

**IN THE MATTER OF THE EDINBURGH TRAM PROJECT**

**BETWEEN:**

**TIE LIMITED**

**AND**

**BILFINGER BERGER UK CIVILS LIMITED, SIEMENS PLC and  
CONSTRUCCIONES DE FERROCARRILES S.A.**

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**INSTRUCTIONS TO SENIOR COUNSEL  
TO ADVISE IN RELATION TO GROUNDS FOR TERMINATION  
OF THE INFRACO CONTRACT**

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**Richard Keen, Q.C.**  
Dean of Faculty  
Parliament House  
EDINBURGH  
EH1 1RF

**DLA Piper Scotland LLP**  
Collins House  
Rutland Square  
EDINBURGH  
EH1 2AA

Tel:

Fax:

FE: ASF

## INSTRUCTIONS

Senior Counsel is instructed by Instructing Solicitors who act on behalf of **tie** Limited and The City of Edinburgh Council. Senior Counsel is respectfully asked to focus initially on his assessment of the set of questions put to him by these instructions. These are intended to assist in forming the advice sought, but are in no sense restrictive or exclusionary.

The central objective of these instructions are to obtain Senior Counsel's view on the strength of **tie's** arguments to support termination for Infraco Default and the quality of the evidence underpinning those arguments.

## THE ACCOMPANYING PAPERS

Counsel receives with these instructions the following papers for his consideration:

### 1. DRAFT A

A draft letter prepared by Instructing Solicitors which would be issued and dispatched by the client pursuant to Clause 90.1.2 of the Infraco Contract. *[At Bundle I, divider 1]*

### 2. DRAFT B

A draft Remediable Termination Notice prepared by Instructing Solicitors which would be served under cover of Draft A in accordance with Clause 90.1.2 of the Infraco Contract on BSC and in compliance with the Notice provisions of the Infraco Contract Clause 111. *[At Bundle I, divider 1]*

### 3. Contract administration correspondence comprising evidence of BSC breaches of Contract ordered in the following way:

In **Bundle I**, certain individual elements correspondence, reports and reference papers which are specifically mentioned in the body of these instructions.

In **Bundles II, III and IV**, selected contract administration correspondence which relates to the distinct heads of breach by the Infraco. Instructing Solicitors have endeavoured to group these materials around the facts of each Infraco breach. A further note to assist in navigation of these papers will follow. Bundle II contains relevant contract administration correspondence from January 2010.

### 4. Copy Infraco Contract dated 14 May 2008 and its Schedule Parts 1, 2, 4, 9, 22, 23 and 24, **Bundle V**.

## THE OPINION FOLLOWING CONSULTATION

Instructing Solicitors understand that Senior Counsel is fully committed during the days following 8 July. The intention would be for Instructing Solicitors to prepare a written note of Counsel's views expressed at consultation for Senior Counsel to consider and agree.

## CONSULTATION

Instructing Solicitors look forward to meeting Senior Counsel in consultation on the afternoon of 8 July at 4.30pm, Parliament House. Should Counsel require any further information or discussion before then, he is invited to contact Joanne Glover of Instructing Solicitors in the first instance until 30 June (0131 345 5170) thereafter Andrew Fitchie (0131 242 5514). In attendance at the conference are expected: Richard Jeffrey (Client Chief Executive), Steven

Bell (Client Tram Project Director), Stewart McGarrity (Client Finance Director), Graeme Bissett (Client non Executive Director), Tony Rush (consultant to **tie**), Andrew Fitchie and Joanne Glover (Instructing Solicitors).

## GLOSSARY FOR SENIOR COUNSEL'S EASE OF REFERENCE

"**BSC**" means the unincorporated consortium comprising Bilfinger Berger Civils UK Limited, Siemens Plc and CAF s.a.<sup>†</sup> who were awarded the Infraco Contract with **tie** Limited on 14 May 2008 on a joint and several liability basis.

"**CEC**" means the City of Edinburgh Council.

"**DRPs**" means the contentious matters referred by either **tie** or by BSC to the contractual dispute resolution process governed by Schedule Part 9 of the Infraco Contract.

"**ETN**" means the Edinburgh Tram Network.

"**Infraco**" or "**BSC**" means the Consortium.

"**Infraco Contract**" means the contract for the design, construction, testing, commissioning and maintenance of the Edinburgh Tram Network between **tie** Limited and BSC dated 14 May 2008.

