

Claim No. HT-04-314 and Claim No. HT-04-238
consolidated by Order dated 10th December 2004
Amended Particulars of Claim by Order of Jackson J dated 5 December 2005

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

B E T W E E N:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED

Claimant/Part 20 Defendant

-and-

CLEVELAND BRIDGE UK LIMITED

Defendant/Part 20 Claimant

AMENDED CONSOLIDATED PARTICULARS OF CLAIM

Introduction

1. The Claimant and Part 20 Defendant (hereafter referred to as "Multiplex") is and was at all material times a company carrying on business as a construction contractor. Multiplex is registered at Companies House with Company Number 3808946. It has registered offices at 8th Floor, Mayfair Place, 50 Berkeley Street, London W1J 8BY.
2. The Defendant and Part 20 Claimant (hereafter referred to as "CBUG") is and was at all material times a company carrying on business as a steelwork contractor. CBUG is registered at Companies House with Company Number 3749601. It has registered offices at Cleveland House, PO Box 27, Yarm Road, Darlington, County Durham DL1 4DE.

The Works

3. In or around September 2002 Multiplex was awarded a fixed-price design and build Contract (“the Main Contract”) for the design and construction of the new Wembley National Stadium (“the Project”) by the Employer for the Project, Wembley National Stadium Limited (formerly The English National Stadium Development Company Limited) (“WNSL”), a limited corporation registered at Companies House with Company Number 3388437 whose registered offices are at 11th Floor, York House, Empire Way, Wembley, HA9 0WS.
4. Pursuant to the terms of the Main Contract Multiplex is obliged, *inter alia*, to undertake the demolition of the existing structures comprising the old Wembley Stadium, site clearance, ground and enabling works, design, construction, fit-out, testing, commissioning, and handover of the Project.

The Sub-Contract

5. By a written agreement dated 26 September 2002 made between Multiplex and CBUK and executed as a deed (“the Sub-Contract”), CBUK agreed, *inter alia*, to undertake for a lump sum payment of £60 million the design, manufacture, fabrication, supply, delivery and erection of the structural steelwork required for the Project (“the Sub-Contract Works”).
6. The Sub-Contract comprised the following documents:
 - (a) The Articles of Agreement;
 - (b) The Conditions of Contract;
 - (c) The Appendices to the Articles of Agreement; and
 - (d) Special Conditions of Contract.
7. The following were, *inter alia*, express terms of the Sub-Contract (as amended by Appendix - Part 16 of the Sub-Contract):
 - (a) The Articles of Agreement
 - (i) The Recitals to the Sub-Contract provide:

"Second the Contractor desires to have designed and executed the works (hereinafter called "the Sub-Contract Works") referred to in Appendix, part 2 and described in the numbered documents,

(hereinafter called "the Numbered Documents") identified in Appendix, part 2.

Third the Sub-Contract Works are to be executed as part of the works (hereinafter called "the Works" referred to in Appendix Part 1 with Wembley National Stadium Limited (hereinafter called "the Employer")"

(ii) By Article 1.2 of the Articles of Agreement:

"The Sub-Contractor shall subject to the Sub-Contract Documents and the provisions of the Contract design and carry out and complete the Sub-Contract Works shown upon and described by or referred to in those documents."

(iii) By Article 2 of the Articles of Agreement:

"The Contractor shall pay to the Sub-Contractor the net, VAT exclusive sum of £60,000,000 (Sixty million pounds only), (the "Sub-Contract Sum") or such other sum as shall become payable in accordance with the Sub-Contract."

(b) The Conditions of Contract

(i) By Clause 1.3 of the Conditions of Contract:

(i) *"Sub-Contract Works the works referred to in the Appendix part 2 and described in the Numbered Documents to be executed as part of the Works including any changes made to such works in accordance with the Sub-Contract."*

(ii) *"Numbered Documents the documents referred to in the Second recital."*

(ii) By Clause 4 of the Conditions of Contract ("**Execution of the Sub-Contract Works - directions of Contractor**"):

"4.1.1 The Sub-Contractor shall for the consideration payable in accordance with clause 21 carry out and complete the Sub-Contract Works and perform all its other Sub-Contract Obligations in compliance with the Sub-Contract Documents and the Contract [and for that purpose shall complete the design for the Sub-Contract Works including the selection of materials, goods and workmanship to be used in the construction of the Sub-Contract Works] and in conformity with all reasonable directions and requirements of the Contractor (so far as they may apply) regulating for the time being the due carrying out of the Works.

.2 All materials and goods shall, so far as procurable, be of the kinds and standards described in the Sub-Contract Documents or if not therein specifically described, in the Contract. The Sub-Contractor warrants and undertakes to the Contractor that all materials and goods used in or about the Sub-Contract Works are and will be of a standard and quality

consistent with the Numbered Documents, Employer's Requirements and Contractor's Proposals.

- .3 All workmanship shall be of the standard described in the Sub-Contract Documents, or, to the extent that no such standards are specified in the Sub-Contract Documents, shall be of a standard consistent with the Numbered Documents, Employer's Requirements and the Contractor's Proposals.*

...

- .3B The Sub-Contractor has familiarised itself with, and shall not perform the Sub-Contract Obligations so as to put the Contractor and/or the Employer in breach of, inter alia, the Lottery Funding Agreement, the Wembley Property Agreements, the Statutory Requirements, the requirements of any Planning Permission, the Mandatory Technical Requirements (having due regard to the Non-Mandatory Technical Requirements) and the Key Development Criteria and shall have due regard to the Background Information in connection therewith.*

- .4 All work shall be carried out in a proper and workmanlike manner and in accordance with the Health and Safety Plan.*

....

- 4.3.2 If any work, materials or goods are not in accordance with the Sub-Contract ("non-complying work") the Contractor, without prejudice to the generality of his powers, may:*

.1 issue directions requiring the removal from the Site or rectification of all or any of such non-complying work; ...

- .4 The Sub-Contractor shall, indemnify the Contractor in respect of any liability, and reimburse the Contractor for any costs, which the Contractor has incurred:*

.1 as a direct result of compliance by the Sub-Contractor with clause 4.3.2..."

- (iii) By Clause 5 of the Conditions of Contract ("*Sub-Contractor's liability under incorporated provisions of the Contract*"):**

"5.1 The Sub-Contractor shall:

.1 observe, perform and comply with all the provisions of the Contract on the part of the Contractor to be observed, performed and complied with so far as they relate and apply to the Sub-Contract Works (or any portion of the same). Without prejudice to the generality of the foregoing, the Sub-Contractor shall observe, perform and comply with the following provisions of the Contract 6, 9 and 34; and

.2 indemnify and save harmless the Contractor against and from:

- .1 *any breach, non-observance or non-performance by the Sub-Contractor or his servants or agents of any of the provisions of the Contract insofar as they relate and apply to the Sub-Contract;*
- .2 *any act or omission of the Sub-Contractor or his servants or agents which involves the Contractor in any liability to the Employer under the provisions of the Contract insofar as they relate and apply to the Sub-Contract;*
- .2A *any act of omission of the Sub-Contractor or his servants or agents which prejudices or leads to the diminution or any rights, entitlements or other benefits or the Contractor under the Contract insofar as they relate and apply to the Sub-Contract; and*
- .3 *any claim, damage, loss or expense due to or resulting from any negligence or breach of duty on the part of the Sub-Contractor, his servants or agents (including any wrongful user by him or them of the scaffolding referred to in the Sub-Contract or other property belonging to or provided by the Contractor).*

(iv) By Clause 5.3 of the Conditions of Contract ("**Site Risks, Sub-Contractor's Design Warranty**"):

