

Claim No. HT-04-314/HT-04-238 consolidated
by an Order dated 10 December 2004

Amended by Order of Jackson J dated 5 December 2005

***IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT***

BETWEEN:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED
Claimant/Part 20 Defendant

- and -

CLEVELAND BRIDGE UK LIMITED
Defendant/Part 20 Claimant

AMENDED CONSOLIDATED DEFENCE AND COUNTERCLAIM

AMENDED DEFENCE

Preliminary

1. In this Amended Defence and Counterclaim:
 - (a) Except as otherwise stated, CBUK will adopt, for the purposes of reference only, the definitions used in the Amended Consolidated Particulars of Claim.
 - (b) References to paragraph numbers are, except as otherwise stated, to the paragraph numbers in the Amended Consolidated Particulars of Claim.

Introduction

2. Paragraphs 1 and 2 are admitted.

The Works

3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.

The Sub-Contract

5. Paragraph 5 is admitted.
6. Paragraph 6 is admitted.
- 7.1 As to paragraph 7:
 - (a) Clause 5.1.1 contains the word “clauses” before the words “6, 9 and 34”.
 - (b) The quotation of clause 21.9.1 should refer at line 4 to the “Sub-Contractor” not the “Sub-Contract”.
- 7.2 With the exception of the above, paragraph 7 is admitted.
- 8.1 CBUK will also rely on the following express terms of the Sub-Contract:
 - (a) By the pricing schedule, it was provided that detailed valuation rules and the build up to the Sub-Contract Sum were set out. This was subsequently varied by the parties agreeing to carry out valuation in accordance with a document entitled "Valuation Procedures" which was in all material respects identical to the Sub-Contract pricing schedule.
 - (b) By clause 30.2 of the Sub-Contract Conditions, it was provided that if before the date of practical completion of the sub-contract works, Multiplex failed to make payment in accordance with the Sub-Contract where the amount of the shortfall exceeded the value in the last Certificate of Payment issued by Multiplex then CBUK was entitled to give Multiplex a notice specifying the default and, if Multiplex continued the specified default for 10 days from the receipt of the notice, CBUK would be entitled to determine its employment under the Sub-Contract.

- (c) By clause 30.4 of the Sub-Contract Conditions, it was provided that the provisions of clause 30.2 were without prejudice to any other rights or remedies which CBUK might possess.
- (d) By clause 12.2 of the Sub-Contract Conditions it was provided that the aggregate monetary liability of CBUK under the Sub-Contract for each right or remedy to Multiplex for any matters arising in connection with the performance of its obligations under the Sub-Contract shall not exceed £6 million and Multiplex released CBUK from any liability in excess thereof.
- (e) By Appendix Part 4 to the Articles, headed “Programme” it was provided that:
 - (i) The programme contained within Volume 2 of the Numbered Documents listed as item p in Appendix Part 2 hereof is provided for information only, to indicate anticipated sequence of the Sub-Contract Works and interface with others subcontract packages. Dates and the sequence contained within the programme do not form part of the Sub-Contract.
 - (ii) The date for commencement of the Sub-Contract Works on site would be between 7 July and 10 August 2003 and the period for carrying out and completion of the Sub-Contract Works on Site was 81 calendar weeks.

8.2 Further, it was an implied term of the Sub-Contract that Multiplex would not do anything to prevent CBUK from performing its obligations under the Sub-Contract or to delay it in performing those obligations and would co-operate in the performance of the Sub-Contract. This term was implied as a matter of law.

9.1 As to paragraph 9, it is admitted that the following were implied terms of the Sub-Contract:

- (i) That sums paid on an interim basis pursuant to an adjudicator’s decision would be repayable if so determined in subsequent legal proceedings. CBUK will refer at trial to section 108(3) of the Housing Grants, Construction and Regeneration Act 1996.

(ii) That CBUK would exercise reasonable skill and care in the design of the connections (that is, for the avoidance of doubt, the welds or interfaces between members).

(iii) That CBUK would exercise reasonable skill and care in the construction of the Sub-Contract works.

9.2 It is specifically denied that CBUK was under any implied obligation to carry out the Sub-Contract Works and/or any section thereof with all reasonable diligence and/or to maintain reasonable progress. Such an implied term was not reasonable or necessary in the light of the express terms of the Sub-Contract pleaded at paragraph 8.1(e) of the Defence.

9.3 With the exception of the above, paragraph 9 is denied.

10. Paragraph 10 is ~~admitted~~ denied.

11.1 As to paragraph 11:

(a) CBUK commenced the Sub-Contract Works off-site on or around 28 September 2002

(b) By early 2003 there were serious problems arising from late and incomplete design by the civil and structural engineers, Mott Stadium Consortium (“MSC”) and delays in providing design information. The design changes and late information caused costs increases and delays and disruption to the Sub-Contract Works. By 15 February 2004 there were logged about 808 variations.

(c) As a result, CBUK made claims against Multiplex for extensions of time and additional payment under the Sub-Contract

(d) Multiplex has made claims against CBUK in respect of its performance of the Sub-Contract Works and for contra charges.

11.2 With the exception of the above, paragraph 11 is admitted.

Heads of Agreement

11A.1 By the Heads of Agreement, CBUK and Multiplex agreed to settle CBUK’s claim for extension of time. CBUK and Multiplex did not agree to settle all CBUK’s claims.

- 11A.2 With the exception of the above, paragraph 11A is admitted.
- 11B. It is admitted that the Heads of Agreement contained the express terms set out at paragraph 11B.
- 11C. It is denied that on the true construction of the Heads of Agreement or as a matter of common intention, of business efficacy or of law that:
- (i) CBUK's entitlement to reimbursement at cost for erection and site works under the Supplemental Agreement (or the Heads of Agreement) was subject to such costs being reasonably and/or properly incurred.
 - (ii) CBUK was obliged to execute the Sub-Contract Works with such diligence and expeditions as were reasonably required in order to meet the dates in the projected CBUK programme attached to the Heads of Agreement.
- 11D. CBUK will also refer to the Heads of Agreement at trial for its full terms and effect.
- 11E. It is admitted that the effect of the Heads of Agreement was to amend the terms of the Sub-Contract.

The Supplemental Agreement

- 12.1 It is admitted that, on 16 June 2004, CBUK and Multiplex entered into the Supplemental Agreement as alleged at paragraph 12. The Supplemental Agreement was entered into following the conclusion of Heads of Agreement dated 18 February 2004 ("the Heads of Agreement") under the terms of which Multiplex and CBUK agreed to settle CBUK's claim for extension of time on the terms set out in the Heads of Agreement, pleaded at paragraph 84.1 of the Counterclaim.
- 12.2 The circumstances in which the Supplemental Agreement was entered into are set out at paragraphs 83 to 86 of the Counterclaim.

13. The express terms of the Supplemental Agreement set out at paragraph 13 are admitted.
14. It was an implied term of the Supplemental Agreement that Multiplex would cooperate with CBUK in seeking to agree a new fixed price and programme for completion. This term was implied as a matter of law.
- 15.1 It is denied that Supplemental Agreement was effective with retrospective effect from 15 February 2004 or that the Supplemental Agreement superseded the terms of the Heads of Agreement with retrospective effect.
- 15.2 With the exception of the above, paragraph 15 is admitted.
- 15A. As to paragraph 15A, it is admitted that the provisions of the Heads of Agreement and the Supplemental Agreement took effect as variations of and amendments to the Sub-Contract, ~~constituting a new agreement~~ The Sub-Contract as amended and varied will be referred to as “the Amended Sub-Contract”.

Arch Member “Defects”

- 16.1 It admitted that the Arch is a key part of the new stadium.
- 16.2 Paragraph 16 is admitted as a broadly accurate description of the Arch construction. Connecting the chords to the diaphragms are four-pronged X nodes which are welded to the external edge of the diaphragms. The chords are welded to the stubs of the nodes.
17. Paragraph 17 is admitted.
18. Paragraph 18 is admitted as a broadly accurate description of the method by which the Arch was constructed on-site.
- 19.1 As to paragraph 19:
- (a) It is denied that, at the end of December 2003, CBUK forecast that the Arch would start to be lifted into its vertical position on 22 March 2004

and finish on 21 April 2004. CBUK had produced and sent to Multiplex in December 2003 a document known as the “Delay Entitlement Programme” in which the date of the commencement of the Arch Erection was stated to be mid September 2004.

- (b) For these reasons, it is denied that Multiplex programmed its works or those of its other subcontractors on the basis that the Arch lift would be completed on 21 April 2004 in reliance on a programme put in place by CBUK at the end of December 2003.
- (c) It is admitted that at the end of January 2004 a revised construction programme was produced entitled “Update No.16 31 January 2004” (not 2003 as pleaded in the Consolidated Particulars of Claim) and that in that programme it was forecast that the Arch would start to be lifted into its vertical position on 15 March 2004 and finish on 21 April 2004.
- (d) The programmes which were produced monthly by CBUK from September 2002 were the subject of continual change and postponement owing to the large number of design changes and the late delivery of information by MSC. The forecasts contained within the programmes were founded upon certain assumptions concerning the design and the provision of information which were continually falsified by subsequent events. They did not have contractual effect, nor is that alleged in the Consolidated Particulars of Claim. Further, CBUK will refer to and rely upon the provisions of Appendix Part 4 to the Articles, headed “Programme” set out at paragraph 8.1(e)(i) of the Defence. For these reasons, the dates and sequences contained within the construction programme allegedly relied upon by Multiplex do not form part of the Sub-Contract.
- (e) By the Heads of Agreement (referred to below at paragraph 84 of the Counterclaim) it was provided that, at clause 9, that CBUK would “complete the raising of the Arch by 21 April 2004 (subject to EOT’s)” and that the parties would “re-programme erection works beyond the 3 months, and determine a new fixed price”.

- (g) On 23 February 2004 CBUK was predicting that the arch lift would commence on 20 March 2004. CBUK refers to its programme WS05-V1.
- (h) If, at any stage, Multiplex relied on “Update No.16” to programme its works and those of its other subcontractors, such reliance was unreasonable. As, Multiplex knew, the construction programme was being continually updated. CBUK will also rely on the matters pleaded at paragraph 35.2 of its Defence.

19.2 Except as set out above, paragraph 19 is denied.

20.1 As to paragraph 20, it is admitted that in or about ~~October~~ late November 2003 CBUK undertook surveys of the Arch in its then current state of completion and discovered that certain chords and nodes of the Arch were not exactly straight. It is specifically denied that CBUK became aware of defects on 4 August 2003.

20.2 It is denied that what CBUK discovered were “defects” in the Arch.

21.1 As to paragraph 21:

- (a) It is admitted that the Tolerance Specification contains the words quoted. It is denied that the words quoted have any application to the tolerances of chords when attached to stubs. For the reasons set out at paragraph 22(b) of the Defence the term “built-up” member does not refer to chords when attached to stubs.
- (b) The Tolerance Specification also provides (at page A10/18) in respect of the Arch as follows:

“The main arch steelwork shall be set out in accordance with the architectural drawings. The arch steelwork shall be fabricated prior to erection in relation to the centreline axis “Z” as defined on the architectural drawings, within a tolerance of +/- 25mm. This centreline is defined as a compound set out circular arcs contained within an inclined plane. Arch diaphragms shall be fabricated prior to erection within a translational tolerance of +/- 15mm and rotational tolerance of +/- ~~0.515~~ degrees in relation to the ring section planes “t” which are spaced along the arch axis and are perpendicular to the axis.

The Contractor shall provide a schedule of the points during erection at which the arch setting out and positioning will be surveyed and checked against its calculated centreline profile.

The Contractor shall identify loadcases appropriate for each check and calculate the resulting deflected shapes of the arch. At each check, the surveyed shape of the arch centreline shall be within +/-100mm of the calculated centreline shape”.

The Tolerance Specification is referred to at item 4, Section D of Volume 2 of the General Sub-Contract Document.

- (c) The words quoted at paragraph 21.1(b) of the Defence took precedence over the words relied on by Multiplex at paragraph 22 (if, which is denied, they are applicable at all). By reason of the words “unless noted otherwise” quoted by Multiplex at paragraph 21, ~~of the~~ paragraph 7.2.2.2 of BS5950 is irrelevant and inapplicable.
- (d) The words quoted at 21.1(b) of the Defence relate to the tolerance limits for the diaphragm rings and the tolerance limit of +/-25mm was not applicable to the chords and not directly applicable to the chord stub assembly.
- (e) Accordingly the permitted deviations for the position of the diaphragms were:
 - (i) An alignment tolerance of +/- 25 mm.
 - (ii) A translational tolerance of +/- 15mm.
 - (iii) A rotational tolerance of +/- 0.5 degrees.Such permitted deviations applied to the nodes on diaphragm rings where the stubs are attached.
- (f) If, which is denied, paragraph 7.2.2.2 of BS 5950 is applicable to the stub-chord assembly, the tolerance specified is inconsistent with the tolerances permitted by the words set out at paragraph 21.1(b) of the Defence which take precedence.
- (g) Further, in the absence of an express contractual specification as to the permitted deviation for the assembly of the stubs onto the diaphragm rings, CBUK’s obligation was limited to the use of reasonable skill and care in the fabrication of such assemblies.

