

1 Tuesday, 6 October 2015

2 Edinburgh Tram Inquiry Preliminary Hearing
3 (10.30 am)

4 THE CHAIRMAN: Good morning everyone, and welcome to the
5 Preliminary Hearing of the Edinburgh Tram Inquiry.

6 I wish to apologise to parties, members of the
7 public and the media for the cancellation of the
8 preliminary hearing fixed for 19 August. As you may be
9 aware, the reason for that was my unavailability due to
10 ill health. I hope that the postponement until today
11 did not cause too much inconvenience to anyone.

12 This hearing has been convened to update parties,
13 members of the public and the media about the progress
14 of the Inquiry to date, to announce the identity of
15 Core Participants and to raise other issues in an effort
16 to avoid challenges to the progress of the Inquiry at
17 a later date.

18 It would be beneficial to me, as well as to everyone
19 else here, for each representative to introduce
20 themselves and the members of their team. I will start
21 with Senior Counsel to the Inquiry and thereafter take
22 appearances for other parties in alphabetical order of
23 the parties. It would also be helpful if each party
24 advised me of the representatives who will appear at
25 future hearings, because that may have an effect on

1 planning.

2 Mr Lake.

3 MR LAKE: Thank you.

4 My name is Jonathan Lake, I am a Queen's Counsel and
5 I am instructed by the Solicitor to the Inquiry, Gordon
6 McNicoll, who is sitting diagonally behind me. My role
7 is Counsel to the Inquiry. In carrying out this
8 function, I will be assisted by Euan Mackenzie and Ross
9 McClelland, advocate, sitting to my right and behind me.

10 THE CHAIRMAN: Thank you.

11 Mr Borland.

12 MR BORLAND: My name is Gary Borland, QC, and I appear on
13 behalf of Bilfinger Construction UK Limited, which, as
14 your Lordship was aware, was part of the consortium that
15 built the tram network. I am instructed by Pinsent
16 Masons solicitors, and at this stage would be instructed
17 for any future hearings in the Inquiry, my Lord.

18 THE CHAIRMAN: And you will be instructed on your own?

19 MR BORLAND: That has yet to be decided, my Lord.

20 THE CHAIRMAN: Thank you.

21 Mr Arnott.

22 MR ARNOTT: Good morning, my Lord.

23 David Arnott from MacRoberts. I am instructed on
24 behalf of Carillion Utility Services Limited, who was
25 the contractor under the Multi Utilities Diversion

1 Framework Agreement. It is intended I will be at
2 hearings. We may have counsel instructed at some stage
3 but that will depend on how matters develop, my Lord.

4 THE CHAIRMAN: Thank you.

5 Mr Martin.

6 MR MARTIN: Good morning, my Lord.

7 I appear on behalf of the City of Edinburgh Council.
8 I am instructed along with Alasdair Burnet, advocate,
9 who is present today and Graham Dunlop, advocate, who is
10 not present today, but I mention him because he may
11 participate in future proceedings.

12 We are instructed by Brandon Nolan of Pinsent
13 Masons, who is present today, and assisted by Simona
14 Williamson, also of Pinsent Masons, who is not present
15 today. Present from the City of Edinburgh Council today
16 are Alastair Maclean, Chief Operating Officer and Deputy
17 Chief Executive and Carol Campbell, the Head of Legal,
18 Risk and Compliance, each of whom I expect will be
19 present on future occasions of the sitting of the
20 Inquiry.

21 THE CHAIRMAN: Thank you.

22 Mr Dunlop.

23 MR DUNLOP: My Lord, I am Roddy Dunlop, QC. I am instructed
24 along with Gavin Walker, advocate, who is on my left, on
25 behalf of DLA Piper, who were the solicitors for TIE and

1 for City of Edinburgh Council in the course of the tram
2 project. We are both instructed by Alan Calvert and
3 Adam McKinlay of Brodies LLP, who are both here today,
4 and I imagine that all four of us will be present in the
5 course of the Inquiry, subject to their commitments.

6 THE CHAIRMAN: Thank you.

7 MR MCLEAN: My Lord, I am Alan McLean, QC. I am instructed
8 on behalf of Parsons Brinkerhoff, along with Jane
9 Patrick, advocate, who sits on my left. I am instructed
10 by Mr Farndale of Burness Paull LLP, who is present
11 today.

12 During the course of the Inquiry, there may be parts
13 of the Inquiry, it is anticipated, my Lord, where
14 Parsons Brinkerhoff will have very little to contribute
15 to what is done and on those occasions it may be that
16 one or other of us might be absent or there might even,
17 if it is appropriate, be no representation at all but
18 that is a matter, obviously, in your Lordship's hands.

19 THE CHAIRMAN: I am more concerned with additional people,
20 Mr McLean. Do you anticipate additional people coming?

21 MR MCLEAN: No, my Lord.

22 THE CHAIRMAN: Thank you.

23 MS SPRINGHAM: My Lord, my name is Kay Springham, advocate,
24 and I appear on behalf of the Scottish Ministers, of
25 which Transport Scotland forms a part. I am instructed

1 by Stephen Rees, solicitor, at the Scottish Government
2 Legal Directorate.

3 Scottish Ministers have not yet decided whether to
4 instruct counsel for the oral hearings. Therefore I am
5 not able to say precisely who will be here and indeed
6 which of the oral hearings there may be representation
7 on the part of Scottish Ministers.

8 THE CHAIRMAN: Obviously it would be helpful, once the
9 Scottish Ministers decide what they want to do, if they
10 could tell the Inquiry secretariat as soon as possible.

11 MS SPRINGHAM: I am sure we will do that, my Lord.

12 THE CHAIRMAN: Mr Jones.

13 MR JONES: Thank you, my Lord.

14 My name is Peter Watkin Jones. I am a partner at
15 Eversheds LLP. I am here today to represent Siemens
16 PLC, also a member of the consortium with Bilfinger
17 Berger. I also represent Vodafone UK, who are
18 potentially witnesses to the Inquiry.

19 The current intention is that either I, or a member
20 of my firm, will represent my clients at future
21 hearings. There is the potential for instructing
22 counsel down the line and we will keep that under review
23 and keep the Inquiry informed.

24 THE CHAIRMAN: Thank you very much.

25 In due course I will ask specific questions of each

1 party, but in the meantime it may be helpful to explain
2 the process so far.

3 In preparing for today I recall that many months ago
4 a friend told me that Hannah, his 13 year old daughter,
5 asked him if I could suggest the relocation of the
6 West End tram stop, as she thought it was not in the
7 best place for her shopping. While I was impressed that
8 such a young person wished to participate in the
9 Edinburgh Tram Inquiry, I regret that I will not be able
10 to consider her request because the scope of the issues
11 to be considered by the Inquiry is fixed by the terms of
12 reference, which was set by the Scottish Ministers and
13 I am precluded from straying into issues beyond that
14 scope.

15 This Inquiry has the task of establishing why the
16 Edinburgh Tram Project incurred delays, cost
17 considerably more than originally budgeted and, through
18 reductions in scope, delivered significantly less than
19 was projected.

20 The terms of reference clearly state that I have to
21 inquire into the delivery of the project, from the
22 proposals of the project emerging to its completion,
23 including the procurement and contract preparation, its
24 governance, project management and delivery structures
25 and oversight of the relevant contracts.

1 The terms of reference also state that I need to
2 examine the consequences of the failure to deliver the
3 project in time, within budget and to the extent
4 projected.

5 Thereafter I must report to Scottish Ministers
6 making recommendations as to how major tram and light
7 rail infrastructure projects of a similar nature might
8 avoid such failures in future.

9 These are broad terms of reference, focusing on
10 major infrastructure project delivery and considering
11 procurement and legal issues.

12 Hopefully, I have made it clear that the scope of
13 the Inquiry is defined by the terms of reference. In
14 that regard, it is important to stress that the terms of
15 reference do not allow the Inquiry to consider whether
16 the decision by the council to build a tram line was
17 correct in the first place or whether the route for the
18 line should have been different or even the location of
19 tram stops.

20 I would also like to emphasise that section 2 of the
21 Inquiries Act 2005 excludes the question of legal
22 liability from the scope of this Inquiry, and that
23 exclusion covers both civil and criminal liability.
24 Therefore, this Inquiry cannot determine whether anyone
25 is guilty of an offence or is liable to pay damages to

1 someone else.

2 Having said that, others might choose to draw
3 inferences about such matters from findings in fact made
4 in the report submitted to Scottish Ministers and based
5 upon evidence evaluated by me.

6 In conducting this Inquiry, it is important to
7 stress that I am independent of Government. I have
8 a responsibility to ensure that the Inquiry is carried
9 out in an independent, fair and effective manner. My
10 obligations are to the public as a whole.

11 Although ministers have appointed me to conduct the
12 Inquiry and to report, I do of course of necessity have
13 the assistance of the Inquiry team. Members of that
14 team are also independent of Government.

15 Following my appointment, I realised that the
16 complexity of a project such as the Edinburgh Tram
17 project, which had spanned over a decade, itself raised
18 difficulties that had to be addressed from the
19 beginning. I had to establish the identity of people
20 involved, their present whereabouts in the world, the
21 existence, location and recoverability of documentary
22 evidence, governance procedures and the actions of local
23 and national politicians, as well as many other matters.

24 The passage of time and other factors, not least the
25 desire to justify decisions with the benefit of

1 hindsight, could also influence the accuracy of evidence
2 of some individuals involved in the project.

3 Accordingly, I determined that the principal sources
4 of evidence would be contemporaneous documents recovered
5 during investigations by the Inquiry team and written
6 statements submitted to the Inquiry by witnesses. These
7 would be supplemented by oral evidence as necessary.

8 Each member of the Inquiry team has had an important
9 role in the investigation to date and I have been
10 impressed by their commitment, dedication and efficiency
11 in implementing the approach that I have outlined.

12 Later, when I am dealing with progress and numbers
13 of documents, it should be clear to everyone that
14 the Inquiry has been fully operational since day one,
15 in June 2014, contrary to various comments by others
16 made via the media, including an early report on BBC
17 this morning. These uninformed comments fail to
18 appreciate the essential difference between the Inquiry
19 and the oral hearings.

