BY EMAIL ONLY

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Dear Patrick

William Penn Leisure Centre, Rickmansworth
Updated Advice

Following our recent discussions, 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 30 January 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 position which I believe should be adopted at the forthcoming Mediation on 20 and 21 March 2012.

I deal in this letter with my updated views on the merits, the further costs to be incurred in the Mediation process, the costs which would be incurred if the matter proceeded to a full Court hearing in the event of the Mediation failing, 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 31 August 2011 ("*the August 2011 Advice*"). Since that was written, the team assisting TRDC has prepared and served in October 2011 on Fenwick Elliott, representing Gee, and Reed Smith, representing Atkins, a comprehensive bundle of documents ("*the October 2011 Submission*") essentially responding to the very detailed Submissions served by Gee earlier in 2011. For the assistance of the Executive Committee, those documents comprised:-

- A detailed Report from the quantity surveying experts, Jackson Rowe, setting out their views on the quantification of the claim against Gee and Atkins.
- A "*Notes Report*" by the delay analysis expert, David Aldridge of ACUTUS, setting out his comments on the Report by Rob Palles-Clark served on behalf of Gee;

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- An updated Report by the architect expert, Christopher Miers of Probyn Miers;
- A Note prepared by me on elements of the Gee counterclaim which I believed to be unsustainable in law;
- A detailed covering letter from this firm summarising the effect of the above documents and summarising the financial claims now made against Gee and Atkins.

1.2 Since the August 2011 Advice, I have also written to you (on 9 December 2011) setting out my views on two elements of the TRDC claim which were not covered in detail in the October 2011 Submission, these being the legal costs incurred and also the in-house staff costs. These items were not, quite properly, included in the Jackson Rowe Report because that necessarily formed the Employer's Statement under the Building Contract and could not therefore take account of other costs incurred by TRDC separate from those directly associated with the completion and rectification works. Because these sums are large (close to £600,000 for the legal and other expenses incurred in connection with the claims and close to £360,000 incurred by way of staff costs) I spent some time in my letter of 9 December 2011 analysing these and I understand that this letter will form part of your submission to the Executive Committee. I will not therefore repeat in this letter the points I made in my letter of 9 December, save to confirm that those views remain unchanged.

1.3 Since serving the October 2011 Submission, there has been some correspondence with Fenwick Elliott in relation to certain of the matters raised and it is understood that Mr Palles-Clark will be preparing a short Report commenting on some matters raised in Dr Aldridge's Notes Report. I also understand from an email received earlier this week from Reed Smith that Atkins will be providing what is described as a "*response to [the] reformulation of the claim against Atkins*". This is rather a misnomer as the claim has not been "*reformulated*" - it has merely been accurately quantified by quantity surveyors rather than estimated as before. It is also understood that Atkins will make some further comments on the issues between themselves and TRDC (and presumably Gee also). Naturally we do not know what this further Submission will say but it seems likely that some reference to the net contribution clause argument will be raised as this has never been set out in correspondence, merely debated verbally.

1.4 It will therefore be possible to have a better idea of the position now taken by Gee and Atkins closer to the Mediation, although timing is very much in their hands and not ours.

1.5 The merits of TRDC's case were closely examined by the entire team in the course of the preparation of the October 2011 Submission. Dr Aldridge spent some considerable time reviewing not only the comments by Mr Palles-Clark on his original Report but also the observations made by Gee upon it. Mr Miers reviewed his original Report in the light of the comments made by Gee. Jackson Rowe prepared a very detailed Report with some 180 pages of schedules supporting TRDC's claim and a detailed

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analysis of the sums which would otherwise have been paid to Gee under the terms of the Building Contract. All of this was in accordance with the strict wording of the Contract requiring such an analysis to be carried out; it became clear during the course of the summer that Atkins were unable or unwilling to carry out a proper assessment and it thus became necessary for TRDC to commission Jackson Rowe to carry out this task. It is perhaps worth mentioning for the benefit of the Executive Committee that the costs incurred by TRDC in carrying out this work (when it should have been undertaken by Atkins under the terms of their agreement with TRDC) will of course be claimed from Atkins.

