

IN THE MATTER OF the *Public Inquiries Act, 2009*, S.O. 2009,
c. 33, Sched. 6

AND IN THE MATTER OF The Elliot Lake Commission of
Inquiry, established by Order in Council 1097/2012 dated July 19,
2012

**SUBMISSIONS ON BEHALF OF
JOHN CLINCKETT, ARCHITECT**

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Submissions on behalf of John Clinckett

Introduction

These submissions are made on behalf of John Clinckett (“Mr. Clinckett”). These submissions relate only to findings of fact that may be made by the Commission as they pertain to Mr. Clinckett and will not include policy recommendations.

The Role of Mr. Clinckett

Nature and Scope of Mr. Clinckett’s Retainer

Mr. Clinckett is an architect, licensed to practice architecture in the Province of Ontario. Mr. Clinckett also holds a degree in engineering. Mr. Clinckett was introduced to Mr. Bob Nazarian (“Mr. Nazarian”) by Brian England (“Mr. England”). There is no credible evidence to suggest that Mr. Clinckett has held himself out to be a licensed engineer to Mr. Nazarian or others. Significantly, all correspondence between Mr. Clinckett and Mr. Nazarian, including the original retainer letter sent by Mr. Nazarian to Mr. Clinckett, describes Mr. Clinckett as an architect

Transcript of Brian England, May 8, 2013 (“England Transcript”), p. 8502, lines 2-20, p. 8607, lines 15-25, p. 8608, lines 1-2.

Exhibit No. 4068, Purchase Order dated December 7, 2007.

Exhibit No. 92, Structural Report.

Exhibit No. 228, Project Manual.

Mr. Clinckett was retained by Bob Nazarian (“Mr. Nazarian”)/Eastwood Mall Inc. (“Eastwood”) to assess the feasibility of installing a roof over the roof top parking deck of the Algo Centre Mall (the “Mall”) and, if such an option was not feasible, to propose an alternative.

Exhibit No. 4068, Purchase Order dated December 7, 2007.

Mr. Clinckett’s retainer commenced in December, 2007 and effectively ceased no later than May 30, 2008, by which time Mr. Nazarian had consulted with Andrew Holford (“Mr. Holford”), a structural engineer. Notwithstanding the effective termination of Mr. Clinckett’s retainer, in June and July of 2008, Mr. Clinckett was sporadically contacted by Mr. Nazarian, Antoine-Rene Fabris (“Mr. Fabris”) and Mr. Holford with certain queries with respect to various questions related to parking deck remediation.

At some point during the course of his retainer Mr. Clinckett was provided with the 1999 Structural Condition Assessment Report of Halsall Associates Ltd. (the “Halsall Report”), however, he was not provided with any other architectural or engineering reports, including but not limited to those prepared by Trow Consulting or Nicholls Yallowega Belanger.

Exhibit No. 70, Halsall Report.

Transcript of John Clinckett, May 14, 2013 (“Clinckett Transcript”), p. 9561, lines 17-25 and p. 9562, lines 1-10.

Covering Roof Over Parking Deck

Mr. Nazarian proposed to address the issue of ongoing leaking into the Mall by installing a roof over the parking deck. Mr. Clinckett was retained to assess the feasibility of this proposal.

Mr. Clinckett enlisted the services of a structural engineer, Jim Fisher (“Mr. Fisher”), to assist in the evaluation of the proposal to cover the parking deck with a roof. Mr. Nazarian/Eastwood were aware that Mr. Clinckett had enlisted the assistance of Mr. Fisher in the assessment of options for the parking deck.

Clinckett Transcript p. 9569, lines 10-19.

Clinckett Transcript, p. 9574, lines 6-16.

On March 13, 2008, Mr. Clinckett provided an evaluation on the concept of the roof, on the letterhead of John Clinckett Architect, titled Structural Report (the “Report”). The Report concluded that the Mall structure could not take the load required by a roof covering the parking deck. The Report reflects Mr. Clinckett’s architectural assessment, as well as the advice and information provided to Mr. Clinckett by Mr. Fisher, the structural engineer, and Ed Karaluk of Coreslab Structures. In addition, Mr. Clinckett advised that the installation of a roof over the parking deck was not a complete solution because cars driving over the roof would carry ice, snow, and salt onto the roof, thus infiltration of moisture and salt into the Mall would continue.