20 An Inquiry like this is considerably more extensive
21 than just the oral hearings. The oral hearings come
22 towards the end of the process and have to follow on
23 from a major investigation to identify relevant material
24 and the names and location of witnesses who might best
25 assist me to exhaust my terms of reference.

1 Some Inquiries follow on, and benefit from, the
2 completion of a detailed investigation by others into
3 the factual background to a particular issue. I would
4 go as far as to suggest that the majority of Inquiries
5 follow on from such investigation by others and have
6 available to them basic data, including witness
7 statements and documents, produced in the earlier
8 investigation. That basic data forms a foundation upon
9 which investigations of the Inquiry team can build.

10 That is not the situation in this case. Here, the
11 Inquiry team has had to start from scratch and its
12 investigation has included a detailed consideration of
13 the factual background to the project, as well as
14 investigations flowing from that, as we are concerned
15 with a more complex and time-consuming Inquiry than many
16 others.

17 In addressing this unusual challenge, I had to bear
18 in mind my statutory obligations under section 17 of the
19 Inquiries Act 2005 to act with fairness and with regard
20 also to the need to avoid unnecessary costs. The
21 strategy which I implemented from the start was to break
22 the Inquiry down into a number of stages, with some of
23 the stages running concurrently. This allowed us to
24 start the investigation whilst also establishing the
25 Inquiry and preparing for the gathering and storage of

1 evidence.

2 Ten stages were identified and details of these are
3 included on the website. Stages one to three have been
4 completed. These involved establishing the Inquiry,
5 preliminary administrative steps and the preliminary
6 investigation. The Inquiry team is currently working on
7 stages four, five and six, namely gathering material,
8 this preliminary hearing and a formal call for evidence.

9 Obviously nothing need be said about this
10 preliminary hearing because it is happening now. Before
11 dealing with the gathering of documentary evidence,
12 I want to say something about the formal call for
13 evidence.

14 In December 2014, when we published the order of
15 events and I was interviewed by the media, I explained
16 that the public would have an opportunity to submit
17 evidence to the Inquiry about the consequences for them
18 of the failures in the project, and I asked
19 organisations and groups to get together to consider
20 what evidence they would like to submit. The formal
21 call for evidence was then issued on 12 May of this year
22 and that gave everyone the opportunity to submit
23 evidence to the Inquiry, dealing specifically with how
24 they were affected by the failure of the project to be
25 delivered on time, within budget and to the extent

1 projected.

2 The material gathered through that process is being
3 reviewed and analysed and will be published as part of
4 the record of the Inquiry.

5 On 12 May, I also published the list of issues
6 identified by the Inquiry team and invited members of
7 the public to consider them and suggest any issues that
8 may have been omitted. There have been 75 responses
9 submitted, covering both evidence and issues. The
10 majority of these responses came from people and
11 organisations based in Edinburgh and a short analysis
12 paper of the responses about the issues will be
13 published on the website today.

14 The team has considered all the issues identified.
15 The majority were already covered by the existing issues
16 list, and there were a number, particularly around the
17 decision to proceed with the project and the design of
18 the trams network, which are not within the terms of
19 reference. There were, however, a number of common
20 themes around communication and the consequences on
21 local communities which will be included. As a result,
22 the list of issues being considered by the Inquiry has
23 been updated slightly and [a] new version of that list
24 will be published on the website later today.

25 I now want to say something about the documentary

1 evidence. The main source of material so far which has
2 been considered by the Inquiry is contained in the
3 contemporaneous records of documents prepared and
4 communications that occurred throughout the time that
5 the project was being progressed. The Inquiry team has
6 worked with the main organisations involved in the
7 Edinburgh Tram project to map out what documentary
8 material still exists in relation to the project.
9 Initially, in an effort to assess the scale of the task
10 facing the Inquiry, these organisations were asked to
11 submit to the Inquiry team an estimate of the number of
12 documents held by each of them and the form in which
13 they existed.

14 These estimates suggested that a total of 2 million
15 documents existed. The Inquiry team considered this to
16 be modest in the context of a major project such as the
17 Edinburgh Tram project. Accordingly, members of the
18 team engaged in discussions with the main organisations
19 and undertook separate investigations about the nature
20 and extent of the material that was actually available.

21 The result of these investigations and discussions
22 is that there could be up to 500 million potentially
23 relevant documents in existence. This includes
24 a significant amount of duplicate material inevitably
25 created by the use of emails and electronic copies of

1 documents. Any expectation or requirement that the
2 Inquiry should analyse each of these documents, even
3 with the assistance of computerised [document]
4 management system, would obviously be unrealistic.

5 The storage and analysis of 500 million documents
6 would involve publicly funded resources that would not
7 be justified and would be in breach of my duty to avoid
8 unnecessary expenditure.

9 Accordingly, we had to adopt a strategy that would
10 result in the capture of the most significant documents
11 relevant to the terms of reference and we have
12 identified a selection of the available material for
13 storage and analysis on the Document Management System,
14 to which I will refer later.

15 In accordance with that strategy, requests have
16 focused on the main governance bodies, emails of key
17 personnel and information about the various contracts
18 and contractual disputes. Through this strategy, the
19 Inquiry has obtained around 6 million documents, which
20 are now being filtered, reviewed and assessed by the
21 team.

22 As you can imagine, the review and assessment of
23 approximately 6 million documents is an enormous task.
24 Therefore, in order to help with the management of this
25 stage of the investigation, a sophisticated document

1 management system and services of a specialist provider
2 have been procured.

3 The reality is that the actual number of documents
4 being handled is considerably more than originally
5 envisaged by anyone. The technology is there to assist
6 but there are still vast numbers of documents that have
7 to be reviewed and analysed by members of the team.
8 This is a time consuming but vital exercise that cannot
9 be short-circuited if I am to carry out a thorough
10 investigation, as required under my terms of reference.

11 While it is anticipated that the strategy will
12 result in the identification for analysis of the most
13 significant documents, I recognise that some of the
14 Core Participants may consider that there is additional
15 relevant material that has either not been identified or
16 has been excluded through the review process that we
17 have adopted. They may also wish other documents to be
18 included in the material available to the Inquiry to
19 reflect their particular interests.

20 So an important role for Core Participants will be
21 to draw to the attention of the Solicitor to the Inquiry
22 any documents that they consider to be of significance
23 that have been omitted. As we move forward, I would
24 encourage parties to fulfill those obligations to ensure
25 that their interests and the interests of their clients

1 are adequately represented in an Inquiry that is shown
2 to be thorough and balanced.

3 The current stage of the Inquiry involves reviewing
4 the documentary evidence collected and carrying out
5 detailed formal interviews with prospective witnesses.
6 These two tasks are interrelated. Witnesses need to be
7 provided with prepared bundles of relevant documents to
8 assist with the provision of detailed formal statements.

9 There is uncertainty about the time this current in
10 depth stage will take but I can assure you that every
11 member of the team is working as quickly and as
12 efficiently as possible.

13 I anticipate that Core Participants will have
14 prepared, or are in the process of preparing, witness
15 statements in support of the position to be taken by
16 them at the Inquiry or perhaps even in connection with
17 existing litigation. The provision of such witness
18 statements by Core Participants to the Inquiry team
19 would speed up the process and it would provide the
20 Inquiry team with an additional check that no
21 significant document has been overlooked in the
22 selection process that has necessarily been used.

23 Obviously, it will be apparent from that that we
24 depend on the cooperation of the Core Participants and
25 it is for them to decide whether and to what extent they

1 wish to do so.

2 However, it would not be appropriate to rely solely
3 on statements provided by parties. Although such
4 statements are provided, they will be the starting point
5 from which the Inquiry team can take more far reaching
6 and detailed statements for the purposes of the Inquiry.

7 Independently of any assistance that may be
8 forthcoming from Core Participants in this respect, the
9 Inquiry team is also arranging to take statements from
10 individuals identified by it as key witnesses. The time
11 taken at this stage will obviously depend on the
12 availability and cooperation of witnesses, as well as
13 the continued cooperation of Core Participants and
14 interested parties.

15 I now want to deal with the Core Participant status.
16 Decisions on who should be designated as
17 a Core Participant are solely for me as chairman.
18 Rule 4 of the Inquiries (Scotland) Rules 2007 encourages
19 me to designate as Core Participants individuals or
20 organisations who played or may have played a direct and
21 significant role in relation to the matters to which the
22 Inquiry relates; or who may have a significant interest
23 in an important aspect of the matters to which the
24 Inquiry relates; or who may be subject to significant or
25 explicit criticism during the proceedings of the Inquiry

1 or in its report.

2 However, a person or organisation may only be
3 designated as a Core Participant with their consent.

4 I think at this stage it might be important, before
5 going on about the question of consent, to differentiate
6 between a witness and a Core Participant.

7 Witnesses are people who have information relevant
8 to the Inquiry, which the Inquiry propose to take from
9 them, either in written form, or orally, or both. Apart
10 from giving evidence, the witness will not generally
11 take any part in the Inquiry and we are not concerned
12 about witnesses with this hearing today.

13 A Core Participant, on the other hand, is a person
14 or organisation who will be expected to have a key role
15 during the Inquiry on the basis of their involvement in
16 the subject matter of it. A Core Participant may attend
17 all sessions of the Inquiry or substantial parts of it,
18 either personally or by their recognised legal
19 representatives.

20 The legal representatives of Core Participants can
21 have a useful role in assisting the Inquiry by
22 providing the written statements that I have mentioned
23 and by suggesting lines of questioning to be adopted by
24 Counsel to the Inquiry.

25 The Inquiry is a process designed to assist me to

1 elicit the information that I require to enable me to
2 report on the terms of reference to Scottish Ministers.
3 The procedure is inquisitorial and investigative. It is
4 not the adversarial procedure that is normal in the
5 courts.

6 The inquisitorial nature of the Inquiry means it
7 will be for me, not anyone else, to decide what
8 questions are permitted. Most of the examination of
9 witnesses at oral hearings will be done by Counsel to
10 the Inquiry. However, Core Participants or their
11 representatives may suggest possible lines of
12 questioning to Counsel to the Inquiry, although as far
13 as possible they should do that before, rather than
14 during, any oral hearings. Core Participants may also
15 undertake limited cross examination, with my consent.

16 Turning to the decision of Core Participants,
17 although Core Participants can be designated at any time
18 during the Inquiry, I was anxious to encourage early
19 applications to afford interested parties the maximum
20 time to prepare for the public hearings. This approach
21 was also designed to avoid the risk of delays caused by
22 late applications immediately before or even after oral
23 hearings commenced.

