

IN THE MATTER OF AN ADJUDICATION BETWEEN:

LAPLAND BUILDERS OS

Referring Party

and

DEEPEN, CRISP & EVEN ENGINEERING LLP

Responding Party

REFERRAL NOTICE

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The Contract

- 1) The Referring Party is and was at all material times a Finnish registered company, carrying on business in the United Kingdom as a 'design and build' contractor in the construction industry.
- 2) The Responding Party is and was at all material times a firm of structural engineers.
- 3) The Responding Party was appointed by Three Kings Watersports Plc ("the Employer") for the consideration of £2 million exclusive of VAT ("the Appointment") to provide certain structural engineering design works and services. This Appointment was subsequently novated to the Referring Party. This Appointment is evidenced in writing in the following documents included in Appendix A herein :
 - i) A contract between The Employer and the Responding Party dated 1st April 2005 appointing the Responding Party to provide structural engineering design works ("the Appointment");
 - ii) The form of novation between the Employer, the Responding Party and Referring Party dated 25 December 2005; and
 - iii) Copies of the invoices numbered 1012 to 1035 inclusive dated monthly from 30 January 2006 to 30 November 2007 from the Responding Party to the Referring Party
- 4) The Appointment is a construction contract within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") and being entered into after 1 May 1998 is subject to its terms, conditions and stipulations.

History of Dispute

- 5) Under Clause 1 of the Appointment the Responding Party is to carry out and complete the services using the reasonable skill, care and diligence in performance of its services which would normally be expected of an experienced Structural Engineer with expertise in the design of steel framed ski slopes in Wootton under Edge.
- 6) Under Clause 2 of the Appointment the Responding Party is deemed to have knowledge of the programme for the construction works to which the Appointment relates and will perform its services in such a way and in such a manner that it will not delay, disrupt or otherwise cause hindrance to the construction works and/or the programme in relation there to.
- 7) In Appendix 1 of the Appointment the Services included, amongst other things:
 - i) the design of all structural steel works;*
 - ii) assisting in value engineering the development including attendance at meetings as may be reasonably required;*

.....

iix) examining and advising on structural design and/or calculations submitted by the Contractor, its sub-contractors and/or sub-consultants;

.....

x) reviewing the design post-contract and undertaking necessary revisions in respect of amendments and/or variations to the Works”

- 8) The Responding Party commenced its design works on 1 April 2005 and construction works were commenced on site on 20 March 2006.
- 9) In breach of its obligation to design all the structural steelwork the Responding Party failed to design the structural connections. Instead it allowed and/or otherwise encouraged, by passive inferred acceptance, the structural connections to be designed by others namely Sleighbellsringing Inc (“Sleighbells”). The Responding Party knew or ought to have known that Sleighbells did not have the requisite skill and expertise to carry out the design of the steel connections.
- 10) On 4 April 2006 Sleighbells who were at all material times a company of steel erectors, submitted to the Responding Party designs and calculations in respect of the steelwork connections.
- 11) The Responding Party failed to agree timeously or at all the design of the steelwork connections with Sleighbells.
- 12) Further and in the alternative the Responding Party failed to amend the design of the steelwork connections timeously or at all.
- 13) As part of the design works the Responding Party specified a primer paint for use on the steelwork.
- 14) The primer was not suitable for the application.
- 15) In breach of its obligations the Responding Party failed to review its design and issue amendments thereto timeously or at all.
- 16) The failures mentioned in 11, 12 and 15 above caused delay to the completion of the Works.
- 17) The project was certified as being practically complete on 25 December 2007.
- 18) On 29 February 2008 the roof of the project collapsed due to the failure of the steelworks connections.
- 19) The Responding Party failed to adequately warn the Referring Party of the likelihood of failure of the connections and/or the possibility of collapse.
- 20) Further the Responding Party, on Sleighbells connection design being incorporated into the Works, did not seek to terminate its appointment.
- 21) Further and in the alternative and in breach of its obligations the Responding Party did not submit to the Referring Party its own design proposals in respect of the design of the connections.
- 22) As a result of the collapse of the roof the Employer entered into insolvency.

