

IN THE MATTER OF AN ADJUDICATION

BETWEEN:

LAPLAND BUILDERS OS

(Referring Party)

and

DEEPEN, CRISP & EVEN ENGINEERS LLP

(Responding Party)

RESPONSE TO THE REFERRAL

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RESPONSE TO THE REFERRAL

1.0 INTRODUCTION

- 1.1 This is the Response to the Referring Party’s “Referral Notice” received on 24 November 2008, following service of a “Notice of Adjudication” on 19 November 2008.
- 1.2 In making this Response, Deepen reserves its position (as set out in Section 4.0) as to the Adjudicator’s proper appointment, and also reserves its position on the Adjudicator’s ability to decide issues that do not currently form disputes under the contract, and are therefore not capable of adjudication. We remind the adjudicator of our client’s clear position with regards to his lack of jurisdiction and the action that will be taken should the adjudicator proceed.
- 1.3 In this Response, the Referring Party and the Responding Party are referred to as “Lapland” and “Deepen” respectively.
- 1.4 This Response does not provide a detailed reply to every paragraph in the Referral. Instead, it responds directly to the issues raised by Lapland and cross-referencing will be made to the Referral where appropriate. This approach should not be taken as an admission of any individual contention made by Lapland unless expressly acknowledged in this Response.

2.0 THE PARTY RELATIONSHIPS

- 2.1 Deepen entered into a contract with Three Kings Wintersports plc (“Three Kings”) to complete the structural design for the project. Certain design issues were specifically excluded from the design contract as will be illustrated later in this Response. At some point afterwards, Three Kings entered into a building contract with Lapland. It was agreed that once the main contractor, i.e. Lapland, had been appointed, the structural design contract would be novated to the main contractor. This novation took place.
- 2.2 At some point after the novation, Lapland entered into a Sub-contract with Sleighbellsringin Inc (“Sleighbells”), a US-based company, to complete the structural steel sub-contract. Deepen was not involved in any way with the formation of the sub-contract, nor was it consulted on this matter. There has been no contract made at any point between Deepen and Sleighbells.

3.0 THE ROOT OF THE DISPUTE

- 3.1 The dispute seems to arise out of problems with the design and construction of the project and the insolvency of the Employer with whom Lapland had contracted to build the project. It is

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Deepen's contention that Lapland's claims are against the Employer and their own sub-contractor, Sleighbells. However, Lapland has raised this spurious and unjustified claim against Deepen because (a) Three Kings has become insolvent, and (b) Lapland seems to consider that raising a claim against its USA-based sub-contractor will be resisted by the Chapter 11 protection.

- 3.2 Three Kings has become insolvent due to the collapse of the project which was built and partially designed by Lapland and/or Sleighbells. The cause of that collapse is due to the failure of a connection which was designed and built by Sleighbells. It will be shown later that Lapland and/or Sleighbells had the obligation to design the connections.
- 3.3 Lapland is claiming recovery of liquidated damages that it had to pay to Three Kings due to delay in construction. It is Deepen's contention that the entirety of the delay was caused by Lapland and/or Sleighbells. Lapland is also seeking to recover retention that it has been unable to recover from Three Kings. Lapland is also seeking to recover a sum which it allegedly had to pay Three Kings to settle its building contract due to lost profit. It is abundantly clear that these are issues between Lapland and Three Kings.
- 3.4 The other sums now claimed by Lapland are additional costs claims and monies related to the principal sums claimed (i.e. interest) and costs of adjudication procedure.
- 3.5 It is Deepen's contention that Lapland has suffered loss of monies due to its own failures, and those of its own sub-contractor Sleighbells, but it considers it too difficult to raise an action against Sleighbells to recover these monies, due to Sleighbells pleading Chapter 11 protection in the USA. Lapland is therefore seemingly attempting to take an action against Deepen which defies logic and has no basis in law. It was Lapland's decision to employ Sleighbells and, as stated above, Deepen had no involvement in the letting of the sub-contract. Therefore, it cannot have been even remotely foreseeable by Deepen that Lapland would contract with a US-based company which may have claimed Chapter 11 protection. Deepen can therefore not be liable for any of the consequences arising from Sleighbells claiming Chapter 11 protection.
- 3.6 It will be shown that the entire claim stems from poor performance by Lapland and their own sub-contractor Sleighbells, due to inadequate design of connections and the poor methods of construction, all of which were Sleighbells' responsibility.
- 3.7 It is therefore Deepen's contention that this adjudication should be dismissed and Deepen reserves its right to claim as damages any losses which it suffers in having to prepare for and defend this action.

