Edinburgh Tram Inquiry

Brandon Nolan – Q&A issued by Inquiry

Overview and General

1. **Please provide a copy of your CV**

This is produced **(WED00000204).**

2. **Please give an overview of your involvement and the issues that arose in the project?**

The nature of my involvement, and that of McGrigors generally, is set out in the answers below, and in particular in my answer to question 6.

My initial involvement in attending challenge meetings concerning specific heads of claim developed into a work stream, which was part of what was known as Project Pitchfork, in relation to the interpretation of various provisions in schedule part 4 of the Infraco Contract, and other contractual terms, including clauses 80 and 34.1. It was issues arising from these provisions which brought work to a virtual standstill in September/October 2010. The work on clauses 80 and 34.1 led to McGrigors being instructed in connection with the adjudication relating to INTC 109 before Lord Dervaird.

Towards the end of 2010, the involvement of McGrigors increased significantly, with a corresponding decrease in the involvement of DLA, with a formal handover taking place in January 2011. From this point, our principal involvement was in relation to (i) termination issues; (ii) ongoing involvement in DRPs/INTCs; and (iii) mediation – namely assisting in preparations for mediation, attending the mediation itself and drawing up the agreed principles and heads of terms.

Following the mediation, the principal work stream was in relation to MoV4 (the agreement in relation to certain prioritised works) and producing a draft report in June 2011 in respect of certain options for the project and their implications.

3. **What were the principal factors which affected the smooth implementation of the INFRACO contract? Were these factors unique to this contract?**

Pricing Assumptions and the clause 80 mechanism contained within the Infraco Contract were principal factors which affected the smooth implementation of the contract. I had not come across similar provisions in other contracts.

4. **What is your view of the decision to use bespoke contracts for this project rather than one of the standard forms?**

The key issue is not, in my opinion, between using a bespoke contract or one of the standard forms. There are many different standard forms and often they are the subject of bespoke amendment. In the first instance key decisions require to be made regarding the construction procurement technique which is to be utilised. These decisions cover issues such as the level of management that is required in administering the contract, design responsibility and liability and contractual risk allocation on issues concerning time and price. All of these require to be weighed up and decided upon and thereafter reflected in the terms of the contract whether the starting point is a bespoke form or standard form which is then amended.

5. **What changes could have been made that might have prevented the problems that arose?**

The principal problems that brought work to a virtual standstill in September/October 2010 arose out of Pricing Assumptions which were contained in the Infraco Contract. A departure from these Pricing Assumptions constituted a Notified Departure which created a basis to claim for an increase in price and more time. In particular Pricing Assumption 1 created an entitlement to claim for an increase in price for the cost of design development from the design as it stood in 25 November 2007 to the final design if it involved a change in design principle, shape and form and outline specification. It also created an entitlement to more time if the change caused delay but importantly it also enabled Infraco to contend, under certain clauses, that unless and until its claims were recognised there was no requirement to proceed with the work which was affected. An attempt to quantify the risk in financial terms prior to the contract being let would have informed decisions around price and risk allocation.

Instructions

6. **What involvement did you / McGrigors have in the tram project?**

The principal work streams were as follows:

McGrigors' initial involvement was attending certain challenge meetings and producing short papers for those challenge meetings in respect of specific heads of claims, in respect of which DLA had prepared a case for going forward to DRP.

McGrigors also prepared a note on general contractual issues which was issued to tie on 23 September 2009, and updated on 7 October 2009, and further updated on 16 October 2009 **(CEC00797335).** I produce the final version of this note **(CEC00797337 and CEC00797336)**

This led to a work stream in relation to the interpretation of various provisions in schedule part 4 of the Infraco Contract and other contractual terms, including clauses 80 and 34.1 – this work stream was also one element of Project Pitchfork. The work stream involved the analysis of the factual

background to the relevant provisions, the production of short notes on the position, taking advice from Richard Keen QC and producing a lengthier report on certain contractual issues which was produced in March 2010, followed by a supplemental report at the end of March 2010, with a follow-on involving Helen Davies QC (see question 24). The report of March 2010 addressed a number of issues beyond Pricing Assumption 1, including time related issues and termination.

We were involved in obtaining reports from an expert engineer, Robin Blois-Brooke. Initially, he was instructed by DLA, but latterly these instructions came through McGrigors. In 2009/2010, his involvement was in relation to Pricing Assumption 1, but later in 2010, his involvement extended into other issues such as the basis for issuing Remediable Termination Notices ("RTNs").

Connected with the advice in relation to and Schedule part 4, was tie's entitlement to instruct Infraco to proceed with work notwithstanding a dispute in respect of whether a Notified Departure had occurred – this involved advice in relation to clauses 80 (and in particular 80.13) and 34.1 – see question 34.

