

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim Number CV NO 2012-01753 filed Civil Court of Justice April 17, 2013

BETWEEN

**URBAN DEVELOPMENT CORPORATION  
OF TRINIDAD AND TOBAGO LIMITED**

**Claimant**

And

[1] **JOHN CALDER HART**

[2] **KRISHNA BAHADOORSINGH**

[3] **RICARDO O'BRIEN**

[4] **NEELANDA RAMPAUL**

**Defendants**

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**RE RE-AMENDED STATEMENT OF CASE**

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**THE PARTIES**

1. At all material times:

- a. The Claimant, Urban Development Corporation of Trinidad and Tobago Limited (hereinafter referred to as "UDECOTT" or "the Claimant") was a limited liability company incorporated under the laws of Trinidad and Tobago with its registered office situated at 44-58 Edward Street, Port of Spain, Trinidad. The issued shareholding in UDECOTT is and was in the name of the Minister of Finance a Corporation Sole pursuant to the Minister of Finance (Incorporation) Act Chap: 69:03. UDECOTT carried

on business as the Government of Trinidad and Tobago's primary developer for the physical development and rehabilitation of urban and other designated areas within the Republic of Trinidad & Tobago;

- b. The First and Second Defendants were directors of the Claimant. The First Defendant was Chairman of UDECOTT and from 25<sup>th</sup> August, 2006, Executive Chairman, and Chief Executive Officer. He relinquished the latter post in or about July, 2007.
- c. The Third Defendant was from the time of the tender for the Customs and Excise Building to 6<sup>th</sup> October, 2006, Chief Financial Officer of UDECOTT. He was acting Chief Executive Officer from 6<sup>th</sup> October, 2006, until in or about July, 2007.
- d. The Fourth Defendant was from the time of the tender for the Customs and Excise Building to 25<sup>th</sup> January, 2007, Chief Legal Officer of UDECOTT. On 25<sup>th</sup> January, 2007, she was appointed Chief Operating Officer and, on 3<sup>rd</sup> June, 2008, she was appointed Chief Executive Officer. At all material times she was a member of the UDECOTT Tenders Evaluation Team for the Customs and Excise Building, the Ministry of Legal Affairs Tower and the Brian Lara Cricket Academy ("BCLA"), packages 2, 3 and 5 to 8.

## **Summary of Claim**

2. As directors and officers, the Defendants owed to the Claimant a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances and/or a fiduciary duty to act honestly and in good faith in the best interest of the company. This duty was owed pursuant to section 99 of the Companies Act Chap. 81:01 and the common law. In breach of that duty of care.
  - a. At Board meetings held on 17<sup>th</sup> March, 2006, 15<sup>th</sup> May, 2006, and 29<sup>th</sup> September, 2006, the First and Second Defendants resolved to award and UDECOTT subsequently entered into a contract (the “Agreement”) dated 12<sup>th</sup> December, 2006 with Hafeez Karamath Limited for the carrying out of construction work on packages 2, 3 and 5 to 8 of the Brian Lara Cricket Academy (“BLCA”) when they knew and/or ought to have known that due to Hafeez Karamath Limited's lack of management expertise and financial viability there was a high risk of Hafeez Karamath Limited being unable to complete the construction work on packages 2, 3 and 5 to 8 in the contractual period or at all, such that the Claimant should not have entered into the agreement. A true copy of the contract dated the 12<sup>th</sup> December, 2006 is hereto annexed and marked “JCH 1”
  - b. The Third and Fourth Defendants recommended to the Board of Directors the award of the BCLA packages 2, 3 and 5 to 8 when they knew and/or ought to have known that due Hafeez Karamath Limited's the lack of management expertise and financial viability there was a high risk of Hafeez Karamath Limited being unable to complete the construction work on packages 2, 3 and 5 to 8 in the contractual period or at all, such that the Claimant should not have entered into the agreement;

- c. The Defendants permitted and/or allowed and/or authorized advanced payments to Hafeez Karamath Limited in circumstances where they knew and/or ought to have known that financial viability and management, technical and construction capability of Hafeez Karamath was such that the Claimant ought not to have made such advances to it;
- d. The First and/or Fourth Defendants failed to ensure that Advance Payment Bonds were renewed so as to secure the repayment of advance payments made to Hafeez Karamath Limited by the Claimant;
- e. The First and/or Second Defendants failed and/or refused to terminate the construction contract with Hafeez Karamath Limited and advanced funds to it following clear warnings and advice that Hafeez Karamath Limited could and would not complete the construction of the Brian Lara Cricket Academy construction packages 2, 3 and 5 to 8.
- f. The First and/or Third and/or Fourth Defendants failed to ensure that the contracts for the Brian Lara Cricket Academy between Hafeez Karamath Limited and UDECOTT contained any or any sufficient safeguards to ensure that Hafeez Karamath Limited entered into a contract with 3D/I International whereby the latter assumed primary responsibility for the construction project management and delivery of the BCLA packages 2, 3 and 5 to 8.
- g. At all material times the First and/or Second Defendants and the Third and/or Fourth Defendants were acting in a fiduciary capacity to the Claimant and as such failed in their continuing duty to inform the Board of Directors and/or its shareholders of the First and Second Defendants' breach of duty as summarized above when they knew or ought to have known of such breach of duty.

3. The First Defendant in breach of his duty of good faith pursuant to section 99 of the Companies Act and/or the common law:
- a. failed and/or refused and/or neglected to disclose to the Board of Directors and/or the Tenders Committee of UDECOTT, prior to the award to CH Development of the contract for the construction of the Ministry of Legal Affairs Tower, the relationship between his wife and directors of CH Development;
  - b. after the award of the contract to CH Development failed in his continuing duty as a fiduciary to the company to disclose the relationship between his wife and the directors of CH Development.

**B. Legal Duties of Directors and Officers of a Company**

**B1. Statutory Duties**

4. At all material times the directors of UDECOTT were each subject to the following duties pursuant to the Companies Act, 1995:

- a. **“the section 60 duty”**: a duty (subject to the articles and any unanimous shareholder agreement):
1. to exercise the powers of the company directly or indirectly through the employees and agents of the company; and
  2. to direct the management of the business and affairs of the company.
- b. **“the section 99 duty”**: in exercising their powers and discharging their duty:
1. to act honestly and in good faith with a view to the best interests of the company; and
  2. to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
  3. by reason of section 99(3), the duty upon the UDECOTT directors arising under section 99(1) was and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.
  4. At all material times the Third and Fourth Defendant owed UDECOTT a section 99 duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

## **B2: Common Law Duties**

Further or alternatively, the directors of UDECOTT and the Third and Fourth Defendants each owed to the company various common law duties as set out in this section.

### **5. Fiduciary duties:**

- a. a duty of loyalty;
- b. a duty to act honestly and in good faith;
- c. a duty to act in UDECOTT's best interests and to promote its success.



6. **Contractual duties:** The directors and officers were each engaged pursuant to a contract with UDECOTT, whereby he was engaged for reward to act as a director and/or officers of the company, such contract to be implied in the circumstances if not express.
7. It was an implied term of each such contract that the directors and/or officers would exercise reasonable care, diligence and skill in acting as a director of UDECOTT.
8. **Tortious duty of care:** Further or in the alternative, each director and/or officers each owed to UDECOTT a duty of care in tort in acting as a director of the company.

**THE DEFENDANTS BREACH OF DUTY ARISING FROM THE BOARD'S**  
**AWARD OF PKS 2, 3 AND 5 TO 8 FOR THE BRIAN LARA CRICKET**  
**ACADEMY**

9. Prior to the award of the contract to Hafeez Karamath the First and/or Second and/or Third and/or Fourth Defendant were involved in and obtained information from the tenders for the Customs and Excise Campus Plaza and the Ministry of Legal Affairs Tower which would have led a director and officer acting prudently to recommend the rejection of Hafeez Karamath's tender for the BCLA PKS 2, 3 and 5 to 8.