- ".2 *Insofar as the Sub-Contractor is responsible for the design of the Sub-Contract Works, the Sub-Contractor warrants and undertakes to the Contractor that:*
- .1 *there has been exercised and will continue to be exercised in the designs and specifications for the Sub-Contract Works all the skill, care and diligence to be expected of a large reputable, multi-national, multi-disciplined team of specialist designers experienced in and possessing all the expertise necessary for the design and specification of large projects of the size, scope complexity and technical sophistication of the Project.*
- .2 *the Sub-Contract Works have been and will continue to be designed and specified utilising proven up-to date systems, procedures and technology, high quality goods and materials and the high standards of workmanship and fabrication consistent with the Numbered Documents and the Employer's Requirements;*
- .3 *the Sub-Contract Works have been and will continue to be designed and specified with due regard to the Background Information in accordance with, and will, when completed, comply and be consistent with the Development Control Requirements, the requirements of the Planning Permission, the Statutory Requirements, the Mandatory Technical Requirements (taking due and proper account to the Non-Mandatory Technical Requirements), the Key Development Criteria, and all other legal, technical, performance, operational and health and safety requirements referred to in or to be reasonably inferred from the*

Contract and/or the Sub-Contract Documents which are in force at the date of the Sub-Contract or are reasonably foreseeable as at the Base Date by an international contractor will be skill and experience warranted under clauses 5.3.2.1 to be likely to come into force before the completion of the Sub-Contract Works.

...

.3 The warranties and undertakings contained in this clause 5.3 shall be without prejudice to any additional warranties which may be implied by law or by reason of statute. The Sub-Contractor acknowledges that the Contractor is entirely reliant upon the Sub-Contract in relation to the designs and specifications for the Sub-Contract Works ..."

(v) By clause 21 of the Conditions of Contract ("**Payment of Sub-Contractor**"):

"21.1 Initial Payment

The initial payment shall be the lump sum amount detailed in the Payment Programme in respect of the Pre-Development Costs and the Start-Up Sum...

21.2 Interim Payments

- .1 All interim payments shall be made by the Contractor to the Sub-Contractor in accordance with the following clauses:*
- .2 The Progress Inspection shall proceed on the third Business Day prior to the end of each month unless otherwise agreed by the Contractor and the Sub-Contractor. The Sub-Contractor shall ensure that the Contractor's representative is allowed sufficient access to all works and other information (including evidence of orders placed and materials purchased) required by the Contractor's representative to assess the Sub-Contractor's next anticipated Application for Payment. The Sub-Contractor shall also confirm anticipated payments in respect of Off-site Materials.*

21.3 Applications for Payment

- .1 Within five (5) Business Days of a Progress Inspection having taken place pursuant to clause 21.2.2, the Sub-Contractor shall be entitled to make applications for payment (each an "Application for Payment") in respect of the previous month (in this clause 21.3, and clause 21.4 the "Relevant Month").*
- .2 Each Application for Payment shall be submitted with 3 (three) hard copies 3 (three) electronic copies, and shall specify the total amount claimed up to and including the Relevant Month by reference to:*
 - .1 the value of the works properly completed;*
 - .2 the total value of work properly completed to which clause 4.6 and 4.7A refer;*

- .3 any amounts due pursuant to clause 45.2;*
- .4 any additional payments to which the Sub-Contractor is entitled under the Sub-Contract during the Relevant Month;*

Less

- .5 except where the Sub-Contractor has made the election pursuant to clause 39, the Retention referred to in clause 21.12 for all the amounts referred to above (except the payments referred to in clause 21.3.2.4); and*
 - .6 all previous payments made to the Sub-Contractor under the Sub-Contract.*
- .3 The Sub-Contractor shall submit with its Application for Payment any Off-Site Materials Bond required to be procured pursuant to clause 45.2.*

21.4 Valuation

- .1 The Gross Valuation shall be lesser of:*
 - .1 the amount specified for the relevant month in the Maximum Cumulative Monthly Amount column as shown in the Payment Profile;*

And

 - .2 the gross value of the works claimed in accordance with clause 21.3.2.*
- .2 For the purpose of paragraph 21.3.2.1 the value of the works properly completed shall be ascertained by allocating to each activity bar in the Payment Programme a monetary value equal to the same percentage of the total amount attributed to the whole of that activity bar in the Payment Programme as the percentage of the total work represented by the said bar as has been properly completed on Site and in accordance with the Sub-Contract prior to the end of the Relevant Month, and aggregating the said monetary values for all activity bars.*
- .3 For avoidance of doubt and notwithstanding any other provision of the Sub-Contract, the Sub-Contractor shall not be entitled to claim or request payment in respect of any Sub-Contract Works if the amount of such claim or request would on the date when payable result in the aggregate amount of Gross Valuation, then paid or payable to the Sub-Contractor exceeding the amount specified in the Cumulative Monthly Amount column as shown in the Payment Profile.*

...

21.9 Issue of Interim Payment Certificates

- .1 Within twelve (12) Business Days after the receipt of the Application for Payment under clause 21.3, the Contractor shall*

issue a certificate (a "Certificate of Payment") certifying what amounts are due to the Sub-Contract pursuant to this clause 21.9, less any amounts which are to be deducted pursuant to clause 21.10 or are the subject of a notice under 21.11.1

- .2 All Certificates of Payment shall specify the amount which the Contractor proposes to pay to the Sub-Contractor and basis on which that amount was calculated. Such amount shall become due on the date of issue of the Certificate for Payment and the final date for payment shall arise ten (10) Business Days after the date of issue of the said Certificate for Payment.*

21.10 Sums Due to the Contractor

- .1 Where by virtue of any provision in the Sub-Contract, the Sub-Contractor becomes liable to pay sums to the Contractor or the Contractor becomes entitled to abate amounts against sums due to the Sub-Contractor, the Contractor may:
 - .1 deduct such sums in computing the amount in any Certificate of Payment;*
 - .2 issue an invoice to the Sub-Contractor for such sum identifying the amount and the grounds for the Contractor's claim; or*
 - .3 do a combination of Clauses 21.10.1.1 and 21.10.1.2.**
- .2 The amounts specified in such Certificate of Payment and/or invoice shall become due and the final date for payment shall arise ten (10) Business Days after the date of issue of such Certificate of Payment and/or invoice as applicable.*

21.11 Deductions and Disputes

- .1 In the event that the Contractor proposes to withhold any amount included in a Certificate of Payment, he shall give to the Sub-Contractor a notice of intention to withhold payment, specifying:

the amount proposed to be withheld and the grounds for withholding payment; or

*if there are more than one ground, each ground and the amount attributable for each.**

Such notice shall be given not less than five (5) business days before the final date for payment of the amount from which the withholding is proposed to be made."

- (vi) By Clause 29 of the Conditions of Contract ("**Determination of employment under the Sub-Contract**"):

"29.1 Any notice or further notice to which clauses 29.2.1, 29.2.2, 29.3.4 and 29.4 refer shall be in writing and given by actual delivery or by facsimile

transmission or registered post or by recorded delivery. If given by actual delivery or facsimile transmission the notice of further notice shall subject to proof of delivery, be deemed to have been received 24 hours after the date of posting (excluding Saturday and Sunday and Public Holidays).

29.2 .1 *If before the date of Practical Completion of the Sub-Contract Works the Sub-Contractor shall make default in any one or more of the following respects.*

.1 without reasonable cause he wholly or substantially suspends the design or carrying out of the Sub-Contract Works; or

.2 without reasonable cause he failed to proceed regularly and diligently with the performance of the Sub-Contract Obligations; or

.3 he refuses or neglects to comply with a written direction from the Contractor requiring him to remove any work, materials or goods in accordance with the Sub-Contract and by such refusal or neglect the Works are materially affected;

...