Involvement in the above work stream in relation to clauses 80.13 and 34.1 led to McGrigors being instructed in the adjudication relating to INTC 109 (Murrayfield Bridge) with Lord Dervaird as adjudicator – see question 18.

During 2010, a number of RTNs were issued by tie; McGrigors were not involved in this work stream, but in the autumn of 2010, McGrigors were asked to provide legal advice in relation to termination of the Infraco Contract, which led to a report being issued in December 2010, and then to a forensic exercise to consider the factual and legal position underpinning the RTNs which had been issued, and the possibility of issuing further RTNs. Acutus were instructed in respect of this forensic analysis. This was part of what was variously described as Project Notice and Project Resolution.

A realignment of the providers of legal services took place in the autumn/winter of 2010. Andrew Fitchie's involvement stopped at around the end of October 2010 although DLA continued to be involved as a firm. From November 2010, McGrigors' involvement increased significantly – principally in relation to (i) termination issues; (ii) ongoing involvement in DRPs/INTCs; and (iii) mediation. Richard Jeffrey wrote formally to DLA in this respect on 3 December 2010, and a handover meeting took place on 13 January 2011. Another McGrigors partner and his team (Richard Anderson) were involved in particular in relation to the DRPs/INTC. Certain work remained with DLA notwithstanding this – principally ongoing DRPs/adjudications.

McGrigors supported tie in relation to preparations for the mediation – see question 67 in respect of support prior to 26 November 2010; question 68 in respect of support between 27 November 2010 and 12 January 2011, and question 71 in respect of support between 13 January 2011 and the mediation itself. This support included procurement advice from another McGrigors partner at the time (Drysdale Graham) and his team in respect of Project Phoenix proposals.

McGrigors produced the mediation statement on behalf of tie, with the involvement of tie, City of Edinburgh Council ("CEC"), Tony Rush and Nigel Robson - see question 72.

McGrigors also provided support to CEC prior to the mediation – see questions 71 and 72. As the mediation grew nearer, CEC were generally involved in most communications relating to the mediation.

McGrigors attended the mediation and were involved in drawing up the agreed principles and heads of terms – see question 82

After the mediation, the primary involvement for McGrigors was in relation to advice on what would become MoV4 - the agreement in respect of certain prioritised works. MoV4 was eventually finalised in May 2011 (see question 87).

There were also other work streams in relation to:

- corporate advice to tie;
- public law issues;
- a draft report in respect of different options for the project and their implications – a draft report was produced on 29 June 2011 – see question 86.
- a report on third party liabilities at the request of Nick Smith of CEC;
- McGrigors were asked to provide some ongoing project support to CEC after the settlement agreement was entered into.

7. **When were you first instructed and was it solely by the Council? What was the scope of your instructions at that stage? What was the relationship at this stage between McGrigors and DLA**?

McGrigors were not initially instructed by the Council, but by tie. DLA acted on behalf of tie in relation to the tram project. McGrigors were approached at the end of July 2009 to deal with specific matters which are covered in my response to question 9 below.

8. **What was your / McGrigors involvement in providing advice to CEC at the time of contract close in the period from December 2007 to May 2008?**

Neither I, nor McGrigors had any involvement in this. McGrigors' first involvement on behalf of tie was at the end of July 2009.

9. **At what stage were you and McGrigors first instructed by TIE? What brought about the situation in which you were instructed? Who within TIE instructed you? Did he or she**

explain why you were being instructed at that stage? Were DLA instructed at this stage? What was the working relationship between McGrigors and DLA at this stage? What was the scope of your initial instructions from TIE? When and how did that scope change over time?

We were first approached by tie at the end of July in 2009. This was because of an increasing number of claims and disputes and the failure of a recent mediation. Our first points of contact were Steven Bell and Dennis Murray. We were advised that DLA were providing legal advice to tie across all aspects of the contractual arrangements for delivering the trams project. Our role was to attend meetings to stress test certain matters that tie were intending to refer to adjudication. Our involvement on behalf of tie as it developed thereafter is set out in my answer to question 6.

10. **What difference, if any, did instructions from TIE make to the instructions you held from CEC? On 20 August 2009, you sent a letter to the Council notifying then that you were providing services for TIE (CEC00774999). You said in your letter that TIE had said it was a requirement of the instructions that the duty of care arising out of them was owed not only to TIE but the council. Did you have any discussions with the council regarding this? In the first numbered paragraph of the letter you say that the duty is owed on the basis that the interest of tie and those of the City Council are aligned. At any point in carrying out your work to type did you become aware that the interests of CEC and those of TIE were not aligned? What action did you take in relation to that?**

We were not instructed by CEC when we were instructed by tie in August 2009. We were informed by tie that a duty of care letter was required by CEC and that is why the letter of 20 August 2009 was issued. It was provided to tie who passed it on to CEC. I had no discussions with CEC regarding the duty of care letter. We had little direct involvement with CEC until the end of 2010. The specific issues which we were involved in, such as the challenge sessions, looking to see what arguments could be used to deal with the interpretation of the words at the end of Pricing Assumption 1 all the way through to the expansion of our role in January 2011 were all aimed at maximising whatever arguments and position that tie had against Infraco, and this was aligned with the interests of CEC.

