Pollard and representatives of Dipcon. During cross-examination, De Souza testified that Pollard was UDeCOTT's Quantity Surveying Technician. Pollard left the employ of UDeCOTT. De Souza was unable to recall the exact number of meetings or the dates when they would have met since no minutes were taken. He testified that the purpose of those meetings would have been to assess the additional claim. De Souza attended those meetings because he was instructed to do so by Mr. Primus and based on a courtesy to Dipcon.

49. In undertaking the assessment of Dipcon's claim, De Souza and Pollard reviewed daily equipment records to determine the number of hours worked by each item of equipment for the day. This was summarized and entered on a monthly basis in a spreadsheet, however this was never shared with the Dipcon. During cross-examination, De Souza testified that he provided information to be entered into the spreadsheet but that Pollard entered the information on the spreadsheet. He further testified that he did not provide a copy of the spreadsheet to the court because he was not responsible for same.

50. De Souza saw a copy of a spreadsheet provided by Dipcon. He testified that he does not recall UDeCOTT giving any such document to the Dipcon. According to De Souza, the provision of such a document by UDeCOTT to Dipcon would have been irregular since it would have been contrary to UDeCOTT's practice of not giving internal assessments or opinions to third parties, especially since there was no valid claim by Dipcon and the final account had already been settled in full.

51. De Souza testified that at no time did he represent to Dipcon at any of the meetings or any time whatsoever that the additional claim would be paid. According to De Souza, UDeCOTT's position was always that the final sum had already been agreed and that Dipcon was not entitled to any additional sums. According to De Souza, he did not have the authority to make the decision to pay any additional sums or to agree to make such a payment. He testified that Mr. Primus would not have had that authority either. Moreover, De Souza testified that Pollard did not indicate to Dipcon that the additional claim would have been paid. Given De Souza's employment at UDeCOTT, he is aware of its operations

and what must be approved by the Board of Directors. According to De Souza, a decision to pay Dipcon's additional claim would have had to be made by the Board of Directors.

52. De Souza testified that as with the preparation of the final account figure of $18,816,233.94, any recommendation or proposal to pay Dipcon's additional claim would have had to be submitted by the Construction Department to the Board of Directors for adjudication. According to De Souza, at no time was this done and as such there could have been no such approval to pay Dipcon's additional claim. Further, De Souza testified that during the meetings there was no oral agreement made with Dipcon to pay its additional claim nor was the claim assessed in accordance with the contract. According to De Souza, Dipcon knew based on its course of dealings throughout the administration of the contract that none of UDeCOTT's employees who attended and participated in those meetings had the authority to bind UDeCOTT to any such agreement without the Board's approval.

53. During cross-examination, De Souza was referred to letter dated the 26th May, 2009 in which he signed off as Civil Engineer. He testified that he was one of the persons who prepared this letter. In this letter, De Souza referred to UDeCOTT as the Engineer of the said contract. Counsel for Dipcon asked De Souza whether by referring to UDeCOTT as Engineer, he meant its employees were the Engineers to which De Souza testified yes.

54. Further during cross-examination De Souza was referred to **clause 60.7** of part I of the FIDIC conditions which provides as follows;

"Upon submission of the Final Statement, the Contractor shall give to the Employer, with a copy to the Engineer, a written discharge confirming that the total of the Final Statement represents full and final settlement of all monies due to the Contractor arising out of or in respect of the Contract. Provided that such discharge shall become effective only after payment due under the Final Payment Certificate issued pursuant to Sub-Clause 60.8 had been made and the performance security referred to in Sub-Clause 10.1, if any has been returned to the Contractor."

55. De Souza testified that in accordance with clause 60.7, the discharge of the contract only became effective when the last set of payments were made to Dipcon on the 4th April, 2010. He was then asked whether the final payment certificate was issued within 28 days after receipt of the final payment and written discharge in accordance with **clause 60.8** of part I of the FIDIC conditions. De Souza testified that the final payment certificate was done but that he could not say whether it was done within the 28 day period. UDeCOTT has provided no evidence of the final payment certificate to this court.

56. Further in cross-examination, De Souza testified that a taking over certificate was issued by UDeCOTT: See **clause 60.9** of part I of the FIDIC conditions. However, this certificate was also not provided to the court.