.6 subject to clause 29.2.5 he is in breach of any of his Sub-Contract Obligations, and after the expiry of a period of twenty eight (28) days from the date the Contractor has notified the Sub-Contractor of his intention to terminate the employment of the Sub-Contractor under the Sub-Contract the Sub-Contractor has failed to remedy such breach

...

then the Contractor may issue a notice to the Sub-Contractor specifying the default or defaults (the "specified default or defaults.")

(c) The Appendices to the Articles of Agreement

(i) By Appendix - Part 2 of the Articles of Agreement:

"Particulars of the Sub-Contract Works

*The carrying out of the **Structural Steelwork and Roof Works** package as defined in the Numbered Documents.*

The Numbered Documents are as follows:

...

Multiplex Constructions (UK) Limited: Volume No. 2 entitled "Specific Sub-Contract Document" referenced: Volume 2, 2411; incorporating the following:

- n) *Package Scope Definition.....*
- q) *Drawings*
- r) *Specifications “*

(ii) By the Numbered Document “Volume Two - Specific Sub-Contract Document” at Section D (page 20):

"D. SUB-CONTRACT SPECIFICATION....

- 4. *Wembley National Stadium Tolerance and Movement Specification (Rev H)"*

(d) The Special Conditions of Contract

(i) By Clause 3.03(d) of the Special Conditions of Contract:

The Sub-Contractor is required to commence and complete the Sub-Contract Works, fully in accordance with the Contractor's programme and any subsequent amendments thereto.

(ii) By Clause 3.05 of the Special Conditions of Contract:

The Sub-Contractor shall proceed with any portion or portions of the Sub-Contract Works at such time or times as the Contractor shall require having regard to the requirements of the Contractor in relation to the progress of the Works. The provisions of this clause apply in addition to any specific requirements included elsewhere in this Sub-Contract and empower the Contractor to issue instructions on the order or execution of the Sub-Contract Works and the hours of working.

(iii) By Clause 8.10 of the Special Conditions of Contract:

“The Sub-Contractor is responsible for the timely repair and making good of any defects or imperfections in the Sub-Contract Works which are not in accordance with the requirements of the Sub-Contract up to the issue of the Final Certificate in respect of the Sub-Contract. Such repair and making good shall be carried out at the Sub-Contractor's own expense, including bearing the cost of making good other works affected by such defect and/or its making good.”

8. Multiplex will refer at the trial hereof to the Sub-Contract for its full terms and true effect.

9. **There were, *inter alia*, as a matter of business efficacy and/or as a matter of law, implied terms of the Sub-Contract that:**

~~9. It was, *inter alia*, as a matter of business efficacy and/or as a matter of law an implied term of the Sub-Contract that~~

(i) any sums paid on an interim basis pursuant to an adjudicator's decision shall be repayable if so determined in subsequent legal proceedings;

(ii) CBUK would exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor in the design of the Sub-Contract Works;

(iii) CBUK would exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor in the construction of the Sub-Contract Works;

(iv) CBUK would carry out the Sub-Contract Works and/or any section thereof with all reasonable diligence and/or maintain reasonable progress.

10. Further and/or in the alternative, CBUK owed Multiplex a duty at common law to exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor in the design and construction of the Sub-Contract Works.

11. CBUK commenced the Sub-Contract Works on or around 28 September 2002 but, by the end of 2003, there were delays to the Sub-Contract Works and disputes or differences had arisen between the parties. CBUK made claims against Multiplex for extensions of time and additional payment under the Sub-Contract and Multiplex made claims against CBUK in respect of its performance of the Sub-Contract Works and for contra charges.

Heads of Agreement

11A By an agreement dated 18 February 2004 (the "Heads of Agreement"), the parties agreed to settle claims between them and make amendments to the Sub-Contract.

11B The Heads of Agreement included, *inter alia*, the following express terms:

(i) Clause 2:

"Intent of the parties is that a Supplemental Agreement (formally adjusting contract), with an effective date of 15 February 04, incorporating the points below be concluded by end February."

(ii) Clause 8:

"MPX to re-imburse CBUK (weekly/monthly on a basis to be agreed) at cost for erection and site-works (site staff, direct labour, cranes and other site-

related costs) for period of three months. i.e. ending 15/05/04. Plus £80,000 per month for off-site administration and overheads.”

(iii) Clause 9:

“During these three months CBUK is to complete the works in accordance with the attached programme (named: projected CBUK programme) and complete the raising of the arch by 21st April 2004 (subject to EOT’s). In addition, MPX/CBUK will re-programme erection works beyond the 3 months, and determine a new fixed price and programme for completion (price to include 10% contribution to CBUK overheads and profit).”

11C On the proper construction of the Heads of Agreement, alternatively it was to be implied as a result of the common intention of the parties and/or as a matter of business efficacy and/or as a matter of law:

(i) CBUK’s entitlement to re-imburement at cost for erection and site works was subject to those costs being reasonably and/or properly incurred;

(ii) CBUK was obliged to execute the Sub-Contract Works with such diligence and expedition as were reasonably required in order to meet the dates in the projected CBUK programme attached to the Heads of Agreement.

11D Multiplex will refer to the Heads of Agreement at the trial hereof for its full terms and true effect.

11E The effect of the execution of the Heads of Agreement was to amend the terms of the Sub-Contract.

The Supplemental Agreement

12. By an agreement in writing dated 16 June 2004 between Multiplex and CBUK (“the Supplemental Agreement”) and executed as a deed, the parties agreed to settle claims between them and make amendments to the Sub-Contract.

13. The Supplemental Agreement included, *inter alia*, the following express terms:

(i) Clause 2.1:

“Subject to Clause 2.2, the provisions of this Agreement are in full and final settlement of all disputes between the Contractor and the Sub-Contractor and all and any claims by the Sub-Contractor to the Contractor and by the Contractor to the Sub-Contractor existing on or before 15 February 2004 under or in connection with the Sub-Contract whether for extension of time, direct loss

and/expense, Variations, other adjustments to the Sub-Contract Sum, damages for breach of contract or otherwise or howsoever arising. Neither the Contractor nor the Sub-Contractor shall be entitled or permitted to make or pursue any claims against the other for any matter arising from any event or circumstance occurring up to and including 15 February 2004 (whether or not known to the Sub-Contractor).

(ii) Clause 2.2:

"Clause 2.1 shall not apply to any claim that the Contractor might have for design workmanship or materials not being in accordance with the Sub-Contract."

(iii) Clause 3.1:

"The Sub-Contract Works shall be varied post 15 February 2004 only by the omission of the fabrication and supply to the Site of the items specified in Schedule 3, Part A."

(iv) Clause 3.2:

"Notwithstanding Clause 3.1, the Sub-Contractor shall retain responsibility under the Sub-Contract for all design and fabrication drawings. In addition, the Sub-Contractor shall retain responsibility under the Sub-Contract for bought out materials and sub-contracts remaining in its scope after execution of this Agreement."

(v) Clause 3.3:

"The Sub-Contract Works shall be completed in accordance with the revised programme contained in Schedule 4."

(vi) Clause 4:

"Save as may be subsequently adjusted in accordance with the terms of the Sub-Contract (any such adjustment being subject to Clause 2.1 above), it is agreed that (taking account of all matters referred to in Clauses 2.1, 3.1 and 3.2) the adjusted Sub-Contract Sum (exclusive of Value Added Tax) shall be as specified in Schedule 1."

