EDINBURGH TRAM NETWORK

ADJUDICATION.

THE HILTON HOTEL CAR PARK WORKS.

This adjudication is concerned with a small portion of the works to be carried out in connection with the Scheduled Works referred to in the Edinburgh Tram (Line Two) Act, 2006, the re-configuration of certain car parking spaces in the car park of the Hilton Hotel near Edinburgh Airport. I set out below the reasons, on the basis of which I arrived at the decision in the adjudication which I intimated to the parties on 13th October, 2009.

The Referring Party in the adjudication, tie Ltd, is the employer in a contract (the "Infraco Contract") for the carrying out and completion of, *inter alia*, the work needed and the services requisite for, the delivery and subsequent maintenance of the Edinburgh tram network. The other party to that contract is an unincorporated joint venture (hereinafter referred to, *brevitatis causa*, as "the JV"), the joint adventurers in which are Bilfinger Berger UK Ltd, Siemens P.L.C. and Construcciones y Auxiliar de Ferrocarriles, S.A.. The JV is the Responding Party in the adjudication. The Referring Party (hereinafter referred to as "tie") seeks by way of redress the grant of a declarator to the effect that the JV is obliged under the Infraco Contract to carry out the Car Park Works at the Hilton Hotel in accordance with the Programme, and that without further instruction. The JV, on the other hand, contends that the requested declarator ought not to be granted, it being premature or academic, and in any event ill-founded because a further instruction would be needed before the JV could undertake those works consistently with its obligations under the Infraco Contract, and, in particular, the requirements of clause 18.17A.

In its Reply, the JV argued that the definition of the dispute between the parties was to be found in the Notice of Adjudication, where tie stated that

> "The dispute concerns the issue of whether the Responding Party is obliged pursuant
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> "to the Infraco Contract and without further instruction, to proceed with the carrying
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> "out and completion of the Car Park Works all in accordance with the Programme."

The JV distinguished between that matter (to which it gave the shorthand name of "the Instruction Dispute") and the difference which it said had arisen between the parties about the basis on which the Car Park Works, once carried out, would fall to be valued (the Valuation Dispute). The latter had not been remitted to me, albeit that it was the real bone of contention between the parties. So far as the Instruction Dispute was concerned, it sought to make clear that it did not dispute that the Car Park Works were "Third Party Obligations" as defined in the contract between the parties, and that it accepted that they were works which "it is obliged to carry out under the Infraco contract". What it did not accept was that it had to carry out the Car Park Works without further instruction from tie. To the contrary, it argued that it would be in breach of the Infraco Contract were it to do so. For the purposes of the dispute before me, it said, it did not matter whether the Car Park Works were properly to be regarded as being "Accommodation Works", and the reason that an instruction to proceed with the Car Park Works was not that they fell within the definition of Accommodation Works. Rather, the JV,

> "requires an instruction to proceed because of the obligations placed upon CEC
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> "and the Referring Party in the agreement between Stakis Limited and CEC set out
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> "in Schedule 13 Section B (the "Car Park Agreement") and the obligations in turn
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> "placed upon the Responding Party in respect of that agreement."

This point the JV expanded, arguing that it had to receive an instruction from tie that a licence gad been obtained from the Licensor allowing entry on to its land to do the Car Park Works, and that the Works could be commenced, for were it to do those works without the licence the JV would put tie in breach of its agreement with the owners of the hotel and would therefore itself breach clause 18.7A of the Infraco contract, which places it under obligation not to place tie in such breach of the Car Park Agreement.

In its Response, tie complains that the JV is seeking to alter the dispute in "what appears to be an attempt to preclude the adjudicator from considering the substance of the dispute between the parties". Its argument, shortened considerably, is that the section of the declarator concerned with the "further instruction" not only remains in dispute, but implicitly imports an assertion about the exclusion of the Car Park Works from the class of "Accommodation Works", since the latter require to be instructed before the JV is obliged to proceed with them. Tie denies that the arguments made

by the JV in relation to the need for instruction to proceed on account of the effects of clause 18.7A of the Infraco Contract are correct.