24 A number of applications for designation as
25 Core Participants were received and all applicants have

1 been notified in writing of the outcome of their
2 application.

3 I have designated the following applicants as
4 Core Participants, in alphabetical order, and it is
5 basically the people who have spoken this morning:
6 Bilfinger Construction UK Limited; Carillion Utility
7 Services Limited; City of Edinburgh Council; DLA Piper
8 Scotland LLP, Parsons Brinkerhoff Limited; Scottish
9 Ministers; and Siemens PLC.

10 Rule 5 of the Inquiry Rules makes provision for the
11 designation of qualified lawyers as recognised
12 legal representatives. All parties who have been
13 granted Core Participant status have asked that their
14 solicitors should be designated under Rule 5 and
15 I direct that, in the case of each of the
16 Core Participants, those solicitors be designated as the
17 recognised legal representatives.

18 The list of Core Participants and their solicitors
19 will be published on the Inquiry website, as will
20 a transcript of today's proceedings.

21 I wish to emphasise that the justification for the
22 grant or refusal of Core Participant status can alter as
23 the Inquiry progresses and I will keep this under
24 review.

25 I also want to emphasise, as I mentioned earlier,

1 that under the Rules I can only designate
2 Core Participants with the consent of the individual or
3 organisation. In other words, the individual or
4 organisation must agree to becoming a Core Participant,
5 usually by making an application to become one.
6 The Rules do not permit me to compel anyone to
7 participate as a Core Participant. That is in contrast
8 to my powers to compel others to give evidence and to
9 produce material to the Inquiry.

10 The need for the consent of Core Participants has
11 important implications for this Inquiry, as it could
12 result in the exclusion of full participation in the
13 proceedings of one of the principal parties involved in
14 the Tram project. I am referring to TIE Limited, now
15 known as CEC Recovery Limited. For simplicity, I will
16 refer to CEC Recovery Limited as TIE, as that is the
17 name by which they will be recognised by members of the
18 public and by the media.

19 TIE is a company that is wholly owned by the City of
20 Edinburgh Council. Although TIE and the Council are
21 distinct legal entities, having their own legal rights
22 and obligations, the Council has decided that TIE should
23 not participate as a separate entity in the Inquiry or
24 have separate representation. In other words,
25 the Council has decided that TIE should not apply for

1 Core Participant status, although, and without
2 prejudging any issues, there must be the possibility
3 that others may be critical of TIE, since it was a key
4 participant in the project. Indeed there is
5 a possibility that the council itself may be critical of
6 TIE.

7 If that occurs, the council's decision to stop TIE
8 from participating as a Core Participant will deprive
9 TIE of an opportunity to respond fully to any such
10 criticism and will prevent it from making closing
11 submissions which might include criticism of the Council
12 itself. I will revert to this matter later when I ask
13 Senior Counsel for the City of Edinburgh Council to
14 address me on it and on related questions.

15 In any Public Inquiry of any duration, one has to
16 anticipate that events might occur that will affect the
17 planned progress of the Inquiry. It is possible to
18 anticipate some circumstances that could disrupt the
19 Inquiry and such circumstances might include issues such
20 as issues of representation or of conflicts of interest,
21 and I would like each of the legal representatives today
22 to answer questions about, and deal generally with, each
23 of these two matters, as far as they may be relevant to
24 their client.

25 While I recognise that each of these issues is

1 essentially a matter for the solicitors and their
2 clients, my interest is to assess the risk of a dispute
3 arising from such matters that could affect the Inquiry
4 and to manage that risk as far as possible to avoid
5 disruption and delay. I propose to leave the City of
6 Edinburgh Council and Bilfinger Construction UK Limited
7 to the end of this section and will ask questions of the
8 others in alphabetical order.

9 The first person will be Mr Arnott on behalf of
10 Carillion. As Mr Arnott I think explained to members of
11 the public, Carillion were responsible for the utilities
12 works that were undertaken, so I would like to ask you,
13 Mr Arnott, as well as the company, do you represent all
14 current and former employees who were involved in the
15 project?

16 MR ARNOTT: No, my Lord. At the moment I am purely
17 representing the company.

18 THE CHAIRMAN: Have other arrangements been made for the
19 former employees?

20 MR ARNOTT: Not through Carillion, my Lord. The view has
21 been taken that these individuals were very much
22 witnesses of fact on the project and Carillion are more
23 than happy that these people are contacted directly and
24 that they give evidence. We don't see any particular
25 concerns from those individuals' point of view in

1 relation to the evidence they have to give that would
2 necessitate any sort of legal representation at the
3 moment.

4 THE CHAIRMAN: That is very helpful.

5 The other matter I want to ask you about is the
6 question of conflict of interest, and I should advise
7 all parties that I intend to make a formal requirement
8 that each Core Participant considers the question of
9 conflict of interest and provides a written response
10 about that to the Solicitor to the Inquiry in accordance
11 with a direction that I will issue in early course.

12 In the meantime, could I ask you, Mr Arnott, bearing
13 in mind what I have just said, are you presently aware
14 of any conflicts of interest affecting you or your
15 client that could threaten the progress of this Inquiry?

16 MR ARNOTT: Not aware of any, my Lord, or I cannot foresee
17 any that would threaten the process of this Inquiry.

18 THE CHAIRMAN: Thank you very much.

19 Turning now to Mr Dunlop of DLA Piper -- as
20 Mr Dunlop explained, they were the legal firm acting on
21 behalf of TIE and I think he also said the City of
22 Edinburgh Council. As well as the partnership,
23 Mr Dunlop, do you represent all current and former
24 partners and employees of DLA Piper who were involved in
25 the project?

1 MR DUNLOP: That's correct, my Lord, yes, and in particular
2 your Lordship will be familiar with the names Mr Fitchie
3 and Dr Fitzgerald.

4 THE CHAIRMAN: I just need to know that you are covering
5 everyone.

6 MR DUNLOP: Yes.

7 THE CHAIRMAN: Bearing in mind what I have said and the
8 opportunity to consider the matter in detail and provide
9 a written response, are you presently aware of any
10 potential conflicts of interest that could threaten the
11 progress of the Inquiry?

12 MR DUNLOP: None, my Lord. There has been disclosure given
13 of certain [members] of the legal team who have acted
14 for other parties here but nothing that is thought to
15 give rise to any conflict and that has been given
16 anxious consideration by all involved.

17 THE CHAIRMAN: Thank you.

18 Turning now to Mr McLean of Parsons Brinkerhoff, and
19 I think, for the public, this company was responsible
20 for developing the designs of the project and the design
21 contract. I am really asking you the same question, or
22 questions, Mr McLean. As well as the company, do you
23 represent all current and former employees who were
24 involved in the project?

25 MR MCLEAN: Yes, my Lord, I do represent all those employees

1 both present and former.

2 THE CHAIRMAN: And then the other matter, bearing in mind
3 that there will be a formal requirement, are you
4 presently aware of any conflicts of interest that could
5 threaten the progress of this Inquiry?

6 MR MCLEAN: I am not aware of any such conflict, my Lord,
7 no.

8 THE CHAIRMAN: Thank you.

9 Turning to the Scottish Ministers, the public will
10 obviously know who the Scottish Ministers are but they
11 funded the project to a significant extent and Transport
12 Scotland, as an executive agency for the Scottish
13 Ministers was responsible for this aspect, and I would
14 like Ms Springham to tell me in detail who are you
15 representing and, in particular, do you represent all
16 Scottish Ministers, political advisers and past and
17 present civil servants in the Scottish Government and in
18 Transport Scotland who had any involvement in the
19 project on behalf of Scottish Ministers?

20 MS SPRINGHAM: No, my Lord, I don't. I do represent
21 Scottish Ministers, in the form of the Scottish
22 Government. As far as current Scottish Government, and
23 I put within that Transport Scotland, current Scottish
24 Government employees, those persons are being assisted
25 by the legal directorate within the Scottish Government.

1 So, for example, in the giving of witness statements,
2 they are being assisted to give witness statements but
3 I don't represent those individuals.

4 My Lord, may be aware that the Scottish Government
5 has arranged for separate representation for one current
6 Scottish Government employee, and that is as
7 a consequence of his role within TIE, which was separate
8 from his Scottish Government position. That was simply
9 to be cautious and to avoid any potential conflict of
10 interest that might arise in relation to that
11 individual.

12 THE CHAIRMAN: Thank you.

13 Mr Jones, on behalf of Siemens, Siemens were
14 involved as part of INFRACO, the joint venture involving
15 Bilfinger and CAF.

16 MR JONES: That you, my Lord, yes. I represent the company
17 Siemens PLC and its current employee. I do not
18 represent its former employees but I think it is right
19 to note that we have facilitated communication between
20 the Inquiry and former employees, when we know where
21 they are.

22 On the question of conflict of interest, we do not
23 see a conflict of interest arising.

24 THE CHAIRMAN: Very helpful, thank you very much.

25 I want to turn to both the City of Edinburgh Council

1 and then Bilfinger. I will take them in turn, and the
2 reason for that is that our investigation so far has
3 highlighted specific issues relating to representation
4 and/or potential conflicts of interest that could impede
5 the progress of the Inquiry if either issue was raised
6 at a later stage.

7 Turning, first of all, to the City of Edinburgh
8 Council, they were the promoters of the Tram project,
9 and they created TIE as a wholly owned company to
10 deliver various transport initiatives, including
11 the Tram project.

12 Mr Martin, I should just explain that the issue of
13 representation relating to the City of Edinburgh Council
14 involves the extent of that representation as well as
15 the question of participation of TIE and there is
16 a further issue about potential conflicts of interest.
17 So those are the three matters I will be asking you
18 about.

19 Before doing that I want to set out some background.

20 On 25 September, of this year, the Solicitor to the
21 Inquiry wrote to Mr Nolan of Pinsent Masons, listing
22 some questions that I wished you to consider. I am
23 aware that the Solicitor to the Inquiry received a reply
24 yesterday afternoon but consider in due course we should
25 address these issues in public as this is a public

1 hearing.