Clinckett Transcript, p. 9573, lines 4-5.

Exhibit No. 1925, Fax from Ed Karaluk

Exhibit No. 92, Structural Report.

Clinckett Transcript, p. 9577, lines 6-12.

Clinckett Transcript, p. 9567, lines 10-17.

Membrane/Asphalt Proposal

As an alternative to a roof over the parking deck, Mr. Clinckett proposed that a waterproofing membrane and 3 inches of asphalt be installed on the parking deck. Mr. Clinckett’s proposal was akin to that proposed as option 2 in the Halsall Report.

Clinckett Transcript, p. 9578, line 2-7.

Clinckett Transcript, p. 9639, lines 1-25 and p.9640, lines 1-7.

Exhibit No. 70, Halsall Report, pp. ii, 4-5.

Mr. Clinckett specified the use of the Carlisle membrane system and believed the use of such a system was supported by the findings in the Halsall Report. Mr. Clinckett retained Mr. Fisher when Mr. Clinckett was creating the specification and the design of the membrane and the wearing surface. Mr. Clinckett was confident that, given the contents of the Halsall Report and the information provided by Mr. Fisher, the roof deck could properly sustain the weight of the Carlisle system, including 3 inches of asphalt.

Clinckett Transcript, p. 9597, lines 3-25, p. 9598, lines 1-25, and p.9599, lines 1-19.

Clinckett Transcript, p. 9564, lines 1-15.

The evidence given at the Inquiry has been inconclusive with respect to the ability of the parking deck to sustain a membrane and 3 inch asphalt coursing. Significantly, it was the evidence of Coreslab engineer Sonia Saari that, based on her calculations, a waterproofing membrane and 3 inches of asphalt could have been supported by the concrete slab. Ms. Saari further testified that the slab was designed to achieve 120 pounds per square foot ("psf") without topping, but that if a bonded topping was applied it could achieve 150 psf.

Transcript of Sonia Saari, May 28, 2013, p. 12088, lines 18-25 and p. 12089, lines 1-18.

The Decision of Mr. Nazarian/Eastwood Not to Install the Carlisle System as per Mr. Clinckett's Specifications

On the instruction of Mr. Nazarian, Mr. Clinckett prepared a specification for the parking deck that included the installation of the Carlisle system with 3 inches of asphalt. Mr. Clinckett also prepared a detailed project manual for the work. The project manual included a CCDC 2 Contract which specifically described Mr. Clinckett as the architect for the project. Further to the instruction of Mr. Nazarian, Mr. Clinckett put the project out to tender. The successful bidder was C3 Harrell, with a bid of \$903,241.50 inclusive of taxes.

Exhibit No. 228, Project Manual.

England Transcript, p. 8510, lines 7-22.

On or around May 20, 2008 Mr. Clinckett forwarded copies of contract between C3 Harrell and Eastwood to Mr. Nazarian for his signature. The contract was not signed by Mr. Nazarian. It was Mr. Clinckett's understanding that the contract was not signed because Mr. Nazarian had asked C3 Harrell to put up \$250,000.00 for materials to commence the project and C3 Harrell was not willing to do so. Mr. England testified that Mr. Nazarian decided not to enter into the contract with C3 Harrell because it was too expensive.

Clinckett Transcript, p. 9593, lines 15-20.

Clinckett Transcript, p. 9595, lines 1-16.

England Transcript, p. 8520, lines 12-16.

Mr. England and Mr. Nazarian attended a meeting on May 30, 2008 with Mr. Elliot of ELNOS. As at that date the C3 Harrell contract was not going ahead. Mr. England testified that the purpose of the meeting was to raise funds to fix the roof.

England Transcript, p. 8522, lines 2-20.