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4.0 JURISDICTIONAL ISSUES

4.1 In this section, Deepen sets out jurisdictional issues that have arisen in connection with these proceedings. Accordingly the Adjudicator has no jurisdiction in these matters and/or no jurisdiction to provide the redress sought by Lapland. Deepen contends that:

- 4.1.1 the Adjudicator has not been correctly appointed and therefore has no jurisdiction;
- 4.1.2 a significant part of the referral material is new to Deepen, has not been provided to Deepen prior to submission in the Referral, and therefore cannot be considered by the Adjudicator;
- 4.1.3 some of the referred issues do not currently form disputes under the contract, and therefore cannot be adjudicated; and,
- 4.1.4 the Adjudicator has no powers to decide certain issues in any event.

4.2 The Adjudicator's Appointment

- 4.2.1 The Adjudicator was appointed by Société Anonyme National Terminé d'Adjudication (SANTA) of Biarritz. SANTA is not a body that holds itself out publicly as an adjudicator nominating body. It is a society based on 'anonyme'. SANTA is not a body that is capable of regulation, control, or accountability under English law.
- 4.2.2 SANTA was not included in Deepen's agreement with Lapland as either a named or agreed adjudicator nominating body. Deepen has not agreed with Lapland that SANTA can act as an ANB.
- 4.2.3 Therefore, the Adjudicator is not properly appointed, and has no jurisdiction to act. As a consequence, Deepen has no liability for any fees and expenses incurred by the Adjudicator. See Referral Paragraph 77.

4.3 New Material

- 4.3.1 Deepen has not had any previous opportunity to respond to the following submissions, which appeared as 'new' submissions within the Referral.
- 4.3.2 The expert report of Dr Dolittle on connection failure. See Paragraph 28 of the Referral.
- 4.3.3 The expert report of Professor Slipup on delay analysis. See Paragraph 42 of the Referral.
- 4.3.4 The expert report of Professor Dulux on primer paint. See Paragraph 49 of the Referral.
- 4.3.5 The expert report of Mr Ives on costs for paint systems. See Paragraph 57 of the Referral.

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4.4 **Disputes not Crystallised**

The following issues have not previously been submitted to Deepen, and were not included in the Notice of Intention to Refer. The Adjudicator's jurisdiction stems from the Notice of Intention to Refer and therefore, Deepen does not agree that any of these issues can be included in this adjudication.

4.4.1 Lapland's claim for interest based on the Late Payment of Commercial Debts (Interest) Act.

See Paragraph 79 of the Referral. Deepen contends that the Adjudicator has no freestanding power to award interest (see *Carillion v Devonport CA 2005*).

4.4.2 Lapland's claim for £100.00 for debt recovery costs under the Late Payment of Commercial Debts (Interest) Act. See Paragraph 80 of the Referral.

4.5 **No Powers**

4.5.1 The Adjudicator does not have any powers to decide the following issues within the Referral, and no such powers are given to the Adjudicator by Deepen.

4.5.2 Party costs. See Paragraph 78 of the Referral.

4.5.3 The Referral Fee. See Paragraph 76 of the Referral.

5.0 **THE ISSUES**

5.1 **Original Design Responsibilities**

5.1.1 Lapland seems to consider that Deepen had responsibility for "*the design of all structural steel works*" (See Referral Para 7). Lapland has clearly failed to acknowledge the pre-novation agreement between Deepen and Three Kings, as evidenced in Minutes of Meeting. In addition, by their own admission, Lapland has stated at Paragraph 3 of their Referral that they appointed Deepen to provide "*certain structural engineering works...*" [Emphasis added]; This is not all structural engineering works, and it will be shown that Lapland knew, or ought to have known, that they had responsibility for the design of steel connections.

5.1.2 Prior to the formation of the structural design contract, Three Kings and Deepen agreed that, due to the nature of the overall design of the structure and the issues relating to the practical construction of the project, Deepen would conduct the design of the steel members and provide the forces which were to pass through the connections. It was agreed with Three Kings that the connection design would be best completed by the Contractor, in order to give him the flexibility to choose the best and most economical method of actually building the facility. This is because it was agreed that some connections may be easier to construct with welded

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connections, whereas other connections would be best constructed with bolted connections, due to the complexity of framing the steel structure.

