

## EXECUTIVE COMMITTEE – 31 JANUARY 2011

### PART II – NOT DELEGATED

#### 3. WILLIAM PENN LEGAL FEES (DCES)

*This report is NOT FOR PUBLICATION because it deals with information relating to the financial or business affairs of any particular person (including the authority holding that information),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 updates members on legal actions relating to the refurbishment of William Penn Leisure Centre since the meeting of Leisure & Community Safety Policy & Scrutiny Committee on 4 January 2011, and requests allocating a further sum towards the next stage in the legal process to recover costs.

##### 2 Details

###### **a) Response from Gee Construction**

- 2.1 As anticipated in the related earlier report (Part ii, Item 2b) on this agenda, Gee Construction's response to TRDC's Letter of Claim of 7 September 2010, which argues that they share liability for over £3m with Atkins arrived on 7 January. This is extensive and includes:
- Responses to TRDC's expert delay and defects reports
  - A delay report from their own independent expert
  - A witness statement from their site manager
  - A counterclaim against TRDC for £3.63m
  - Seven volumes of supporting evidence
- 2.2 Gee continue to argue that the termination of their contract in January 2009 was unjustified, and that the delays experienced on site were all due to late or missing information from the design team (Atkins). They claim that TRDC's own experts have been misinformed due to their reliance on Atkins for condition surveys etc.
- 2.3 Gee's counterclaim is summarised at Appendix 1. It includes a charge for variations on site which is over £1m higher than the value provided by Atkins after Gee's contract termination. The initial advice from Bird & Bird (TRDC's solicitors) is that this charge should be briefly examined by a quantum expert, and that the bulk of the rest of their claim can be demonstrated to be either spurious or reliant on their assertion that the termination was unjustified, principally due to Atkins's failure to grant sufficient Extensions of Time (EOTs).
- 2.4 After an initial review by Bird & Bird and expert analysts of the other documents submitted by Gee, their view is that the Council's case remains strong. The Letter of Claim was addressed to Atkins and Gee jointly, and the responses from both parties have blamed each other for the scheme's time and cost overruns, rather than the Council. Officers have therefore instructed that solicitors and experts avoid getting drawn into allocating liability between the two parties, by examining the Gee claim only as far as is essential to maintain the strength of the Council's own case. A full copy of the Gee response is being copied to Atkins, and vice versa. A copy of a letter to both parties firmly restating the Council's claim is enclosed as Appendix 2.

2.5 Bird & Bird are further pursuing the Guarantee Bond of £343k as instructed. They have however advised that while the Council is fully entitled to this money, it should only expect to receive payment upon 'proof of breach' by a judge. If Bird & Bird's advice against launching 'satellite litigation' against the bondsman directly is accepted, then payment of this bond can only be anticipated after either a court decision, or within the terms of a negotiated or mediated settlement involving Gee.

**b) Options for further action**

2.6 The Pre Action Protocol requires that TRDC attempts to resolve its disputes through at least one meeting with both parties, and/or mediation, before commencing court action. Now that formal responses have been received from both Atkins and Gee, TRDC would appear to have four options:

Option A <b>Drop case</b>	Accept the 'without prejudice' offer (£250k and no fee claims) made to TRDC by Atkins on 17 December. Offer Gee a 'drop hands' deal, where both TRDC and Gee agree to abandon their claims against each other.
Option B <b>Negotiation</b>	Instruct limited rejoinders to responses received, so as to maintain a strong position in an immediate negotiation with both parties (e.g. having refuted all or most of the Gee counterclaim). Any agreement likely to be strictly confidential.
Option C <b>Mediation</b>	As B, but work towards a more formal mediation process instead of an informal negotiation, in the expectation of a larger settlement as a result. Settlement may still be confidential.
Option D <b>Court</b>	Proceed with either B or C as required by the Pre Action Protocol, but while preparing for a full court action.

