BY EMAIL ONLY

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Dear Patrick

William Penn Leisure Centre - Claims for Direct Costs and Staff Costs

Thank you for your email of 1 December 2011. As the sums mentioned are very large, I have taken a little time to review the principles as although I was aware of them in general terms I thought that, given the fact that we are talking here about figures not very far from £1m, a little further work was both justified and indeed desirable.

I will deal with the two issues separately and in doing so will answer the queries you have raised.

1. Direct Costs

1.1 I have mentioned in the past that we should be aiming to recover the costs incurred in dealing with the Pre-Action Protocol process. This is in accordance with the general rule that the Courts are entitled to award costs at the end of a case which are incidental to the proceedings; incidental costs may include costs which were incurred before proceedings were commenced, including during a Pre-Action Protocol procedure or generally in preparation for litigation.

1.2 On this basis, the majority of the costs that have been incurred as reflected in the Schedule that you have sent me should be recoverable. Matters do, however, become a little more uncertain when one looks at the costs incurred in a pre-action Mediation. I have looked at one or two cases on this and the general rule is that such costs will only be recoverable if the Mediation is regarded as part of the parties' attempt to comply with the Pre-Action Protocol. I believe this is very much so in this case and indeed the Mediation is really taking the place of the Pre-Action Protocol meeting with Gee. I therefore believe that we should have available at the Mediation a completely up-to-date list of direct costs, including any further costs which are incurred in connection with the Mediation.

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1.3 We can of course expect the opposition to dispute this and there are indeed one or two quotations in some of the cases which may give them some encouragement. It does, however, seem clear to me that the costs that TRDC have incurred in dealing with the Pre-Action Protocol process should indeed be recoverable as we were bound by the rules to go down this avenue in the first place and the costs have largely been incurred because of the attitude taken by the other parties. I think we should be very firm indeed on our case that these costs are recoverable in exactly the same way as the other heads of loss that are being claimed.

1.4 The second issue that I should raise is that of the direct costs incurred prior to the commencement of the Pre-Action Protocol process. These are not represented in your Schedule but I do not believe that they should be dismissed. The only costs which are certainly not recoverable are those in connection with the adjudication commenced by Gee and would largely be represented by the fees that I incurred (I believe a little over £30,000) and the fees incurred by ACUTUS (which I recall were considerably more).

1.5 The other fees that were incurred, which I believe were largely legal, are certainly "*softer*" but were in my view incurred as a result of the breaches of contract by Gee and/or Atkins. As an example, the advice that I gave on termination of Gee's contract, the setting up of the new contractual arrangements and during the course of the remedial/completion works should not be entirely ignored. The sums would technically fall in my view under the heading of "*damages*" rather than "*costs*" but that is a detail. I think it would be worthwhile compiling a Schedule of those costs so that at least they are available. It may be one of the first areas that we would be willing to negotiate on but if they are not available then there is nothing to negotiate and I believe that there is a sufficiently robust case for TRDC to recover these sums to justify a little work being carried out in connection with them.

1.6 I turn now to deal with your question on substantiation. For the purposes of the Mediation, I do not believe it necessary to have full substantiation. You have the Schedule of Costs, which can be updated for the Mediator, and doubtless the gaps for the three or four invoices where narratives do not appear can easily be filled. The Schedule can then, as I have mentioned above, be updated in preparation for the Mediation and then made available to the other parties and the Mediator.

1.7 It will only be necessary to obtain full timesheets in the event that the Mediation fails and we wish to proceed with litigation. Even then, the breakdown of the "*costs*" as opposed to "*damages*" would not be necessary until the costs came to be assessed. It would, however, be sensible to have a full and detailed breakdown available at the outset in case negotiations take place at any stage.

2. Staff Costs

2.1 You are correct in saying that I have always thought that this claim falls into the "*soft*" category. However, because it is in monetary terms quite significant, I have

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looked into it in a little more detail and am reasonably encouraged. The general principle is that an innocent party can recover its additional costs in dealing with breaches of contract by others provided that they are sufficiently identifiable and reasonable in amount. The issue here of course is that the costs are not "*additional*" in that they would have been incurred in any event as you and your colleagues would have been employed by TRDC even if the project had gone smoothly. We can certainly expect that to be the major point made by Gee and Atkins.

