Trinity Term
[2025] UKPC 29
Privy Council Appeal No 0114 of 2023

JUDGMENT

Dipcon Engineering Services Limited (Appellant) *v* Urban Development Corporation of Trinidad and Tobago Limited (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Briggs
Lord Burrows
Lord Richards
Dame Janice Pereira

JUDGMENT GIVEN ON
25 June 2025

Heard on 13 March 2025

Appellant
Tom Poole KC
Adam Riley
(Instructed by Blake Morgan LLP (London))

Respondent
Ravindra Nanga SC
John Paul Nahous
Sasha Darbeau
(Instructed by Edwin Coe LLP (London))

DAME JANICE PEREIRA:

Introduction

1. The issue for determination in this appeal is whether the Respondent, Urban Development Corporation of Trinidad and Tobago Limited ("UDeCOTT"), became liable to pay to the Appellant, Dipcon Engineering Services Limited ("Dipcon"), an additional sum of TT$11,686,956.15 ("the Additional Claim") pursuant to or by reference to a written agreement between UDeCOTT and Dipcon made on 15 April 2004 ("the Contract").

The background

2. Dipcon is a company which carries on the business of providing engineering services in Trinidad and Tobago. UDeCOTT is a special purpose company whose objective is the development of urban and other designated areas of Trinidad and Tobago.

3. In or around March 2003, UDeCOTT retained Dipcon to perform engineering services at Oropune Gardens Phase II ("the Project"), a housing development being undertaken by UDeCOTT. Under the Contract, Dipcon was to carry out certain infrastructural works for the Project in consideration of the sum of TT$25,904,180.20 plus VAT payable by UDeCOTT. The Contract incorporated Parts I and II of the FIDIC Conditions of Contract for Works of Civil Engineering Construction 1987 Edition ("FIDIC" or "the FIDIC Conditions").

4. Under the FIDIC Conditions, the Employer is defined as UDeCOTT and the Contractor is defined as Dipcon. The Engineer is defined under FIDIC (Part I, Clause 1.1(a)(iv)) to mean the person appointed by the Employer to act as Engineer for the purposes of the Contract. Mr Telfer was first appointed Engineer. Sometime later he was replaced by Mr Fong.

5. Dipcon completed its work on the Project in July 2006. From sometime in 2009, representatives of the parties engaged in written correspondence as well as several meetings in efforts to settle the final accounts in respect of the Project including a claim by Dipcon for an increase in the cost of materials and labour.

6. Following one such meeting between representatives of Dipcon and UDeCOTT on 20 July 2009, UDeCOTT, in a letter to Dipcon dated 4 August 2009, recorded, in summary, the matters discussed and agreed at their earlier 20 July 2009 meeting relating to the proposed Final Account Certificate. After setting out a table itemising the various

heads of payment altogether totalling the sum of TT$18,628,158.83, UDeCOTT stated, so far as relevant:

> "The terms and conditions of the above agreement are as follows:
>
> …
>
> UDeCOTT by 14 August 2009 is to seek the requisite Board approval for payment to Dipcon Engineering Services Ltd [Dipcon], of the approximate sum of $18,628,158.83 VAT inclusive.
>
> Following receipt of the requisite approvals, UDeCOTT is to use its best endeavours to pay to [Dipcon] the above approximate sum of $18,628,158.83 VAT inclusive within 30 days approval …".

7. UDeCOTT, in the said letter, went on further to state, in effect, that notwithstanding what had been set out, the terms and conditions of the Contract did not allow for payment of interest (itemised in a total sum of $2,888,412.43) and therefore the claim for interest for late payment was not applicable, so that the Final Account proposed was to be the sum of $14,566,076.82.

8. On 7 October 2009, Dipcon wrote "without prejudice" to UDeCOTT to say that it was making a claim in the sum of $11,255,800 in addition to the Contract sum due of $14,566,076.82, and interest thereon of $4,062.080.60. Dipcon, by letter dated 8 October 2009, submitted for consideration by UDeCOTT an additional claim in the sum of $15,299,800.

