

EXECUTIVE COMMITTEE – 14 JANUARY 2013**PART II - DELEGATED****1. William Penn Leisure Centre – Mediation Briefing (CE)**

This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information), and information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (paragraphs 3 and 5 of Schedule 12A).

1 Summary

- 1.1 This report seeks the Executive's approval to settle, or not, the WPLC situation at the mediation hearing on 15/16 January 2013

2 Details**Background**

- 2.1 Members are aware of the protracted dispute with Gee Construction and Atkins over the refurbishment of the William Penn Leisure Centre. We have been successful in forcing all parties to attend another mediation process with the intention of settling and not having to go to the Construction & Technology Court.
- 2.2 The first mediation in March 2012 concluded when Atkins walked out before the conclusion of the first day. This second mediation is an "evaluative mediation", more "senior" than the first, with one of the judges from the Construction & Technology Court acting as mediator. Whilst any settlement would still be voluntary, one can speculate that it would be noted by the Court that one or more of the parties had withdrawn from the process presided over by a Judge from the Court in which a trial would take place. The Judge will also be taking a keen technical note of the pros and cons of the cases of each party so he can expertly evaluate the respective claims and suggest solutions with authority.
- 2.3 The costs to each party have been considerable, hence the belated but now eager willingness for Atkins and Gee to attend the mediation. For information, the costs claimed to have been borne by the other parties so far is set out below, with all figures excluding VAT.

Gee's current actual and anticipated costs:

| | |
|---|-----------------|
| 1. Costs to 31 December 2012 | |
| Fenwick Elliott | £257,425 |
| David Sears QC | £75,505 |
| FTI Brewer/FTI/Blackrock (Rob Palles-Clark and Gary Peters) | £267,379 |
| Miscellaneous disbursements | £10,900 |
| Total to date before mediation | <u>£611,209</u> |

2. Costs from 1 January 2013 to the end of a 4 week trial

| | |
|-----------------------------|------------------------|
| Fenwick Elliott | £265,000 |
| David Sears QC | £340,000 |
| Rob Palles-Clark | £192,240 |
| Gary Peters | £147,125 |
| Miscellaneous disbursements | £10,000 |
| Total: | <u>£954,365</u> |

Atkins' current actual and anticipated costs:

"We anticipate that the total costs incurred by Atkins up to and including the mediation will be in the region of £900k plus VAT."

"By the end of a full trial we would expect the same amount of costs to be incurred [plus VAT] - perhaps slightly more."

2.4 Three Rivers' approach to the mediation is best summed up in the summary conclusion to our Mediation statement, prepared with Sean Wilken QC and Rachael O'Hagan (Counsel), and this is reproduced below as Appendix 1.

2.5 To aid members, Appendix 2 to this briefing is the briefing of 10 months ago with a commentary on it. To aid comparison, I have set out the present position in the same format.

2.6 Present Financial Position

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|--|--------------------------|
| Original budget approvals | £4,600,000 |
| <u>Overspend</u> | |
| Cost of completion and remedial work | £4,000,000 |
| Legal so far (approx. and inc. adjudication costs) | <u>£1,500,000</u> |
| Sub-total | <u>£5,500,000</u> |
| Total | £10,100,000 |

2.7 Tactical Position

| In favour of settling at mediation | In favour of NOT settling |
|--|--|
| Draw a line | JW says our claim is easily better than 50/50 and they thus went on a conditional fee agreement (CFA) High Court action will almost certainly point out that TRDC was the innocent party |
| TRDC hopes to obtain some money from both parties. | None – costs to all parties are ruinous and the matter is entirely costs-driven |
| In our £5.5m 'claim pot', there is our maximum liability to Atkins of £175,000 approx, and maximum liability of £1.25m to Gee's counterclaim + £500,000 in possible later adjudications (After an aborted mediation, TRDC is then exposed to Gee's swift follow-on adjudications and possible award of £500,000 approx | None |