2 So, before we go any further, can I confirm that you
3 have a copy of the report prepared for the Council
4 meeting on 20 August 2015, which was mentioned in the
5 solicitor's letter to Mr Nolan, and do you also have
6 a copy of the questions and are you aware of the
7 answers?

8 MR MARTIN: Yes, my Lord.

9 THE CHAIRMAN: I think this might be a convenient point for
10 copies of the report to the Council and the questions,
11 not the answers, to be provided to other parties,
12 members of the public and the media so that they can
13 follow proceedings.

14 I should say to everyone here that, in future oral
15 hearings, documents will be displayed on your monitors
16 in front of you and on screens around the room for
17 others to see but this will take time and some expense
18 to set up. So today we are relying on paper for this
19 hearing and a link to the paper will be published on the
20 website this afternoon.

21 I will just pause so that these documents can be
22 handed out.

23 MR MARTIN: My Lord, I wonder if, before that is done,

24 I might just raise one matter.

25 THE CHAIRMAN: Don't hand them out just now.

1 Yes?

2 MR MARTIN: The letter of 25 September and the attached note
3 containing questions refers in part to matters which may
4 be the subject of legal privilege, and I say that only
5 very broadly because it will be a matter for my Lord as
6 to the extent that that is disclosed in a public forum
7 at this stage.

8 I should also say that one of my learned friends may
9 have an interest in that issue, that is to say the
10 potential legal privilege which could be said to arise
11 in respect of matters raised in that note.

12 Now, my Lord, I have no formal instructions either
13 to agree to or to oppose the disclosure of that note at
14 this Inquiry and it will obviously be a matter for
15 my Lord but I do just raise that at the moment because
16 it could potentially become a more significant issue
17 depending how matters develop.

18 THE CHAIRMAN: Are you saying Mr Martin that there is
19 an issue on behalf of the Council of legal privilege?

20 MR MARTIN: Yes.

21 THE CHAIRMAN: Can you point me to the parts of the
22 questions that you are talking about.

23 MR MARTIN: Well, I am talking about questions 4 and 5 --
24 possibly questions 3, 4 and 5, which relate to matters
25 there. I don't want at this stage, without instruction,

1 to say anything more in public but the fact is they
2 refer to the existence of events in which legal
3 privilege may be claimed, not just by the Council but
4 potentially by at least one other party upon the basis
5 of matters prepared in contemplation of litigation which
6 are not otherwise in the public domain.

7 THE CHAIRMAN: What we are talking about in these questions,
8 Mr Martin, are two actions, summonses, which are in the
9 public domain, because they have appeared in the rolls
10 of court. So are you saying, for instance, that the
11 date on which these actions started is a matter of legal
12 privilege?

13 MR MARTIN: Well, what I say, my Lord, and I was careful,
14 I hope, to raise it in the generality, of course I am
15 aware, not least as it is set out in the response to the
16 Inquiry's letter, of certain public facts about these
17 litigations which are in the public domain.

18 THE CHAIRMAN: Yes.

19 MR MARTIN: All I was, with respect, alerting my Lord to was
20 the possibility that going any further into these
21 matters may give rise to a risk that legal privilege
22 either would be breached or indeed a possible argument
23 in due course about the existence and nature of legal
24 privilege. The questions in the note, my Lord, in
25 a sense, move into these matters. The response of the

1 letter, revealing what is in the public domain,
2 I actually do not think there is any difficulty about
3 because that is not subject to legal privilege.

4 THE CHAIRMAN: I am just wanting a simple answer, Mr Martin,
5 if it is possible, to the question. Are you saying that
6 the date upon which a summons is signetted is legally
7 privileged?

8 MR MARTIN: My Lord, I think, strictly speaking, the date
9 of the calling of a summons is in the public domain
10 because that is on the rolls of court and public. I am
11 not sure that the date of the signetting of the
12 summons -- strictly speaking, it is a very small point
13 and I don't think it matters very much -- but the answer
14 to my Lord's question is, if we are simply talking about
15 the date of the signetting of the summons, I don't think
16 there is any difficulty, in the sense that, by reference
17 to the calling date, it will be in the public domain.

18 THE CHAIRMAN: Well, what about the place and method of
19 service?

20 MR MARTIN: That is where one becomes potentially involved
21 in issues of legal privilege, because the contents of
22 a summons in its entirety are at the stage of calling,
23 up until at least the lodging of defences, if not until
24 the closing of the record, not in the public domain, not
25 published and are accessible only to the parties and

1 their agents.

2 My Lord, if it would be helpful, I can refer to, as
3 authority for that, to the case of Richardson v Wilson
4 [1879] 7 Rettie, page 237. I have a copy here for
5 my Lord, if that would be helpful? (Handed)

6 THE CHAIRMAN: Thank you.

7 MR MARTIN: Putting the point shortly for the moment,
8 my Lord, unless one or other of the parties were
9 voluntarily to disclose the contents of the document,
10 not the existence of the document but the content of it,
11 in my submission there is a risk that legal privilege
12 would be breached and, as I emphasise it, not simply
13 a matter for counsel.

14 THE CHAIRMAN: Mr Martin, I don't need to know the content
15 of the document to know the date of the service of the
16 summons. That, presumably, is within the knowledge of
17 Mr Nolan, who is sitting behind you?

18 MR MARTIN: With respect, my Lord, that was not the subject
19 of the questions which relate to the contents of the
20 summonses and what was done upon the basis of them.

21 If my Lord is simply looking for the dates, then,
22 without prejudice, I do not want in any sense -- and
23 perhaps why I am labouring this point -- in any sense to
24 be seen to be doing anything which would waive
25 privilege. On the other hand, subject to that, I am

1 sure the date can be provided if it is not in the
2 letter.

3 THE CHAIRMAN: I think we will just circulate the documents
4 and carry on. (Pause)

5 The first question on which I seek clarification
6 from you, Mr Martin, is the extent of your instructions.
7 You are clearly instructed on behalf of the City of
8 Edinburgh Council by Pinsent Masons. The Council is
9 a statutory body acting through its elected members or
10 councillors and consists of a convener and councillors.
11 It is supported by officials and employees who are not
12 members of the Council. On 9 July, Mr Nolan, a partner
13 in Pinsent Masons, wrote to the Inquiry an explanation
14 of their application for Core Participant status and he
15 indicated that the application only covered the Council
16 and no other entity or person.

17 Can I just confirm that that is accurate, Mr Martin,
18 you only act for the Council and no other entity or
19 person?

20 MR MARTIN: That is the case, my Lord, always accepting of
21 course that, as a corporate body, it will have vicarious
22 responsibility for acts of its employees but it does not
23 act for them as individuals.

24 THE CHAIRMAN: At the end of the day, although employees may
25 be criticised, unless they have gone outside the scope

1 of their employment, then the Council bears
2 responsibility?

3 MR MARTIN: Again, without prejudice to the position that
4 might be adopted as matters develop, the Council
5 certainly bears corporate responsibility for acts done
6 with authority on its behalf.

7 THE CHAIRMAN: Yes -- by officials.

8 MR MARTIN: By indeed anybody who has authority, my Lord, in
9 the normal vicarious liability sense.

10 THE CHAIRMAN: The report of the Council meeting of
11 20 August deals with representation of current and
12 former Council members and employees at paragraphs 3.18
13 to 3.22, and you will see that, at 3.19, it says that
14 the Council will fund legal advice "if desired from
15 an independent firm for current and former councillors
16 or employees," including officials, obviously.

17 These are not councillors or officials who may be
18 subject to criticism by the council, is that correct?

19 MR MARTIN: At the moment, my Lord, the council has
20 identified no individuals, whether former or present
21 councillors, employees, officers, who may be subject to
22 criticism. The position which has been adopted is one
23 in general that any such person who seeks legal support
24 in the course of the taking of witness statements may
25 call upon arrangements which the council has put in

1 place to provide them with independent legal advice.

2 THE CHAIRMAN: When you say any such person, the report
3 seems to suggest it could be any employee, any official
4 or councillor, whether or not he is to be subject of
5 criticism?

6 MR MARTIN: That is certainly my understanding, my Lord.

7 I will be corrected if I am wrong and I say that because
8 the Council has not decided that anyone is to be
9 criticised, so the logical position is all of those
10 persons.

11 THE CHAIRMAN: That is very helpful.

12 Going on, Mr Nolan's letter, that is the original
13 letter and the quotes and our past exchange, suggests
14 that current and former councillors, officials and
15 employees will not be protected by your representation,
16 even if they are not the subject of criticism by you on
17 behalf of the Council?

18 MR MARTIN: I think, again, my Lord, that is the logic of my
19 position.

20 THE CHAIRMAN: Can I just ask this question then. Why
21 should current and former elected members, that is
22 councillors, officials and employees of the Council, not
23 be covered by the legal team representing the council if
24 the council does not intend to criticise them?

25 MR MARTIN: My Lord, I think the Council is attempting to be

1 even-handed at this early stage of the Inquiry when it
2 is simply not knowing what the positions may be adopted
3 in respect of particular individuals and, whilst it is
4 in a sense possible to distinguish between those who are
5 being criticised and those who are not being criticised,
6 I suspect that experience teaches that when it comes to
7 the detailed matters under consideration, there may be
8 shades in between and therefore my advice certainly has
9 been, and accepted, as I understand it, by the Council
10 and its officers, is that no distinction is to be made
11 amongst members, officers, employees, former and
12 existing, for the purposes of, as it were, the resources
13 of the Inquiry.

14 Of course, my Lord, as a matter of fact, if
15 an individual is giving evidence and is not being
16 criticised by the Council, then of course the Council
17 will be there, no doubt maintaining a point of view in
18 respect of that individual who hypothetically will have
19 acted as an officer or member in doing a particular
20 thing in the Council will supporting the consequence of
21 that.

22 I am not sure at this stage it would be proper to
23 make any distinction, certainly at the point where no
24 individuals have been identified for specific criticism.

25 THE CHAIRMAN: One obvious course of action would be, until

1 you identify someone to be criticised, that you simply
2 bring on all of the officials and councillors under your
3 umbrella as part of the Council, rather than incur what
4 might be seen as the additional expense of retaining
5 another independent firm of solicitors.

6 MR MARTIN: My Lord, these are, with respect, decisions for
7 the council --

8 THE CHAIRMAN: Yes.

9 MR MARTIN: -- in responding to this Inquiry, and they have
10 made the decision they have made. They might have made
11 a different one but the one they have made is they would
12 proceed as I have described it, and has the solicitor.