9. On 27 January 2010, Mr Primus on behalf of UDeCOTT wrote to Dipcon proposing a payment to Dipcon in the amount of $18,816,233.94 as full and final payment of all claims of Dipcon relative to the Project. The letter, so far as relevant, stated:

> "Re Orupune Phase 2- Final Account
>
> Reference is made to the several meetings relative to the captioned matter between 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$18,816,233.94 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: …".

The letter then set out a table itemising the heads of payment which would comprise the Final Account Certificate. One of those heads stated: "Add'n Claim: Eqm. Cost increase- $3,500,000.00". The letter then went on to state: "Following your 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."

10. Dipcon, by letter dated 8 February 2010 accepted UDeCOTT's proposal for payment in the sum proposed ("the Agreed Sum"). Dipcon however, went on to say in its letter:

> "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".

11. UDeCOTT paid the Agreed Sum by instalments. In relation to the Additional Claim, discussions and correspondence continued between officers of UDeCOTT and representatives of Dipcon with Dipcon submitting documents to UDeCOTT's officers in support of its Additional Claim. Several letters followed, in which Dipcon chased after UDeCOTT for payment of the Agreed Sum. In respect of the Additional Claim, a spreadsheet was prepared and shared with Dipcon in which the officers of UDeCOTT assessed or re-assessed the Additional Claim in the sum of $11,686,956.15.

12. UDeCOTT completed payment of the Agreed Sum on 10 April 2012 enclosing a cheque dated 4 April 2012 in the remaining sum of $1,816,233.94 with its letter. On 10 May 2012, Dipcon sent a further letter to UDeCOTT regarding the Additional Claim in which it stated, so far as relevant, the following:

> "…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 in attendance, after several meetings at UDeCOTT's office between May 18, 2010 and June 22, 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 will be done".

Dipcon asked for a meeting to resolve the matter.

13. On 12 May 2012 UDeCOTT responded to Dipcon denying liability to pay any further sums to Dipcon. Further correspondence was exchanged between the parties and their legal representatives with UDeCOTT denying any liability for payment of the Additional Claim. Dipcon therefore launched proceedings in the High Court for payment of the Additional Claim.

The High Court proceedings

14. Dipcon's claim in the High Court was for payment of the Additional Claim which was said to be due and owing under a contract made orally on or about 1 April 2010. In its Statement of Case Dipcon relied on Clause 70.1 in Part I of the FIDIC Conditions and averred that the Additional Claim was to be added to the Contract price in accordance with Clause 70.1; the Additional Claim had been quantified by UDeCOTT as set out in a spreadsheet provided by UDeCOTT's servants and/or agents; and UDeCOTT, through its servant or agent Mr Primus, on or about 1 April 2010, had agreed that an additional sum of money was due and payable by UDeCOTT under Dipcon's claim for increased costs of equipment usage between 2003 and 2006.

Findings of the High Court

15. Rahim J, in a written judgment dated 2 November 2017, dismissed Dipcon's claim. He found for present purposes that:

> (i) In respect of UDeCOTT's argument that Dipcon had deviated from its pleaded case which was based on an oral contact made on or about 1 April 2010,

that Dipcon had not done so and its claim was being made pursuant to Clause 70, Part I of FIDIC (paras 86-89).

(ii) The Agreed Sum was not final in relation to additional costs based on the prior communications which showed that, first, the additional costs were substantially more than that which Dipcon purported to accept in the letter of 8 February 2010; secondly, there was a continued discourse thereafter where Dipcon asked for a reconsideration of the figure to be paid in respect of additional costs; and, thirdly, UDeCOTT agreed to revisit the issue of additional costs and did in fact re-assess them (para 94).

