

**EXECUTIVE COMMITTEE – 6 SEPTMBER 2010  
PART II - DELEGATED**

**1. WILLIAM PENN LEISURE CENTRE  
(DCES)**

***This report is NOT FOR PUBLICATION because it deals with information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.***

**1. Summary**

1.1 To advise Committee on the progress made on the dispute regarding the refurbishment of the William Penn Leisure Centre (WPLC) since Executive Committee on 7<sup>th</sup> June 2010 and to seek approval for an amended course of action to that previously adopted.

**2. Details**

2.1 Members will recall it was agreed at the last Executive Committee to implement options 2 and 3, namely:-

- Option 2, to protect the Council's position in respect of an expected application by Gee for adjudication on the section 1 works (wet side).
- Option 3, the Council to adjudicate against Gee on the basis of defects only.

2.2 The course of action taken by Officers in respect of option 2 was to further instruct Acutus, an expert in the field of construction delay analysis, to examine the "as planned" versus the "as built" programme activity and report accordingly. That report has now been received and the Summary of Findings is extracted at Appendix 1.

2.3 The course of action taken by Officers in respect of option 3 was to interview a shortlist of Expert Architects and ultimately instruct a report by the appointee concerning the main defects found in the construction. Mr Christopher Miers, of Probyn Miers, was appointed as an independent expert architect and has drafted his report. The Summary section of his report is reproduced at Appendix 2.

2.4 It should be noted that Atkins are not now responding in an adequate manner, in particular to requests by the Council for information and for completion of various trade contract final accounts. Their interest in the matter seems to be primarily in the recovery of remaining and disputed fee accounts. This presents Officers with some difficulty in concluding financial details of the legal process described later in this report. Their apparent lack of site notes and/or diary entries when Atkins representatives visited site during the Gee contract has impacted on the briefing given by the Council to Acutus and Mr Miers.

2.5 The report produced by Acutus analyses in detail the delaying events that occurred throughout the project. It demonstrates Gee's culpability in the project overrun and required remedial works however this in no way relieves Atkins of responsibility. Other key conclusions are:-

- As designer, Atkins had responsibility to ensure that information was as complete as necessary to start construction activity and to answer

requests for information in a timely manner to ensure project continuity. As Contract Administrator, its responsibility was to ensure the obligations, rights and responsibilities of contracting parties were met. The report also demonstrates that on many occasions neither of these responsibilities was carried out efficiently.

- The initial cause of the problems experienced at the leisure centre is attributable to poor pre-construction planning by Gee, coupled with poor preliminary surveys by Atkins. As a consequence the project quickly ran into difficulties with early activities, such as demolition, not being possible due to existing services remaining live. But unforeseen events are commonplace when refurbishing existing buildings and Gee should have considered alternative construction procedures and re-sequenced options to mitigate further delays.
- The construction programme was of poor quality, lacking key activities and a pragmatic thought process which meant that any sort of re-sequencing was difficult. It would appear from the electronic copy passed to Acutus, that the programme had not in fact been written for this project but was a poorly amended programme from a previous project.
- A delay at the beginning of a project often means that there is plenty of scope for activity re-sequencing. But (in the instance of the demolition) instead, Gee chose to do nothing and simply stood the demolition subcontractor down and awaited the service terminations. In fact – when the demolition contractor eventually returned to site to commence works it did so with the existing services in place – using a method that the clients own Clerk of Works (CoW) had initially recommended.
- Atkins did voice concerns about progress but when faced with claim requests by Gee, they failed to investigate the claims vigorously enough seemingly accepting the facts put forward, missing false claims and merely granting extensions of time. This is proved by Acutus with regard to the relocation of a swimming pool sump (which Atkins granted Gee extra time for) when diary entries and photos clearly show that the activity had not even commenced. Time was also granted for the cessation of works to the entire learner pool, when Atkins had only instructed the cessation of works to a small backwash tank adjoining the pool. The stopping of works to the entire swimming pool was in fact required due to impractical (and near impossible) activity sequencing in Gee's programme.
- There is also little evidence of Atkins proactively recording and checking the quantity and quality of work carried out on site and this attitude did nothing to assist a project which was showing signs of becoming out of control very early on – signs which were realised as the project continued. Whilst Atkins is at fault, it is Gee that was carrying out day to day operations on site and that had the ability to make operational decisions and alter construction sequences to speed up progress on site.
- The Clerk of Works diary and photos show that at the beginning of the project when planning is crucial the Gee site manager was on site only 2 days per week. When it finally became a permanent position both he and the Gee senior managers were unwilling to amend the poorly produced programme instead endeavouring to follow it rigidly until it became impractical and finally impossible at which point the project was out of control. It is recorded that the original site manager rarely walked the site, instead choosing to manage the site from his site office. Throughout the project Gee changed the site management on a number of occasions and finally a manager was employed that appeared to take control and the project started to move forward. However this site manager was released and progress again slowed down.