**(a) Knowledge Obtained from the Customs and Excise Campus Plaza Tender**

10. In or about **October 2002** UDECOTT took a decision to re-issue an invitation to tender for the construction of the Customs and Excise Campus Plaza Project in Port of Spain, Trinidad. At the time the First Defendant was the Chairman of the Board of Directors of UDECOTT.
11. The tendering process for the Customs and Excise Building contract was done by public tender and the Board, under the chairmanship of the First Defendant, took a decision to adopt a post-qualification approach for contractors.

12. Among the tenderers for the contract to construct the Customs and Excise building was Hafeez Karamath Limited. The First Defendant was present at the opening of the tenders on the 11<sup>th</sup> March, 2003. A true copy of the Record of Tenders Submissions dated the 11<sup>th</sup> March, 2003 is hereto annexed and marked “**JCH 2**”. Subsequently, on the 17<sup>th</sup> April, 2003, at the Board Meeting of UDECOTT, he summarized the findings of the First Report of the committee formed to evaluate the tenders. A true copy of the minutes of the Board meeting of the 17<sup>th</sup> April, 2003 is hereto annexed and marked “**JCH 3**”.
13. On the 5<sup>th</sup> May, 2003 Hafeez Karamath wrote to the First Defendant, as Chairman of UDECOTT, to complain about questions asked of him and Hafeez Karamath Limited by UDECOTT regarding;
- a) financial and accounting concerns and issues raised by representatives of UDECOTT;
  - b) general management and organisation concerns and issues and in particular the lack of evidence of a contractual relationship between a major sub-contractor and Hafeez Karamath Limited; and
  - c) financial capability of Hafeez Karamath Limited to undertake the project;
- which took place at a meeting held with the UDECOTT Evaluation Team to evaluate the tenders for the construction of the Customs and Excise Building. In so doing the First Defendant became aware, if he had not already been so, of the concerns which representatives of UDECOTT had with regard to Hafeez Karamath Limited.

A true copy of the letter dated the 5<sup>th</sup> May, 2003 is now hereto annexed and marked “**JCH 4**”.

14. In May, 2003, the Evaluation Team produced a Third Report on the evaluation of the tenders for the Customs and Excise Building. A true copy of the Evaluation Team Third Report dated 12<sup>th</sup> May 2003 is hereto annexed and marked “JCH 5”. The report was given to the First Defendant as Chairman of the Tenders Committee. Hafeez Karamath Limited was the lowest tenderer. Notwithstanding the fact that Hafeez Karamath Limited was the lowest tenderer, the Evaluation Team failed Hafeez Karamath Limited for a number of reasons set out fully in its report including the following;
- a) Hafeez Karamath Limited had failed to provide evidence that major sub-contractors had committed or were prepared to commit to the project for the duration of the project;
  - b) Hafeez Karamath Limited was unable to produce financial statements for 5 years since it had only been incorporated in 2000 and such financial statements as provided showed a deficient working capital;
  - c) Hafeez Karamath Limited submitted financial statements for a related company in order to attempt to qualify for the 5 years of financial statements. The failure to submit financial statements for the 5 years was in breach of UDECOTT's Terms and Conditions for the Evaluation of Tenders. The Evaluation Team also found that the related company may in any event, have been gravely insolvent;
  - d) That the financial statements submitted did not qualify the tenderer for consideration of a project of the magnitude of the Customs and Excise Building.

15. The Tenders Committee of the Board of Directors, of which the First Defendant was the Chairman, considered the reports of the Evaluation Team, including the Third Report, and recommended the rejection of Hafeez Karamath Limited as a valid tenderer for the Customs and Excise Building.

16. The First Defendant did not agree with the Third Report of the Evaluation Committee.

The First Defendant sought the advice of outside Counsel, Deborah Peake, who advised by letter dated 15<sup>th</sup> July 2003 that the tender of Hafeez Karamath Limited was flawed having failed to adhere to the Terms and Conditions for the Evaluation of Tenders as required by UDECOTT. The First Defendant thereafter sought to have all the tenderers assessed for compliance with the tender process. Reports on all tenderers were submitted to the First Defendant who passed the Report to QES/Design Collaborative for its further evaluation. A true copy of the letter dated 15<sup>th</sup> July 2003 is hereto annexed and marked “JCH 6”.

17. At a meeting held on 25<sup>th</sup> July, 2003, at which were present, inter alia, the then Minister of Planning, Dr. Rowley, and the Board of UDECOTT, Dr. Rowley pointed out the inconsistencies between the Third Evaluation Report and the report from QES Associates. Dr. Rowley indicated he was satisfied with the Third Evaluation Report but not that provided by QES Associates. In the premises, the Second Defendant, if he was not aware of the contents of the Third Evaluation Report prior to 25 July, 2003, he became so aware on that date and/or in pursuance of his duty to exercise care, skill and diligence was under a duty to acquaint himself with its contents. On the 19<sup>th</sup>, August, 2003, the Customs and Excise tender process was voided by a resolution of the Board

and the tender process recommenced. At the aforesaid Board Meeting the First Defendant informed the Board that he intended to carry out a post-mortem on the aborted Customs and Excise tender process when, inter alia, the Second Defendant had returned to the country to ascertain what lessons could be learned.

**(b) Knowledge obtained from the Ministry of Legal Affairs Tower Tender**

18. The Defendants' knowledge of the financial and technical ability of HKL and the HKL Group of companies to undertake a major construction project was augmented by Hafeez Karamath Limited's bid for the construction contract for the Ministry of Legal Affairs Tower. At a Board meeting chaired by the First Defendant on the 11<sup>th</sup> September, 2003 the pre-qualification documents in the invitations to pre-qualify were approved without the requirement that a contractor wishing to prequalify for large projects should supply five (5) years audited financial statements notwithstanding that one director requested the inclusion of the requirement that a contractor who wishes to be considered for large projects should supply five (5) years audited financial statements. A true copy of the minutes of the meeting of the Board dated the 11<sup>th</sup> September 2003 is hereto annexed and marked "JCH 7".
19. The financial details and capability of Hafeez Karamath Limited were evaluated in detail during the pre-qualification process for contractors wishing to bid for contracts with UDECOTT in excess of \$100 million. and, in particular the misstatement by Hafeez Karamath Limited's bankers as to its current balances and the indication by its bankers that it was willing to lend Thirty Million United States Dollars (US\$30 million) to the Hafeez Karamath group of companies after debt consolidation. This evaluation was provided to the First Defendant as Chairman of the Board and Chairman of the

Tenders Committee.

20. On the 8<sup>th</sup> November, 2004 the Board of Directors of UDECOTT chaired by the First Defendant resolved to issue invitations to a number of contractors, including Hafeez Karamath Limited, to tender for the award of the contract for the Ministry of Legal Affairs Tower as a part of the Government Campus Plaza Project. A true copy of the minutes of the meeting of the Board dated the 8<sup>th</sup> November 2004 is hereto annexed and marked “**JCH 8**”.
21. Six tenders were submitted for the Ministry of Legal Affairs Tower contract, of which Hafeez Karamath Limited was the lowest tenderer. Hafeez Karamath Limited’s tender was evaluated by both QES/Design Collaborative and Arun Buch & Associates Limited/ENCO. The First Defendant, as Chairman of the Board of UDECOTT was presented with a “Note for the Board” from UDECOTT’s Chief Executive Officer/Secretary on or about the 22<sup>nd</sup> March, 2005 for the Board’s consideration of the award of the tender for the Ministry of Legal Affairs Tower. Attached to the Note were the QES/Design Collaborative tender evaluation report and the Arun Buch & Associates Limited & Associates Limited tender evaluation report of the 8<sup>th</sup> March 2005. A true copy of the letter dated the 8<sup>th</sup> March 2005 is hereto annexed and marked “**JCH 9**”. A true copy of the Design Collaborative tender evaluation is hereto annexed and marked “**JCH 10**”. The Note, prepared by senior management of UDECOTT referred to the “risk” of awarding the contract to Hafeez Karamath Limited as “high”. At a Board meeting held on 24<sup>th</sup> March, 2005, at which the First and Second Defendants were present, the Third Defendant informed the Board of the recommendation of the

evaluation in respect of the tenders for the construction of the Ministry of Legal Affairs Tower. The Board resolved to “defer this matter to allow members additional time to consider the various reports and the recommendation of the evaluation team”. Attached to the report of the evaluation team dated 8<sup>th</sup> March, 2005, was a “Note to the Board” from the Third Defendant which referred to the “risk” of awarding the contract to Hafeez Karamath as “high”. As members of the Board, the First and Second Defendants were therefore aware of the “high risk” rating given to Hafeez Karamath Limited.