The Scope of the Dispute.

In view of the arguments which have been addressed to me, the first matter I am called on to decide is the extent of the dispute on which I am empowered to adjudicate.

The starting point for a consideration of that issue must be Schedule 9 to the Infraco Contract, and in particular, paragraph 14 thereof, which is the leading provision on adjudication under this contract. That postulates that a "Dispute" will come before an adjudicator in one of three ways : by way of paragraph 13, by way of sub-paragraph 10.1.2, or by operation of the statutory right to adjudication conferred by section 108 of the Housing Grants, Construction and Regeneration Act,1996. In a case of the last-mentioned class, the adjudication would be of a familiar type, and in seeking to establish the ambit of a dispute referred to the adjudicator one would have recourse to the authorities canvassed in the well-known line of cases leading up to the recent decision in **Quartzelec Ltd v Honeywell Control Systems Ltd [2009] B.L.R. 328**, to which I was referred by Mr M^{c}Millan for the JV. However, it is a matter of agreement between the parties, as I confirmed with them at the meeting held on 2nd October, that the works to be undertaken at the Hilton Hotel car park would fall within the definition of "Authorised Works" for the purposes of the Edinburgh Tram (Line Two) Act, 2006 asp. 6. Accordingly, by virtue of sub-section 79(2) of that Act, the right to adjudication afforded by section 108 of the 1996 Act is excluded, because sub-section 79(2) disapplies section 108 in the case of Authorised Works. To the present adjudication, therefore, the authorities on the scope of a dispute under the statutory adjudication scheme have no direct application.

Paragraph 13 is similarly irrelevant to the present discussion, for it applies to the case where a mediation has taken place and again it is a matter of agreement, confirmed at the meeting held on 2nd October, that this is not a case in which a mediation had taken place. The focus of concentration must therefore be sub-paragraph 10.1.2 of Schedule 9, for the very broad definition of "Dispute" which appears in page 250 of the Infraco Contract, and to which one would normally expect to be able to look to for assistance, is in fact so broad as to be of little help in this context.

Paragraph 10.1, of which sub-paragraph 10.1.2 forms part, is posited upon the failure, in a given case, of the Internal Resolution Procedure. It declares that, following such a failure, the parties are to seek to agree by which of three mechanisms set out in the paragraph, mediation, adjudication or litigation "**the** Dispute" (my emphasis) is to be resolved. The definite article refers the reader back to that dispute which was not resolved in the Internal Resolution Procedure within twenty days of the notification by which that procedure was begun. The metes and bounds of the dispute which may be sent to adjudication are therefore to be found, *prima facie*, in the notification sent under paragraph 9.1. Tab 14 in tie's productions is the letter of 11th August by which recourse to the Internal Resolution Procedure was started. It sets out in specific terms the disputed question: whether,

> "...the Infraco is obliged pursuant to the Infraco Contract and without further
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> "instruction to proceed with the carrying out and completion of the construction/
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> "reconfiguration of the car parking spaces at the Hilton Hotel...all in accordance
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> "with the Programme."

Prima facie, that was the subject of the dispute referable to adjudication. I accept, however, that neither party is bound to present to me the arguments which were advanced in the position papers issued under the Internal Resolution Procedure, or, indeed, in earlier correspondence. They would not be so bound were the matter ultimately to find itself in court, and if the adjudication process is to be of assistance in resolving disputes so that they need not go to court, (as it is presumably intended to be, standing the fact that, absent special agreement to go straight to court under sub-paragraph 10.1.3, it is a step which must be gone through before recourse is taken to the court – see paragraphs 3 and 11 of Schedule 9), the same must hold true for the adjudication process. The dispute may be widened by the nature of the defence to the initially advanced contentions of the referring party, or it may be narrowed, as previously contested elements of the argument are accepted by one side or the other. The referring party may not choose to refer all of that earlier advanced in correspondence, and the responding party may concede elements of the previously disputed material. Ultimately, therefore, as in the case of a statutory adjudication, the Dispute comes to be the contentions originally advanced insofar as those are still insisted in at the point of referral, as met by the defence thereto.