5.1.3 At Appendix 1 of this response, Deepen provides an extract from the Minutes of Meeting dated 3 August 2004, prior to the design contract formation. It clearly states at Item 6.3: *“It is agreed that the design of structural connections will not be included in the scope of work for the Structural Engineer. This element of structural design will be completed by the appointed contractor in order to give him the opportunity to decide the best method for practically executing the connections. However, the Structural Engineer is to provide the forces which pass through the connections so as to enable the contractor to complete structural design.”*

5.1.4 It is therefore abundantly clear that Deepen did not have responsibility for the design of steel connections. It is possible that Three Kings may have failed (during novation) to provide all the necessary details and agreements of the design contract that it had with Deepen. Deepen contends that Lapland’s action lies against Three Kings if the latter failed to inform them that the structural connections were to be completed by the Contractor. To support this contention, it is odd that Lapland did not raise this issue with Deepen at any point in the project, if it was Lapland’s opinion that the connection design responsibility lay with Deepen. If Lapland considered that Deepen had responsibility for connection design, why did it not query this on receipt of the structural steel design package? Given that it was patently clear from the structural design completed by Deepen that it did not include any connection design, Sleighbells completed all the connection design even before there was any inkling of a disagreement regarding connection design.

5.1.5 Furthermore, Lapland has drawn attention to Appendix 1 of the Appointment contract (See Paragraph 7 of the Referral), that the structural engineer had the responsibility for *“iix) examining and advising on structural design and/or calculations submitted by the Contractor, its sub-contractors and/or sub-consultants;”*. This is a clear admission by Lapland that it had, or was likely to have, responsibility for part of the structural design, otherwise there would be no requirement for a clause which expressly stated that the structural engineer was to examine and advise on the contractor’s structural design. It will be shown later that Deepen did exactly that – they did examine and advise on the connection design completed by Sleighbells, the contractor’s selected sub-contractor.

5.1.6 Should Lapland seek to rely on sub-para (x) of the Appointment (see Referral Para 7), it can only be the case that Deepen’s obligations were to review and make necessary revisions to its own design, rather than make amendments to some other party’s design. If it was required to amend another party’s design, the requirement of sub-clause (ix) would be superfluous. There

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would be no need to advise on another party's design because the obligation would presumably be to amend the design, having examined it. That is not what Deepen is obliged to do.

5.1.7 Summary of Design Obligations

5.1.7.1 Deepen had the structural design obligations, less the structural connections.

5.1.7.2 Three Kings had expressly agreed that the contractor was to undertake the connection design.

5.1.7.3 Deepen was expressly instructed to provide the forces through the connections to enable the contractor to complete connection design. Deepen did provide the forces.

5.1.7.4 Deepen had an obligation to examine and advise on the contractor's design, which it did. It did not have an obligation to amend any other party's design.

5.2 The Actual Connection Design

5.2.1 Deepen did not do the connection design, nor did it have any obligation to do so (see above).

5.2.2 Lapland appointed Sleighbells as its sub-contractor for the structural steel. It is not in dispute that Sleighbells actually did complete the connection design. Deepen cannot comment as to who ultimately had responsibility for design, whether it be Lapland or Sleighbells. However, as stated above, it was agreed by Three Kings that the connection design was to be done by the contractor. It is not known whether Lapland did specifically instruct Sleighbells to undertake the connection design on Lapland's behalf, as Deepen has not seen the sub-contract. Any suggestion that Deepen is vicariously liable for Sleighbells design is farcical (See Referral Paragraph 27) as there was no discussion or communication at all between any of Deepen, Lapland or Sleighbells concerning connection design until Sleighbells submitted their design to Deepen for 'examination and advice'. That cannot possibly generate a vicarious liability for the design.

5.2.3 Sleighbells did submit its connection design to Deepen. Lapland alleges (see Referral Paragraph 9) that Deepen "*encouraged the structural connections to be designed by others, namely Sleighbells...*". This is strongly denied. As stated above, Deepen had previously had no communications with Sleighbells by the time it had received the connection design. It therefore could not have encouraged it. In fact, Deepen understood that Lapland was doing the connection design, as that had been agreed with Three Kings.