- 23) As a result of the above matters the Referring Party suffered the following expenses and damages:
- i) the Referring Party failed to complete the project within the period afforded to it under its own contract with the Employer and was obliged to pay and/or allow to the Employer the sum of £10,000,000.00 in respect of Liquidated Damages;
 - ii) the Employer further claimed £500,000.00 in respect of loss of profit that it incurred during the summer period. This amount was paid to the Employer by the Referring Party on 1 May 2008 so as to avoid legal proceedings being brought against it; and
 - iii) on the date of its insolvency the Employer had retained £2,000,000.00 in respect of Clause 4.17 under its contract with the Referring Party. Due to the insolvency of the Employer, which insolvency was caused by the acts and/or omissions and/or failures of the Responding Party, the Referring Party has been unable to recover the said retention.
- 24) On 1 October 2008 the Referring Party wrote to the Responding Party making claim for the above expenses and damages and requesting payment within 21 days from the date thereof.
- 25) The Responding Party has failed to respond to the Referring Party's letter dated 1 October 2008 within 21 days or at all.
- 26) The Responding Party has not denied the amounts stated in the Referring Party's letter dated 1 October 2008 are owing and due to the Referring Party.

Submission of the Referring Party

Design of Structural Steelworks Connections

- 27) Without prejudice to the Referring Party's contention that the failure by the Responding Party to design the structural steelwork connections is a breach of contract by the Responding Party, the Referring Party submits that by the Responding Party encouraging and/or otherwise allowing Sleighbells to carry out the design of the steelwork connections the Responding Party was vicariously liable for the design produced by Sleighbells and the Adjudicators attention and is drawn to Hole v Sittingbourne Rly (1861) 6H&N.488 and Honeywell & Stein v Larkin Brothers [1934] 1KB 191 in Appendix B hereof.
- 28) The Adjudicator's attention is further drawn to the Expert Report of Doctor Dolittle MICE MAPM in Appendix C hereof, where it is confirmed that the collapse of the roof was caused by the failure of the structural steelwork connections.
- 29) It is reasonably foreseeable that the failure of the steelwork connection would cause collapse of the roof and as a result the Employer would suffer loss and damage.
- 30) It is common that a sum of money is held in retention for a period of time after Practical Completion of the project and consequently the Responding Party would have, or ought to have, known that the Employer could set-off the sum

held in retention (and ultimately due to the Referring Party) against monies that the Employer could claim as damages against the Referring Party.

- 31) The Responding Party is therefore liable to the Referring Party for all and any damages claimed by the Employer against the Referring Party arising from the collapse of the roof.
- 32) Further and in the alternative if, which is denied, the Responding Party is found not to be vicariously liable for the design undertaken by Sleighbells then the Responding Party under services 'iix' had an express obligation to examine and advise on the structural design and structural calculations submitted by others.
- 33) It is submitted that had the Responding Party used reasonable skill, care and diligence in examination of, and advising upon, the design of Sleighbells it would have alerted the Referring Party to the possibility and probability of collapse.
- 34) The Adjudicator's attention is drawn to the 2 cases of Plant Construction Plc v Clive Adams Associates and JMH Construction Services Ltd (2000) CILL 1598 and Plant Construction Plc V Clive Adams Associates and JMH Construction Services Ltd (2000) CILL 1619 included in Appendix D, where it will be noted that even when there is no express obligation imposed, an engineer has an implied duty to warn so as to guard against the risk of injury and that to discharge such duty it is insufficient to merely state or otherwise opine that the design by others is inadequate; but that the engineer should vigorously protest and if necessary "*walk off site*".
- 35) In breach of the abovementioned duties the Responding Party failed to warn of the possibility and probability of collapse and failed to protest vigorously. At no time did the Responding Party seek to terminate its appointment.
- 36) The Responding Party is therefore liable to the Referring Party in damages for its failure to warn sufficiently.
- 37) Further it is submitted that by failing to discharge its obligations and undertake and complete all the design of the structural steelwork, namely the structural steelwork connections, the fee payable to the Responding Party should be abated by the value of the work not undertaken. The Referring Party submits that the fees should be abated by £50,000.00.
- 38) Further, in failing to design the structural steelwork connections the Responding Party acquiesced and allowed the design of the same to be undertaken by a party that it knew or ought to have known did not have the requisite skills to perform such a design.
- 39) It is submitted that the Responding Party had a duty to ensure that the design was carried out by a person or persons with reasonable skill suitable for the preparation of such design and it failed in that duty.

Delay in Progress of the Project

- 40) The Referring Party was contractually bound to the Employer to complete the project by 19 March 2007.