(h) Further by clause 110 of the Wembley National Stadium Structural Steelwork Specification for Roof Structure (as reference in the Numbered Document “Volume Two – Specific Sub-Contract Document”) the product standard is BS EN 10210-2 for the supply of circular hollow section tubes, such as an arch chord. This specifies a permitted deviation from straightness of 0.2%. In relation to a chord of 6.5 metres this would permit a deviation of +/- 13 mm in addition to the permitted deviations referred to at (e) and (f) above.

21.2 With the exception of the above, paragraph 21 is denied.

22. As to paragraph 22:

- (a) It is denied that the Tolerance Specification obliged CBUK to comply with paragraph 7.2.2.2 of BS 5950. The Tolerance Specification required otherwise and paragraph 7.2.2.2 is expressly stated to be subject to any contrary requirement.
- (b) It is admitted that the words quoted are contained in British Standard 5950, Part 2, which was published and effective from 24 August 2001 (“BS 5950”). Paragraph 7.2.2.2 is applicable to members made up of original members reinforced by the addition (via welding or bolting) of additional members such that a new stronger member is produced. It is not applicable to the 10 metre length section formed by a chord and two end nodes such as is referred to at paragraph 23. The end on end connection of individual pieces does not produce a “built up member”.
- (c) As a result if (contrary to CBUK’s primary case) paragraph 7.2.2.2 of BS5950 is applicable to the Arch at all, it was not applicable to the members constituted by the assembly of a chord added to two end nodes.
- (d) Further, at paragraph 7.1 of BS 5950 it is stated that:
“additional or different tolerances may be specified when necessitated by the nature of the particular building or structure under consideration”.

- 23.1 As to paragraph 23, it is admitted that the combined length of the two stubs of the node projecting from each diaphragm plus the tubular chord connecting the two nodes is about 10 metres. The two stubs of the node typically measure about 1.75 metres each and the tubular chords typically measure about 6.5 metres.
- 23.2 For the reasons set out above paragraph 23 is otherwise denied.
- 23.3 In further support of this denial:
- (i) CBUK will say that a maximum tolerance of +/-10mm for the stub-chord assembly could not, in practice be achieved using the assembly sequence indicated on the MSC drawings issued by Multiplex and adopted by CBUK (being drawings 1000/011 to 014). Such a standard of fabrication would exceed any of the classes specified in BSEN ISO 13920 which has been provided for the purposes of establishing customary workshop accuracy.
 - (ii) CBUK will rely on the fact that Multiplex do not allege that CBUK was in breach of the tolerance limits for the diaphragm rings referred to above or of the product standard deviation of 1/500 in respect of the chords as supplied.
 - (iii) CBUK will rely on the fact that Multiplex approved CBUK's quality procedures for dimensional control.
- 24.1 As to paragraph 24:
- (a) It is admitted that a meeting took place between representatives of Multiplex and CBUK on 18 December 2003.
 - (b) At the meeting:
 - (i) MSC stated that 5 chords were outside a 10mm tolerance.
 - (ii) Mr McHugh of CBUK stated that he believed that the chords were not outside tolerance.
- 24.2 For these reasons, it is denied that CBUK made the admission alleged at paragraph 24.

25. As to paragraph 25, it is admitted that Multiplex orally instructed CBUK to carry out an as-built survey of the members and nodes making up the Arch to establish their degree of straightness.
- 26.1 As to paragraph 26:
- (a) It is admitted that, on or about 6 February 2004, CBUK prepared an as-built survey entitled “Arch As Built Survey – Longitudinal Tubes Capacity Arch Erection”.
 - (b) It is admitted that the Survey only included results from chords and nodes between diaphragm 8 and 37. This was because in early February 2004 these were the only parts that had been affixed.
 - (c) The Survey recorded that there were 170 members that deviated from straightness.
- 26.2 With the exception of the above, paragraph 26 is denied.
- 27.1 As to paragraph 27:
- (a) It is admitted that there were discussions between the parties concerning the issue of potential weaknesses in the chords and nodes.
 - (b) It is admitted that MSC is the structural engineer for the project.
 - (c) It is admitted that Multiplex instructed MSC to analyse the Arch. The precise nature of MSC’s brief is not admitted.
 - (d) It is denied that this instruction was issued “in order to help mitigate the losses caused by the defective members”. It is denied that the chords or nodes were defective.
 - (e) It is admitted that MSC commenced an analysis which took a protracted time to complete.
- 27.2 With the exception of the above, paragraph 27 is denied.
- 28.1 As to paragraph 28:
- (a) It is admitted that during the morning of 3 March 2004 there was a telephone conversation between Mr Petaccia of Multiplex and Mr McHugh of CBUK and Mr Satchell of MSC.
 - (b) During that telephone conversation:

- (i) Mr McHugh said that there were 9 chords which had the potential to fail during the temporary load case and CBUK was conducting an analysis to see if they needed replacing.
 - (ii) There was a discussion of an analysis conducted by MSC which indicated that 13 chords in the permanent load case were “very likely to fail”.
 - (iii) Mr Petaccia required that CBUK change those 13 chords “as a minimum”. This requirement constituted a variation of the Sub-Contract.
 - (iv) It was agreed that MSC would check on 14 other chords which it had identified as potentially liable to fail in the permanent load case and that MSC would send through a list of all chords which had a utilisation of 80% or higher and perform a sensitivity analysis on the diaphragm and investigate whether the thickening of the chord would have any impact.
- (c) It is admitted that MSC subsequently conducted a review of those 14 chords to ascertain their strength in the permanent and temporary load cases.

28.2 With the exception of the above, paragraph 28 is denied.

29. As to paragraph 29:

- (a) It is admitted that CBUK replaced the 24 chords listed at paragraph 29 on the pleaded dates.
- (b) It is denied that the chords and nodes were defective. The reason why CBUK replaced the 24 chords was because MSC had identified weaknesses or potential weaknesses in them and required CBUK to replace them. ~~As pleaded at paragraph 29, the replacement chords were significantly thicker than the original chords.~~
- (c) For the avoidance of doubt, CBUK accepts that if the stub-chord assemblies had been within the tolerance limits which Multiplex allege were applicable then it would not have been necessary to replace any of them.

~~Multiplex is put to proof that the need to replace any of the chords arose as a result of the chords being out of a +/-10mm tolerance margin rather than as a result of errors in MSC's original design.~~

30. Save that it is denied that the chords were defective, paragraph 30 is admitted.
31. As to paragraph 31
- (a) It is admitted that MSC wrote a letter dated 18 May 2004 in which it was said:
- “We have now completed our assessment of the ‘as-fabricated’ arch under the permanent load conditions based on all survey data that has been provided to us. On this basis we believe that apart from 16 no. arch chords that have already been identified, there are no further chords that require remedial measures to accommodate the permanent load effects”.
- (b) The Babbie written approvals were dated 19 May 2004. The submission by CBUK of its design certificate and the provision by Babbie of its written approval were dependent upon the confirmation received from MSC referred to in the first sentence of paragraph 31. That confirmation was given in writing, as set out above.
- (c) It is denied that Babbie’s written confirmation was in accordance with clauses 120 and 465 of the Wembley National Stadium Structural Steel Specification for the Roof Structure. Neither of these clauses has any relevance to the approval provided. The approval provided by Babbie constituted a certification that CBUK had utilized criteria received from MSC without error.
- 32.1 As to paragraph 32:
- (a) It is denied that the Arch lift commenced on 22 May 2004. Stage 1 of the initial lift of the Arch was commenced on 1 May 2004 but had to stop at 33% of the load because the concrete rectification works were incomplete.
- (b) The Arch was rotated into its parked, temporarily restrained position on 22 June 2004.

32.2 With the exception of the above, paragraph 32 is denied.

33.1 As to paragraph 33:

- (a) Paragraph 33 is currently so inadequately pleaded that CBUK cannot respond to it until the provision of Further Information by Multiplex.
- (b) Without prejudice to what is pleaded above, it is CBUK's case that:
 - (i) For reasons set out above, the tolerance limits set out at paragraph 7.2.2.2 of the Tolerance Specification were not applicable to the chords and nodes of the Arch.
 - (ii) CBUK exercised reasonable skill and care in the ~~design~~, fabrication and construction of the Arch and the design of the Arch connections.
 - (iii) There was no agreed contractual programme for the lifting of the Arch hence CBUK was not obliged to complete this operation by any specified date. Even if the chords, at the time of the survey conducted by CBUK, were outside of contractual tolerances, that does not of itself, constitute a breach of contract. CBUK did not assume a contractual obligation to achieve contractual chord tolerances prior to the erection of the Arch or by any specific date.

33.2 For these reasons, paragraph 33 is denied.

33A.1 It is denied that CBUK was in breach of clause 9 of the Heads of Agreement by failing to complete the raising of the Arch by 21 April 2004 as alleged in paragraph 33A or at all.

33A.2 In support of this denial, CBUK will rely on the following:

- (a) CBUK was prevented from complying with clause 9 by Multiplex, as set out in paragraph 35.2 of the Defence.
- (b) Further, by clause 9 of the Heads of Agreement, CBUK was under an obligation to complete the raising of the Arch by 21 April 2004, subject to extensions of time. CBUK was entitled to an extension of time because the raising of the arch was delayed by the failure of Multiplex's concrete sub-contractor PC Harrington, ("Harrington") to use the

correct grade of concrete in the Arch foundations and by its defective workmanship in the laying of the Arch foundations and/or the conduct of Multiplex. CBUK will rely on the facts and matters pleaded at paragraph 35.2 of the Defence.

33A.3 Further or in the alternative, Multiplex is precluded and/or estopped from alleging that any breach on the part of CBUK of clause 9 of the Heads of Agreement caused it any losses. CBUK will rely on the facts and matters pleaded at paragraph 35.3 of the Defence.

33A.4 Further and in any event, if (contrary to CBUK's primary case), the effect of the Supplemental Agreement on the Heads of Agreement was to supersede, with retrospective effect, the terms of the Heads of Agreement that were inconsistent with the corresponding terms of the Supplemental Agreement, clause 9 of the Heads of Agreement was superseded because:

- (a) The lifting of the Arch formed part of the Sub-Contract Works. CBUK will rely on clause 6.2 of the Supplemental Agreement.
- (b) The Supplemental Agreement provided that the adjusted period for the carrying out and completion of the whole Sub-Contract Works was 26 weeks commencing on 15 February 2004. CBUK will rely on clause 9.4 of the Supplemental Agreement.
- (c) As a result, the Supplemental Agreement provided that the Arch lift should take place within the period of 26 weeks commencing on 15 February 2004 and superseded clause 9 of the Heads of Agreement.

34. For the reasons set out at paragraphs 16 to 33 of this Defence, paragraphs 34 and 35 are denied.

35.1 Further, if and insofar as the Arch Members were out of contractual tolerance, then CBUK will contend as follows:

- (a) By clause 2.1 of the Supplemental Agreement, the parties settled all disputes and all and any claims under or in connection with the Sub-Contract, existing on or before 15 February 2004 and Multiplex is debarred from pursuing for any matter arising from any event or circumstance occurring up to or including 15 February 2004.

- (c) Clause 2.1 was expressed to be subject to clause 2.2 which provided that clause 2.1 would not apply to any claim that Multiplex might have for design, workmanship or materials not being in accordance with the Sub-Contract.
- (d) On a true construction of clause 2.2 it applies only to future claims by Multiplex and does not permit Multiplex to make a claim in respect of a matter which was known at 15 February 2004.
- (e) The claim in respect of the Arch Members was known at 15 February 2004 and, as a result, Multiplex are debarred from pursuing it.
- (f) In any event, as at the date of execution of the Supplemental Agreement there were no defects in the Arch and it is not alleged that any have arisen since that date.

35.2 Further and in any event, any delay in respect of which Multiplex seeks damages was not caused by the alleged breaches of contract and/or negligence by CBUK but the failure of Multiplex's concrete sub-contractor PC Harrington, ("Harrington") to use the correct grade of concrete in the Arch foundations and by its defective workmanship in the laying of the Arch foundations and/or the conduct of Multiplex. CBUK will rely on the following:

- (a) Although it was contemplated by Multiplex that the grade of concrete which Harrington would use for the Arch foundations would change from C40 to C60, Multiplex failed to issue any instruction to Harrington to do this. On about 12 December 2003 Harrington began pouring the concrete to the east foundation using C40 concrete. On about 12 January 2004 Harrington began pouring the concrete to the west foundation again using C40 concrete. The pours on both bases were completed by about 14 and 23 January 2004 respectively.
- (b) Multiplex was aware that Harrington had used the incorrect grade of concrete and of the presence of voids in the concrete by at the latest 2 March 2004. Multiplex required Harrington to remove the concrete around the Arch foundations and repour.
- (c) Harrington commenced concrete remedial works on or about 8 March 2004 with the hydro-cutting of defective concrete and the removal of some of the existing reinforcement in the arch base foundation to allow

removal of the concrete. Between 17 and 20 May 2004, further reinforcement was added to the foundations and new concrete was poured in both arch bases. These works were complete only when the newly laid concrete had gained sufficient strength to lift the Arch on or about 21 May 2004. CBUK were verbally advised by Multiplex that it could not work in the East and West arch base foundation areas during this period.