5.2.4 As to Lapland's allegation that Deepen ought to have known that Sleighbells did not have the requisite skill and expertise and should have ensured that the connection designer did have the necessary skills (See Referral Paragraph 39), this is a fatuous argument. Given the contractual responsibility for design of connections, it cannot possibly be the case that Deepen should have any concern about the skill of others to whom it had no contractual relationship. In fact,

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Deepen had not (and still has not) been provided with the sub-contract terms between Sleighbells and Lapland. Surely it was Lapland who should have known the skill and expertise of its own appointed sub-contractor, and taken that into consideration before appointing the sub-contractor? Furthermore, if Lapland is arguing that Deepen should have ensured that the connection designer had the requisite skill to perform the task, does this not stymie Lapland's argument that Deepen had the responsibility for the connection design from the outset? Lapland has submitted two conflicting arguments.

5.2.5 On receipt of the design calculations from Sleighbells, Deepen reviewed them, as it was obliged to do (See Para (ix) of the Appointment). Deepen did not like one of the connection designs because it was patently clear that it could not withstand one of the forces for which Deepen had provided in its structural design to Three Kings. Deepen advised Sleighbells that the design was insufficient (see letter at Appendix 3). Sleighbells objected to this and refused to change its design; Sleighbells' reasoning for this is unknown. In fact, Sleighbells were so confident in their design that they placed on record that their connection design was "*as safe as The Kentucky Subprime Bank and Garden Centre*" (See Appendix 4), whatever that meant. However, Deepen still continued to object to that design. Deepen can therefore not be accused of having failed to amend the design of the steel connections (See Referral Paragraph 12). First, it had no obligation to do so, and second, it complied with its contractual obligation to "*examine and advise*", and its duty to warn that the connection design was insufficient to carry the loads. Any suggestion that Deepen failed to examine and advise, and failed to warn (as suggested at Referral Paragraphs 32/33/36) is denied. Likewise, Deepen strongly denies that it "acquiesced" and allowed the design by others to continue (See Referral Paragraph 38).

5.2.6 It is a fact that Lapland specifically instructed Sleighbells to continue with the design which Deepen continued to aver was not sufficient. It was at that point that Deepen specifically notified Lapland that it would not approve the connection design, even if it had an obligation to do so (which it did not) – it was not safe, and Lapland stated that it could carry no responsibility for the structural integrity of the project if Sleighbells connection design was to be incorporated into the project (see letter at Appendix 5).

5.3 **The Building Collapse and the alleged failure of Deepen to adequately warn**

5.3.1 The roof collapsed due to connection failure. Lapland relies on the expert report of Doctor Dolittle (see Referral Paragraph 28) who confirms that the collapse was caused by the failure of the connections. Notwithstanding that Deepen has not seen this report prior to the Referral and therefore it is new material in the dispute, Deepen concurs that it was the failure of the

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- connections which caused the collapse. There is no suggestion in Doctor Dolittle’s report that the design forces were insufficient.
- 5.3.2 As we have demonstrably shown, it was Lapland (and/or subsequently Sleighbells at Lapland’s behest) which had the responsibility for connection design. This was expressly excluded from the scope of work for Deepen.
- 5.3.3 Whilst Deepen had the responsibility to “*examine and advise on structural design and/or calculations submitted by the contractor, its sub-contractors and/or sub-consultants*”, it is a fact that Deepen did just that and specifically rejected Sleighbells design for one of the main roof connections because it would not withstand the forces specified. At no point did Deepen approve that connection design. In fact it continued to specifically reject the design. This was the case even if there had been no degradation of the connections due to the paint or welding issue.
- 5.3.4 Furthermore, Doctor Dolittle’s report identifies that the source of the roof collapse was likely to have occurred at the very same main roof connection which had specifically been rejected and warned by Deepen. Once that connection had failed, the remainder of the roof suffered progressive collapse because the remaining connections in turn suffered loads and forces which exceeded the design. So whilst the remaining connections had been designed correctly to withstand Deepen’s advised forces, the failure of the critical connection meant that the designed forces were exceeded, hence progressive collapse.
- 5.3.5 As to the issue of whether Deepen failed to adequately warn Lapland, it has been demonstrably shown that sufficient warning was made by Deepen. Deepen had rejected the connection design due to it being unable to withstand the specified forces. Deepen placed in writing its disassociation from connection design because Lapland had specifically instructed Sleighbells to proceed in the full knowledge that the design was insufficient, in Deepen’s opinion. There was nothing more that Deepen could do to warn the parties of its concerns with the design. Lapland therefore waived its rights to claim anything from Deepen on the connection issue because it instructed Sleighbells to continue with its design. Of particular note, Sleighbells did not submit any new design at all to Deepen for approval or otherwise, if any new design actually occurred. How could Deepen “examine and advise” on any new design, if no new design was done? And if it was done, why did Sleighbells and/or Lapland not ask Deepen to “examine and advise” on it?
- 5.3.6 It was therefore reasonable, and Deepen was therefore assured, that the onus for providing a solution lay with Sleighbells. If it was any different, why did Lapland not instruct Sleighbells to change their design and get approval from Deepen and/or instruct Deepen to specifically