22. The QES/Design Collaborative tender evaluation report questioned Hafeez Karamath Limited's financial ability to manage a project the size of the construction of the Ministry of Legal Affairs Tower given its turnover and also highlighted the risk to the project in the event that the technical consultant proposed by Hafeez Karamath Limited, namely 3D/I Limited was to pull out of the project.

23. The Arun Buch & Associates Limited tender evaluation stated that they were unable to recommend the award to the Hafeez Karamath Limited tender for a number of reasons including;

- a) the bidder's superficial grasp of the project's requirements;
- b) the project engineers identified by the bidder were inexperienced;
- c) the agreement between the bidder and its technical support consultants allowed for termination with 30 days notice with no financial implications;
- d) the bidder grossly underestimated the preliminaries for the proper execution of the contract;
- e) some of the key subcontractors proposed did not have a track record in projects

of this size; and

- f) that it was probable that the bidder would have work which was likely to be well beyond its existing management capability.

24. As of March, 2005 therefore the Defendant was well aware that in respect of construction projects in excess of \$100 million, the financial and construction management and/or management capability of Hafeez Karamath Limited was lacking.

25. On the 5<sup>th</sup> April, 2005, the Board of Directors, chaired by the First Defendant agreed to award the contract for the Ministry of Legal Affairs Tower to CH Development at a cost of \$368.9 million.

**Tender for the Brian Lara Cricket Academy, Packages 2, 3 and 5 to 8**

26. In or about January, 2006 UDECOTT issued invitations to a number of companies to tender for package 2 (“PK 2”) of the construction packages for the Brian Lara Cricket Academy. PK 2 was the contract for the Building sub-structure of the stadium at Toruba. A six month construction period was proposed by UDECOTT for PK 2.

27. Tenders for PK 2 closed on the 6<sup>th</sup> February, 2006 with six tenderers including Hafeez Karamath Limited whose bid of \$166 million represented the lowest tender for PK 2. Hafeez Karamath Limited indicated their intent to complete the contract in six months.

28. At a Special Board meeting chaired by the First Defendant on the 17<sup>th</sup> March, 2006 a Note was presented to the Board in relation to the evaluation undertaken of the three lowest tenderers for PK 2, the construction on the BLCA substructure. A true copy of the minutes of the meeting of the Board of Directors dated 17<sup>th</sup> March 2006 is hereto annexed and marked “**JCH 11**”. Attached to the Note was the Report of the Evaluation of Tenders by the Tenders Evaluation Team dated March 17<sup>th</sup> 2006 which evaluated tenderers on the basis of tender price, construction period, project financing, technical, management and staffing, litigation history and major strengths and weaknesses. A true copy of the note to the Board of Directors is hereto annexed and marked “**JCH 12**”.
29. The Board at the foregoing meeting was advised by the Third Defendant that the recommendation by the Tender Evaluation Team to award the PK 2 contract to the lowest bidder namely Hafeez Karamath Limited was not unanimous. Winston Chin Fong, the Chief Construction Engineer, and Advani, the Operations Consultant, were invited to the meeting and, in the presence of the Defendants the Operations Consultant expressed his concerns, inter alia, regarding the ability of Hafeez Karamath Limited to complete the job as described in the PK 2 tender within the six months stated in the tender.
30. The Report on the Evaluation of Tenders for the PK 2 BLCA annexed to the Note for the Board at its meeting of the 17<sup>th</sup> March, 2006 clearly stated that Hafeez Karamath Limited proposed that **UDECOTT pay up-front for major material purchases** as well as advance payment for mobilisation of 15% of the value of the contract. At this point therefore the Defendants were aware that in the event that PK 2 BLCA was awarded to

Hafeez Karamath Limited, UDECOTT would effectively be the financier for Hafeez Karamath Limited. The Claimant will say that this was a reflection and confirmation of Hafeez Karamath Limited's lack of financial viability highlighted in its tenders for the Customs & Excise Building and the Ministry of Legal Affairs Tower. Indeed, the Risk Assessment Report attached to Report on the Evaluation of Tenders gave Hafeez Karamath Limited a score of 4.5 out of 5 in respect of "Finance", with 5 being very high risk and 4 being high risk. There was therefore nothing to indicate to the Defendants that Hafeez Karamath Limited's financial position had altered materially from that which prevailed when it tendered for the Customs and Excise and Ministry of Legal Affairs Building. In any event, the First Defendant, as a member of the Tenders and Evaluation Committee, was well aware of Hafeez Karamath Limited's precarious financial position. In the light of the Defendants knowledge of Hafeez Karamath Limited's lack of financial viability and construction project management and/or management experience the Defendants were or ought to have been put on inquiry as to whether Hafeez Karamath Limited's financial viability and management experience had materially improved since their bid for the Customs and Excise Building and Minister of Legal Affairs Tower. In failing to have regard to such information and/or making such inquiry the Defendants and each of them were in breach of their Section 99 duty.

31. The Report on the Evaluation of Tenders also listed as an issue, the possibility that the relationship between the contractor and 3D/I, the consultants upon whom Hafeez Karamath Limited placed major reliance for the construction project management technical expertise for the PK 2 contract, could dissolve during the construction and "adversely impact on the timely delivery of this project". The Report on the Evaluation

of Tenders also listed as a “major weakness” that “It is possible for 3D/I to dissolve their relationship with HKL midstream”. On 2<sup>nd</sup> March 2006, Turner Alpha & Associates Limited, the technical consultants appointed on the project, wrote to Winston Chin Fong, the Chief Construction Engineer, expressing the view that “if it is determined that you wish to proceed with Hafeez Karamath it is essential that the relationship with 3D/I be clearly defined in their agreement and that 3D/I to the maximum extent possible step forward and assume primary responsibility for project delivery”. A true copy of the letter dated the 2<sup>nd</sup> March 2006 is hereto annexed and marked “**JCH13**”.

32. In the premises, the Defendants knew or ought to have known that the contractual, or any, completion of the project by Hafeez Karamath Limited was contingent upon securing the continued services of 3D/I throughout the project to completion, and the provision by them of viable financial capability and experienced construction management to manage a project the size of the construction of the Brian Lara Cricket Academy.
33. The Board meeting of 17 March, 2006, lasted approximately seventeen (17) minutes, at the conclusion of which the Board awarded the contract for PK2 of the Brian Lara Cricket Academy to Hafeez Karamath Limited with 3D/I the purported technical consultant for Hafeez Karamath Limited for the Brian Lara Cricket Academy project. UDECOTT relied upon the technical expertise of 3D/I in awarding PK2, to Hafeez Karamath Limited. Despite the fact that Hafeez Karamath Limited's tender was premised, and highly dependent, upon 3D/I throughout the project to completion, the Defendant in breach of their duty to exercise care, skill and diligence, **failed to take any,**

or adequate, steps to ensure that contractual provisions were concluded ensuring that prior to entering into the Agreement there was a partnership agreement in place between 3D/I Limited and Hafeez Karamath Limited and/or that 3D/I assumed primary responsibility for the project and/or take any, or any adequate, steps to ensure that 3D/I Limited would incur legal and/or financial liabilities in the event that they failed to participate in the project in accordance with Hafeez Karamath Limited's tender.