11. **What was your initial impression of the contract and the manner in which it was being administered/operated when you were first instructed by TIE? Did your views change over time? If so, when and why?**

My first involvement was through challenge meetings when it became immediately apparent that the Pricing Assumptions and specifically Pricing Assumption 1 presented significant problems for tie. My impression was that tie was looking at all avenues open to it under the contract to deal with the growing number of Notified Departures and claims from Infraco. The first 3 adjudications which involved the application of Pricing Assumption 1 established that design development from BDDI (Base Date Design Information) to IFC (Issued for Construction) did trigger the exclusionary words

at the end and the focus moved to a consideration on whether a non literal interpretation of these words could be advocated.

12. **Later, as matters progress, there is a great deal of email correspondence between Andrew Fitchie, Tony Rush and TIE officers which is cc-ed to you (examples can be provided if required). Why was this done? What was your role in relation to such communications?**

I was copied into many emails. This did not change the scope of what McGrigors were doing. I think the reason why I was copied in was to keep me updated on matters as they developed so that I could take this into account in relation to the specific matters that I was dealing with, such as our advice on Pricing Assumption 1.

13. **It appears that by the end of 2010, you had taken over as the principal legal adviser from Andrew Fitchie of DLA (see, for example, the email to you from Tony Rush dated 9 November 2010, CEC00101585, and the email from Richard Jeffrey to you and others dated 10 November 2010, CEC00013165) neither of which went to DLA. Do you agree? Despite this, on 8 November, Andrew Fitchie had been due to attend a meeting with CEC and TIE which you also attended (CEC00102091). Can you comment on this? Was there an identifiable decision taken that there should be a change of advisor or was it a gradual process?**

The email of 9 November 2010 was sent to 12 people, 3 of whom were at DLA and the email of 10 November 2010 was sent to 4 people, 1 of whom was at DLA. I do not know whether Andrew Fitchie was due to attend the meeting on 8 November 2010. From my recollection Andrew Fitchie stopped being involved at the end of October 2010. McGrigors involvement increased significantly in November 2010 through to the point in early January 2011 when McGrigors took over the lead role from DLA on 13 January 2011.

Dispute Resolution

14. **What was your role in relation to the decision as to whether not to use the dispute resolution procedure? What advice did you provide? What factors determined which issues were selected for DRP? What was your role in relation to that decision? What were the objectives in referring matters to DRP? Were these objectives met?**

When McGrigors were appointed by tie it was to attend challenge meetings in relation to matters that were intended to be taken to adjudication. Thereafter our efforts were in considering what arguments could be utilised to shift adjudicators away from a literal interpretation of Pricing Assumption 1. Until the realignment of legal services at the end of 2010, DLA were acting on behalf of tie in the DRPs, with the exception of (i) the INTC 109 adjudication before Lord Dervaird -- in relation to which see question 18 and (ii) some *ad hoc* involvement in specific adjudications - see question 17.

15. **The documents referred to challenge meetings having taken place in relation to the issue of whether not refer disputes to the resolution procedures (eg the DLA Document entitled "Review of Points Arising from the Challenge Meeting on 17 August 2009 - CEC00832826). It is clear from this that you participated in the review meeting. What was your role? How did your role relate to or sit alongside the role of DLA? What was the purpose of the challenge meetings? Who attended them? How were they conducted? How effective were they? Do you consider that they achieve their purpose?**

The role of DLA was to prepare heads of claim which outlined the principal issues for DRP, and for these to be tested in the challenge meetings. The format at these meetings was that Dennis Murray gave a high level presentation of the claim as set out in the paper that would typically be circulated on the Friday afternoon prior to the Monday morning meeting. There was then a discussion around key issues.

The challenge meetings were attended by representatives from tie, DLA and McGrigors.

The first of these meetings took place on 3 August 2009. I was on annual leave at the time and my colleague Simona Williamson attended. Two matters were considered. Firstly an issue concerning reconfiguring the Stakis car park at Edinburgh Airport and how that fell to be treated under the Infraco Contract. The second issue involved extension of time 1 which arose from a postponed start. I produce herewith my email to Dennis Murray of tie of 10 August 2009 **(CEC00805413)** and the 2 summary notes **(CEC00659784 and CEC00659783)** referred to therein in respect of each of these matters.