- (d) The Arch lift could not ~~be lifted~~ progress beyond 33% loading before 21 May 2004 because there were insufficient foundations for it (see further sub-paragraph (g) below).
- (e) Further Multiplex instructed CBUK not to fit the bearings to the east and west arch bases (which physically connected the Arch to the rotation assemblies and were a necessary precondition to the lifting of the Arch) until after the concrete repairs had been carried out and instructed CBUK to weld approximately 450 vertical extension pieces to the west end arch base reinforcement, to install strengthening plates to some of the arch nodes, and to undertake various types of strengthening works to the cast-ins. These instructions resulted in a delay to the lifting of the Arch. In particular:
 - (i) By an instruction dated 31 March 2004 Multiplex required CBUK to supply, fabricate and install plates and Macalloy bars to the West arch bases. CBUK was given access to the West base on about 20 April 2004 and it completed these works on 9 May 2004.
 - (ii) By instructions dated 1 April and 13 May 2004 Multiplex further instructed CBUK to carry out the provision and welding of additional plates and couplers, the supply of the Macalloy bars to the eastern arch base and to cut further holes in the drum of the cast-in. CBUK was given access to the East base on about 20 April 2004 and it completed these works by about mid May 2004.
 - (iii) On about 27 April 2004 Multiplex further instructed CBUK to weld approximately 450 vertical extension pieces to the West end

arch base reinforcement. This work was completed by about 13 May 2004.

The arch could not be lifted while the concrete repairs and the arch base remedial strengthening works referred to above were being carried out.

- (f) Further, the arch roll up procedure sign off could only occur (and the arch lift continue) once certain information (including FOS information concerning the temporary pulling bases and information concerning the strength of the concrete foundation) had been received from Multiplex, which only occurred by about 21 May 2004. On that date CBUK received from Multiplex a letter enclosing concrete cube crush results “confirming that the required concrete strength has been obtained” and a letter from MSC to Multiplex confirming the relevant FOS (or load factor) for the pulling bases.

(fA) Further the Arch Lift could not progress further until 22 May 2004 as a result of the following:

- (i) On or about 18 to 20 May 2004 Multiplex undertook remedial works to the pulling bases by placing substantial quantities of kentledge (ballast) onto pulling bases JB1 (about 150 tonnes) and JB5 (about 80 tonnes). This kentledge was required because otherwise those pulling bases would have been inadequate for the load being applied during roll up. The arch lift could not have occurred prior to the placing of that kentledge. The reason this kentledge was added was because once the loading information was obtained from MSC it established that the FOS for pulling bases JB1 and JB5 was inadequate and hence further support was required to make the FOS satisfactory. CBUK will refer to MSC’s letter of 21 May 2004 to Multiplex.
- (ii) On 21 May 2005 Multiplex sought a concession from CBUK to allow the reduction of the nominal transverse loading on JB1 and JB5 from +/-11000kN to +/-200kN. CBUK provided this concession. The arch roll up could not have occurred prior to that concession being provided.

- (iii) CBUK only received approval to all its temporary and permanent design submissions from Multiplex on 21 May 2004. The arch roll up could not occur until those submissions had been approved.
- (iv) Further, it was only on 21 May 2004 that, by signing the relevant parts of the Arch Roll-up Manual Control Document (i.e. the “Interface” between “the Concrete Substructure” and the “Cast-in Steelwork” in relation to all the pulling bases, turning and restraint bases), Multiplex accepted responsibility that the foundations of the temporary bases had been designed so that the steel embedments in those bases would not be pulled out of the foundation when subject to the load of arch roll-up. The signing off of that Manual was a necessary pre-cursor to arch roll-up.
- (g) The chord remedial works were in fact completed by about 29 April 2004 and stage 1 of the initial lift of the arch was commenced on 1 May 2004 but had to stop at 33% of the load because the concrete rectification works were incomplete, because the bearings had not been fitted and because of the lack of the information referred to at (f) above.
- (gA) Although the arch lift continued on 22 May 2004, CBUK was only provided assurance concerning the adequacy of the restraint bases at the beginning of June 2004. Absent that assurance the arch lift could not have proceeded beyond 31 degrees (because thereafter the restraint bases would start to take strain).
- (h) Multiplex claims loss and damage arising from the alleged arch delays in paragraphs 34 and 76 and in Scott Schedule 2A where the claims are based on what is described as the “delay to the arch lift of 69 days”. The period of 69 days appears to be 21 April 2004 to 29 June 2004 (although this is not pleaded anywhere by Multiplex). The claims in Scott Schedule 2A based on the alleged arch delays are all themselves based upon this alleged 69 days delay. As regards this:
- (i) If and insofar as it is so alleged, it is denied that CBUK was in breach of contract or negligent.

- (ii) On the contrary, as explained above, Multiplex was itself in breach of contract.
- (iii) If, which is denied, CBUK was in breach of contract or negligent, it is denied that CBUK was responsible for any critical delay to the arch lift (or for the purposes of Scott Schedule 2A, any critical delay to the project).
- (iv) If, which is denied, CBUK was in breach of contract or negligent and if, which is denied, CBUK was responsible for any critical delay to the Arch Lift, then the period of delay was not 69 days and accordingly all claims based upon an alleged delay of 69 days by CBUK must fail.
- (v) Further and in any event, Multiplex and its sub-contractor Harrington, was responsible for all, or if not all, then a significant proportion of those delays as explained above and, accordingly, all claims based on an alleged delay of 69 days by CBUK must fail.

~~As a result of these matters any breach on the part of CBUK, which is denied, did not cause any losses in respect of which Multiplex claims damages; the dominant cause of such losses was Multiplex's own conduct and/or the acts and omissions of Harrington, set out above.~~

35.3 Further, and without prejudice to what is pleaded above, on 28 April 2004 CBUK wrote to Multiplex stating that its concern with leaving the bearings until last is that Multiplex might “deem CBUK to the dominant concurrent delay” and sought, in order to alleviate this concern, Multiplex’s written assurance that it would hold CBUK “harmless from any charges relating to the time differential in the arch remediation works”. Mr Muldoon on behalf of Multiplex orally agreed with Mr Rogan as follows:

- (a) That the problems with the concrete were the dominant cause of the delay in lifting the Arch.
- (b) That the Arch could not be lifted until after the concrete rectification works had been completed.

- (c) That CBUK could leave out the bearings and would not at a later date try to claim the steel tolerance issues had caused the arch to be erected late.

In reliance on this agreement and/or the representations made by Mr Muldoon, CBUK did not fit the bearings until 19 to 21 May 2004. Multiplex is accordingly precluded and/or estopped from alleging that any breach on the part of CBUK in respect of arch chords caused it any losses. This agreement and/or representations are evidenced by a letter from Multiplex to CBUK dated 19 May 2004 in which it was written "... we confirm Ashley Muldoon's verbal advise [sic] to Brian Rogan that it is agreed that the arch bearings could not be installed until after the rectification works have been completed".

35.4 Further, and without prejudice to what is pleaded above, in so far as the need arose to replace the chords by reason of their deviation from straightness then the need to replace the chords did not arise by reason of any breach of duty on the part of CBUK and any losses sustained by Multiplex were not caused by any breach of duty by CBUK.

35.5 Further, it (if and insofar as it is so alleged) is specifically denied that Multiplex programmed its works and those of its other sub-contractors in reliance on clause 9 of the Heads of Agreement having placed CBUK under a legal obligation to complete the raising of the Arch by 21 April 2004. CBUK will rely on the fact that, at all relevant times, Multiplex believed that the Heads of Agreement was not intended to create legal relations and was not a binding or concluded agreement (as pleaded at paragraph 33 of the Reply and Defence to Counterclaim).

Alleged Defective Work

36.1 As to paragraph 36:

- (a) It is admitted that CBUK commenced offsite bowl steelwork fabrication at its Darlington factory in or about June 2003.
- (b) It is admitted that CBUK commenced on-site erection ~~in~~ on or about 22 September 2003.

36.2 With the exception of the above, paragraph 36 is denied.

37.1 As to paragraph 37:

- (a) It is admitted that between February and August 2004 CBUK continued with the offsite fabrication of bowl steelwork.
- (b) It is denied that defects became apparent in either fabricated or erected bowl steelwork as alleged.
- (c) At a site meeting between representatives of Multiplex and CBUK which took place on 27 July 2004 they inspected the bowl steelwork erected and listed the items of incomplete work. The purpose of these inspections was to agree the status of the work at the date on which CBUK left site. It was not a schedule of defects. The items listed would have been completed by CBUK in the normal course had Multiplex not served a notice under clause 8 of the Supplemental Agreement, as pleaded at paragraph 50 (“the Clause 8 Notice”).
- (d) The service of the Clause 8 Notice had the effect of removing the on-site works from the Amended Sub-Contract and, as a result, CBUK cannot be in breach of contract for failing to complete works which had not been done as at 28 July 2004.
- (e) Further and in any event, the effect of the service of the Clause 8 Notice was that CBUK were required to stop working on site on 28 July 2004 irrespective of the status of the works. Works which were incomplete on this date were not defective and would have been completed by CBUK in the ordinary course but for the service of the notice by Multiplex.
- (f) It is admitted that Multiplex commissioned a company called Sandberg to carry out a review of the steelwork provided by CBUK.

37.2 With the exception of the above, paragraph 37 is denied.

38. As to paragraph 38:

- (a) CBUK cannot at present plead properly to Schedules 1A and 1B because they are unclear and inadequately particularised. ~~It will provide Further Information after consideration of the results of its inspection of the items referred to in Schedule 1.~~

- (b) Without prejudice to the above, any alleged defects that may be the subject of a claim by Multiplex are in fact items where CBUK's work is incomplete and where it had no opportunity to complete that work due to Multiplex's having served the Clause 8 Notice which resulted in CBUK leaving site on or about 28 July 2004.
39. Paragraph 39 is currently so inadequately pleaded that CBUK cannot respond to it until the provision of Further Information. It is denied that CBUK was in breach of duty in relation to the bowl steelwork as alleged in paragraph 39. CBUK cannot plead properly to Schedule 1D because it is unclear and inadequately particularised.
40. As to paragraph 40:
- (a) CBUK is unable to plead properly to paragraph 40 because it is at present inadequately pleaded. Schedule 1C is so inadequately pleaded that it should be struck out.
- (b) Without prejudice to the above, any alleged omissions are in fact items where CBUK's work is incomplete. CBUK did not complete these works because it accepted Multiplex's repudiatory breach of the Amended Sub-Contract on 2 August 2004.
- 41.1 As to paragraph 41:
- (a) It is admitted that, on completion of the Arch lift, it became apparent that 4 of the Bridon cable connections suspended from the Arch were twisted. During the course of erection of the Arch lift personnel from Bridon International Limited ("Bridon") were in attendance. On discovery of the twisting CBUK immediately carried out (in conjunction with Babtie and Bridon) an engineering assessment of the forestays in question and concluded that the 180 degree twist was not detrimental to their ultimate breaking capacity. It was decided that that the four cables should be disconnected from the catenary nodes at their lower ends and re-connected the correct way round however CBUK

was removed from the site, as pleaded at paragraph 50, prior to its being able to carry out these works.

- (b) The alleged inspection by Bridon in October 2004 and the reporting of its result to Multiplex are not admitted.
- (c) It is admitted that works to the Bridon cables are required. The extent of these works is not admitted.

41.2 With the exception of the above, paragraph 41 is denied.

41A. CBUK cannot plead properly to Schedule 1E because it is unclear and inadequately particularised.

42. As to paragraph 42:

- (a) CBUK is unable to plead properly to paragraph 42 because it is at present inadequately pleaded.
- (b) Without prejudice to the above, it is denied that CBUK is in breach of the Sub-Contract and/or the Amended Sub-Contract as alleged or at all.

43.1 As to paragraph 43:

- (a) It is denied that Multiplex is entitled to make the purported deduction or that it is entitled to damages.
- (b) It is denied that clause 21.3.2.1 of the Amended Sub-Contract provides the entitlement alleged.
- (c) Without prejudice to what is pleaded above, the purported deductions at “M – Abatement for defective work” of Schedule 2 are wholly unsupported and arbitrary figures.
- (d) In particular any expenditure Multiplex may incur in respect of the Bridon cables will have been increased by reason of its failure to take any steps, in breach of its duty to mitigate its loss, to remedy the twists in the cables, between June 2004 and January 2005 (or the date when such remedying takes place, if later).