- During the construction process, sub-contractors were also poorly managed and often had to leave site because of lack of continuity of work or even work areas. The mechanical and electrical subcontractor (Scomac) for example was requested to attend site to commence installation only to find they were 6 months too early. When they returned 6 months later their director confirmed 'tradesmen would often get to site and commence work wherever work was available as opposed to in a sequential manner'. Payment problems were also common with Gee making sub-contractor payments late – consequentially Gee often had to replace tradesmen at short notice which again hampered progress.
- The quality of trades was also continually called into question by the Clerk of Works. The ground work contractor for example was particularly poor. Clerk of Works diary entries confirm specifications and practical construction methods were often sidelined for cheaper alternatives. Photos show formwork for poured concrete ground beams being supported by Cordek protective plastic sheets supported by earth ramps at the back as opposed to traditional formwork supports.
- Gee's performance from the outset was woeful and Atkins was often late with design information and instructions which hampered progress. Gee has not demonstrated the claims for extension of time well. They have issued an 'As Planned-Impacted' method of delay analysis using a programme that was impractical for this particular project, lacking in key activities and not taking into account any contemporaneous facts and information. They have also failed to show a pragmatic critical path – indeed their original construction programme suggested that only a few activities towards the end of the project were critical anyway.
- Atkins has already awarded (or over-awarded) Extensions of Time (EOT) for certain early delays which, when examined carefully, can be demonstrated not to have actually caused critical delay to Gee's work. But, there are many occasions when Gee could have and should have mitigated delay (and further delay) with simple pragmatic construction planning.

2.6 Invariably a construction project with an inherently casual culture usually means that time and cost overruns are prevalent. The Acutus report demonstrates that both the Principal Contractor and Contract Administrator were guilty of this casual approach in varying degrees which meant that time and cost overruns were widespread throughout the build process.

2.7 Mr Miers reports in particular on defects found in the roof, the fire protection works, the pool screed & render, the floor screed & tiling, the underground drainage and the concrete slab. As demonstrated in the Scott Schedule, Mr Miers found numerous detailed examples where there were construction defects in the work by Gee and regularly found that these defects should have reasonably been observed by Atkins and acted upon, given their responsibility for supervising the work in progress.

2.8 Key findings of Mr Miers include:-

- In relation to the damage to the existing flat roof membrane, Gee would have been responsible for protecting the roof, and much of the roof was not effectively protected and damage occurred.
- In respect of fire protection, it is clear that the work undertaken by Gee failed to comply with the requirements of the contract. Deficiencies in the intumescent paint finish were known about before the termination of Gee's contract. Whilst an appropriate cost deduction therefore should have been allowed for in the interim valuations such that Gee were paid only for that work which was in accordance with the contract, it is not clear if all defects were known about, or if the full cost of remedial work was included in Atkins' estimate of the cost of incomplete and defective work.

