

BY EMAIL ONLY

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Dear Patrick

**William Penn Leisure Centre, Rickmansworth
Updated Advice**

Following the recent mediation in this matter, I set out below my updated views on the merits of the case so that you can submit a full report to your Executive Committee for its meeting on 2 April 2012. I am deliberately keeping the report reasonably brief so that the Committee has as clear as possible a view as to the merits of the case and the potential ways forward in light of the failure to settle at the mediation.

I deal in this letter with my updated views on the merits, the further costs to be incurred in a potential Adjudication, the costs which would be incurred if the matter proceeded to a full Court hearing, and conclude by setting out briefly how I would propose to deal with those costs by way of a Conditional Fee Agreement.

1. Updated views on the merits

1.1 I last reported to you formally in my letter of 13 January 2012 ("*the January 2012 Advice*"), a copy of which is attached for ease of reference. Since that was written, a substantial amount of further expert evidence and correspondence has been received as set out at 3.1 below. Some of this material was received only shortly before the mediation. Having considered this further documentation, our experts have each indicated that, to date, they have seen nothing which causes them to significantly alter their opinions on this matter. For my part none of the recent correspondence with Fenwick Elliott and Reed Smith has caused me to materially alter my opinion on the legal aspects of the case. As such my view on the merits of your case is that it is still strong.

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2. Proposed Adjudication

- 2.1 Following the failure of the Mediation, it has been suggested by Steven Halls that TRDC might consider commencing an Adjudication against Gee seeking a declaration as to the proper extension of time to be granted to Gee under the Building Contract. It is worth mentioning that in their opening presentation to the Mediator Gee said, repeating what was in their Position Paper, that they had a “*very powerful*” case for a full extension of time and associated loss and expense; they also added for the first time that they would be commencing Adjudication proceedings on time issues “*by the end of the month*”.
- 2.2 We have considered whether it would be in TRDC’s interests to commence its own Adjudication against Gee. In doing so we have consulted with Dr David Aldridge, the delay analysis expert instructed by TRDC, and obtained his timescale for assisting in such an Adjudication and also an estimate as to his further fees.
- 2.3 David Aldridge is fully engaged in giving evidence in the Technology and Construction Court until Easter and is then on holiday for a week thereafter. He could therefore not start substantial time working on the Adjudication until the week commencing 16 April and it is therefore unlikely that the procedure leading up to service of the Referral Notice could start until the week after. That would then mean that, with the Adjudicator likely to request a 14 day extension to the statutory period of 28 days for his decision, we could expect to receive a decision some time during the week commencing 11 June.
- 2.4 As to costs, Dr Aldridge estimates that for such an Adjudication he would usually budget a sum in the region of £20,000 to allow for his further initial work (part of which would be to consider in exhaustive detail the recent 200 page Report submitted on behalf of Gee and to review the documents on which that Report relies), but in this situation he feels it is wise to add a contingency of £10,000. This is largely because we have now seen throughout the currency of this dispute that Gee have an inexhaustible appetite for lengthy correspondence, very detailed Reports and constant attempts, particularly by Mr Kaminski, to introduce new facts and evidence into the proceedings.
- 2.5 So far as this firm’s fees are concerned, again for such an Adjudication I would usually expect to incur costs of no more than £20,000. A great deal of work has already been done and in normal circumstances one would expect that the only work necessary would be to summarise the present position, set out some of the history behind the grant of extensions of time and the project as a whole and then draw attention to particular points made in Dr Aldridge’s Report. The rest of the Adjudication would then be taken up by responding to the submissions made by Gee and again in normal circumstances one would not expect that much new material would be produced.
- 2.6 However, Gee are not a traditional opponent and it seems inevitable that in some

way further evidence will be produced. The most likely way in which this evidence would be put before the Adjudicator would be by way of a very detailed Witness Statement from one of the Gee personnel most closely involved in the project. There would then need to be discussions with TRDC and possibly the Clerk of Works and it is then easy to see how rather more fees would be incurred than would usually be the case.