"**Keating**" means Keating on Construction Contracts December 2008.

"**On-Street Works**" means any part of the Infraco Works involving the deconstruction and reconstruction of the public roads in order to install the track foundation and track works, notably from Haymarket to the East End of Princes Street.

"**ROGS**" means the Railway and other Guided Transport Systems (Safety) Regulations 2006.

"**SDS Provider**" means Parsons Brinkerhoff, the design consultancy procured in October 2005 to develop and produce the tram scheme design, whose contract with **tie** Limited for design services was novated to BSC under a novation agreement on 14 May 2008. The company is now owned by Balfour Beatty.

"**tie**" or "**tie Limited**" means the Instructing Solicitors' client and wholly owned subsidiary of the City of Edinburgh Council.

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<sup>†</sup> As detail: CAF in fact entered the Consortium through negotiation and counter party to the Infraco Contract at award by a deed of variation.

## BACKGROUND TO PREPARATION FOR TERMINATION

Senior Counsel is already aware of the serious contract administration difficulties and myriad disputes which have plagued the Edinburgh Tram Project for over 18 months. Irrespective of fault or genuine physical engineering impediment to works progress, the level of progress achieved by BSC on actual installation works is dismal by any objective industry standard. After 25 months of the original 39 month build programme, less than 15% of the Infraco Works have been carried out.

1. Despite 15 DRPs having been undertaken and more planned (some 50 identified), with a considerable number finding that the Infraco Estimates of the cost of the change have been seriously inflated, little improvement in BSC's attitude towards the production of competent, timely and professionally justifiable Estimates has occurred. The DRPs have driven out savings of £10.6 million for **tie** (representing aggregate reduction to Infraco claims of over 60%) but it is not practical to envisage continuing to resolve every single difference of opinion through adjudication. At the core of the BSC position have been two immutable convictions: their entitlement to extension of time and prolongation cost due to **tie**'s failure to complete utilities diversions and their opinion of entitlement to **tie** Changes in respect of all design development. **tie** has accepted that an extension of time of nine months is reasonable on account of this delay but the inability of BSC to present properly calculated and justified prolongation costs has led to **tie** withdrawing its interim offer of nine months EOT and six months cost. [See **tie** letter 18 June *Bundle 1, divider 2.*]

Unsurprisingly, political and public opinion about not only the Project but also the performance of BSC (especially Bilfinger Berger, the civils contractor) is turning from impatience to analysis of why BSC should remain contracted to **tie** at all.<sup>‡</sup> The war of words between **tie** itself and BSC has however been calmed intentionally, while intensive commercial effort seeks out if there is scope for a compromise which would permit an appreciable segment of Phase 1A of the Edinburgh Tram Network to be completed by the BSC Consortium. These efforts over a period of approximately six months have at last led to productive engagement by BSC, as opposed to an obdurate and, in many ways, increasingly truculent approach to the administration of the Infraco Contract. The timeframe given for these in-depth and "without prejudice" commercial and technical negotiations to reach outcome is no later than early August 2010. At their heart<sup>§</sup> is the concept of a guaranteed maximum price for a defined scope (Airport to East End of Princes Street) with an assured, integrated design to be constructed and commissioned to a new programme, backed by recalibrated liquidated and ascertained damages. Nevertheless it is very important that **tie** plans for the eventuality that these negotiations break down (pricing/risk allocation will inevitably be a very contentious subject). If no compromise is achievable, a termination of the Infraco Contract is an outcome that must be countenanced and planned.

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<sup>‡</sup> Counsel is referred to the CEC report dated June 2010. [*Bundle 1, divider 2*]

<sup>§</sup> Procurement considerations and risk (lying in any event with the public sector) are beyond the ambit of these instructions; Instructing Solicitors recognise and have advised on the implications for **tie** and CEC as contracting authorities under the Public Procurement Regs. [Instructing Solicitors' Note at *Bundle 1, divider 2* as an example]