57. **Nalini Maharaj** ("Maharaj") is the Accountant of UDeCOTT and has been since the 5th September, 2016. As the Accountant, her duties and functions include the supervision of accounts payable, accounts receivable and payroll. Maharaj's witness statement was made from perusing UDeCOTT's file on Dipcon as she was not employed with UDeCOTT at the material time.

58. From her perusal of the file, Maharaj testified that in or about February, 2010 Dipcon submitted its invoice on the final account to UDeCOTT for payment. When the invoice was received it was processed and sent to the Finance Department for payment. The invoice was not paid by one payment but was paid via six cheques dated the 21st May 2010, 8th December 2011, 9th February 2012, 28th February 2012, 16th March 2012 and 4th April 2012.

59. From a perusal of the file, Maharaj recalled seeing letters from Dipcon enquiring about payment for the additional claim.

60. During cross-examination, Maharaj testified that a final payment certificate is prepared by the Construction Department of UDeCOTT. She further testified that she did not see a final payment certificate in the file.

61. **Ms. Danielle Salandy** ("Ms. Salany") is an Attorney-at-Law and has been the Senior Legal Officer of UDeCOTT since the 13th July, 2015. As Senior Legal Officer, her duties and functions includes reviewing contract documentation, project correspondence and claims against UDeCOTT.

62. Whilst holding the post of Senior Legal Officer, Ms. Salandy became aware of this action as it is one of the files that is now in her care, custody and control as the former Chief Legal Officer, Mrs. Kathryn Denbow has resigned. Ms. Salandy was able to make her witness statement based on facts and knowledge she obtained from a perusal of the file. Most of Salandy's evidence was the same as De Souza's and Maharaj's and as such there was no need to repeat it.

63. According to Ms. Salandy, there was nothing on the file stating that after the agreement of the final account was made, there was an oral agreement entered into by the employees of UDeCOTT and Dipcon for payment of any further sum.

64. During cross-examination, Ms. Salandy testified that the final payment certificate was an important document and that she would have disclosed it. She further testified that she could not recall if there were any spreadsheets in the file but if there were spreadsheets she would have disclosed it.

65. According to Ms. Salandy, by letter dated the 10th May, 2012 Dipcon sought to treat its additional claim as an existing claim. This letter stated as follows;

"…Having completed infrastructure works on Oropune Housing Development Phase II since June 2006, we wish to bring to your attention an additional claim in the sum of $11,686,956.25 plus VAT which is still outstanding to be settled. The analysis and evaluation of this claim was carried out by Mr. Atiba De Souza and Mr. Gareth Pollard of UDECOTT together with Mr. Wayne Singh, Mr. Andre Singh and Mr. Harold Narinesingh of Dipcon in attendance, after several meetings at UDECOTT's office between May 18th, 2010 and June 22nd, 2010. The claim was assessed for $11,686,956.25. The analysis was

then submitted to the Chief Legal Officer for preparing the necessary board note for approval but it is our understanding that the said board note has not yet been prepared albeit it was agreed that this would be done..."

66. By letters dated the 29th October, 2012 and 16th November, 2012 UDeCOTT categorically denied that it owed any further sums to Dipcon and indicated that all Dipcon's claims were paid in full.

67. Subsequently, by letter dated the 9th April, 2013 Dipcon's then Attorneys at law wrote to UDeCOTT claiming in addition to the sum of $11,255,800.00, damages in the sum of $1,855,281.01 for breach of UDeCOTT's agreement to pay the sum of $18,816,233.94 within ninety days (see letters dated the 27th January, 2010 and 8th February, 2010). According to Ms. Salandy, this letter only came after UDeCOTT indicated to Dipcon that it was not indebted to it in respect of the additional claim.

68. By letter dated the 25th April, 2013 UDeCOTT wrote to Dipcon's Attorneys at law indicating that it was not indebted to Dipcon.

69. Ms. Salandy testified that the Senior Personnel involved in the meetings with Dipcon, including Mr. Primus, are no longer employed at UDeCOTT and UDeCOTT has been unable to obtain witness statements from them.

