

OPINION OF SENIOR COUNSEL

for

tie LIMITED

in re

EDINBURGH TRAM NETWORK

NOTIFIED DEPARTURES

and

tie CHANGES

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1. The issue which arises for immediate consideration concerns what has been referred to as “disputed Notified Departures”. The issue has to be considered in light of the decision of Lord Dervaird of 8 August 2010 in the matter of the “Murrayfield-Underpass Structure S21C”. In the course of that decision Lord Dervaird expressed his views with respect to the interpretation and application of Clause 80 of the **Infraco Contract** and made incidental observations on the application of Clause 34 of the **Infraco Contract**. While Lord Dervaird’s observations on the construction of Clause 80 and in particular Clause 80.13, may be open to doubt they are not made the subject of challenge for the purposes of the present opinion.
 2. In circumstances where **tie** propose a variation to the **Infraco Works**, which are identified as **tie Changes** in accordance with the **Infraco Contract**, they are to be dealt with in accordance with Clause 80. If **tie** issue an instruction in terms which differ from the **Base Case Assumptions** there will be a **Notified Departure** from the **Infraco Works** and pursuant to paragraph 3.5 of Schedule Part 4 **tie** will be deemed to have issued a **tie Notice of Change**. The provisions of Clause 80 with respect to a **tie Change** will then apply as if **tie** had required a **tie Change** and served a **tie Notice of Change** on **Infraco**: Clause 80.24.

3. It is accordingly to be noted, and was expressly acknowledged in the context of the Murrayfield-Underpass Structure Adjudication, that where a **tie** instruction constitutes a variation to the **Infraco Works** there may be a **Notified Departure** in terms of Schedule Part 4 and consequently a deemed **tie Change** to which the provisions of Clause 80 shall apply. This then leads into Lord Dervaird's construction of Clause 80.13 and the consequent requirement for **tie** to give a **tie Change Order** in terms of Clause 80.15 if they wish work to proceed pending the determination of a Dispute Resolution Procedure.
4. In circumstances where a **tie** instruction is not regarded (at least by **tie**) as constituting a **Notified Departure** pursuant to Schedule Part 4 it has been suggested that Clause 80 has no application. That, as a matter of generality, is correct. If **tie** issues an instruction which does not give rise to a variation of the **Infraco Works** so as to constitute a **Notified Departure** then it will not be deemed to have issued a **tie Notice of Change** and there will be no **tie Change** for the purposes of Clause 80. It is however necessary to have regard to the particular provisions of Clause 80.20 which will apply where there is a dispute between **tie** and **Infraco** as to whether or not an instruction from **tie** would amount to a **tie Change**.
5. Clause 80.20 provides as follows,

“If, having received instructions from tie or tie’s Representative, the Infraco consider that compliance with those instructions would amount to a tie Change, then the Infraco shall comply with the instruction and shall within 20 Business Days of any instructions being received, notify tie of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by tie of such an Estimate, Clause 80.1 and 80.16 shall be deemed to apply *mutatis mutandis* to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a tie Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by tie) then the provisions of this Clause 80 (tie Changes) shall apply to such instructions.”

The provisions of this Clause may not be distinguished by their clarity but I would take from them the following:

- If **tie** issue an instruction with respect to the **Infraco Works** then **Infraco** must comply with such an instruction in accordance with the provisions of Clause 34.1.
- If **tie** insist that the instruction is not a variation to the **Infraco Works** and that there is accordingly no **Notified Departure**, then there will be no deemed **Notice of Change** pursuant to paragraph 3.5 of Schedule Part 4. Consequently the instruction would not amount to a **tie Change**.
- If **Infraco** consider that the instruction does amount to a **tie Change** then the provisions of Clause 80.20 apply. In such circumstance i.e. where there is what has been referred to as a “disputed Notified Departure” then **Infraco** must proceed with the work as instructed. Thus, “Infraco shall comply with the instruction”.
- Clause 80.15 and 80.16 do not apply to such an instruction. Rather, they “shall be deemed to apply *mutatis mutandis* to the work carried out by Infraco in complying with such instructions.” It follows in my opinion that **Infraco** must carry out the work instructed as if **tie** had issued a **Change Order** to that effect. If the instruction is then determined to be a **tie Change** then **Infraco** will be entitled to claim demonstrable costs as provided for by Clause 80.16, prior to the determination of any **Estimate**.

6. The consequence of the foregoing is that where there is a disputed Notified Departure **Infraco** must comply with the **tie** instruction and carry out the work as instructed. If the instruction is subsequently determined to be a **tie Change** then the instruction will be treated as if **tie** has issued a **Change Order** with the result that prior to the determination of any **Estimate** **Infraco** will be able to recover their demonstrable costs.

7. In summary, where **tie** wish to issue an instruction which they do not regard as a variation to the **Infraco Works** which would result in the occurrence of a **Notified Departure** they should give such an instruction pursuant to Clause 34.1 and advise **Infraco** that in the event that the instruction is considered by **Infraco** to amount to a **tie Change** they must, pursuant to their obligations under Clause 80.20, carry out the work as instructed. **Infraco** cannot delay compliance with such an instruction pending the submission of an **Estimate** or pending the resolution of a dispute regarding an **Estimate**. The work which is carried out in compliance with the instruction is “deemed” to be carried out pursuant to a **tie Change Order** with the result that if the instruction is determined to be a **tie Change** **Infraco** will enjoy the benefit of Clause 80.16 with respect

to the recovery of demonstrable costs prior to the determination of any **Estimate. Infraco** cannot delay the execution of the instruction pending any Dispute Resolution Procedure as to whether the instruction results in the occurrence of a **Notified Departure**. Per Clause 80.20 **“Infraco shall comply with the instruction”**.

**Parliament House
Parliament Square
Edinburgh
Scotland**

THE OPINION OF

22 September 2010

RICHARD KEEN QC

OPINION OF SENIOR COUNSEL

for

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