34. The Minutes of a meeting held on 12<sup>th</sup> February, 2007, between representatives of Turner Alpha Limited, UDECOTT and Hafeez Karamath Limited record that 3D/I Limited had taken no or no material part, in the construction of the Brian Lara Cricket Academy project since its inception. This was further emphasised in a letter from Nick Billotti of Turner International to the First Defendant on 3 May 2007 in which the former stated that Hafeez Karamath Limited had not provided the full time senior managers from 3D/I Limited that were a main factor in UDECOTT's acceptance of Hafeez Karamath Limited as the PK-2 contractor. A true copy of the minutes of the meeting of the 12<sup>th</sup> February 2007 is hereto annexed and marked "**JCH 14**".
35. On the 23<sup>rd</sup> March, 2006 Bankers Insurance Company Limited issued Bond number 01/350/561/56177 valued at \$21,699,042.65 (with a face value of \$24,953,899.05 inclusive of VAT). On the 24<sup>th</sup> March, 2006 UDECOTT, in accordance with the terms proposed by Hafeez Karamath Limited for PK 2, issued an Advance Payment to Hafeez Karamath Limited of \$24,953,899.06. This sum represented 15% of the contract sum. A true copy of the advance payment dated the 24<sup>th</sup> March 2006 is hereto annexed and marked "**JCH15**".

36. On the 15<sup>th</sup> May, 2006 the Board of Directors of UDECOTT, chaired by the First Defendant, resolved to award the contracts for packages 3 and 5 to 8 of the Brian Lara Cricket Academy to Hafeez Karamath Limited subject to management's receipt and satisfaction with the contractor's detailed work program/schedule and same being based on achievable milestones. A true copy of the minutes of the meeting of the board of Directors dated the 15<sup>th</sup> May 2006 is hereto annexed and marked "JCH16". The Board instructed at its meeting, which lasted one hour and fifteen minutes, that Hafeez Karamath Limited be awarded, subject to the aforementioned conditions, the following packages at a maximum guaranteed price of \$399 million;

PK2	Substructure
PK3	Interior/Exterior finishes, mechanical, electrical and plumbing works,
PK5	Scoreboard
PK6	Roof canopy
PK7	Sewer storage facilities, sports lighting, suites build-out and FF& E
PK8	Security Fencing

37. The award of Pkgs. 3 and 5 to 8 were also premised on the purported participation by 3D/I as part of the Hafeez Karamath Limited construction management team.

38. The Ministry of Finance (Corporation Sole) on the 7<sup>th</sup> August, 2006 put forward a note to Cabinet wherein it proposed that the First Defendant be made Executive Chairman of UDECOTT in order to ensure completion of certain projects (including the Brian Lara Cricket Academy) within budgetary and time constraints. A true copy of the note of Cabinet dated 7<sup>th</sup> August 2006 is hereto annexed and marked “**JCH 17**”. On the 25<sup>th</sup> August, 2006 the Board of Directors of UDECOTT, with the approval of Cabinet, appointed the First Defendant Executive Chairman of UDECOTT for three years. On the 1<sup>st</sup> September, 2006, the First Defendant replaced the Third Defendant as Chief Executive Officer of UDECOTT. A UDECOTT document (numbered UDE01189576) entitled “List of Responsibilities of the Executive Chairman” sets out the role of the Executive Chairman and includes, inter alia, “to oversee the day to day operations” and “to delegate to the senior management responsibility and authority for the performance of business in their respective areas of responsibility and manage the senior management against agreed objectives”. A true copy of the list of responsibilities of the Executive Chairman I hereto annexed and marked “**JCH 18**”.
39. On the 14<sup>th</sup> September, 2006 Hafeez Karamath Limited re-submitted a proposal for PK's 2, 3 and 5 to 8 of the BLCA at a total cost-fixed price of \$379 million. At its Board Meeting on the 29<sup>th</sup> September, 2006 chaired by the First Defendant, the Board agreed to accept the proposal of Hafeez Karamath Limited for PK's 2, 3 and 5 to 8 of the BLCA. The acceptance of the Hafeez Karamath Limited bid was premised upon the latter providing accelerated construction to enable the BLCA to participate as a venue for the ICC World Cup. A true copy of the letter dated 14<sup>th</sup> September 2006 is hereto annexed and marked “**JCH 19**”.

40. However, prior to 14<sup>th</sup> September, 2006, Turner Alpha Limited expressed their strong doubts that Hafeez Karamath Limited could complete the Brian Lara Cricket Academy in time for the ICC World Cup. On 26 June, 2006, Turner Alpha Limited wrote to the Third Defendant, the UDECOTT Chief Executive Officer, stating that, based on recent events and lack of performance by Hafeez Karamath Limited to effectively manage PK2 and to carry out simple work such as building the Turner Alpha field offices, they would recommend that Hafeez Karamath Limited not be awarded any further work on the Brian Lara Cricket Academy project. A true copy of the letter dated 26<sup>th</sup> June 2006 is hereto annexed and marked “**JCH20.**” In a letter to Winston Chin Fong, UDECOTT Chief Construction Engineer, Turner Alpha expressed their view that based on the present progress by Hafeez Karamath Limited on PK- 2 the Brian Lara Cricket Academy could not be completed in time for the tournament. On 23<sup>rd</sup> August, 2006, Turner Alpha wrote to Winston Chin Fong, with a copy to the Fourth Defendant, the Corporate Secretary of UDECOTT, stating that as “each day progresses” Hafeez Karamath Limited’s goal of completing the Brian Lara Cricket Academy by 18<sup>th</sup> February, 2007, “is more impossible to meet. Turner Alpha continued “I have no clue what HKL has committed to suppliers and or contractors ...we at TAL feel that meeting February 18, 2007 is impossible”. A true copy of the letter dated 23<sup>rd</sup> August 2006 is hereto annexed and marked “**JCH 21**”.
41. Notwithstanding the foregoing warnings, on the 2<sup>nd</sup> October, 2006 a letter of award was issued to Hafeez Karamath Limited for PKs 2, 3 and 5 to 8 of the BLCA and Hafeez Karamath Limited presented a payment certificate re-dated to 2<sup>nd</sup> October, 2006 which

reflected a new contract sum of \$379,000,000.00 and a total advance payment of 15% being \$68,566,986.00. On the said 2<sup>nd</sup> October, 2006 UDECOTT issued a payment to Hafeez Karamath Limited of \$53,898,135.00 guaranteeing the repayment of the advance in the event that Hafeez Karamath Limited failed to fulfil its obligations pursuant to the construction contract with UDECOTT. True copies of award and advance payment certificates are hereto annexed and marked “**JCH22**”.

42. On the 15<sup>th</sup> September, 2006, more than two weeks before the award of the contract for Pkgs. 3, 5 to 8, Bankers Insurance Company Limited issued an Advance Payment Bond to Hafeez Karamath Limited in the sum of \$53,898,135.00 under bond number 01/350/561/56770. A true copy of the advance payment bond is hereto annexed and marked “**JCH23**”.
43. The contract for the award of Pkgs. 2, 3 and 5 to 8 of the BLCA to Hafeez Karamath Limited was executed by the First Defendant as Chairman and Chief Executive Officer of UDECOTT on the 12<sup>th</sup> December, 2006. Prior to this date the ICC had removed the Brian Lara Cricket Academy as a venue for the ICC World Cup. There could therefore have been no justification based upon urgency and/or necessity for the award to Hafeez Karamath Limited.
44. In the premises, in relation to the award of the contracts for PKs 2, 3 and 5 to 8 of the Brian Lara Cricket Academy by the Board of Directors of UDECOTT, the Defendant breached their duty to exercise care, diligence and skill in the management of the affairs of UDECOTT.