2.2 That is not, however, the end of the matter. It has always been thought that a party who employs its own resources should not be in a worse position than one who simply goes out into the market place and buys in additional resource at a cost which is then recoverable. Accordingly, in some circumstances an innocent party may be entitled to recover costs that it would have incurred in any event. To do this, however, it must be shown that the resources to which the cost relate (in this case the five TRDC employees) would have been allocated to other productive areas of the business rather than being dedicated to dealing with the consequences of the breaches of contract.

2.3 Here, in order to make good the claim, we will need to:

(i) Bring forward adequate proof of the cost being incurred (this could be achieved by internal costing documents and would not be difficult);

(ii) Show how the costs related to the breach of contract in question (this would probably be done by way of witness statements from each of the five of you saying what work was carried out and justifying the percentage of time spent in each case); and

(iii) Show how the resources used in dealing with the breaches of contract would otherwise have been deployed for profitable purposes (this is, as you can see, probably the most difficult area of all).

2.4 Each case really depends on its own circumstances. However, the broad principles are that:

(i) Merely stating that a member of staff has been required to spend time dealing with the problem does not automatically entitle that party to recover the portion of the staff member's salary attributable to the time spent in dealing with the problem;

(ii) It is also insufficient for the innocent party merely to assert, without evidence, that its staff would have been used productively elsewhere; and

(iii) Nevertheless, even in the absence of formal records, if it is clear that a certain amount of time was spent by the innocent party's staff in dealing with the consequences of a breach of contract, instead of performing profitable work, the Court may award damages based on a retrospective assessment or simply estimate the time spent in undertaking the relevant

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activities.

2.5 For the Mediation, I think we should be prepared for the claim in relation to the staff costs to be dismissed out of hand by Gee and Atkins. To meet this we will need to be prepared to say that there is ample evidence that the five of you were diverted away from other activities to the extent shown in the Schedule which we will serve. We should also say that there will be clear and cogent witness statement evidence setting out what other activities you would have been undertaking and why the Council suffered loss as a result of you not being able to undertake those other activities.

2.6 Where the claimant is a company making profits there could probably be some analysis undertaken showing how profit making activities suffered. This is not of course the case here, but I hope that there may be considerable evidence available to show that the Council did suffer damage by you being diverted away from other activities and this led to other issues not being dealt with or being dealt with late, to other staff members having to assist with consequent disruption to their work or (probably the strongest of all) the Council incurring actual cost in having to bring in outside contractors to take up the workload.

2.7 I do not think we should show in the Schedule full details of how the costs are made up and I would therefore simply start with the total annual cost, saying in the footnote that this represents a salary plus a suitable uplift to represent oncosts. The footnote relating to the completion works period and the claims period are of course sensible. I would suggest that the Schedule is updated to the date of the Mediation and is made available either with the position paper we will be preparing or as part of an agreed bundle of documents to go before the Mediator.

2.8 It would doubtless be possible for you to prepare prior to the Mediation some of the evidence that I have mentioned above and which will be required in the event that the case proceeds. That should be balanced against the need to concentrate on the strong elements of the claim rather than matters such as this which, although significant, will be recognised by the Mediator as falling into the "*soft*" category.

2.9 The area where any work that was carried out should concentrate is in my view that of how your time would otherwise have been spent and what the financial consequences were of you being diverted from that other work. If the evidence is quite strong, then we can certainly consider putting in some of this evidence before the Mediator; if the evidence is not so strong, then I would suggest that we assert before him that the Council should not be in a worse position than a company seeking to make profit because its activities have been damaged in exactly the same way and it should still be compensated as a result of the breaches of contract by the other parties. We should then say that we will be inviting the Court to infer from the disruption that your time would have been usefully spent and the Council should be compensated at least in an amount equal to the costs of employing the five relevant staff members during the disrupted period.

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3. Conclusion

3.1 I hope these thoughts are of use. I have gone into slightly more detail than you might have expected because of the large sums involved and the fact that we certainly should not treat claims of this size with anything other than appropriate care. The direct costs have of course all been incurred and paid for by the Council and so to that extent I imagine that you are more concerned to recover them. However, if the Mediation proves unsuccessful, the exercise of preparing these claims will have been well worthwhile (and of course recoverable, on the principles I have set out above, as costs of the litigation, including of course the cost of this letter).

Please let me know if there are any points you would like to raise on these issues. Nick and I will, in any event, be back in touch with you shortly with regard to the practical steps which we are taking in connection with the Mediation and to deal with the various remaining actions arising from our meeting on 11 November.

With kind regards

Yours sincerely

John

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