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check and comment on the final (and subsequent) design after Deepen had warned Lapland of likely failure of the original design? Lapland did neither. We suspect that there was no new design, and therefore the failure was caused by the actual connection being insufficient to carry the specified loads, as notified and warned by Deepen.

5.3.7 It would seem that Lapland considers that if Deepen objected that strenuously to the design, Deepen should have sought to terminate its appointment (Referral Paragraphs 20/35) and/or “walk off site” (Referral Paragraph 34). That is a fatuous argument. Deepen had no cause to terminate its appointment. On the one hand, it had completed its design obligations; it had also warned of the design inadequacies. On the other hand, subsequent instructions by Lapland to its sub-contractor overcame any further obligation which Deepen had to examine and advise on designs completed by others. Indeed, Lapland instructed Sleighbells to continue with the design because it had a concern that Deepen may indeed have walked from the site; for the avoidance of doubt, Deepen never considered walking from the site as it considered that its letter of disassociation from the connection design was the strongest action it could contractually have taken.

5.4 **The Primer Issue**

5.4.1 Deepen did specify a primer to be used on the steelwork. This was a primer which had been used before in the shipbuilding industry with no problems encountered with any type of known connections. Deepen denies that the primer was not suitable for the installation applied (See Referral Paragraph 14). The mention of the shipbuilding industry is a red-herring.

5.4.2 It is known that Sleighbells had problems with their paint system. It is of note that Deepen did not specify the outer paint. It is not known exactly what caused the problem, but it is Deepen’s case that the primer could not have caused the problem. The problem only manifested itself during the welding process, and it would seem that it was Sleighbells construction method which affected the outer paint. Given that Deepen had no responsibility for the design of the connections or their method of construction or their actual construction, it cannot possibly be the case that Deepen carries responsibility for any defect or failure which stems from those activities.

5.4.3 If the primer or paint was not suitable for the connections, the connection designer (Sleighbells) should have identified and notified this, or they should have designed different connections or used a different outer paint. In fact, Sleighbells did neither. What was to stop Sleighbells from designing bolted connections? In fact, Sleighbells performed its design of welded connections in full knowledge of the primer specification. Had the connection been

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bolted there would have been no welds to degrade. What was to stop Sleighbells from specifying a different outer paint which would not be affected by the welding process? Sleighbells did not do this.

5.4.4 Then Lapland specifically instructed Sleighbells to solve the problem “*using the same primer*”. So, even though the problem concerning the connection design, the method of installation, the outer paint and the specification of the primer was known about by Lapland and Sleighbells, Lapland had effectively endorsed the use of the primer as specified by Deepen; it was the one aspect they preferred over every other factor, otherwise why would they have instructed Sleighbells to continue “*using the same primer*”? The responsibility was therefore on Sleighbells or Lapland to find a different construction solution which would not react adversely with the primer which Lapland had specifically instructed Sleighbells to continue using.

5.4.5 In the event, it would seem that Lapland did adopt a different solution because Lapland states that it used a paint which negated the need for the primer (see Referral Paragraph 55 and Deepen’s case later in this Response). It therefore cannot have been the specification of the primer which caused the delay in completion and opening of the project, and subsequent collapse of the building.

5.4.6 Therefore, Deepen denies Lapland’s allegation at Referral Paragraph 15 that it failed to review its design. Lapland had specifically instructed its own sub-contractor to find a solution using Deepen’s specified primer. Lapland did not instruct Deepen to find a solution; Lapland has therefore waived its rights to claim against Deepen as a result of its implicit acceptance of Deepen’s specification. It would seem that this is an issue which Lapland is seeking to claim against Deepen because of its perceived difficulties of claiming against Sleighbells for their delay in finding a suitable solution for the connection design to suit their construction method.