In this case, tie seeks a declarator which in large measure reflects the question posed in the letter of 11th August, and the JV contests its grant. Whether tie is entitled to a declarator of the matters encompassed within the drafting of the one proposed in the Notice of Adjudication was the Dispute put before me, as it was the Dispute which went to the Internal Resolution Procedure without success. In my opinion, the question whether or not the JV is placed under an obligation to do the Car Park Works is logically a different question from the identification of the contractual basis for the valuation of the work it does in constructing or reconfiguring the Hilton Hotel's car parking spaces in the event that that work is undertaken by the JV. Either question could arise without any disagreement existing between the parties about the other. Whether the JV now has to do the Car Park Work is an issue which does not depend on how it is to be paid for that work. How the work it does is to be valued does not depend on whether or not the JV is presently obliged to carry it out. I therefore accept the argument presented to me by the JV that what it has termed the "Valuation Dispute" has not been placed before me.

The Prematurity or Academic Nature of the Declarator.

The fact that the declarator relates to the question whether the JV is presently obliged to carry out the Car Park Works under the Infraco Contract rather than the valuation of those works does not mean that the declarator is therefore academic or premature, and thus incompetent. The JV denies that it is obliged to do the works without further instruction, as the declarator would assert, whereas tie contends that the JV is indeed obliged to undertake that work in accordance with the Programme, and that without any further instruction from tie.

So far as I can see, it is not said by either side that the works are in fact underway, and, implicitly at least, it seems to be common ground between the parties that no instruction to proceed with the Car Park Works has been given. The more recent Programmes adduced before me show the works in question as being timetabled to take place in September and October, 2009. It cannot in these circumstances be either academic or premature to submit to adjudication a dispute as to whether or not, absent the aforesaid instruction, the JV is contractually obliged to do the works in question. I therefore reject the JV's contention that the proceedings are academic or premature. In my view, in the circumstances disclosed by the papers before me, the declaratory conclusion sought by tie is entirely competent.

Paragraph 5.3 of tie's Reply.

In paragraph 5.2 of its Reply to the JV's Response to the Referral, tie picks up on statements made by the JV in the Response to the effect that the Car Park Works are Third Party Obligations and that those works are ones which, as it accepts, the JV is obliged under the Contract obliged to carry out. In the following paragraph, tie submits that it must follow from these statements that the declaratory has to be granted; at least insofar as it states that the JV is "obliged under the Infraco Contract to proceed with the carrying of of the Car Park Works in accordance with the Programme".

That submission raises the question whether I have the power to grant a declarator in terms narrower than those in which it is sought, or whether I am restricted to either granting the declaratory in the terms in which it is drawn or refusing it. I invited submissions from the parties on this aspect of my powers. As might be expected in light of the terms of paragraph 5.2, at the meeting held on 2nd October, tie argued that I could grant the declarator in narrower terms, whilst the JV argued that I could not. In the events which have happened, however, I am spared the necessity of deciding this question because in its letter to me dated 6th October, tie advised that it was not seeking that I grant a declarator in "lesser or different terms to that set out in paragraph 7.1 of the Notice of Adjudication and the Referral." In light of that alteration in tie's position, I am no longer required to consider whether, if I were to regard the declarator as being justified only in part, I ought to grant a declarator in restricted terms, as I had understood paragraph 5.3 to request that I did. The choice which is now put before me is to grant the declarator in full or not at all.

The Defence based on Clause 18.17A.