13 THE CHAIRMAN: Do you foresee any difficulty in acting for
14 the Council but distancing yourself from, and perhaps
15 even criticising, individual councillors who comprise
16 the Council?

17 MR MARTIN: As a matter of principle, my Lord, and
18 emphasising that no such criticism has been identified
19 as yet and may never be identified, I do not see any
20 difficulty. There are situations in which officers and
21 members of a local authority may act in a way which can
22 be the subject of criticism by the authority itself.
23 Whether these circumstances were to occur here, I simply
24 don't know.

25 THE CHAIRMAN: The second question I wanted to raise relates

1 to the participation of TIE. As I have already
2 observed, TIE is wholly owned by the Council and the
3 position of the Council in relation to TIE is summarised
4 at paragraphs 3.5 to 3.17 of the report to
5 Council.

6 The first thing for the sake of those who have
7 copies of the report in the public, paragraph 3.8 should
8 be amended because, in terms of the response that was
9 received yesterday afternoon, the date of September 2011
10 was wrong. It should be November.

11 Subject to that change, does it appear from 3.8 and
12 3.9 that since 2011 TIE has been a dormant, non-trading
13 company?

14 MR MARTIN: Yes, indeed, my Lord.

15 THE CHAIRMAN: I was going to go on to deal with the
16 questions that were posed and have been circulated, but,
17 before doing that, I think it might be helpful to put
18 this in context for the members of the public and the
19 media who are not familiar with court procedure because
20 the questions are directed to court procedure.
21 I perhaps could give an example, an overview of
22 an action.

23 Imagine that I wanted to sue someone in the court of
24 session, and let's call this person James Waverley-Gate.
25 I would then have to think about the basis on which

1 I was going to take an action. I would go to see my
2 solicitor, who would take statements from me. I would
3 produce evidence and other documents and a view would be
4 taken as to whether I had a right of action or not.

5 If there was a positive view, counsel would be
6 instructed, a summons would be prepared on the basis of
7 the evidence that I had put forward. Then the
8 solicitors would print the summons on to a special form
9 and take it to the court to have it, we call signetted,
10 but it is really the start of the action is the date
11 that it goes up to the court and gets a number, and if,
12 you look at the questions that you have got, you will
13 see there are questions about two actions and each of
14 them have got an A-number. So for instance, question 4
15 is asking about an action by the council against TIE and
16 you will see in "(A299/13)". If I was raising the
17 question now, it would be A-something/15. So the 13
18 means that action was raised in 2013.

19 Once the document has been lodged with the court,
20 authority is given to serve a copy of it on
21 Mr Waverley-Gate and, once that is done, he would have
22 21 days within which to respond, but as soon as he gets
23 the document, I would imagine, he would go to his
24 solicitors, they would discuss the action, they would
25 gather together evidence, if he wanted to defend it, and

1 they would wait until the action called -- you may have
2 heard Mr Martin earlier referring to the action calling.

3 The action calls by my solicitor taking the process,
4 including the served summons, back to the court after
5 the 21 days have expired. That can be done any time
6 after the expiry of 21 days, up to a year and a day, so
7 there is a long period that they can do that, but once
8 they do that, the action calls appears on a public roll
9 with the name of the action, the number of the action
10 and the solicitors who are appearing for me.

11 At that point, Mr Waverley-Gate's solicitors have
12 three days to go up to the court and to mark on the
13 summons that they wish to defend it, they enter
14 appearance. Then, after that, after the action calls, they
15 have a total of seven days within which to lodge
16 defences, unless the action is suspended or sisted.

17 The important thing to remember is that everything
18 has to be done on instruction by the client. It is not
19 to be made up by solicitors or counsel. Counsel and
20 solicitors are professional people who are bound by
21 professional rules. They act on instructions. So the
22 client instructs solicitors and counsel.

23 If it is desired to stop the action so that maybe
24 further investigations could take place before the
25 defences are finalised, a motion has to be enrolled with

1 the court. In other words the party wanting the delay
2 goes to the court, enrolls a motion seeking that the
3 action is sisted for a certain period. He has to
4 intimate that to the other party, who then considers it
5 and decides if he or she will oppose a motion.

6 If it is not opposed, it then goes to the judge as
7 an unopposed motion and he or she deals with it. If it
8 is opposed, there is a public hearing.

9 But, again, the important thing to remember is that,
10 at any stage, any part of the action, including a motion
11 to sist has to be on instructions and a decision to
12 oppose or not to oppose has to be on instructions of the
13 client.

14 Looking at the questions now, we did receive,
15 Mr Martin, as I said yesterday afternoon, a response to
16 some of our questions from which we know that
17 Pinsent Masons acted and apparently continue to act for
18 CEC, that is the Council, in the action against TIE,
19 which is the subject of question 4. We also know from
20 the responses that Pinsent Masons acted and apparently
21 continue to act for TIE in the action against DLA Piper,
22 which is the fifth question.

23 Now, the response that we received did not answer
24 part A of either question 4 or 5, and that is what I was
25 asking about, the date of service of the summons. Are

1 you able to provide that information, Mr Martin?

2 MR MARTIN: My Lord, I am not able to provide that myself
3 but, if I may attempt to assist my Lord at this -- given
4 that these questions of the Inquiry are already in the
5 public domain, given that I anticipate the letter in
6 response to the letter of 25 September, that is to say
7 the letter of yesterday, 5 October, is in the public
8 domain --

9 THE CHAIRMAN: I have not circulated that.

10 MR MARTIN: All I was going to say, my Lord, is,
11 anticipating that such a letter might be put into the
12 public domain, and that is a matter for your Lordship
13 and the information provided is information in the
14 public domain, I have already said, if my Lord is asking
15 for these particular dates, then without prejudice to
16 any issue arising later about privilege, then if that is
17 to go into the public domain, I suspect there is no
18 difficulty about that.

19 What I would ask, and it may be my Lord would wish
20 to identify other aspects of the questions raised, if
21 there are particular points which your Lordship would
22 wish to have, and bearing in mind my own anxiety already
23 expressed regarding privilege and the fact that the
24 responses would be put into the public domain, if
25 Pinsent Masons could have the opportunity to consider

1 these specific questions and again, no doubt I shall be
2 asked to advise, we shall reply to them any way which we
3 are satisfied is appropriate, having regard to the
4 anxiety about privilege.

5 THE CHAIRMAN: Yes, that is somewhat disappointing,
6 Mr Martin. Pinsent Masons had the response since the
7 end of September, but I understand what you are saying,
8 that they have taken this view.

9 What I want to know, basically, is the date on which
10 each of these summonses was served, and I want to know
11 the name of the individual solicitor who acted in each
12 of these actions. Now, I would have thought that
13 Mr Nolan, who is sitting behind you, must know that
14 quite clearly and I also want to know the name of the
15 firm of solicitors or of the individual solicitor who
16 acted for TIE in entering appearance in action on behalf
17 of the defendant. I want to know the date on which
18 appearance was entered. I want to know if the same
19 solicitors, that is Pinsent Masons, continued to act for
20 the Council against TIE and the other firm, whoever they
21 are, continued to act for TIE in defence of that action.

22 We know from the responses that have been disclosed,
23 that there have been motions, I am told unopposed
24 motions, all at the instance of Pinsent Masons -- what
25 I want to know is whether these motions were, in accordance

1 with court practice, intimated to the other firm of
2 solicitors and did that other firm of solicitors advise
3 Pinsent Masons that they did not object or oppose the
4 motion?

5 What I also want to know is who instructed and
6 continues to instruct the respective solicitors, for
7 instance, I presume the City of Edinburgh Council
8 continue to instruct Mr Nolan of Pinsent Masons in the
9 action against TIE, who is instructing whatever counsel
10 is representing TIE on behalf of TIE -- who in TIE is
11 instructing these people?

12 Turning to question 5, the reason for these
13 questions is that I want to clarify whether at the same
14 time that Pinsent Masons were acting on behalf of the
15 City against TIE, they were acting for TIE in the action
16 against DLA Piper, and so that is why I want the dates.

17 I can tell you, Mr Martin, that it may not be
18 necessary to have the precise dates. I would rather
19 have the accurate information, but I am able to do sums,
20 I can work out issues and I can also tell you that from
21 the reference number of the two actions, it appears that
22 Pinsent Masons must have lodged with the court both
23 actions, either on the same day or within a day of each
24 other, because there is only two numbers difference, and
25 I am also aware, from the public records, that the

1 action in between is also an action by Pinsent Masons on
2 behalf of the City of Edinburgh against DLA Piper.

3 So we have three actions in sequence which, to my
4 mind, appear to indicate that Pinsent Masons were acting
5 for and against TIE at the same time and I just want
6 to -- if that understanding is wrong, I think it would
7 be useful if Mr Nolan could tell you now, because this
8 is being broadcast, and may be broadcast, the media are
9 here, and I don't want any misunderstanding.

10 So if it is not the case that Pinsent Masons were
11 acting for and against TIE at the same time, please will
12 Mr Nolan tell you.

13 MR MARTIN: My Lord, I regret to say I do not have
14 instructions immediately to answer those questions.

15 I understand what your Lordship has asked for.

16 I understand the implications of the information which
17 may result but I am not prepared at the moment to
18 respond, at least without an opportunity to take
19 instructions from Mr Nolan.

20 As I have said, my Lord, the response to the
21 Inquiry's letter of 25 September was carefully
22 considered with my advice in light of, as I have said,
23 a number of factors, including in particular anxieties
24 about privilege and it may be that there is another way
25 of dealing with this because your Lordship, having made

1 clear, and I recognise that these proceedings may be
2 broadcast but, given that any response to the Inquiry
3 will go into the public domain, as we have already
4 discussed, it may be that, if your Lordship were, having
5 rehearsed the questions and emphasised the significance
6 of the answers, it may be better if those instructing
7 me, and of course the Council, my clients, can have
8 an opportunity properly to consider what your Lordship
9 has said and reply in writing in early course.

10 THE CHAIRMAN: And presumably that letter can be published
11 on the website?

12 MR MARTIN: That is of course the basis of my concern,
13 my Lord, because if it is to be on the website, if it is
14 to be in the public domain, then it needs to be
15 a properly considered answer but, yes, I am proceeding
16 upon that basis.