It was Mr. Nazarian's own evidence that he did not have the funds to repair the roof as of May 30, 2008 and he met with ELNOS after deciding not to sign the contract with C3 Harrell. Mr. Nazarian testified that at the time he and Mr. England met with Mr. Elliot of ELNOS on May 30, 2008, Eastwood was desperately looking for financing to repair the roof. It was Mr. Nazarian's evidence that he told Mr. Elliot that if Mr. Nazarian could borrow \$250,000.00, he could put up \$200,000.00, and that the total of \$450,000.00 would be enough to get the project started and the rest could be dealt with at a later date. Mr. Nazarian further testified that his plan was get the rest of the funds from the Royal Bank ("RBC") \$300,000.00 reserve and that if RBC would not advance the funds then Eastwood would bring a lawsuit against the bank.

Transcript of B. Nazarian, July 24, 2013 ("Nazarian Transcript No. 2"), p. 17849, lines 1-21.

Nazarian Transcript No. 2, p.17864, lines 8-25, p. 17865, lines 1-25, and p. 17866, lines 1-14.

It was Mr. Nazarian's evidence that Alexander Sennett ("Mr. Sennett") convinced Mr. Nazarian that funds for the Mall could be secured through government grants. Mr. Nazarian testified that Mr. Sennett told him, "As long as you sign any documents I ask you, I'll be able to get financing for you and get you of this misery of the roof leak." Mr. Nazarian testified that Empire Roofing was established in June 2008 for purpose of obtaining funds for the Mall.

Nazarian Transcript No. 2, p. 17947, lines 19-25 and p. 17948, lines 1-6.

The evidence before the Commission clearly establishes that Mr. Nazarian/Eastwood did not have the requisite funds to proceed with the course of action proposed by Mr. Clinckett in 2008.

The End of Mr. Clinckett's Retainer

No later than May 30, 2008 Mr. Clinckett was aware that Mr. Nazarian did not intend to proceed with Mr. Clinckett's recommendation for the installation of a waterproofing membrane and 3 inches of asphalt. Further, Mr. Clinckett knew that Mr. Nazarian had not signed the contract with C3 Harrell, nor did he intend to do so.

Clinckett Transcript, p. 9593, lines 15-25 and p. 9594, lines 1-5.

In early June, 2008, Peak Restoration began to work on the parking deck. The evidence is inconclusive with respect to whether it was Mr. Nazarian or Mr. England that directed Peak Restoration to begin its work. The Contract, signed by Glen Day on behalf of Peak Restoration and Mr. England on behalf of Eastwood, included the application of a waterproof membrane, but specifically excluded the application of 3 inches of asphalt.

Transcript of Glen Day, May 9, 2013, p. 8696, lines 9-25 and p. 8697, lines 1-19.

England Transcript, p. 8543, lines 22-25 and p. 8544, lines 1-15.

There is no credible evidence that Mr. Clinckett was retained or directed to supervise the work of Peak Restoration on the parking deck. By Mr. Nazarian's own evidence, Peak Restoration began its work without his consent or knowledge and there is no credible evidence to suggest that Mr. Clinckett had any role in this work.

Nazarian Transcript No. 2, p. 17932, lines 17-25, p.17934, lines 16-22 and p. 17938, lines 2-20.

Although Mr. Clinckett was not retained to supervise the work of Peak Restoration, he responded to an email written by Mr. Nazarian of July 7, 2008 in which Mr. Nazarian requested Mr. Clinckett's advice regarding a proposal to remove concrete from the roof and apply a layer of hot rubber on top of it in order to reduce the weight on the roof. Mr. Clinckett promptly replied that the proposal was not a good one and that any jack hammering done in service of the work would weaken the existing slabs.

Exhibit No. 1512, Email correspondence between B. Nazarian and J. Clinckett, dated July 7, 2008.

Mr. Fabris, counsel to Mr. Nazarian, wrote to Mr. Clinckett on June 10, 2008 and July 10, 2008 requesting a guarantee with respect to the work Mr. Clinckett had proposed for the roof and also requesting confirmation regarding the ability of the parking deck to sustain the additional weight set out in that proposed work. Mr. Clinckett provided a response to Mr. Fabris' letter of July 10, 2008 on July 11, 2008. Mr. Clinckett did not specifically respond to the request for a guarantee or the ability of the parking deck to withstand the additional weight.