(iii) The spreadsheet provided by Mr De Souza of UDeCOTT contained the re-assessment figure for the additional costs and Mr De Souza was authorised by Mr Primus to carry out the re-assessment (paras 101-102); and this was done pursuant to the terms of the original contract and not a new contract created by agreement post final payment (para 103).

(iv) Board approval of UDeCOTT was required for the payment by UDeCOTT of the Additional Claim after re- assessment and Dipcon had acknowledged by its letter of 10 May 2012 that board approval was necessary (para 111).

(v) There could have been no binding oral agreement to pay the Additional Claim by Mr Primus, Mr De Souza or any other employee (of UDeCOTT) in the absence of a board directive to pay (para 112).

(vi) At its highest, UDeCOTT would have promised to revisit/re-assess the additional costs figure and seek approval for its payment. The figure was in fact re-assessed but it appears was never taken to the Board and never approved (para 113).

The proceedings in the Court of Appeal

16. The Court of Appeal dismissed the appeal (Smith, Kokaram and Wilson JJA) holding that the judge was not plainly wrong to reject Dipcon's claim. The appeal before the Court of Appeal proceeded on the basis that Dipcon was no longer relying on an oral agreement but relied upon Clause 70.1 of the FIDIC contract. The Court of Appeal accordingly framed the question for determination this way: "Was there an agreement made by UDeCOTT to pay Dipcon the sum of $11,686,956.15 [the Additional Claim] allegedly due under the parties' building contract which was subject to the FIDIC terms". The Court considered that this question involved an inquiry into whether the alleged agreement was made pursuant to Clause 70.1 of the FIDIC Conditions or whether the

parties had engaged in a re-assessment of Dipcon's claim for that sum which was subject to approval by UDeCOTT's Board.

17. It was common ground before the Court of Appeal that if the Additional Claim was made pursuant to the terms of the FIDIC Conditions, no board approval was required. The Court of Appeal found that:

> (i) there was no agreement that the Agreed Sum was in full and final settlement of Dipcon's claim as the relevant correspondence between the parties setting out the account between the parties were not compliant with the FIDIC terms, and further that Dipcon's acceptance of the Agreed Sum was conditional upon a re-assessment of its Additional Claim (paras 7(a) and 32).
>
> (ii) the parties entered into negotiations to re-assess Dipcon's Additional Claim. Those negotiations were not conducted pursuant to the terms contained in the FIDIC contract. It was a fresh negotiation made between the parties to ascertain the Additional Claim without regard for the procedures set out in the FIDIC contract. In that negotiation the parties were aware that board approval was required before any agreement to pay any re-assessed sum could be made (paras 7(b) and 37).
>
> (iii) it was open to Rahim J to find that the agreement between the parties was simply to re-assess the Additional Claim and not to pay the said sum unless there was board approval to do so. The re-assessment was done between the parties directly without reference to the claims or payment process set out in the FIDIC contract, which therefore required the approval of UDeCOTT's Board (paras 45, 77, 78, 79, 82).

The approach adopted by the Court of Appeal

18. It is worthwhile to make the following observations about the manner in which Dipcon's case progressed:

> (i) Firstly, in its pleaded case it relied upon an oral agreement, it seems, pursuant to Clause 70.1 of FIDIC. In its Reply it asserted that Clause 5.2 of Part II of FIDIC gave priority of Part I over Part II of FIDIC and this enabled the determination of the Additional Claim to be made pursuant to the Clauses 55.1 and 56.1 of FIDIC and that this was the basis on which UDeCOTT calculated its Additional Claim through the route of Clause 5.2. Dipcon further asserted that no board approval was required prior to payment because under the Contract it was the Engineer who was tasked with certifying payment pursuant to Clause 60.1 of

Parts I and II of FIDIC. No mention was made of Clause 53 of FIDIC nor does it appear to have been addressed during the proceedings before the trial judge.