In view of the JV's expressed position that it accepts that the Car Park Works fall within the Infraco Contract's definition of "Third Party Obligations", and that (subject, no doubt, in order that its overall submission should be consistent, to an implicit qualification that the further instruction on which the JV has made no little averment is given) the Car Park Works are ones that the JV is obliged under the Infraco Contract to do, the dispute between the parties has come to be significantly narrower than tie apprehended it to be when it served the Referral. A number of issues, earlier the subject of controversy in connection with the contractual basis for valuing any work done by the JV to secure that the Car Park Works were completed, no longer arise, and I therefore restrict myself to deciding on those which appear still to be in issue and to be germane to the resolution of the Dispute brought before me in the shape of the declarator.

The critical remaining issue appears to be that about the need for further instruction to bring into operation an obligation on the JV under the Infraco Contract to execute the Car Park Works. Although the declarator contains reference to the duty of the JV to do those works "in accordance with the Programme", I do not detect in the submissions made to me any argument to the effect that, *esto* the JV has been brought under a present obligation to do the Car Park Works, it need not do them in accordance with the Programme. If there be any issue about the reference to the Programme in the conclusion, it can only be on the basis that there can be no obligation to commence work by a date shewn on the Programme if that date is before the date of the instruction to proceed, if, on the true construction of the Infraco Contract, there is indeed a need for such an instruction to impose on the JV a present obligation to proceed with the Car Park Works. Any such issue is therefore but a function of the dispute about the instruction question, and is carried by the result of the decision on that question. Although I am given power under Part 9 of the Schedule to take the initiative in ascertaining the facts and the law, this does not, in my opinion, go the length of entitling me to raise *ex proprio motu*, legal or factual points about matters which are not already the subject of contest between the parties, or to put forward and decide upon arguments about points as to which the parties are not already in dispute in the adjudication. I do not, therefore, consider any issue about the Programme independent of the instruction question, for I consider that there is no such issue before me.

I have already outlined the argument on the basis of which the JV contends that it requires to receive an instruction from tie to the effect that there has been granted a licence to occupy hotel land before it comes to be under a prestable obligation to do the Car Park Works. The crucial clause on which it founds is clause 18.17A of the Infraco Contract which, put shortly, requires that in "delivering the Infraco Works" the JV will take "all necessary steps" to secure that, *inter alios*, CEC, is not put in breach of its obligations under the Third Party undertakings and commitments contained in section B of part 13 of the Schedule. Numbered among those undertakings and commitments are those embodied in the Minute of Agreement between CEC and the former owners of the Hilton Hotel anent the car park of that hotel.

The Reply to the Response made by tie seeks to counter that argument in paragraphs 5.8 and 5.10. In the former paragraph, it contends that the Clause 18 process for obtaining access to lands

required for the purposes of the tram works requires the JV to give forty days notice to tie of any need for access or Land Consents, but that no requirement appears in that process for tie to give instruction to the JV in relation to proceeding with the work. The JV in turn asserts that that argument is irrelevant because the process to which it appeals relates to the Infraco Works rather than the Car Park Works (paragraph 3 of the Retort). Tie's argument in paragraph 5.10 is to the effect that clause 18.17A of the Infraco Contract does not suggest that the JV "must receive instruction from the Referring Party that a licence under the Car Park Works Agreement has been obtained as a condition of the Car Park Works being commenced", because it contains no reference to such instructions. Rather, is it for the JV to provide tie with the requisite information about start dates for work etc. which is needed for the purposes of clause 8 of the Minute of Agreement anent the car park. This, tie says, the JV has not timeously done.