43.2 For these reasons, paragraph 43 is denied.

44. Paragraph 44 is denied for the reasons set out at paragraph 43.

Events in June 2004

45.1 As to paragraph 45:

- (a) It is denied that Multiplex made any proper attempts to reach agreement with CBUK on a new programme for the completion of the steelwork and a new fixed lump sum and/or reimbursable Sub-Contract Sum for the completion of CBUK's work in accordance with clause 7 of the Supplemental Agreement.
- (b) It is admitted that from time to time between May 2004 and 16 June 2004 Multiplex informally approached CBUK and raised the issue of a new programme and price. These informal approaches were not made in accordance with clause 7 of the Supplemental Agreement which was not executed until 16 June 2004. In response to Multiplex's informal approaches, CBUK gave indicative prices and programme dates but made it clear that a formal agreement as to a new programme and price could not be concluded until the Supplemental Agreement was executed.
- (c) It is admitted that Mr Stagg raised the matter directly with Mr Grant before 16 June 2004. Mr Grant ~~who~~ made it clear that the Supplemental Agreement had to be agreed first. Mr Stagg agreed with this approach.

45.2 With the exception of the above, paragraph 45 is denied.

46. As to paragraph 46:

- (a) It is denied that CBUK was in breach of any obligations (which are not identified in the Consolidated Particulars of Claim) in failing to provide a programme or price proposal until 14 June 2004. In particular, CBUK was not under any obligation to provide a new programme or price proposal in the period of 4 months prior to 14 June 2004 (and no such obligation is pleaded by Multiplex).
- (b) It is admitted that on 14 June 2004 CBUK provided a new programme and price proposal as alleged. The programme envisaged CBUK completing its work within 13.5 months from 28 June 2004.

47. As to paragraph 47:
- (a) It is admitted that there was a meeting on 22 June 2004 between Mr Muldoon and Mr Rogan. This meeting was arranged by Mr Rogan in order to discuss clause 7 of the Supplemental Agreement and CBUK's proposal.
 - (b) In advance of the meeting Mr Rogan prepared Draft Heads of Agreement which he handed to Mr Muldoon at the meeting. Mr Rogan and Mr Muldoon discussed the Draft Heads of Agreement at the meeting.
 - (c) It is admitted that Mr Muldoon and Mr Rogan met again on 23 June 2004 to further discuss the Draft Heads of Agreement. At this meeting, Mr Rogan presented a Revised Draft Heads of Agreement.
 - (d) The meeting on 23 June 2004 was very brief, lasting less than 10 minutes. After reading the Revised Draft Heads of Agreement, Mr Muldoon said that Multiplex had a decision to make and would do so by 29 June 2004, as envisaged by the Supplemental Agreement.
 - (e) It is denied that Mr Rogan said at this meeting that it was "too hard" for CBUK to provide a fixed price because the price would be "too high" or that CBUK wanted a cost-plus arrangement.
 - (f) On 24 June 2004, Mr Muldoon telephoned Mr Rogan and stated that Multiplex had decided that it wanted to reach agreement with CBUK to stay and complete the works on site in line with the revised Heads of Agreement that had been supplied the previous day.

47.2 With the exception of the above, paragraph 47 is denied.

48. As to paragraph 48:

- (a) It is admitted that Multiplex wrote a letter dated 24 June 2004
- (b) It is admitted that CBUK replied to that letter by letter dated 28 June 2004.

49. As to paragraph 49:

- (a) It is admitted that Mr Muldoon and Mr Rogan met on 29 June 2004.

- (b) During that meeting Mr Muldoon stated that the CBUK letter did not meet Multiplex's requirements and that a two-month delay to the programme was unacceptable, as were CBUK's cost proposals. Mr Muldoon said that he was invoking the clause 8 notice provision.
 - (c) It is denied that Mr Rogan "confirmed" that CBUK was not prepared to put forward a fixed price.
50. As to paragraph 50, it is admitted that by letter dated 30 June 2004 Multiplex gave the Clause 8 Notice to CBUK, being 28 day's written notice to remove from the Amended Sub-Contract the unperformed reimbursable cost items contained in Schedule 1, paragraph (c).
51. Paragraph 51 is admitted. The sum of £500,000 was only paid pursuant to an Adjudicator's award, dated 5 November 2004.

June 2004 Valuation

52. As to paragraph 52, it is admitted that on 6 July 2004 (not 6 July 2003) CBUK made Application for Payment Number 23 for the period ending 30 June 2004 and that in that Application the total value of the Works (net of retention) was stated to be £58,626,501.43. The sum claimed was £5,020,420.76, the sum of £53,606,080.67 having already been paid.
53. As to paragraph 53:
- (1) As set out at paragraph 85(4)(c) of the Counterclaim, CBUK and Multiplex had previously agreed a gross valuation as at 15 February 2004 in the sum of £32.66million.
 - (2) For these reasons, paragraph 53 is denied.
- 54.1 As to paragraph 54:
- (a) Paragraph 54 is currently so inadequately pleaded that CBUK cannot respond to it until the provision of Further Information by Multiplex.
 - (b) Without prejudice to this contention:

- (i) It is denied that CBUK claimed monies which were not justified and in respect of which timesheets were not produced.
 - (ii) CBUK made proper allowance for staff costs referable to the cost of the Arch member remedial works (which costs CBUK was not, in any event, obliged to meet).
 - (iii) All costs claimed by CBUK were properly referable to on-site erection and site works.
 - (iv) CBUK's overtime costs were justified. On a number of occasions Multiplex sought additional overtime working by CBUK on site.
 - (v) CBUK's redundancy costs were properly recoverable. CBUK has claimed only those redundancy costs which are directly attributable to the Wembley contract and which accrued during this period.
 - (vi) It is denied that travel costs were claimed which were not referable to the project.
- (c) It is denied that the proper value of the on-site costs to 30 June 2004 was £7,090,603.30. The decision of the Adjudicator is only binding until the dispute as to the proper value of the on-site costs to 30 June 2004 is finally determined in this action. Multiplex is not entitled to rely on the sum determined by Adjudicator and must prove the proper value of the on-site costs which it contends were not reasonably or properly incurred.
- (d) CBUK will plead further to these allegations when proper information has been provided.
- ~~The costs claimed by CBUK for site works during the period 15 February 2004 to 16 June 2004, were claimed pursuant to clause 8 of the Heads of Agreement (pleaded at paragraph 84.3(3) of the Counterclaim) which entitled CBUK to reimbursement for erection and site works "at cost" and contained no provision that such costs should be reasonably or properly incurred.~~
- (e) ~~Further and in any event, CBUK will say:~~

- ~~(i) It was understood by CBUK and Multiplex at the time at which the Heads of Agreement was concluded that a period of “costs reimbursable” working was required to allow CBUK to deal with the consequences of the variations and delays over the period 6 months.~~
- ~~(ii) CBUK employed a team of workmen on site who were, throughout, properly engaged in tasks under the Sub-Contract.~~
- ~~(iii) It is denied that a reasonably skilled and competent steelwork contractor would have achieved a steelwork erection rate of 400 tonnes/week.~~
- ~~(iv) CBUK’s on site steelwork erection rates were adversely affected by factors such as site access constraints, site retrofit and reworks, site variations and changes, lack of availability of cranes, disruption as a result of the activities of other sub-contractors on site, ground conditions, and lack of adequate lay down areas.~~

54.2 For these reasons, paragraph 54 is denied.

55.1 As to paragraph 55, it is admitted that Multiplex issued Payment Certificate Number 37 on 16 July 2004, showing a valuation to 30 June 2004 as £41,195,829.42, and seeking repayment of the sum of £12,410,251.25 plus VAT.

55.2 With the exception of the above, paragraph 55 is denied. As set out at paragraph 85 of the Counterclaim, CBUK and Multiplex had previously agreed that the final valuation of work undertaken by CBUK to 15 February 2004 would be £32.66 million.

56. As to paragraph 56:

- (1) It is admitted that Multiplex issued Certificate of Payment No.38 as alleged.
- (2) For the reasons set out above and in the Counterclaim, it is denied that Multiplex was entitled to issue this certificate.

57.1 As to paragraph 57:

- (a) It is admitted that Mr Stagg telephoned Mr Grant on Friday 16 July 2004 at about 4.30pm prior to the issue of Certificates No.37 and 38, which were sent by fax at about 5.00pm.
- (b) It is denied that either Mr Stagg or Mr Cursley consulted with Mr Grant on the deduction that Multiplex proposed to make against CBUK's Applications for Payment. Mr Stagg merely indicated that there was a "drastic reduction" from CBUK's application, as confirmed by Mr Grant's letter to Mr Stagg dated 16 July 2004. Mr Grant suggested that he and Mr Stagg meet, over the weekend if necessary. Mr Stagg refused.
- (c) Prior to 16 July 2004 attempts by Mr Grant to contact Mr Stagg had proved fruitless.
- (d) On Wednesday 21 July 2004 Mr Stagg summoned Mr Underwood and Mr Thomas of CBUK to his office for a meeting at short notice. At this meeting he demanded payment of Multiplex's invoice, failed to allow CBUK to respond and terminated the meeting abruptly. A few hours later Multiplex served an Adjudication Referral Notice.

57.2 With the exception of the above, paragraph 57 is denied.

58. As to paragraph 58:

- (a) It is admitted that Multiplex issued invoice Number 00376 dated 16 July 2004 to CBUK for the sum of £11,874,500.35 plus VAT (being the total sum of £13,952,537.91).
- (b) It is denied that Multiplex was entitled to issue such an invoice or that the sum claimed or any sum was in fact due to Multiplex from CBUK.

59. Paragraph 59 is admitted.

60. As to paragraph 60:

- (a) It is admitted that, under the terms of clause 21.10.2 of the Amended Sub-Contract, the final date for the payment of any sum due from CBUK to Multiplex was 30 July 2004.

- (b) It is denied that any sum was, in fact, due from CBUK to Multiplex under Invoice Number 000376. CBUK will rely on paragraphs 87 to 93 of the Counterclaim.
 - (c) For these reasons it is denied that CBUK's failure to pay the sum of £11,874,500.35 plus VAT was wrongful or in breach of contract.
61. Accordingly, it is denied that Multiplex is entitled to payment of the sum of £11,874,500.35 plus VAT pursuant to the Amended Sub-Contract as alleged in paragraph 61 or at all.
62. It is denied that Multiplex has suffered loss or damage or that Multiplex is entitled to the sum of £11,874,500.35 plus VAT or any sum as damages for breach of the Amended Sub-Contract as alleged in paragraph 62 or at all.

Programme Delays

- 63.1 As to paragraph 63:
- (a) It is admitted clause 3.3 provides as follows: "The Sub-Contract Works shall be completed in accordance with the revised programme contained in Schedule 4" [off site works – drawings and fabrication].
 - (b) Schedule 4 deals only with off-site works, that is the delivery of drawings and fabrication. No programme was agreed for on-site works.
- 63.2 It is denied that CBUK was in breach of the obligation pleaded at paragraph 63. CBUK relies upon the following:
- (a) As pleaded at paragraph 50, on 30 June 2004 Multiplex served the Clause 8 Notice on CBUK. As a result clause 9.4 was applicable.
 - (b) The Supplemental Agreement cannot be properly construed as retrospectively imposing obligations on CBUK to complete certain works by certain dates as set out at Schedule 4. Such a construction would have meant that at the date of execution of the Supplemental Agreement CBUK was already in immediate breach.

- (c) The reason why CBUK had not completed the various works by the various dates referred to in the Particulars to paragraph 64 was because of variations instructed by Multiplex after 15 February 2004.

64. As to the paragraph 64 CBUK pleads as follows:

(a) Bowl (PH11-18) Band 1

Multiplex's factual case as regards Activities 0001, 00012, 00013 and 00015 is admitted.

(b) Bowl (PH21-28) Band 2

(i) As regards Activity 0005 it is denied that drafting was not properly completed prior to 5 August 2004. In fact it was completed by mid-June; thereafter there were merely revisions caused by Multiplex variations.

(ii) Multiplex's factual case as regards Activity 00016 is admitted.

(c) Bowl (PH31-38) Band 3

(i) As regards Activity 0007, it is denied that the design was not completed prior to 5 August 2004. In fact it was completed by mid-June 2004; thereafter there were merely revisions caused by Multiplex variations.

(ii) As regards Activity 0009, it is denied that the drafting was not properly completed prior to 5 August 2004. In fact it was completed by mid-July 2004; thereafter there were merely revisions caused by Multiplex variations.

(iii) Multiplex's factual case as regards Activity 00020 is admitted.

(d) PPT

Multiplex's factual case as regards Activities 0019 and 0020 is admitted.

(e) Roof

Multiplex's factual case as regards Activities 0300, 0302, 0312, 0314, 0322, and 0324 is admitted.