(ii) Secondly, on appeal, no ground of appeal was raised with respect to Clause 53 of FIDIC. It seems that Clause 53 of FIDIC arose during the hearing before the Court of Appeal, that court having been told by Dipcon that it was no longer relying on an oral contract. Rather, Dipcon relied on compliance with the FIDIC Conditions of the Contract for grounding their entitlement to the Additional Claim and in this regard, submitted as a consequence, that prior board approval was unnecessary where the amount to be paid was fixed or certified by the Engineer. It was this shift in Dipcon's case which explains the Court of Appeal's detailed inquiry and analysis of the FIDIC Conditions in seeking to determine whether Dipcon could make good its case that the Additional Claim was FIDIC compliant. This involved a fulsome examination of the various clauses (1, 2.1, 70.1, 60 and 53) of FIDIC.

19. Ultimately, the Court concluded that "A claim under Clause 70 must be determined in accordance with Part II of the Conditions and must be assessed pursuant to Clause 53 of FIDIC" (para 48). Having examined the trial judge's findings and the evidence before him, the Court found that "the re-assessed claim was conducted by UDeCOTT directly and not by its appointed Engineer … under the FIDIC contract" (para 64) and that "UDeCOTT in fact had taken over the responsibility of negotiating with Dipcon directly with respect to its claim rather than proceed under the terms of the FIDIC contract ..." (para 69).

The appeal before the Board

20. Before the Board, Dipcon sought to raise the issue of the enforceability of Clause 70.1 of FIDIC but UDeCOTT made plain in its written submissions that no challenge was being made to the lower courts' finding of enforceability on this issue. Accordingly, there is no need for the Board to address this issue.

21. On the foundation of Clause 70.1 of FIDIC, Dipcon now puts forward its case on two bases:

(i) The first and primary basis is an invocation of Clause 53 and specifically subclause 53.4 of the FIDIC Conditions. Dipcon says that the Additional Claim fell to be considered under Clause 53.4 of FIDIC in circumstances where Dipcon had failed to comply with Clauses 53.1 to 53.3 of FIDIC and that the parties had conducted their dealings with each other directly with the result that the Additional Claim fell squarely within the terms of Clause 53.4. Dipcon says that subclause 53.4 allowed the parties to deal directly with each other. The parties having so

done, as found by the Court of Appeal, Dipcon submits that this made the Additional Claim FIDIC-compliant such that no prior board approval of UDeCOTT was required or was merely a rubber stamp exercise given the general board approval operating under the Contract itself;

(ii) The second alternative basis urged by Dipcon is that the Additional Claim became payable having regard to the parties' course of dealings which showed the parties' failure to adhere strictly to the terms of the Contract.

22. Clause 70.1 of the FIDIC Conditions states as follows:

> "There shall be added to or deducted from the Contract Price such sums in respect of rise or fall in the costs 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."

23. Dipcon says that Clause 70.1 of FIDIC is a type of price fluctuation clause. This is not doubted. However, Part II of FIDIC contained no provision for making the determination for addition to or deduction from the Contract Price. Dipcon accepts this and also accepts that it is unnecessary to consider Clause 60 of FIDIC as that clause pertains to general payments under the Contract. Additionally, subclauses 60.1, 60.2 and 60.4, which provide for rolling interim monthly payments from the Employer (UDeCOTT) to the Contractor (Dipcon) for specified sums, are, as accepted by Dipcon, irrelevant to the present dispute as this appeal concerns a price fluctuation claim that the parties agreed to settle after the completion of the Project in July 2006. As UDeCOTT has submitted in its case, Clause 2 (which provides the scope of the Engineer's power), Clause 51 (which provides for variations), Clause 60.1 (which deals with submission of monthly statements), Clause 55.1 (which relates to quantities), and Clause 56.1 (dealing with measurement of works) of FIDIC, are all irrelevant to the question of Dipcon's entitlement to payment of the Additional Claim. Accordingly, no useful purpose will be served by setting out these clauses here.