- In relation to the main pool render, it appears likely that the failure can be attributed to workmanship and protection issues. Mr Miers would expect an architect to make specific inspections of areas of poor workmanship identified by the CoW; and also to make his own inspections.
- In relation to the learner pool render, it appears from the CoW's records that preparation of the substrate was inadequate, and that this was brought to the architect's attention. The architect does not appear, however, to have issued any instruction to remedy the work. Insofar as the learner pool render failed because of poor preparation of the substrate, it appears that Atkins was at fault in failing to instruct the necessary remedial work.
- In relation to the pool tank floors, according to the CoW's records, the floors of the pool tanks were properly physically prepared, in line with the recommendations of the screed manufacturer. However, the CoW does not refer to a cement slurry coat being applied. If the pool tank floor screeds were correctly laid with the exception of a missing slurry coat, it appears to Mr Miers that the architect should have been expected to notice this defect.
- Regarding floor tiling and screeds, Gee appears to have been clearly instructed, through Atkins' drawings, to lay screeds and to fix tiles to 'envelope' cuts. In most, though not all, cases, it did not do this. The other issues in relation to floor tiling appear to derive from poor workmanship.
- The screed cracked in places in the main pool surround. It is not clear to Mr Miers when this problem arose – i.e. whether the work was done by Gee or in the completion contract – nor what caused it.
- Regarding drainage, in the opinion of Mr Miers it is probable that the numerous defects in the below ground drainage installation were all or almost all a result of poor workmanship on Gee's sub-contractors' part and/or of poor site management by Gee that allowed damage to be caused to completed work. If Atkins did instruct tests of the below ground drainage (other than in the general terms set out in the contract specification) and then did not witness such tests, nor direct the CoW to witness the tests and then check with the CoW on the results of those tests, as appears to have been the case, then Mr Miers considers that it was also at fault and that it did not meet the requirements of its Appointment.
- It appears that the CoW also failed to witness any tests of the below ground drainage, but Mr Miers considers that the duty to instruct and the primary duty to witness these tests lay with the architect. The architect might have chosen to delegate to the CoW the job of witnessing some tests, but if that was his intention he would have had to make it clear both to the CoW and to Gee. Atkins should, in any case, have witnessed some tests in order to establish the standard expected, and should have sought test results from Gee and the CoW.
- Regarding concrete, one issue relates to reinforcement not being correctly positioned within (and in some cases entirely outside) the pool surround slab. In Mr Miers opinion, the architect, the structural engineer or the CoW might have had the opportunity to notice the defect before the concrete was placed. Mr Miers has not seen any record of such a defect having been recorded. Mr Miers notes that he has not seen any claim that a loss arose from this defect, other than in relation to the cost of investigation works.

2.9

It is the opinion of Officers and Bird & Bird, the Council's Solicitors, that both expert reports present very substantial grounds for action against Gee and Atkins. This has led to us concluding that a more "offensive" strategy may be appropriate as compared to that previously agreed. Accordingly at a meeting

with Bird & Bird on 5th August a schedule, as attached at Appendix 3, was considered. The schedule outlines the various options in relation to actions against each or both of Gee and Atkins.

- 2.10 Whilst each option has its merits, there is agreement that option (e), the Pre-Action Protocol for Construction Disputes (PAP) offers on balance, the prospect of the most attractive outcome. It gives the Council the best opportunity of recovering not only the extra capital sums expended in achieving completion of the facility, as well as the legal, expert and management costs in pursuit of the claim. An adjudication process does not permit the opportunity of cost recovery. An extract of the procedure that has to be followed in a PAP is attached at Appendix 4.
- 2.11 The protocol itself does not compel Atkins or Gee to attend mediation, but by invoking the PAP process the Council adds some strength to its position. The ultimate sanction in the process is the commencement of Court proceedings. There is of course a risk that Gee or Atkins call the Council's bluff by assuming TRDC would not litigate.
- 2.12 There can be no certainty as to how either Gee or Atkins will react to the serving of a PAP letter on them both. The expectation is that Atkins may seek to agree a settlement with the Council, based primarily on their lack of diligence in supervising the works. Their response could however be clouded by the position taken by their Professional Indemnity insurers. Atkins reputational damage in this matter will be a major factor and there is every likelihood that a confidentiality clause would be included as part of any settlement with them.
- 2.12 The response from Gee is more unpredictable and the possibility is that mediation may not achieve a satisfactory outcome. The Council will of course maintain the option of pursuing adjudication against Gee (as option (b) at Appendix 3), either after the PAP, or indeed during that process if there is a clear advantage in doing so. Members should be aware that Gee could launch adjudication against the Council at any time.