I attended the meeting on 17 August 2009 which was concerned with Gogarburn Bridge and I produce my email to Dennis Murray of 24 August 2009 **(CEC00805684)** together with the comment paper **(CEC00805685)** referred to therein. It refers to the final paragraph of Pricing Assumption 1 (clause 3.4.1 of Schedule Part 4) and whether the IFC drawings reveal changes of design principle, shape and form and outline specification. The same points are narrated in relation to Carrick Knowe Bridge and Russell Road Retaining Wall. My emails in respect of these further two matters to Dennis Murray of 26 August 2009 **(CEC00805738) and** 4 September 2009 **(CEC00805916) are** produced together with the respective comment papers **(CEC00805739 and CEC00805917)**.

The challenge sessions were concerned with issues of principle and we were not involved at this stage in the adjudication process.

By the time the decision in the Gogarburn and Carrick Knowe adjudications were issued the focus moved away from challenge sessions into the Project Pitchfork strategy.

16. **In an email dated 3 December 2010 (TIE00304731) sent to Richard Jeffrey and you, Tony Rush described the adjudication in relation to Landfill Tax as a "potential loser" and says that the way to avoid the embarrassment flowing from losing it is not to pursue it. Did you agree that it was a 'potential loser'? Why was it nonetheless pursued?**

McGrigors had no involvement in this matter until February 2011 when one of my partners Richard Anderson provided advice on whether the decision could be challenged. However, this was superseded by the mediation.

17. **Once disputes were taking to DRP, in general, what was your role in pursuing them? What input did you have in relation to the arguments to be advanced in these procedures? Had they already been determined?**

Until the realignment of the provision of legal services at the end of 2010, DLA acted in the DRPs and adjudications, except in relation to (i) the INTC 109 adjudication (see answer to question 18 below and (ii) some specific *ad hoc* involvement – see below.

Specific *ad hoc* McGs involvement:

- Russell Road Retaining Wall: on 1 December 2009 at 18.50, Keith Kilburn of DLA issued a 30+ page draft Rejoinder document for comment by McGrigors the following day. I responded on 2 December 2009 at 16.46 with some text for consideration;

- Depot Access Bridge: Andrew Fitchie sent me a copy of Infraco's position paper on 24 February 2010. He did not explain why he is sending it, but it relies upon Pricing Assumption 1, and was presumably therefore relevant to the legal analysis that we were carrying out as part of our report on contractual issues;

- Section 7 drainage (Coutts - bat boxes): we were notified about what was happening in adjudications where it bore upon the work which we were carrying out on Pricing Assumption 1;

- Email from me on 29 April 2010 **(CEC00323248)** raising a concern that the draft letter on clause 34.1 of the Infraco Contract **(CEC00323249 and CEC00323250)** might not align with DLA's pleadings in adjudication ";

34.1 should be 3.4.1

- Prelims adjudication: we were asked to provide comments in relation to DLA's draft Response in a very short timeframe (same day) – 1 December 2010.

18. **McGrigors acted for TIE in the DRP procedure for INTC 109 — a dispute as to whether TIE could instruct INFRACO to proceed under Clause 80.13 (see letter from Steve Bell to you dated 23 June 2010 - CEC00369253). Why was the decision taken to instruct McGrigors rather than DLA in relation to this dispute?**

I understand that McGrigors were instructed on this dispute because McGrigors had advised in relation to utilising clause 34.1 - see report on contractual issues referred to in questions 24 and 34.

The dispute process was initiated by Infraco; DLA acted initially. A draft position paper was produced by DLA on 27 May 2010.

Adjudication Decisions

19. **When the decisions were given on the Carrick Knowe bridge and Gogarburn bridge adjudications in November 2009 (CEC00479431 and CEC00479432), what was your reaction? What effect did you consider they would / could have in relation to the future management of the contract? What difference, if any, didn't make to the position of TIE and their relationship with BSC?**

These decisions held that the development of the design from BDDI to IFC came with the ambit of the final sentence of Pricing Assumption 1 as a matter of fact. It was therefore unsurprising that the Adjudicator gave a literal interpretation to the final sentence of Pricing Assumption 1 - see my answer to question 15 and to my comment papers in respect of Gogarburn and Carrick Knowe. It was a major set back for tie. McGrigors' efforts then went into considering what could be done to advocate a different legal interpretation of Pricing Assumption 1.

20. **You have a presentation on the decisions in late November 2009 (it is referred to in an email from Andrew Fitchie dated 26 November 2009 CEC00851367). To whom did you give the presentation? Did you prepare slides, a report or a handout? Do you have notes of your presentation? Where would they be kept?**

The email referred to is from Andrew Fitchie to Gill Lindsay at CEC. I was not copied into it. I cannot recall giving a presentation on the decisions in question, but I do recall discussing the decisions at meetings. I did not prepare slides or a handout, nor do I have any notes.