24. Dipcon therefore focuses its argument on Clause 53.4 of FIDIC in reliance upon Clause 70.1. Clause 53, so far as relevant, provides:

> "53.1 Notwithstanding any other provision of the Contract*, if the Contractor intends to claim any additional payment* pursuant to any Clause of these Conditions or otherwise, *he shall give notice of his intention to the Engineer*, with a copy to the Employer, within 28 days after the event giving rise to the claim has arisen. (Emphasis added)

> 53.2 Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.
>
> 53.3 Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account with 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the Engineer pursuant to this Sub-Clause.
>
> 53.4 *If the Contractor fails to comply* with any of the provisions of this Clause *in respect of any claim which he seeks to make*, his entitlement to payment in respect thereof shall not exceed such amount *as the Employer* or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 *assessing the claim considers to be verified* by contemporary records (whether or not such records were brought to the Employer's notice as required under Sub-Clauses 53.2 and 53.3)." (Emphasis added)

25. Subclauses 53.1 to 53.3 do not apply to the present circumstances because it is not Dipcon's case that it gave notice of its intention to the Engineer to claim additional payment within 28 days after the event giving rise to the claim arose. The Additional Claim was made in 2009 after Dipcon had completed works in 2006. Subclauses 53.2 and 53.3, being consequential on 53.1, similarly do not apply. The result is that there was no compliance by Dipcon with subclauses 53.1 to 53.3 inclusive and as such no functions or

duties of the Engineer became engaged. Dipcon accordingly grounds its case squarely within the four corners of subclause 53.4, which contemplates the parties dealing directly with each other, and submits that the Employer (UDeCOTT) decided, by assessing and verifying the Additional Claim, the Contractor's (Dipcon's) entitlement to payment.

26. Dipcon says that UDeCOTT "determined" Dipcon's entitlement to payment of the Additional Claim and that UDeCOTT became liable to pay once UDeCOTT "confirmed" the entitlement. But this simply begs the question: How did UdeCOTT "determine" or "confirm" the Additional Claim? Dipcon sought to suggest that the re-assessment carried out by the officers of UDeCOTT amounted to that "determination" or the assessment and verification by UDeCOTT itself, for the purposes of subclause 53.4. However, there are two difficulties with this argument:

(i) Firstly, subclause 53.4 must be construed within the context of subclauses 53.1, 53.2 and 53.3 which sets out the process where the Contractor (Dipcon), intends to claim any additional payment. As Dipcon accepts, there was a failure by Dipcon to follow this process. This therefore brings subclause 53.4 into play. Subclause 53.4 may be viewed as a backstop or default provision to the prescribed process set out in subclauses 53.1-53.3 which allows the Employer (UDeCOTT) to decide for itself the Contractor's entitlement to payment. As Dipcon itself says in its submissions, and the Board accepts, "there is no provision in subclause 53.4 which provides for the intervention of the Engineer in UDeCOTT's assessment….". In the Board's view, subclause 53.4 contemplates an act being taken by UDeCOTT. That act is the assessment and verification of the Additional Claim by UDeCOTT. UDeCOTT can only do so by its Board, as the organ through which, as a trite principle of company law, it can act, in the absence of delegation of its powers.

(ii) Secondly, the fact that employees of UDeCOTT carried out a re-assessment of the Additional Claim (albeit that Mr De Souza was an engineer employed by UDeCOTT but not the Engineer appointed under the Contract) does not make it the act of UDeCOTT unless it could be shown that UDeCOTT's Board had authorised those employees to "assess and verify" the Additional Claim on its behalf. The courts below found that they were not so authorised and further found that Dipcon knew that UDeCOTT Board approval was required for payment of the Additional Claim and that such approval had not been obtained. These are concurrent findings of fact. No reason has been put forward to show that the courts below misapprehended the evidence.