5.5 **The Delay Issue**

5.5.1 Lapland has allegedly suffered a nine month delay to the project and is seeking to recover the full delay costs from Deepen.

5.5.2 Deepen denies that it is liable for any of the delay. The delay was caused by problems with the connection design and the method of completing the connections, as well as other construction delays. The method of construction was entirely at Lapland’s (or Sleighbells’) risk, arising from Lapland’s (or Sleighbells’) design. At no point was Deepen instructed to address the problem; in fact, it is clear that Sleighbells were instructed to deal with the problem and were specifically instructed to do so on the basis that the primer was not to be changed.

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- 5.5.3 Sleighbells knew of the primer specification before it undertook the connection design. It should therefore have designed the connection and method of installation to take account of this. It would seem that they did not. Furthermore, some other party specified the outer paint, but it was not Deepen. That other party should therefore have known that the interaction of the outer paint with the primer and the connection design (and/or method of construction) would cause a problem. Deepen could not possibly have foreseen the specification of the outer paint, specified by some other unknown party. So the cause of delay was either the outer paint and/or connection design and/or the method of construction, none of which was the responsibility of Deepen.
- 5.5.4 Lapland contend that part of the project delay was caused by a delay with the production of the steel connection design (Paragraphs 45 – 48 of the Referral), which allegedly should have been designed by Deepen. As Deepen have demonstrated above, this is clearly not the case. Any delay in connection design submission is a matter between Lapland and Sleighbells;
- 5.5.5 Lapland contend that the other part of delay was due to the paint system (Paragraph 49 – 53 of the Referral). Lapland rely on an expert report by Professor Dulux. Professor Dulux’s report has not been seen by Deepen prior to its inclusion in the Adjudication Referral; it is therefore new material which Deepen has not had the opportunity to respond to. Deepen therefore requests that the Adjudicator ignores the findings of Professor Dulux.
- 5.5.6 If the Adjudicator does consider Professor Dulux’s report, Deepen strenuously denies that the primer specification was not suitable with welded steelwork. Deepen consider that Professor Dulux is wrong. The primer has been specified on welded steelwork for many years. If it is “*widely known*” that the primer is prone to breakdown when subject to a welding process (as Professor Dulux suggests), why did Sleighbells go ahead with a welded connection design knowing that it would be a problem? It knew of the primer specification before it designed the welded connections. And why did Lapland go ahead and instruct Sleighbells to continue to find a solution with the specified primer if it was “*widely known*” that the primer would continue to cause a problem with welded connections? Surely this is negligence on Lapland’s part and therefore they must be liable for any consequential delay?
- 5.5.7 It is Deepen’s contention that it was the method of welding and/or the materials used in the welding process which caused the problem. Even if it was not, the fact is that the primer had been specified and Lapland had responsibility for the connection design in the knowledge of that specification, and Lapland had the responsibility to deal with that issue; it could have designed bolted connections; and Sleighbells had a direct instruction to solve the paint problem with the specified primer retained. Clearly it was not “*widely known*”.

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- 5.5.8 Deepen denies that it did know that welds were to be used for the connection design (See Referral Paragraph 51). That is the very reason why the connection design was specifically left to the contractor so that he could design the connections to suit the construction methods. Welds were specified by Deepen, but only in the event that welds were the preferred solution by the contractor. In addition, Deepen had no risk in specifying the welds because the combination of the primer specification and the weld specification had never generated a problem previously. Furthermore, the specification does not include the method of construction of the welds or the materials/consumables required; that is a method requirement for the contractor.
- 5.5.9 Lapland then contends that Deepen should have value engineered the solution and provided an alternative (Paragraphs 54 – 64 of the Referral). As described above, Lapland gave an express instruction to Sleighbells to devise the solution; it did not give any instruction to Deepen. Deepen had no power to usurp the Contractor’s instruction to its own sub-contractor. It had no requirement to specify a different primer paint because it was the connection design and the method of effecting the connections (the responsibility of others) which caused the problems. Furthermore, Deepen had no responsibility for specifying the outer coat of paint. It would seem that the product actually provided by Sleighbells was not in accordance with the specification or the instruction by Lapland. Sleighbells were instructed by Lapland to find a solution “*using the same primer*”; they seem to have provided a solution which obviates the use of the specified primer. If that is the case, Deepen denies that it can be liable for any claims (now or in the future) relating to the finish or the effect that the actual finish paint has on the steel, nor can the primer have any relevance to the collapse of the building, because the primer was not used!
- 5.5.10 In addition, we have not seen any of the details in Mr Ives expert report before the submission of the Referral, and we request the Adjudicator to ignore this material as it is new in the dispute and Deepen has not had the opportunity to consider it and respond.
- 5.5.11 Deepen contends that it has no liability for delay due to the reasons stated above. Additionally, there is no evidence that Lapland has followed the contractual procedures required in order for it to be able to claim Liquidated Damages. There is no evidence that the Employer has issued a Non-Completion Notice to Lapland, which is a pre-requisite under Clause 2.29 of the Main Contract. There is no evidence that the Employer has notified the Contractor of his intent to deduct LD’s.
- 5.5.12 No account has been taken of the raft of other concurrent delays caused by the Contractor’s lack of resources and other failures to proceed with work in a diligent manner. The other