## **PARTICULARS**

- a) The Defendants knew and/or ought to have known they were under a duty to exercise due diligence in respect of Hafeez Karamath Limited's tender. The Defendants were well aware of the facts and matters set out at paragraphs 4-37 above. They failed and /or refused and/or neglected to utilize information to reject Hafeez Karamath Limited's tender and/or recommend to the Board the rejection thereof. The Claimant will contend at trial that Hafeez Karamath's failure to complete the Brian Lara Cricket Academy in accordance with the contract, or at all, were directly connected to the facts and matters identified in the Customs & Excise Building and Ministry of Legal Affairs tenders and the failure of 3D/I to undertake the construction project management role set out in the HKL Tenders;
- b) Further or alternatively, the Defendants failed and/or refused and/or neglected to make or ensure that enquiries were made regarding the tender by Hafeez Karamath Limited for PK 2, 3, and 5 to 8 in circumstances where they were aware of the questions and concerns about the financial and construction project management and/or management capability of Hafeez Karamath Limited to undertake and complete large projects;
- c) Further or alternatively, the First Defendant failed and/or refused and/or neglected to alert the other members of the Board to concerns previously raised by members of UDECOTT evaluation teams on previous projects concerning Hafeez Karamath Limited's financial and construction project management and/or management capability to undertake large projects;

- d) Further or alternatively the First Defendant failed and/or refused and/or neglected to properly investigate the concern raised by UDECOTT's evaluation team regarding the lack of a long term commitment between 3D/I and Hafeez Karamath Limited in circumstances where heavy reliance was placed on this alliance for providing technical support for the work ;
- e) The First and Second Defendant failed and/or refused and/or neglected to properly or adequately investigate or ensure any or any sufficient investigation was carried out into the concerns raised by the Operations Consultant Mr. Advani at the Board Meeting of the 17<sup>th</sup> March, 2006, to the effect that Hafeez Karamath Limited may be unable to complete the PK 2 contract within the six months stipulated and as described in the tender documents;
- f) Further or alternatively the First Defendant failed to inform the Board of Directors of the concerns raised by Turner Alpha as set out in paragraph 33 above and, in particular, their recommendations that PKs, 3 and 5 to 8 should not be awarded to Hafeez Karamath Limited;
- g) The First and Third Defendants failed to issue instructions to the Fourth Defendant that there was to be inserted in the contract between Hafeez Karamath Limited and UDECOTT a term requiring Hafeez Karamath Limited to enter into an agreement with 3D/I International whereby they became primarily liable for the construction and delivery of the BCLA packages 2, 3 and 5 to 8 as project managers;
- h) The Fourth Defendant, as Chief Legal Officer, failed to ensure that there was inserted into the contract between Hafeez Karamath Limited and UDECOTT in the form pleaded in the foregoing sub-paragraph;

- i) Further or alternatively, following the information provided to the First Defendant as set out in paragraph 26 above he failed and/or refused to take any or any sufficient action to ensure that Hafeez Karamath Limited engaged 3D/I in accordance with HKL's tender and/or engaged an equivalent construction project management entity and/or suspended all further advance payments until such an entity had been contracted;
- j) The Third and Fourth Defendants in breach of their duty of care recommended to the Board the award of the BCLA packages 2, 3 and 5 to 8 contract when they knew or ought to have known from their involvement in the Customs and Excise Building, Ministry of Legal Affairs and BCLA evaluation that Hafeez Karamath Limited's financial and project managerial ability presented UDECOTT with a high risk that they could not complete the project;
- k) The First and Second Defendants failed to exercise prudence in awarding the contracts for PKs 2, 3 5 to 8 to Hafeez Karamath Limited;
- l) Further and/or in the alternative, the Defendants and each of them, in breach of their fiduciary duty to UDECOTT failed to disclose to the Board of Directors of UDECOTT and/or its shareholders their breach of duty as set out above. Such duty was a continuing duty and continued until the termination of the Defendant's contract.

45. At no time was the Minister of Finance (the corporation Sole), the sole shareholder of UDECOTT fully informed of all the facts and matters set out above. The Claimant will contend, insofar as is necessary, first, that the Defendants well knew that they were committing a breach of duty as pleaded above when approving and/or recommending the award Pk.2, 3 and 5 to 8 and executing the Agreement, and, second, that the breach of duty was committed in circumstances where it would not be discovered for some

time, within the meaning of section 14(2) of the Limitation Act. In particular, it would not have been known until such time as the First Defendant was no longer the Executive Chairman and director of UDECOTT and the facts and matters could be investigated by a new Board of Directors or on their behalf. The Defendant resigned as Executive Chairman of UDECOTT in March 2010. Such an investigation was not completed until August, 2011.

46. The BLCA is incomplete. To date Hafeez Karamath Limited has been paid \$531,280,139.73 on Pkgs. 2, 3, 5 to 8 of the BLCA. UDECOTT has thereby suffered the loss and damage representing the difference between the sum paid to Hafeez Karamath Limited and the sum that will have to be paid for completion of the Brian Lara Cricket Academy, full particulars of which will be provided on disclosure herein.

**THE FIRST AND FOURTH DEFENDANTS BREACH OF DUTY ARISING FROM THEIR FAILURE TO TERMINATE HAFEEZ KARAMATH LIMITED'S CONTRACT FOR PKS 2, 3 AND 5 TO 8 AND/OR REFUSE TO MAKE FURTHER PAYMENTS PURSUANT THERETO**

47. On the 19<sup>th</sup> December, 2007 Turner Alpha, the technical consultants employed by UDECOTT for the Brian Lara Cricket Academy wrote to the First Defendant recommending that a Notice of Termination be issued to Hafeez Karamath Limited for PKs 2 and 3 and 5 to 8 on the basis that the contractor had failed to complete any of the contractual works within the time for completion as defined by the contract documents. A true copy of the letter dated the 19<sup>th</sup> December 2007 is hereto annexed and marked "JCH24". A number of further clear warnings were issued to UDECOTT concerning

the Hafeez Karamath Limited's performance in carrying out its contractual obligations as follows:

- a. On 9<sup>th</sup> January, 2007, Turner Alpha wrote to Chin Fong at UDECOTT advising him that the accelerated schedule, to which Hafeez Karamath Limited had committed was not being adhered to. Turner Alpha indicated to UDECOTT that "We do not believe that the progress achieved to date is in anyway consistent with UDC's expectations at the time of the contract award. It is clearly evident that HKL have not implemented their contractual obligations to accelerate the works and certainly will not achieve the milestone dates in the contract award letter". A true copy of the letter dated 9<sup>th</sup> January 2007 is hereto annexed and marked "**JCH25**".
- b. On 23 January, 2007, Nick Billotti, the President and Chief Executive Officer of Turner International, wrote to the First Defendant. A true copy of the letter dated 23<sup>rd</sup> January 2007 is hereto annexed and marked "**JCH26**". The letter was a follow up to a conversation between the First Defendant and Billotti in Port of Spain the previous week regarding Hafeez Karamath Limited and their ability to deliver the Brian Lara Cricket Academy in a timely and cost effective manner. Billotti stated that Hafeez Karamath Limited did not demonstrate the capability to plan, organize, staff, resource and execute the work and that all work was behind schedule. Billotti recommended a number of actions that would assist in expediting the project. One of these recommendations was that no more money should be paid to Hafeez Karamath Limited. If they had cash flow problems, UDECOTT should establish a revolving letter of credit and arrange for client direct payments to subcontractors and suppliers;

- c. On 25<sup>th</sup> January, 2007, Turner Alpha wrote to Chin Fong of UDECOTT advising him, inter alia, that the Hafeez Karamath Limited November 2006 application for payment of TT\$37.2 million for materials off site in Trinidad and overseas did not exist at the time. A true copy of the letter dated 25<sup>th</sup> January 2007 is hereto annexed and marked “JCH27”. On 2 February 2007, Turner Alpha again wrote by email to Nina, Chin Fong, Cilla and Rampaul at UDECOTT recommending that advance payment should not be made for materials off site as this method of funding did not ensure that money was spent on goods for which it was originally intended;
- d. On 3 May, 2007, Nick Billotti of Turner International wrote to the First Defendant emphasizing that payments to Hafeez Karamath Limited continued to be an issue. The latter continued to bill for “materials stored off-site” without producing the required supporting documentation and for work not yet completed and, in some cases, for work not started. Billotti informed the First Defendant that “in order to best be able to protect the financial interests of UDECOTT, we have requested a record of payments made by UDECOTT to HKL. To date, our requests have not been responded to. Your assistance in having this information forwarded to us is appreciated....Finally, I had stressed to you that in order to properly do our job, TAL requires the full support of UDECOTT. To date UDECOTT has ignored every single piece of TAL correspondence requesting assistance in the matter. This undermines our ability to effectively manage the project”;
- e. On 19<sup>th</sup> December, 2007, Turner Alpha wrote to the First Defendant recommending that UDECOTT serve notice of termination on Hafeez Karamath Limited pursuant to clause 15.5 of the contract between UDECOTT and Hafeez Karamath Limited, stressing that “TAL is of the opinion that the ever increasing delay to completion of the whole of the Works and consequently the works of other contractors is entirely as a direct result of

HKL's culpable failure to progress the works in accordance with the contract". A true copy the letter dated the 19<sup>th</sup> December 2007 is hereto annexed and marked "**JCH28**".