### 3. **Reasons for Recommendation**

- 3.1 Officers recommend that the Pre-Action Protocol process is adopted. The primary advantages are:-
- Lower cost at this stage
  - Both Atkins and Gee are involved so the risk of different findings by different Adjudicators is avoided
  - The Miers report implicates both Gee and Atkins
  - Costs can be re-covered.
- 3.2 In anticipation of Committee agreeing the recommended course of action as outlined above, a draft of the PAP letter, prepared by Bird & Bird is attached at Appendix 5. Subject to any comments from Committee, that letter and supporting reports could be served the day following Committee.

### 4. **Policy/Budget Reference and Implications**

- 4.1 The recommendations in this report are within the Council's agreed policy and recently agreed budgets. The relevant policy is entitled Strategic Plan 2010-13 and which was agreed in February 2010.
- 4.2 The purpose of this policy is to detail the strategic direction of the authority by March 2013. At the end of one year, the William Penn Leisure Centre will have

been fully open to all local residents for a year, so meeting the targets in the annual management plan.

5. **Financial Implications**

5.1 No change from that reported to Executive committee on 7<sup>th</sup> June 2010.

6. **Legal Implications**

6.1 As contained within the body of the report.

7. **Equal Opportunities Implications**

7.1 **Relevance Test**

Has a relevance test been completed for Equality Impact?	No
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8. **Staffing Implications**

8.1 Significant staff resource will continue to be expended on the matter.

9. **Environmental Implications**

9.1 None specific.

10. **Community Safety Implications**

10.1 None specific.

11. **Customer Services Centre Implications**

11.1 None specific.

12. **Communications and Website Implications**

12.1 None specific.

13. **Risk Management and Health & Safety Implications**

13.1 The Council has agreed its risk management strategy which can be found on the website at <http://www.threerivers.gov.uk>. In addition, the risks of the proposals in the report have also been assessed against the Council's duties under Health and Safety legislation relating to employees, visitors and persons affected by our operations. The risk management implications of this report are detailed below.

13.2 The risks arising from this report are the same as reported to Executive Committee on 7<sup>th</sup> June 2010. The subject of this report is covered by the Leisure and Community service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within plan.

14. **Recommendation**

14.1 That Executive Committee notes the progress made since the last report.

- 14.2 That Executive Committee endorses the action taken to date and confirms the recommendation to adopt a Pre–Action Protocol process against Gee and Atkins for recovery of cost and expense.
- 14.3 That public access to the report be denied until issue resolved (see future agenda).
- 14.4 That public access to the decision be denied until Council agenda publication.

**Committee Decision on Public Access:-**

1.	Public access to report	-	immediate
2.	Public access to report	-	denied until (date): .....
3.	Public access to report	-	Council agenda publication
4.	Public access to report	-	denied until issue resolved (see future agenda)
5.	Public access to decision	-	immediate or Council agenda publication

- Note: (a) The timescales for public access to reports and decision(s) may differ.
- (b) Minutes of the Development Control Committee are approved at the next Development Control Committee meeting.
- (c) Minutes of special meetings of standing Committees are generally included in the Council agenda ie normally before the next meeting of the Committee.

Report prepared by: Alan Head, Building Surveyor.

**Data Quality**

Data sources: Council’s correspondence files.

Data checked by: Alan Head, Building Surveyor

Data rating:

1	Poor	
2	Sufficient	
3	High	X

**Background Papers**

None.

**APPENDICES.**

- 1. Summary of Findings extract, from the report prepared by Dr David Aldridge of Acutus dated August 2010
- 2. Summary extract, from report prepared by Christopher Miers of Probyn Miers dated August 2010.

3. Options schedule prepared by Bird & Bird, Solicitors.
4. Extract from Ministry of Justice publication, "Pre-Action Protocol for Construction and Engineering Disputes".
5. Draft Pre-Action Protocol Letter of Claim prepared by Bird & Bird.