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delays were the dominant causes of delay, in particular the clearance of the site, the foundations, the provision of utilities beneath the ground slab and the construction of the ground slab itself. Even once the structural frame had been completed, other delays caused by Lapland were abundant, and this is why the project was overall delayed by nine months.

5.5.13 Whilst we appreciate that Professor Slipup has provided an Expert Report, it can be seen that none of these issues are included in his report, nor do they even feature in his programme analysis.

5.5.14 Neither this analysis, nor any other delay analysis, has ever been provided to Deepen prior to Lapland's adjudication submission. Deepen was not even warned of its existence in the Notice of Intention to Refer. The Adjudicator will therefore appreciate that Deepen has not had the opportunity to respond to this and provide its own expert analysis to take into account all of the delaying events to the project. The Adjudicator is therefore requested to ignore the evidence submitted in respect of Professor Slipup's report.

5.5.15 In conclusion, Deepen denies any liability for the delay to the project.

6.0 THE QUANTUM CLAIM

6.1 Recovery of Liquidated Damages (£10,000,000) and Loss of Profit (£500,000)

6.1.1 Lapland has claimed £10,000,000 to recover the Liquidated Damages it allegedly paid to Three Kings. In addition, it seeks to recover a sum of £500,000 allegedly paid in respect of loss of profit in order to prevent a claim from Three Kings (See Referral Paragraphs 23 (i) and (ii)).

6.1.2 Deepen denies that it has any liability at all for the delays which Lapland allegedly suffered, and the new delay analysis in the Referral has failed to take into consideration any of the apparent concurrent delay events which are Lapland's liability. Furthermore, there is no basis in law for the Employer to claim LD's and an additional spurious loss of profit claim (£500,000). The purpose of the LD provision is to agree a reasonable pre-estimate of loss caused by delay. It would therefore seem that if the loss of profit agreed between Three Kings and Lapland was only £500,000, the LD provision in the contract is not a reasonable pre-estimate of the likely loss and it would seem to be a penalty which is invalid at law. We therefore request the Adjudicator to dismiss the claim for Liquidated Damages even if it is found that Deepen is liable for any extent of delay (which is denied).

6.1.3 Furthermore, it would seem that the sum of £500,000 has no science behind it, Deepen was not able to engage in any of the negotiations, and therefore this sum is merely a spurious figure in order to settle a potential dispute between two other parties. By the mere fact that the parties

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had to negotiate a settlement, this implies that Three Kings had a dispute with Lapland arising from the delay to the project. Deepen contends that it was because of delays clearly caused by Lapland; if Three Kings thought that it was due to Deepen, why then did Three Kings and/or Lapland not raise the issue with Deepen? Surely if blame is to be attributed to a party, would that party not be advised of it? In the absence of any logical calculation provided by Lapland, we request the Adjudicator to also dismiss this claim.

6.2 **Claim to recover Retention (£2,000,000)**

6.2.1 Lapland is seeking to recover £2,000,000 which Three Kings had held back on the contract (See Referral Paragraph 23(iii)). Deepen denies that it has any liability for this sum. Deepen has demonstrated that it carries no liability for the cause of any delay, and no liability for the collapse of the building. It must therefore be concluded that Deepen carries no liability for the insolvency of Three Kings.

6.2.2 Furthermore, Lapland has provided no evidence to show the build-up of the retention sum. Deepen contends that the retention would have been held back in any event until the expiry of the Defects Liability period. It could therefore never be foreseen that Three Kings would not have become insolvent due to other issues, which would still have meant Lapland could not recover the retention monies.

