

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

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 REPLY AND
DEFENCE TO COUNTERCLAIM

AMENDED REPLY

1. In this Amended Consolidated Reply and Defence to Counterclaim, unless otherwise stated references to paragraph numbers are to the numbered paragraphs of the Amended Defence and Counterclaim.
2. Save insofar as it consists of admissions or as is admitted below, Multiplex joins issue with CBUK on its Amended Defence and Counterclaim.

The Sub-Contract

3. As to paragraph 8.1:

- (a) It is denied that the valuation rules in the Sub-Contract were varied by a document entitled "Valuation Procedures", which was a document prepared by CBUK after execution of the Sub-Contract. The parties did not follow the Valuation Procedures for monthly payments.
- (b) By Clause 30.2.5 of the Conditions of Contract, it was provided that any notice of determination under Clause 30.3 or 30.4 should not be given unreasonably or vexatiously.
- (c) Clause 30.4 is admitted, save that it provides that the provisions of both clauses 30.2 and 30.3 are without prejudice to any other rights or remedies which either CBUK or Multiplex may possess.
- (d) Clause 12.2 is admitted.
- (e) Appendix Part 4 to the Articles is admitted. The introduction to the Restraint Schedule contained within Volume 2 of the Numbered Documents also provided that "*Within 21 calendar days of execution of this Sub-Contract a detailed Sub-Contract programme will be developed and agreed, and will be co-ordinated with other trade packages in respect of craneage and progress, in accordance with the dates/milestones referred to within the above Sub-Contract Restraints Schedule*", and the Restraint Schedule provided that "*7 (e) The Steelwork Subcontractor will not have exclusive use of any area of the site but must co-ordinate with those of other subcontractors, including but not limited to, Piling, Steelwork, Mechanical and Electrical, Roofing and Cladding subcontractors.*".

4. Paragraph 8.2 is denied. It is Multiplex's case that any term implied into the Sub-Contract as a matter of business efficacy and/or as a matter of law would contain mutual obligations that neither party would prevent the other from performing its obligations and that both parties would co-operate in the performance of their mutual obligations.

4A As to paragraph 9:

- (a) It is denied that CBUK's design obligation was limited to the design of connections. It is Multiplex's case that CBUK's design obligations included, *inter alia*, design of Temporary Works, analysis of the effects of its erection scheme on the permanent works, production of fabrication procedures and production of detailed fabrication drawings.

(b) It is denied that “connections” are limited to the welds or interfaces between members. For the avoidance of doubt it is Multiplex’s case that the term “connection”, as described by the Sub-Contract and as used within the industry, includes the whole of the connection, namely both the joint and the connection.

(c) It is denied that an implied term of reasonable diligence and/or progress was not reasonable and/or necessary in light of the express terms of the Sub-Contract set out at paragraph 8.1(e) of the Defence. For the avoidance of doubt, it is Multiplex’s case that the said implied term is consistent with express terms of the Sub-Contract set out at paragraph 3(e) above.

5. As to paragraph 11.1:

(a) It is admitted that by Spring 2003 there was late and incomplete design by MSC, but it is denied that such late and incomplete design caused serious problems in relation to the Project.

(b) Further, it is denied that those late and/or incomplete designs were causative of cost increases and/or delays and/or disruption to the Sub-Contract Works. By Spring 2003, CBUK was already in delay as a result of its own failure to progress the design, fabrication and erection of the Sub-Contract Works in a timely manner.

(c) It is denied that 808 variations had been logged. By 15 February 2004 CBUK had submitted 720 Contractor’s Notifications of Change, but the level of substantiation provided by CBUK was inadequate: only 289 had been priced, and of these only 67 had any supporting details.

Save as aforesaid, paragraph 11.1 is denied.

5A As to paragraph 11A.1, it is denied that the parties only agreed to settle CBUK’s claim for an extension of time. The Heads of Agreement settled all claims existing on or before 15 February 2004, save for any claims by Multiplex for design, workmanship or materials not being in accordance with the Sub-Contract.

The Supplemental Agreement

6. ~~As to paragraph 12, it is denied that the Heads of Agreement was a binding or concluded agreement, and it is denied that the parties only agreed to settle CBUK’s claim for an extension of time. Multiplex’s position is pleaded in full at paragraphs 35 to 36 below.~~

7. It is denied that the term set out in paragraph 14 is implied into the Sub-Contract as a matter of law or at all. For the avoidance of doubt, it is Multiplex's case that the parties' obligations regarding the agreement of a new fixed price and a programme for completion are expressly and exclusively set out in the Supplemental Agreement.

Arch Member Defects

8. As to paragraph 19.1:

- (a) Whilst it is admitted that CBUK did send to Multiplex a "Delay Entitlement Programme" in December 2003, the programme was created by CBUK to try to demonstrate an alleged entitlement to an extension of time and was rejected by Multiplex by letter dated 8 January 2004. That programme was not issued as part of CBUK's construction reporting regime and was not relied upon by Multiplex.
- (b) Multiplex relied upon the construction programmes issued by CBUK with its Monthly Progress Reports. Such reliance was reasonable in all the circumstances including, *inter alia*, the scope of CBUK's reporting responsibilities set out in Numbered Document "Volume One – General Preliminaries" and the facts that:
- (1) Monthly Progress Report up to 24 December 2003 contained "Programme: P430C_02" (updated to 31 January 2004), which predicted the Arch would be lifted into its vertical position from 29 March to 13 April 2004.
 - (2) Monthly Progress Report up to 31 January 2004 contained "Programme: P430C_02" (updated to 24 December 2004), which predicted the Arch would be lifted into its vertical position from 22 March to 2 April 2004.
 - (3) CBUK was still, on 23 February 2004, predicting an Arch lift commencement on 20 March 2004.
- (c) The "Programme" referred to at Appendix Part 4 of the Sub-Contract is not the programme relied upon by Multiplex in support of this claim. In accordance with the Numbered Document "Volume One – General Preliminaries", paragraph 7.6.5, CBUK was obliged to produce and maintain a Sub-Contractor's Works Programme, which was the baseline against which progress of the Sub-Contract Works was monitored and reported. The construction programmes produced by CBUK constituted an integral part of the Sub-Contractor's Works Programme.

Save as aforesaid, paragraph 19.1 is denied.

8A As to paragraph 20.1, it is Multiplex's case that CBUK was aware of defects on or before 4 August 2004 but failed to inform Multiplex of such defects at that time. Multiplex will rely on the following:

- (a) On 30 July 2003, Mr K Hudson (of CBUK) sent an e-mail to Mr A Smyth (formerly of CBUK) concerning a query raise from CBUK's site employees about misalignment of arch tubes. In that e-mail, Mr Hudson stated that "*Further to your query regarding misalignment of Chord Tubes, the spec quotes the following ... on the basis of a 10000mm bay we are looking at a maximum deviation of 10mm. However if both nodes deviate in differing directions and the global misalignment remains within 10mm, this may still not be acceptable if the "dog leg" is visible...every effort should be made to bring assemblies [of the Arch tubes] within this tolerance.*"
- (b) On 4 August 2003, Mr S Baron (of Dorman Long Technology) sent an e-mail to Mr Mike McHugh (of CBUK) in which he stated that the relevant clauses of the specifications are "*...exceptionally tight*", and that CBUK would need "*... a well thought out case before we approach the client for any relaxation.*". Mr Baron went on to state that Mr K Hudson's e-mail should be "*... treated as a general alert to the works and site of the tolerance requirements. If we have specific problems i.e. nodes fabrication which cannot reasonably be altered, then we can consider the possibility of a design justification to accompany a concession request.*"
- (c) On 12 August 2003, CBUK produced a survey report for Arch Diaphragm 21 which indicated that four nodes had a magnitude of over 10mm.
- (d) On 13 August 2003, CBUK produced "*CB Response 42*" which acknowledged that CBUK had been experiencing tolerance problems when building the diaphragms making up the Arch and had changed its design in an attempt to minimise the problems.
- (e) On 14 August 2003, CBUK produced a survey report for Arch Diaphragm 20 which indicated that six nodes had a magnitude of over 10mm.
- (f) On 29 August 2003, Mr J O'Neill (of CBUK) sent an e-mail to Mr S Baron (of Dorman Long Technology) relating to the arch straw tolerances in which he stated

that "fabrication and construction tolerance could be a show stopper if we don't urgently resolve this".

(g) On 11 September 2003, CBUK produce a survey report for Arch Diaphragm 23 which indicates that one node had an alignment error with a magnitude of over 10mm.

9. As to ~~paragraphs 21 and 22~~:paragraph 21.1:

(a) It is denied that ~~paragraph 7.2.2.2 of British Standard 5950 is irrelevant and inapplicable. For the avoidance of doubt, it is Multiplex's case that the tolerance limits referred to by CBUK relate to the tolerance limits for the diaphragm rings and not for the individual members.~~the Tolerance Specification is irrelevant and inapplicable.

(b) It is admitted that the Tolerance Specification contains the words quoted, but denied that the words quoted have any application to the straightness tolerance for members. The quoted tolerance of +/- 25mm applies to global deviations in the Arch geometry, as confirmed by the final two paragraphs of the quotation which refer to the need for surveys regarding global deviations during the erection process.

(c) ~~(b)~~The +/- 25mm tolerance is a tolerance on the spatial position of the as-fabricated steel, not a straightness tolerance of the fabricated members. Accordingly, the positional tolerance referenced by CBUK does not supersede the straightness tolerance of British Standard 5950 and/or the NSSS. It is Multiplex's case that CBUK was required to meet the straightness tolerance of the British Standard 5950 (paragraph 7.2.2.2) and the NSSS (Section 7.2.4), as well as the spatial positional tolerances referenced by CBUK. Further, and in any event, if the correct tolerance limit was +/- 25 mm (which is denied) then CBUK failed to ensure that even this limit was met in respect of at least 180 members.

(d) For the reasons set out in paragraph 9(c) above, denied.

(e) For the reasons set out above, it is admitted that the deviations quoted apply to the diaphragm rings, but denied that the deviations apply to the node points on the diaphragm rings when considered individually.

(f) For the reasons set out above in paragraph 9(c) above, denied.

(g) For the reasons set out above in paragraph 9(c) above, denied.