21. **The Russell Road decision (CEC00034842) reached a different conclusion on the principle of changes. Can you comment on that? What effect did it have on the approach that TIE wished to pursue or on the negotiations with INFRACO? Despite the decision on principle that was closer to that for which TIE had been arguing, they were still unsuccessful on terms of the eventual outcome. What was your view of that? What significance did you consider that it had for the operation of the INFRACO contract?**

The Russell Road decision is addressed in the McGrigors' report on Certain Contractual Issues of 23 March 2010 which is referred to in question 24 below. See paragraphs 9.15 - 9.16 of the report. Doc ID: CEC00591754

22. **On 8 August 2010, you emailed Lord Dervaird's decision on the Murrayfield Underpass structure to TIE personnel (CEC00129398 and CEC00129399). He found that it was not open to TIE to use Clause 80.13 to issue instructions requiring that work be carried out. What difference did this make to the tactics and strategy for negotiation? Following the decision it is clear that you discussed it with Richard Keen QC (CEC00129396), prepared a Note of your thoughts (CEC00129397) and sought an Opinion from him (CEC00129395). You received emails regarding it from Andrew Fitchie (CEC00337984) and Tony Rush (CEC00337999). What was the purpose in conducting these investigations? What decisions were taken in**

light of the advice and what aspects of the advice were determinative of the course of action that was pursued.

Clearly the decision was a setback although it did not appear to block a route through clause 34.1 which I had been advocating. In August 2010 Project Carlisle was ongoing and the primary lever that tie were using to bring pressure to bear on Infraco was the RTNs. The immediate focus moved away from clauses 80.13/80.15. However, letters were developed in draft form utilising clause 34.1 and an example of this is tie's letter to Infraco dated 24 May 2010 **(CEC02083927)**. See also answer to question 34 below.

23. **None of the adjudication decisions were challenged in court proceedings. This is despite the proposal noted above that Steve Bell made to Martin Foerder. Was there an express decision made that there should not be a challenge or was it the case that there was never a decision to commence the challenge process? If there was a decision, what role did you play in it? What factors were taken into account in making the decisions and what were the factors which determined the outcome?**

The proposal from Steven Bell to Martin Foerder is presumably that referred to at question 54 below.

tie were keen for some kind of dispute resolution process in relation to Pricing Assumption 1 but we recommended against expert determination, and also said that the legal issues need to be pinned down first. The conclusions reached in relation to Pricing Assumption 1 meant that the dispute resolution procedure was not pursued and was overtaken by the mediation.

Report on Contractual Issues

24. **On 23 March 2010, you sent an email to Steve Bell with a report you had prepared on contractual issues (CEC00591753 and CEC00591754). Why had you prepared this document? Who instructed you to prepare it and when?**

I cannot recall precisely who issued the instructions, or when. The precise source of the instructions is not clear – however a draft outline was issued to Richard Jeffrey, Tony Rush and Andrew Fitchie on 4 February 2010. Various iterations of the draft report were issued culminating in the final version on 23 March 2010. A Supplemental Note **(CEC00592603)** was issued on 31 March 2010 **(CEC00592602)** following discussion with Richard Keen QC.

This was part of the Project Pitchfork stream of work.

25. **In relation to the claims by BSC for additional payment arising out of changes to the BDDI, you consider the wording within Part 4 of the Schedule and the lead up to it. You state that it is not clear whether key words within the contract in question were proffered by INFRACO or TIE (paragraph 1.2). On examination of the correspondence concerning Part 4 of the**

Schedule the position appears to be clear that the requirement that the design should not be amended from the BDDI in terms of design principle, shape, form and/or specification was first proposed by BB in an email dated 4 February 2008 (see CEC00592614 and its attachments, CEC00592615 and CEC00592616). Does this affect the views contained in the report? Had you seen these mails?

This wording in question did not originate from the emails of 4 February 2008, but from the Contract Price (Wiesbaden) Agreement: see Appendices 1 and 2 of the report on certain contractual issues. In particular, the relevant wording in the agreement provided at clause 3.3:

"*The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25th November 2007. The price excludes [specific items]. For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.*"

A copy of the executed Wiesbaden agreement **(CEC02085660)** is produced .

26. **Significantly, in paragraph 1.4 you state that there are difficulties with the argument that Infraco bears the risk of all design development other than substantial or material changes. Up until that time, that appears to have been the argument being advanced by TIE. Do you agree? TIE had presented their arguments in adjudications on that basis. Did you have concerns about the argument at that time?**

Yes, that is the argument that tie had advanced. My comment papers referred to in my answer to question 15 flagged the words at the end of Pricing Assumption 1. See also paragraphs 9.10 to 9.22 of the report.