2.7 The advantages, disadvantages and risks associated with each option are summarised by officers as follows:

	<b>Advantages</b>	<b>Disadvantages</b>
Option A <b>Drop case</b>	<ul style="list-style-type: none"> <li>• No further costs &amp; officer time</li> </ul>	<ul style="list-style-type: none"> <li>• Risks counterclaim from Gee</li> <li>• Risks fee claim from Atkins</li> <li>• Reputation risk</li> </ul>
Option B <b>Negotiation</b>	<ul style="list-style-type: none"> <li>• Prospect of quick resolution of all claims</li> <li>• Limited further costs &amp; officer time</li> </ul>	<ul style="list-style-type: none"> <li>• Risks a low settlement as TRDC may appear reluctant to pursue to court</li> <li>• May fail to prevent counterclaims</li> </ul>
Option C <b>Mediation</b>	<ul style="list-style-type: none"> <li>• Advised that higher settlement likely due to strength of case (including guarantee bond)</li> </ul>	<ul style="list-style-type: none"> <li>• Preparation and mediation costs</li> <li>• Settlement may be hard to enforce (against Gee)</li> </ul>
Option D <b>Court</b>	<ul style="list-style-type: none"> <li>• Advised that high settlement is likely (including guarantee bond)</li> </ul>	<ul style="list-style-type: none"> <li>• Very high costs</li> <li>• Settlement may be hard to enforce (against Gee)</li> </ul>

2.8 Officers and advisers are unable to confidently predict the scale or range of settlement likely from any of these options. Cost estimates for each option have been recently revised on advice from Bird & Bird, and are set out below.

### 3 Options/Reasons for Recommendation

- 3.1 Officers recommend that Option B ('Negotiation') is pursued, so as to avoid the additional costs of court action if possible.

### 4 Policy/Budget Reference and Implications

- 4.1 The recommendations in this report are within the Council's agreed policy and budgets. The relevant policy is entitled Strategic Plan 2010-13 and was agreed on 1 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, William Penn Leisure Centre will be fully open to all local residents for a year, so meeting the targets in the Leisure & Community Service Plan.

### 5 Staffing, Environmental, Community Safety, Customer Services Centre, Communications & Website and Health & Safety Implications

- 5.1 None specific to this report.

### 6 Legal Implications

- 6.1 The legal implications of this report are as described above.

### 7 Financial Implications

- 7.1 The approved budgets and expenditure to date on the refurbishment and associated legal costs are as follows, as of 21 January 2011:

	APPROVED BUDGETS			Actual to	
	Council 20/10/09	Exec 7/6/10	TOTAL	21/1/11	Variance
Design Team (Atkins)	850,000		<b>850,000</b>	931,221	81,221
Enabling contract (Rok)	191,000		<b>191,000</b>	191,255	255
Main contract (Gee)	3,485,000		<b>3,485,000</b>	3,484,890	(110)
Completion contracts	2,122,000		<b>2,122,000</b>	2,443,627	321,627
Construction contingency	500,000		<b>500,000</b>	0	(500,000)
Fitting out & Disbursements	542,000		<b>542,000</b>	421,290	(120,710)
Legal costs	147,010	200,000	<b>347,010</b>	493,739	146,729
General Contingency	100,000		<b>100,000</b>	0	(100,000)
Recovered costs	0		<b>0</b>	0	0
Guarantee bond income	(350,000)		<b>(350,000)</b>	0	350,000
<b>TOTAL</b>	<b>7,587,010</b>	<b>200,000</b>	<b>7,787,010</b>	<b>7,966,022</b>	<b>179,012</b>

- 7.2 Even if Option A ('Drop case') were adopted some further expenditure is inevitable, as the Council is contractually obliged to settle withheld payments to Gee (unless these are negotiated). Provision is also required to cover retentions due to completion contractors and for defects and outstanding accounts. Assuming that the Atkins fee claim is already written off and that their 'without prejudice' offer is confirmed, final expenditure **before** any additional settlements under each option is projected and compared to budget below:

### OPTIONS

<b>Heading</b>	<b>A Drop case</b>	<b>B Negotiate</b>	<b>C Mediation</b>	<b>D Court</b>
<b>ACTUAL TO 21/1/11</b> (from 3.1 above)	<b>7,966,022</b>	<b>7,966,022</b>	<b>7,966,022</b>	<b>7,966,022</b>
Design Team (Atkins)	0	0	0	0
Main contract (Gee)	63,719	63,719	63,719	63,719
Completion contracts	37,108	37,108	37,108	37,108
Construction defects contingency	10,000	10,000	10,000	10,000
Fitting out & disbursements	0	0	0	0
<b>Projected Non-Legal Sub Total</b>	<b>110,827</b>	<b>110,827</b>	<b>110,827</b>	<b>110,827</b>
Solicitor - Dec 2010	8,000	8,000	8,000	8,000
Solicitor - Jan 2011	10,000	10,000	10,000	10,000
Solicitor - Rejoinder and negotiation		20,000	20,000	20,000
Solicitor - Mediation			30,000	30,000
Solicitor/Counsel - Court				450,000
Expert architect - Dec 2010	4,000	4,000	4,000	4,000
Expert architect - Jan 2011	5,000	5,000	5,000	5,000
Expert architect - Mediation			40,000	40,000
Expert architect - Court				50,000
Expert delay analyst - Jan 2011	4,000	4,000	4,000	4,000
Expert delay analyst - Feb 2011		10,000	10,000	10,000
Expert delay analyst - Mediation			30,000	30,000
Expert delay analyst - Court				50,000
Quantum analyst - initial		15,000	15,000	15,000
Quantum analyst - full quantification			50,000	50,000
<b>Projected Legal Sub Total</b>	<b>31,000</b>	<b>76,000</b>	<b>226,000</b>	<b>776,000</b>
Guarantee bond (either agreed or enforced)		(342,681)	(342,681)	(342,681)
Anticipated Gee settlement	0	0	0	0
Initial Atkins settlement offer	(250,000)	(250,000)	(250,000)	(250,000)
Anticipated Further Atkins settlement	0	0	0	0
<b>ACTUALS + PROJECTION TOTAL</b>	<b>7,857,848</b>	<b>7,560,167</b>	<b>7,710,167</b>	<b>8,260,167</b>
Approved Budgets (from 3.1 above)	7,787,010	7,787,010	7,787,010	7,787,010
<b>Variance to Budget before settlement</b>	<b>70,838</b>	<b>(226,843)</b>	<b>(76,843)</b>	<b>473,157</b>

### 7.3

The projections for legal costs, particularly under Options C & D, are highly notional and speculative. However Bird & Bird have offered to discuss a 'success fee' arrangement for a mediation or court action, where hourly rates are reduced in return for a share of a settlement to be paid by the other side. Details of such an agreement have not yet been provided.

## 8 Equal Opportunities Implications

### 8.1 Relevance Test

Has a relevance test been completed for Equality Impact?	No
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## 9 Risk Management and Health & Safety Implications

9.1 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.

9.2 The risks associated with this report are the same as reported to Executive Committee on 7 June 2010. The subject of this report is covered by the Leisure & Community service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within this plans.

## 10 Recommendations

10.1 That the Chief Executive and Director of Community & Environment are given delegated authority, in consultation with the Portfolio Holder for Resources, to enter into immediate negotiations as described in Option B above.

10.2 That a further budget provision of £150,000 is made available from balances to finance such action.

10.3 That public access to the report be denied until issue resolved (see future agenda).

10.4 That public access to the decision be denied until Council agenda publication.

Report prepared by: Patrick Martin  
Leisure Performance & Contracts Manager

### Data Quality

Data sources: Council correspondence and report files

Data checked by: Patrick Martin  
Leisure Performance & Contracts Manager

Data rating:

1	Poor	
2	Sufficient	✓
3	High	

### Background Papers

None

***The recommendations contained in this report DO NOT constitute a KEY DECISION.***

Appendices	1	Gee Counterclaim
	2	Letter to solicitors representing Gee & Atkins, 25 January 2011

**APPENDIX 1****Gee counterclaim, 10 Jan 2011**

	£	£	£
Initial Contract Sum	3,426,805		
less as BQ A54 & BQ A55	-161,296		
Omit works not carried out during contract	-94,986		
Omit works outstanding at termination	-95,517		
Add materials on site at termination	33,499		
Add variations as summary of variations	1,127,782		
Add hire costs of accommodation & fences	50,307		
Adjusted contract sum		4,286,595	
Refund of L&ADs omitted		123,120	
Less payments to Cert 22		-3,608,010	
<b>Contractual claims</b>			<b>801,705</b>
Delay - Project Mgr (CW/IM)	55,868		
Delay - Quantity Surveyor (AH)	41,034		
Delay - Foreman	34,365		
Delay - General labour	15,784		
Delay - Accommodation	18,899		
Delay - Hoardings	13,791		
Delay - Plant	15,078		
Delay - Other site costs	25,782		
Delay - Insurance & general reserve	122,007		
Delay costs claimed		342,608	
Disruption - Additional site supervision	6,503		
Disruption - Additional contract mgr input	45,541		
Disruption - Additional costs - groundworks	211,934		
Disruption - Additional costs - bricklaying	32,618		
Disruption - Additional costs - carpentry	30,214		
Disruption - Additional security costs	38,495		
Disruption - Additional costs - partitions	11,867		
Disruption - Additional costs - M&E	244,692		
Disruption - Additional costs - other trades	23,743		
Disruption/out of sequence costs claimed		646,998	
Loss of overheads and profit	367,945		
Interest & finance charges	83,497		
Increased materials costs due to delays	16,618		
Additional costs for winter working / wastage	5,100		
Inability to achieve target programme	28,581		
Adverse publicity affecting turnover	748,158		
Legal and consultant fees	432,487		
Loss of profit on omitted works	6,094		
Staff redundancy costs	116,469		
Post-termination surveying costs	32,934		
General Heads of Claim		1,837,883	
<b>Loss &amp; Expense claims</b>			<b>2,827,488</b>
<b>Total Claim</b>			<b>3,629,193</b>