(h) The referenced tolerance of 0.2% of length in BS EN 10210-2 is a product specification for the supply of individual tubes and is not a fabrication tolerance. The Tolerance Specification specifically refers to BS 5950 and the NSSS (in both of which the straightness tolerance is L/1000, which applies not only generally to structural shapes but specifically to structural hollow sections). It is denied that the tolerance in the product specification BS EN 10210-2 is additive to the tolerances given by BS 5950 and NSSS. CBUK had a responsibility to implement any necessary corrective measures to ensure that the specified straightness tolerance was achieved.

9A As to paragraph 22:

- (a) It is admitted that the term “built-up” member does not refer to chords when attached to stubs.
- (b) It is denied that paragraph 7.2.2.2 of British Standard 5950 is inapplicable. A chord attached to two stubs forms a chord of nominal length of 10 metres. The straightness tolerance of paragraph 7.2.2.2 of British Standard 5950 applies to a such chord and applies over the full nominal length of the chord.

Save as aforesaid, paragraph 22 is denied.

9B As to paragraph 23:

- (a) It is denied that any assembly sequence was given on the MSC drawings issued to CBUK by Multiplex. The drawings referenced by CBUK depict an assembly sequence, but were prepared by CBUK.
- (b) It is denied that the specified straightness tolerance of +/- 10mm could not in practice be achieved. The need for CBUK to employ fabrication techniques that exceeded customary workshop practice in order to meet the requirements of the Tolerance Specification does not excuse CBUK from failing to comply with the Tolerance Specification.
- (c) Approval by Multiplex of CBUK’s quality procedures for dimensional control does not relieve CBUK of its primary obligation to comply with the Tolerance

Specification. Multiplex will rely upon Clauses 42, 51.7 and/or 52.1 of the Conditions of Sub-Contract.

Save as aforesaid, paragraph 23 is denied.

10. As to paragraph 24.1:
 - (a) Noted.
 - (b) In respect of the meeting:
 - (1) No admissions are made as to any statements made by MSC.
 - (2) It is denied that Mr McHugh stated that he believed that the members were not out of tolerance. For the avoidance of doubt, it is Multiplex's case that it was Mr McHugh of CBUK who admitted that at least five steel members making up the arch were outside the tolerance limits set out in the Sub-Contract Specifications.
11. As to paragraph 27.1(e), it is denied that the length of time taken for MSC to complete its review was the result of any default on the part of MSC and/or Multiplex (if the same be alleged). The information from CBUK was provided piecemeal, causing delays to the analysis being carried out by MSC.
12. As to paragraph 28:
 - (a) It is admitted that Mr Petaccia required CBUK to change 13 members "*as a minimum*", but denied that such a requirement constituted a variation to the Sub-Contract.
 - (b) No admissions are made as to CBUK's analysis of temporary load cases or its calculation that 9 members had the potential to fail during the temporary load case.

Save as aforesaid, paragraph 28 is admitted.
13. With regard to paragraph 31:
 - (a) The content of MSC's letter is admitted.

- (b) It is admitted that some of the Babbie written approvals were dated 19 May 2004, but those approvals were only sent to CBUK on 20 May 2004 and were not received by Multiplex until 21 May 2004.
- (c) CBUK had not completed all of its certification obligations prior to 21 May 2004:
- (1) By email dated 21 May 2004, Mr McHugh of CBUK finally submitted CBUK's Design Certificate for the permanent arch works.
 - (2) By telefax dated 21 May 2004 (Ref: 005949) Multiplex attached a list of outstanding items and stated "*...attached is a list of submissions that do not have Babbie check certificates and as such are NOT approved by MPX. We also note that T8002 is not on your submission register and thus is also not approved. Please note that all outstanding check certificates are required to be submitted by CBUK prior to rollup*".
 - (3) By telefax dated 21 May 2004 (Ref: 005950) Multiplex raised a number of issues regarding the status of the Babbie certificates and stated "*Please ensure that these items are addressed prior to rollup*".
- (d) It is denied that the Wembley National Stadium Structural Steel Specification has no relevance to the Babbie approvals. Both parties referred to the requirements of clause 120 of that Specification as 'third party checks'. By letter dated 12 March 2002 CBUK confirmed the inclusion of such third party checking within its lump sum price (CBUK's Sub-Contract breakdown includes the sum of £250,000 for such checking) and CBUK/Dorman Long's method statement for the erection of the Arch stipulated such third party checks.

Save as aforesaid, paragraph 31 is denied.

14. As to paragraph 32:

- (a) It is admitted that Stage 1 of the Arch lift was commenced on 1 May 2004, but denied that this had to stop at 33% load because the concrete rectification works were incomplete. Stage 1 of the Arch lift was carried out for the purpose of determining if there were any deficiencies in any of the systems to be employed during the actual lift, such as security, communications, lifting equipment and associated control systems; crew positions; site access; and surveys. Stage 1 only involved putting a nominal tension in the upper pannel lines of the Arch and could

have been performed at any time after the majority of the Arch had been assembled. The lift could not progress further because the Arch was incomplete and final confirmation of the number of members requiring replacement had not been obtained.

- (b) It is denied that the Arch was rotated into its parked, temporarily restrained position prior to load transfer on 22 June 2004. For the avoidance of doubt, it is Multiplex's case that the Arch reached the appropriate position on 29 June 2004.

Save as aforesaid, paragraph 32 is denied.

15. As to paragraph 33.1(b)(iii), it is ~~denied~~averred that the fabrication by CBUK of members outside the contractual tolerances prior to the erection of the Arch does ~~not~~ constitute a breach of the Sub-Contract. Fabrication of members outside the tolerances constitutes breaches of, *inter alia*, Clauses 4.1.1, 4.1.3, 4.1.4, 5.1.1 and 5.3.2.1 of the Sub-Contract.

15A As to paragraph 33A.2:

- (a) For the reasons set out in paragraphs 17 of this Amended Consolidated Reply and Defence to Counterclaim, it is denied that CBUK was prevented from lifting the Arch by 21 April 2004 by Multiplex and/or its sub-contractor, PC Harrington.
- (b) Further, for the reasons set out in paragraphs 18 of this Amended Consolidated Reply and Defence to Counterclaim, it is denied that Multiplex is precluded and/or estopped from alleging breach by CBUK of clause 9 of the Heads of Agreement.
- (c) CBUK has provided insufficient particulars of the alleged contractual mechanism for an extension of time to the Arch lift date to allow Multiplex properly to respond.

15B As to paragraph 33A.4, it is denied that clause 9 of the Heads of Agreement was superseded by the Supplemental Agreement. CBUK's obligation to lift the Arch by 21 April 2004 was consistent with its obligation to complete the Sub-Contract Works by 15 August 2004, being 26 weeks after 15 February 2004. Accordingly, clause 9 of the Heads of Agreement remained a term of the Amended Sub-Contract. As to paragraph 35.1:

- (a) It is denied that Multiplex is debarred from pursuing any claims as alleged at paragraph 35.1(a). Clause 2.2 of the Supplemental Agreement expressly preserved Multiplex's right to make any claims that it might have for design, workmanship or materials not being in accordance with the Sub-Contract.

(b) On a true construction of the Supplemental Agreement, the rights reserved to Multiplex at Clause 2.2 apply to both existing claims and future claims.

16. As to paragraph 35.1:

(a) It is denied that Multiplex is debarred from pursuing any claims as alleged at paragraph 35.1(a). Clause 2.2 of the Supplemental Agreement expressly preserved Multiplex's right to make any claims that it might have for design, workmanship or materials not being in accordance with the Sub-Contract.

(b) On a true construction of the Supplemental Agreement, the rights reserved to Multiplex at Clause 2.2 apply to both existing claims and future claims.

17. In respect of paragraph 35.2:

(a) It is admitted that Multiplex's sub-contractor, PC Harrington, used the incorrect grade of concrete for the Arch foundations, but it is denied that Multiplex failed to issue any instruction to PC Harrington to use C60 grade concrete.

(b) It is admitted that Multiplex became aware of the defective concrete in early March 2004 and required PC Harrington to remove the concrete and repour.

(c) No admission is made as to the date upon which the newly laid concrete had gained sufficient strength to lift the Arch.

(d) It is admitted that Multiplex instructed CBUK not to fit the bearings until after the concrete repairs had been carried out, to carry out welding reinforcements and to install strengthening plates, but it is denied that those instructions by Multiplex were causative of any delay to the lifting of the Arch.

(e) Whilst it is admitted that Multiplex did send to CBUK some FOS information on 21 May 2004, it is denied that it caused any delay to the Arch lift.

(f) It is denied that stage 1 of the Arch lift had to stop solely because the concrete rectification works were incomplete. CBUK still had to install node strengthening plates, which were not completed until 20 May 2004. Further, the Arch lift could not have continued until CBUK's third party checker, Babtie, had approved CBUK's remedial works. These were not approved by Babtie until 21 May 2004.

(g) It is Multiplex's case that it was not until 18 May 2004, when MSC's final confirmation that a total of 16 members required replacement, could arrangements

be put in place to lift the Arch. At a meeting on the afternoon of 18 May 2004, it was agreed between the parties that the Arch lift would commence on Saturday 22 May 2004, allowing CBUK sufficient time to procure its design certificates and approval from its third party checker, which were necessary for the commencement of the Arch lift. On the basis of the aforesaid agreed date, Multiplex carried out and completed its works necessary for the commencement of the Arch lift, which included completion of the pulling bases.

- (h) ~~(g)~~ For the avoidance of doubt, it is Multiplex's primary case that the defective members installed by CBUK were the dominant cause of the delays to the Arch lift.
- (i) ~~(h)~~ Further and/or alternatively if, which is denied, any delays caused by the acts and/or omissions of PC Harrington were concurrent with the delays caused by the breaches of contract of CBUK pleaded at paragraphs 16 to 33 of the Amended Consolidated Particulars of Claim, it is Multiplex's case that CBUK's breaches of contract materially contributed and/or were causative of delays to the Arch lift and accordingly Multiplex is entitled to damages and/or an indemnity in respect of its loss and expense from CBUK in any event.

Save as aforesaid, paragraph 35.2 is denied.

18. As to paragraph 35.3:

- (a) It is admitted that CBUK wrote to Multiplex on 28 April 2004, but denied that CBUK was not the dominant cause of delay and denied that CBUK was entitled to seek the assurances it requested.
- (b) It is denied that any such agreement was reached between Mr Muldoon and Mr Rogan on the terms as alleged or at all.
- (c) It is denied that CBUK relied upon any alleged representations made by Mr Muldoon (which are denied).
- (d) It is accordingly denied that Multiplex is precluded or estopped from claiming losses flowing from the delays to the Arch lift as a result of defects in the Arch members.