Issue 1 – *whether Dipcon departed from its pleaded case*

The submissions of UDeCOTT

70. UDeCOTT submitted that the pleadings are what marks out the parameters of a case. In so submitting, UDeCOTT relied on the Privy Council decision of ***Bernard v Seebalack 77 W.I.R. 455, at page 464, paragraphs 15 and 16,*** wherein the Judicial Committee stated as follows;

"... Pt 8.6, which is headed 'Claimant's duty to set out his case', provides that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Pt 16.4(1) of the England and Wales Civil Procedure Rules, which provides that 'Particulars of claim must include—(a) a concise statement of the facts on which the claimant relies'. In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792–793 Lord Woolf MR said:

> *'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together at with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction—Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.'*

[16] But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows…"

71. UDeCOTT submitted that Dipcon has pleaded one case and has led evidence on an entirely different case. As such, UDeCOTT submitted that since Dipcon has not supported its pleaded case, same should be dismissed.

72. According to UDeCOTT, Dicpon's claim was based entirely on an alleged oral contract purportedly enter into on the 1st April, 2010. That there was no allegation that the claim

arose under the said contract. UDeCOTT argued that Dicpon cannot by its witness seek to bring an entirely new claim based on an entirely new contract purportedly entered into in February, 2010 as same was not pleaded. UDeCOTT submitted that this would be highly prejudicial to it as it was not afforded an opportunity to answer a claim based on an oral contract entered into in February, 2010. That this was not merely an error but was an entirely new contract being relied upon.

73. UDeCOTT relied on the authority of ***Waghorn v George Wimpey & Co Ltd, [1970] 1 All E.R. 474*** wherein Geoffrey Lane J dismissed the plaintiff's case when his evidence departed from his pleaded case. At page 479 d His Lordship held as follows;

"*In my judgment this is not a case which is just a variation, modification or development of what is averred. It is a case which is new, separate and distinct, and not matters of technicality. Let me hasten to add that if matters emerge, particularly matters of technicality, which perhaps could not be foreseen by those responsible for pleading cases, if those things emerge during a case it would be quite wrong to dismiss a plaintiff's claim because his pleadings have not measured up to the technical facts which have emerged. One often listens sympathetically to applications to amend in those circumstances. Here there is nothing technical at all. A man is said to have slipped. There is nothing technical about that."*

74. UDeCOTT submitted that there was nothing technical about entering into an oral contract, more so given Singh's experience in the business world. According to UDeCOTT, had Dipcon pleaded a February contract, it would have defended the matter differently in that it would have required evidence as to what occurred in February 2010 to give rise to an oral agreement. Further, UDeCOTT submitted that it came to answer a claim that there was an oral contract made on or about the 1st April, 2010 and not any other oral contract.

75. UDeCOTT further relied on the authority of ***Universal Projects v The Attorney General, CV 2008 – 04896 at page 14, paragraphs 25 and 26*** wherein Justice Charles stated as follows;

"[25] It is well settled that a party must set out in his pleadings the case upon which he intends to rely. It is upon his pleaded case that the other side responds and prepares his case. One is therefore not allowed to either present a different case at trial or during the course of submissions.

[26] It is for this reason that I must agree with Mr. Bisnath that that portion of the Defendant's submissions, which do not fall within the ambit of its pleaded case, cannot be taken into account by the Court in arriving at a decision. I wish to note that the submissions, though well researched and very persuasively and forcefully argued could not be entertained for this reason."

The submissions of Dipcon

76. Dipcon submitted that it was clear from the pleadings that its claim was that there was an oral agreement between itself and UDeCOTT whereby UDeCOTT agreed to pay the additional claim pursuant to Clause 70.1. That UDeCOTT denied that there was any such oral agreement made on or about the 1st April 2010 or at all. As such, Dipcon argued that by its pleadings, UDeCOTT was not in the dark in any way about what Dipcon's claim was all about and why it was being sued. That Dipcon's case made perfect sense UDeCOTT as UDeCOTT addressed its attention to any such oral agreement at any time between itself and Dipcon, chose its words carefully and specifically denied the existence of any such oral agreement on any date stated by Dipcon or at all, be it in April 2010, February 2010 or otherwise. Dipcon submitted that UDeCOTT was therefore not in any way denied the opportunity to defend the existence of an oral contract entered into in February 2010, April 2010 or at any time.

