

Mock Adjudication

Lapland Builders OS

-v-

Deepen, Crisp & Even Engineers LLP

Scenario

Lapland Builders OS (Lapland) (a Finnish Company) were engaged as design and build contractors by Three Kings' Wintersports plc (Three Kings) to construct an indoor ski centre at Wooton Under Edge under the JCT form of Design and Build Contract 05. Unfortunately whoever put together the contract elected to retype the Contract Particulars and omitted the reference to Clause 9.2.1

Originally Messrs Deepen, Crisp and Even, Engineers LLP (Deepen) were engaged by Three Kings as structural engineers for the project but on appointment of Lapland, their appointment was novated to Lapland. *[See form of novation attached]*.

Deepen designed the structural steelwork for the project with the exception of the connections which, as is usual, was left for the structural steelwork subcontractor to design to fit in with its preferred method of working. Deepen provided the forces which were to pass through the connections. Deepen also prepared pre-novation a specification which included a requirement, in view of the nature of the project, for a special prefabrication primer which was commonly used in the ship building industry to be used.

Sleighbellsringin Inc of the USA (Sleighbells) was engaged as the structural steel subcontractor by Lapland.

During the design process Sleighbells submitted its design and calculations to Deepen for approval in accordance with the subcontract requirements. In respect of one of the main roof connections Deepen expressed concern that the connection as designed by Sleighbells would not be sufficient to withstand the forces which Deepen had specified. Sleighbells disagreed and insisted that the connection was "as safe as The Kentucky Subprime Bank and Garden Center". The dispute continued for some time and was delaying the project. In desperation Lapland, who could see that the project was getting into significant delay, instructed Sleighbells to proceed with its design for the connection. Thereupon Deepen wrote to Lapland disassociating itself from the design of the connection but did not terminate its appointment.

During the course of the fabrication of the steelwork, Sleighbells encountered problems with their paint system which broke down repeatedly in the area of the welds. Extensive testing of the paint system revealed no defect in either the system or the application by Sleighbells, however it determined that the primer specified by Deepen had, when subjected to the welding process, broken down to form chloride

salts which in turn attacked the outer paint system causing that to breakdown. Again Deepen refused to change its specification arguing that the primer was perfectly good for use in the ship building industry where it is subject to much harsher climatic conditions during fabrication than in Sleighbells' factory and therefore it must either have been the techniques used by Sleighbells or the gas mix used in the welding process which caused the primer to break down. Fearing that Deepen may walk off the project because of the previous issue, Lapland sided with Deepen and instructed Sleighbells to solve the problem using the same primer. Because the salts were of a pasty nature, they proved virtually impossible to remove until the combined effect of all the solutions which had been used by Sleighbells removed the salts and Sleighbells changed the outer coating system so that no primer was necessary (especially since the steelwork had by this time been erected).

The combined effect of these issues caused a delay in completion and opening of the project of some 9 months from March to December for which Three Kings have deducted liquidated damages of £10,000,000 and have agreed a settlement with Lapland for a further £500,000 in respect of loss of profit which it would have made during the summer period. In the February following the opening of the project, during a particularly heavy snowfall for which Wootton under Edge is known, the roof of the project collapsed due to the disputed connection failing. This caused Three Kings to become insolvent whilst holding the deducted liquidated damages and a further sum of £2,000,000 by way of retention. As Sleighbells have no assets in the United Kingdom and in any event, anticipating these proceedings, have sought Chapter 11 protection in the United States, Lapland is seeking to recover these amounts from Deepen arguing that the delays which caused them to be liable for the liquidated damages and caused them to settle the loss of profit claim were attributable to Deepen's specification of the pre fabrication primer. Further because Deepen had failed adequately to warn Lapland of the likelihood of failure of the connection and/or to terminate its appointment when Lapland had decided to proceed with Sleighbells' connection design, it contributed to the collapse which in turn caused Three Kings insolvency and the loss of retention. Finally Lapland claims interest on any sums awarded by the Adjudicator together with the penalty proscribed by the Late Payment of Commercial Debts Regulations 2002. These two claims had not been raised before the issue of the Referral Notice.

His Honour Judge Thornton QC., was appointed adjudicator by Société Anonyme National Terminé d' Adjudication (SANTA) of Biarritz. The Responding Party has challenged the Adjudicator's jurisdiction on the grounds that Santa was not a proper Adjudicator Nominating Body for the purposes of the Housing Grants, Construction and Regeneration Act 1996. They have threatened that if the Adjudicator does not resign forthwith they will sue him for the losses which they may incur as a result of any decision together with their costs of the Adjudication. In addition they will send "the boys" (aka Robin "The Hatchet" Hood and the Merrie Men) around to sort him and his family out.

Issues:

1. Was the Adjudicator properly appointed?
2. What should the adjudicator do about the threats made to him by the Responding Party?

3. The extent of the warning which Deepen should have given to Lapland in respect of the defective connection and whether Deepen should have terminated its appointment.
4. To what extent was Lapland negligent in issuing the instruction to Sleighbells against the advice of its structural engineer and what effect does this have on the liability of Deepen?
5. Was Deepen negligent in specifying the ship-building primer which subsequently caused delay? If so, given the type of novation entered into in connection with its appointment, was Deepen liable to Lapland in any event? Was Lapland liable to contribute to the loss occasioned due to the delays in resolving the primer issue by insisting that the primer continue to be used even when the effects were apparent?
6. What, if any, damages should be awarded to Lapland?
7. As the issue of interest on any sum awarded and the penalty proscribed by the Late Payment of Commercial Debts Regulations 2002 had not been raised prior to the Referral Notice, was there a dispute which was capable of adjudication and does the Adjudicator therefore have jurisdiction? If not, does this mean that the Adjudicator has no jurisdiction over that issue only or over all matters which have been referred to him?

Date

Messrs Deepen, Crisp & Even LLP.,
Structural Engineers,
Wenslaslas House,
Letsbeigh Avenue,

25th December 2005

Dear Sirs

Wooton Under Edge Appointment as Structural Engineer - Subject to Contract

We refer to our appointment as structural engineers for our indoor ski centre at Wooton Under Edge. During the course of negotiations between us we advised you that we anticipated entering into a design and build contract with a contractor to whom your appointment would be novated. This was reflected in your appointment.

We would advise you that we have now appointed Lapland Builders OY of Helsinki as design and build contractors and now wish to novate your appointment to them and that the rights and obligations pursuant to your appointment be performed by and owed to that Company.

We therefore assign the whole of our rights and obligations under your appointment to Lapland Builders OY.

By their signature of this letter Lapland Builders OY agree to be bound by the terms and conditions of your appointment as if they had been originally a party thereto in place of ourselves.

We would ask that you sign the enclosed copy of this letter to signify your consent to the assignment of our rights and obligations in accordance with this letter and your agreement to be bound by your appointment accordingly. Your signature will also indicate your agreement to release us, Three Kings Wintersports plc, from all claims and demands whatsoever in respect of your appointment.

Yours faithfully
for and on behalf of
Three Kings Wintersports plc

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We agree to the terms of this letter.

**for and on behalf of
Lapland Builders OY**

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[On copy letter:

We hereby agree to the terms of this letter.

**for and on behalf of
Deepen Crisp & Even LLP**

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