## **Infraco Breaches**

2. In order to bring BSC (as a conjoined counterparty)\*\* to a negotiating mindset, **tie** has taken a far more assertive approach since the beginning of 2010. Progressively in the last three to four months, **tie** has pinpointed key BSC failings, alongside the use of DRPs to force change order quantum clarity, (even if the adjudication awards regarding interpretation of the contract have not been entirely supportive or conclusive). Leaving as a backdrop the well documented demand for better BSC performance and re-statement of complaints over a host of minor, but continual, failings by BSC, **tie** has targeted seven main interconnected heads of delinquent BSC performance:
- BSC's refusal to comply with explicit instructions under Clauses 80.13 and 34.1 to progress the works On Street (this matter has been referred to DRP by Infraco in context of a **tie** Change claim);
  - BSC's failure (after 25 months in contract and five years on from SDS Provider appointment) to deliver an assured, integrated and completed design for the track work, its foundations and road reconstruction following installation;
  - BSC's failure to manage the SDS Provider in the production of Design;
  - BSC's failure to achieve a rate of progress consistent with the contractual obligation to proceed with the works with due expedition and in a timely and efficient manner (Infraco Contract Clause 60.1) without delay, to achieve timeous delivery and completion of the Infraco Works;
  - BSC's failure to perform its core obligations under Infraco Contract Clause 7 (Duty of Care and General Obligations in relation to Infraco Works);
  - BSC's failure to comply with the provisions of the Infraco Contract Clause 80 (**tie** Change); and
  - BSC's failure to deliver Best Value under Infraco Contract Clause 73 (Best Value).

**Senior Counsel is referred to the two drafts A and B in *Bundle I divider 1* to see how Instructing Solicitors have approached the task of identifying the breaches, stating their materiality and connecting their impact with proof of material adverse effect on the carrying out and completion of the Infraco Works.**

## **Defective works in Princes Street**

3. In the fourteen days preceding the issue of these instructions, it has emerged that the trackwork installed in Princes Street contains manifest deficiencies in that (i) the design used by BSC is not integrated and capable of assurance and cannot therefore be approved by the Independent Competent Person and (ii) materials chosen by BSC for the road surfacing and vital immediate rail/ road interface area are not compatible and are already showing obvious dilapidation. In addition, the considered independent expert roads engineering view is that defects in the works installed may well pose appreciable physical

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\*\* Counsel will recall from previous instructions that the BSC Consortium behaviour (as between Bilfinger and Siemens) is dysfunctional, with Siemens previously disowning the difficulty with progressing the Civils Works and Bilfinger attempting to assert that design is not their responsibility.

health and safety hazard.<sup>††</sup> The Infraco has written attempting to explain these defects and tie has responded.<sup>\*\*</sup>

Irrespective of their technical significance or the complexity of rectification, these defective works in Princes Street were built under special supplemental agreement entered into in May 2009 whereby Infraco were remunerated (outside the contractual fixed price lump sum arrangement) on a demonstrable cost basis. The approximate value of the Princes Street installation claim is approximately £11 million in contrast to the original tender inclusion of £2.5 million. [See CEC Report at *Bundle I, divider 2*]

The position of Mr John Dolan, the contractual Independent Competent Person for ROGS purposes,<sup>§§</sup> is that he agrees with tie's assessment that the current Infraco design is not competent and could never be the basis for his certification (as is required under ROGs) that the Edinburgh Tram Network is technically safe to open for testing, commissioning and, ultimately, public service.

These new facts (see tie's letter 18 June *Bundle I, divider 3*) therefore support further clear tie positions that the Infraco is in breach of its obligations to exercise the contractual standard of care (Clause 7.1, 7.2 and Clause 7.3.13) when designing and constructing works so that these comply with the Employers' Requirements, do not put tie in breach of their obligations under the Tram Acts and demonstrate the application of Good Industry Practice. **In Instructing Solicitors' view, then:**

The presence of these defective works (installed under an arrangement to enhance production efficiency and obviate claims at additional cost to the Client), the total absence of an assured and integrated design,<sup>\*\*\*</sup> alongside the presence of a hazard in Princes Street must on any objective analysis be breaches, until corrected, which have a material adverse effect on the carrying out and completion of the Infraco Works.<sup>†††</sup>

The Infraco appears to have committed informally to providing an assured integrated design for mid July 2010 in the context of ongoing negotiations, but not formally. The BSC position on design integration and assurance has waived from statements about BSC having no responsibility for design to BB (particularly) being unable to "sign off" for professional integrity reasons [see Instructing Solicitors' e-mail to Client dated 11 June at *Bundle I, divider 3*]. This in itself is preventing the carrying on of the Infraco Works.