Mediation risks

| Risks | Likelihood |
|---|------------------------|
| Gee and Atkins go for drop-hands with minimal outlay to both and TRDC will be the biggest loser | They will attempt this |
| Gee walk out so that we are challenged to engage them at trial and face EOT adjudication consequences (see below) | High |
| Atkins walk out again, so that we are challenged to engage them at trial and face EOT adjudication consequences (see below) | Low |
| Political & media fallout at a 'bad' settlement – after so much time and expense | Inevitable |
| We still shall have to forego a considerable sum. | Inevitable |

Risks including a trial

| | |
|---|-------------------------------------|
| Before trial, TRDC is then exposed to Gee's swift follow-on adjudications and possible award of £500,000 approx. | Inevitable, with further legal fees |
| We win against Gee in a trial and they go bust, so we may get a favourable judgement but pyrrhic victory with no money besides, say, £500,000 from Atkins | Possible |
| Victory means CFA is triggered so we have to pay the legal bills with no settlement cash to pay them | Equally possible |
| If, after aborted mediation we go to trial, our legals cost a further £1,500,000, our £5.5m 'claim pot' increases to £7.0m and we shall not get this back | Inevitable as a minimum exposure |
| Yet more bills and officer time spent on a diversionary activity | Inevitable |

Aims at Mediation

We strive to settle at mediation and avoid trial

As a minimum, we seek to ensure we do not have to spend further than the present £10,100,000,

We strive to ensure we are a net gainer.

Recommendation to Executive Committee 14 January 2013

That Executive Committee delegates authority to the Chief Executive and Director of Community & Environment to settle the Council's claims against Gee and Atkins at the best possible terms to TRDC and in accordance with the above aims and risk analysis, or not to settle, should the circumstances make a trial inevitable.

Summary extracted from the TRDC Position Statement

142. In brief, both Atkins and Gee are liable to TRDC for numerous breaches of many differing obligations.

143. As far as Gee is concerned:

143.1. Gee's performance throughout its time on the project was defective. The works were slow and defective.

143.2. By December 2008, the attempts Gee had made to remedy its defective works had ceased and labour on site had been reduced.

143.3. As at December 2008 – January 2009 there were no programmes such that Gee could or can now estimate that which was necessary either to perform the outstanding works or to remedy Gee's defective works. The absence of such programmes further makes it difficult for Gee realistically now to assert that the labour it had on site was adequate.

143.4. Finally, even if Gee is correct in asserting that there was an alternative remedial programme, this was not shared with TRDC, and Gee had not completed the works under that programme.

143.5. Gee's employment was therefore lawfully terminated.

143.6. In any event Gee was and is liable to TRDC for the loss and damage caused by Gee's defective works.

144. As far as Atkins is concerned:

144.1. Atkins had numerous and wide ranging obligations to TRDC.

144.2. Atkins is in admitted breach of those obligations – in relation to the M&E.

144.3. In any event, Atkins failed properly to perform those obligations – in terms of the design, inspection, supervision and control of the works.

144.4. The result of that failure was, if Gee is right that Gee's works were disrupted and Gee has suffered the loss and damage for which Atkins should be liable.

144.5. Atkins advised TRDC on the issue of, and itself issued, the Notice of Default. If any of the grounds in that notice ceased to be valid as a matter of fact (an issue on which Atkins was solely qualified to advise), then Atkins could and should have so advised TRDC – particularly, if as is Atkins' case now, Atkins view was that TRDC could not terminate in January 2009 but would have been able to terminate shortly afterwards.

144.6. Atkins did not so advise. Nor can Atkins properly say that its duties so to advise could be delegated or transferred to others.