6.3 **Additional Costs to complete (Referral Paragraphs 69 and 72)**

6.3.1 Lapland has claimed an additional sum of £1.8M which allegedly arises due to delayed completion. Given that Deepen has denied any liability for delay due to the steelwork connection design and the paint finish and can demonstrate that there were numerous other delaying effects which actually caused delay, it follows that Deepen cannot be liable for any other additional costs which Lapland may have suffered.

6.3.2 Furthermore, Lapland has not argued or identified any cause and effect as to why the alleged additional costs are costs which stem from any alleged failings by Deepen. Liability for these costs is denied.

6.4 **Additional Profit due to Value Engineering(Referral Paragraphs 57 and 73)**

6.4.1 Lapland has claimed a sum of £70,000 for additional profits that it contends it would have made if further value engineering had been undertaken. This is a spurious claim in the extreme in that it is purely speculative and there is no contractual basis on which to measure any profit sharing arising from any value engineering that might have taken place. The fact remains that

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there was no value engineering which took place for which Deepen had a contractual obligation. Its obligation was to “*assist in value engineering the development including attendance at meetings as may be reasonably required*”. It does not say that Deepen ‘is to perform value engineering’. Deepen attended all meetings that it was requested to do. In addition, there has been no suggestion by any party before this spurious claim in the Referral that Deepen should, or could, have done anything further with respect to Value Engineering. The claim is rejected.

6.5 Interest Claim (Referral Paragraphs 79 and 80)

- 6.5.1 Lapland has introduced, for the first time in the Referral, a claim for interest based on the Late Payment of Commercial Debts (Interest) Act. This is a new argument by Lapland. Additionally, the limits of the Adjudicator’s jurisdiction are set by the Notice of Intention to Refer. The issue of interest did not appear in that Notice and therefore it could not form part of the adjudication without the agreement of Deepen. That agreement has not been made. As such it does not form part of a dispute between the Parties and is not capable of being adjudicated.
- 6.5.2 Additionally, Deepen contends that no sums are due, and therefore no interest is due in any event.
- 6.5.3 Deepen has claimed a debt recovery cost of £100 under the Late Payment of Commercial Debts (Interest) Act. This is a new argument that is also absent from the Notice of Intention to Refer. No interest is due and therefore no recovery fee is applicable. Lapland has not provided any evidence to demonstrate that it has suffered this cost. As such this cannot represent a cost that Lapland has incurred. Alternatively it duplicates part of its claim for party costs.

6.6 Abatement of Fee (Referral Paragraphs 37 and 75)

- 6.6.1 Lapland has provided no details or evidence in support of its claim and has provided no evaluation.
- 6.6.2 Deepen denies it has not completed any part of its obligations under the Appointment contract. It completed its contractual design obligations, it provided the forces to the connection, it examined and advised on every submission made to it, and it reviewed its design post-contract.
- 6.6.3 No abatement is due.

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6.7 **Recovery of Referral Fee (Referral Paragraph 76)**

- 6.7.1 The Adjudicator has no power, whether from the parties' agreement or the Construction Act or the Scheme, to decide this issue.
- 6.7.2 In the alternative, should the Adjudicator consider that he does have that power, Deepen contends that the fee should remain payable by Lapland because it is the Referring Party that has commenced a process that is not capable of adjudication or success.

6.8 **Adjudicators Fees & Expenses (Referral Paragraph 77)**

- 6.8.1 Deepen contends that the Adjudicator has not been properly appointed, and therefore it has no liability for any of the Adjudicator's fees.
- 6.8.2 In the alternative, Deepen contends that a number of the issues have been instigated for the first time in the Referral, and/or there is material on which Lapland seeks to rely which has never been provided to Deepen prior to the Referral submission. Therefore these issues are not available to be adjudicated, and Lapland has wasted the Adjudicator's time and expense in promoting those issues. Furthermore, Deepen denies any liability for any of the claims set against it. As a result, the Adjudicator's fees and expenses should be paid in full by Lapland.

6.9 **Recovery of Referring Party's costs in adjudication (Referral Paragraph 78)**

- 6.9.1 Neither the agreement between the parties, nor the Construction Act, nor the Scheme confer any power on the Adjudicator to take a decision on party costs. No such powers are conferred by Deepen. The Referring Party's costs remain the responsibility of the Referring Party.

Served this 1st day of December 2008, by Trett Consulting, Representative for the Responding Party.