77. According to Dipcon, UDeCOTT's submission on this issue begs the question as to why UDeCOTT did not seek to have the irrelevant evidence of the entirely different contract be struck out via evidential objections. Dipcon submitted that UDeCOTT clearly had the opportunity to object to this evidence but chose not to do so and allowed the evidence to be admitted and become part of the record. Dipcon further submitted that the position now

adopted by UDeCOTT is simply untenable and serves to highlight the highly unmeritorious nature of UDeCOTT's submissions.

78. Dipcon relied on the authority of ***Daron Williams v R.B.P Lifts Limited CV2014-01088 at paragraph 65*** wherein this court stated as follows;

"A court must adopt a common sense approach to evidence and to the issue as to whether a litigant has deviated substantively from his pleaded case. It would defeat the ends of justice if parties were to be restricted to the narrow confines of facts which are themselves obscure. Such an approach will result in manifest injustice to the litigant having regard to the overriding objective of the CPR. In this case, the pleading of the Claimant is clear. Its import is that that was a clutter of what he considered to be rust present on the rung of that ladder."

UDeCOTT's submissions in response

79. UDeCOTT submitted that Dipcon continues to treat this claim as being one brought pursuant to the said contract rather than the pleaded oral contract. According to UDeCOTT, by no reading of Dipcon's pleadings, no matter how generous a reading, do the pleadings identify any claim pursuant to the said contract. UDeCOTT further submitted that it was clear that Dipcon's claim was brought pursuant to an oral contract made on 1st April, 2010 and that UDeCOTT was never answering a claim under the contract. That Dipcon's Reply filed on the 7th October, 2016 pleaded that the assessment took place under the contract, not that the claim was being brought pursuant to the contract.

80. Moreover, UDeCOTT submitted that although it denied the existence of any oral contract that was not an answer to Dipcon's pleadings of an oral contract entered into in April and leading evidence of an oral contract entered into in February.

81. UDeCOTT submitted that it did not apply to have the evidence concerning the contract struck out because the contract was relevant in light of the pleadings. According to

UDeCOTT, the contract was pleaded to give the precursor on what would have eventually led to the purported oral contract allegedly entered into on 1st April, 2010 since it was the contract that formed the relationship between the parties. UDeCOTT submitted that this however does not take away from the fact that although the contract was pleaded, there was no claim pursuant to the contract.

82. According to UDeCOTT, Dipcon's reliance on ***Daron Williams*** supra was very limited. UDeCOTT argued that if Dipcon properly analyzed the case of ***Daron Williams***, it would have been clear why this court found that there was no departure from the pleaded case. UDeCOTT submitted that Dipcon cannot rely on ***Daron Williams*** since its sole witness, who also signed the Statement of Case and Reply, is a very experienced business man, who fully understands the concept of what is a contract and the importance of a contract whereas in ***Daron Williams*** the claimant was an elevator service technician who was not an expert on rust. According to UDeCOTT, there was nothing technical about entering into a contract and even a lay man would have beeen able to understand the simplest of a contract.

83. UDeCOTT submitted that if the court did apply ***Daron Williams*** to the present case, it would be clear that Dipcon varied and modified the date of the contract relied upon.

84. Moreover, UDeCOTT submitted that if Dipcon pleaded the existence of an oral contract agreed to in February, 2010, its claim filed in March, 2014 would have been met with a limitation defence. As such, UDeCOTT submitted that if this court allows Dipcon to now substitute its pleadings to reflect an oral contract occurring in February, 2010, this would be highly prejudicial to UDeCOTT as it would have been deprived of the limitation defence.

Findings

85. The court finds that Dipcon did not depart from its pleaded case. The court agrees with its finding in ***Daron William*** supra that a court must adopt a common sense approach to the issue as to whether a litigant has deviated substantively from his pleaded case since, if

parties were to be restricted to the narrow confines of facts which are themselves obscure, such an approach will result in manifest injustice to the litigant having regard to the overriding objective of the CPR.

86. In this case the pleadings of Dipcon were clear. The case of Dipcon is that it was awarded a contract by UDeCOTT and that pursuant to clause 70.1 (which was incorporated into the contract), it recognised that it could have made a claim for additional costs under the contract. Dipcon did in fact make such a claim and UDeCOTT initially compromised the claim but Dipcon was dissatisfied with the compromised sum and therefore asked for a re-assessment of its additional claim, which UDeCOTT did undertake. Therefore, the additional claim was not distinct and separate from the contract but one which formed part of the contract itself and the court so finds. As such, UDeCOTT's submission that the additional claim was not pleaded as being pursuant to the contract is plainly wrong.