(vii) Clause 6.1:

"In consideration of the above, the Contractor has paid to the Sub-Contractor prior to the date of this Agreement the sum of £4,000,000 (exclusive of Value Added Tax)"

(viii) Clause 6.2:

"In addition, the Contractor shall pay to the Sub-Contractor the sum of £1,250,000 (exclusive of Value Added Tax) within 14 days following completion of the lifting of the steel arch (forming part of the Sub-Contract Works) to the position referred to in Schedule 1, paragraph (e)."

(ix) Clause 7:

"The parties shall use reasonable endeavours to agree to re-programme the completion of the Sub-Contract Works and to agree a fixed lump sum and/or

reimbursable Sub-Contract Sum for the completion of the Sub-Contract Works (to incorporate the reimbursable cost items referred to in Schedule 1, paragraph (c), an additional lump sum payment of £500,000 and a 10% contribution to overheads and profit), and to enter into a further supplemental agreement, recording the agreement contemplated by this Clause 7, on or before 29 June 2004 (or other such extended date as agreed in writing between the Contractor and the Sub-Contractor). The said additional lump sum payment of £500,000 will be paid on execution of the further supplemental agreement described in this Clause 7.

(x) Clause 8:

"In the event that the parties fail to reach such agreement in accordance with Clause 7 on or before 29 June 2004 (or other such extended date as agreed in writing between the Contractor and the Sub-Contractor), the Contractor shall be entitled to give 28 days written notice (or other such extended notice period as agreed in writing between the Contractor and the Sub-Contractor) to the Sub-Contractor further varying the Sub-Contract Works to remove from the Sub-Contractor the unperformed reimbursable cost items referred to in Schedule 1, paragraph (c). It should be noted in this regard that the Sub-Contractor issued HRI notices in respect of its Site employees on 30 April 2004.

(xi) Clause 9:

"In the event that the unperformed reimbursable cost items (referred to in Schedule 1, paragraph 9 (c)) are removed from the Sub-Contract Works in accordance with Clause 8, it is agreed that:

...

9.4 the adjusted period for the carrying out and completion of the whole of the Sub-Contract Works shall be 26 weeks commencing on 15 February 2004, as described in Schedule 4."

(xii) Schedule 1 of the Agreement:

"The adjusted Sub-Contract Sum shall comprise:-

- (a) the gross valuation as at 15 February 2004 of work properly completed on Site and goods and materials brought onto the Site by the Sub-Contractor and Off-Site Materials in accordance with the provisions of the Sub-Contract, subject to the deduction of Retention and other deductions permitted under the Sub-Contract; and*
- (b) a fixed, lump sum of £12,000,000 for the completion of all remaining works, services and other obligations under the Sub-Contract (save for those reimbursable cost items referred to in paragraphs (c) and (f) below and those lump sum items referred to in paragraphs (d) and (e) below) subject to the deduction of Retention and other deductions permitted under the Sub-Contract; and*
- (c) all costs reasonably and properly incurred by the Sub-Contractor from 15 February 2004, in connection with the erection and site works (being site staff, direct labour, cranes and other site related*

costs), plus a fixed amount for off-site administration and overheads at a rate of £80,000 per month from 15 February 2004, subject to the deduction of Retention and other deductions permitted under the Sub-Contract; and

- (d) a fixed, lump sum of £4,000,000 previously paid as consideration for this Agreement (as referred to in Clause 6.1 above) not subject to the deduction of Retention;
- (e) a fixed, lump sum of £1,250,000 following completion of the rotation of the steel arch to its parked, temporarily restrained position prior to load transfer (as referred to in Clause 6.2 above) not subject to the deduction of Retention; and
- (f) the costs reasonably incurred by the Sub-Contractor in purchasing steel (as directed by the Contractor) that are not included in the gross valuation as a [sic] 15 February 2004, subject to the deduction of Retention and other deductions permitted under the Sub-Contract. The Contractor has, prior to the execution of this Agreement, directed that all steel required for these Works is purchased by the Sub-Contractor, but the Contractor reserves the right to alter this direction for subsequent purchases.

Payment of the adjusted Sub-Contract Sum shall be made, monthly, in accordance with the payment provisions of the Sub-Contract save as to the items referred to at paragraph (c) above which shall be paid by the Contractor to the Sub-Contractor at two week intervals. An Application for Payment in respect of the items referred to at paragraph (c) above may be made in accordance with clause 21.3 of the Sub-Contract at two week intervals and clause 21 of the Sub-Contract shall be construed accordingly with necessary changes made."

(xiv) Schedule 4:

- (a) A programme (referenced WS05-V1), entitled "Acceleration (Sub-Let fabrication listing)", and dated 11 February 2004; and
- (b) A programme, entitled "Projected CBUK Programme (including CBUK Design & Fabrication Dates as at 06/02/04) Rev CBDP."

14. Multiplex will refer to the Supplemental Agreement at the trial hereof for its full terms and true effect.

15. The Supplemental Agreement was effective with retrospective effect from 15 February 2004. Accordingly, the effect of the execution of the Supplemental Agreement on the Heads of Agreement was to supersede with retrospective effect any terms of the Heads of Agreement that were inconsistent with the corresponding terms of the Supplemental Agreement, and its effect on the Sub-Contract was to amend the terms of the Sub-Contract, ~~constituting a new agreement which will be referred to as the "Amended Sub-Contract".~~

15A The Heads of Agreement, the Sub-Contract as amended and the Supplemental Agreement together constituted a new agreement which will be referred to as the "Amended Sub-Contract".

Arch Member Defects

16. One key part of the new stadium is the steel arch which is to span the North side and from which the stadium roof is to be suspended (the "Arch"). The Arch construction employs 41 circular diaphragms, each around 7.0 metres diameter, spaced at approximately 10.0m centres. The diaphragms are connected together by a series of 457mm diameter circular hollow section members (or chords) of various thicknesses, there being 12 members (or chords) between each pair of diaphragms. The chords form a series of helical shapes around the longitudinal axis of the Arch.
17. Offsite fabrication of the diaphragm ring sections commenced on or about 2 June 2003 at CBUK's facility at Darlington. The rings were split into three sections for transport and re-assembly as complete rings on site.
18. In or about August 2003 CBUK commenced the on-site erection of the Arch. The sections for each diaphragm ring were connected together, and then connected by members (or chords) with three other rings to form a module. Each module was lifted into position on the ground until the entire Arch was constructed in a near horizontal position. At each end of the Arch a purpose made rotation pin was connected to allow the Arch to be rotated into its final position.
19. At the end of December 2003, a revised construction programme was put in place by CBUK. The programme (entitled "Update No. 16 31 January 2003⁴"), forecasted that the Arch would start to be lifted into its vertical position on 22 March 2004 and finish on 21 April 2004. A copy of this programme was included in CBUK's Monthly Progress Report for December 2003. In reliance upon that revised programme, Multiplex proceeded to programme its works and those of its other subcontractors including, *inter alia*, PC Haigh Harrington on the basis that the arch lift would be completed on 21 April 2004.
20. However, on a date which Multiplex cannot at present give until after disclosure and/or the provision of further information but sometime ~~or~~ before ~~December 4~~ August 2003, CBUK discovered and became aware of defects in the Arch, particularly in relation to the tolerance and straightness limits specified in the Sub-Contract specifications.

21. The Wembley National Stadium Tolerance and Movement Specification (the "Tolerance Specification"), as referenced in the Numbered Document "Volume Two - Specific Sub-Contract Document", states:

"SUPERSTRUCTURE TOLERANCES - STEELWORK (ROOF AND UPPER TIER RAKERS)

Fabrication clearances and tolerances shall be in accordance with BS5950 and the National Structural Steelwork Specification - 3rd Edition (NSSS) unless noted otherwise."