On 13 March, 2008, Turner Alpha reiterated its recommendation that Hart should terminate Hafeez Karamath Limited's contract;

- f. On 31 July, 2008, Genivar emailed the Fourth Defendant of UDECOTT to inform her that they could no longer recommend any further payment to Hafeez Karamath Limited. A true copy of the email dated the 31<sup>st</sup> July 2008 is hereto annexed and marked "**JCH 29**". On 7<sup>th</sup> August, 2008, Genivar again reiterated its recommendation that no further payments be made to Hafeez Karamath Limited;
- h. On 28<sup>th</sup> July, 2009, a UDECOTT internal memo to, among others, the First Defendant, records that "HKL is the greatest risk to the project on all fronts, safety, schedule and budget. An analysis by QES shows the value of works completed to be much less than what is being claimed by HKL... UDECOTT needs to pay HKL's domestic suppliers directly". A true copy of the internal memo dated 28<sup>th</sup> July 2009 is hereto annexed and marked "**JCH30**".

48. The First Defendant, as Executive Chairman with day to day responsibility for the management of UDECOTT and as a director of the UDECOTT and/or the Fourth Defendant, as Chief Executive, were under a duty to exercise care, diligence and skill in the management of the affairs of UDECOTT. In breach of the foregoing duty they

- (a) failed to terminate and/or recommend to the Board of UDECOTT termination of Hafeez Karamath Limited's contract for Pkgs. 2,3 and 5 to 8 and/or
- (b) to refuse to make any further payments pursuant to the said Agreement.

The First and Fourth Defendants failed and/or refused to stop the making of payments to Hafeez Karamath Limited and/or to discontinue funding Hafeez Karamath Limited, and/or cease making advance payments at each stage when further disbursements were sought by Hafeez Karamath Limited. At each stage of such disbursement the First and Fourth Defendants knew that Hafeez Karamath Limited was not complying and could not comply with its obligations under the agreement for PKs 2,3 and 5 to 8 and that the completion costs and time for completion of PKs 2, 3 and 5 to 8 had escalated to the extent that UDECOTT had no reasonable assurance as to the extent or when the BLCA would be completed. In the events that transpired the First and/or Fourth Defendants in breach of their duty pursuant to section 99 of the Companies Act authorized and/or permitted UDECOTT to pay out the following sums to Hafeez Karamath Limited , each of which being a breach of duty on the dates they were made:

Date of payment	Amount	Type	Package
24 March 06	\$ 24,953,899.06	Advance Payment Payment cert. 1	2
06/06/06	\$ 28,745,482.00	Payment cert. 2	2
10 July 06	\$ 21,586,787.25	Payment cert. 3	2
	2 October 06	Advance payment bond plus 6% tax Payment cert.6	
6 October 06	3 October 06	Payment cert. 7	3, 5-8
16 October 06	\$ 425,051.80	Payment cert. 1	Site Office
20 October 06	\$ 26,107,274.04	Payment cert. 8	3, 5-8

10 November 06	\$ 7,000,000.00	Payment cert. 8	
10 November 06	\$ 33,364,067.25	Advance payment	3, 5-8
1 December 06	\$ 3,000,000.00	Payment Cert. 8	
8 December 06	\$ 3,500,000.00	Payment cert. 8	
15 December 06	\$ 282,566.68	Payment cert. 2	Site Office
21 December 06	\$ 3,000,000.00	Payment cert. 8	
29 December 06	\$ 5,000,000.00	Payment cert. 8	
15 January 07	\$ 2,000,000.00	Payment cert. 8	
19 January 07	\$ 2,607,274.04	Payment cert. 8	
19 January 07	\$ 7,392,725.96	Payment cert. 9	
1 February 07	\$ 3,000,000.00	Payment cert. 9	
9 February 07	\$ 2,000,000.00	Payment cert. 9	
14 February 07	\$ 3,000,000.00	Payment cert. 9	
21 February 07	\$ 2,005,175.43	Payment cert. 9	
23 February 07	\$ 1,500,000.00	Payment cert. 10	
1 March 07	\$ 2,000,000.00	Payment cert.10	
2 March 07	\$ 3,000,000.00	Payment cert. 10	
9 March 07	\$ 2,000,000.00	Payment cert. 10	
14 March 07	\$ 8,135,932.25	Payment cert. 10	
16 March 07	\$ 16,728,135.00	Payment cert.11	
13 April 07	\$ 11,500,000.00	Advance payment	3, 5-8
13 April 07	\$ 1,500,000.00	Payment cert.12	
17 April 07	\$ 10,000,000.00	Payment cert. 12	

27 April 07	\$ 5,933,268.52	Payment cert. 13	
10 May 07	\$ 40,116.60	Payment cert. 1	
10 May 07	\$ 2,898.00	Payment cert. 1	
11 May 07	\$ 10,000,000.00	Advance Payment	3, 5-8
5 June 07	\$ 2,500,000.00	Payment cert. 10	
6 June 07	\$ 1,669,225.89	Payment cert. 14	
29 June 07	\$ 243,827.75	Payment cert. 15	
27 July 07	\$ 6,595,643.78	Payment cert. 16	
6 August 07	\$ 2,562.00	Payment cert. 1	
13 August 07	\$ 5,175,000.00	Payment cert. 17	
14 August 07	\$ 9,963,679.61	Payment cert. 18	
7 September 07	\$ 7,836,421.32	Payment cert. 19	
10 September 07	\$ 2,607,033.68	Payment cert. 19	
10 September 07	\$ 10,925,000.00	Advance payment	2
21 September 07	\$ 4,158,983.16	Advance payment	2
21 September 07	\$ 1,000,000.00	Payment cert. 20	
21 September 07	\$ 2,000,000.00	Payment cert. 20	
28 September 07	\$ 2,621,568.00	Payment cert. 20	
5 October 07	\$ 2,000,000.00	Payment cert. 20	
9 October 07	\$ 2,158,983.16	Payment cert. 20	
26 October 07	\$ 10,000,000.00	Payment cert. 20	
2 November 07	\$ 4,000,000.00	Payment cert. 20	
19 November 07	\$ 2,915,456.01	Payment cert. 21	

27 November 07	\$ 5,096,298.66	Payment cert. 22	
4 December 07	\$ 5,158,228.50		
11 December 07	\$ 5,000,000.00		
14 December 07	\$ 7,000,000.00		
11 January 08	\$ 4,370,000.00	Payment cert. 22	
25 January 08	\$ 6,000,000.00	Payment cert. 23	
25 January 08	\$ 555,000.00	Payment cert. 23	
28 January 08	\$ 5,750,000.00	Payment cert. 24	
12 February 08	\$ 3,944,840.66	Payment cert. 25	
22 February 08	\$ 3,146,899.26	Payment cert. 26	
27 February 08	\$ 2,000,929.05	Payment cert. 27	
4 March 08	\$ 805,929.98	Payment cert. 28	
7 March 08	\$ 6,150,134.35	Payment cert. 29	
19 March 08	\$ 2,273,015.64	Payment cert. 29	
20 March 08	\$ 4,052,357.66	Payment cert. 29	
4 April 08	\$ 6,523,031.06	Payment cert. 30	
14 April 08	\$ 5,894,100.47	Payment cert. 30	
9 May 08	\$ 2,000,000.00	Payment cert. 31	
16 May 08	\$ 1,772,442.20	Payment cert. 31	
21 May 08	\$ 4,078,761.24	Payment cert. 32	3, 5-8
23 May 08	\$ 3,000,000.00	Payment cert. 32	
12 June 08	\$ 1,078,761.24	Payment cert. 32	
20 June 08	\$ 5,000,000.00	Advance payment	3, 5-8