## **BDDI to IFC**

4. Senior Counsel is familiar with the vexed and complex issue concerning responsibility for payment for design development, including the two uncontested exclusions to Infraco's argued entitlement: Infraco Breach and Infraco Change. Instructing Solicitors have greatly valued Senior Counsel's input on this matter. At *Bundle I, divider 4*, Counsel will find the following documents:
  - **Site Minutes** extract showing a July 2009 management meeting between BSC and SDS Provider. These were obtained by tie on audit under Clause 104. Counsel's attention is drawn to the item which states:

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<sup>††</sup> See T Rush/I Baker Report [*Bundle I, divider 3*] and Bateman Paper.

<sup>††</sup> See *Bundle II, June*, Infraco letter of 9 June 2010 and tie response dated 15 June 2010.

<sup>§§</sup> See *Bundle I, divider 3*.

<sup>\*\*\*</sup> We are instructed that at this time there is no assured completed design for any part of the Infraco Works. See Client's note on design assurance at *Bundle I, divider 3*.

<sup>†††</sup> See also technical evidence: Bateman Report at *Bundle I, divider 3*.

"4	<b>BDDI - IFC Change</b>		
	<i>SDS reiterated commitment to assist BSC in securing Tie changes in respect of change from BDDI to IFC drawings.</i>	Note	
	<i>BSC will keep under review whether it is more efficient to convert SDS input into this process to some sort of fee based on outcome, but at present will maintain current basis of staff ATR or use of Construction Support (not ECS) resource.</i>		
5	<b>SDS Prolongation Claim</b>		
	<i>The management meeting on SDS commercial issues (M Foerder, K Russell, H Norton, S Reynolds, J Chandler) agreed to be necessary in the Design Management Meeting on 4/6/09, has not taken place. This to be arranged as early as possible."</i>	CBr/SRe	asap

- A December 2009 e-mail from Messrs Pinsent Masons to BSC attaching their comments on a form of draft agreement to be executed by BSC members. [Bundle I, divider 4]

The purpose of the draft agreement appears to be to incentivise SDS Provider to work on design development in such a way that always favours BSC ability to substantiate claims against tie (as Client), in exchange for SDS Provider limiting (or not pursuing) its claims against BSC for delay in the production of Infraco deliverables and design, required to enable SDS Provider to produce and complete design. It is instructive that Pinsent Masons make observations as to (a) the risk that BSC have on design delay (b) the propriety of the proposed agreement given Clause 11.5 of the Infraco Contract. It is also apparent that item 5 in the Site Minutes of July 2009 indicates that BSC recommend that SDS recover the costs of this design work through a Construction Support mechanism. This was an additional amount agreed by tie (at novation) to be paid to SDS Provider for their work in explaining/ clarifying IFC drawings at the point of issue; not to be paid to SDS Provider because BSC was requiring them to work on amending BDDI drawings.

- An earlier letter from BSC to SDS Provider dated 28 May 2009 *Bundle I, divider 4*. This letter appears to rebut claims by BSC but is less clearly connected to the above.

#### Senior Counsel's opinion sought

As a discrete issue, Instructing Solicitors ask:

1. What a reasonable conclusion on the meaning of these exchanges should be, specifically the intent of the draft agreement; and
2. If that conclusion were that an arrangement exists (or existed) between SDS Provider and BSC (instigated by BSC) to ensure that BDDI to IFC changes were orchestrated so as to enable BSC to assert Notified Departures (tie Changes) that would not be so unless SDS Provider demonstrated that BSC had not initiated the change by breach or as an Infraco Change, whether that arrangement would fall within Clause 92 of the Infraco Contract (Termination for Corrupt Gifts and Fraud), in particular Prohibited Act (d).



3. Whether such an arrangement, whatever its integrity, is consistent with BSC and SDS Provider duties of care owed to **tie**, particularly *Good Industry Practice (including 'good faith')* as defined in the Infraco Contract and the SDS Agreement.

## THE QUESTIONS FOR COUNSEL

Instructing Solicitors set out the specific questions which Senior Counsel is asked to address in consultation:

### QUESTION A

Applying the contractual test contained in Infraco Default (a) that a breach of any obligations must be having a material and adverse effect on the carrying out and completion of the Infraco Works for it to be a **ground for termination**: does Senior Counsel agree with Instructing Solicitors view that the BSC breaches of contract set out at 3 and 4 of these instructions and specified in drafts A and B are sustainable and adequate grounds for **tie** to issue the 90.1.2 Remediable Termination Notice? [See below for Instructing Solicitors view on the effect of such a Notice.]