22. The Tolerance Specification therefore obliged CBUK to comply with British Standard 5950 which states in Part 2 ("Specification for materials, fabrication and erection - Rolled and welded section"):

7.2.2.2 *Straightness and curvature*

Unless required to be any other shape, the deviation of a built-up member from a straight line drawn between adjacent points of subsequent effective lateral restraint shall not exceed 3mm or 1/1000 whichever is the greater, where l is the distance between restraints (in mm)".

23. In the Arch, the length of the tubular members is 10 metres. Accordingly, CBUK was obliged to ensure that the members did not have a deviation greater than ± 10 mm.
24. At a meeting held between representatives of Multiplex and CBUK on 18 December 2003, CBUK admitted that at least five steel members making up the Arch were outside the tolerance limits set out in the Sub-Contract Specifications.
25. Pursuant to an instruction from Multiplex dated 22 December 2003, CBUK were **required to carry out** an as-built survey of the members and nodes making up the Arch in order to evaluate the extent to which the members and nodes were outside the limits set out in the Tolerance Specification and **British Standard 5950** and were therefore defective.
26. On 6 February 2004, Multiplex received a copy of CBUK's as-built survey, entitled "*Arch As Built Survey – Longitudinal Tubes Capacity Arch Erection*" (the "Survey"). The Survey included only results from members between diaphragm 8 and 37, and recorded 170 members that were **outside the (± 10 mm) tolerance limit set out in the Tolerance Specification and British Standard 5950.**
27. The parties investigated ways of resolving the matter of defective members. The structural engineer for the Project is a joint venture called Mott Stadium Consortium

(“MSC”), comprising Mott MacDonald Limited, Connell Wagner and Sinclair Knight Merz. In order to help mitigate the losses caused by the defective members, Multiplex instructed MSC to analyse the entire Arch to determine whether it was possible (by waiver of strict compliance with the Tolerance Specification) to avoid replacing any of the then identified 170 defective members. MSC duly commenced a detailed and time consuming analysis.

28. At a meeting on 3 March 2004, CBUK agreed to replace 13 out of tolerance members that had been identified as “working very hard” and likely to fail under load. A further 14 out of tolerance members, which had been identified as “working hard”, were then the subject of further review by MSC.
29. CBUK commenced remedying the defective members and nodes on 9 March 2004 and continued remedial work throughout April 2004. In total, CBUK replaced the following 24 members:

No.	LOCATION	MEMBER	Original Thickness	New Thickness	Weld date
1	T7-T8	10755	25	38.1	28/04/2004
2	T7-T8	10756	20	25	28/03/2004
3	T8-T9	10858	16	20	09/04/2004
4	T8-T9	10860	10	12.7	25/03/2004
5	T8-T9	10861	10	12.7	22/03/2004
6	T9-T10	10956	16	25	26/04/2004
7	T9-T0	10959	16	25	30/03/2004
8	T10-T11	11057	16	20	07/04/2004
9	T13-T14	11356	12.5	19.1	10/04/2004
10	T14-T15	11459	25	38.1	30/03/2004
11	T16-T17	11651	16	25	27/04/2004
12	T16-T17	11653	16	25	16/04/2004
13	T17-T18	11752	25	38.1	26/04/2004
14	T17-T18	11756	25	31.75	06/04/2004

15	T18-T19	11852	40	45	27/04/2004
16	T21-T22	12161	10	16	04/04/2004
17	T22-T23	12256	16	19.1	08/04/2004
18	T23-T24	12356	32	38.1	23/04/2004
19	T29-T30	12961	20	25	04/04/2004
20	T30-T31	13052	25	30	20/04/2004
21	T30-T31	13056	25	31.75	06/04/2004
22	T30-T31	13059	20	25	10/04/2004
23	T31-T32	13151	16	20	19/04/2004
24	T39-T40	13958	16	19.1	27/03/2004

30. In anticipation of the need for further remedial works, CBUK procured an additional 7 members, which were held at the Wembley Site and available for replacing any defective members that might subsequently have been identified as requiring replacement.
31. On 18 May 2004, final confirmation was received by MSC that a total of 16 members required replacement. As those 16 members had already been replaced, no further remedial works were required. CBUK submitted its design certificate on 20 May 2004. Written approval was then obtained by CBUK's third party checker, Babbie, on 21 May 2004 in accordance with clauses 120 and 465 of the Wembley National Stadium Structural Steel Specification for the Roof Structure.
32. Following completion of the remedial works and receipt of the requisite approval on 21 May 2004 from the third party checker, the Arch lift could then commence on 22 May 2004. It was eventually rotated into its parked, temporarily restrained position prior to load transfer on 29 June 2004.
33. CBUK was in breach of, *inter alia*, clauses 4.1.1, 4.1.3, 4.1.4, 5.1.1, 5.3.2.1 of the Sub-Contract and/or the Amended Sub-Contract and/or clause 8.10 of the Special Conditions of Contract and/or in breach of the common law duty to exercise reasonable skill and care when designing and/or fabricating and/or erecting the Arch steelwork.

Particulars

- (a) CBUK failed to design, fabricate, construct **and/or** cause to have constructed the steelworks making up the Arch within the tolerance limits set out in the Tolerance Specification in that a significant number of members were outside the tolerance limits set out in the Tolerance Specification.
- (b) CBUK failed to exercise reasonable care and skill in the design of the Arch **steelwork in that it failed to prepare sufficiently detailed and/or consistent drawings and/or fabrication procedures.**
- (c) **CBUK failed to exercise reasonable care and skill in the fabrication of the Arch steelwork in that it failed to follow its own Quality Management System.**
- (d) **CBUK failed to exercise reasonable care and skill in the fabrication of the Arch steelwork in that** a significant number of members were outside the tolerance limits set out in the Tolerance Specification.
- (~~e~~) CBUK failed to carry out the Arch fabrication and construction in a proper and workmanlike manner **in that** a significant number of members were outside the tolerance limits set out in the Tolerance Specification.
- (~~e~~f) CBUK failed to deliver proper and complete Quality Assurance documentation for fabricated and painted structural steelwork.
- (~~f~~g) In the premises, CBUK failed to exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor.

33A Further, CBUK was in breach of clause 9 of the Heads of Agreement in that it failed to complete the raising of the Arch by 21 April 2004.

- 34. By reason of the said breaches of contract and/or negligence by CBUK and the said remedial works, Multiplex has suffered loss and expense and is entitled to an indemnity from CBUK under clause 4.3.4 of the Sub-Contract in respect of its loss and expense incurred.
- 35. Further and/or in the alternative, by reason of the matters aforesaid Multiplex is entitled to damages for breach of contract and/or negligence by CBUK.