# Bird & Bird

Bird & Bird LLP  
15 Fetter Lane  
London EC4A 1JP  
United Kingdom  
Tel +44 (0) 20 7415 6000  
Fax +44 (0) 20 7415 6111  
DX 119 London  
twobirds.com

Our ref: CJW/CBB/THHRI/0001/Matters/11151283.1

25 January 2011

**BY HAND**

**BY HAND**

Your ref: VR/KO/3412/9189/601875

Your ref: NPS/IEH/SO.766432.00002

Fenwick Elliott LLP  
Solicitors  
Aldwych House  
71-91 Aldwych  
London  
WC2B 4HN

Reed Smith LLP  
Solicitors  
Broadgate Tower  
20 Primrose Street  
London  
EC2A 2RS

Dear Sirs

## **Refurbishment of William Penn Leisure Centre Pre-Action Protocol**

We refer to the Letter of Claim sent to Gee Construction Limited ("Gee") and Atkins Limited ("Atkins") on 7 September 2010.

Since delivery of the Letter of Claim, the process envisaged in the Pre-Action Protocol for Construction & Engineering Disputes ("the Protocol") has proceeded albeit at a somewhat different pace as regards the claims against Gee and Atkins.

So far as the claim against Atkins is concerned, Reed Smith replied to the Letter of Claim by way of their letter dated 19 November 2010 and in return this firm responded on 25 November 2010. Further, Reed Smith's second letter of 7 October 2010 set out details of Atkins' counterclaim for fees, to which this firm responded on 4 November 2010. We enclose for Fenwick Elliott copies of these letters. These constitute the entirety of the Protocol correspondence.

A meeting has also been held with Atkins as envisaged in paragraph 5 of the Protocol.

So far as the claim against Gee is concerned, the Protocol correspondence has extended only to Gee serving, through Fenwick Elliott, a detailed response to the Letter of Claim by way of Fenwick Elliott's letter of 10 January 2011 and numerous attachments. All these documents are enclosed for Reed Smith.

The most striking feature about this correspondence is that both parties deny liability and blame each other. Although of course formally each party resists the claim made by Three Rivers District Council ("TRDC") by reference to the contract between itself and TRDC, the main thrust of the correspondence and documentation supplied is that it is not TRDC itself which is to blame but Gee or Atkins (as the case may be).

We're in Beijing & Bratislava & Brussels & Budapest & Düsseldorf & Frankfurt & The Hague & Helsinki & Hong Kong & London & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Stockholm & Warsaw & ...

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Because of the attitude taken by both parties, TRDC is in the unenviable position of having to pursue each of your respective clients to recover the very significant sums that it has expended in bringing this project to a conclusion. Of all the parties involved TRDC is not responsible for the delays that occurred to completion and the defects that were discovered following termination of Gee's employment under the Building Contract. Although naturally TRDC accepts that it must prove its case, in a matter such as this where the Defendants essentially blame each other for the problems that were encountered on the project it appears to us inevitable that the Court will largely be concerned with allocating responsibility between the two Defendants. Please be assured that if TRDC is unsuccessful, for whatever reason, against one Defendant it will seek to have the successful Defendant's costs paid by the other. Although in practice we imagine the likelihood of either of your respective clients wholly escaping liability is remote in the extreme, you should know that TRDC will, in pursuing its claims, run little or no costs risks.

Although TRDC will be responding in due course to the Gee Letter of Response and Counterclaim we invite both parties to comment on the assertions made by the other. If this leads to a three way discussion with a view to avoiding litigation TRDC would welcome that; however, neither party should be in the slightest doubt that TRDC will pursue its claims to trial unless it receives very significant sums indeed in settlement of its claims.

Yours faithfully



**Bird & Bird LLP**

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