17 THE CHAIRMAN: Going on from there, Mr Martin, from our
18 investigation and examination of documents, so far it
19 appears that, at least as early as 2010, senior
20 officials in the City of Edinburgh Council, including
21 senior members in the solicitor's office, perceived that
22 there was a possibility of a conflict of interest
23 between CEC and TIE. They had sight of an opinion
24 provided to TIE by the then Dean of Faculty, Richard
25 Keen QC, as he then was and, as a result of that

1 perception, the Council instructed independent
2 solicitors in Edinburgh to arrange a consultation in
3 England with an English silk.

4 It also appears from our investigations so far that
5 McGrigors, who are now Pinsent Masons, McGrigors having
6 been taken over by Pinsent Masons, McGrigors may also
7 have acted for TIE in relation to a number of disputes
8 arising in the course of the project. They may also
9 have acted for the Council and TIE in connection with
10 the mediation at Mar Hall. Pinsent Masons also acted
11 for Bilfinger in the mediation and, at that time, they
12 were separate firms, McGrigors and Pinsent Masons.

13 The adjudications and mediation are issues that will
14 be considered by me and from the responses and the
15 earlier and current involvement of McGrigors and Pinsent
16 Masons on behalf of TIE, it appears that there is clear
17 scope for a conflict of interest between the City of
18 Edinburgh Council and TIE. This is not least because
19 the Council has raised an action for damages in the
20 court of session against TIE, which have separate
21 solicitors, albeit, I presume, funded by the Council,
22 but that is no doubt something which will be clarified.

23 The action against TIE will involve investigations
24 on behalf of TIE and the receipt of instructions from it
25 to enable solicitors and counsel to prepare defences to

1 that action.

2 As we have seen, TIE also raised an action against
3 a third party and we have already had an exchange of
4 information about that. I await with interest the
5 response from Pinsent Masons.

6 As I said earlier, there have been motions enrolled
7 in both actions which TIE either enrolled or consented
8 to. That must also have involved giving instructions
9 and, whatever the position as regards the action against
10 the third party, on what basis could the Council issue
11 instructions on behalf of TIE in the action that the
12 Council has raised against them?

13 Now the report to the Council at paragraph 3.14
14 suggests that TIE could not issue instructions to
15 solicitors without being revived because it had ceased
16 to operate in 2011. Mr Martin, do you consider that to
17 be an accurate statement, and, if you do, how is that
18 different from TIE engaging in litigation without being
19 revived, and in particular defending an action without
20 being revived?

21 MR MARTIN: My Lord, has raised a number of matters and
22 perhaps I might just say this, in brief introduction.

23 The conflict of interest is not, as it were,
24 an objective circumstance. It will arise in particular
25 circumstances in many, many different ways.

1 My Lord, may take it that those instructing me have
2 satisfied themselves both for the purposes of the
3 Inquiry and the questions asked and indeed,
4 I understand, previously before I was involved satisfied
5 themselves that they had complied with the Law Society
6 rules and guidance on conflicts of interest.

7 Now, perhaps I say no more about that for the moment
8 because if my Lord is permitting the Council to reply in
9 writing on the various matters raised, then that is
10 something that can be considered but my observation to
11 my Lord at this stage is that, whilst it may appear that
12 there are circumstances in which the possibility of
13 a conflict of interest could be said to exist, it is not
14 definitively so and I am satisfied, again, having been
15 involved in giving advice on this, that those
16 instructing me are properly aware of their full
17 responsibilities in relation to conflicts of interest
18 and I hope will satisfy the Inquiry on the details of
19 that in due course.

20 To turn to the question of TIE and the statement in
21 paragraph 3.14 of the report, it says instructions on
22 behalf of TIE would require to be issued to legal
23 representatives appointed on its behalf. That is
24 a statement made in the context of this Inquiry, that is
25 to say, if TIE were to participate in this Inquiry as

1 a party, whether recognised as a Core Participant or
2 otherwise, would be a matter for my Lord. Instructions
3 would require to be given to legal representatives
4 appointed on its behalf, because otherwise it simply
5 would not be participating and it is that which is
6 critical.

7 TIE exists as a limited company, it has not been
8 wound up or struck off. It has a single officer who is
9 legally capable of giving instructions but, in the
10 absence of any resources, and the company has not been
11 trading or operating since 2011, in the absence of
12 resources to instruct legal and, no doubt, other agents
13 on its behalf to participate fully in the Inquiry, then
14 the view has been taken that it cannot practicably -- it
15 cannot do so in practical terms.

16 If the Council were to fund it, which is the only
17 alternative short of funding from another source,
18 the Council has already said it will cooperate fully
19 with the Inquiry. It took over the rights and
20 liabilities of TIE in 2011. It will do everything and
21 wishes to do everything to assist the Inquiry both in
22 practical terms, documentation and the like and in
23 providing individuals who are required to give
24 statements and evidence. In that context, this report,
25 written for the purposes of potential participation of

1 TIE at this Inquiry, the sentence thereafter for TIE in
2 its current form to provide instructions would require,
3 as indicated above, individuals to be appointed to it
4 and for those individuals to immerse themselves into an
5 extensive factual matrix in order to be in a position to
6 provide instructions to legal representatives.

7 Similarly, those legal representatives would require to
8 carry out their own factual investigation and legal
9 analysis, which could be both time consuming and costly.

10 That is the position regarding the Inquiry. It does
11 not mean that TIE was not in a position to carry out or
12 assent to the individual legal acts which would be
13 necessary in the context of legal proceedings which have
14 gone no further than simple calling and then sisting.
15 The expense of that has been, I would believe, minimal
16 and therefore there is a distinction between
17 participation in these actions, which can be done
18 legally and without any, if not significant, costs and
19 potential participation in this Inquiry which would be
20 very significant.

21 The Council's position is that the revival of TIE
22 would cost a great deal of public money. It would not
23 provide anything which the council cannot provide and is
24 not more than willing to provide, and that is why the
25 decision has been made, and in my submission what is

1 stated in paragraph 3.14 in the context of this Inquiry
2 is correct.

3 THE CHAIRMAN: I hear what you say, Mr Martin, but I have
4 some difficulty with the proposition that in the action
5 by the City of Edinburgh against TIE, which I would
6 presume must relate to the Tram project because the only
7 relationship between the City and TIE was the Tram
8 project, and therefore if TIE wish to defend the action
9 by the City, there would still need to be detailed
10 investigations and the people would have to immerse
11 themselves into the extensive factual matrix to enable
12 defences to be prepared, so that is an issue perhaps
13 that you can deal with, or Mr Nolan can deal with, in
14 the reply to the Inquiry.

15 Going on, Mr Martin, it doesn't appear in the report
16 to council that elected members were told that TIE was
17 currently pursuing and defending two actions relating to
18 the Tram project and, again, that is something no doubt
19 that Mr Nolan would want to raise in his response.

20 I think for the benefit of the public and the media,
21 I should explain that the reason that I have raised
22 these matters with Mr Martin on behalf of the City of
23 Edinburgh Council so far has been, firstly, to ensure
24 that in its decisions, taken on 20 August, about
25 representation of past and present councillors,

1 officials and employees of the Council, and about the
2 non-participation of TIE, to ensure that decisions were
3 decisions which might be expected of a reasonable local
4 authority and employer, taken in the full knowledge of
5 all relevant facts; and, secondly, to ensure that the
6 position taken regarding TIE's participation in the
7 Inquiry is consistent with the position taken in current
8 litigation.

9 If councillors were not fully advised of the correct
10 position, it might be prudent for the City of Edinburgh
11 Council to reconsider these issues following a full and
12 more balanced report than was available on 20 August in
13 an effort to reduce any challenge that might impede this
14 Inquiry.

15 I now wish to turn to the third issue involving the
16 potential conflict of interest relating to
17 Pinsent Masons. As I have already mentioned, there is
18 a clearly potential for a conflict between the City of
19 Edinburgh Council and TIE. However, there would also
20 appear to be potential for a conflict of interest
21 involving Pinsent Masons.

22 That potential arises in different ways. First,
23 they are acting for TIE in the action against DLA Piper,
24 while at the same time acting against TIE in the action
25 by the council. The second way in which

1 an apparent conflict could arise is if there is
2 criticism of the conduct of the adjudications on behalf
3 of TIE or the conduct of the mediation at Mar Hall in
4 which current partners in the newly constituted firm of
5 Pinsent Masons acted for both parties by reason of the
6 existence at that time of different firms.

7 The third way in which an apparent conflict could
8 arise is that the City of Edinburgh Council and
9 Bilfinger are each represented at this Inquiry by
10 Pinsent Masons. This has arisen because McGrigors, who
11 formerly acted for the Council, were taken over by
12 Pinsent Masons who acted for Bilfinger. There are areas
13 of potential dispute about the project between the City
14 of Edinburgh Council and Bilfinger and perhaps about
15 issues surrounding the adjudications and mediation.

16 Mr Martin, can you elaborate. You have said
17 something about potential for conflict and I understand
18 that, but does Pinsent Masons fully appreciate that, in
19 the context of a conflict of interest, there are two
20 separate issues, one of confidentiality and one of
21 loyalty. I want to be satisfied that both of these have
22 been addressed to avoid any risk of challenge to the
23 Inquiry.

24 In other words, is the apparent conflict within
25 Pinsent Masons one which gives rise to an automatic

1 breach of fiduciary duty -- not confidentiality but
2 fiduciary duty -- of loyalty owed to both clients by the
3 firm as a whole? The duty of loyalty is not owed via
4 individual partners, as I understand it, but by the firm
5 and, if that is correct, has that matter been addressed
6 by Pinsent Masons? If so, I would like to see the
7 response.

8 MR MARTIN: My Lord, I wonder if I might have
9 an opportunity, given that this is a public domain of
10 responding to your Lordship's comments.

11 THE CHAIRMAN: Certainly.

12 MR MARTIN: My Lord, the first matter which you referred to
13 before you turned to the potential conflict of
14 Pinsent Masons was to refer to the Council's report of
15 20 August and potentially the need to revise that, as
16 you put it, on all relevant facts.

17 Well, my Lord, it will be a matter for the Council
18 and the local authority properly constituted to decide
19 whether or not it requires to do that.