18A Paragraph 35.4 is noted but denied. Multiplex notes that CBUK has made a claim under its PI policy for its additional costs incurred on the permanent Arch works. It is to be inferred that the basis of this claim is an acceptance by CBUK of responsibility for defective design

and/or fabrication of the Arch. Multiplex is unable to give further particulars at this stage until CBUK gives further disclosure.

18B As to paragraph 35.5, it is averred that Multiplex did rely upon an Arch lift date of 21 April 2004 to programme its works and those of its sub-contractors.

Further Defective Work

19. Paragraph 36.1 is admitted.
20. As to paragraphs 37 and 38, CBUK has misconstrued Multiplex's claim. Schedule 1 to the Amended Consolidated Particulars of Claim identifies defects in the steelwork fabricated and erected by CBUK. Insofar as on-site erection works were incomplete by reason of Multiplex's exercise of its Clause 8 Notice, Multiplex acknowledges that such incomplete works do not form part of the Schedule 1 list and no claim arises. However, insofar as offsite steelwork fabrication and/or pre-15 February 2004 on-site erection is incomplete, it is Multiplex's case that the work is defective because CBUK has been paid for those works on the basis that each item is properly completed.

Events in June 2004

21. With regard to paragraph 45.1, it is noted that CBUK admits that only indicative prices and programme dates were given to Multiplex and that CBUK had no intention of concluding a formal agreement prior to the execution of the Supplemental Agreement. In the circumstances, Multiplex's attempts to reach agreement with CBUK were frustrated by CBUK's failure to use any or any reasonable endeavours to agree to re-programme the completion of the Sub-Contract Works and/or to agree to a fixed lump sum or reimbursable Sub-Contract Sum.
22. As to paragraph 46, CBUK has misstated Multiplex's case. It is Multiplex's case that CBUK was in breach of Clause 7 of the Supplemental Agreement in failing to provide a programme or price proposal until 14 June 2004.
23. As to paragraph 47:
 - (a) CBUK's admission in sub-paragraph (a) is noted.
 - (b) No admissions are made as to when Mr Rogan prepared the draft Heads of Agreement, but it is admitted that the drafts terms were handed to Mr Muldoon and

that the draft terms were discussed between the parties. The draft terms proposed by CBUK were inconsistent with the Supplemental Agreement in that they proposed a cost-plus arrangement. Mr Muldoon of Multiplex insisted that CBUK's proposal be consistent with Clause 7 of the Supplemental Agreement.

- (c) It is admitted that, at a further meeting on 23 June 2004, the parties discussed the draft terms and that CBUK presented a revised set of draft terms. The meeting was brief and only lasted about 10 minutes because Multiplex wanted to see a total price and CBUK refused to provide a fixed price. CBUK said it would be "too high" and only wanted a cost-plus arrangement. It is admitted that Mr Muldoon said that Multiplex had a decision to make and would do so by 29 June 2005.
- (d) Sub-paragraph (f) is denied. Mr Muldoon telephoned Mr Rogan to confirm that Multiplex wanted to proceed with CBUK but needed a proposal in accordance with the Supplemental Agreement. By letter dated 24 June 2004, Mr Muldoon wrote to Mr Rogan to confirm the nature and scope of the proposals required from CBUK.

Save as aforesaid, paragraph 47 is denied.

- 24. As to paragraph 49, Mr Muldoon advised that the programme put forward by CBUK was unacceptable. Further, Mr Rogan confirmed that no fixed price would be put forward by CBUK as Mr Grant would not authorise it.

June 2004 Valuation

- 25. As to paragraph 54, it is denied that Multiplex is not entitled to rely upon the Adjudicator's decision and denied that the burden of proof has reversed. It is Multiplex's case that it is for CBUK to prove the proper value of its claim.

~~(a) — It is denied that the Heads of Agreement was a binding or concluded agreement and/or that it was of continuing effect during the period 15 February to 16 June 2004. Multiplex's position is pleaded in full at paragraphs 33 to 36 below.~~

~~(b) — Alternatively if, which is denied, the Heads of Agreement was binding during the period 15 February to 16 June 2004, it is Multiplex's case that there were, as a matter of business efficacy and/or as a matter of law, implied terms of the Amended Sub Contract that:~~

~~(1) — CBUK's entitlement to re-imbursment at cost for erection and site works was subject to those costs being reasonably and/or properly incurred; and/or~~

~~(2) those additional terms of the Supplemental Agreement necessary to reflect the parties' true intentions would be imported into and supersede the corresponding terms of the Heads of Agreement.~~

~~(e) It is denied that CBUK's workforce on site were, throughout, properly engaged on tasks for which CBUK was entitled to reimbursement as on site costs under the terms of the Amended Sub-Contract.~~

~~(d) Paragraph 54.1(d) is so inadequately pleaded that Multiplex cannot respond until Further Information has been provided by CBUK.~~

~~Save as aforesaid, paragraph 54 is denied.~~

26. As to paragraph 57:

(a) Noted.

(b) It is admitted that Mr Stagg indicated that Multiplex proposed to make a reduction to CBUK's application and that Mr Grant suggested meeting over the weekend if necessary, but denied that this procedure did not represent consultation. Mr Cursley was present with Mr Stagg to answer any questions on the deductions proposed, but Mr Grant did not enquire as to the level of reduction or the reasons for that reduction.

(c) No admissions are made as to any attempts made by Mr Grant to contact Mr Stagg.

(d) The meeting held on 21 July 2004 was arranged pursuant to an urgent request for a meeting made by CBUK in its letter dated 20 July 2004. In addition to Messrs Stagg, Underwood and Thomas, Mr Cursley, Mr Muldoon and Mr Ong from Multiplex were present. It is denied that Multiplex failed to let CBUK respond and/or terminated the meeting abruptly. The meeting discussed a number of issues between the parties, particularly Multiplex's recent invoice and CBUK's response to it.

Save as aforesaid, paragraph 547 is denied.

Programme Delays

27. Save that it is denied that Clause 3.3 of the Supplemental Agreement contains the words "*off site works – drawings and fabrication*", paragraph 63.1 is admitted.

28. As to paragraph 63.2:

- (a) It is agreed that Clause 9.4 of the Supplemental Agreement was applicable in the event Multiplex served a notice pursuant to Clause 8 of the Supplemental Agreement, which they did on 30 June 2005.
- (b) It is denied that the dates set out at Schedule 4 are inapplicable as alleged or at all. CBUK was fully aware of the terms of the Supplemental Agreement but nonetheless executed the document in the knowledge that it was or was likely to be in breach of the dates set out in Schedule 4.
- (c) It is denied that CBUK was delayed by variations as alleged or at all. Paragraph 63.2(c) is so inadequately pleaded that Multiplex cannot respond until Further Information has been provided by CBUK.

Save as aforesaid, paragraph 63.2 is denied.

29. As to paragraph 65:

- (a) It is denied that delays to the offsite activities had no impact on site progress.
- (b) No admissions are made as to the weights of steel available either on site or in adjacent holding yards, or as to their suitability for erection.

Save as aforesaid, paragraph 65 is denied.

29A As to paragraph 65A.1:

- (a) It is denied that CBUK's obligation was limited merely to following the "sequence" set out in the "Projected CBUK Programme".
- (b) It is denied that activity 00021 merely "contemplated" completion of Phases 11 to 18 of the bowl steel by 26 July. For the avoidance of doubt, Multiplex avers that CBUK was obliged to complete activity 00021, comprising Phases 11 to 18 of the bowl steel, by 26 July 2005.
- (c) It is denied that CBUK is entitled to an extension of time for the raising of the Arch as alleged or at all.

29B As to paragraph 65C.2, CBUK's case is so inadequately particularised that Multiplex is unable to respond to the allegations without the provision of further particulars.

29C As to paragraph 65E, Multiplex will further rely upon the voluntary particulars served on 12 January 2006, a copy of which is appended to this Amended Consolidated Reply and Defence to Counterclaim.

29D As to paragraph 65F, Multiplex will further rely upon the further particulars served on 10 January 2004, a copy of which is appended to this Amended Consolidated Reply and Defence to Counterclaim. Further and alternatively:

(a) As CBUK's monetary liability to Multiplex for damages is limited to £6 million (see paragraph 30A below), it is important to assess the true value of CBUK's work.

(b) Multiplex is entitled to and claims an abatement of the value of the Sub-Contract Works carried out by CBUK by reference to the cost of the steel erection work completed by Hollandia (Item 16 of Schedule 3 of the Amended Consolidated Particulars of Claim) pursuant to paragraph 74 and Schedule 2 of the Amended Consolidated Particulars of Claim.

30. Paragraph 72(c) is not understood. For the avoidance of doubt, it is Multiplex's case that CBUK's entitlement to payment to 2 August 2004 only includes a valuation of work to 30 June 2004 (as set out in Schedule 2 to the Consolidated Particulars of Claim). Paragraph 72 is accordingly denied.

30A As to paragraph 79A:

(a) It is denied that Multiplex's claims against CBUK are limited to an aggregate sum of £6 million. It is averred that Clause 12.2 operates to limit CBUK's aggregate monetary liability against Multiplex for damages to £6 million.

(b) It is denied that Clause 12.2 limits:

(1) CBUK's liability for the repayment of sums paid pursuant to any Adjudicator's decisions; and/or

(2) CBUK's liability for the repayment of interim sums overpaid by Multiplex; and/or

(3) Multiplex's right to abatement of interim valuations of the Sub-Contract Sum.

(c) For the avoidance of doubt, it is Multiplex's case that the sums claimed at paragraph 74 of the Amended Consolidated Particulars of Claim fall within sub-paragraph (b) above and accordingly are not subject to Clause 12.2 of the Sub-Contract.

DEFENCE TO COUNTERCLAIM

31. Paragraphs 1 to 30 above are repeated.

Heads of Agreement

32. As to paragraph 83:

(a) It is admitted that by Spring 2003 MSC there was late and incomplete design by MSC, but it is denied that such late and incomplete design caused serious problems in relation to the Project.

(b) Further, it is denied that those delayed and/or incomplete designs were causative of substantial cost increases and/or delays and/or disruption to the Sub-Contract Works. By Spring 2003, CBUK was already in delay as a result of its own failure to progress the design, fabrication and erection of the Sub-Contract Works in a timely manner.