- 41) However, the project was not certified as being Practically Complete until 25 December 2007.
- 42) The Adjudicator's attention is drawn to the delay analysis prepared by Professor Slipup included in Appendix E where it is identified that the delay in completion of the project arose due to delay in 2 aspects of the project i.e.:
 - i) the design of the structural steelwork connections; and
 - ii) the finish (namely the paint system) to the structural steelwork.
- 43) The Adjudicator's attention is referred to Clause 2 of the Responding Party's Appointment and that the Responding Party has:
 - i) deemed knowledge of the programme of the construction works; and
 - ii) a duty to perform its Services in such a way and in such a manner that it will not delay, disrupt or otherwise cause hindrance to the construction works and/or the programme in relation thereto.
- 44) The Adjudicator's attention is drawn to the original programme included in Appendix 1 of Professor Slipup's report in Appendix E of this document; and the achieved programme included in Appendix 4 thereof.

Steelwork Connections

- 45) The Adjudicator will note the design of the steelwork connections should have been progressed on 14 February 2006 but were not in fact progressed until 4 April 2006 a delay of 7 weeks.
- 46) The Referring Party's primary contention is that these connections should have been designed by the Responding Party; and in abandoning its obligations in respect of the same not only was it in breach of Clause 1 of the Appointment, namely failing to carry out and complete the Services, but was also in breach of Clause 2, namely it caused delay and/or disruption and/or hindrance to the programme.
- 47) Further and in the alternative if, which it denied, the Responding Party is found not to have been obligated to undertake the design of the steelwork connections; it is submitted that:
 - i) by Services 'ii' it should have assisted in the value engineering of the development; and/or
 - ii) by Services 'iix' it should have examined and advised upon structural designs produced by others; and/or
 - iii) by Service "x" it should have reviewed the design proposed by Sleighbells and, if it was dissatisfied with Sleighbells proposal, issued revisions to Sleighbells design

and that by Clause 2 of the Appointment the above were to be carried out timeously so as not to cause delay and/or disruption and/or hindrance to the programme.

- 48) It is submitted that the Responding Party failed to perform the service mentioned in 47 (i), (ii) and (iii) timeously or at all and in breach of its obligations caused delay and/or disruption and/or hindrance to the programme.

Finish (Paint System) to Steelwork

Specification of Paint

- 49) The Adjudicators attention is drawn to the Expert Report of Professor Delux included in Appendix F of this Referral.
- 50) Professor Delux confirms that the paint primer specified by the Responding Party was not suitable for use with welded steelwork.
- 51) The Responding Party knew that the steelwork was going to be welded; as can be seen by the specification of Structural Steelwork included in Appendix G, it was the Responding Party who specified the welds utilized.
- 52) The Adjudicators attention is drawn to conclusion Nr 17 of Professor Delux's Expert Report in that it is widely known, that the primer of substances specified are prone to breakdown and form chloride salts when subject to a welding process.
- 53) It is therefore submitted that a reasonably competent Structural Engineer would have known, or ought to have known, that the primer specified was not suitable for the purpose proposed and the Responding Party is therefore in breach of its obligations to use reasonable skill care and diligence in the performance of its Services, i.e. the preparation of the Specification of Structural Steelwork.

Value Engineering

- 54) Service "ii" requires the Responding Party to value engineer the development.
- 55) The solution adopted by Sleighbells was for an outer coating that obviated the need for a primer application.
- 56) Although the cost of this outer coating was more expensive than the one specified by the Responding Party; it saved on the cost of primer and saved on the cost of the application.
- 57) The Adjudicator's attention is drawn to the Expert Report of Mr Francis Ives Chief Executive of Cyril Sweett Quantity Surveyors Extraordinaire Ltd in Appendix H hereof who has confirmed that had the Sleighbells system originally been specified there would have been a saving of £70,000.00 for this section of the work.
- 58) Further, had Sleighbells system originally been specified, the delay caused by the problems associated with the primer, and seeking its alternative, would not have occurred.
- 59) It is therefore submitted that the Responding Party was in breach of its obligation to Value Engineer the development and is liable to the Referring Party for the damages mentioned below.

Specification of Alternative:

- 60) Further, it submitted that by service 'x' the Responding Party had an obligation to review its design and undertake revisions as may have been necessary.
- 61) The Responding Party was informed on 20 September 2006 that Sleighbells were experiencing a problem with the Primer and it should have therefore reviewed the design and specified an alternative.
- 62) However, as evidenced by the Responding Party's letters dated 20 October 2006 and 23 November 2006 included in Appendix J the Responding Party refused to specify an alternative.
- 63) It is submitted that a reasonably competent Engineer would not have refused to specify an alternative to a paint system that had already proven to be defective for the purposes it was being used.
- 64) The refusal by the Responding Party to specify an alternative paint system caused delay in the progress of the works.