20 THE CHAIRMAN: Yes.

21 MR MARTIN: I would not want by silence to be seen to be
22 assenting to any extent on behalf of the City of
23 Edinburgh Council to any suggestion that their decision
24 of 20 August, or indeed any other decision, was not
25 entirely lawful and made properly in accordance with all

1 of the relevant law and practice.

2 Of course I might say that, until your Lordship
3 raised these matters in detail this morning, whilst
4 recognising that the Inquiry was interested in the
5 procedure which had been followed and there was previous
6 correspondence, I was not aware of any suggestion that
7 the Council had in some way not entirely fulfilled its
8 legal duties and I would therefore wish emphatically to
9 reserve the position on these matters. It will be for
10 the Council on advice to decide what it intends to do.

11 As far as the issue of potential conflict of
12 interest, as far as Pinsent Masons is concerned,
13 my Lord, again, has dealt with this by making statements
14 about representation of City of Edinburgh Council and of
15 TIE as legal entities. That was the first, I think, of
16 my Lord's three concerns about potential conflict of
17 interest.

18 My Lord, again, it remains to be seen whether there
19 is truly any such conflict of interest because, of
20 course, the City of Edinburgh Council is the principal,
21 if not only, shareholder in TIE and it has been, in
22 effect, a limited company operating on behalf of the
23 local authority all along and that of course that is not
24 unknown. Many local authorities have limited companies
25 which carry out particular functions related to the

1 local authority.

2 There is therefore an inevitable coincidence of
3 interest which, my Lord is right to recognise, the
4 existence of legal proceedings between the two may be
5 a distinct factor in this case but it is not necessarily
6 a reason for any conflict of interest and of course it
7 will depend, as the Law Society Rules and Guidance
8 emphasise, whether in a situation where a potential
9 conflict might arise the matters have been properly
10 canvassed and instructions have been given. It will be
11 covered in more detail in the response.

12 The second is the participation of Pinsent Masons in
13 the mediations in 2010. Now, of course my Lord, that is
14 a historical fact and I think that does, as your
15 Lordship said, fall within the terms of reference of
16 this Inquiry but, as I say, it is a historical fact. It
17 is what has happened in the past.

18 Whether the fact that Pinsent Masons may have had
19 certain representative responsibilities at that time,
20 whether because of what is happening now that gives rise
21 to potential conflict, again, can be addressed but, as
22 far as I am concerned, there has been no suggestion of
23 any such actual conflict arising in that context.

24 The third is in the fact that Pinsent Masons
25 appeared here today representing both the Council and

1 Bilfinger. Now, any dispute between the Council and
2 Bilfinger as one of the contractors under the
3 infrastructure contract, any dispute between them, as
4 I understand it, was resolved by 2011 at the time of
5 those mediations. There is no dispute between the
6 Council and Bilfinger, neither in practical terms nor
7 any litigation. All accounts have been settled, the
8 project has been completed and the situation where
9 Pinsent Masons comes to be representing each is a force
10 of, or a consequence of, the circumstance where
11 McGrigors were taken over by Pinsent Masons, I think in
12 2012.

13 Since that time, care has been taken to ensure that
14 the two teams, if one can call them that, within the
15 firm overall, are entirely separate. There is no
16 communication with them other than in respect of the
17 parties.

18 My learned friend Mr Borland, I understand, will
19 confirm that Bilfinger is entirely satisfied that there
20 is no actual conflict of interest, both of the clients,
21 that is to say CEC and Bilfinger have consented to the
22 arrangement. Again, my Lord has talked about duties of
23 loyalty to the firm, et cetera. Well, my submission
24 would be that conflicts of interest are practical. Of
25 course they involve loyalty but they are not some sort

1 of objective or higher duty. If in practical
2 circumstances, such as exist following the amalgamation
3 of McGrigors by Pinsent Masons, a potential for conflict
4 came about but the potential parties who might be said
5 to be conflicting do not regard themselves as being so
6 and are satisfied that they may continue to be
7 represented by those who represented them previously,
8 suitable arrangements having been made. In my
9 submission, that is not a conflict which is likely to
10 cause any difficulty to this Inquiry.

11 My Lord, I emphasise that those instructing me, I am
12 sure, will note all that your Lordship has said and will
13 respond on all of these matters but I think it is
14 appropriate that I say what I have just said at this
15 stage.

16 THE CHAIRMAN: I am grateful, Mr Martin.

17 As I will mention later, of course it is for the
18 City of Edinburgh to decide whether it wishes to
19 reconsider any matter or whether it wishes to put any
20 matter before council, and I mentioned earlier that
21 I would be making a requirement and, when I come to that
22 bit of the speech, I will make it clear that there will
23 be an opportunity to Edinburgh, if so advised, to
24 consider these matters. But I think it is important
25 that this matter is aired in public, so that, at a later

1 date, if issues arise between parties, between the City
2 or between Bilfinger, in the course of the Inquiry --
3 I appreciate there has been a mediation, I appreciate
4 there has been a settlement, I appreciate all the
5 accounts have been paid, but that is different from the
6 context of the Inquiry where one party may be pointing
7 the finger at the other as to what did or did not
8 happen -- if that starts to happen, experience tells us
9 that that is when conflicts of interest suddenly become
10 very important and that is why I am raising this now, so
11 that parties can give proper consideration to the matter
12 so that if, months down the line, they decide that they
13 don't like the evidence that is coming out and they want
14 to go to court for judicial review, they might find it
15 is more difficult, having been alerted at this stage to
16 the possibility and having failed to address it.

17 MR MARTIN: My Lord, forgive me, may I just say I entirely
18 agree with that and I am in no sense attempting to avoid
19 this debate taking place in a way that will minimise the
20 risk of any interruption to the Inquiry later on. So,
21 as a matter of the spirit of what is being discussed, we
22 are entirely content with these issues being aired so
23 that, as my Lord suggests, in due course it cannot be
24 said they have not been addressed.

25 THE CHAIRMAN: Thank you.

1 I want to turn to you, Mr Borland. A lot of the
2 matters have been covered but I don't want you to feel
3 left out.

4 Can I first of all clarify, as well as the company,
5 do you represent all current and former employees who
6 were involved in the project?

7 MR BORLAND: My Lord, I am instructed on behalf of Bilfinger
8 Construction UK Limited, and I take that to encompass
9 its current employees. I am not instructed on behalf of
10 any former employees but I should say it is not, thus
11 far, nor is it anticipated, to be necessary to arrange
12 for separate representation in relation to any former
13 employees.

14 The basis upon which I proceed is that the interests
15 of the company are aligned with its current employees
16 and any former employees that may be relevant to the
17 Inquiry.

18 THE CHAIRMAN: Thank you.

19 I think, just for the sake of the record, the
20 contract for the construction of the tram line was
21 concluded by TIE with, amongst others, Bilfinger Berger
22 UK Limited. I understand that is the same company as
23 Bilfinger Construction UK Limited. Just for the sake of
24 the record, can you confirm that?

25 MR BORLAND: It is, my Lord, and I can confirm that

1 specifically.

2 THE CHAIRMAN: You have heard the exchange with Mr Martin
3 and, as I have already indicated, some areas of
4 potential dispute might arise between the Council and
5 TIE and the Council and Bilfinger and you have heard
6 what I have said about Pinsent Masons appearing on
7 behalf of both, and I appreciate that that has come
8 about because of the amalgamation but, as a result of
9 that, there would be clear scope for a potential
10 conflict of interest in continuing to act for both
11 parties and the purpose, as I have said, Mr Martin, in
12 raising this matter at this stage is to address my
13 concerns about the effect this could have on the
14 progress of the Inquiry and, basically, what I am trying
15 to do is to assess the risk of a judicial challenge by
16 either of the current clients of Pinsent Masons, in the
17 event of criticism of one of the other, or by former and
18 current councillors, officials, et cetera, or of
19 (Inaudible).

20 From your point of view, Mr Borland, I would like to
21 hear, from the issues that I have raised with Mr Martin,
22 from the perspective of Bilfinger Construction UK
23 Limited. In particular can you help me how issues of
24 confidentiality and loyalty might apply; whether there
25 is a fiduciary duty owed by the firm to both of its

1 clients; whether acting for both clients in a single
2 issue dispute conflicts with such a duty; and whether
3 Bilfinger made an informed decision before agreeing that
4 Pinsent Masons could continue to act for both parties.

5 MR BORLAND: Yes, my Lord.

6 The first thing that I would say is that Pinsent
7 Masons have acted for the relevant Bilfinger entity
8 since the inception of the project in or about 2007
9 through to its conclusion.

10 In 2008 the infrastructure contract, which my Lord
11 has referred to, was let between TIE Limited and
12 a consortium of which Bilfinger formed a part.

13 Now, it is a matter of public record that disputes
14 did arise under that contract between, on the one hand,
15 TIE and, on the other hand, the consortium, including
16 Bilfinger. However, my Lord, ultimately all of those
17 disputes were resolved by autumn 2011, culminating in
18 the overall settlement agreement in September 2011.

19 I can confirm to the Inquiry that,
20 since September 2011, there have been no disputes
21 between the parties I have referred to and that the
22 project was completed and the consortium's final account
23 has been paid.

24 To be absolutely clear about the matter, my Lord,
25 there are no outstanding disputes, claims or court

1 proceedings between, on the one hand, the Council or TIE
2 and, on the other, the consortium, of which Bilfinger
3 was a part.

4 THE CHAIRMAN: Mr Borland, I appreciate that. What the
5 Inquiry might be wanting to look at are the disputes
6 that have ultimately been resolved. I appreciate they
7 have been resolved but, clearly, these disputes might
8 well have had an effect on the way in which the project
9 was delivered.

10 MR BORLAND: I understand that, my Lord. The reason,
11 however, I have taken some care to mention the dates is
12 that in my submission they are important, relative to
13 the issues that your Lordship has raised.

14 I noted the settlement agreement
15 of September 2011, and I noted that since then there
16 have been no disputes between the parties I have
17 mentioned. It was some eight or nine months after that
18 overall settlement agreement, namely in May 2012, that
19 there was a merger between the firms of Pinsent Masons
20 and McGrigors. Prior to that merger taking place,
21 my Lord, I can advise the Inquiry that the matter of
22 representation by Pinsent Masons as a merged entity for
23 the Council and for Bilfinger was discussed in
24 considerable detail by representatives of Pinsent Masons
25 with representatives of Bilfinger.