144.7. Therefore, if Gee is correct and Gee's employment on the project was not lawfully terminated, Atkins is liable.

145. Finally:

145.1. The sums which Atkins and/or Gee are liable to pay TRDC outweigh the counterclaims that they seek to bring (even assuming that the amounts counterclaimed are recoverable);

145.2. Atkins and/or TRDC are therefore net payors both in terms of the principal sums and legal costs;

145.3. That said, the costs of litigating these claims will, in all probability, exceed the amounts at issue. For that reason alone, the parties can and should mediate a settlement of these claims now.

SEAN WILKEN QC
RACHAEL O'HAGAN

16 March 2012 - Briefing to Councillors for Settlement before the first mediation

Position

A £4.6m project has turned into a £7.5m project with a legal bill of £0.8m, total £8.3m

OVERSPEND

| | |
|--------------------------|---------------------|
| Sum due to TRDC from GEE | = £2,665,865 |
| Sum due to TRDC | = £0,571,824 |
| Sub-total | = £3,237,689 |
| Legal so far (approx) | = £0,840,000 |
| TOTAL | = £4,077,689 |

Recommendation of Executive Committee 30 January 2012

That Executive Committee delegates authority to the Chief Executive, in consultation with the Leader of the Council and the Deputy Leader of the Council (check minute), to settle the Council's claims against Gee and Atkins.

We need authority both to settle for a figure, and also authority NOT to settle.

| In favour of settling at mediation | In favour of NOT settling and issuing proceedings |
|--|--|
| Draw a line | JW says our claim is easily better than 50/50 and they will go on a conditional fee agreement (CFA) |
| TRDC will get some money from both parties, perhaps up to £3m | Issuing will show we are <i>seriously</i> serious, and Atkins' insurers and Gee will be very concerned at the future expense |
| We shall have to forego up to 50% of a legitimate claim | After issuing, there will be settlement offers made that may yield us more than 50% of claim |
| In our £4m 'claim pot', there is Atkins' maximum liability(?) of £2.5m, and Gee's liability of £2.6m = £5.1m – plenty of margin | High Court action will almost certainly point out that TRDC was the innocent party |
| In our £4m 'claim pot', there is our maximum liability to Atkins of £175,000 approx, and maximum liability of £1.1m to Gee's counterclaim | Atkins' maximum liability may be higher than £2.5m subject to further legal advice |
| 'Black hole' of the EoT, but we are advised that, even at our expert's worst calculation, Gee still fall short, so we are confident of winning | Adjudication |

Even after all the expensive experts' reports with their concomitant adjustments, our case still remains very solid

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| Risks |
| Gee and Atkins go for drop-hands with minimal outlay to both |
| Political & media fallout at a 'bad' settlement – 50/50 after so much time and expense |
| Even with £3m received, we still forego approx. £1m – but remember there would have been an inevitable financial overrun |
| 'Black hole' of EoT; their expert's calculation is Gee should have EoT to make termination invalid |
| |
| SUGGESTED MINIMUM = £2m |

Question
If a £2m or above offer is made, do we need to consult to settle?

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| Risks |
| Small chance of a perverse decision either on Extension of Time or culpability of Gee/Atkins |
| Political & media fallout over so much time and expense |
| More time for Gee to go bust, so we may get a favourable judgement but pyrrhic victory with no money besides, say, £500,000 from Atkins |
| Victory means CFA is triggered so we have to pay the legal bills with no settlement cash to pay them |
| Atkins limited liability to £2.5m? |
| Yet more bills and officer time spent on a diversionary activity |
| If, after a further year, our legals cost a further £750,000, our £4m 'claim pot' increases to £4.75m but there is Atkins' maximum liability(?) of £2.5m, and Gee's liability to £3.35m = £5.85m so exposure to default is much higher and we may lose £4m |

| | |
|--|---|
| I agree to the <u>minimum</u> settlement figure of £2million | I agree for authority for <u>no</u> settlement to be reached at the mediation of 20/21 March 2012 |
| Cllr Ann Shaw | |
| Cllr Matthew Bedford | |
| Cllr Chris Hayward | |
| Cllr Stephen King | |