Analysis:

Instructing Solicitors have considered the question of adjudication or Court proceedings about **tie's** Remediable Termination Notice and its legitimacy (see also McGrigor's pertinent comments at 35 in their detailed report).

Instructing Solicitors' view is as follows:

1. Since by its nature the RTN requests a response from BSC within 30 days (or a longer time if required and granted), the notice does not terminate the contract and cannot be a repudiation (if issued on erroneous view by **tie** of facts and the law). The RTN converts to a potential repudiation act when either the 30 days elapses or BSC state that they are not going to produce a rectification plan.
2. **tie** can elect to withdraw the RTN even if no rectification plan is provided. Given **tie's** proposed request as to how remediation should be carried out (see Draft A at *Bundle I, divider 1*, the Infraco's refusal to produce a plan may itself constitute a repudiation.<sup>+++</sup>
3. If **tie** terminated under Clause 90.4 and was found to have done so without proper cause, BSC may assert repudiation. Instructing Solicitors consider the Clause 77.11 of the Infraco Contract confines the damages for repudiation to those stipulated to be recoverable from **tie** Default.<sup>§§§</sup> *Bundle I, divider 8*.

### QUESTION B

Based on a review of the materials before him<sup>\*\*\*\*</sup>, what level of confidence does Senior Counsel have that a Court would uphold **tie's** decision to terminate the Infraco Contract with cause, with a finding that BSC breaches were of sufficiently gravity and materiality so as to constitute:

Infraco Default (a)

Infraco Default (d)

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<sup>+++</sup> See 6-063 Keating and cited authorities at *Bundle I, divider 8*.

<sup>§§§</sup> See 6-068 Keating at footnote 51.

<sup>\*\*\*\*</sup> It is appreciated that these materials are dense, span many months and are interrelated.

Nevertheless, a clear pattern of BSC obdurate resistance to partnering and a policy of non-transparency is evident.

## Infraco Default (j)

Instructing Solicitors have provided a matrix to assist Senior Counsel's ranking of the materiality of the categories of breach. Instructing Solicitors have provided their view with brief comment for Senior Counsel's critique.

Senior Counsel knows that Messrs McGrigor have been advising the Client ably and have also instructed Senior Counsel on various issues on the construction and interpretation of the Infraco Contract, importantly on Schedule Part 4 and Clauses 80.13 and 34.1. See attachments to tie's letter of 24 May 2010 *Bundle I, divider 6*. It would be entirely remiss of Instructing Solicitors not to put McGrigor's distilled view on grounds for termination in front of Senior Counsel. An extract on this from McGrigors March 2010 report to the Client on this issue is included at *Bundle I, divider 5*. Senior Counsel will note that the two firms' views align on the contractual mechanics of termination. Where there is a difference of opinion is over (i) the issue of the nature of the test for termination with cause and (ii) the cumulative effect of prolonged myriad breaches of contract, affecting its proper administration as a distinct ground for termination under Infraco Default (a).

With regard to the specific breaches shown in the matrix below, based upon the facts and circumstances evidenced in the correspondence how would Senior Counsel evaluate each as a ground for termination (with cause) under Clause 90.1.2 (Infraco Default (a) or (j), as relevant)?

<b>BREACH</b>	<b>VERY HIGH</b>	<b>HIGH</b>	<b>MODERATE</b>	<b>LOW</b>	<b>ABSENT</b>
Failure to comply with <b>tie</b> instructions to proceed with the Works: Clause 34.1 and Clause 80.13					
Instructing Solicitors view/comment		✓			
Failure to achieve contracted rate of progress: Clause 60.1 and failure to mitigate: Clause 60.9					
Instructing Solicitors detailed view/comment to follow				✓	
Failure to produce completed, assured and integrated Design and installing defective works: Clause 7, Clause 11					
Instructing Solicitors view/comment to follow	✓				
Failure to manage the SDS Provider: Clause 11 and SDS Novation Agreement					
Instructing Solicitors view/comment to follow	✓				