I accept the argument advanced by the JV that the process for securing access on forty days notice to which tie refers in paragraph 5.8 of its Reply to the Response is not relevant to the Dispute. It is not therefore necessary for me to form a view as to whether or not anything done by the JV might be regarded as bring out of time in relation to the timetable laid down in the clause of the Infraco Contract that sets up that process. Although the clause is not specifically mentioned therein, paragraph 5.8 is clearly paraphrasing clause 18.4 of the Infraco Contract. That clause, however, only relates to Temporary Sites. Such sites are defined by reference to red areas on the drawings in part 31 of the Schedule. The drawings produced to me show that the re-configuration and construction of the Hilton Hotel car park is to be undertaken at other locations (areas coloured yellow and green) within the Property let to the Hilton Hotels chain. It is quite apparent from the terms of Section 12 of Section A of part 13 of the Schedule and the correlative drawings that the Car Park Works are not intended to take place on Temporary Sites, and therefore that, in relation to the Car Park Works, the procedure laud down in clause 18.4 is irrelevant. It has nothing to do with clause 8 of the Car Park Agreement and the obligation to obtain a licence to undertake the Car Park Works which that places on CEC.

I accept, of course, that tie is correct to say that in order that it should be able to seek a licence under a mechanism such as that set up by clause 8 of the Car Park Agreement, which requires it to give notice to a landowner or tenant of the date when work is timetabled to start on his land, it must know in advance when that work is to begin. However, the current revised Programme accepted by

tie under sub-clause 60.4.1 of the Infraco Contract will afford it that information. Indeed, it is noticeable that paragraph 8.1.1.1 (b) of the Car Park Works Agreement presupposes that the Licensor will be given information by tie drawn from that very source. I see no evidence from the contractual material before me to suggest that the JV need give tie more or other, notice of its intentions anent the start date for the Car Park Works than that which is provided by the up- to-date revised programme. Armed with that information, tie, or in this case, CEC, to which, one assumes, tie is intended to pas the programme information, is enabled to procure the necessary licence under clause 8 of the Car Park Works Agreement to allow the JV to go on to Hilton Hotels' land in order to do the Car Park Works. As it happens, the evidence of the correspondence would indicate that the JV has, in fact, advised tie separately of its intended start date, but in terms of contractual obligation that appears to have been unnecessary, and to have been the extension of a courtesy. I do not therefore think that tie's appeal to clause 18.4 of the Infraco Contract and clause 8 of the Car Park Works Agreement provides a sound rejoinder to the JV's contention that tie requires to instruct it to proceed with the Car Park Works if it (the JV) is not to breach clause 18.17A of the Infraco Contract.

In my opinion, however, a sound rejoinder to the JV's fundamental case about the need for instruction does arise from a consideration of the matters canvassed before me in relation to tie's case based on clause 18.4. On page 3 of the Retort, the JV rightly points out that the Car Park Works with which the Dispute is concerned do not form part of the Infraco Works, a fact which can be seen, *inter alia*, from the terms of paragraph 12.11 of Section 12 of Section A of Part 13 of the Schedule which the JV quotes in argument. But a consequence of that conclusion which, unsurprisingly, goes unmentioned by the JV is that its argument that clause 18.17A gives rise to an obligation on tie to instruct the JV that a licence has been obtained is misconceived. That argument is founded upon the proposition that, if the JV were to go on to the Hilton Hotel's land in order to execute the Car Park Works when a licence had not in fact been granted to the Council, the latter would be put into breach of the Car Park Works Agreement and the JV would therefore breach clause 18.17A. Since that result cannot be intended by the Contract, and the JV would not know when a licence had in fact been issued, the argument proceeds, tie must be obliged to instruct the JV that the licence has been granted once that licence has in fact been obtained. In my opinion that line of reasoning is not soundly based. On a true construction of clause 18.17A, that clause would not apply to the kind of situation the JV figures in argument.