Defective Work

36. CBUK commenced offsite bowl steelwork fabrication at its Darlington facility in August 2003, and on-site erection ~~towards~~ on or about 22 September 2003.
37. Between February and August 2004, CBUK continued with the offsite fabrication of bowl steelwork and the on-site erection of bowl steelwork. However, defects became apparent in both the fabricated and erected bowl steelwork. Multiplex commissioned Sandberg on or about July 2004 to carry out an independent review of the steelwork provided by CBUK.
38. The defects identified in the steelwork fabricated and erected by CBUK are set out in ~~Schedule 1~~ **Schedules 1A and 1B** to these **Amended Consolidated** Particulars of Claim. **The cost of Sandberg's additional work in reviewing the steelwork provided by CBUK is set out in Schedule 1E to these Amended Consolidated Particulars of Claim.**
39. Further, ~~recent~~ survey work undertaken by Hollandia of the erected bowl structure has revealed structural steelwork that is outside the erection tolerances and steelwork that has been fabricated in accordance with drawings that were defective and which accordingly requires refabrication. ~~Further details will be provided as soon as possible~~ **These defects are set out in Schedule 1D to these Amended Consolidated Particulars of Claim.**
40. Further, there were defects, errors and omissions in the designs and/or drawings produced by CBUK ~~including, inter alia, the following~~: **The defects, errors and omissions in the designs and/or drawings produced by CBUK are set out in Schedule 1C to these Amended Consolidated Particulars of Claim.**
- (a) ~~two of the roof phases for the North and South Roofs are missing;~~
 - (b) ~~some of the phases are incomplete;~~
 - (c) ~~retro fit work for some phases is not included;~~
 - (d) ~~connection designs are missing;~~
 - (e) ~~calculations require cross checking against the X steel model;~~
 - (f) ~~the V strut cones have been wrongly dimensioned.~~

~~These particulars are the best that Multiplex is able to give at present. Further particulars will be provided as and when they become available.~~

41. Further, during the course of the arch lift in or about June 2004 it became apparent that 4 of the Bridon cable connections suspended from the Arch were twisted. The connections were subsequently inspected by the manufacturer, Bridon International Limited, in late October 2004. They have confirmed that the cables are twisted as a result of CBUK incorrectly connecting the sockets to the catenary nodes 180 degrees out of alignment. Remedial works are therefore necessary to disconnect the sockets from the catenary node, turn them around 180 degrees, repair the damage to the cables and re-attach the sockets correctly to the catenary nodes.

41A The defects identified in the Bridon cables are set out in Schedule 1E to these Amended Consolidated Particulars of Claim.

42. CBUK was in breach of *inter alia* clauses 4.1.1, 4.1.3, 4.1.4, 5.1.1 of the Sub-Contract and/or the Amended Sub-Contract and/or in breach of the common law duty to exercise reasonable skill and care when fabricating and/or erecting the steelwork.

Particulars

- (a) **CBUK failed to exercise reasonable care and skill in the fabrication of the steelwork in that** a significant number of defects are present.
- (b) CBUK failed to carry out the fabrication and construction in a proper and workmanlike manner **in that** a significant number of defects are present.
- (c) In the premises, CBUK failed to exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor.
43. By reason of the said breaches of contract and/or negligence by CBUK, Multiplex is entitled, pursuant to clause 21.3.2.1 of the Amended Sub-Contract, to make an appropriate deduction in respect of the defects, as set out in Schedule 2, against sums to be certified in a valuation of CBUK's work up to 5 August 2004.
44. Further and/or in the alternative, by reason of the matters aforesaid Multiplex is entitled to damages for breach of contract and/or negligence by CBUK.

Events in June 2004

45. In accordance with clause 7 of the Supplemental Agreement, Multiplex sought to try 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. From 24 February 2004 onwards, Multiplex repeatedly requested a

new programme and price from CBUK but was never provided with one. The matter was continually raised at Multiplex's weekly meetings with CBUK and then, as a result of CBUK's inaction, by Mr Stagg of Multiplex directly with Mr Grant of CBUK— late in June 2004.

46. In breach of its obligations, CBUK did not provide a new programme or price proposal until 14 June 2004, some four months later. The programme envisaged CBUK completing its work within 13.5 months from 25 June 2004. There was also a proposal for the payment of an additional £28.896 million, plus overheads, contingency and profit element.
47. The parties met on 22 June to discuss the proposal. The following day, 23 June, Mr Muldoon of Multiplex met again with Mr Rogan of CBUK to discuss the proposal further. In breach of CBUK's obligation to use reasonable endeavours to agree a new price, Mr Rogan said that it was "*too hard*" for CBUK to provide a fixed price because the price would be "*too high*" and that CBUK wanted a cost-plus arrangement.
48. By letter dated 24 June 2004, Multiplex responded to CBUK's proposal requesting, *inter alia*, a revised programme, a fixed price, and a cost-plus price based on the Sub-Contract rates. CBUK responded by letter dated 28 June 2004. It indicated that there were "*difficulties*" in arriving at a fixed price and proposed a "*pain/gain*" scheme.
49. On 29 June, Mr Muldoon of Multiplex met again with Mr Rogan of CBUK. In breach of CBUK's obligation to use reasonable endeavours to agree a new price, Mr Rogan confirmed that CBUK was not prepared to put forward a fixed price and would only continue to carry out on-site erection on a cost-plus basis.
50. As the parties had been unable to reach agreement by 29 June 2004, Multiplex became entitled, pursuant to clause 8 of the Supplemental Agreement, to give and did by letter dated 30 June 2004 give 28 days written notice to CBUK to remove from the Amended Sub-Contract the unperformed reimbursable cost items contained in Schedule 1, paragraph (c).
51. Pursuant to that written notice and in accordance with clause 9 of the Supplemental Agreement, CBUK liaised with Multiplex with a view to securing alternative employment for CBUK's site employees and to ensure an orderly handover of the works. CBUK claimed and was in due course paid £500,000 pursuant to clause 9.3 of the Supplemental Agreement to allow Multiplex the use of all temporary buildings, plant, tools, equipment, temporary works and the like for the completion of the works.

June 2004 Valuation

52. On 6 July 2003~~4~~, CBUK issued an Application for Payment No. 23 for £5,020,420.76 for Works carried out up to 30 June 2004. CBUK claimed, in that application, that the total value of the Works (net of retention) was £58,626,501.43 out of an initial lump-sum price Sub-Contract of £60 million (subsequently amended by the Supplemental Agreement).
53. Multiplex believed that the Application for Payment significantly overstated the true and proper valuation. In particular, the parties had been unable to agree upon the gross valuation as at 15 February 2004 of work properly completed on site and goods and materials brought onto site in accordance with paragraph (a) of Schedule 1 of the Supplemental Agreement.
54. Further, it is Multiplex's case that not all of the on-site costs claimed by CBUK pursuant to paragraph (c) of Schedule 1 of the Supplemental Agreement were reasonably and/or properly incurred ~~in that, *inter alia*, CBUK's on site steelwork erection rates fell well short of the rate of 400 tonnes/week that a reasonably skilled and competent steelwork contractor would have achieved.~~with the consequence that CBUK was not entitled to be reimbursed for the same in that, *inter alia*:
- (i) sums of money were claimed for which were not justified and in respect of which CBUK produced no timesheets;
 - (ii) inadequate allowance was made for the staff costs referable to the cost of the Arch member remedial works;
 - (iii) not all costs were referable to on-site erection and site works;
 - (iv) overtime costs were not justified;
 - (v) redundancy costs were not recoverable;
 - (vi) travel costs were claimed which were not referable to the project.
- Multiplex's case is that the proper value of the on-site costs to 30 June 2004 is £7,090,603.30, as described at item I of Schedule 2 to these Amended Consolidated Particulars of Claim and being the sum determined in the Adjudicator's decision dated 21 October 2004.
55. In accordance with the terms of the Amended Sub-Contract, Multiplex carried out a bona fide valuation of the Works to 30 June 2004, which it assessed to be

£41,195,829. As Multiplex had already paid CBUK £53,606,080.67, it issued, on 16 July 2004, Certificate of Payment No.37 with the negative value of £12,410,251.25 (plus VAT).

