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**From:** Anthony Rush [rush\_aj@  
**Sent:** 08 August 2010 22:45  
**To:** 'Nolan, Brandon'; Richard Jeffrey; Steven Bell; Susan Clark; Dennis Murray; 'Fitchie, Andrew'  
**Cc:** 'Williamson, Simona'  
**Subject:** RE: Edinburgh Trams, Murrayfield Underpass Structure S21C

Brandon,

Please let me have a time for the call in the morning.

Late Sunday night isn't a good time to pick bones out of such a disappointing decision, however I refer to his Lordships determination in paragraph 27 (1):

There not having been an agreed Estimate in respect of the works referred to in INTC 109, the letter of the Responding Party to the Referring Party dated 19 March 2010 (Ref INF.CORR4487) does not oblige the Referring party to commence or carry out those works.

Clearly Paragraph 24 confirms his view that an 80.13 instruction has only to be in respect of an agreed Estimate.

I agree with you that the decision doesn't address the position where it is not agreed that a Notified Departure Exists. He does not seem to be saying in those circumstances an instruction under 34.1 would be inappropriate.

I can understand his implied logic that there are three different circumstances:

- 1 Where the Estimate is agreed (80.13);
- 2 Where the Estimate has been referred to DRP (80.15)
- 3 Where there is a dispute that there is a Notified Departure.

In the latter case he does not clearly say it is the same as the second case but doesn't address it because, as he confirms in paragraphs 15 and 16, it was common ground that the works were a Notified Departure.

What I cannot understand is what meaning he places on the final phrase "unless otherwise directed by tie" and he doesn't explain why he may not conclude that Infraco's interpretation is commercially absurd – he implies his decision is what was intended by the parties.

However, following his thinking in paragraphs 18 and 19 he confirms that if the latter case is not in accordance with 80.13 and 80.15 tie can validly issue an instruction under 34.1.

By accepting Lord Dervaird's decision it seems to me therefore we have three ways of proceeding to apply to each INTC:

- 1 Dispute that a Notified Departure is a tie Change and instruct under Clause 34.1 to proceed.
- 2 Accept that it is and disagree with the Estimate and instruct under Clause 80.15 to proceed.
- 3 Accept that it is and agree Estimate and issue tie Change Order.

I would of course like to hear Richard Kean's reaction to the Decision.

Tony

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**From:** Nolan, Brandon [mailto:Brandon.Nolan@mcgrigors.com]  
**Sent:** 08 August 2010 20:56  
**To:** Richard Jeffrey; Steven Bell; Susan Clark; Dennis Murray; Anthony Rush; Fitchie, Andrew

**Cc:** Williamson, Simona

**Subject:** FW: Edinburgh Trams, Murrayfield Underpass Structure S21C

Dear All

Here is Lord Dervaird's decision. He grants the redress sought by Infraco.

The essence of the decision is (as set out in para 24) that "...as an Estimate had not been agreed in respect of the relevant works at the time that the letter dated 19 March 2010 was written..tie was not empowered under Clause 80.13 to issue an instruction ...The letter bears the heading ' Clause 80.13 Instruction.' Accordingly insofar as it bears to proceed under Clause 80.13 it is not a valid instruction and Infraco was not under any obligation to comply therewith."

The decision flows from Lord Dervaird's analysis (para 21) that Clause 80.13 only has application where an Estimate has been agreed (para 21 (ii)) and that notwithstanding the words "otherwise directed" (para 21 (v)) "It does not follow that tie is empowered to issue instructions under this Clause except where the contents of an Estimate have been agreed." The justification for this appears to be that Infraco are protected in respect of the consequences of having to carry out work under 80.15 but (para 23) "There is no such provision in respect of Clause 80.13, and that is appropriate given that 80.13 is only operable after an Estimate has been agreed."

Clause 34.3 does not provide a different route because it leads into 80 and in particular 80.13 (para 25).

Lord Dervaird does not express an opinion on the position where there is a dispute over the existence of a Notified Departure. Can Clause 34.1 be invoked? The matter is addressed by Lord Dervaird at para 17 but he is careful to conclude that "The question is whether tie's instructions are given under this Clause [34.1] and in accordance with the terms of the Agreement." In para 24 Lord Dervaird approaches the instruction on the basis of Clause 80.13 and of course the position here is that it was subsequently accepted that a Notified Departure did exist.

My immediate observations are :

1. This decision only covers the position where it is agreed that a Notified Departure exists.
2. In this situation Lord Dervaird holds that Clause 80.13 cannot be the basis for an instruction to proceed outwith Clause 80.15 in advance of the Estimate being agreed.
3. Lord Dervaird's reasoning is that Clause 80.13 does not contain the protection to Infraco afforded by Clause 80.15.

4. I do not consider Lord Dervaird's reasoning to be compelling. His approach is narrow and fails to recognise that if Infracore did proceed in accordance with a direction under Clause 80.13 or 34.1 they would be protected by 34.3. The link from Clause 34.3 to Clause 80 does not disapply the protection contained within Clause 34.3.

5. The decision does not cover the position where the Notified Departure is disputed and Infracore are instructed to proceed under Clause 34.1.

I am on annual leave but will still be in the UK tomorrow. Happy to discuss by phone tomorrow morning.

Regards

Brandon

**Brandon Nolan**

Partner

for McGrigors LLP



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**From:** Jane Murray [REDACTED]  
**Sent:** 08 August 2010 09:35  
**To:** GILLESPIE Mark; Nolan, Brandon  
**Subject:** Edinburgh Trams, Murrayfield Underpass Structure S21C

Please find attached my adjudication in this matter. Hard copies follow by post. Lord Dervaird

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