87. The court further finds that the evidence of Singh does not depart from Dipcon's pleaded case. Singh maintained that there was an agreement to pay the additional claim. Therefore, the change in the dates from April to February made no material difference to the pleaded case. The crux of Dipcon's pleaded case was that UDeCOTT agreed to pay the sum of the additional claim. In substance it is Dipcon's case that in order so to do, the additional claim was assessed. In the court's view, the assessment was substantively a re-assessment because of the fact that a figure had been allowed on first assessment.

88. Moreover, UDeCOTT's submissions that it would be deprived of a limitation defence if the court allows Singh to substitute February as the date when the promise took place has no basis since time would not have begun to run in February but when the re-assessment of the claim was completed which was sometime in June according to Dipcon. The court therefore finds that time began to run when the re-assessment of the claim was completed.

89. The court further agrees with Dipcon that UDeCOTT was not denied any opportunity to defend the case against it. To submit that the only case UDeCOTT would have been put on notice for and therefore be prepared to meet was that of an oral agreement entered into on

the 1st April, 2010 does not accord with common sense as the satetment of case clearly set out that the claim was being made pursuant to clause 70 Part I FIDIC. The court therefore finds no merit in the arguments of UDeCOTT on this issue and finds that claim was not separate from the contract but one which would have been subsisting under the very contract.

Issue 2 - *Whether Dipcon accepted the sum of $18,816,233.94 by letter dated the 8th February, 2010 as full and final settlement of all its claims under the contract.*

The submissions of UDeCOTT

90. UDeCOTT submitted that it was clear from Dipcon's letter dated the 8th February, 2010 ("the said letter) that Dipcon agreed to accept the sum of $18,816,233.94 which included a sum in respect of the increased cost of equipment as full and final settlement of all claims under the said contract. According to UDeCOTT, no work was done after the final account was agreed upon by Dipcon that would warrant an additional claim. As such, it was the submission of UDeCOTT that Dipcon by agreeing to accept the said payment in full and final settlement cannot now maintain this action.

91. Further, UDeCOTT submitted that Dipcon is estopped from maintaining this action since by having paid the said sum to Dipcon, UDeCOTT acted to its detriment in reliance on Dipcon's representation that it agreed to the final account by the said letter.

The submissions of Dicpon

92. Dipcon submitted that UDeCOTT has denied the existence of an agreement being arrived at with respect to the final account by letters dated the 27th January, 2010 and 8th February, 2010. Further, Dipcon submitted that the method for calculating the sum of $3,500,000.00 which allegedly represented the claim in respect of the increased cost of equipment was

embarrassingly incorrect. That UDeCOTT's witness, De Souza unequivocally established that no detailed consideration of Dipcon's additional claim was undertaken prior to arriving at the sum of $3,500,000.00. Moreover, Dipcon submitted that UDeCOTT's calculation on its own evidence added up to $4,700,000.00 instead of $3,500,000.00. As such, Dipcon submitted that it was more probable that the sum of $3,500,000.00 was not paid in respect of the increased costs of equipment. Accordingly Dipcon submitted that UDeCOTT's final account submissions just do not add up.

UDeCOTT's submissions in reply

93. UDeCOTT submitted that it was always its position that the parties agreed to the final account which was contained in letters dated the 27th January, 2010 and 8th February, 2010. That what it had consistently denied was the existence of any oral agreement to pay the additional claim. UDeCOTT further submitted that even if it accepts that the calculation of the $3,500,000.00 was incorrect, the fact remains that Dipcon accepted that sum in respect of the increased cost of equipment and submitted its final account. According to UDeCOTT one just has to look at the contemporaneous documentary evidence agreed to in this matter and the plain interpretation of letters dated the 27th January, 2010 and 8th February, 2010 in order to reject Dipcon's submissions under this issue.