65. As to paragraph 65:

- (a) It is denied that Multiplex has suffered loss and damage by reason of the alleged breaches of contract or negligence by CBUK.
- (b) CBUK is unable to plead further to this paragraph in the absence of Further Information as to the loss and damage alleged to have been suffered.
- (c) Without prejudice to this contention, the alleged delays which Multiplex complains of related to off-site activity which had no impact on on-site progress. At the time that notice was served under clause 8 of the Supplemental Agreement, over 5000 tonnes of fabricated steel were on site or in holding yards adjacent to the site and available for erection.

Steelwork Erection Rate

65A.1 As to paragraph 65A:

- (a) It is admitted that, by clause 9 of the Heads of Agreement, it was provided that during the period of 3 months ending on 15 May 2004 CBUK was “to complete the works in accordance with the [Projected CBUK Programme] ...(subject to EOTs)”.
- (b) CBUK will contend that, on its true construction, clause 9 required CBUK to continue to carry out the Sub-Contract Works in the sequence set out in the Projected CBUK Programme but did not require it to complete any particular activity by any particular date.
- (c) It is admitted that, by activity 00021, the Projected CBUK Programme contemplated the completion of phases 11 to 18 of the bowl steelwork by 26 July 2004.
- (d) It is specifically denied that clause 9 required CBUK to complete phases 11 to 18 of the bowl steelwork by 26 July 2004. In support of this denial, CBUK will rely on the fact that clause 9 only dealt with the period 15 February to 15 May 2004 and did not deal with the works which were to be carried out in the period 16 May to 26 July 2004.
- (e) Further or in the alternative, if (contrary to CBUK’s primary case), clause 9 placed CBUK under an obligation to complete phases 11 to 18 of the bowl steelwork by 26 July 2004, CBUK will contend that it was

entitled to an extension of time because the raising of the arch was delayed by the failure of Harrington, to use the correct grade of concrete in the Arch foundations and by its defective workmanship in the laying of the Arch foundations and/or the conduct of Multiplex. CBUK will rely on the facts and matters pleaded at paragraph 35.2 of the Defence.

65A.2 With the exception of the above, paragraph 65A is denied.

65B. As to paragraph 65B:

- (a) It is denied that CBUK was under any contractual obligation to complete the erection of Phases 11 to 18 of the bowl steelwork by 26 July 2004.
- (b) It is denied that CBUK was under any implied obligation to achieve any “average on-site steelwork erection rate” during the period 15 February to 26 July 2004 – whether or 400 tonnes/week or any other tonnage. It was not reasonable or necessary to imply such an obligation and such an obligation did not arise under clauses 4.1.1 or 4.1.4 of the General Conditions of the Sub-Contract or clauses 3.03(d) or 3.05 of the Special Conditions of the Sub-Contract.
- (c) It is specifically denied that an express or implied term of the Heads of Agreement could give rise to an obligation to achieve any particular average on-site steelwork erection rate during the period 15 May to 26 July 2004. By its terms, the Heads of Agreement only dealt with the obligations of the parties during the period 16 February to 15 May 2004.
- (d) If (contrary to CBUK’s primary case) it was under any implied obligation to carry out the Sub-Contract Works with reasonable diligence and/or to maintain reasonable progress, this did not place CBUK under an obligation to achieve any “average on-site steelwork erection rate” but, rather, an obligation to erect such daily tonnage of steel as was reasonable in the circumstances including, in particular, the conditions on site each day.

65C.1 It is denied that a reasonably skilled and competent steelwork sub-contractor would have achieved an average erection rate of 400 tonnes/week in the period 15 February to 26 July 2004.

65C.2 The achievable erection rates depended on what was happening on site during the relevant period. In fact, CBUK's on-site steelwork erection rates were adversely affected by factors such as site access constraints, site retrofit and reworks; site variations and changes, lack of availability of cranes, disruption as a result of the activities of other sub-contractors on site, ground conditions, and lack of adequate lay down areas.

65C.3 As to the matters relied on as "evidencing" the allegation that a reasonably skilled and competent steelwork contractor would have achieved:

- (i) It is admitted that CBUK issued programme WS05-v1 in February 2004 ("WS05-v1").
- (ii) It is admitted that WS05-v1 showed planned tonnages of erection (as set out at paragraph 65D). These were CBUK's best estimates based on its then understanding of site conditions which would appertain during the relevant period (including the likely date of the Arch lift).
- (iii) It is denied that Multiplex relied on WS05-v1 as alleged or at all.

65D. As to paragraph 65D:

- (a) It is admitted that CBUK's average on-site steelwork erection rate between 15 February and 30 June 2004 was 202 tonnes/week.
- (b) It is further admitted that the rate of steelwork erection achieved by CBUK and rates predicted by CBUK are set out in the Table at paragraph 65D.
- (c) It is denied that by erecting steel on-site at the average rate of 202 tonnes/week during the period 15 February and 30 June 2004 CBUK was in breach of its contractual obligations to Multiplex as alleged or at all.

65E.1 It is denied that CBUK was in breach of the express or implied terms of the Sub-Contract or the Amended Sub-Contractor or the Heads of Agreement or of any common law duties of care as alleged in paragraph 65E or at all.

65E.2 As to the Particulars pleaded at paragraph 65E:

- (i) It is admitted that CBUK did not erect an average of 400 tonnes/week of bowl steelwork between 15 February and 30 June 2005.
- (ii) It is admitted that, by 30 June 2005 CBUK had erected 6687 tonnes of Phase 11-18 bowl steelwork and that it would have been unable to erect the remaining Phases 11 to 18 bowl steelwork by 26 July 2004.
- (iii) It is denied that CBUK failed in the respects set out in sub-paragraphs (c) to (k). CBUK will plead further to these allegation when further information has been provided as to the precise respects in which, it is alleged, that CBUK failed to under each sub-paragraph.
- (iv) It is denied that CBUK failed to exercise reasonable skill and care as alleged or at all.

65F. Paragraph 65F is denied. CBUK reserves the right to plead further to this allegation when further information has been provided as to causation of the alleged loss and damage by the alleged breaches.

Repudiation of the Sub-Contract

66.1 As to paragraph 66:

- (a) The precise time at which Multiplex received CBUK's letter of 23 July 2004 is not admitted.
- (b) In this letter CBUK specifically stated that unless Multiplex took the steps set out therein, it would accept Multiplex's repudiatory breach.

66.2 With the exception of the above, paragraph 66 is admitted.

67. As to paragraph 67, it is admitted that Multiplex replied to CBUK's letter by its solicitors' letter dated 26 July 2004.

68. As to paragraph 68 it is admitted that CBUK sent to Multiplex a letter dated 2 August 2004. In that letter CBUK wrote:

“You have not remedied the breaches specified in our letter of 23 July 2004 and in particular, you have not reinstated the agreed gross valuation as at 15 February 2004 in the sum of £32.66m.

Accordingly, we give notice that we accept your conduct as showing an intention no longer to be bound by either the Sub-Contract dated 26 September 2002 or the Supplemental Agreement dated 16 June 2004 and advise you that we will carry out no further work on this project pursuant to the Sub-Contract or the Supplemental Agreement. As a consequence we will demobilize today.”

It is denied that this letter was written in repudiatory (or any) breach of contract.

69. As to paragraph 69:

(a) It is admitted that Multiplex wrote a letter dated 5 August 2004 in which it was stated:

“We reject your suggestion that we are in repudiatory breach of contract or that any of the alleged grounds upon which you purport to rely could, or do, form any basis for an allegation of repudiatory breach. In these circumstances, we regard your letter of 2 August 2004 and your refusal to carry out further work on the Wembley National Stadium as repudiatory breaches of contract. Our rights in respect of such repudiation are hereby reserved...”

(b) With the exception of the above, paragraph 69 is denied.

70. As to paragraph 70:

(a) It is denied that Multiplex has suffered loss and damage by reason of the alleged breach of contract or negligence by CBUK.

(b) CBUK is unable to plead further to this paragraph in the absence of Further Information as to the loss and damage alleged to have been suffered.

July 2004 Valuation

71. Paragraph 71 is admitted.

72. As to paragraph 72:

- (a) The first sentence is not admitted.
- (b) The remaining sentences are denied for reasons set out above.
- (c) Further and in any event, if (which is denied) CBUK repudiated the Amended Sub-Contract, it is denied that Multiplex was released from its obligations either to issue a Payment Certificate or make payment to CBUK in respect of work undertaken up to 2 August 2004. Indeed, at Paragraph 74 Multiplex purports to value those works, albeit that Schedule 2 constitutes a purported valuation only to 30 June 2004.

73. For these reasons, paragraph 73 is denied.

Loss and Damage

74. For the reasons set out above paragraph 74 is denied.

75. For the reasons set out above, paragraph 75 is denied.

76. As to paragraph 76 and Schedule 3:

- (a) Multiplex has not provided sufficient information to allow CBUK properly to plead to these allegations.
- (b) Further, for the reasons pleaded above, it is denied that Multiplex is entitled to any damages in respect of the matters pleaded at paragraphs 16 to 35, paragraphs 63 to 65 or paragraph 54.
- (c) In particular, CBUK was not obliged to construct the Arch or undertake the Activities set out at Schedule 4 to the Amended Sub-Contract by a contractually agreed date and hence any expenses incurred by Multiplex in order to accelerate the completion of the Sub-Contract works are not ascribable to any breach on the part of CBUK.

77. As to paragraph 77 and Schedule 4:

- (a) Multiplex has not provided sufficient information to allow CBUK properly to plead to these allegations.

(b) Further, for the reasons pleaded above, it is denied that Multiplex is entitled to any damages in respect of the matters pleaded at paragraphs 66 to 70.

78. For these reasons, it is denied that Multiplex is entitled to damages for breach of contract or of any duty of care at common law, as alleged in paragraph 78 or at all.

79. The claim to interest at paragraph 79 is accordingly denied.

79A. Further, by operation of clause 12.2 of the Amended Sub-Contract, Multiplex's claims against CBUK are limited to an aggregate sum of £6 million and Multiplex has released CBUK from any liability in excess of this sum.

80. Except as set out above, CBUK denies each and every allegation made in the Consolidated Particulars of Claim.

81. Further, so far as necessary, CBUK will set off in diminution or extinction of Multiplex's claim the sums claimed in its Counterclaim.

COUNTERCLAIM

82. Paragraphs 1 to 80 of the Defence are repeated.

Heads of Agreement

83. By Spring of 2003 there were serious problems in relation to the Project arising from late and incomplete design by MSC and delays in providing design information. The design changes and late information caused substantial costs increases and delays and disruption to the Sub-Contract

Works. As a result of the late information and design changes, CBUK made requests for extensions of time under the Sub-Contract. By a letter dated 5 December 2003, CBUK indicated that the result of these delays was a revised date for completion of 15 February 2006, a delay of 50.5 weeks.

84.1 By Heads of Agreement dated 18 February 2004 (“the Heads of Agreement”), Multiplex and CBUK agreed to settle CBUK’s claim for extension of time. In the Preamble, the Heads of Agreement recorded that:

- (a) By Paragraph A, that CBUK had claimed a 1 year extension of time for late delivery of design information, and that Multiplex disputed the extent of the claim but accepted that later changes to the design had delayed the project.
- (b) By Paragraph B, that CBUK had offered to settle the extension of time claim by altering the Sub-Contract to cost reimbursable but that this alteration was not acceptable to Multiplex.
- (c) By Paragraph C, that Multiplex and CBUK had agreed to settle the extension of time claim on the terms of the Heads of Agreement, which allowed for acceleration of fabrication, the ability for Multiplex to accelerate erection and for reversion to a fixed price.

84.2 By clause 2 of the Heads of Agreement, Multiplex and CBUK recorded their intention that a supplemental agreement formally varying the terms of the Sub-Contract, with an effective date of 15 February 2004, would be concluded by the end of February 2004.

84.3 The following were, inter alia, express terms of the Heads of Agreement:

- (1) By clause 3 it was provided that the agreement was in settlement of all claims and disputes to date with the exception of the dispute as specifically contemplated by Clause 11.
- (2) By clause 4, that future fabrication would be outsourced by Multiplex in accordance with agreed schedules.
- (3) By clause 8, it was agreed that Multiplex would, for a period of 3 months from 15 February 2004, reimburse CBUK at cost for erection and site works and would make a further payment of £80,000 per month for off-site administration and overheads.

- (4) By clause 9, that during this period of 3 months Multiplex and CBUK would reprogramme erection works and would seek to agree a new fixed price and programme for completion, to include a 10% contribution to CBUK's overheads and profit.
- (5) By clause 10, that if after this period of 3 months, no agreement had been reached as to fixed price and/or programme, CBUK would agree an orderly handover of the Sub-Contract Works to Multiplex at no additional cost to Multiplex and that Multiplex would give CBUK 4 weeks notice of its intention to seek such a handover.
- (6) By clause 11, that a valuation would be compiled up to 15 February 2004 which would be checked by an independent quantity surveyor. Payment would then be made on the basis of this valuation, less the sums paid to 15 February 2004.
- (7) By clause 12, that Multiplex would pay CBUK the sum of £4 million on execution of the Heads of Agreement and an additional £1.25 million on completing the lifting of the arch at Wembley ("the Arch").