Failure to comply with core obligations: Clause 7					
Instructing Solicitors view/comment to follow		✓			
Failure to comply with the provisions of Clause 80					
Instructing Solicitors detailed view/comment to follow	✓				
Failure to secure Key Subcontractors and to provide collateral warranties: Clause 28					
Instructing Solicitors detailed view/comment to follow				✓	
Failure to comply with obligation to produce Best Value: Clause 73					
Instructing Solicitors detailed view/comment to follow			✓		
Cumulative failings leading to erosion of contractual platform of trust and confidence: Clause 65, Clause 6, Clause 7.3.16, Clause					

101.14					
Instructing Solicitors view/comment		✓			
Culpable delay resulting in (and failure to prevent a situation where) the Planned Service Commencement Date is likely to occur more than 12 months after the Planned Service Commencement Date: Infraco Default (d)					
Instructing Solicitors detailed view/comment to follow				✓	

## QUESTION C

Does Senior Counsel share Instructing Solicitors' view that Infraco Default (a) allows for a legitimate termination as a consequence of the cumulative material adverse effect of many lower order breaches by the Infraco, producing a situation in which **tie** is entitled to form the reasonable opinion that BSC no longer intends to be bound by the Infraco Contract?

Analysis:

- Using the concept of an implied term that each party will co-operate with the other to secure performance of the Infraco Contract, at what point do the Infraco's actions to immerse the administration of the Contract in argument become a deliberate prevention of performance?
- Has the conduct of the Infraco over 25 months reached a level of deliberate non-compliance where there is, in effect, a frustration by breach?<sup>\*\*\*\*</sup> Has **tie** elected to affirm the contract despite these breaches and how influential is the absence of any Persistent Breach Notice (Clause 93)?

In the final analysis, are the terms of the Contract which the Infraco has breached and continues to breach intermediate terms as opposed to express conditions whereby **tie** only has an entitlement to terminate if any one of the breach goes to the root of the Infraco Contract - that is it deprives **tie** of substantially the whole benefit that the performance of the Contract was to deliver?<sup>††††</sup>

**Instructing Solicitors consider that the definition of Infraco Default (a) makes it clear that the test is not fundamental breach but rather any breach of obligation or obligations which pass the MAE test in that definition.**

## QUESTION D

Applying the contractual test in Infraco Default (d) that (absent excused delay or permitted suspension) a programming by Infraco of Service Commencement Date or Section Completion Date later than 12 months after the date set at contract award<sup>††††</sup> gives **tie** grounds for termination - an infringed long stop date on culpable delay.

Analysis:

That the utilities diversions are substantially late is not contested by **tie**. What is contested is Infraco's failure to mitigate the delay by resequencing works intelligently and non production of realistic revised programmes. The EOT claim is currently the subject of a DRP adjudication. Notwithstanding the outcome of this adjudication, BSC have presented numerous unmitigated programmes to **tie** showing planned Service Commencement Dates far beyond 17 July 2012.

## QUESTION E

Applying the contractual test in Infraco Default (j), does Counsel share Instructing Solicitor's view that a BSC failure to proceed with the on-street works (and provide **tie** with the requisite information to enable **tie** to issue permits to commence works) can constitute a suspension of

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<sup>\*\*\*\*</sup> Chilean Nitrate Sale & Corporation -v- Marine Transportation Co Ltd [1982] 1 Lloyd's Rep 570;

<sup>††††</sup> Chitty on Contracts Vol 1 at 12-041

<sup>††††</sup> The original programme completion dates are: Section A 25 March 2010; Section B 23 April 2010; Section C 17 January 2011; and Section D 17 July 2011.

the Works without due cause? If this is correct, do the facts support a right to terminate when BSC have failed to commence any on street works since mid March 2010?

Analysis:

In relation to On Street works between Haymarket and Lothian Road junction at the West End, the Infraco asserted in March that **tie** were preventing it from starting work by failure to issue permits to commence works. **tie** required BSC to provide relevant documentation including safety case, methodology and an assured design and instructed BSC to proceed with the works. Since 8 April, Infraco has refused to produce the documentation and has not progressed the works on grounds that **tie** is not entitled to have the documentation since this has not been asked for before. (See correspondence at *Bundle II*.)

#### **QUESTION F**

Given the scheme of Clause 90.1, does Senior Counsel agree with the approach adopted in the two draft documents (A: cover letter and B: draft Remediable Termination Notice)? If yes, would Senior Counsel recommend any additions or refinements to the two drafts, bearing in mind **tie** has absolute discretion over the acceptance/ rejection of a BSC rectification plan submitted pursuant to Clause 90.2?

