

Appendix 4

Legal analysis in relation to tie's claims against Infraco

- 1 The intervention of the Mar Hall mediation and the subsequent execution of MOV 4 essentially placed on hiatus a number of claims which tie was intending to bring against Infraco (and *vice versa*). However, as part of the culture change, these claims were effectively shelved in the hope that they would be incorporated into the lump sum price to be paid for the Off Street works on the basis that the Settlement Agreement was entered into.
- 2 However, on the basis that the Settlement Agreement is not entered into and the party's positions then become entrenched, in response to any claims brought by Infraco it is inevitable that tie will look to its own claims as a means of abatement.
- 3 It is likely that a number of claims already exist and that, upon termination or through separation, more claims come to light. However, the following claims have been identified which need to be taken into account when assessing separation costs. Those claims are:
 - (a) Princes Street defects;
 - (b) Consequential losses/third party claims in relation to Princes Street;
 - (c) Over payments in relation to the Princes Street Supplemental Agreement;
 - (d) Other defective works;
 - (e) Lost value engineering opportunities.
- 4 Looking at each of these claims in turn, the strengths and merits of each claim have been identified in overview, and a range of values placed against those heads. Again, given the fact that a number of those heads relate to matters which have yet to be determined elsewhere, or are dependant upon unknown variables, it is difficult to predict, with any level of certainty, what range of costs (or, technically, what level of diminution of costs) is correct. Regardless, these claims have been highlighted in order that the principles, at the very least, are considered.
- 5 **Princes Street Defects:** it is accepted that the rails and surfaces along Princes Street are defective, and a planned rectification scheme is in place. Those defects have been the subject of detailed discussions between the parties and are reflected in the proposed terms of the Settlement Agreement.

- 6 In the context of separation, and the other options which have been identified in the main body of the report, it will be necessary to consider the extensive remedial work which will have to be undertaken in a compressed timescale and in a high-profile area which received significant news coverage during the 2009 period.
- 7 In previous discussions between the parties, and in open correspondence, the positions adopted by each party have been developed. It is tie's position that the works were undertaken under the provisions of the Princes Street Supplementary Agreement, which effectively relaxed the provisions of the Infraco Contract in relation to Princes Street. On this basis, Infraco was able to progress the works at a more advantageous pace and was remunerated in line with the degree of difficulty of the works. In addition, the decision installed was not approved, therefore at the Contractor's risk and has subsequently been amended (improved) by the Infraco to address some of the defects. It has still to be formally approved by CEC as Road Authority.
- 8 Infraco's position is that the cause of the defects lies in tie's approach which required that the works had to be concluded (or access removed) prior to the Christmas 2009 shopping period. As a result, Infraco assert that lines were installed in particularly adverse weather and at breakneck speed, thereby causing the lines to fail subsequently.
- 9 If it is decided to undertake this work using another contractor (to the extent the project is not placed on hold), then the nature of the defects and the difficulty of working within such a popular tourist area will have to be taken into account. As a guide to the likely cost of such an exercise, the terms of the original supplemental agreement indicated that the costs of installing the works were in the region of £10 million. This figure is subject to the adjudication which was commenced prior to the Mar Hall mediation, and then placed on hold as a consequence of the Mar Hall discussions.
- 10 tie has estimated that the costs of repairs will fall in a range between £0.5m and £8m, depending on how extensive the remedial works are, and the depth to which they are carried out. Clearly, tie/CEC would seek to maximise their recovery in this respect.
- 11 On the basis of discussions with tie and the Certifier, a figure of £4m has been adopted as a prudent allowance in relation to potential sums which might be reclaimed from Infraco in relation to these defects.
- 12 **Consequential losses/third party claims in relation to Princes Street:** the extended time period over which the Princes Street works were originally completed caused disruption to local businesses. It is understood that the parties agreed to operate an escrow account into which money was intended to be placed to deal with third party claims.

- 13 The details of this escrow arrangement are not known, and there is no information available in relation to the extent to which any sums in that account are adequate. Further factual investigation would be required in order to enable any assessment to be made in relation to this issue.
- 14 **Over payments in relation to the Princes Street Supplemental Agreement:** the Princes Street Supplemental Agreement has been the subject of an adjudication which is presently on hold, as referred to above. It is Infraco's position that a further sum of £2,447,726 over and above the £10,009,968 certified by tie is due and payable to Infraco. tie's position, on the other hand, is that there has been an over-payment of £1,065,186 and that the true value of the works is only £8,944,782.
- 15 This represents a range between (positive) £1,065,000 and (negative) £2,437,000. For present purposes it has been assumed that tie will not be entitled to make any recovery from Infraco under this head.
- 16 **Other Defective Works:** it is understood that there are a number of other defects in the Infraco Works which will require rectification. Details of these defects have not been made available, but tie has assessed the likely costs of repair as being less than £1m. In the absence of any further information, it has been assumed that no recovery will be made from Infraco under this head.
- 17 **Lost Value Engineering opportunities:** the Infraco Contract operates a provision by which Infraco is encouraged to identify Value Engineering ("VE") opportunities to drive down the Construction Works Price. The Construction Works Price operates on the basis that these VE savings have already been achieved, and therefore no additional benefit would accrue to tie in the event that they are realised.
- 18 If Infraco cannot achieve the VE opportunities or if it would be more costly to carry out the VE work, then the agreed reduction is added back to the Construction Works Price leading to an increase in the payments to Infraco.
- 19 For present purposes, it has been assumed that no recovery will be made from Infraco in relation to the lost VE opportunities.

McGrigors LLP
29 June 2011