

Appendix 2

Legal analysis in relation to tie's claim to be entitled to claw back mobilisation payments

- 1 One element of the payment to which Infraco may be entitled for work carried out is in respect of the mobilisation payment made to BB and Siemens of £45.2m. That sum has already been paid by tie; the question which arises is whether any element of it can be recovered in the event that the Infraco Contract is brought to an end prematurely, without all of the Infraco Works having been completed.
- 2 The Infraco Contract appears to envisage two different types of payment in relation to mobilisation: the first is in relation to Mobilisation Milestones, which relate to the provision of Mobilisation Services during the Mobilisation Period (which runs from the Effective Date to the Service Commencement Date). Provision is made in both Schedules 4 and 5 for the way in which this payment is to be approached, within the context of clauses 66 and 67 in relation to Applications for Milestone Payments generally.
- 3 Separately, Schedule Part 5 contains a reference to Mobilisation – not expressed to be a Milestone. Page 1 of that schedule contains the following:

		<i>"£45,200,000.00</i>	<i>100%</i>	
<i>Contract Award</i>	<i>Mobilisation</i>	<i>£38,200,000.00</i>	<i>84.5%</i>	<i>14 Apr 08</i>
<i>Period 1 Payment</i>	<i>Mobilisation</i>	<i>£3,500,000.00</i>	<i>7.7%</i>	<i>14 May 08</i>
<i>Period 2 Payment</i>	<i>Mobilisation</i>	<i>£3,500,000.00</i>	<i>7.7%</i>	<i>14 Jun 08"</i>
- 4 Notwithstanding that this entry appears in Schedule part 5, this mobilisation payment does not appear to be treated as a Milestone¹.
- 5 It appears that the mobilisation payment was in effect an advance payment to BB and Siemens, paid 50/50, to assist them with cashflow. It is understood that value was taken out of the other elements of the Contract Price and paid to Infraco at the outset of the project in the form of the mobilisation payments.
- 6 On this basis, if the Infraco Works are completed, the mobilisation payments would eventually balance themselves out as the Milestones (whose value had been reduced to take account of the mobilisation payments) catch up with the payments which had been made up front. However, if the Infraco Works are not completed, and Infraco's involvement

¹ It can be seen from the treatment of preliminaries that not all items contained within Schedule part 5 fall to be treated as Milestones – see section 10 of the main body of this report

is halted part way through the project, the balancing out of the mobilisation payments will not have been completed in its entirety.

7 The Infraco Contract does not describe the mobilisation payments as an advance against the value of the physical works: on a literal, and straightforward interpretation of Schedule Part 5, they are a series of one off payments, described as being for mobilisation. There are no express provisions in the Infraco Contract which would provide for the recouping of any element of these mobilisation sums.

8 However, there are problems with this literal interpretation of the Infraco Contract: it is difficult to see how the costs of mobilising could amount to anything in the region of £45.2m. It would make no commercial sense for tie to agree to such a significant early payment in circumstances where it would not be entitled to claw that payment back if work did not proceed: had Infraco stopped working immediately after they received the mobilisation payments, could it have been the intention of the parties that Infraco would have been entitled to retain what would essentially have amounted to a windfall payment?

9 As referred to above in section 5 of the main body of the report in the context of partially completed Construction Milestones, there is support in the Infraco Contract for the proposition that the parties did not intend this to be the case: where termination occurs for tie Default or Infraco Default, the provisions of clause 88.8 and 90.12 suggest that an exercise will be carried out whereby the payment to which Infraco are entitled will be proportionate to the work actually executed by them.

10 Clause 88.8 addresses the consequences of a termination for tie Default, and provides that:

"tie...shall pay the Infraco...the value of all work carried out prior to the date of termination and in addition:

88.8.1 the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items have been partially carried out or performed."

11 Clause 90.12 addresses the consequences of a termination for Infraco Default, and provides that:

"...the Parties shall agree..."