20 June 08	\$ 5,674,238.96	Payment cert. 33	
26 June 08	\$ 951,223.13	Payment cert. 32	
27 June 08	\$ 2,079,491.58	Advance payment	2
27 June 08	\$ 2,079,492.00	Payment cert. 32	
11 July 08	\$ 2,079,491.58	Advance payment	2
11 July 08	\$ 2,082,825.80	Payment cert. 33	
17 July 08	\$ 2,115,976.51	Payment cert. 34	
8 August 08	\$ 5,000,000.00	Advance payment	3, 5-8
8 August 08	\$ 6,000,000.00	Payment cert. 35	
8 August 08	\$ 4,094,569.05	Advance payment	3, 5-8
28 August 08	\$ 6,077,815.32	Payment cert. 36	
12 September 08	\$ 6,243,884.68	Payment cert. 37	
19 September 08	\$ 3,792,217.29		
3 October 08	\$ 6,000,000.00		
18 October 08	\$ 2,788,319.11	Payment cert. 35	
24 October 08	\$ 3,189,265.34	Payment cert. 36	2
26 November 08	\$ 5,750,000.00	Advance payment	3, 5-8
26 November 08	\$ 14,950,000.00		
6 December 08	\$ 6,868,072.74	Payment cert. 39	3, 5-8
15 December 08	\$ 4,549,808.04	Payment cert. 39	
27 February 09	\$ 345,345.00	Payment cert. 1	
3 April 09	\$ 4,396,829.94	Payment cert. 40	

15 May 09	\$ 4,331,795.98	Payment cert. 42	
15 May 09	\$ 380,454.37	Payment cert. 2	
1 July 09	\$ 1,000,000.00	Payment cert. 43	
20 July 09	\$ 4,003,075.04	Payment cert. 44	
31 July 09	\$ 2,361,062.19	Payment cert. 46	
3 August 09	\$ 4,600,000.00	Payment cert. 45	
24 August 09	\$ 3,746,246.32	Payment cert. 37	
18 September 09	\$ 5,000,000.00	Payment cert. 48	
12 October 09	\$ 7,014,426.16	Payment cert. 50	
26 October 09	\$ 3,450,000.00	Payment cert. 31	
3 November 09	\$ 4,600,000.00	Payment cert. 52	
2 December 09	\$ 8,212,546.39	Payment cert. 53	
22 December 09	\$ 6,323,441.39	Payment cert. 56	
	\$ 37,963,457.34	Advance payment endorsed on PC 2	
	\$ 108,762,202.00	Advance payment endorsed on PC 39	3, 5-8
	\$ 21,699,042.66	Advance payment endorsed on PC 2 revised	
	\$ 21,151,838.66	Advance payment endorsed on PC 3	
	\$ 46,867,943.48	Advance payment Endorsed on PC 32	

Total payments including advance payments made to HKL \$888,730,334.50

Advance payments made to HKL \$400,838,120.80

**THE FIRST AND FOURTH DEFENDANTS BREACH OF DUTY ARISING FROM  
THEIR FAILURE TO ENSURE THE ADVANCE PAYMENT BONDS WERE  
RENEWED ON EXPIRY**

49. On or about the 14<sup>th</sup> February, 2007 another Advance Payment Bond No. 01/350/561/59162 was issued by Bankers Insurance Company Limited to secure a further advance payment by UDECOTT to Hafeez Karamath Limited of \$50 million. The Advance Payment represented payment for materials for PKs 3, 5 to 8 of BLCA. A true copy of the advance payment bond dated the 14<sup>th</sup> February 2007 is hereto annexed and marked “JCH 31”.
50. The Advance Payment Bonds issued by Bankers Insurance Company Limited to secure the Advance Payments made by UDECOTT to Hafeez Karamath Limited, namely;

Number	Date	Amount
01/350/561/56177	17.3.06	\$21,699,042.65
01/350/561/56770	15.9.06	\$53,898,135.00
01/350/561/59162	14.2.07	<u>\$50,000,000.00</u>
<b>TOTAL</b>		<b><u>\$125,597,177.65</u></b>

have all lapsed. Bond No. 01/350/561/56177 has not been extended beyond the 30th April, 2009. Bond No. 01/350/56770 was not extended beyond the 31st December, 2009 and even then only for the sum of \$25,000,000.00. Bond No. 01/350/561/59162 expired on the 30<sup>th</sup> April, 2009.

51. The BLCA is incomplete. To date Hafeez Karamath Limited has been paid approximately \$531,280,139.73 on PKs 2, 3, 5 to 8 of the BLCA. There is outstanding to UDECOTT \$ 65,680,978.88 of the Advance Payments made.
52. The First Defendant, as Executive Chairman of the Board (since 1<sup>st</sup> September, 2006) and the Fourth Defendant as Chief Executive Officer, had day to day responsibility for management of the business of UDECOTT and had duty to exercise care, diligence and skill in the management of the affairs of UDECOTT and/or a fiduciary duty to act in the best interest of the company. In breach of the foregoing duty they failed to ensure that the Advance Payment Bonds in favour of UDECOTT were extended on their expiration dates as set out at paragraph 43 above, with the effect that UDECOTT is now unsecured in respect of the advanced payments made to Hafeez Karamath Limited with no or no reasonable prospect of repayment and has thereby suffered loss and damage in the sum set out at paragraph 45.

#### **THE FIRST DEFENDANT'S BREACH OF FIDUCIARY DUTY TO UDECOTT**

53. At the material time the First Defendant lived at No.7 the Park Clenco, Port-of-Spain in the Island of Trinidad and had had installed at the said address since in or about 1987, telefax line number 868-624-8239 registered in his name.

54. In or about February, 2004 UDECOTT's Board of Directors, chaired by the First Defendant approved the retention of Turner Alpha Limited as consultants for the Government Campus Plaza Project which was to include the construction of the Ministry of Legal Affairs Tower.
55. On or about the 25<sup>th</sup> October, 2004, prior to invitations to tender for the Ministry of Legal Affairs Tower being issued, the First Defendant presented to Mr. Winston Agard, Chief Executive (then Corporate Secretary of UDECOTT) a professionally prepared brochure from Sunway Construction Berhad of Malaysia (hereinafter referred to as "SUNCON"). A letter accompanied the Brochure from C.H. Development and Construction Pte. Ltd (hereinafter referred to as "CH Development") dated 25<sup>th</sup> October, 2004, signed by Leong Choong Chee and David Ng Chin Poh. A true copy of the letter dated 25<sup>th</sup> October 2004 is hereto annexed and marked "**JCH 32**".
56. The CH Development letterhead included a reference to a fax number of 868-624-8239. Listed as directors of CH Development in October, 2004 were Allen Lee Hip Ming, David Ng Chin Poh and Leong Choong Chee.
57. On the 8<sup>th</sup> November, 2004 the Board of Directors of UDECOTT chaired by the First Defendant pre-qualified SUNCON to undertake building contracts with UDECOTT valued in excess of \$100 million. True copy of the minutes of the meeting of the Board of Directors is hereto annexed and marked "**JCH 33**".

58. On 10<sup>th</sup> November, 2004 a letter of invitation was sent via fax to SUNCON/CH Development at 868-624-8239. A number of tender bulletins were issued thereafter in respect the Ministry of Legal Affairs Tower and delivered to CH Development by sending same by fax to 868-624-8239.
59. At all material times Allen Lee Hip Ming was the brother and David Ng Chin Poh the brother in law of Mrs. Sherrine Hart.
60. On the 31<sup>st</sup> January, 2005 CH Development submitted a tender for the Ministry of Legal Affairs Tower. The Board of UDECOTT chaired by the First Defendant on the 5<sup>th</sup> April, 2005 awarded the contract to construct the Ministry of Legal Affairs Tower to CH Development. A true copy of the letter dated the 31<sup>st</sup> January 2005 is hereto annexed and marked “**JCH 34**”.
61. At no time, and in particular at its Board Meetings on the 8<sup>th</sup> November, 2004 and 5<sup>th</sup> April, 2005, or at the opening of the tenders for the Ministry of Legal Affairs on January 31 2005 did the Defendant declare his relationship, or the relationship of his wife, to directors of CH Development and/or SUNCON. A true copy of the minutes of the meeting of the Board of Director dated the April 2005 is hereto annexed and marked “**JCH35**”.
62. On the 5<sup>th</sup> May 2005 CH Development formally changed its name to Sunway Construction Caribbean Limited (hereinafter referred to as “Sunway”). A true copy of the Articles of Amendment is hereto annexed and marked “**JCH 36**”.