27. **In paragraph 4.5 you set out your understanding of the position that lead to the inclusion of the Pricing Assumptions in Part 4. You had earlier provided with information by officers within TIE - see the following emails:**

- **email from Stewart McGarrity dated 30 November 2009 with attachments (CEC00622139, CEC00622140, CEC00622141, CEC00622142 and CEC00622143)**
- **email from Stewart McGarrity dated 12 February 2010 with attachment (CEC00547179 and CEC00547180)**
- **Email from Graeme Bissett dated 15 February 2010 (DLA00006320)**

- **email from Stewart McGarrity to you and others dated 17 February 2010 (DLA00002789).**
- **email from Andrew Fitchie to you dated 21 February 2010 (CEC00649800).**
- **summary of comments made by Geoff Gilbert in a conference call in which you participated (CEC00542536)**
- **most comprehensively, an email from Stewart McGarrity to you dated 24 February 2010 with all emails from the mail boxes of Geoff Gilbert and Matthew Crosse relating to the Agreement.**

Doc IDs: CEC00605640-44; CEC00605646 CEC00605648

Was this the basis of your comments as to the inclusion of wording in Part 4? If you took other information into account what was it and when and how was it provided to you?

The documentation referred to above was some of the material that we received - however, we did receive documentation from other sources - e.g. from Steven Bell and Torquil Murray.

However appendices 1 and 2 of the report refer to the specific documentation that was considered in compiling the report.

28. **In paragraph 4.5, you describe the Base Case Assumptions as being the means by which risk was allocated. Is it fair to say that the effect of them against the background of the incomplete design and the design misalignment as at contract conclusion was to place the risk substantially on TIE?**

Undoubtedly risk was being allocated to tie.

29. **You quote Pricing Assumption 1 in paragraph 5.1 of the report. It appears to include circularity. The wording in brackets in the first sentence gives the impression that ALL normal design development is at the risk of INFRACO even if it consists of design principle etc. However, the next sentence quoted (there is some intervening text which is not relevant and is omitted from the passage quoted), says that normal design development excludes changes of design principle etc. Do you agree that the result of this is that the text in brackets in the first sentence is irrelevant and that the entire issue of normal design development is irrelevant? Is the result that the only issue is whether there is a change of "design principle, shape, form and/or specification" with the result that any change of form or specification would be at TIE's risk? Would / should this have been obvious at the time that the contract was negotiated and then concluded?**

The exclusionary words at the end, as stated in paragraph 1.1 of the report, "*...on the face of it appear to narrow substantially the scope or content of what would otherwise form part of normal*

design development, for which Infraco would bear the risk". The report sets out our analysis and advice.

The words were clearly intended to have utility and were foreshadowed by the Wiesbaden Agreement - see question 31.

30. **In paragraph 8.5 you say that the relevant wording first arose in the Wiesbaden agreement and was incorporated almost verbatim into schedule part four. Could you identify the wording from the Wiesbaden agreement that was so incorporated? The version attached to the email from Stewart McGarrity of 12 February 2010 says that the Infraco price includes the development and completion of detailed designs "save for future changes to elements of the design intent for civils works that are substantially different compared to those forming the current scheme being designed by SDS"**

The version of the Wiesbaden Agreement attached to Stewart McGarrity's email of 12 February 2010 is a draft dated 19 December 2009, and not the final executed version.

The agreement was executed on 20 December 2009. As referred to at question 25 above, the relevant wording is contained at clause 3.3 of the executed agreement:

"*The BBS price for civils works includes for any impact on construction cost arising from the normal development and completion of designs based on the design intent for the scheme as represented by the design information drawings issued to BBS up to and including the design information drop on 25th November 2007. The price excludes [specific items]. For the avoidance of doubt normal development and completion of designs means the evolution of design through the stages of preliminary to construction stage and excludes changes of design principle, shape and form and outline specification.*"

31. **In paragraph 9.21 you draw together the various issues discussed in relation to interpretation. In short, although you conclude that there is an argument that something has gone wrong with the wording of the agreement, it is hard to identify what the 'correct' or intended wording would have been. Do you agree? You note in this paragraph that the matter is to be the subject of further consideration by McGrigors and Richard Keen QC. Did your views change as a result of that further consideration? In essence, the problem seems to be that no clear agreement had in fact ever been reached as to where design risk lay all that none of the principal parties involved in the Wiesbaden discussions had actually applied their minds to this issue. Do you agree?**

Paragraph 9.21 does draw the various issues in relation to interpretation together and highlights the difficulty in identifying a construction that could be put forward which mitigated the full effect of the exclusionary words at the end of Pricing Assumption 1. The matter was considered further but our views did not change.