27. Dipcon also sought to argue that no prior board approval by UdeCOTT was required for payment of the Additional Claim because once it fell under subclause 53.4 it was FIDIC compliant. However, this argument is difficult to follow. On a proper construction of subclause 53.4, it requires the agreement of UDeCOTT in order for

Dipcon to become entitled to payment in circumstances where there has been a failure to follow the process provided for under subclauses 53.1 to 53.3 of FIDIC and, in the absence of a delegation of its powers, such agreement requires the authority of the Board. Put simply, subclause 53.4 provided the default route by which a non-compliant contractor may still be able to obtain payment in respect of a claim which was not FIDIC compliant.

28. In the Board's view, there is no room for arguing that board approval was either unnecessary or, as counsel put it, "a rubber stamp" exercise when the very wording of subclause 53.4 of FIDIC itself incorporates the taking of a decision by UDeCOTT in circumstances separate and apart from the prescribed submission and payments procedure certified by the Engineer set out under the Contract.

29. In any event, the further difficulty Dipcon faces is the concurrent findings of fact made by the courts below that Dipcon knew that board approval of UDeCOTT was a requirement for payment of the Additional Claim, as acknowledged in its letter of 10 May 2012 recited in para 12 above. The Board has on numerous occasions stated its "practice of not interfering with concurrent findings of fact reached in the courts below subject to rare exceptions" (see, for example, *Low v Lezama* [2022] UKPC 15, para 42; *Dass v Marchand (Practice Note)* [2021] UKPC 2; [2021] 1 WLR 1788, paras 15 and 16). No rare exceptions have been shown warranting the Board going behind the findings of fact made by the courts below.

30. The Board accordingly concludes that Dipcon is not entitled to payment of the Additional Claim based on subclause 53.4 of FIDIC as Dipcon has been unable to demonstrate that UDeCOTT *assessed* and *verified* the Additional Claim thereunder.

The "course of dealing" basis

31. Dipcon, in putting forward its alternative case, referred to the prescribed process set out in Clause 60 of FIDIC and in particular subclauses 60.5 to 60.9 of FIDIC which provided, among other things, for the steps to be followed for:

> (a) the Contractor to issue to the Engineer a Statement of Completion (60.5);
>
> (b) the issuance by the Contractor and submission to the Engineer of a Final Statement (60.7); and

(c) the issuance by the Engineer of a Final Payment Certificate to the Employer with a copy to the Contractor (60.8).

Clause 60.9 says in effect that the Employer shall not be liable to the Contractor for any matter or thing arising under the Contract which has not been included by the Contractor in its Final Statement and Statement of Completion.

32. Dipcon refers to these clauses to show that the parties did not adhere to the prescribed process for certification and payment set out under Clause 60 of the Contract. For example, Dipcon did not provide a Statement of Completion nor has it been said that a Final Payment Certificate was issued by the Engineer. Notwithstanding these failures UDeCOTT did pay to Dipcon the Agreed Sum related to the Project. This is borne out by UDeCOTT's letter dated 27 January 2010 in which UDeCOTT proposed a settlement in the sum of TT$18,816, 238.94 as "full and final settlement of all Dipcon's claims related to the work on the Project" and sought Dipcon's agreement or acceptance of the same. Dipcon in fact accepted payment of the Agreed Sum but, as the courts below found, on condition that its Additional Claim be assessed or re-assessed. It is not disputed that this course was a deviation by both sides from the prescribed process which was laid out in subclauses 60.5 to 60.8 of the Contract.