Analysis:

The scheme of the two drafts is intended to specify the breaches, state their effect on carrying on and completing the Infraco Works, require specified remediation and warn of **tie's** entitlement to terminate.

#### **QUESTION G**

In the event of the use of a Remediable Termination Notice by **tie**, does Senior Counsel agree with Instructing Solicitor's analysis of the likely reaction from Infraco set out below? If yes, does Senior Counsel have any recommendations regarding pre-emptive or preparatory actions which **tie** should plan in advance?

Analysis:

The Infraco has already indicated in correspondence that it disputes **tie's** entitlement to found a termination notice under Clause 90.1.2 on a failure to comply with instructions under Clause 34.1 and Clause 80.13. Instructing Solicitors consider that a Remediable Termination Notice would likely to be met with:

- a Notice of Dispute as to the existence of grounds for termination and assertion of repudiatory breach;
- possible interdict seeking to prevent **tie** from entering site or moving to reprocore (as a negotiating stance);
- possibly, a 'bare bones' Rectification Plan with request for further time to put **tie** at risk of being unreasonable in not granting time (though **tie** has absolute discretion).

If **tie's** caveats operate it would provide **tie** with an opportunity to resist the grant of an interim interdict. It would be for BSC to show that it must have an Order to prevent **tie** from stepping in. Clearly, BSC would need to be arguing (and showing) that they have all intention to carry on performance of the Project. They might well approach an interdict



tactically to try to prevent **tie** from using their supply chain as a means of exerting maximum leverage on **tie** to settle their termination claim; however, given their dislike for the Infraco Contract this move would seem somewhat counterintuitive.

The Court would assess whether damages would be an adequate remedy for Infraco and to what extent BSC could persuade that **tie** had no arguable grounds for terminating the contract. The jurisprudence here is, on balance, in **tie**'s favour in the sense that if **tie** were ultimately found to have "got it wrong" with termination, BSC would have its recompense in an award of damages - bearing in mind that this contract circumscribes in a clear manner what is recoverable by Infraco when terminated either with or without cause. Equally, **tie** could be seeking an interdict to exclude BSC from site after termination and an implement to oblige BSC to comply with Clause 90. [See also Keating at -022, -023.]

Were BSC to obtain an interdict (which would effective be an order for specific implement ie ordering **tie** to perform the Infraco Contract and not terminate it), there would be a substantive hearing within weeks of the interim order. If this order were upheld, it would remain in effect until a full hearing - probably measured best case at upwards of a year to eighteen months away at a minimum depending on court lists, unless the matter could be expedited.

#### **QUESTION H**

On the assumption that a termination of the Infraco Contract may be inevitable, would Senior Counsel recommend any specific actions or course of action by **tie** to strengthen and/ or protect enforcement of its contractual rights and minimise its liabilities and/ or vulnerabilities. Senior Counsel is asked particularly to comment on the effect of the DRP which BSC have initiated that includes a referral of Clause 80.13 and 34.1.<sup>§§§§</sup>

#### **QUESTION I**

Does Senior Counsel agree with Instructing Solicitor's view that irrespective of the permission provided under Clause 90.2 for BSC to produce a comprehensive rectification plan, **tie** would be entitled to make call on the Performance Bond and the Retention Bond [*Bundle I, divider 7*] no earlier than 14 days from the date of service of the Remediable Termination Notice.

Analysis:

The instruments are 'on demand', callable by on the basis of certified evidence of **tie**'s notification to Infraco that they are in breach of contract. No other test or requirement is imposed prior to call by **tie** as beneficiary. [See also Keating 10-036 *Bundle I, divider 7*.]

#### **QUESTION J**

Does Senior Counsel agree with Instructing Solicitor's summaries of the effects of termination? [*Bundle I, divider 5*] If not, Counsel is asked to advise on how his opinion differs.

DLA PIPER SCOTLAND LLP

22 June 2010

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<sup>§§§§</sup> See Infraco letter of 21 May, **tie**'s letter dated 24 May 2010 *Bundle I, divider 6*. Instructing solicitors view this as a precursor to attacking any Termination Notice founded on failure to comply with instructions [see BSC letters of June 2010 at *Bundle I, divider 6*].