84.4 It was an implied term of the Heads of Agreement that Multiplex would not do anything to prevent CBUK from performing its obligations under the Heads of Agreement or to delay it in performing those obligations and would co-operate in the performance of the Heads of Agreement. This term was implied as a matter of law.

85.1 In accordance with the terms of the Heads of Agreement, the following steps were taken by Multiplex and CBUK:

- (1) Multiplex paid CBUK the sum of £4 million on 18 February 2004.
- (2) CBUK continued to carry out erection and site works at Wembley and was reimbursed by Multiplex in accordance with the provisions of clause 8.
- (3) Hollandia BV ("Hollandia") was appointed to carry out the fabrication of the roof steel.
- (4) In relation to valuation:
 - (a) CBUK and Multiplex agreed to appoint WT Partnership ("WT") as the independent surveyor under clause 11 of the

Heads of Agreement.

(b) A valuation to 15 February 2004 in the sum of £38,457,601.66 was ~~compiled~~ compiled by CBUK and was submitted to Multiplex.

~~(c)~~(b) On 19 March 2004 WT put forward two alternative valuation figures, £30,294,651 and £30,052,606, which then formed the subject matter of negotiations between the parties.

~~(d)~~(e) As contemplated by clause 11 of the Heads of Agreement, on 14 May 2004, it was orally agreed between Mr Matt Stagg on behalf of Multiplex and Mr Roddy Grant, Mr Brian Rogan and Mr James Child on behalf of CBUK that the final valuation of work undertaken by CBUK to 15 February 2004 would be £32.66 million (“the Valuation Agreement”). In support of the contention that agreement was reached at this figure on 14 May 2004, CBUK will rely on an E-Mail dated 13 May 2004 from Mr Stagg to Messrs Cursley and McGregor in which he states that the intention was that he would meet CBUK the next day and that he would need “a 15/2/04 valuation at £32.6 million”.

~~(e)~~(d) On 3 June 2004, in accordance with the Valuation Agreement, Multiplex issued a draft certificate showing the valuation to 15 February 2004 in the agreed sum of £32.66 million.

(5) Pursuant to clause 2 of the Heads of Agreement the parties entered into negotiations with a view to concluding a formal supplemental agreement which was intended to formalise the Heads of Agreement.

(6) The 3 month period referred to in clauses 8, 9 and 10 of the Heads of Agreement was, by agreement between CBUK and Multiplex, extended to 29 June 2004.

85.2 In relation to steel which needed to be brought back from China for fabrication in the United Kingdom to meet the accelerated programme (“China Steel”):

(a) An issue arose as to which party was to be responsible for the cost of fabricating China Steel.

(b) In May 2004 it was orally agreed between Mr Grant on behalf of CBUK and Mr Stagg on behalf of MPX that Multiplex would place a

separate order with CBUK for this steel and that this order it would not form part of the Supplemental Agreement.

- (c) By a written purchase order, no 74010, dated 26 May 2004 (“the Order”), Multiplex requested CBUK to fabricate and deliver “China steel returned unmade” as defined in Schedule 3 Part A of the Supplemental Agreement, being 1,874 tonnes of steel, at a rate of £1,067.24 per tonne. CBUK will refer to the Order at trial for its full terms.
- (d) The Order was accepted by CBUK which was, as a result, under an obligation to fabricate and deliver the China Steel to Multiplex which was under an obligation to take delivery of the China Steel and to pay the agreed rate per tonne (“the China Steel Agreement”).

Supplemental Agreement

- 86. By the Supplemental Agreement it was agreed to resolve and settle all claims and disputes between Multiplex and CBUK existing on or before 15 February 2004 and to vary and to make consequential amendments to the Sub-Contract. The Supplemental Agreement was concluded in accordance with the intent recorded in clause 2 of the Heads of Agreement.
- 87. The effect of clause 4 and Schedule 1(a) of the Supplemental Agreement and of the Valuation Agreement was that the valuation to 15 February 2004 of £32.66 million formed part of the adjusted sum payable under the Amended Sub-Contract and it became a term of the Supplemental Agreement and, thereby, of the Amended Sub-Contract that the parties agreed that the final value of the work carried out by CBUK up to 15 February 2004 was £32.66 million.
- 87A. Further, so far as necessary, CBUK will say that Multiplex is precluded and estopped from contending that the Valuation Agreement did not become a term of the Supplemental Agreement and thereby the Amended Sub-Contract and from relying upon clause 1.8.1 of the Sub Contract (“the Entire

Agreement Clause"), whether in the manner pleaded at paragraph 36(c) of the Reply, or otherwise. CBUK will rely upon the following facts:

- (1) At meetings on 14 May 2004 and 20 May 2004 Mr Grant suggested to Mr Stagg that the agreed figure of £32.66 million be inserted into the Supplemental Agreement.
- (2) At those meetings Mr Stagg represented to Mr Grant, Mr Rogan and Mr Child that the figure of £32.66 million was a final agreed figure and that a certificate in that sum would be issued upon signing the Supplemental Agreement, but said that he would prefer not to place that figure into the Supplemental Agreement because he had difficulties in advertising the figure to his superiors and that the figure did not need to be expressly mentioned in the Supplemental Agreement.
- (3) In reliance upon these representations CBUK signed the Supplemental Agreement.
- (4) As Multiplex well knew, CBUK signed the Supplemental Agreement on the assumption and understanding that the "gross valuation as at 15 February 2004" referred to at paragraph (a) of Schedule 1 was an agreed final figure in the sum of £32.66 million and that CBUK would be paid on the basis of that figure.
- (5) It would be inequitable for Multiplex to resile from the representations referred to above, whether by denying the existence of the Valuation Agreement, denying that the figure agreed was the "gross valuation as at 15 February 2004" for the purposes of the Supplemental Agreement, seeking to re-open the figure, or by relying upon the Entire Agreement Clause in the original Sub-Contract.

87B. Further and in any event if, which is denied, Multiplex is entitled to rely upon the Entire Agreement Clause whether as in paragraph 36(c) of the Reply or otherwise, it is denied that the Entire Agreement Clause is applicable to the agreement of the gross valuation in any event:

- (1) Clause 1.8.1 was not a term of the Supplemental Agreement.

- (2) The purpose and effect (if any) of the Entire Agreement Clause was to debar either party from relying upon any representations or other warranties made by each to the other pre-dating the execution of the Sub-Contract. CBUK will refer to the formulation: “all prior negotiations ...”.
- (3) That Clause cannot prevent the parties from entering into subsequent contracts or variations on such terms and in such manner as they choose, including the terms and manner chosen in the present case. If that is wrong, then the parties waived the clause by their very conduct in entering into the Valuation Agreement and Supplemental Agreement.
- (4) In any event the figure agreed by the Valuation Agreement was, in all the circumstances and on the proper construction of the Supplemental Agreement in its factual matrix, a term of the Supplemental Agreement, and thereby a term of the Amended Sub-Contract.

Events after Supplemental Agreement

88.1 Following the execution of the Supplemental Agreement:

- (1) On 6 June 2004, in accordance with the Amended Sub-Contract, CBUK made Application for Payment Number 22 for the period ending 30 May 2004 and a separate application was made in respect of week 88 which provided a net total in the sum of £59,926,674.98 On 25 June 2004, in accordance with the Amended Sub-Contract and the Valuation Agreement, Multiplex issued Payment Certificate Number 35 showing the valuation (incorporating week 88) to 30 May 2004 in the net sum of £52,656,727.58 and the valuation to 15 February 2004 in the agreed sum of £32.66 million gross. The difference between the net sums applied for and the net sums certified was £7,272,947.40.
- (2) On 1 July 2004, in accordance with the Amended Sub-Contract and the Valuation Agreement, Multiplex issued Payment Certificate Number 36 showing the net valuation to 30 May 2004 and including weekly valuation to week 90 of £53,606,080.67 and the valuation to 15 February 2004 in the agreed sum of £32.66 million gross.

- (3) The rotation of the Arch to its parked temporarily restrained position, prior to load transfer, was completed on 22 June 2004 and, as a result, the agreed sum of £1.25 million was due and owing by 6 July 2004.
- (4) By a letter to CBUK dated 6 July 2004 Multiplex stated that it intended to withhold the sum of £1.25 million as a result of CBUK's breach of the Sub-Contract in that it failed to fabricate more than 100 members of the Arch within the specified tolerances, resulting in delay in the lifting of the Arch by some 8 weeks and Multiplex had incurred additional loss and expense in excess of £1.25 million.

88.2 Multiplex purported to take steps to reach agreement with CBUK to re-programme completion of the Sub-Contract Works as follows:

- (1) By a letter dated 24 June 2004 Multiplex responded to CBUK's document dated 14 June 2004 headed "Estimate to Completion for 28 June 2004" and sought:
 - (a) a programme of the erection works in line with the milestones in the Heads of Agreement;
 - (b) a fixed lump sum price for erection, which reflected the original rates, with a reasonable uplift for changed circumstances;
 - (c) a cost-plus budget based on the original Sub-Contract rates/allowances, with an incentive mechanism for early finish and a penalty for late completion and/or budget cost overrun.Multiplex sought CBUK's response by 28 June 2004.
- (2) As requested, CBUK responded by a letter dated 28 June 2004 setting out its proposals for reprogramming the works and for the price of these works.

88.3 By a letter to CBUK dated 30 June 2004 Multiplex stated that, despite reasonable endeavours CBUK and Multiplex had been unable to agree to re-programme the completion of the Sub-Contract Works or to agree a fixed lump sum or reimbursement Sub-Contract Sum for the completion of the Sub-Contract Works and that, as a result, purportedly in accordance with clause 8 of the Supplemental Agreement, Multiplex gave CBUK 28 days notice removing from the Sub-Contract the unperformed reimbursable items referred

to at Schedule 1(c) of the Supplemental Agreement.

- 89.1 On 7 July 2004, in accordance with the Amended Sub-Contract, CBUK made Application for Payment Number 23 for the period ending 30 June 2004 (incorporating week 91) in the sum of £58,626,501.28 less payments already made in the sum of £53,606,080.67, equals £5,020,420.61
- 89.2 On 16 July 2004, in purported compliance with the Amended Sub-Contract Multiplex issued Payment Certificate Number 37, showing the valuation to 30 June 2004 as £41,195,829.42, as opposed to CBUK's application in the sum of £58,626,501.28. In the breakdown attached to the Certificate Multiplex falsely stated:
- (a) that Measured Variations in the sum of £1,401,890.60 had been "settled" by the Supplemental Agreement;
 - (b) that the other items in the Application for Payment had been "revalued in accordance with" the Supplemental Agreement.
- 89.3 Payment Certificate Number 37 made the following deductions from Application for Payment Number 23:
- (1) The valuation to 15 February 2004 was reduced to the sum of £23,973,207.85.
 - (2) The sum of £1,580,445.83 was deducted as "costs incurred due to member misalignment".
 - (3) The total sum of £4,107,600.15 was deducted, in respect of "inefficient site works", and unreasonable and unsubstantiated costs during the period 15 February to 25 June 2004.
- Payment Certificate Number 37 purported to show that the gross sum of £14,582,045.22 (inclusive of VAT) was due from CBUK to Multiplex.
- 90.1 On 2 July 2004, in accordance with the Amended Sub-Contract, CBUK made Application for Payment for the Reimbursable Costs up to Week 92, being the period ending 2 July 2004. Together with the monthly application this provides the sum of £59,612,169.34 less payments already claimed in the sum of £58,626,501.28, equals £985,668.05.
- 90.2 In purported compliance with the Amended Sub-Contract on 16 July 2004

Multiplex issued Payment Certificate Number 38 showing the net valuation to 2 July 2004 as £41,731,580.32. Payment Certificate Number 38 purported to show that the gross sum of £13,952,537.91 (inclusive of VAT) was due from CBUK to Multiplex.

- 90.3 On 16 July 2004, Multiplex rendered an invoice to CBUK in the sum of £13,952,537.91 inclusive of VAT.
- 91.1 Following the service of the Clause 8 Notice, Multiplex and its sub-contractors and agents entered upon the Sub-Contract Works and used the temporary buildings, plant tools, equipment and temporary works in accordance with clause 9.3 of the Supplemental Agreement.
- 91.2 CBUK complied with clause 9 of the Supplemental Agreement and left the Site on 27 July 2004 and, as a result, the right to payment of £500,000 pursuant to clause 9.3 of the Supplemental Agreement was unconditionally acquired as at that date.
- 92.1 On 29 July 2004, in accordance with the Amended Sub-Contract, CBUK made Application for Payment Number 24 in which it claimed payment of £24,442,583.31 inclusive of VAT.
- 92.2 On 10 August 2004, MPX issued a Certificate of Payment no. 41 which valued CBUK's works incorporating work done up to and including week 95 at £42,070,792.94 and certified that MPX was entitled to payments from CBUK of £11,535,287.74 plus VAT.