- (c) It is admitted that CBUK made a claim for an extension of time of 50.5 weeks by letter dated 5 December 2003, but denied that CBUK was or is entitled to such an extension of time. Multiplex responded by letter dated 8 January 2004 setting out its reasons for rejection of the claim.

Save as aforesaid, paragraph 83 is denied.

33. As to paragraphs 84.1 to 84.4:

- (a) ~~It is denied~~admitted that the parties agreed to settle certain claims by a Heads of Agreement was or is a binding and/or concluded agreement as alleged at paragraph 84.1: dated 18 February 2004. Multiplex repeats paragraphs 11A to 11E of the Amended Consolidated Particulars of Claim.

~~(1) The Heads of Agreement set out the principles upon which the parties proposed to compromise claims between themselves and set out the broad terms to be incorporated into a formal binding document, but it did and does not represent a concluded or binding agreement.~~

~~(2) The Heads of Agreement was not intended to create legal relations, as evidenced by paragraph 2 of the Heads of Agreement which records the intention of the parties to conclude a supplemental agreement formally to adjust the Sub-Contract and the actions to be taken by the parties to negotiate that formal agreement.~~

~~(3) The terms as set out in the Heads of Agreement were not sufficiently certain to be binding in that, *inter alia*, a number of key terms were yet to be agreed and many provisions were agreements to agree.~~

- (b) For the avoidance of doubt, it is denied that the parties only agreed to settle CBUK's claim for an extension of time. It is Multiplex's case that the Heads of Agreement settled all claims existing on or before 15 February 2004, save for any claims by Multiplex for design, workmanship or materials not being in accordance with the Sub-Contract.

- (c) ~~(b)~~It is admitted that paragraphs 84.1 (a) to (c), 84.2 and 84.3 (1) to (7) are a broadly accurate summary of the terms set out in the Heads of Agreement, but it is denied that the terms are binding on the parties. Further, it is averred that paragraph 9 of the Heads of Agreement confirmed the parties' intention that CBUK

~~would complete the Sub-Contract Works in accordance with an attached programme and that CBUK would complete the lifting of the Arch by 21 April 2004.~~

~~(c) For the reasons set out above, it is denied that there can be any terms implied into the Heads of Agreement.~~

~~(d) Further and/or alternatively if, which is denied, the Heads of Agreement is a concluded and/or binding agreement, it is Multiplex's case that such an agreement was only of temporary effect until the parties entered into the Supplemental Agreement on 16 June 2004, which superseded the Heads of Agreement with retrospective effect from 15 February 2004. Accordingly, the Heads of Agreement is of no continuing effect. It is averred that paragraph 9 of the Heads of Agreement confirmed CBUK's obligation to complete the Sub-Contract Works in accordance with an attached programme, including that CBUK would complete the lifting of the Arch by 21 April 2004 and that CBUK would complete fabrication and erection of Phases 11 – 18 of the bowl steelwork by 26 July 2004.~~

~~(e) Further and alternatively if, which is denied, the Heads of Agreement was binding during the period 15 February to 16 June 2004, it is Multiplex's case that there were, as a matter of business efficacy and/or as a matter of law, implied terms of the Amended Sub-Contract that:~~

~~(1) CBUK's entitlement to re-imburement at cost for erection and site works was subject to those costs being reasonably and/or properly incurred; and/or~~

~~(2) those additional terms of the Supplemental Agreement necessary to reflect the parties' true intentions would be imported into and supersede the corresponding terms of the Heads of Agreement.~~

~~(f) Further and alternatively if, which is denied, the Heads of Agreement is a concluded and/or binding agreement:~~

~~(1) It is denied that the scope of the settlement was limited to CBUK's claim for an extension of time.~~

~~(e) (2) Any implied term Paragraph 84.4 is denied. Any term implied into the Heads of Agreement as a matter of business efficacy and/or as a matter of law would contain mutual obligations that neither party would prevent the other from performing its~~

obligations and that both parties would co-operate in the performance of their mutual obligations.

Save as aforesaid, paragraph 84 is otherwise denied.

34. ~~Save that it is denied that any of the steps set out in sub-paragraphs (1) to (6) of paragraph 85 were taken pursuant to the terms of the Heads of Agreement, which was not a binding agreement,~~ Multiplex responds to each sub-paragraph of Paragraph 85.1 as follows:

- (1) Admitted.
- (2) ~~CBUK continued to carry works on site, but it is denied that those works were in accordance with paragraph 8 of the Heads of Agreement.~~ Admitted. For the avoidance of doubt, payments made by Multiplex were based upon interim valuations and included on-account payments to assist CBUK's cashflow
- (3) Hollandia commenced fabrication of the roof steel, but no concluded contract with Hollandia had been agreed prior to November 2004.
- (4) Sub-paragraphs (a), (b) and ~~(bc)~~ are admitted, but Sub-paragraphs ~~(ed)~~ and ~~(de)~~ are denied in their entirety. It is expressly denied that any agreement was reached on 14 May 2004, ~~it is denied that the meeting was contemplated by paragraph 11 of the Heads of Agreement,~~ and denied that the draft certificate of 3 June 2004 contained an agreed sum of £32.66 million. Multiplex did issue a draft certificate on 3 June 2004, but only on an interim basis to assist CBUK's cashflow. No concluded agreement as to the valuation to 15 February 2004 was ever reached.
- ~~(5) Save that it is admitted that the parties entered into negotiations to conclude a formal agreement, sub-paragraph (5) is denied.~~
- ~~(5) (6) Admitted. Admitted.~~
- (6) Admitted.

Save as aforesaid, paragraph 85.1 is otherwise denied.

34A As to paragraph 85.2, Multiplex responds to each sub-paragraph as follows:

- (a) It is admitted that there was an issue between the parties concerning China Steel. Under the terms of the Heads of Agreement, CBUK retained responsibility for the fabrication and delivery of China Steel. Subsequent to the signature of the Heads of

Agreement, CBUK sought to negotiate the deletion of the fabrication of China Steel from the scope of its work, which had been priced on a lump sum basis.

(b) Denied. Multiplex indicated that it might place a separate order with CBUK, but no concluded agreement was reached in May 2004.

(c) Denied. CBUK wanted to have the option of fabricating some of the steel which was ultimately removed from its scope of work by the Supplemental Agreement. CBUK requested a purchase order to confirm the rate for fabrication and delivery to site of steel if Multiplex decided to use CBUK for that work. In the event, Multiplex awarded the fabrication work to CBUK on or about 15 June 2004.

(d) Admitted. Further:

(i) It is admitted and averred that the China Steel Agreement is one part of the Order, which is a separate and distinct agreement governed by the terms and conditions of the Order. For the avoidance of doubt, the Order does not contain any contractual cap on CBUK's liability for damages.

(ii) By clause 5 of the Order, time was of the essence;

(iii) By clause 3 of the Order, CBUK warranted that the fabricated steel would be fit for purpose;

(iv) CBUK was in breach of the Order in that it failed to deliver the China Steel in accordance with Activities ID: 00013 and ID: 0014 of Schedule 4 of the Supplemental Agreement;

(v) Multiplex thereby became entitled to and hereby cancels the Order pursuant to clause 13(i) of the Order;

(vi) Further and/or alternatively, CBUK repudiated the Order by failing to fabricate and deliver to Multiplex all the steel under the Order, which repudiation has been or is hereby accepted by Multiplex.

(vii) By reasons of the matters aforesaid, Multiplex is entitled to and does claim from CBUK its loss and/or expense suffered and/or incurred as a consequence of the said cancellation and/or damages and is entitled to and does set-off such sums and/or claims against any liability herein. Full particulars will be provided by way of an amendment to Schedule 4.

Supplemental Agreement

35. ~~Save that it is denied that the Heads of Agreement was a binding document, paragraph~~Paragraph 86 is admitted.
36. For the reasons set out in paragraph 33 above, paragraph 87 is denied. Further and/or alternatively:
- (a) It is denied that Clause 4 and paragraph (a) of Schedule 1 of the Supplemental Agreement and/or terms of the Sub-Contract were amended by the alleged Valuation Agreement. The sum of £32.66 million was not incorporated into the Supplemental Agreement and/or the Amended Sub-Contract.
 - (b) In any event, the Supplemental Agreement was entered into subsequent to the alleged Valuation Agreement. The terms of the Supplemental Agreement do not refer to the terms of the alleged Valuation Agreement as those amending the Sub-Contract and therefore there can be no term of the Amended Sub-Contract to the effect that the final value of the work carried out by CBUK to 15 February 2004 was agreed at £32.66 million.
 - (c) Further, the provisions of the Amended Sub-Contract set out the entire agreement between the parties and Clause 1.8.1 of the Amended Sub-Contract precludes the implication of any such additional term as alleged or at all. Clause 1.8.1 of the Amended Sub-Contract provides:

"The Sub-Contract constitutes the entire agreement between the Parties and supersedes all prior negotiations, commitments, representations, communications and agreements relating to the Sub-Contract either oral or in writing except to the extent they are expressly incorporated herein. The Sub-Contractor confirms that it has not relied upon any representation inducing it to enter into the Sub-Contract (whether or not such representation has been incorporated as a term of the Sub-Contract) and agrees to waive any right which it might otherwise have to bring any action in respect of such representation. The Sub-Contractor further confirms that there is not in existence at the date of the Sub-Contract any collateral contract or warranty of which the Sub-Contractor is the beneficiary which might impose upon the Contractor obligations which are in addition to or vary the obligations expressly contained in the Sub-Contract and which relate in any way to the subject matter of the Sub-Contract. The Sub-Contractor's only rights arising out of, or in connection with, any act, matter or thing said, written or done, or omitted to be said, written or done, by or on behalf of the Contractor (or any agent, employee or sub-contractor of the Contractor) in negotiations leading up to the Sub-Contract or in the performance or purported performance of the Sub-Contract or otherwise in relation to the Sub-Contract are the rights to enforce the express obligations of the Contractor contained in the Sub-Contract

and to bring an action for breach thereof. Nothing in this clause 1.8 is intended to exclude liability of the Contractor for fraud or fraudulent misrepresentation."

36A Paragraph 87A is denied in its entirety. Multiplex responds to each sub-paragraph as follows:

(1) At meetings on 14 and 20 May 2004, Mr Grant suggested that the figure of £32.66 million be inserted into the Supplemental Agreement, but Mr Stagg refused because the figure was not agreed.

