

## Glover, Joanne

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**From:** Fitchie, Andrew  
**Sent:** 29 September 2010 20:13  
**To:** Steven Bell; Anthony Rush  
**Cc:** Richard Jeffrey; david\_mackay@██████████ Glover, Joanne; Stewart McGarrity  
**Subject:** Senior Counsel's advice - Summary of telephone call at 6pm this evening

**Importance:** High

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

### Legally privileged and FOISA exempt

### Urgent - Restricted distribution

All

Following our instructions to Richard Keen this morning (thanks to Tony for contribution here and to Jo for working on this until late last night), he was able to manage a call before leaving. We discussed the complexity of the current situation which he likened to "three dimensional chess". After testing a number of points and avenues with me, his advice is, I believe, clear and robust from a strategic and contractual standpoint:

1. Following **tie's** formal rejection of the Princes Street RTN rectification plan, **tie** needs to have the courage of its convictions. The issue of the RTN on the defective works was an intentionally serious formal move. Short of termination, the next move by **tie** would be to recoup the value paid for the defectively constructed asset in Princes Street - which, on **tie's** engineering assessment and on the basis of Approval Body acceptance, is **nil** until the substandard works and materials are removed and re-installed, using a integrated, assured and approved Design in compliance with the ERs.

The Performance Bond should be called by **tie** at the full value (ca £9mio) of the Princes Street Works, deploying the Princes Street RTN as the default notice which is certified and demonstrated to the Bondsman.

2. **tie** should then issue a Clause 37.1 instruction to BSC (this may in effect have already been issued within the letter communicating rejection of the rectification plan) for the immediate removal of the defective works and materials and the replacement of the Design, giving BSC a short time period for this to be commenced - 5 BD was discussed - but in light of the 30 day period for the rectification plan and the prior lengthy delay in BSC responding at all, this time period can be short. Clause 37.1.1 allows for **tie** to give timelines.

3. If BSC move visibly ahead to comply with the 37.1 instruction, the matter ends there for the time being until such time as **tie** wishes to instruct the installation of replacement works. If BSC refuse the 37.1 instruction or put this matter into DRP, **tie** then notifies operation of Clause 37.2 and either (i) as an intermediate step, calls the two PCGs requiring Siemens AG and Bilfinger Berger AG to remove the defective works and materials and replace the Design; or (ii) calls the performance bond again in an amount to defray the estimated costs of removing the defective works itself or procuring third parties to remove the defective works and/or replace the Design.

If BB AG and Siemens AG refuse the PCG call, **tie** acts as in 3 (ii) above.

4. RK continues to have reservations about the use of Clause 87 (Suspension) because of the "breathing space" it would afford BSC, as well as potential battery of minor arguments about how the suspension was interfering with their supply chain etc. He regards as it as absolutely right to be looking at how to force BSC to confront Design production; he is also alive to the issue of **tie** being seen to permit BSC continuing with deficient on-street methodology and no Design - but see this as secondary to **tie** needing to act on the heels of the RTNs.

5. I was able to discuss briefly with Richard the considerable importance of live parallel negotiations and the possible effect of the above on them. He said that there could be unproductive speculation about BSC's next moves but momentum for **tie** is important. He, understandably, is not in a position to judge the equilibrium between contract and negotiating positions, but certainly views access to the performance securities as legitimate at this point and the way to prevent a stand off while BSC simply swallow time.

6. We agreed that dates would be set for consultation on his return from Canada where he will be for five days.

**May I suggest a call early tomorrow to review this advice. I have copied Richard Keen (with thanks) to ensure continuity.**