1 From the Bilfinger perspective, my Lord, I have had
2 enquiries made and I can confirm to the Inquiry today
3 that I am satisfied that a very full and adequate
4 explanation was given to the representatives of
5 Bilfinger as to the position regarding future
6 representation.

7 I can also advise the Inquiry that those
8 representatives of Bilfinger expressly consented to the
9 representation of both the Council and Bilfinger on the
10 basis that Pinsent Masons put in place arrangements that
11 were in effect and are in effect operating on the basis
12 that the two teams of solicitors are acting in a way
13 that is entirely separate and distinct from each other.
14 They are in effect operating as separate and distinct
15 legal firms for these purposes.

16 That is obviously important, my Lord, with a view to
17 maintaining the necessary division, mindful of the duty
18 of loyalty that your Lordship has mentioned and also
19 confidentiality.

20 I myself have consulted with a senior executive at
21 Bilfinger and have confirmed, specifically in relation
22 to the matters to be dealt with by this Inquiry as
23 outlined in the terms of reference, that Bilfinger
24 Berger is content for Pinsent Masons to continue to act
25 and it is content that the arrangements in place are

1 adequate.

2 THE CHAIRMAN: Content that Pinsent Masons continue to act
3 for both?

4 MR BORLAND: Yes, indeed, my Lord.

5 So coming back perhaps to the central questions,
6 I am satisfied that there is no actual or potential
7 conflict in relation to Pinsent Masons continuing to act
8 for Bilfinger in relation to the Inquiry. That matter
9 has been given careful consideration by those
10 instructing me; nor do I consider, my Lord, there is any
11 real likelihood of a potential conflict arising.

12 So on that basis I am satisfied that there is no
13 current actual conflict, nor any likelihood, any real
14 likelihood of a potential conflict which would
15 critically impede the progress of the Inquiry.

16 So on that basis my Lord, I would simply state in
17 conclusion that Pinsent Masons have very carefully
18 considered the issue from the Bilfinger perspective and
19 Bilfinger is satisfied with the arrangements that have
20 been put in place with a view to preserving the
21 necessary division between the two teams acting
22 repetitively for the council and for Bilfinger and to
23 maintain a very, very strict degree of confidentiality.

24 THE CHAIRMAN: Thank you.

25 As I have already said, I intend to make a formal

1 requirement that each Core Participant considers the
2 questions of conflict of interest and provides a written
3 response to the solicitor to the Inquiry. I will
4 reflect upon what has been said today before drafting
5 the detailed requirement but that should not preclude
6 Core Participants and their legal representatives from
7 thinking about these issues in the meantime and
8 commencing the preparation and detailed factual
9 statements to enable persons potentially affected to
10 make informed decisions.

11 I understand from the Council's website that the
12 dates of the next two meetings of the full Council are
13 22 October and 19 November. I will fix the deadline for
14 responding to the requirement at 12.00 noon on
15 27 November. That should allow a reasonable time to
16 enable full disclosure of the factual basis upon which
17 a potential conflict might arise and also to afford time
18 for the subsequent preparation of a report to council,
19 if the Council wishes, on the question of conflict of
20 interest and other issues raised today.

21 Turning now to the assistance from
22 Core Participants, as I stated at the start, legal
23 representatives of Core Participants have an important
24 role in assisting the Inquiry. One area where your
25 assistance would be a great benefit, as I have said,

1 would be the provision of statements from witnesses.
2 Each Core Participant has been provided with a list of
3 witnesses from its organisation from whom the Inquiry
4 team wishes a formal statement. It would expedite
5 preparation for the oral hearings if Core Participants
6 were prepared to assist the Inquiry by providing a copy
7 of any statements they have from such witnesses or any
8 others they consider to be relevant to their case to the
9 solicitor to the Inquiry.

10 If Core Participants are willing to assist in this
11 way, each witness statement should be sent to the
12 solicitor as soon as it is available and Core
13 Participants should not wait until all of the statements
14 have been prepared before sending them. As I said,
15 these statements will not be treated as evidence but
16 will form the foundation upon which detailed statements
17 will be taken by the Inquiry team.

18 Another area, as I have said, where
19 Core Participants and other organisations can help is in
20 the provision of documentary evidence relating to the
21 terms of reference. As I have stated, a considerable
22 amount of documentary evidence has already been
23 collected but if anyone has any specific evidence that
24 they are keen for the Inquiry to consider, can they
25 please send that to the secretary no later than the end

1 of November of this year.

2 I want to turn now to the practical arrangements for
3 future oral hearings.

4 The documentary material that has been gathered is
5 being added via the electronic Document Management
6 System, Relativity. Relativity is an E-discovery
7 platform which is licensed by the legal process
8 outsourcing company DTI and from kCura.
9 Core Participants will be provided with a user account
10 to access the material that is being used as evidence by
11 the Inquiry. Training will also be provided if
12 required. Some material has already been added to the
13 system and more will follow. There will be a procedure
14 in place to notify Core Participants of new material
15 when it is added to the system.

16 By the end of the Inquiry, this database will contain
17 the totality of the documents that will feature in
18 evidence, whether written or oral, which will be
19 considered by me in the preparation of my report.
20 Material from the database which was referred to in the
21 oral hearings will be published on the website following
22 the relevant session.

23 The Inquiry team will be in contact with
24 representatives of Core Participants in the next few
25 days with written details of the arrangements for

1 accessing the database.

2 This room will be the venue for the oral hearings.
3 12 desks of 24 seats will be set up for
4 Core Participants' legal representatives. 12 hardline
5 internet connections will be available from these desks
6 and public wi-fi will also be available for media and
7 public use.

8 In order to accommodate all of the
9 Core Participants, there will, as a general rule, be one
10 desk which has one connection and two seats per
11 Core Participant legal team. However, on days when not
12 all Core Participants intend to be present, the desk can
13 be used by additional legal staff from those Core
14 Participants who are, and the secretariat will manage
15 the allocation of desks.

16 The Inquiry will be working with electronic
17 evidence. We do not plan to display evidence on paper.
18 Therefore documentary evidence will be displayed on
19 monitors on the desks of Core Participants' legal
20 representatives, on the desk of the witness and on the
21 desks of the Inquiry team. The documents will also be
22 displayed on large screens placed around the room. The
23 evidence of each witness will be transcribed and
24 transcripts of the day's hearings will be loaded on the
25 Inquiry's website as soon as possible after the end of

1 each session.

2 Microphones will be set up on the desks of the legal
3 representatives, witnesses and Inquiry team and there
4 will be an induction loop system in place.

5 As I have already indicated, I am not yet in
6 a position to say when the Inquiry will be able to start
7 taking oral evidence in public but, when the hearings do
8 start, my intention is that the Inquiry will sit between
9 Tuesday and Thursday inclusive each week. We will
10 notify parties nearer the time of start and finish times
11 each day, as we will need to accommodate travelling
12 arrangements of witnesses and take other issues into
13 account.

14 Members of the public are welcome to attend the oral
15 hearings. However, numbers are limited due to room
16 capacity and fire safety regulations so admittance will
17 be on a first come first served basis. An information
18 leaflet on general safety and hearing room etiquette
19 will be prepared and issued to members of the public
20 attending these hearings.

21 There will be no opening statements made by the
22 Inquiry counsel or by or on behalf of any of the
23 Core Participants. In accordance with longstanding
24 judicial procedure in Scotland, and having regard to the
25 need to avoid unnecessary cost and public funds, the

1 stage of the Inquiry involving evidential and public
2 hearings will commence with the evidence of the first
3 witness.

4 In advance of the oral hearings, a list of the
5 proposed witnesses and the order in which they will give
6 evidence will be published on the website and, while
7 every effort will be made to follow the published order,
8 it would be appreciated that the order may change on
9 occasions but, where that occurs, as much notice as
10 possible will be given to Core Participants and
11 published on the website.

12 Each witness will give his or her evidence by
13 responding to questions from Counsel to the Inquiry.
14 Evidence will be taken on oath. Any documents to which
15 reference is made will be exhibited electronically on
16 screens visible by the witness, the Inquiry team, Core
17 Participants and the public.

18 My intention is that each witness should give all of
19 their evidence in one block, even where that evidence
20 relates to a number of different issues. That should
21 make it unnecessary to call witnesses to give evidence
22 more than once.

23 It is anticipated that all questioning of witnesses
24 will be conducted by Counsel to the Inquiry. Core
25 Participants will have the opportunity to suggest lines

1 of questions to Counsel to the Inquiry.

2 As this is not intended to be an adversarial
3 process, in other words it is an Inquiry not a court
4 hearing, there will be no routine cross-examination of
5 witnesses on behalf of Core Participants. If a Core
6 Participant wishes to cross-examine a witness, it will
7 be necessary to obtain leave from me to do that and, in
8 seeking leave, the Core Participant will need to
9 persuade me that cross-examination is necessary rather
10 than questions being directed but Counsel to the
11 Inquiry. The evidence of each witness will be recorded
12 by a stenographer and a transcript of each day's
13 proceedings will be published on the Inquiry website as
14 soon as possible after the end of each session.

15 As with any public Inquiry, representatives of the
16 media may attend and report on the proceedings if they
17 wish to do so. In addition, the proceedings may be
18 broadcast on radio and television but any arrangements
19 to do so will be such that they will not disrupt the
20 proceedings or distract the witness.

21 At the conclusion of the oral evidence I will
22 adjourn the Inquiry to enable Core Participants and
23 Counsel to the Inquiry to prepare final written
24 submissions based upon all of the written and oral
25 evidence submitted to me.

1 More detail of all of these aspects will be issued
2 as procedure directions or guidance notes and published
3 on the website prior to the start of the oral hearings.
4 If any of the Core Participants have any points to raise
5 or questions about these arrangements, please write to
6 the Inquiry secretary.

7 Ladies and gentlemen, that concludes the Preliminary
8 Hearing. Thanks to everyone for being so accommodating
9 and changing your busy schedules to attend this hearing.
10 A transcript of today's proceedings will appear on our
11 website as soon as possible.

12 The main channel for communication by the public
13 will be the website but anyone wanting to contact the
14 Inquiry about a specific issue should do so, in the
15 first instance, through the Inquiry secretary.

16 (12.32 pm)

17 (The hearing concluded)

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