Findings

94. Upon an analysis of Dipcon's letter dated the 8th February, 2010 ("the said letter"), the court finds that Dipcon's acceptance of the sum of $18,816,233.94 ("the said sum") was not final in relation to additional costs. At first blush on a purely literal of the letter at paragraphs two and three appear to indicate an acceptance of the said sum in full and final payment but paragraph four of the same letter asks for consideration of the additional sum as a matter of courtesy. The court had to scrutinize the contents of the letter as a whole in the context of the other the other surrounding circumstances to assist in the determination of the meaning of what was stated therein. On examination of the letters prior to that of the 8th February 2010 it was clear that the sums sought by Dipcon for additional costs were

substantially more than that which they purported to accept by letter of the 8th February 2010. Further, the continued discourse by letters after the acceptance when taken together with the prior letters leads the court to conclude that Dipcon's acceptance was given in circumstances where they nonetheless intended to and did pursue a re-consideration of the entire figure to be paid on account of additional costs. As the correspondence demonstrate, Dipcon continued to ask that the figure be re-visited. It could therefore not have been the intention of Dipcon at the time it accepted to accept the figure of $3,500,000.00 as the final figure for additional costs. This finding is supported by the fact that UDeCOTT in fact agreed to revisit the issue of the additional costs and did in fact re-assess them. Further, the court accepts the explanation of Singh, that Dipcon used the word "courtesy" in the said letter because it did not wish to be aggressive towards UDeCOTT. But it is clear that UDeCOTT was not hearing of the figure in excess of what it purported to pay for additional costs for the first time in the letter of the 8th February 2010. They had been very aware that much more was being sought under that head. The acceptance was therefore one in which the figure for the additional costs was not a final one although the other figures may have been final.

Issue 3 – *whether there was an oral agreement or promise to pay Dipcon's additional claim for increased costs by UDeCOTT in or about the 1st April, 2010 or at all.*

Sub-Issue - The assessment of the additional claim

Submissions of UDeCOTT

95. UDeCOTT submitted that there was no basis for the calculation of the additional claim since clause 70.1 was not completed. That Dipcon ignored the very last clause of the contract which provided that clause 70.1 must include additional wording in part II of the FIDIC conditions in order to be complete. In order to fully appreciate the need for such additional wording, UDeCOTT made reference to the 1999 FIDIC Conditions of Contract

for Construction, wherein clause 13.8 makes a similar provision as clause 70.1. UDeCOTT submitted that clause 13.8 is far more specific and aptly illustrates the need for a part II provision in respect of the old clause 70. As such, UDeCOTT submitted that the problems encountered in the instant contract will no longer be an issue under the 1999 FIDIC conditions given the clarity in which clause 13.8 is drafted which included the formula to calculate an increase or decrease in cost. Additionally, UDeCOTT submitted that clauses 52.2 and 60.2 which were relied upon by Dipcon were irrelevant for the calculation of the additional claim.

The submissions of Dipcon

96. Dipcon submitted that it must be remembered that UDeCOTT admitted that it arrived at the sum of $3,500,000.00 allegedly in full settlement of the additional claim without any analysis of the relevant documentation and information. That it must also be remembered that UDeCOTT has failed to produce any final certificate for the project. Moreover, that UDeCOTT failed to pay Dipcon the sum of $18,816,233.94 within the time stipulated in the contract. As such, Dipcon submitted that it would be wrong to allow UDeCOTT to conveniently choose not to follow its own contractual obligations when it is in its interests to do so and then seek to rely on the same contract when its interests are threatened.

97. According to Dipcon, UDeCOTT cannot approbate and reprobate the contract at its convenience. Dipcon submitted that this principle is based on the doctrine of election. That no party can accept and reject the same instrument and further a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.

98. Moreover, Dipcon submitted that UDeCOTT pleaded and led evidence that it actually considered the additional claim and also allegedly offered to settle it in the sum of $3,500,000.00 but thereafter submitted that there was never any contractual provision for the said assessment of the additional claim and consequently, there was no basis for the

calculation of the increased cost of equipment. According to Dipcon, these inconsistent positions adopted by UDeCOTT not only undermined the credibility of its case but made its submissions that there was no basis for the calculation of the increased cost of equipment illogical and baseless.

99. It was therefore the submission of Dipcon that nothing prevented the parties from utilizing the contract to assess its additional claim for costs. That the oral contract was to consider the additional claim and that could have only been done by using the said contract given UDeCOTT's admitted shortcomings with procedure.