I am not in a position to say what was in the minds of the principal parties involved in the Wiesbaden discussions. What is clear is that Bilfinger Berger concerns over underdeveloped design led to the Wiesbaden Agreement which was then reflected in Pricing Assumption 1. The exclusionary words were then relied upon successfully in 3 adjudications. Identifying on an objective basis an interpretation which did not go as far as giving effect to the words was the difficulty with which we were confronted. However, the position was advocated in tie's letter of 24 May 2010 **(CEC02083927)** referred to in my answer to question 34 below.

32. **In your report, you considered the issue of whether BSC could be compelled to proceed to carry out works when there was a dispute as to whether they constituted a change. In relation to the Clause 80 provisions, the conclusion appears to be that there is no effective remedy in respect of the failure by INFRACO to provide estimates and no means to compel them to work. Is this a position you encounter in relation to other construction contracts? How might matters have been done differently in order to improve TIE's position?**

Yes, section 17 of the Report addresses this and the position is summarised in section 1 at paragraphs 1.7 to 1.12. The conclusion identifies arguments for tie to use. Clause 80 links into the Pricing Assumptions. I have not come across similar provisions in other construction contracts. Different provisions would have had to have been agreed in order to improve tie's position.

33. **What difficulties arose from clause 80.13? What is your view of the wording of this clause? The issue that this clause is intended to address arises in relation to other construction projects. How it addressed there? Is the deadlock that arose in this project common?**

The difficulties that arose from clause 80.13 are highlighted in the Report and arise from the words at the end which state:

"*Subject to clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie change until instructed through receipt of a tie Change Order unless otherwise directed by tie*".

Infraco's position was that clause 80.13 should be read to mean that tie are entitled to direct Infraco to proceed with work in the specific circumstances set out in clause 80.15, and that they are not entitled to otherwise direct Infraco where an Estimate has not been referred to DRP or where there is a dispute about the existence of a Notified Departure or where Infraco have failed to produce an Estimate. Normally under construction contracts the contractor requires to proceed with the work where there is a difference on matters such as whether it is entitled to a variation, but it would have the ability to take matters to adjudication.

34. **Did TIE attempt to use the procedure for serving noticed under 80.13/80.15? What were the reasons for the course of action that they chose?**

Yes. By letter dated 24 May 2010 **(CEC02083927)** tie wrote to Infraco and at numbered paragraph 10 referred to both clauses 80.13 and 34.1 and to the paper apart which was based on wording which McGrigors had drafted. The arguments set out in the paper apart were subsequently advanced in the adjudication before Lord Dervaird which is referred to in question 22. The reason for this course of action was to try and achieve a position where Infraco required to proceed with the Work where it was disputed that a Notified Departure had occurred and/or where an estimate had not been provided or where it was provided but was disputed.

35. **From your experience, is the situation that occurred here in which a dispute means that the works could no longer proceed one that you have come across in other contracts? If you have come across it, was the contract in question one of the standard forms or was it bespoke?**

Not to my recollection.

36. **Your report also considers the related issues of liability for delays and BSC's entitlement to extensions of time. Once again, is it fair to say that your conclusion is that, on the basis of the work that had been carried out up to that date, it is not possible to express a concluded view as to the extent of entitlement to further extensions (see paragraph 1.17) and therefore that it is not possible to say that there has been undue delay?**

Our advice on this topic was contained in paragraphs 13 to 16 of the report. We were not able to express a view on the entitlement to extension of time.

37. **In relation to delay, it is apparent that both the design problems and the MUDFA problems were identified as possible causes of delays in the MUDFA work. Were you aware of further work which attempted to determine the causative potency of each?**

Section 19 of the report addresses this. Acutus were engaged in relation to delay analysis.

38. **In relation to the part of the delay was attributable to the late running of the MUDFA works, did you form a view as to whether they late running was the result of the additional length of utilities that had to be moved or was contributed to by one or more of late design by SDS, delay in approvals by statutory utility companies and slow / defective works by the MUDFA contractor?**

We were not in a position to form a view on the factual causes of delay.

39. **In relation to delay by SDS, although they were subcontractors to BSC and there was an obligation to manage them, it was also the case that Infraco were entitled to an extension of time where SDS were late in the issue of design. It was well known that the designs were very late. Did this mean that this was an avenue that was not pursued? As you note in paragraph 1.23, design delay is only at Infraco risk where it was Infraco's failure to manage**

design that caused the delay. Do you agree that this is a very narrow basis for risk being transferred to Infraco and that the practical result is that TIE retained substantially the whole of the risk of design delay? If that is so and the designs were known to be late at the date that the contract was concluded, should it have been apparent that there was a substantial liability in store for TIE/CEC from the outset?

The report at section 20 sets out our analysis of the relevant contractual provisions which are summarised at paragraph 1.23 of the Executive Summary. We were not asked to do anything further in relation to this topic.