Breaches of Contract

- 93.1 In breach of the Amended Sub-Contract and/or the Heads of Agreement and/or of the Supplemental Agreement and/or of the Valuation Agreement (in each case so far as applicable), Multiplex:
- (1) Refused to make payments to CBUK based on the agreed valuation of £32.66 million but, instead, purported to revalue the works at £23,973,207.85 thereby making deductions of £8,686,792 and sought consequential repayment sum in its Payment Certificates 37, 38 and 41.

- (2) Refused to make the payment of £1.25 million within 14 days of the rotation of the Arch to its parked temporarily restrained position, prior to load transfer, but instead advanced an inflated cross-claim in an attempt to avoid its obligation to make payment.
- (3) Refused to pay sums applied for by CBUK in respect of “costs reimbursable” to 2 July 2004 on the basis of arbitrary and unsubstantiated deductions.
- (4) Failed and refused to cooperate with CBUK in seeking to agree a new programme and price for the completion of the Sub-Contract Works.
- (5) Failed to consult CBUK before issuing a Certificate of Payment for an amount less than the amount claimed in the Application for Payment, in breach of Schedule 1 of the Supplemental Agreement.

93.2 In support of these allegations of breach of contract, CBUK will rely on the following:

- (1) **Refusal to make payments based on agreed sum of £32.66 million**
 - (a) By Payment Certificate Number 37 (and in subsequent Payment Certificates) Multiplex purported to reduce the 15 February Valuation from £32.66 million to £23,973,207.85 and sought repayment of the balance of £8,686,792 by CBUK.
 - (b) Multiplex, by its director Mr M Stagg, knew that the 15 February Valuation had been agreed in the sum of £32.66 million but, after 16 July 2004, falsely claimed that this sum had only been agreed “for cashflow” and had been expressly made subject to “clawback”. For the avoidance of doubt, CBUK’s case is that, in making this claim, Mr Stagg was acting dishonestly in that he knew that the claim was false. This dishonesty is to be attributed to Multiplex. On the basis of the false claim that the sum of £32.66 million had only been agreed “for cashflow”, in Certificate of Payment No 37 Multiplex advanced a 15 February Valuation of £23,973,207.85 knowing that there was no justification or legal entitlement for re-opening the Valuation Agreement.
 - (c) CBUK will invite the Court to infer that, in or about 15

February 2004, Multiplex decided that it would make sufficient payments as were necessary to procure the lifting of the Arch and would then attempt to “clawback” these payments from CBUK on the basis that they had not, in fact, been agreed and/or that CBUK had been overpaid. As a result, Multiplex knew and intended at the time of making the Heads of Agreement, the Valuation Agreement and the Supplemental Agreement that it would breach the Amended Sub-Contract by refusing to pay the sums of £32.66 million and £1.25 million, by issuing Payment Certificates which were not founded upon the agreed ~~ment~~ valuation of £32.66 million (but instead purported to value the works up to 15 February 2004 in a substantially reduced amount with the result that substantial sums would be sought from CBUK) and by not endeavouring to agree a new programme or price but entered into those agreements in bad faith with the intention of breaching them once the Arch was lifted. In support of this inference CBUK will rely on the matters pleaded at paragraphs 11, 83, 84, 85 and 88 above and on the following:

- (i) In or about January 2004, as a result of its dispute with CBUK concerning extensions of time, Multiplex began to consider whether or not it could terminate the Sub-Contract. Multiplex considered five “scenarios” as follows:
1. Termination of the Sub-Contract with immediate effect.
 2. Termination of the Sub-Contract when the Arch was “fully signed up and ready to go”.
 3. Termination of the Sub-Contract when the Arch was “in final position”
 4. Seeking to vary the Sub-Contract so that CBUK would complete the Bowl but another steelwork sub-contractor would be appointed to erect

steelwork for the PPT and the Roof.

5. Seeking to vary the Sub-Contract so that CBUK would complete the bowl and PPT and another steelwork sub-contractor would be appointed to erect the steelwork for the Roof.

In relation to Scenario 3, Multiplex considered a number of possible approaches, including that it should “tag CBUK along and make them think everything will continue” but at the same time talk to alternative sub-contractors and “have them geared up to start as soon as we sack CBUK”. CBUK will rely on a note erroneously dated 23 January 2003 which prepared by Mr Ran McGregor of Multiplex in or about January 2004.

- (ii) Multiplex recognised that the Arch Lift would be very difficult to achieve without CBUK and, as a result, on a date between January and April 2004 which CBUK cannot further particularise, Multiplex decided to adopt Scenario 3 above which was described as the “Armageddon Plan” and had the following elements.

1. By the date on which the Arch was lifted the Supplemental Agreement was to be finalised and a new steelwork erection sub-contract was to be finalised with Hollandia which would be appointed to carry out the erection work formerly included within the Sub-Contract.
2. When CBUK claimed the agreed Arch Lift payment this would be disputed by Multiplex on the basis of “backcharges” and “reassessing of value”.
3. Multiplex would prepare for an adjudication dispute with CBUK.

CBUK will rely on a note dated 26 April 2004 prepared by Mr Stagg.

- (iii) Multiplex’s aim was to make substantial financial claims against CBUK in an attempt to ensure that CBUK (which it knew to be facing cash flow problems) would then “fall over under the pressure”. CBUK will rely on Mr Muldoon’s E-Mail to Mr Stagg dated 5 May 2004. In an E-Mail in reply of the same date, Mr Stagg referred to the proposed course of action as follows: “plan b: CBUK fixed and fuck them later?”
- (iv) In the course of May 2004 Multiplex took steps to implement the Armageddon Plan by preparing claims against CBUK in respect of defective work and delay. The purpose of these claims was to extinguish CBUK’s claims against Multiplex and to justify a substantial claim by Multiplex against CBUK. Multiplex had “target figures” which it was aiming for in order to produce substantial claims against CBUK. CBUK will rely on the following:
- a. In a document entitled “CBUK breakdown” dated 20 May 2004, Mr Ong produced a “CBUK Off Site” scenario including £7 million “negative valuation”, £4 million “credit for arch delays” and £1 million “credit for delays and workmanship”, producing total claims against CBUK of £12 million.
 - b. In a document entitled “CBUK breakdown – MS 800604” Mr Ong produced a “CBUK Off Site” scenario including an estimate of “revaluation credit” of £7 million and general claims against CBUK of £6 million, producing total claims against CBUK of £13 million.
 - c. In a document entitled “CBUK Scenarios 040604” Mr Ong set out five scenarios “Plan A: Supplementary Agreement signed: Armageddon

now”, “Plan A: Supplementary Agreement Signed: CBUK continue with Hollandia management”, “Plan B: Supplementary Agreement signed: Hollandia Take over Erection”, “Plan B No Heads of Agreement: Revert to Original Contract”, “Plan D: No Heads of Agreement: Terminate under Clause 31 of Sub-Contract”. The “Target Cost to Complete” included an estimate of “revaluation credit” of £9 million, credit for Arch delays of £5.5 million, credit delays for workmanship of £4 million and Credit for revised valuation of £1.5 million, producing total claims against CBUK of £20 million.

- (v) Multiplex took further steps to implement the Armageddon Plan by instructed planning and quantity surveying experts whose reports could then be used in the course of the adjudication which Multiplex planned to commence as soon as CBUK refused to meet its claims. These experts were instructed by Multiplex prior to 14 June 2004.
 - (vi) The draft Supplemental Agreement was produced by Multiplex with a view to the implementation of the Armageddon Plan. CBUK will rely on Mr Stagg’s E-Mail dated 25 May 2004 circulating a draft to Messrs Muldoon, Ong and Cursley in which he asked “Does this work for Armageddon????”.
 - (vii) Multiplex, by Mr Stagg, knew at all relevant times after 14 May 2004, that CBUK believed that the 15 February valuation had been agreed in the figure of £32.66 million and that CBUK was only prepared to sign the Supplemental Agreement on this basis.
- (d) For these reasons, Multiplex knowingly and intentionally acted

in breach of the Amended Sub-Contract by purporting to reduce the 15 February Valuation from £32.66 million to £23,973,207.85 and, in seeking repayment of the sum of £8,686,792, did not act bona fide. For the avoidance of doubt, CBUK's case is that in seeking repayment of the sum of £8,686,792 Multiplex was acting dishonestly in that it knew (by Mr Stagg) that the sum of £32.66 million had been agreed as a final "line in the sand" figure and that it was not entitled to reduce this figure in subsequent Payment Certificates.

- (e) Further, Multiplex knew that the consequences of its failure to make payments based on the agreed valuation of £32.66 million, its purported revaluation of the works up to 15 February 2004, and its attempt to seek repayment of the sum of £8,686,792 would be extremely serious for CBUK in that CBUK would be placed in severe financial difficulties and would be deprived of any cash flow. CBUK will rely on Mr Muldoon's E-Mail to Mr Stagg dated 5 May 2004 in which he indicated that Multiplex's aim was to make claims and hope that CBUK would "fall over under the pressure". By issuing Payment Certificates 37 and 38 Multiplex was indicating that it had no intention of making further payment to CBUK.

(2)(3) Refusal to pay the sum of £1.25 million

- (a) Multiplex knew that CBUK was entitled to the sum of £1.25 million in respect of the lifting of the Arch. However, shortly after the Arch had been lifted, on 6 July 2004, without any prior notification, Multiplex gave notice that it intended to withhold the sum of £1.25 million as a result of CBUK's breach of the Sub-Contract in that it failed to fabricate more than 100 members of the Arch within the specified tolerances. CBUK will invite the Court to infer that Multiplex deliberately withheld this notice until after the Arch had been lifted in order to obtain the benefit for which it had bargained (the lifting of the Arch) whilst at the same time denying CBUK the payment

for this benefit. Multiplex took these steps as part of its “Armageddon Plan”. CBUK will rely on the matters pleaded at paragraph 93.2(1)(c) of the Counterclaim.

- (b) Multiplex wrongly refused to make the payment of £1.25 million within 14 days of the completion of the rotation of the Arch to its parked temporarily restrained position prior to load transfer.
- (c) Multiplex wrongly contended that the Arch had not, in fact, been raised until 29 June 2004.
- (d) Multiplex then advanced an inflated cross claim, designed to provide it with a purported justification for failing to pay the sum of £1.25 million. The claims for “abnormal hours working” by salaried staff, prolongation/standing time of specific facilities and temporary works, measures taken to mitigate the effects of CBUK’s failure and claims from other sub-contractors as a result of disruption of work in the total sum of £1,268,759.33 were unsubstantiated. These claims were prepared by Mr Ong as part of the “Armageddon Plan” as set out in paragraph 93.2(1)(c) of the Counterclaim.

(3)(4) Refusal to pay sums in respect of “costs reimbursable”.

- (a) In Payment Certificate Number 38 Multiplex deducted the arbitrary and unjustified sum of £4,581,197.15 in respect of “inefficient site works”, and unreasonable and unsubstantiated costs during the period 15 February to 2 July 2004. Multiplex then sought repayment of this sum by CBUK.
- (b) Multiplex purported to deduct this sum without having proper evidence or substantiation knowing that the repayment of this sum would place CBUK in severe financial difficulties.

(4)(5) Failure to co-operate with CBUK to agree a new programme and price

- (a) On a date ~~which CBUK cannot give until after disclosure and/or the provision of further information, before 15 February 2004, alternatively, before 15 June 2004~~ between February and

April 2004 which CBUK cannot further particularise Multiplex decided that, once the Arch had been raised, it would remove CBUK from site and would engage Hollandia to carry out the remaining erection and site works. CBUK will rely on the matters pleaded at paragraph 93.2(1)(c) of the Counterclaim. As a result, Multiplex had decided it would not agree a new programme or price with CBUK and cooperate in any negotiations with CBUK with a view to agreeing a new programme and price for the completion of the Sub-Contract Works.

(b) Multiplex did not take any or any serious steps to agree a new programme and price with CBUK but instead entered into secret negotiations with Hollandia with a view to appointing Hollandia as the sub-contractor for on-site steel erection as soon as the Arch had been raised. ~~The best particulars that CBUK can give prior to disclosure and/or the provision of further information are as follows.~~ CBUK will rely on the following:

- (i) On 28 January 2004 Messrs Cursley and Muldoon of Multiplex met with representatives of Hollandia and told them that Multiplex was considering subletting out some bowl steel and wanted them to price the roof.
- (ii) In early March 2004, Multiplex instructed Hollandia to take all steps necessary to prepare a team and proposal which could be implemented if Multiplex chose to “change horses” by replacing CBUK as the steelwork sub-contractor.
- (iii) In April 2004, having decided to adopt the “Armageddon Plan”, Multiplex sought to finalise the “Hollandia erection deal”.
- (iv) In May 2004, Multiplex informed Hollandia that it could expect to come on site in mid June 2004.
- (v) In a document entitled “CBUK breakdown” dated 20

May 2005, Mr Ong provided, in Scenario 2 for Hollandia to carry out erection for the bowl and PPT.