(2) In relation to sub-paragraph (2):

(i) It is denied that Mr Stagg represented to Mr Grant, Mr Rogan and Mr Child that the figure of £32.66 million was a final agreed figure. Mr Stagg did agree to issue a certificate for £32.66 million, but only on an interim basis to assist CBUK's cashflow.

(ii) Further, on CBUK's own case it entered into an agreement with Multiplex through the agency of Mr Stagg, who informed CBUK at the very meetings where he is alleged to have made the Valuation Agreement that he had "difficulties in advertising the figure to his superiors". Whilst it is denied that Mr Stagg made any such statements, if he did so:

(a) CBUK knew that he was not binding Multiplex as he could not inform his superiors of the same.

(b) CBUK, had it believed that it had an agreement with Multiplex, would have confirmed the same to bind Multiplex.

(c) On CBUK's own case, it was colluding with Mr Stagg in hiding an agreement from Multiplex.

(iii) In the circumstances, it is denied that Multiplex is or can be bound by the alleged Valuation Agreement.

(3) For the reasons set out above, denied. Further, it is denied that CBUK relied upon the alleged representations by signing the Supplemental Agreement. CBUK had legal advice whilst negotiating the Supplemental Agreement, and no legal adviser would have advised signing the Supplemental Agreement without inserting the figure of £32.66 million if it had been agreed (which is denied).

(4) For the reasons set out above, denied.

(5) For the reasons set out above, denied.

36B Paragraph 87B is denied:

(1) Clause 10 of the Supplemental Agreement confirmed that, save as amended by the terms of the Supplemental Agreement, the Sub-Contract continued to be of full force and effect. Accordingly, the effect of the Supplemental Agreement was to amend the terms of the Sub-Contract, constituting a new agreement, being the “Amended Sub-Contract”. Clause 1.8.1 (the “Entire Agreement Clause”) of the Amended Sub-Contract is therefore of full force and effect, and applicable to the terms of the Supplemental Agreement.

(2) It is Multiplex’s case that the proper construction of the Entire Agreement Clause of the Amended Sub-Contract, after the execution of the Supplemental Agreement, is to exclude either party from relying upon any representations or other warranties made by each to the other prior to the execution of the Supplemental Agreement.

(3) It is admitted that the Entire Agreement Clause does not prevent the parties from entering into subsequent agreements on such terms as the parties choose, but denied that such a proposition deprives the Entire Agreement Clause of its true intent or purpose.

(4) For the reasons set out above, denied

Events after Supplemental Agreement

37. As to paragraph 88.1:

(1) In relation to paragraph (1):

(a) It is admitted that CBUK made an Application for Payment No. 22, which was received by Multiplex on 9 June 2004.

(b) It is denied that Application for Payment No. 22 was for the period ending 30 May 2004. It is Multiplex's case that this Application was for the period ending 28 May 2004.

(c) It is admitted that a separate application was made in respect of week 88 which provided a net total in the sum of £59,926,674.98.

- (d) It is Multiplex's case that on 25 June 2004, Multiplex issued an Amended Payment Certificate 35 showing the valuation to 28 May 2004 in the net sum of £52,656,727,58.
- (2) Paragraph 88.1(2) is admitted, save that Payment Certificate 36 showed the gross valuation to 28 May 2004 including weekly valuation to week 90 for the sum of £53,606,080.67 and that the valuation to 15 February 2004 was for the sum of £30,826,267.76.
- (3) Paragraph 88.1(3) is denied.
- (4) Paragraph 88.1(4) is ~~denied~~admitted.
- (5) For the avoidance of doubt, it is denied that CBUK was entitled to the sums claimed in the various Applications for Payment.
38. As to paragraph 88.2:
- (a) It is admitted that by a letter of 24 June 2004, Multiplex sought from CBUK a programme of the erection works in line with the milestones in the Heads of Agreement.
- (b) Paragraphs (b) and (c) are denied. It is Multiplex's case that they sought either a fixed lump sum price for erection which reflected the original rates with a reasonable uplift for changed circumstances; or a cost-plus budget proposal 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.
39. Paragraph 88.3 is admitted.
40. As to paragraph 89.1:
- (a) It is admitted that CBUK made Application for Payment No.23 in the sum of £56,626,501.28.
- (b) It is denied that CBUK was entitled to the sum claimed.
41. As to paragraph 89.2:
- (a) It is denied that the breakdown to Multiplex's Payment Certificate No. 37 made false (which Multiplex takes to mean incorrect) statements as alleged or at all. Multiplex carried out a bona fide valuation of CBUK's Sub-Contract Works in

accordance with the Amended Sub-Contract and valued those works at £41,195,829.42.

Save as aforesaid, paragraph 89.2 is admitted.

42. Paragraph 89.3 is admitted.
43. As to paragraphs 90.1, 90.2 and 90.3:
 - (a) It is admitted that CBUK made the Applications for Payment.
 - (b) It is denied that CBUK was entitled to the sums claimed.
44. Paragraphs 91.1 and 91.2 are admitted.
45. Paragraph 92.1 is admitted.
46. Paragraph 92.2 is denied. By letter dated 5 August 2004 Multiplex accepted CBUK's repudiation of the Amended Sub-Contract and was thereby released from further performance of its obligations under the Amended Sub-Contract. Accordingly, Multiplex was released from its obligation to issue a Certificate of Payment in response to CBUK's Application for Payment No.24. Multiplex did issue a Certificate of Payment, but purely on a without prejudice basis simply to demonstrate that no further sums were due to CBUK in any event.

Breaches of Contract

47. Save that it is admitted and averred that Multiplex re-valued the works completed to 15 February at £23,973,207.85, thereby making a reduction of £8,686,792, and sought consequential repayment in its Payment Certificates Nos. 37, 38 and 41, paragraph 93.1 is denied for the reasons set out below.
48. As to paragraph 93.2:
 - (1) **Disputed valuation of £32.66 million.**
 - (a) It is admitted and averred that by Certificate of Payment No.37 Multiplex re-valued the works completed to 15 February 2004 at £23,973,207.85 and sought repayment of the balance of £8,686,792 from CBUK.
 - (b) (i) It is denied that the sum of £32.66 million had been agreed, denied that Mr M Stagg knew that it had been agreed, and denied that Mr Stagg was acting

dishonestly and/or that the alleged dishonesty is to be attributed to Multiplex. Further, given CBUK's knowledge on its own case that Mr Stagg was not informing his superiors of the alleged Valuation Agreement (as set out in paragraph 36A(2)(ii) above), not only is any dishonesty not to be attributed to Multiplex, but rather such dishonesty led to Multiplex being deceived with the knowledge and connivance of CBUK.

~~(b) — It is denied that the sum of £32.66 million had been agreed and denied that Mr M Stagg knew that it had been agreed.~~ (ii) The said sum of £32.66 million was accepted by Mr M Stagg, at CBUK's request, for incorporation into subsequent certificates for cashflow purposes only, whilst the parties sought to reach final agreement on a proper valuation.

(iii) Further and alternatively if, which is denied, Mr Stagg was acting dishonestly, Multiplex was unaware of such dishonesty and Mr Stagg had no actual or ostensible authority to act dishonestly on behalf of Multiplex. Accordingly, it is Multiplex's case that such dishonesty is not attributable to Multiplex. Had there been any agreement as alleged and had CBUK realised that there was such an agreement, CBUK could have and should have raised the existence of the agreement with Multiplex (which it did not).

(c) Multiplex retained the right to re-value those works at any time in any subsequent monthly valuation in accordance with the Amended Sub-Contract, and did so in Certificate of Payment No.37. For the avoidance of doubt, it is expressly denied that Multiplex did so knowing that there was no justification or legal entitlement to do so. Multiplex entered into the Supplemental Agreement on the basis that no agreement had been reached as to the 15 February 2004 valuation. In respect of matters pleaded at sub-paragraphs (i) to (vii), Multiplex responds as follows:

(viii) The note prepared by Mr McGregor was a personal record of his own thoughts at the time. Those views were not attributable to Multiplex, nor were they known or adopted by Multiplex.

(ix) Denied. The Supplemental Agreement specifically envisaged that CBUK might not continue to carry out on-site steel erection after June 2004 and that a new on-site steel erector could be appointed. In that event, Multiplex realised that there was a risk that CBUK might walk off site altogether and repudiate

the Amended Sub-Contract. Multiplex regarded such a turn of events as a worst case scenario, which it referred to as “Armageddon”. It was not a plan, rather a worst case scenario if CBUK abandoned the Project (which CBUK ultimately so did).

(x) Multiplex recognised that CBUK might make claims against it and wanted to ensure that it was in the position of having its own claims properly identified and particularised. The reference to CBUK falling “under the pressure” is a reference to CBUK backing down in the face of claims being made by Multiplex against it.

(xi) Denied. As part of its consideration of the options then available, Multiplex prepared a number of different scenarios. The document entitled “CBUK Scenarios 040604” demonstrates that, rather than having an Armageddon Plan as alleged by CBUK (which is denied), Multiplex was in June 2004 (some four months after signature of the Heads of Agreement) still considering the prospect of five possible scenarios, one of which remained the worst case scenario of CBUK abandoning the Project, thereby leaving Multiplex in the difficult position of having to complete the steelwork without assistance from CBUK.

(xii) It is denied that experts were engaged to implement an alleged Armageddon Plan. Multiplex recognised that, if it exercised its right to remove on-site erection from CBUK’s scope of work, CBUK would have been significantly overpaid for its work. Given the risk that CBUK might threaten to or actually abandon the Project, Multiplex wanted to ensure that it had properly justified and particularised claims (as set out in sub-paragraphs (iii) and (iv) above).

(xiii) Denied. The Supplemental Agreement was a heavily negotiated document by both parties. Mr Stagg circulated a copy to ensure that it provided adequate protection for Multiplex in the event that it was unable to agree a way forward with CBUK.

(xiv) For the reasons set out above, denied.