1.6 My firm also prepared a legal analysis of certain of the items in the Gee counterclaim and undertook an overall overseeing role in relation to the October 2011 Submission. It was, and remains, my strong view that the entire team felt that, although Gee had raised points which required a detailed and careful answer, many of the points were unsustainable and ultimately would not avail Gee in putting up a defence to the TRDC claims. As mentioned above, there has been some further correspondence with Fenwick Elliott regarding certain aspects of the points raised by Dr Aldridge in his Notes Report but Dr Aldridge has responded rapidly to those issues and believes that they do not carry great weight. Insofar as those issues raised involve legal considerations, I also remain of the view that the position taken by Gee is incorrect.

1.7 The main event that has occurred since the August 2011 Advice, apart from the October 2011 Submission, has been two meetings between Mr Miers and his opposite number, Adam Zombory-Moldovan, the architect expert instructed by Atkins. Mr Miers has provided to us comments on the outcome of those meetings and I turn now to consider the impact of those meetings on the TRDC claim against Atkins.

1.8 I have considered the notes prepared by Mr Miers of his meetings with Mr Zombory-Moldovan and the associated notes which have been annotated to the Schedule of Defects. I have also compared these notes against the quantification given by Jackson Rowe of the claims in respect of the defects, noting where Mr Miers feels that a claim against Atkins is not viable because he is persuaded that in relation to certain defects which are plainly issues of construction by Gee, Atkins could not reasonably have observed the defects and instructed their rectification and would therefore not be liable in respect of negligent inspection and/or certification.

1.9 Mr Miers now feels that in relation to 7 items, no claim now lies against Atkins. I calculate that the sums claimed against Atkins will therefore be reduced by £48,750. Whilst not a derisory sum, this reduction should be seen in the context of the overall claim against Atkins (in relation to the building works) of £3,321,500, to which sum must be added the legal and in-house TRDC costs discussed above.

1.10 The other aspect that has come out of the meetings between the architect experts is that Atkins clearly consider themselves not to be liable in relation to any claim regarding the cost of completion of the works. Their argument presumably is that Atkins should not be liable for the costs of completing the works, as opposed to those

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of remedying defects, because those have been incurred because of the termination of Gee's Contract, which is a matter between TRDC and Gee and does not involve Atkins. As the claim in relation to the cost of completion is nearly £1.7m this is a significant point.

1.11 Jackson Rowe have dealt in their Report with the rationale behind claiming these sums from Atkins and have identified a number of failures by Atkins not only in relation to their administration of the Building Contract with Gee but also in their acting as Construction Manager in relation to the completion/remedial works. There are also issues regarding over-certification by Atkins in relation not only to defective works but also in relation to work which may not itself have been defective but in respect of which payments were certified in excess of a proper sum for that work. That over-certification did occur seems plain from the fact that sums totalling almost £3.5m were paid to Gee in circumstances where further work which eventually cost £1.7m remained to be done and where Gee's overall entitlement had they carried out and completed the works was, in Jackson Rowe's opinion, only £3.66m.

1.12 Although Atkins will doubtless argue that they should not be liable in relation to any of the completion costs, and therefore the claim against them should be significantly reduced, there is enough in the Reports from Mr Miers and Jackson Rowe to support a claim by TRDC that Atkins should also be responsible for the additional costs of completion.

1.13 In summary, therefore, the work that has been carried out by the team, principally in relation to the preparation of the October 2011 Submission, shows that the sums due from Gee in respect of the building works total a little over £2.9m, to which must be added legal and other claims costs and the TRDC in-house costs. Given that the legal and other claims costs totalling £585,000 start in June 2010 and a respectable argument could be put forward for those costs to include earlier sums, it is reasonable for the purposes of the Mediation to assess the total direct costs and TRDC in-house costs at approximately £1m. This would then indicate a total claim against Gee of £3.9m.

1.14 The claim against Atkins is assessed by Jackson Rowe in two ways. The "*primary claim*" in relation to overpayment of fees, defective or abortive design and other damages totals £440,000. The claim in the alternative, based on the facts I have mentioned above, and taking into account the reduction of £48,750 to which I have referred, now totals £3.27m. Taking into account the £1m direct and in-house costs mentioned above, the claim against Atkins is now £4.27m.

1.15 For the sake of completeness I should also mention the recent Report by the National Design Consultancy highlighting defects in the Mechanical and Electrical System. These defects appear to be matters more of design (and therefore Atkins' responsibility) than workmanship but this is by no means finally settled. Whatever costs TRDC incur in remedying these defects will form part of its claim in the Mediation and, if necessary, in any proceedings which follow. The present

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approximate quantification of this claim is £300,000.