At the time he wrote the letter of July 11, 2008, Mr. Clinckett understood that Mr. Nazarian was not proceeding with the remediation work as set out in the tender documents Mr. Clinckett had prepared. He also understood his retainer to be over and he was not being paid. Furthermore, Mr. Clinckett was aware that the Mr. Nazarian/Eastwood had consulted/was consulting with engineers with respect to the proposal. The evidence of Mr. England, Mr. Fabris and Mr. Nazarian confirms that in May and June of 2008, Mr. Nazarian/Eastwood was consulting with one or more engineers, including Mr. Holford of Kleinfeldt Consultants Ltd., with respect to the parking deck. Furthermore, Mr. Holford's evidence is that he was consulted as of May 26, 2008.

Exhibit No. 1341, Letter of A-R. Fabris, dated June 10, 2008.

Exhibit No. 1340, Letter of A-R Fabris, dated July 10, 2008.

Exhibit No. 804, Letter of J. Clinckett, dated July 11, 2008.

Clinckett Transcript, p. 9607, lines 13-25, p. 9607, lines 1-5.

Clinckett Transcript, p. 9606, lines 6-25 and p.9607, lines 1-12.

Clinckett Transcript, p. 9642, lines 17-25 and p.9643, lines 1-8.

Clinckett Transcript, p. 9607, lines 13-25, p. 9607, lines 1-5.

England Transcript, p. 8605, lines 18-25 and p. 8606, lines 1-13.

Transcript of Antoine-Rene Fabris, July 10, 2013, p. 15551, lines 12-25.

Nazarian Transcript No. 2, July 24, p.17807, lines 18-25 and p. 17808, lines 1-12.

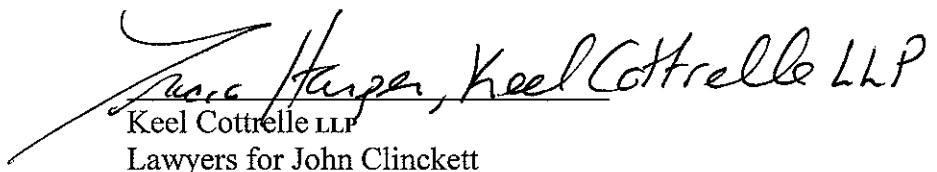
Transcript of Andrew Holford, May 9, 2013 p. 8875, lines 21-25 and p. 8876, lines 1-12.

Factual Findings Regarding the Role of Mr. Clinckett

On the basis of the testimony given at the Inquiry and the documents produced during the proceeding, we respectfully submit the following findings of fact be made with respect to Mr. Clinckett:

- (a) Mr. Clinckett is an architect and did not hold himself out as an engineer. Mr. Clinckett acted within the scope of his retainer with Mr. Nazarian/Eastwood.
- (b) Mr. Clinckett provided sound advice with respect to the feasibility of installing a roof over the parking deck.
- (c) Although there is conflicting evidence with respect to viability of the proposal to add a membrane and 3 inches of asphalt, the feasibility of this proposal is supported by both the Halsall Report, the information Mr. Clinckett received from Mr. Fisher, his structural engineer, and the evidence of Ms. Saari, Coreslab engineer. Regardless, the work did not proceed.
- (d) Mr. Nazarian/Eastwood did not proceed with the work proposed by Mr. Clinckett because of a lack of funds. Eastwood was simply not in a position to finance the work necessary for the remediation of the parking deck at any time during Mr. Clinckett's involvement with the Mall and could not enter the contract with C3 Harrell for financial reasons.
- (e) Mr. Nazarian/Eastwood consulted structural engineers with respect to a solution for the parking deck as early as the end of May, 2008.
- (f) No action or inaction on the part of Mr. Clinckett had any bearing on the owner's actual course action with respect to the parking deck.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8 day of August, 2013.


Keel Cottrelle LLP
Lawyers for John Clinckett

ELLIOTT LAKE INQUIRY

**SUBMISSIONS ON BEHALF OF
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