56. Further, on 16 July 2004, Multiplex issued Certificate of Payment No.38 to include the sum of £535,750.90 in respect of CBUK's Application for Payment for CBUK's weekly reimbursable costs for weeks 91 and 92. Certificate of Payment No.38 had a negative value of £13,952,537.91 (including VAT).
57. Prior to the issue of Certificates No. 37 and 38 on 16 July 2004 and in accordance with Schedule 1 of the Supplemental Agreement, Mr Stagg and Mr Cursley of Multiplex telephoned CBUK and consulted with Mr Grant on the deductions that Multiplex proposed to make against CBUK's Applications for Payment.
58. Subsequent to that consultation and in accordance with the Amended Sub-Contract, Multiplex issued invoice No. 000376 dated 16 July 2004 to CBUK for the sum of £11,874,500.35 (plus VAT), in respect of the sums due to it.
59. By letter dated 20 July 2004, CBUK disputed Multiplex's entitlement under the Certificates of Payment, stating that:

"With reference to your two certificates 37 and 38, dated 30 June 2004 and 2 July 2004 respectively and pursuant to clause 21.11.2 of the sub-contract, we give notice of our objection to your claimed entitlement to withhold the sum stated or abated and entirely reserve our position in relation to these actions."

60. Under the terms of clause 21.10.2 of the Amended Sub-Contract, the final date for payment of that invoice No. 000376 by CBUK was 30 July 2004, but wrongfully and in breach of contract CBUK failed to pay the sum due or any sum.
61. Multiplex is entitled to and accordingly claims the sum of £11,874,500.35 (plus VAT) pursuant to the Amended Sub-Contract.
62. Further and/or in the alternative, by reason of the matters aforesaid, Multiplex has suffered loss and damage and claims such sums as damages for breach of the Amended Sub-Contract.

Programme Delays

63. Pursuant to clause 3.3 of the Supplemental Agreement, CBUK was obliged to complete the Sub-Contract Works in accordance with the revised programme contained at Schedule 4.

64. CBUK was in breach of that obligation in that:

Particulars

(a) Bowl (PH11-18) Band 1:

Activity 0001: CBUK's last drafting submission was not made until 23 May 2004.

Activity 00012: Fabrication UK (including painting) was not completed prior to 5 August 2004.

Activity 00013: Fabrication of China steel was never completed. Part-fabricated carcasses were returned to the UK for completion.

Activity 00015: Transport from China was completed by 10 May 2004, but only part-fabricated carcasses and not completed items.

(b) Bowl (PH21-28) Band 2:

Activity 0005: Drafting was not properly completed prior to 5 August 2004.

Activity 00016: Fabrication was not completed prior to 5 August 2004.

(c) Bowl (PH31-38) Band 3:

Activity 0007: Design was not completed prior to 5 August 2004.

Activity 0009: Drafting was not properly completed prior to 5 August 2004.

Activity 00020: Fabrication UK (including painting) was not started prior to 5 August 2004.

(d) PPT:

Activity 0019: CBUK's last design submission was not made until 14 May 2004.

Activity 0020: CBUK's last drafting submission was not made until June 2004.

(e) Roof:

Activity 0300: North Roof design was not completed prior to 5 August 2004.

Activity 0302: North Roof drafting was not completed prior to 5 August 2004.

- Activity 0312: South Roof design was not completed prior to 5 August 2004.
- Activity 0314: South Roof drafting was not completed prior to 5 August 2004.
- Activity 0322: East/West Roof design was not completed prior to 5 August 2004.
- Activity 0324: East/West Roof drafting was not completed prior to 5 August 2004.

65. By reason of the said breaches of contract and/or negligence by CBUK, Multiplex has suffered and continues to suffer loss and damage.

Steelwork Erection Rate

65A Pursuant to clause 9 of the Heads of Agreement, CBUK was obliged to complete the Sub-Contract Works in accordance with the attached programme (the "Projected CBUK Programme"). By activity 00021 of the Projected CBUK Programme, CBUK was obliged to complete erection of Phases 11 to 18 of the bowl steelwork by 26 July 2004.

65B It is Multiplex's case that in order to meet its obligation to complete erection of Phases 11 to 18 of the bowl steelwork by 26 July 2004 and to discharge its obligations under the implied terms set out a paragraphs 9(iii) and/or (iv) and/or 11C(ii) above and/or clauses 4.1.1 and/or 4.1.4 of the General Conditions of the Sub-Contract and/or clauses 3.03(d) and/or 3.05 of the Special Conditions of the Sub-Contract, CBUK should have achieved an average on-site steelwork erection rate between 15 February and 26 July 2004 of 400 tonnes/week.

65C Further and/or alternatively, it is Multiplex's case that a reasonably skilled and competent steelwork contractor would have achieved an average erection rate of 400 tonnes/week in the same period, as evidenced by the following:

- (i) CBUK issued a revised programme in February 2004 (known as WS05-v1). This programme was subsequently used by CBUK to measure its own progress in its monthly progress reports from February 2004 onwards.**
- (ii) Programme WS05-v1 shows that CBUK had to erect more than 400 tonnes of steel per week. CBUK's monthly progress reports between February and July 2004 were based on this predicted erection rate.**

(iii) In reliance upon WS05-v1, Multiplex issued its weekly programming update TW75 on 5 March 2004 to its subcontractors. Multiplex's further programming updates (the TW series) were based on CBUK's monthly progress reports and thus programme WS05-v1.

65D In breach of the obligations set out in paragraphs 65B and/or 65C above, CBUK failed to achieve an average on-site steelwork erection rate between 15 February and 30 June 2004 of 400 tonnes/week. The rate of steelwork erection achieved by CBUK is set out in CBUK's monthly progress reports and the following table sets out the rates predicted by CBUK and those actually achieved:

<u>Week Commencing</u>	<u>Planned</u> <u>(on 27 February 2004)</u>	<u>Actual</u> <u>(on 22 June 2004)</u>
<u>16-Feb 04</u>	<u>140</u>	<u>140</u>
<u>23-Feb 04</u>	<u>200</u>	<u>146</u>
<u>1-Mar 04</u>	<u>250</u>	<u>237</u>
<u>8-Mar - 04</u>	<u>275</u>	<u>260</u>
<u>15-Mar - 04</u>	<u>300</u>	<u>46</u>
<u>22-Mar - 04</u>	<u>175</u>	<u>210</u>
<u>29-Mar - 04</u>	<u>175</u>	<u>306</u>
<u>5 -Apr 04</u>	<u>175</u>	<u>158</u>
<u>12-Apr 04</u>	<u>300</u>	<u>190</u>
<u>19-Apr 04</u>	<u>450</u>	<u>539</u>
<u>26-Apr 04</u>	<u>450</u>	<u>98</u>
<u>3-May 04</u>	<u>500</u>	<u>226</u>
<u>10-May 04</u>	<u>550</u>	<u>287</u>
<u>17-May 04</u>	<u>500</u>	<u>197</u>
<u>24-May 04</u>	<u>550</u>	<u>259</u>
<u>31-May 04</u>	<u>600</u>	<u>168</u>
<u>7-Jun 04</u>	<u>650</u>	<u>187</u>

<u>14-Jun 04</u>	<u>625</u>	<u>180</u>
<u>21-Jun 04</u>	<u>550</u>	<u>144</u>
<u>28-Jun 04</u>	<u>600</u>	<u>71</u>
<u>Average weekly erection rate</u>	<u>400 (planned)</u>	<u>202 (achieved)</u>

65E CBUK was in breach of *inter alia* clauses 4.1.1 and/or 4.1.4 of the General Conditions of the Sub-Contract and/or clauses 3.03(d) and/or 3.05 of the Special Conditions of the Sub-Contract and/or the aforesaid implied terms set out at paragraphs 9(iii) and (iv) above of the Sub-Contract and/or the Amended Sub-Contract and/or clause 9 and/or the aforesaid implied term set out at paragraph 11C(ii) of the Heads of Agreement and/or in breach of the common law duty to exercise reasonable skill and care when fabricating and/or erecting the steelwork in that it:

Particulars

- (a) failed to erect an average of 400 tonnes/week of bowl steelwork between 15 February and 30 June 2005;
- (b) by 30 June 2005 had erected 6687 tonnes of Phase 11 - 18 bowl steelwork (according to CBUK's June 2004 Monthly Report) and therefore would have been unable to erect the remaining 6098 tonnes of Phase 11 - 18 bowl steelwork by the required date of 26 July 2004;
- (c) failed to plan, fabricate and deliver sufficient steel to the Site to enable its site workforce to erect an average of 400 tonnes/week of bowl steelwork;
- (d) failed to adhere to its own procedures, method statements and Quality Assurance Programme;
- (e) failed to coordinate with other contractors working on the Site;
- (f) failed to verify the corrections required for hold down bolts and embedment plates;
- (g) failed to organise a marshalling yard with sufficient manpower and equipment to support an erection rate of 400 tonnes/week;

- (h) failed properly to mark and/or tag fabricated steel being delivered to Site;**
- (i) failed to integrate corrective works into its programme;**
- (j) failed adequately to plan and manage the “leave out” steel;**
- (k) failed to provide adequate third party checking of general arrangement erection drawings; and**
- (l) in the premises, CBUK failed to exercise all the skill and care to be expected of a reasonably skilled and competent steelworks contractor.**

65F By reason of the said breaches of contract and/or negligence by CBUK, Multiplex has suffered and continues to suffer loss and damage.

Repudiation of the Sub-Contract

- 66. By letter to Multiplex dated 23 July 2004 (received at 16:54), CBUK alleged that Multiplex was not entitled to value the works in the way it had in Certificates 37 and 38 and accused Multiplex of repudiatory breach of the Sub-Contract. CBUK advised that unless Multiplex reinstated a gross valuation of £32.66 million, made payment of £1.25 million and undertook to consult with CBUK on future valuations, it would not carry out the works remaining under the Sub-Contract.
- 67. By letter dated 26 July 2004, Multiplex (by its Solicitors) rejected the allegations made by CBUK and rejected any right of CBUK to suspend performance of its Sub-Contract Works.
- 68. By letter dated 2 August 2004 (received 12:06) CBUK, wrongfully and in repudiatory breach of contract, gave notice that it would no longer carry out any further work under the Sub-Contract and would demobilise immediately. CBUK thereafter refused to carry out any further works remaining under the Sub-Contract.
- 69. Multiplex was entitled to treat CBUK as having repudiated the Amended Sub-Contract ~~and/or the Supplemental Agreement~~ and by letter dated 5 August 2004 accepted that repudiation by CBUK.
- 70. By reason of CBUK’s repudiatory breach of contract, Multiplex has suffered and continues to suffer loss and damage.

July 2004 Valuation

71. On 29 July 2004, CBUK issued Application for Payment No. 24 for £20,802,198.56.
72. In accordance with clause 21 of the Amended Sub-Contract, Multiplex proceeded to review that Application for Payment. However, as set out in paragraphs 66 to 70 above, CBUK repudiated the Amended Sub-Contract with effect from 5 August 2004. Accordingly, Multiplex was released from its obligations under the Amended Sub-Contract including, *inter alia*, an obligation to issue a Certificate of Payment pursuant to clause 21.9 of the Amended Sub-Contract.
73. In the circumstances, CBUK has no entitlement to compensation for the work carried out in July 2004 due to the fact that no Certificate of Payment has been issued.

Loss and damage

74. As a result of the matters pleaded at paragraphs 36 to 44 (Defective Work), 52 to 62 (June 2004 Valuation), and 71 to 73 (July 2004 Valuation) above, Multiplex is entitled to and claims the following sums pursuant to the Amended Sub-Contract:

Particulars

Attached at Schedule 2 is Multiplex's valuation of the works carried out by CBUK to the date of repudiation of the Amended Sub-Contract, 2 August 2004. Multiplex is accordingly entitled to the repayment of sums overpaid to CBUK, namely the sum of £17,612,342.38 ~~12,391,036.73~~ (plus VAT).

75. Alternatively, Multiplex claims such sums as damages for breach of the Amended Sub-Contract.
76. As a result the matters pleaded at paragraphs 16 to 35 (Arch Member Defects) and/or 63 to 65 (Programme Delays) and/or 5465A to 65F (Steel Erection Rate) above, Multiplex is entitled to and claims the following sums:

Particulars

Multiplex has and will incur additional loss and expense in arranging for others to ~~accelerate and~~ complete the Sub-Contract Works. These costs are being incurred and will continue to be incurred until the end of the Project.

Multiplex is not able to give full particulars of all the loss and damage suffered or of the anticipated losses. Set out in Schedule 3 are the best particulars of loss and damage

that Multiplex can give at present, which identifies damages in the sum of £17,893,408
22,751,259.

77. Further, by reason of the matters pleaded at paragraphs 66 to 70 (Repudiation) above, Multiplex has and continues to suffer loss and damage.

Particulars

By reason of CBUK's repudiation of the Sub-Contract, Multiplex has and will incur additional loss and expense in arranging for others to complete the Sub-Contract Works. These costs are being incurred and will continue to be incurred until the end of the Project.

Multiplex is not able to give full particulars of all the loss and damage suffered or of the anticipated losses. Set out in Schedule 4 are the best particulars of loss and damage that Multiplex can give at present, which identifies damages in the sum of £2,800,000.3,114,905.41.

78. In the premises, Multiplex is entitled to and claims damages for breach of contract and/or duty of care at common law.
79. Further, Multiplex is entitled to and claim interest pursuant to Section 35A of the Supreme Court Act 1981 at such rate and for such period as the Court thinks fit.

AND MULTIPLEX CLAIMS:

- (1) Under paragraph 74, the sum of £17,612,342.38 ~~12,391,036.73~~ (plus VAT), alternatively damages for breach of contract.
- (2) Under paragraph 76, the sum of £17,893,408 ~~22,751,259~~, alternatively damages for breach of contract.
- (3) Under ~~paragraphs 77,~~ paragraph 77, the sum of £3,114,905.41, alternatively damages for breach of contract.
- (4) Further and/or alternatively damages for breach of duty at common law.
- (5) Interest pursuant to Section 35A of the Supreme Court Act.

~~FINOLA O'FARRELL QC~~

ROGER STEWART QC

PAUL BUCKINGHAM

STATEMENT OF TRUTH:

The Claimant believes that the facts stated in these **amended consolidated** particulars of claim are true. I am duly authorised by the Claimant to sign this statement.

.....

Ashley Muldoon

Director

Multiplex Constructions (UK) Limited

Served this 23 day of December 2004 by
Clifford Chance LLP
10 Upper Bank Street
London E14 5JJ

Ref: EZH/M4770/00781/NHMF
Tel: 020 7600 1000
Fax: 020 7600 5555
DX: 149120 Canary Wharf 3

Solicitors for the Claimant/Part 20 Defendant

Re-served this 12th day of December 2005

Claim No. HT-04-314 and

**Claim No.HT-04-238 consolidated by Order dated
10th December 2004**

**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 PARTICULARS OF
CLAIM**

Clifford Chance Limited Liability Partnership
10 Upper Bank Street
London E14 5JJ

Tel: 0207 006 1000

Fax: 0207 006 5555

Ref: EZH/M4770/007810-20332698/NHMFAXP