Clause 18.17A includes an undertaking by the JV "to take all necessary steps in delivering the Infraco Works" to ensure that neither CEC nor tie is put into breach of the Car Park Works Agreement. The undertaking does not extend beyond circumstances amounting to "delivering" the Infraco Works. The verb is a little curious, but from its grammatical position and the definition accorded the "Infraco Works" in the Infraco Contract, I take it to be intended to be a synonym for "executing" those works. If that be correct, it is only in relation to its execution of the Infraco Works as defined in the Infraco Contract (or, if the word, "delivery" is not intended as a synonym for "executing", in relation to the bringing to fruition of the intended result of the Infraco Works, *videlicet*, the Edinburgh Tram Network) that the JV gives any undertaking, and it is only in relation to the Infraco Works that it could be guilty of a breach of clause 18.17A. Since, as the JV itself points out, the Car Park Works are not "Infraco Works", it follows that any act or omission by the JV in respect of those works would not entail the commission of a breach of clause 18.17A by the JV. It follows further that the need to avoid a breach of that clause by the JV cannot be a reason which implies a need for tie to instruct the JV that a licence has been granted and that it is now to proceed with the Car Park Works. Since the proposition that it implies just that is the cardinal contention in the JV's argument in favour of the need for further instruction before the JV is placed under a prestable obligation to commence the Car Park Works, I hold that that argument fails. It follows that the JV's case for the refusal of the declaratory conclusion (which, in the event, has come to be periled on the need for instruction as to the issue of a licence) also fails.

It seems to me that the JV's case fails for another reason. Whether the clause of the Infraco Contract which bears on the JV's acts and omissions in relation to the Car Park Works is clause 18.17A, clause 18.17B (though the latter is concerned only with the JV's failure to perform, rather than its performance at the wrong time) or otherwise, it seems to me that that which the JV is entitled to receive from tie in order that it should come under a present obligation to do the Car Park Works is intimation that a licence allowing the JV to do the Car Park Works has been granted by Hilton Hotels. That, however, is not in my view an "instruction" for the purposes of the present dispute, as it is merely the communication by one party to another of the existence of a given state of facts. There are, in the English language, some circumstances in which the word "instruction" or one of its cognates is used in relation to the communication of something by teaching (instruction in the doctrines of the church is an example that comes to mind), but the use of the word as meaning the transmission of mere information, such as would be involved in intimation that a licence now exists, is now archaic, and it does not seem to me to be the correct meaning to give to the word

"instruction" where it appears in the declarator or the Infraco Contract. The JV seems to have appreciated the difficulty, for I notice that when it came to draft its Retort, it placed inverted commas round the word when it used it to describe that which it contended that it was entitled to receive from tie, rather as though it realised it was denoting as an instruction that which it knew not to be one.

In my opinion, the declarator sought by tie has to be read and construed in the context of a building contract dispute, for that is the context in which it is used. In that context, as it seems to me, the giving of an instruction connotes the giving of directions or orders by one party to another whereby the latter is required to do, or to refrain from doing, something, the directions or orders being given, usually, by virtue of some contractually granted power to give such directions or orders. If the reference in the declarator to instructions be read as a reference to such directions or orders, it is evident that the intimation which, as a matter of commercial common sense, it must have been intended that the JV would be given (namely, intimation that the requisite licence had been granted) would not fall into the class of communications which could be regarded as being instructions. That being so, the fact that intimation of the grant of a licence might indeed (and, in my view, would) need to be made to the JV, would not involve the need for any instruction to proceed to be given. Tie could comply with that required of it by means of a simple letter of intimation shorn of all imperative language. Accordingly, the JV's admitted obligation to do the Car Park Works must exist in the absence of future instruction, as the declarator seeks to assert. For this reason, too, the JV's challenge to the grant of the declarator fails.

On the view which I have formed about the scope of the Dispute and the absence of any argument between the parties about the question of the Programme, it follows from the above that tie is entitled to the declarator which it seeks, and I pronounce declarator accordingly. Although tie has been successful on the merits, the JV has succeeded on the issues about the scope of the Dispute. I therefore take the view that although the parties are jointly and severally liable to me for my fees, the liability therefor *inter se* ought to be divided so as to reflect the relative success of the parties. I have therefore directed that one – third of my fees should be borne by tie and two – thirds of them should be borne by the JV.

Robert B. M. Howie.

Edinburgh,

15th October, 2009.