(d) It is denied that at the time of making the Supplemental Agreement Multiplex intended to breach the Amended Sub-Contract by not acting in a bona fide manner as alleged or at all. The Supplemental Agreement was signed by the parties to

maintain progress of the works and to allow the parties time to try to reach further agreements for the completion of the works. The 15 February 2004 valuation had always been an issue between the parties and Multiplex had consistently maintained that the sum of £32.66 million was excessive. The figure of £32.66 million was not incorporated into the Supplemental Agreement, which recognised the fact that no agreement had been reached by making reference to a valuation in accordance with the provisions of the Sub-Contract, subject to the deduction of retention and other deductions permitted under the Sub-Contract. It is expressly denied that Multiplex and/or Mr Stagg acted dishonestly.

~~(e) Multiplex was aware of CBUK's financial difficulties, but understood that CBUK was being supported by its parent company.~~

(e) Multiplex was aware of CBUK's financial difficulties, but understood that CBUK was being supported by its parent company. Multiplex carried out a bona fide valuation of the Works and issued Payment Certificates No.37 and No.38 on the basis of those valuations. By issuing Certificates of Payment Nos. 37 and 38 Multiplex was exercising its right to value the works in accordance with the Amended Sub-Contract. It is expressly denied that by doing so Multiplex was indicating that it had no intention of making further payments to CBUK as alleged or at all.

(2) Payment of £1.25 million Arch lift bonus.

(a) It is admitted and averred that on 6 July 2004 Multiplex gave notice that it intended to withhold the sum of £1.25 million as a result of CBUK's breaches of the Amended Sub-Contract, but denied that such a notice was part of an alleged "Armageddon Plan". It is Multiplex's case that it was entitled to withhold payments on the basis of CBUK's breaches of contract.

(b) The Arch was not lifted to its parked, temporarily restrained position prior to load transfer until 29 June 2004. Accordingly, Multiplex's withholding notice was served in accordance with Clause 21.11 of the Amended Sub-Contract. It is denied that any other prior notification of withholding is or was required.

(c) It is denied that the notice of withholding was inflated or unsubstantiated. Multiplex provided details of the amount that was proposed to be withheld, the grounds for withholding, and the amount attributable for each ground.

(d) Multiplex accepted that the Arch lift bonus was payable, but exercised its contractual right to withhold payment. For these reasons, it is denied that Multiplex's failure to make payment of £1.25 million was wrongful or in breach of contract, or as part of an alleged "Armageddon Plan".

(3) **CBUK's entitlement to reimbursable costs.**

(a) It is admitted that Multiplex deducted £4,581,197.15 in Certificate of Payment No.38 in respect of inefficient site works, but denied that such deduction was unreasonable or unsubstantiated. CBUK's progress on site had fallen well short of the rate of 400 tonnes/week that a reasonably skilled and competent steelwork contractor would have achieved.

(b) Multiplex was aware of CBUK's financial difficulties, but understood that CBUK was being supported by its parent company.

(4) **Efforts to reach agreement on a new programme and price.**

(a) It is denied that Multiplex decided that it would not agree to a new programme or price with CBUK and denied that it would not co-operate with CBUK.

(b) Multiplex relies upon paragraphs 45 to 51 of the Amended Consolidated Particulars of Claim and avers that it was CBUK that was in breach of its obligation to use reasonable endeavours to provide a new programme and price proposal. Multiplex will also rely upon the following:

(i) In December 2003, Mr Fletcher (of CBUK) approached Multiplex and suggested the possibility of Multiplex purchasing CBUK or removing some of the steelwork from CBUK's scope of work.

(ii) At a board meeting of Cleveland Bridge Dorman Long Engineering Limited ("CBDLE") (CBUK's parent company) on 11 February 2004, it was resolved that CBUK would not continue to work under the terms of the Sub-Contract until the completion of the Project and resolved that a business plan for "Option 2" be developed to manage CBUK's business and maximise asset valuation. "Option 2" was the proposal to stop work on the pretext that Multiplex had repudiated the Sub-Contract.

(iii) Further, Mr. Roddy Grant was tasked with handling the media, government, local MPs and staff for the actions contemplated. The plan was code-named "PROJECT TRAFALGAR".

(iv) At a further board meeting of CBDLE on 18 February 2004, Mr. Roddy Grant acknowledged that executing the Heads of Agreement might weaken CBUK's repudiatory breach case.

Accordingly, CBUK thereafter regarded an allegation of repudiatory breach as an option to keep in reserve as a fall-back position regardless of any actual repudiation by Multiplex. Further, it is to be inferred from its failure to provide any fixed price or programme in accordance with the Supplemental Agreement that CBUK continued to keep the possibility of alleging that Multiplex was in repudiatory breach of contract as an option open to it until it decided to implement "Project TRAFALGAR" by alleging a repudiatory breach of contract which now forms the subject matter of these proceedings.

(c) ~~By reason of the above, Multiplex invited tenders from a number of companies, including Hollandia, as a precaution and safeguard, in the event that it was unable to agree terms with CBUK. It is denied that Multiplex had no right to enter into such commercial negotiations (if the same be alleged), and denied that Multiplex intended to appoint Hollandia as soon as the Arch was lifted. In the event, Multiplex did not conclude commercial terms with Hollandia until November 2004.~~ respect of matters pleaded at sub-paragraphs (i) to (ix), Multiplex responds as follows:

(i) Admitted.

(ii) It is admitted that Multiplex discussed with Hollandia the possibility of taking over the on-site erection works, which was envisaged by the Supplemental Agreement, as an alternative to continuing with CBUK.

(iii) For the reasons set out above, it is denied that discussions with Hollandia related to an alleged "Armageddon Plan". Multiplex sought a price from Hollandia as a precautionary or contingency measure to protect the programme for the Project in the event that agreement could not be reached with CBUK.

(iv) Multiplex indicated to Hollandia the timing of its right to remove on-site erection works from CBUK's scope of work, but it is denied that any binding agreement was made.

(v) Admitted, but no admissions are made as to the relevance thereof. The document also contained other possible scenarios, none of which was fixed or agreed.

(vi) Expressly denied. Multiplex formally wrote to Hollandia on 6 July 2004 asking it to carry out on-site erection works, but did not conclude commercial terms with Hollandia until November 2004. Further, it is denied that there has been any failure to disclose documents. Multiplex retained Hollandia to carry out the fixed and moving roof and to undertake an audit of various activities on site. Some bowl fabrication had been contracted to Hollandia with CBUK's knowledge and approval. However, Hollandia was not engaged to take over on-site erection until 6 July 2004.

(vii) Admitted.

(viii) Denied.

(ix) ~~(d)~~ It is denied that Multiplex incorrectly informed CBUK that Hollandia was on site to assist in the management of CBUK's works. Hollandia had taken over responsibility for steel fabrication and was present on site to co-ordinate its works with those of CBUK and to provide assistance where appropriate. Further, Mr Muldoon had told Mr Rogan that CBUK's performance was inadequate (as it was) and had proposed that Hollandia's personnel should be seconded to Multiplex to assist in supervising steel erection. Mr Rogan told Mr Muldoon that he knew the Hollandia personnel and was in agreement with that proposal.

(5) **Consultation with CBUK**

(a) For the reasons set out in paragraphs 52 to 67 of the Amended Consolidated Particulars of Claim, it is denied that Multiplex failed to consult as alleged or at all.

Save as aforesaid, paragraph 93.2 is otherwise denied.

49. For the reasons set out above, paragraph 93.3 is denied.

Termination

50. As to paragraph 94.1:

- (a) It is admitted that by letter dated 23 July 2004 CBUK purported to require Multiplex to carry out a number of steps.
- (b) It is denied that CBUK was entitled to make such requests and/or that Multiplex was obliged to comply with the requests.
- (c) CBUK's letter was a continuation of its "Project TRAFALGAR" plan to stop work and allege that Multiplex had repudiated the Sub-Contract. Multiplex will rely upon the following:
- (i) At a CBDLE board meeting on 7 May 2004 Mr Roddy Grant advised that CBUK had "dramatically overspent budget and that the overspend was in the region of £6m". Mr Grant went on to say that "project management and design errors were major contributory factors". CBUK accordingly realised that it was substantially at fault but sought a mechanism to avoid realising the effect of its own wrongs.
- (ii) At the CBDLE board meeting on 8 July 2004, CBUK recognised that Multiplex might make deductions and a note was made to take every effort to improve its position within the terms of the Sub-Contract or, failing that, by means of other legal action open to CBUK.
- (iii) At the CBDLE board meeting on 23 July 2004, Mr Roddy Grant noted that CBUK could challenge Multiplex's deductions through dispute resolution under the Sub-Contract, or accept Multiplex's alleged repudiatory breach, which allowed CBUK to stop work on the Project. It was resolved that CBUK write to Multiplex alleging repudiatory breach. There was no valid reason why CBUK should not, if its complaints were genuine, have resorted to the contractual disputes mechanism.
- (iv) Further, Mr Roddy Grant was tasked with implementing a media and Government strategy as contemplated by "Project TRAFALGAR". This strategy has continued to be put into effect in order to seek to justify CBUK's position.

51. As to paragraphs 94.2 and 94.3:

- (a) It is denied that Multiplex failed to make payments in accordance with the Amended Sub-Contract as alleged or at all.

- (b) It is denied that CBUK was entitled to serve a notice pursuant to Clause 30.2 of the Amended Sub-Contract.
- (c) It is denied that CBUK's letter dated 23 July 2004 constituted a valid notice under Clause 30.2 of the Amended Sub-Contract. In particular, CBUK's letter was not stated to be served pursuant to Clause 30.2 and/or failed to specify the relevant time period for compliance with its requests.
- (d) For the reasons set out above, it is denied that Multiplex incorrectly denied that the value of the works to 15 February 2004 had been agreed and denied that Multiplex was obliged to comply with any of the steps set out in CBUK's letter dated 23 July 2004.
- (e) For these reasons, it is denied that Multiplex indicated that it had no intention of complying with its obligations under the Amended Sub-Contract

For these reasons, paragraphs 94.2 ~~is~~ and 94.3 are denied.

52. As to paragraph 95.1:

- (a) It is denied that any sums became due under Payment Application No. 23. It is Multiplex's case that, in accordance with Clause 21.9 of the Amended Sub-Contract, sums only become due once a Certificate of Payment has been issued.
- (b) It is denied that CBUK's letter specified a period of 10 days from receipt within which it required compliance, and denied that Multiplex was obliged to comply with CBUK's requests.
- (c) CBUK's letter dated 23 July 2004 was received by Multiplex by fax at 16.54hrs, and CBUK's letter dated 2 August 2004 was received by fax at 12.06hrs. The second letter was therefore received by Multiplex less than 10 days after the first. In the circumstances if, which is denied, CBUK was entitled to and did serve a compliant default notice pursuant to Clause 30.2 of the Amended Sub-Contract, CBUK's second letter was premature and of no effect as CBUK had not allowed Multiplex the required period of 10 days within which to comply.