The Delay and Damages Caused by the Above Matters:

- 65) The Adjudicators attention is drawn to the Expert Report of Professor Slipup and the delay analysis included therein which identifies the above matters caused delay in the critical path of the project of 9 months.
- 66) Because of the late completion of the project the Referring Party was deducted £10,000,000.00 in respect of Liquidated Damages from monies that would otherwise have been due to them.
- 67) Further and in addition, the Employer claimed £500,000.00 from the Referring Party for the loss of additional profit it would have made if it had been able to open the development in summer.
- 68) So as to avoid litigation the Referring Party settled the claim and on the principle of Biggin and Co Ltd and Another v Permanite Ltd [1950] 2 All ER 859 (Appendix C) it seeks recovery of the same from the Responding Party.
- 69) Further the delay in completion of the works resulted in additional costs to the Referring Party of £1,800,000.00 which it was unable to recover under its contract with the Employer. The Adjudicator's attention is drawn to the breakdown and evidence included in Appendix I of this Referral.

The Referring Party Claims (and the Adjudicator is requested so to decide and issue directions accordingly):

- 70) That the Responding Party shall pay to the Referring Party the sum of £2,000,000.00 (+VAT) or such other sum that the Adjudicator may decide in respect of retention monies that the Referring Party has been unable to recover from the Employer;
- 71) That the Responding Party shall pay to the Referring Party the sum of £10,000,000.00 (+VAT) or such other sum that the Adjudicator may decide in respect of Liquidated Damages that the Referring Party had to pay or allow to the Employer arising out of the delay in completion of the project which delay was in turn caused to the Referring Party by the Responding Party;

- 72) That the Responding Party shall Pay to the Referring Party the sum of £1,800,000.00 (+VAT) or such other sums that the Adjudicator may decide in respect of additional costs incurred by the Referring Party due to the delayed completion of the project and which costs it was unable to recover under the contract with the Employer;
- 73) That the Responding Party shall pay to the Referring Party the sum of £70,000.00 or such other sum the Adjudicator may decide in respect of the additional profits the Referring Party would have made on the project had the Responding Party properly Value Engineered the project and specified the alternative steelwork finish prior to commencement of the construction works.
- 74) That the Responding Party shall pay to the Referring Party the sum of £500,000.00 (+VAT) or such other sum that the Adjudicator may decide in respect of the settlement of the Employer's claim against the Referring Party;
- 75) That the Responding Party shall reimburse to the Referring Party the sum of £250.00 or such other sum as the Adjudicator may decide being the amount that the fee paid to the Responding Party should be abated by for Services that it did not perform.
- 76) That the Responding Party shall pay to the Responding Party the cost of the Referral Fee of £15,000.00 (+VAT) or such other sum as the Adjudicator may decide.
- 77) That the Responding Party shall pay the Adjudicator's fee and expenses.
- 78) That the Responding Party shall pay to the Referring Party the Referring Party's cost of bringing this Adjudication and preparing and submitting its submissions. The Adjudicator is kindly requested to ascertain from the Referring Party its costs prior to issuing his/her Decision.
- 79) That the Responding Party shall pay to the Referring Party interest of the rate of 8 % above the Bank of England base rate or such other rate as the Adjudicator may decide on the sum and/or sums that the Adjudicator may find due to the Referring Party.
- 80) That the Responding Party shall pay to the Referring Party the amount of £100.00 or such other sum that the Adjudicator may decide in respect of the Late Payment of Commercial Debts Regulations 2002.
- 81) That payment of the above sums is to be made within 7 days of the date of the Adjudicator's decision.
- 82) The Adjudicator is requested to give reasons with his/her Decision.

24 November 2008

Appendices

- A Evidence of Appointment
- B Hole v Sittingbourne Rly (1861) 6H&N.488
Honeywell & Stein v Larkin Brothers [1934] 1KB 191
- C Biggin and Co Ltd and Another v Permanite Ltd [1950] 2 All ER 859
- D Plant Construction Plc v Clive Adams Associates and JMH Construction Services Ltd (2000) CILL 1598
Plant Construction Plc V Clive Adams Associates and JMH Construction Services Ltd (2000) CILL 1619
- E Delay Analysis of Professor Slipup FRICS MAPM PhD
- F Expert Report on Paint of Professor Delux PhD MATT GLOSS
- G Specification of Structural Steelwork
- H Expert Report of Mr Francis Ives FRICS Dip Proj Man FICPD Cyril Sweett Quantity Surveyors Extraordinaire Ltd
- I Delay Costs and Associated Evidence
- J Responding Party's Letter's dated 20 October and 23 November 2006