

OPINION OF SENIOR COUNSEL

for

tie Limited

in re

EDINBURGH TRAM PROJECT

INFRACO CONTRACT

1. I refer to the agents instructions of 10 and 16 November 2010 and to my Opinion of 22 November 2010.
2. I am instructed to address a particular issue with respect to the merit of certain Remediable Termination Notices issued on behalf of tie pursuant to Clause 90.1.2 of the Infraco Contract. Particular reference is made to three Remediable Termination Notices (“RTN’s”) namely two RTN’s dated 9 August 2010 in relation to defects at Princes Street and one RTN dated 8 September 2010 in relation to the matter of design. The matter that I am instructed to address is specified as follows by the agents,

“Setting aside any issues in relation to whether the assertions set out in the RTN’s are capable of being supported by factual evidence, your advice is sought on whether these RTN’s are, on their terms, competent, and whether they contain sufficient relevancy and specification to be capable of forming the foundation of any subsequent termination.”

3. Clause 90 of the Infraco Contract addresses the matter of termination on the occurrence of an Infraco Default. An Infraco Default includes the following event,

“A breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works”.

4. Clause 90.1.2 provides that in the event of such an Infraco Default tie may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred. This is defined as a Remediable Termination Notice (RTN). Clause 90.2 then provides that following the service of a RTN the Infraco may submit a comprehensive rectification plan setting out how it intends to

remedy the Infraco Default in respect of which the RTN has been served.

5. In the event of an Infraco Default involving a breach by the Infraco of an obligation which materially and adversely affects the carrying out and/or completion of the Infraco Works, a notice from tie must meet the following requirements in order to constitute a competent RTN. First, the notice must be in writing. Second, the notice must identify the nature, which I take to mean the character or quality, of the breach of contract which has materially and adversely affected the carrying out and/or completion of the Infraco Works. Third, the specification of the breach complained of must be sufficient to give Infraco notice of what remedial work is required in order to rectify the breach complained of.

6. The RTN's dated 9 August 2010 refer to what are described as "seriously defective works on Princes Street". It is stated at Clause 2.2 of each notice that the faults in the works pose an appreciable health and safety hazard and will severely reduce the life of the pavement. (There is also a reference to "creating further hazards"

but it is not clear what this refers to). The nature of the faults relied upon are then set out at Clause 2.3.1 to 2.3.6 of each notice. Clause 2.3.1 refers to “a considerable number of locations” and Clause 2.3.2 to “many locations” where particular defects appear in the works. While the specification of those complaints might be criticised I consider that Infraco will be able to determine what rectification work was required in respect of the specified defects. I have greater difficulty with the complaints referred to in Clause 2.3.3 and Clause 2.3.4 of the notices. The former refers to work which is “unsatisfactory” and the latter to work which is “of an inadequate standard”. It appears to me that such specification (or lack of it) would entitle Infraco to at least argue that the RTN did not give them fair notice of the rectification work which they were required to carry out. There are other parts of the notice which in my opinion are sufficiently specific. I would refer for example to Clause 2.3.6 which specifies that the road surfacing is not technically compatible with the track form installation in Princes Street. If however tie had to rely on only Clause 2.3.6 in order to establish that sufficient specification of an Infraco Default had been given, I would question whether, notwithstanding the

wording in Clause 2.5, such a breach did of itself materially and adversely affect the carrying out and completion of the Infraco Works.

7. I do not consider that similar problems of specification attend the RTN which was issued on 8 September 2010 in respect of the design of track works. The nature of the Infraco Default relied upon is in my opinion adequately specified at Clause 2.3 of the Notice which provides,

“Despite the Infraco having constructed approximately one kilometre of on-street track works between Lothian Road and Waverly Bridge, the Infraco has not delivered an integrated, assured, design for these on-street track works. As a consequence, tie does not have an integrated, assured, design as it ought to have from the Infraco and tie is unable to issue a Permit to Commence Works pursuant to the Code of Construction Practice for on-street track works.”

It is in my opinion reasonably apparent that what Infraco requires to do in order to rectify the Infraco Default complained of is deliver an integrated design for the on-street track works in order

that the appropriate Permit to Commence Works for on-street track works may be issued.

8. I would however caution that it is not entirely clear to me from the terms of the Infraco Contract that Infraco does require to have delivered an integrated design for the on-street track works as a necessary pre-requisite to the issuance of a Permit to Commence Works. If tie are unable to establish that Infraco was obliged to deliver an integrated design before tie could issue a Permit to Commence Works for on-street track works, then there would be no relevant Infraco Default for the purposes of this RTN.

9. In summary, the RTN's in respect of the Princes Street works are in competent form i.e. they are in writing. The RTN's identify a relevant Infraco Default namely, an alleged breach by the Infraco of its obligations with respect to the standard of the Works. However, there are at least some respects in which these notices can be criticised for lack of specification. In particular the simple reference to work as being "unsatisfactory" or as being "of an inadequate standard" may be criticized as giving Infraco no

reasonable notice of the rectification work they require to carry out in order to meet tie's complaint. I do not consider that similar criticisms of lack of specification may reasonably be leveled at the RTN in respect of design. However (and although I am not instructed to advise on this point) I would question whether Clause 2.3 of this RTN does properly identify what can be construed as an Infraco Default.

10. In light of the foregoing I would have to conclude that in the event of tie giving notice of termination of the Agreement in reliance upon the specified RTN's, there would be a material risk of their acting being found to be a wrongful repudiation of contract.

**Parliament House
Parliament Square
Edinburgh
Scotland**

THE OPINION OF

1 December 2010

RICHARD KEEN QC

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1st December 2010

MCGRIGORS LLP

Ref: BEN/TI0003