For these reasons, paragraph 95.1 is denied.

53. For the reasons set out in paragraphs 48 to 53 above, paragraph 95.2 is denied.

54. As to paragraph 95.3:

- (a) It is denied that CBUK is excused from performance of its future obligations for the reasons set out in paragraphs 95.1 to 95.1.
- (b) It is Multiplex's case that by reason of CBUK's own repudiatory breach of the Amended Sub-Contract, both parties were excused from future performance of their respective obligations under the Amended Sub-Contract. Multiplex will rely upon paragraphs 66 to 69 of the Amended Consolidated Particulars of Claim.

Loss and damage

55. As to paragraphs 96.1 and 96.2:

- (a) CBUK has not provided sufficient information to allow Multiplex to plead to these allegations.
- (b) Further, ~~for the reasons pleaded above~~ and in any event, it is denied that CBUK is entitled to the alleged or any sums pursuant to the Amended Sub-Contract or as damages or by way of restitution, as alleged or at all.
- (c) Further and/or alternatively, it is denied that CBUK is entitled to payment for the China Steel pursuant to the Amended Sub-Contract.

56. It is noted that CBUK acknowledges that it will give credit for any payments made by Multiplex pursuant to any adjudications awards, but averred that CBUK has failed to give such credit in its pleaded Counterclaim-. It is Multiplex's case that CBUK has been paid a total sum of £58,128,276.57 in respect of the Sub-Contract Works (as set out in Schedule 2 to the Particulars of Claim). Accordingly even if, which is denied, CBUK is entitled to the sums claimed, the value of CBUK's claim is £2,440,027.75. CBUK's claim is therefore significantly overstated, by £8,522,195.90.

57. As to paragraph 97:

- (a) CBUK has not provided sufficient information to allow Multiplex to plead to these allegations. For the avoidance of doubt, no admission is made that CBUK has suffered the alleged or any loss and damage, or as to the amount thereof.
- (b) Further, for the reasons set out above, it is denied that CBUK is entitled to the alleged or any damages by reason of the matters pleaded in the Counterclaim.
- (c) Further and in any event, it/or alternatively, the alleged loss of profit on the basis of a 100% certainty of entering into a further contract with Multiplex, which is denied.

is too speculative and too remote to give rise to a claim in damages, and is unsustainable as a matter of law.

(d) Without prejudice to these contentions:

(i) It is denied that CBUK has given any or any proper credit for the costs that it would have saved by not having carried out and completed the remaining works.

(ii) It is denied that CBUK is entitled to make claims in paragraph 97(1)(b) as an alternative to claims in paragraph 96.1(2) of the Amended Consolidated Defence and Counterclaim.

(iii) For the reasons set out in paragraph 34A(d) above, it is denied that CBUK is entitled to damages for breach of the China Steel Agreement as alleged or at all.

(iv) It is denied that CBUK was the only steelwork sub-contractor in Europe with sufficient knowledge and experience to complete the Sub-Contract Works. Multiplex will rely on the following:

(a) Multiplex discussed the possibility of fabrication with William Hare Ltd, who were willing to consider an agreement, and with Severfield Rowan plc, who were willing to return but were too busy to take on the erection.

(b) Hollandia had already carried out complex erection work in the UK including, inter alia, the London Eye and the Swiss Re: building.

(c) Multiplex was originally in negotiations with Hollandia for a fixed price for erection. However, by reason of CBUK's abandonment of the Project, Multiplex did not have the opportunity to negotiate a fixed price with Hollandia. Once Hollandia commenced on-site erection and discovered the full extent of the disarray left by CBUK, Hollandia was unwilling to agree to a fixed price arrangement.

(d) Further and in any event, the alleged loss of opportunity to enter into a contract with Multiplex, which is denied, is too speculative and remote to give rise to a claim in damages. It is denied that the

operation of TUPE obliged Hollandia to employ CBUK's labour force. Multiplex will rely on clause 9.1 of the Supplemental Agreement and the fact that CBUK served its site employees with HR1 notices on 30 April 2004.

(e) It is denied that CBUK were better placed than Hollandia to complete the erection. CBUK's supervision and site management had been unable to progress the Project expeditiously since 15 February 2004 in that it had failed to achieve the erection of an average of 400 t/week of bowl steel.

(f) It is denied that CBUK would have entered into a fixed price agreement with CBUK for the remainder of the erection works for a price of £36,000,000 as alleged or at all. Multiplex will rely upon CBUK's refusal to provide a fixed price proposal during June 2004 and Mr Rogan's statement that it was "too hard" for CBUK to provide a fixed price (as set out in paragraphs 45 to 49 of the Amended Consolidated Particulars of Claim).

58. As to paragraph 98, it is denied that CBUK is entitled to payment of the sum of £500,000 plus VAT pursuant to Clause 9.3 of the Supplemental Agreement. In any event, CBUK has acted in manner that is inconsistent with the primary case now set out in its Counterclaim.

59. CBUK's claim for interest is accordingly denied.

60. Save insofar as is set out above, Multiplex denies each and every allegation made in the Counterclaim.

~~VIVIAN RAMSEY QC~~

ROGER STEWART QC

PAUL BUCKINGHAM

STATEMENT OF TRUTH:

The Claimant believes that the facts stated in ~~these particulars of claim~~ this Amended Consolidated Reply and Defence to Counterclaim are true. I am ~~duly~~ authorised by the Claimant to sign this statement.


.....
Ashley Muldoon

Director

Multiplex Constructions (UK) Limited

Served this ~~25th~~ 18th day of ~~February~~ January 2006 by

Clifford Chance LLP

10 Upper Bank Street

London E14 5JJ

Ref: ~~EZH/M4770/007810-20332698/NEIMEA~~ XP

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Solicitors for the Claimant/Part 20 Defendant

**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 REPLY AND
DEFENCE TO COUNTERCLAIM**

Clifford Chance Limited Liability Partnership

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London E14 5JJ

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EZH/M4770/007810-20332698/NHMFAXP

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
THE HONOURABLE MR. JUSTICE JACKSON**

B E T W E E N:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED

Claimant / Part 20 Defendant

- and -

CLEVELAND BRIDGE UK LIMITED

Defendant / Part 20 Claimant

**PARTICULARS IN RESPECT OF PARAGRAPH 65F
OF THE AMENDED PARTICULARS OF CLAIM**

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

Particulars

The general nature of Multiplex's case applicable to its claims is set out in the particulars below. Further details relating to individual sub-contractors are pleaded in the existing Schedule 3, and will be refined and amplified in the amended Schedule 3 which Multiplex will serve by 28 February 2006 in accordance with the Consent Order dated 9 December 2005.

- (a) During the period 16 February to 31 July 2004, CBUK erected approximately 4,100 tonnes of bowl steel, whereas it should have erected more than 8,000 tonnes. The erection of bowl steel was the critical path of the Project between 16 February and 31 July 2004, and therefore CBUK's shortfall in steel erection caused a delay to the Project
- (b) It is Multiplex's case that, by 31 July 2004, the Project was in delay by 67 days as a result of CBUK's low steel erection rates. (For the avoidance of doubt, the total delay was 86 days, but Multiplex will give credit for 5 days of delay caused by crane downtime from 15 to 19 March 2004 and 14 days of delay as a result of the handover period during July 2004.)
- (c) Multiplex's key follow-on sub-contractors were wholly dependant upon the completion of bowl steel to commence their works. Accordingly, the aforesaid delays to the bowl steelwork were the direct cause of delays to the individual follow-on sub-contractors.
- (d) In respect of existing sub-contractors that were delayed and/or disrupted and sub-contracts executed in reliance upon TW75 (which was based upon CBUK's programme WS05-v1), Multiplex has assessed the effect of the delays on one of the following bases (as appropriate and to be pleaded in the amended Schedule 3):
 - (i) By comparing the difference between a sub-contractor's projected completion date on Multiplex's programme TW92 (as at the end of July 2004) and Multiplex's programme TW75 (as at mid-February 2004); or
 - (ii) By comparing the difference between a sub-contractor's projected completion date on Multiplex's programme TW92 (as at the end of July 2004) and the respective sub-contractor's agreed contractual programme;
or

- (iii) By comparing the difference between a sub-contractor's start date on Multiplex's programme TW92 (as at the end of July 2004) and the start date on the respective sub-contractor's agreed contractual programme.
- (d) In respect of sub-contracts placed after 15 February 2004 at a time when Multiplex was aware of the delays to the Project caused by the CBUK's low steelwork erection rate on the particular sub-contractor's work, Multiplex negotiated shortened programmes to mitigate the effects of the delays and therefore claims the cost of the said mitigation.
- (e) Further, Multiplex rented additional storage areas adjacent to the Site for materials that were delivered to the Site but which required storage prior to installation as a result of delays to the Project.

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
THE HONOURABLE MR. JUSTICE JACKSON**

B E T W E E N:

MULTIPLEX CONSTRUCTIONS (UK) LIMITED

Claimant / Part 20 Defendant

- and -

CLEVELAND BRIDGE UK LIMITED

Defendant / Part 20 Claimant

**PARTICULARS IN RESPECT OF PARAGRAPH 65E
OF THE AMENDED PARTICULARS OF CLAIM**

65E CBUK was in breach of inter alia clauses 4.1.1 and 4.1.4 and/or the aforesaid implied terms set out at paragraphs 9(iii) and (v) 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, as set out in paragraph 65D above;
- (b) by 30 June 2005 had only erected 4135 tonnes of Phase 11 – 18 bowl steelwork and would therefore have been unable to have erected the remaining 3465 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. In this regard, there were consistent failures by CBUK to ensure that fully fabricated, treated steel was available at Site at the right time and in the right sequence. So that CBUK knows the nature of the case being made against it, Multiplex relies, by way of example, on the following:

- (i) In an e-mail from Mr S Osborne to Mr B Rogan on 30 October 2003, Mr Osborne states: "*We are still not receiving steel on site in the correct sequence or timing. By now we should have overcome our initial problems ... for steel to come late and in wrong sequence, this means that either the figures are wrong, we have fabricated totally in the wrong sequence (possible leave out), sub-contractors are not coordinated correctly, there is a problems at dispatch (CBUK or Sub-contractors), there is a problem at sub-painters.*"
- (ii) In an e-mail from Mr S Osborne to Mr B Rogan of 13 November 2003, Mr Osborne states: "*Phase 15 feed is desperate. We have next to no tonnes in the system and it is totally reliant on Fabrication quickly producing in the correct sequence, we have some missing key items, but not as many as phase 11. I think we will have all 4 cranes more or less stopped for a week.*"
- (iii) In his diary on 5 December 2003, an unknown employee of CBUK states "*we will run out of steel tomorrow on Phase 14 and 18. Got a load of Ph 14 s3 beams but no columns .. f***ing shambles*".
- (iv) In his diary on 6 December 2003, Mr Hall states "*PH 17 fin plates all wrong again. Is there no f***ing end to this.*"
- (v) On 16 December 2003, Mr S Osborne states that "*can't see it getting better until we receive "full" and in "sequence" S5, S6 and Raker deliveries because we have no where to go with erection and now have many tower cranes with nothing to do.*"
- (vi) On 10 January 2004, Mr A Hall states in an e-mail to Mr O'Neill that "*It is essential that we fabricate and deliver each erection group totally*

complete and in the correct sequence. Currently for various reasons we have not fabricated to the exact sequence."