Findings

100. The court finds that the submissions of the Dipcon hold much merit and the court agrees entirely with those submissions. Suffice it to say therefore that it is the finding of the court that the submissions of UDeCOTT on this issue must fail as they have in fact admitted to conducting an assessment post February 8th 2010.

Sub- Issue - The spreadsheet

101. UDeCOTT through its witness, De Souza admitted that it assessed the additional claim and reduced same into a spreadsheet but denied that the spreadsheet which Dipcon has in its possession was provided by UDeCOTT. De Souza also said that one Pollard who no longer works for the defendant was the one who put together the spreadsheet so that he De Souza did not possess it. UDeCOTT has failed to produce evidence of the spreadsheet it alleged it created when it assessed the increased costs. The onus was on UDeCOTT to provide such evidence in light of their witness' testimony that one did in fact exist. The onus was on UDeCOTT to call the witness Pollard to produce the spreadsheet or at the very least disclose such spreadsheet in their list of standard disclosure. In can be reasonably inferred that the spreadsheet (if it did exist separate and apart from the one produced by Mr. Singh) was the property of UDeCOTT and not Mr. Pollard so that the evidence which purports to account for its absence is wholly unsatisfactory. The failure produce such

evidence to the court, in the absence of a satisfactory explanation has resulted in the drawing of an inference as matter of common sense that there was no spreadsheet other than that testified to by Singh. Consequently, the court believes Singh's evidence that the spreadsheet was provided to him by De Souza and that upon receiving the spreadsheet Singh enquired as to the absence of UDeCOTT's letterhead on same. The court therefore finds that the spreadsheet provided by De Souza to Singh is in fact the spreadsheet which contained the re-assessed figure for additional costs.

102. Further, the court finds that De Souza was authorized to re-assess the claim having admitted that he received instructions from Mr. Primus to so do.

Sub-Issue - Was there need for consideration

103. It is clear that the case as presented by Dipcon was that UDeCOTT agreed to pay for the additional costs after full assessment under the terms of the original contract and not that a new contract was created by agreement post final payment. The court therefore agrees with the submissions of Dipcon that the issue of consideration does and cannot not arise in the circumstances of this case.

Sub-Issue- Was Board of Directors approval required for the payment of the additional claim

The submissions of UDeCOTT

104. UDeCOTT submitted that on the pleadings, Dipcon has failed to prove that there was any oral agreement made in or about the 1st April, 2010, and that on a balance of probabilities it was more probable that Dipcon accepted and agreed to the final account in full and final settlement of all claims. According to UDeCOTT, when one examines the cotemporaneous correspondence in this matter, there was no mention of any oral

agreement. As such, UDeCOTT submitted that Dipcon's claim that there was an oral agreement was an afterthought in order to fabricate a claim against it.

105. Moreover, UDeCOTT submitted that if there was an oral agreement, Dipcon would not have by its letter dated the 10th May, 2012 stated that its claim was assessed in the sum of $11,686,956.25 and that it acknowledged that the board's approval was required. According to UDeCOTT, it was quite telling that the aforesaid letter was not attached and referred to by Dipcon's witness, Singh.

106. UDeCOTT submitted that there was no guarantee that there would have been board's approval, but that this was an express acknowledgement that showed that Dicpon never had an oral agreement with UDeCOTT. Also that the aforesaid letter contradicted paragraph 7 of Dipcon's Reply where it pleaded that there was no need for board's approval. According to UDeCOTT, with full knowledge that board's approval was required for payment, not only did Dipcon contradict its position on the pleadings, but it was unable to establish that there was any such board's approval for payment of the additional claim. UDeCOTT submitted that its evidence which was never challenged was that there was no such board's approval approving any oral contract.

107. UDeCOTT submitted that it was always its position that the board's approval was required to enter into a new agreement, such as the oral agreement Dipcon is alleging. That it was never UDeCOTT's position that the board's approval was required in order for the Engineer to act under the said contract. UDeCOTT reiterated that this case has never been about a claim under the said contract and that it was never UDeCOTT's case that the board's approval was required for a payment under the said contract. According to UDeCOTT, it was answering Dipcon's claim that an oral contract exists and upon which payment is now being claimed.