63. On the 23<sup>rd</sup> May, 2008 Mr. Ramesh Lawrence Maharaj, Member of Parliament stated, inter alia, in Parliament that Lee Hip Ming of SUNCON is the brother in law of the First Defendant. On the 12<sup>th</sup> June, 2008 the First Defendant caused a statement to be issued on behalf of UDECOTT in relation to the award of the Ministry of Legal Affairs Tower contract wherein the First Defendant and Mrs. Hart categorically and absolutely denied any interest or involvement in CH Development and as well denied that any member of their family was involved in the award of the contract. A true copy of the statement dated 12<sup>th</sup> June 2008 is hereto annexed and marked “**JCH 37**”.
64. By Section 99 of the Companies Act a director is under a duty to act in good faith in the best interest of the company, and such duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.
65. Further, the First Defendant owed fiduciary duties to UDECOTT by reason of the position of trust in which he was placed as Chairman of the Board of Directors of UDECOTT and subsequently as Executive Chairman and Chief Executive Officer of UDECOTT. Without limitation, the following duties were owed by the First Defendant to UDECOTT;
- a) A duty of loyalty;
  - b) A duty to act honestly and in good faith;
  - c) A duty to act in UDECOTT’s best interest and to promote its success
  - d) A duty to avoid conflicts of interest;
  - e) A duty to maintain the confidentiality of information received or knowledge obtained through his position including a prohibition against making improper

use of any such confidential information;

- f) A duty to provide full, complete and timely information to the other directors on matters of serious import and effect on the corporation's financial well-being;

66. In relation to the award of the Ministry of Legal Affairs Tower contract by the Board of UDECOTT, the First Defendant breached his duties as set out at paragraph 46 and 59 above.

### **Particulars**

- a) He failed and/or refused to disclose to the Board or the Tenders Committee at the pre-qualification of contractors stage that his wife's brother and brother in law were employed or involved with SUNCON and/or CH Development;
- b) He failed and/or refused and/or neglected to disclose to the Board of Directors and/or the Tenders Committee of UDECOTT prior to the award of the Ministry of Legal Affairs Tower contract to CH Development the relationship between his wife and Allen Lee Hup Ming and David Ng Chin Poh;
- c) He failed in his continuing fiduciary duty to disclose after the award of the contract the relationship between his wife and the directors of CH Development;
- d) He failed and/or refused and/or neglected to admit to the Board of Directors or the shareholder in May 2008 at a time when he was Executive Chairman and when allegations were made in Parliament, that his wife was related to Allen Lee Hup Ming and/or David Ng Chin Poh and in fact dishonestly denied same;

- e) He failed and/or refused and/or neglected to recuse himself from taking part in any consideration of the prequalification of SUNCON as a contractor entitled to bid for contracts in excess of \$100 million for UDECOTT and in fact participated in the exercise.
- f) He failed and/or refused and/or neglected to recuse himself from any consideration or deliberation of the award of the Ministry of Legal Affairs Tower where CH Development was a tenderer and in fact participated in the tender review process through the Tenders Committee and sat as Chairman of the Board to award the said contract to CH Development.
- g) He failed and/or refused and or neglected to disclose to the Board that his personal fax situate at his home in Cascade was to be utilized by CH Development for the purpose of receiving information by fax from UDECOTT;
- h) He facilitated one tenderer, namely CH Development over the other tenderer for the Ministry of Legal Affairs Tower by permitting CH Development to use his fax number to receive information from UDECOTT relevant to the tender;
- i) He failed and/or refused and/or neglected to disclose to the Board that he had issued an invitation to SUNCON to pre-qualify for projects in Trinidad with UDECOTT.

67. The Claimant claims a declaration that the First Defendant breached his fiduciary duty in failing to disclose to the UDECOTT Board the facts and matters set out at paragraphs 47-59 above and in failing to recuse himself from participating in the award of the contract by the Board of Directors relating thereto.

## **AND THE CLAIMANT CLAIMS**

1. A declaration that the First Defendant is in breach of his duty to exercise skill, care and diligence in the management of the affairs of UDECOTT:
  - a. by resolving as a Board member to award the contract to Hafeez Karamath Limited of the Brian Lara Cricket Academy packages 2, 3 and 5 to 8;
  - b. failing and/or refusing to ensure that the Agreement contained any or any sufficient safeguards to ensure that Hafeez Karamath Limited entered into a contract with 3D/I whereby the latter assumed primary responsibility for the construction project management and delivery of the BCLA packages 2, 3 and 5 to 8;
  - c. failing and/or refusing to resolve to terminate and/or recommend to the UDECOTT Board the termination of the Agreement in January, 2007, or at the latest, May, 2007;
  - d. permitting and/or allowing and/or authorizing advanced payments, or any payments, to Hafeez Karamath Limited on or after January, 2007;
  - e. failing to ensure that Advanced Payment Bonds were renewed on or before 31<sup>st</sup> December 2009;
  - f. failing and/or refusing to disclose to the Board of Directors of UDECOTT and/or the shareholders thereof the First and Second Defendants' breach of duty.
2. A declaration that the First Defendant breached his fiduciary duty in relation to the facts and matters set out at paragraphs 46-58 in the Re-amended Statement of Case.

3. A declaration that the Second Defendant by resolving to award to Hafeez Karamath Limited the BCLA, packages 2, 3 and 5 to 8 he is in his breach of his duty to exercise skill, care and diligence in the management of the affairs of UDECOTT.
4. A declaration that the Third Defendant by recommending to the Board of UDECOTT the award of the BCLA packages 2, 3 and 5 to 8 to Hafeez Karamath Limited is in breach of his duty to exercise skill, care and diligence in the management of the affairs of UDECOTT.
5. A declaration that the Fourth Defendant is in breach of her duty to exercise skill, care and diligence in the management of the affairs of UDECOTT by:
  1. failing to ensure that there was inserted into the contract between Hafeez Karamath Limited and UDECOTT a term requiring Hafeez Karamath Limited to enter into an agreement with 3D/I whereby the latter became primarily liable for the construction and delivery of the BCLA packages 2, 3 and 5 to 8;
  - ii. recommending to the Board the award of the BCLA package 2, 3 and 5 to 8 to Hafeez Karamath Limited
  - iii. failing to recommend in or about July, 2008, to the First Defendant and/or the Board of UDECOTT that the Agreement should be terminated;
  - iv. failing to refuse to make and/or to recommend to the First Defendant and/or the Board the refusal of any further payments to Hafeez Karamath Limited on or after July, 2008;
  - v. failing to ensure that the Advance Payment Bond were renewed and/or extended.

6. Against the First and Fourth Defendants, damages arising out his failure to ensure that the Advance Payment Bonds were renewed upon their expiry, alternatively, the balance of the advance payments made to Hafeez Karamath Limited and not recovered by UDECOTT in the sum of **\$65,680,978.88**.
7. Further or alternatively, damages against the First and Second Defendants for breach of his duty to exercise skill, care and diligence in the management of the affairs of UDECOTT, limited to the loss and damage to UDECOTT pleaded at paragraph 39.
8. Further or alternatively, damages representing such sums paid out by UDECOTT after the facts and matters set out in paragraphs 40 to 41 in the Re-amended Statement of Case.
9. Further or alternatively, equitable damages in respect of the First and/or Second Defendants' breach of fiduciary duty.
10. Interest at a rate to be determined by the Court for a period of time to be determined by the Court pursuant to section 25 of the Supreme Court of Judicature Act Chapter 4:01.
11. Such further or other relief that this Honourable Court may deem fit in the circumstances of this case.