- (vii) On 12 January 2004, another e-mail to sent from Mr Osborne in which he states *"After all the grief and disruption site had to absorb when Phase 11 leave out steel was sent to site with the required steel, we are now encountering the same problems again, even after many discussions and correspondence. We have NEVER on this project to date received a delivery of steel in the order that we have requested. We can understand why the leave out has been fabricated out of sequence, BUT WHY HAS IT BEEN SENT TO SITE when we do not require it for months."*
 - (viii) On 12 January 2004, Mr Smyth states *"WE MUST NOT deliver any more steel out of sequence again as the consequence of this is not only detrimental to budget and time but also impacts on safety"*.
 - (ix) On 11 February 2004, a unknown individual working for CBUK states in his diary *"running out of steel again Phase 18 and 12"*.
 - (x) On 8 March 2004, Mr Hall states in his diary *"Again sent the wrong ones. Ran out of steel again. Phase 12 has four beams then nothing. Phase 18 has nothing. Mixed load in wrong nos. Wrong pieces. We are going absolutely nowhere."*
 - (xi) On 9 May 2004, in his diary Mr Hall states *"struts are a f***ing nightmare design is c**p. Rabbit ears not in line."*
- (d) failed to adhere to its own procedures, method statements and Quality Assurance Programme. So that CBUK knows the nature of the case being made against it, Multiplex relies, by way of example, on the following:
- (i) The erection sequence as outlined in the Phase 11 Bowl Method Statement was not followed. Steel for the leave out area identified in the Method Statement was shipped to the site in some cases months before it was required and ahead of steel that was required in accordance with the erection sequence, thereby reducing work efficiency on site.

- (ii) The Sub-Contract required that the general arrangement drawings be prepared in accordance with NSSS. The NSSS Specification for Erection Drawings, per Section 3, Page 25 states that "*The drawings shall identify member size, material quality, location relative to other members and grid, and the specified surface treatment. They may include a reference system to connections... Details at an enlarged scale should also be made to show the assembly of members.*" CBUK did not follow the Specification in that, for example, Radial Grid lines and Tangential Grid Lines are not always labelled or have duplicate grid line labels; Drawings include columns labelled "Inter" that do not exist but were used by the detailer as placeholders (For example, on Drawing B11 01 12 there are columns labelled "*INTER 350, INTER 351, INTER 370 and 371*", yet these columns do not exist. They are labelled INTER for the benefit of the detailer (Oakwood), but would mean nothing to the erector. On drawing 910101 the bill of materials includes columns labelled "*EX_COL 10 and INTER 102*", yet these do not exist); Incorrect elevations and inconsistencies in elevations; few sections or details necessary to clarify erection or connection details are provided, giving few useful details required by the erectors (For example, MSC Drawing 511S-01WD22426 provides details 19, 20, 21 and for clarifications to Drawing 5115-01 WD 22 411. CBUK Drawing B11 02 05 omitted these details. Further, CN 772 and CN 2020 could have been avoided had CBUK used the details provided on MSC drawings).
- (iii) Section 3 of NSSS paragraph 3.3 Foundation and Wall Interface Information states that "*Information showing holding down bolts and the interface of steelwork components to foundation shall include a Foundation Plan showing the base location, position and orientations of columns, the marks of all columns, any other members in direct contact with the foundations, their base location and level, and datum level. Similar information shall also be provided for components connecting to walls and other concrete surfaces. Complete details of fixing steel and bolts to the foundations or walls, method of adjustment and packing*

space shall be provided." CBUK failed to comply with those provisions in that its drawings:

1. for anchor bolt plans did not always identify the corresponding column to be located at the anchor bolt location and did not the give dimensions between columns. Column orientation was not shown.
2. indicated columns with erection numbers that actually referred to beams.
3. failed to identify the location of all members and member location in relation to grid lines and failed accurately to identify the location of grid lines on all drawings.
4. listed beam references for beams that did not exist.
5. were inconsistent in identifying the location of phases or groupings.
6. did not provide accurate and complete details on all splice locations for both beams and columns.
7. did not provide general arrangement drawings for all levels (Levels B1 and B2 are missing).
8. General Arrangement drawings did not provide any information on field welds and no references to other documents, Method Statements or instructions on field welds (For example, details 27, 27a, 32, 34, 37, and 48 on MSC Design Drawing 511S-01WD 22427; Details 58, 59, 60, 61, and 63 shown on MSC Design Drawing 511S-01 WD22428 were not included on CBUK drawings).
9. lacked cross-references from general arrangement drawings to detail drawings and to other sub-contractor's general arrangement drawings.

10. General Arrangement drawings did provide top of steel elevations for beams but many elevations provided were incorrect or of no value to the steel erector.
 11. The piece markings of the columns is inconsistent from level to level making it difficult to determine which column is to be erected at a given level and sometimes shows the erection of the upper column before the bottom column.
- (e) failed to coordinate with other contractors working on the Site. CBUK was obliged to coordinate its works with those of other sub-contractors, such as PC Harrington, Bison and Permasteelisa, to maintain the rate of steel erection and comply with its programme (WS05-v1). By way of example:
- (i) CBUK failed to prepare the site for the efficient installation of pre-cast concrete planks and decking by failing to install the fin plate connections in a timely manner to ensure that the works of such other sub-contractors were incorporated into its programme and its works;
 - (ii) CBUK was late in supplying information required by PC Harrington for core embeds and initially supplied copies of MSC drawings for embed locations. Even though the design of the steel to the concrete was CBUK's responsibility, on 12 May 2004 Mike McHugh (of CBUK) emailed Mark Hetmanski asking "*who is designing the embeds into the core walls?*";
 - (iii) Problems existed with Bison Planks not fitting properly (such as BISON RFI 2642/125), and delivery coordination with Bison Planks. In an audit of CBUK's sub-contractor, Oakwood, on 15 January 2004, Mr Nathan Perkins stated that "*Oakwood confirmed that they were not and never have used a BISON Builder's Work GA to ensure that correct interface is met for Precast Terracing.*";
- (f) failed to verify the corrections required for holding down bolts and embedment plates. CBUK's initial Holding Down Bolt survey reports indicated anchor bolts as incorrectly located:

Phase

Sample size

Phase 11 EG 01	30/31 not passed
Phase 11 EG 02	15/16 not passed
Phase 11 EG 03	18/22 not passed
Phase 11 EG 04	20/22 not passed
Phase 15 EG 01	20/22 not passed
Phase 15 EG 02	10/10 not passed
Phase 15 EG 03	9/10 not passed
Phase 15 EG 04	4/13 not passed

There is no evidence of resurvey or notification that all such incorrect anchor bolts were brought into tolerance;

- (g) failed to organise a marshalling yard with sufficient manpower and equipment to support an erection rate of 400 tonnes/week. Although CBUK was reporting that there were large quantities of steel available for bowl erection, it had no local marshalling yard where the steel was checked and final delivery sequence adjustments made prior to delivery of steel to the site in the sequence required for erection. Substantial time was lost in last minute efforts to find particular steel pieces. Incorrect delivery sequences resulted in excess handling of the steel due to off-loading and reloading;
- (h) failed properly to mark and/or tag fabricated steel being delivered to Site. CBUK did not use a tagging method that securely fixed the piece number tags to the steel pieces with the result being that tags were removed in the painting process, incorrectly reapplied or lost prior to the steel being delivered to the site. Time was lost in trying to locate steel pieces and, in some cases, pieces had to be remade. This had an impact on the steel erection efficiency. By way of example, in June 2004 CBUK was still having difficulty in locating and identifying steel, and on the 28 June 2004 Mr A.Hall (CBUK) stated in an email "*Find attached list of items currently not located, we require one last effort to locate prior to remaking.*" CBUK still could not, at this late stage, locate pieces;
- (i) failed to integrate corrective works into its programme. CBUK used CN's to register work that CBUK considered to be outside the scope of the Sub-Contract and used Day Works Sheets to record the time spent on work that was

registered on the CN's. No activity was included in CBUK's programme to show the planning of the resources required to execute this work, the duration of the work, or to project the time impact of this work on the base contract programme. CBUK failed to expedite the changes to the drawings and effectively manage the change process;

- (j) failed adequately to plan and manage the "leave out" steel, in that
 - (i) CBUK was not consistent in designating the leave out areas on its drawings;
 - (ii) did not always show the leave out areas on the General Arrangement drawings;
 - (iii) leave out steel was delivered to the site ahead of steel that was required in accordance with CBUK's erection sequence, where it was handled multiple times, thus reducing transportation and worker productivity;
 - (iv) pieces became damaged from multiple handling;
 - (v) the leave out steel quantities inflated the "buffer" steel that CBUK reported as being available;
 - (vi) the leave out areas were not clearly defined on the General Arrangement drawings for all phases.

By way of example, in CBUK's Application for Payment at the end of February 2004 the Phase 11 Steel listed as "*at Fab*" was one-third (1/3) leave out steel that was not erected by CBUK;

- (k) failed to provide adequate third party checking of general arrangement erection drawings. It is good practice to third party check drawings before they are issued to the shop or the site. There is no evidence that such third party checking was being performed; 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.