(vi) Multiplex have failed to disclose documents showing the date on which Hollandia were formally instructed to carry out the erection works. CBUK will invite the court to infer that this was on a date in April or May 2004.

(vii) In a Press Release issued by Multiplex on 30 June 2004 it was stated that Multiplex had appointed Hollandia as sub-contractor for on-site steel erection on the Wembley National Stadium project, that agreement had been reached between CBUK, Multiplex and Hollandia after several weeks of discussion, and that a specialist management team from Hollandia had been on the Wembley site for several weeks and was “completing the smooth hand over of responsibility for the steel related erection”.

(viii) In fact there had not been “several weeks of discussion” between Multiplex, CBUK and Hollandia and no discussions about a “smooth handover of responsibility for the steel related erection” which had involved CBUK.

(ix)(iii) Multiplex falsely informed CBUK that Hollandia was on site to assist it in the management of CBUK's sub contract package.

(5)(6) **Failure to consult CBUK**

Multiplex did not consult CBUK before issuing Payment Certificates Numbers 37, 38, 39 and 40, in breach of the mechanism set out Schedule 1 of the Supplemental Agreement

93.3 By these breaches of contract Multiplex showed that it had an intention not to be bound by the Amended Sub-Contract and/or indicated that it intended only to fulfil the Amended Sub-Contract in a way which was substantially inconsistent with its obligations thereunder and thereby acted in repudiatory

breach of and renounced the Amended Sub-Contract.

Termination

94.1 By a letter dated 23 July 2004, CBUK required Multiplex, by close of business on 30 July 2004 to take the following steps:

- (1) To reinstate the agreed gross valuation of the work to 15 February 2004 in the sum of £32.66 million.
- (2) To make payment without set off or deduction of the sum of £1.25 million plus VAT for completion of the lifting of the Arch.
- (3) To undertake to consult properly with CBUK prior to making any deductions against CBUK's interim applications.

By this letter CBUK stated that if Multiplex did not take these steps it would accept Multiplex's repudiatory breach.

94.2 In response to Payment Application Number 23 Multiplex had failed, before the date of practical completion of the Sub-Contract Works, to make payment in accordance with the Sub-Contract where the amount of the shortfall exceeded the value in the last Certificate of Payment issued by Multiplex. As a result, CBUK was entitled to give Multiplex a notice specifying the default in accordance with the terms of clause 30.2 of the Sub-Contract Conditions of the Amended Sub-Contract. The letter of 23 July 2004 constituted such notice.

94.3 Multiplex failed and refused to take any of these steps but, by a letter dated 26 July 2004 from its solicitors, falsely denied that the valuation of the work to 15 February 2004 had been agreed. Multiplex thereby further indicated that it had no intention of complying with its obligations under the Amended Sub-Contract.

95.1 Multiplex did not make any payment of the sums due under Payment Application Number 23 within 10 days of its receipt of the letter dated 23 July 2004. As a result, CBUK was entitled to determine its employment under the Amended Sub-Contract and did so by a letter dated 2 August 2004.

95.2 Further and in any event, CBUK was entitled to and did accept Multiplex's repudiatory breaches of contract set out at paragraph 93 above as terminating the Amended Sub-Contract.

95.3 For these reasons, CBUK is excused from the performance of all future obligations under the Amended Sub-Contract.

Claims pursuant to the Sub-Contract and Damages

96.1 CBUK is entitled to and claims the following sums pursuant to the Amended Sub-Contract:

- (1) The fixed lump sum due following completion of the rotation of the Arch to its parked temporarily restrained position prior to load transfer, as set out in clause 6.2 and Schedule 1(e) of the Supplemental Agreement
£1,250,000.00
 - (2) The total sum due to CBUK under its applications for payment in respect of works carried out before 30 July 2004 (being the gross sum of £58,704,259.31 claimed in Application for Payment Number 24 in respect of work done minus the total payments of £49,606,080.67 made in respect of work done) £9,098,178.64
 - (3) Further costs incurred in performing site and erection works for period up to 27 July 2004 not included in previous applications
£812,449.29
- Sub-Total: £11,160,627.93

CBUK will give credit in the sum of £198,404.28 in respect of claims made in respect of the fabrication of 612.34 tonnes of China Steel. CBUK sought payment at the rate of £1,391.25 per tonne rather than the rate of £1,067.24 per tonne in the China Steel Agreement and therefore gives credit at the rate of £324.01 per tonne.

Sub-Total: £10,962,223.65

Plus VAT: ~~£1,953,109.89~~ £1,918,389.14

Total: ~~£13,113,737.82~~ £12,880,612.79

96.2 In the alternative, CBUK claims these sums as damages for breach of the Amended Sub-Contract and/or (in relation to the claims under paragraphs 96.1(2) and (3) of the Counterclaim) by way of restitution.

96.3 CBUK will give credit for ~~any~~ payments made by Multiplex under the terms of the Adjudication Decisions dated ~~15~~ 21 October, ~~5~~ November and ~~17~~ November 2004 in the total sum of £5,952,194.52 inclusive of VAT and interest. ~~and any subsequent Adjudication Decision. CBUK reserves the right to add further particulars of loss.~~

97. Further, by reason of the matters aforesaid CBUK has suffered loss and damage, the best present estimate of which is as follows:

(1) **Sums which would have been earned on the remaining works under the Amended Sub-Contract:**

(a) By the end of July 2004 CBUK had claimed by applications for payment £8,951,000 of the £12 million fixed price for the works set out at Schedule 1(b) of the Supplemental Agreement. The sum of £851,918 related to China Steel and, as a result, there remained a sum of £3,900,918 which would have been earned and paid for the remaining works. As a result of MPX's repudiatory breach CBUK lost the right to receive that sum under the Amended Sub Contract. CBUK will give credit against that sum for savings made as a result of its having been relieved from the obligation of further performance under the Amended Sub-Contract in the total sum of £1,643,465. Full details of the savings made by CBUK are set out in the attached Appendix to paragraph 97(1).

Sub-Total £2,302,453

(b) Further, by the end of July 2004, despite CBUK having made applications for payment in respect of £8,951,000 of the £12 million fixed price for the works set out at Schedule 1(b) of the Supplemental Agreement, MPX had only certified and paid for £7,072,000 of those works. Accordingly there remained to be paid £4,929,000 of the £12 million fixed price. In respect of the difference between £8,951,000 and £7,072,000, CBUK has claimed for that

sum at paragraph 96.1(2) above. However if CBUK's claim for that difference either partially or wholly fails then its claim for damages under this head increases proportionately.

- (2) **Sums which would have been earned on the remaining works under the China Steel Agreement:** By the end of July 2004 CBUK had fabricated a total of 612.34 tonnes of China Steel and, as a result, there remained a total of 1216.66 tonnes of China Steel to be fabricated, for which Multiplex would have been obliged to pay the sum of £1,346,494 which would have been earned and paid for the remaining works. As a result of MPX's repudiatory breach CBUK lost the right to receive that sum under the China Steel Agreement. CBUK will give credit against that sum for savings made as a result of its having been relieved from the obligation of further performance under the China Steel Agreement in the total sum of £589,221. Full details of the savings made by CBUK are set out in the attached Appendix to paragraph 97(2).

Sub-Total £757,273

~~and costs which would have been recovered (being 80% of the total contract value of £5.05 million) £4,040,000.00~~

- ~~(2) Sums claimed from CBUK by its own sub-contractors as a result of the termination of the Amended Sub Contract. Claims have presently been made as follows:~~

~~Weldex Cranes £2,500,000.00~~

~~DLT £320,000.00~~

~~Sub Total £2,820,000.00~~

- (3) Loss of the sums which it would have made on the negotiation of a chance to negotiate the reprogramming of the completion of the Sub-Contract Works and to agree the agreement of a fixed lump sum and/or reimbursable Sub Contract Sum for the completion of Sub-Contract Works. and to enter a further supplemental agreement on or before 29 June 2004. The estimated cost to completion was £36 million and it was agreed that the

contribution to CBUK's profit and overheads would be 10%, that is, £3.6 million. CBUK will contend that, if Multiplex had cooperated in the negotiations and/or used reasonable endeavours under clause 7 of the Supplemental Agreement and if Multiplex had not been knowingly and intentionally breaching its contractual obligations to CBUK in an unjustified attempt to obtain a repayment of £8,686,792, such a lump sum would have been agreed and, as a result, CBUK would have earned 10% by way of contribution to profit and overheads ~~there was a 66.66% chance of such a lump sum being agreed.~~ In support of this contention CBUK will rely on the following:

- (a) The only steelwork sub-contractors in Europe with sufficient knowledge and experience to complete the Sub-Contract Works were CBUK, Hollandia, Severfield Rowan plc and William Hare Ltd. Severfield Rowan plc and William Hare Ltd had withdrawn from the Wembley project at an early stage, as Multiplex were aware, were not willing to return.
- (b) Hollandia is a Dutch company which does not employ labour in the United Kingdom and, as at June 2004, had only carried out straightforward erection work in the United Kingdom.
- (c) Hollandia knew that it was the only practical alternative to CBUK and was, therefore, in a strong position to require Multiplex to pay substantially more than the sum sought by CBUK. In fact, Hollandia refused to enter into a fixed price Sub-Contract with Multiplex but required to be paid on a "cost plus" basis. The sum paid to Hollandia by Multiplex to date is substantially in excess of the £36 million fixed contract price offered by CBUK.
- (d) The Wembley Project was in serious delay. A change of steelwork sub-contractor would lead to a one month delay whilst we left site and a minimum of 3 months

delay whilst the new sub-contractor became properly acquainted with the site.

(e) Multiplex knew that, as a result of the operation of TUPE, it would have to employ CBUK's labour force so that, in practice, by engaging Hollandia it would only gain new supervision and site management.

(f) CBUK's supervision and site management had been on site for 12 months and as, a result, were much better placed than personnel employed by Hollandia to progress the Wembley project expeditiously.

For these reasons, if Multiplex had cooperated with CBUK and/or used reasonable endeavours it would have entered into a fixed price agreement with CBUK to complete the remainder of the erection works.

~~£2,399,760.00~~ £3,600,000

Total: ~~£9,259,760.00~~ £6,659,726

98. Further or in the alternative if (contrary to CBUK's primary case herein), a further supplemental agreement would not have been entered into by 29 June 2004, then by reason of the matters set out at paragraph 11 above, CBUK is entitled to payment of the sum of £500,000.00 under clause 9.3 of the Supplemental Agreement, plus VAT, equals £587,500.00.

99. Further, CBUK claims interest pursuant to section 35A of the Supreme Court Act 1981 on such sums as are found due to CBUK at a commercial rate of interest or alternatively at such rate as the Court thinks fit, for such period as the Court thinks fit.

AND the Part 20 Claimant claims:

- (1) Under paragraph 96, the sum of ~~£13,113,737.82~~ £12,880,612.79 alternatively damages for breach of contract; and/or in restitution.
- (2) Under paragraph 97, damages for breach of contract; and/or
- (3) Under paragraph 98, the sum of £587,500.00.

- (4) The aforesaid interest pursuant to section 35A of the Supreme Court Act 1981, to be assessed.

HUGH TOMLINSON QC

SIMON HARGREAVES

THOMAS GRANT

HUGH TOMLINSON QC

SIMON HARGREAVES

THOMAS GRANT

Re-dated the 22nd day of December 2005

Dated the 28th day of January 2005

STATEMENT OF TRUTH

The Defendant/Part 20 Claimant believes that the facts stated in this amended consolidated Defence and Counterclaim are true. I am duly authorised by the Defendant/Part 20 Claimant to sign this statement.

.....

Brian Rogan

Managing Director

Cleveland Bridge (UK) Limited.

Re-Served this day of 2005 by Walker Morris, Kings Court, King Street, Leeds, LS1 2HL, Ref: MLS/SZH/CLE.258-11, Tel: 0113 283 2500, Fax: 0113 245 9412, DX: 12051 Leeds 24 Solicitors for the Defendant/Part 20 Claimant.

**Claim No. HT-04-314/HT-04-238
Consolidated by Order dated
10 December 2004**

***IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION
COURT***

BETWEEN:

MULTIPLEX CONSTRUCTIONS (UK) LTD
Claimant/Part 20 Defendant

- and -

CLEVELAND BRIDGE UK LIMITED
Defendant/Part 20 Claimant

AMENDED CONSOLIDATED DEFENCE
AND COUNTERCLAIM

Walker Morris
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12 King Street
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Ref: MLS/SZH/CLE.258-11

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Solicitors for the Defendant/Part 20 Claimant