90.12.1 *the amount (if any) which has been reasonably earned and not yet paid pursuant to this Agreement by the Infraco in respect of work actually done by it under this Agreement."*

- 12 This would, for example, entitle Infraco to some payment for milestones which have been partially, but not fully, completed.
- 13 By the same analysis, therefore, if it can be established that the mobilisation payment was intended by both parties to bear some relationship or proportionality to work actually carried out, the provisions of 88.8 and 90.12 might provide some support for the proposition that the payment should be repaid upon early termination. For their part, Infraco is likely to argue that the Infraco Contract does not contain any link between the mobilisation payments and the value of work actually carried out: had that been the intention, wording could have been inserted to provide for that eventuality. On Infraco's case, it could have "*reasonably earned*" the mobilisation payments as soon as the dates for their payment had passed, and the proper value of the work – as soon as it had mobilised – would always include the figure of £45.8m on top of any other Milestones passed.
- 14 The general rule is that a court will not be prepared to consider pre-contractual discussions or negotiations in arriving at the proper interpretation to be given to the Infraco Contract: in other words, tie may not be able to go behind the brief reference in Schedule Part 5 to the mobilisation payments in order to establish what the parties "really meant". This will only be permissible where it is evident that something has "gone wrong" with the words in the contract.
- 15 Detailed factual enquiry would, in any event, be required in order to establish what communications took place between tie and Infraco prior to contract formation in relation to the mobilisation payment in order to arrive at what, objectively construed, must have been the common intention of the parties.
- 16 If a literal interpretation of the words is to be avoided, it is not sufficient for tie to establish that the literal interpretation is *unfavourable* to it: the Courts will not intervene simply to save one of the parties from having made a "bad bargain". The test to be applied will be whether the interpretation contended for by Infraco produces a result which is absurd, arbitrary and irrational, in circumstances where an alternative interpretation can produce a rational result².
- 17 An alternative approach would be for tie to assert that it was an implied term of the agreement to make the mobilisation payments that elements of those payments would be

² *Chartbrook Limited v Persimmon Homes Limited and others* [2009] UKHL 38 at paragraph 20. See also section 7 of the Report for tie Limited on Certain Contractual Issues Concerning Edinburgh Tram Project dated 23 March 2010

repaid in the event of termination. There are a number of hurdles that require to be overcome before the court will allow a term to be implied (particularly in the case of a lengthy and closely negotiated contract). These will include the requirement that the implied term is necessary for the "business efficacy" of the Infraco Contract – in other words, that the Infraco Contract simply would not work without an implied term that the mobilisation payment will be returned in certain circumstances. On one analysis, the Infraco Contract can operate without such a repayment: the fact that it would do so to Infraco's significant benefit would not be a relevant factor. However, it might be open to tie to argue that the Infraco Contract cannot operate properly in a commercial or financial sense if Infraco is to be entitled to retain a payment which essentially operates as a windfall.

18 Irrespective of which argument is advanced, it will also be necessary for tie to establish how it is that the calculation of the mobilisation payment falls to be made: in other words, if something has gone wrong with the words, how do they fall to be corrected? Alternatively, what is the precise expression of the term that tie contends should be implied? This is significant for two principal reasons:

- (a) Firstly, the more difficult it is to arrive at a formulation which addresses repayment, the more difficult it is likely to be to persuade the court to adjust the literal meaning of the contract, or imply a term;
- (b) Secondly, it will inform that value of the repayment which tie seeks.

19 It is possible to arrive at a number of ways of calculating the potential repayment (for example, through a recalculation of the Construction Milestones to divide the £45.2m mobilisation advance between them proportionate to value), but the court is only likely to adopt any one of these approaches if it is satisfied that this was, objectively speaking, what the parties must have intended.

20 The approach which tie has taken is to aggregate the Construction Milestones (partially and wholly completed) with an assessment of the value of tie Changes, and compare that with the amount actually paid, in order to arrive at a broad brush view of how much Infraco has been paid ahead of "value earned". However, given that the actual payment includes the mobilisation payments this approach does not identify the amount by which the mobilisation payments fall to be recalculated to reflect a termination prior to completion of the Infraco Works.

21 In the absence of a cogent explanation of the way in which the calculation of any repayment ought to be calculated, the prudent approach for present purposes would be to assume that Infraco will be entitled to retain the full extent of the mobilisation payment. If such a

formulation can be determined by tie, then the issue ought to be revisited in order to assess whether it would be reasonable to conclude that tie will be entitled to make some recovery therefor.

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