- 2.7 On this basis, I think it is only wise to allow a contingency of at least £10,000 on top of the £20,000 I would usually quote, bringing us up to a figure of approximately £30,000, which would be commensurate with that incurred during the Adjudication on Section 2. This previous Adjudication was far less significant but much less work had been done at that stage.
- 2.8 One therefore needs to carry out a cost benefit analysis to see whether it is worthwhile spending £60,000 (plus TRDC internal resources) in launching an Adjudication, the result of which would be temporarily binding. It would not gain TRDC any money as the maximum amount of liquidated and ascertained damages has already been taken from Gee. The rationale of taking this step would be to gain a psychological advantage if successful and also potentially to close the “*black hole*” which exists in the scenario where Gee obtains a significant extension of time, the termination is found to be invalid as a result, and yet Atkins cannot be held responsible in negligence for failing to grant an extension of time prior to termination.
- 2.9 In my view spending this amount of money is unnecessary and would obtain minimal benefit even if TRDC was to be wholly successful. Gee would have the option of simply carrying on towards trial saying that the Adjudicator was in error. Contra wise, if by any chance the Adjudicator were to be convinced by the Gee arguments then TRDC would suffer no more than a psychological blow and could make exactly the same points regarding ploughing on towards trial as Gee. The likely £60,000 expenditure would doubtless reduce the work required on these issues in the litigation but the savings would probably be no more than say £20,000, leaving a net irrecoverable outlay of about £40,000.
- 2.10 I recognise the importance of trying to bring Gee to the table in a positive way and this is unlikely to be achieved by correspondence or even by issuing proceedings. My view is, however, having given the matter a great deal of thought, that spending £60,000 (all of which will be irrecoverable and only about £20,000 would be saved later) to gain what at best is likely to be a temporary advantage is simply not cost effective. That money should be spent in preparing the proceedings for issue and issuing them as quickly as possible so that the Court can hold the first hearing before the summer and fix the trial date. This will concentrate the minds of all concerned and is, in my view, a better tactic than a possible diversion, the effect of which is likely to be only temporary.
- 2.11 I would also observe that the costs incurred by Gee in an Adjudication would directly

reduce the monies available to Gee to pay any damages awarded to TRDC.

- 2.12 It is of course perfectly possible that Gee will commence its own Adjudication proceedings and in that case TRDC will have to respond. The cost would be of the same order as mentioned above although there might just be a slight saving because of the need to respond to the points made rather than make TRDC's case as the referring party.
- 2.13 I am sorry not to be able to embrace this idea, but I simply do not see that the advantages to be gained by a successful Adjudication can in any way be considered as commensurate with the irrecoverable costs that will be incurred.

3. Costs of the Mediation

- 3.1 In August 2011 I estimated that the fees for the Mediation on 20 March 2012 were likely to be £52,940. As I told you at the mediation, that estimate has been exceeded, mainly owing to the significant flow of correspondence from Fenwick Elliott, reports from Andy Kaminski of the Hopkins Muldoon Partnership on architectural matters and from Rob Palles-Clark on delay analysis matters, the latter over 200 pages long, and a very lengthy letter from Reed Smith. There have also been further meetings between the experts and the outcome of those has had to be considered. The actual legal costs of the mediation were £69,515.50, an increase of some 30%.

4. Further costs

- 4.1 I provided with the January 2012 Advice a budget summary for taking the case from Mediation through to trial which was intended to cover all issues save only for ones which were and are unforeseeable (such as particular applications by other parties) and also dealing with costs at the end of the trial.
- 4.2 As stated previously, this is a reasonably detailed estimate but it is only an estimate. Given Gee's likely approach to any litigation, as evidenced by the approach they took to the mediation, I consider that it would be prudent to allow a contingency of 20% for the additional work which is likely to become necessary. On that basis my current best estimate is £720,000.
- 4.3 The estimates in relation to experts' fees are our best guess at this stage but take into account the very significant amount of work that has already been carried out.
- 4.4 The other points made in the January 2012 Advice remain valid.

5. Conditional Fee Agreement

5.1 Please refer to the January 2012 Advice for our thoughts on this issue, which still apply now. We have prepared a draft Conditional Fee Agreement for internal approval, which we will be in a position to supply to you shortly after the Executive Committee meeting.

I hope the above Report is sufficient for the purposes of the Executive Committee but if you have any queries or you would like me to expand on any other particular issue then please do let me know.

With kind regards

Yours sincerely



JOHN WRIGHT
Partner
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Encs:

cc *Alan Head*
Peter Brooker
Steven Halls
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