<u>The submissions of Dipcon</u>

108. Dipcon submitted that whether there was need for the board's approval was not an issue as it is well established that Dipcon as a party dealing with UDeCOTT, was entitled

to assume that UDeCOTT's internal polices and proceedings would have been followed in accordance with ***Section 25 of the Companies Act Chapter 81:01*** which provides as follows;

"25. A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company—

(a) that any of the articles or Bye-laws of the company or any unanimous shareholder agreement has not been complied with;

(b) that the persons named in the most recent notice sent to the Registrar under section 71 or 79 are not the directors of the company;

(c) that the place named in the most recent notice sent to the Registrar under section 176 is not the registered office of the company;

(d) that a person held out by a company as a director, an officer or an agent of the company has not been duly appointed or had no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;

(e) that a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine; or

(f) that the financial assistance referred to in section 56 or the sale, lease or exchange of property referred to in section 138 was not authorised,

except where that person has, or ought to have by virtue of his position with or relationship to the company, knowledge to the contrary."

109. As such, Dipcon submitted that no one can say from the course of dealings with the parties to this claim that any formality with respect to Board of Directors' approval was a prerequisite to the parties consummating any contract or any dealings between the parties. Also that the process of the board finds itself nowhere in the terms of the contract. Further, that it was a formality which was assumed to have been done and there was no evidence in this matter that Mr. Primus was anything other than authorized to treat with this matter on behalf of UDeCOTT. Moreover, Dipcon submitted that UDeCOTT did not bring Mr. Primus nor anyone at board level to advance any position that Dipcon was aware that Mr.

Primus had no authority in this matter. Additionally, Dipcon submitted that it was passing strange that that both Mr. Primus and De Souza had authority to agree to the sum of $18,816,233.94 without the need for any board's approval, but not the sum of $11,255,800.00.

Findings

110. The court finds that the Board of Directors of UDeCOTT ("the board") had to give approval for the payment of the additional claim after re-assessment. UDeCOTT submitted that it was never its case that the board's approval was required for a payment under the said contract. The court understands this submission to mean that payments that were already approved by the board were clearly set out under the contract. However, any additional claims under the contract that were not already pre-approved by the board would have had to be submitted for the board's approval. This was clearly the evidence of De Souza at paragraph 18 of his witness statement, when he testified that, as with the preparation of the final account, any recommendation or proposal to pay Dipcon's additional claim would have had to be submitted by the Construction Department to the board for adjudication. The court understands this evidence to mean that after the Construction Department would have arrived at the final account which included the compromised sum for the additional claim, same had to be submitted to the board, who would then determine whether the sums as calculated were justified and would then authorise payment.

111. Therefore, the court accepted the evidence of De Souza that the board's approval was required, having regard to the manner in which companies make binding decisions way of its boards. In any event it is a reasonable inference that a board would have to approve such substantial payments. The court further finds that Dipcon's submissions that the board's approval was not an issue as it was entitled to assume that such internal policies were followed were without merit since by its letter dated the 10th May, 2012 Dipcon clearly acknowledged that the preparation of a board note for approval was necessary.

112. It follows that there could have been no binding oral agreement to pay the additional sum of $11,686,956.15 by Primus, De Souza or any other employee in the absence of a board directive arising out of a board decision to pay, the Board already having approved a sum for additional costs.

113. UDeCOTT having led evidence that the board's approval was required for the payment of the additional sum, the evidential lay upon Dipcon to prove that the board's approval was in fact obtained but Dipcon has not fulfilled that burden. In so saying the court also considered that Dipcon clearly set out in its letter of the 10th May 2012 that it was aware its re-assessed claim had to be brought before the board by way of a board note from the legal department for board approval. The court has therefore found that at its highest, UDeCott would have promised to revisit/ reassess the additional costs figure and seek approval from the board for its payment. The figure was in fact re-assessed but it appears that it was never taken before the board and never approved. It is one thing to promise that UDeCOTT would take the new figure before the board to seek approval to pay it and quite another to agree to pay it without more. Dipcon cannot recover on this claim on the basis that there was an agreement to pay, the agreement being only to take the new figure to the board for their determination. Consequently, Dipcon has failed to prove that UDeCOTT promised to pay the sum of $11,686,956.15 and the claim will therefore be dismissed with costs.

Dated the 2nd day of November, 2017

Ricky Rahim

Judge