1.16 Whilst doubtless 100% of these claims will not be recovered I believe that on the information available the claim against Gee remains strong and should be vigorously pursued. Whilst Atkins can take some comfort from the fact that the claim in respect of remedial works is stronger than that in relation to incomplete works, and there should be some measure of discount given to reflect this, the claim against Atkins still remains in my view a strong one to the tune of several millions of pounds and should be pursued unless very significant offers are made by Atkins in the Mediation.

2. Fees estimates for the Mediation

2.1 I had previously stated in the August 2011 Advice that I felt the fees estimates for the Mediation were reasonably rigorous. I remain of that view although the continued flow of correspondence from Fenwick Elliott and the promised letter from Reed Smith are likely to generate work which will increase the legal fees budget, albeit hopefully not considerably. As of now the fees incurred are very much in line with the estimates.

3. Further costs in the event of the Mediation failing

3.1 Nick Cook and I have prepared, and I attach, a budget summary for taking the case from Mediation through to trial and including all issues save only for ones which are unforeseeable at this time (such as particular applications by other parties) and also dealing with costs at the end of the trial.

3.2 This is, as you can see, a reasonably detailed estimate but it does remain an estimate. Clearly you may require more certainty and it is perfectly feasible to prepare more detailed budgets, and in very special circumstances offer fixed fees, for certain elements of the work. 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.

3.3 Further, the estimate in relation to Counsel has been prepared after discussion with Adrian Hughes QC and his clerk of the individual tasks in which he and his Junior Counsel would be involved. These figures also assume, to a certain extent, that the rates charged by Counsel will be what they describe as their "*Local Authority rates*" which would be lower than that offered to commercial clients. As those rates would still have to be negotiated, the overall figure of a little under £200,000 is our best estimate at this stage but could, should the need arise, be discussed in more detail with Counsel and refined at the appropriate time.

4. Conditional Fee Agreement

4.1 We have discussed in very broad terms the possibility of our entering into a Conditional Fee Agreement (*"CFA"*) for the carrying out of the work to bring the matter to a conclusion should the Mediation fail. As you probably know, it is becoming increasingly frequent for lawyers (both solicitors and barristers) being asked

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to carry out work on a conditional fee basis. I have discussed this within the firm and in principle we have no objection to considering such a basis and although I would not like to commit quite at this stage to particular figures (we would need to assess the strength of the case in the light of the further Submissions from Gee and Atkins and in the light of the points made both by them and the Mediator at the Mediation itself) I set out below what I think would be a reasonable way forward.

4.2 The cost estimate is prepared on the basis of my firm's existing fee rates (which in my case have been fixed for TRDC since 2008). These are £260 per hour for myself and £200 for Nick Cook, with a trainee being charged at £100 per hour. My thought at this stage is that I would reduce my rate to £200 and Nick Cook's to £150 per hour for interim billing purposes but then would seek a success fee at the end of the case of at least 50%. That success fee would of course be recoverable from the losing party so TRDC would not suffer. This has advantages for us in that if we are successful our total fee recovery would be higher than simply maintaining our current rates (which is fair given the risk that we are running); it is also good for TRDC because of course you would be paying some 25% less in relation to my firm's costs. On the basis of the current estimate that would reflect a saving of approximately £63,000.

4.3 I have discussed on a very preliminary basis with Adrian Hughes QC whether he would be willing to act on a similar basis. He did not rule this out although of course he knows much less about the case and was therefore necessarily more cautious. If one could apply the same percentage to Counsel's fees then a further saving of some £48,000 would be achieved, meaning that overall TRDC would be saving approximately £111,400.

4.4 We have some way to go before we can enter into a formal agreement in that I will need finally to consider the fee rates to be charged and the percentage uplift. We would also need to define what "*success*" means and it may be that there would be a staggered percentage increase depending on the level of recovery. Courts generally accept the concept of a CFA and award an uplift on costs commensurate with the risk that the solicitors are running. In a recent case involving enforcement of an Adjudicator's decision, the solicitors claimed an uplift of 100%; the Courts, quite understandably, said that in adjudication enforcement cases the solicitors were actually running very little risk (the Court actually said "*the Claimant was virtually bound substantially to win its claim*") and so they awarded them an uplift only of 20%. Therefore in these circumstances a 50%-60% uplift seems perfectly reasonable.

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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.

JOHN WRIGHT
Partner
GOODMAN DERRICK LLP

Encs:

cc *Alan Head*
Peter Brooker
Steven Halls
Nick Cook