33. Dipcon accordingly argues that, on the evidence and the findings of the lower courts, the determination of the sums due under the Contract would be made by the parties themselves. In demonstrating this course of dealing, Dipcon points to the approach taken by the parties leading to the proposal of the Agreed Sum made by UDeCOTT and Dipcon's acceptance of that Agreed Sum. The Agreed Sum was proposed after a series of meetings and written communication between the parties beginning with Dipcon's assertion of its additional claim for increased equipment cost from around March 2009 (referred to in UDeCOTT's letter of 26 May 2009). Following a meeting between representatives of the parties on 20 July 2009, UDeCOTT wrote to Dipcon summarising the matters raised at their 20 July meeting relating to the proposed "Final Account Certificate". In that letter UDeCOTT, among other things, (as set out in para 6 above) stated that it "will by 14 August 2009 seek Board approval for payment to Dipcon of approx. $18,628,158.83" and stated the Final Account (inc VAT) to total $14,566.076.82. Dipcon again pressed for its Additional Claim by letter of 8 October 2009 and, on 27 January 2010, UDeCOTT made its proposal for payment of the Agreed Sum which was eventually accepted by Dipcon on 8 February 2010 and paid by UDeCOTT over a period by instalments. Dipcon again, in its 8 February letter, raised for consideration by UDeCOTT its Additional Claim. Officers of UDeCOTT undertook, as the courts below found, a re-assessment of the Additional Claim.

34. Dipcon relies on the statement of Lord Denning MR in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, who at p 121 said:

> "If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it - on the faith of which each of them - to the knowledge of the other - acts and conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not - or whether they were mistaken or not - or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

35. The task then is to determine what has been established as the parties' *course of dealing* based on their prior conduct in relation to their original contract. This clearly showed, in the Board's view, a course of conduct where the parties negotiated and dealt directly with each other in respect of the final sum to be paid by UDeCOTT to Dipcon in respect of the Project. That course of dealing also established that any sum proposed for payment was subject to approval by UDeCOTT's Board. This was the course adopted leading to the ultimate proposal put forward by UDeCOTT for payment of the Agreed Sum to Dipcon.

36. In respect of the Additional Claim, it may be said that the parties engaged in a similar course of dealing. The Additional Claim, following submission of documents and records by Dipcon, was re-assessed by UDeCOTT's employees but that re-assessment was subject to submission to UDeCOTT's Board for approval. In short, the requirement for Board approval was an established element of the parties' course of dealing as demonstrated by the parties' prior conduct in arriving at the proposal for payment of the Agreed Sum. That Board approval was required (as referred to in para 33 above) and given in respect of the proposal made in UDeCOTT's letter of 27 January 2010 in respect of the Agreed Sum is beyond question. This is well demonstrated in UDeCOTT's letter of 4 August 2009 summarising the meeting on 20 July 2009 between representatives of the parties during their direct negotiations.

37. Additionally, as found by the courts below, the requirement for Board approval for payment of the Additional Claim was known to Dipcon. As observed in para 29 above, this requirement was acknowledged in Dipcon's letter of 10 May 2012 to officers of UDeCOTT who had been engaged in the re-assessment exercise. No circumstances, let alone exceptional circumstances, have been put forward warranting the Board going behind those findings by the lower courts. Accordingly, the Board does not accept Dipcon's argument that the references to board approval simply suggest that UDeCOTT had *proposed and assessed* the payment which Dipcon accepted if that is meant to suggest that board approval was unnecessary. It is clear from the evidence establishing the parties' course of dealing supported by Dipcon's own acknowledgement, that board approval was required before payment could be made. "Confirmation" of Dipcon's payment

entitlement could only come about by virtue of UDeCOTT's Board's approval. As the courts below found, the re-assessment never got to the stage of board approval, a necessary requirement for grounding Dipcon's entitlement to payment. The result is that Dipcon's entitlement to payment of the Additional Claim never crystallised. Accordingly, on this alternate basis also, Dipcon has been unable to demonstrate its entitlement to payment of the Additional Claim.

38. After hearing Dipcon's argument it became clear to the Board that Dipcon could not succeed on either of the bases put forward in its case. For that reason, it became unnecessary to hear oral arguments on behalf of UDeCOTT.

Conclusion

39. For the reasons given, the Board dismisses the appeal.