40. **Can you shed any light on the EoT that was granted in response to the claim submitted by Infraco in relation to the MUDFA programme Revision 8? While the DRP was resolved with an extension of time given by TIE, it is not clear how much of it was accepted delay by MUDFA and how much was to reflect delays from other sources. On what basis was the extension conceded? The Report from Acutus in relation to this (CEC00381196) suggested that while it was not disputed that the MUDFA works were late, INFRACO had not shown that this had caused delay — or at least, not the delay claimed to their works.**

The extension of time was not "*conceded*" by tie. It was the subject matter of an adjudication before Robert Howie QC. In his decision of 16 July 2010 Mr Howie decided that the period of the extension of time to which Infraco was entitled under clause 80 in relation to the several sectional completion dates was:

41 Section A – 154 calendar days (to 10 November 2010)

Section B – nil

Section C – nil

Section D – nil.

McGrigors did not act for tie in this adjudication.

41. **CEC00328160 is an email to you from Tony Rush. The attachments include the various letters dealing with the eight-month extension of time and the causes of it. In chronological order, the first CEC00328168, is a letter dated 13 of November 2009 from Steve Bell to Martin Foerder. This indicated TIE were willing to offer an initial extension of time of nine months and six-month prolongation costs. In the correspondence, the position for TIE was that the dominant cause had not been established (CEC00328167 — letter from TIE to BSC dated 11 February 2010 stating that it is premature to say "without doubt" that the delay is driven by the utilities, and CEC00328162 — letter from Steve Bell to Martin Foerder stating in paragraph 20 on page 7 that the dominant cause for delay has not been established). The position of the Consortium (CEC00328163 — letter from Consortium to TIE dated 1 March**

2010, and CEC00328161 - letter from the Consortium to TIE dated 21 May 2010) was that it was attributable to delays in the completion of utility works. What was your role in consideration of the cause of this delay and whether or not the contractors were entitled to an extension of time? What view did you reach as to the cause of the delay and what did you rely upon in reaching your view? Were you involved in the offer made on the letter noted above of 13 November? On what basis was it made?

CE00328160 is an email of 7 June 2010 from Torquil Murray to Tony Rush, Bruce Bentley (DLA) and Denis Murray. I was one of a number of people who were copied in.

CE00328160 should be CEC00328160

McGrigors were not involved in tie's "award" of this extension of time.

42. **Is it fair to say that your conclusion in relation to extensions of time is that, on the basis of the work that had been carried out up to that date, it is not possible to express a concluded view as to the extent of entitlement to further extensions (see paragraph 1.17)**

Our conclusions are set out in the report at numbered paragraphs 13 to 16 and in the Executive Summary at paragraph 1.7 we state:

"*Issues of causation and concurrency can only be properly determined by a detailed analysis of the critical path, underpinned by factual and forensic analysis*".

We were not in a position to express any view on the extent of any extension of time that might fall to be awarded.

43. **In a supplementary report (CEC00259633) you suggested an alternative interpretation that could be placed on the contract but concluded that the prospects were uncertain and noted that, as drafted, the Infraco contract places almost the whole of the risk of design change on TIE (paragraph 3.1) and that this is consistent with the position taken by INFRACO in negotiations. What was the reaction to this within TIE? What effect (if any) did it have on the strategy adopted in relation to the contract?**

I cannot recall any reaction from tie to the supplementary report. I am unaware of what effect it had on the strategy that tie adopted in relation to the contract.

44. **In addition to the issues contained in the reports, in the course of discussions to conclude the contract, it appears that it became clear that there was a misalignment between the Employer's Requirements, the Infraco Proposals and the SDS Design, Have you encountered that situation in other contracts? Is it fair to say that while the need for changes to bring about alignment was recognised prior to contract close, there was no wording in the contracts to address the consequences of this? The misalignment was corrected but the result was an argument as to who was to pay for the changes. Can you explain the issue that arose and the various arguments advanced? What was your view?**

What was done in relation to this issue and what was the outcome? To what extent were the actions to correct the misalignment the cause of the changes to BDDI which created the issue of the entitlement of BSC to additional payment?

I have encountered misalignment between the Employer's Requirements and Contractor's Proposals in other contracts.

Whilst I do recall some discussion at the beginning of our involvement with tie in relation to misalignment, I cannot recall providing any detailed analysis. From memory it was a matter dealt with after contract formation and prior to McGrigors' involvement.

45. **It appears from what it said on page 4 of the DLA Report on Infraco Contract Building Blocks (CEC00806645) that it was recognised that all the work required to address the misalignment would give rise to mandatory TIE changes under the Infraco contract. If this was the case, it appears to be the position that parties were aware that there would be changes entitling the Infraco contractors to additional payment. Is this correct? CEC00851862 is an email to you from Stuart Jordan of DLA in which he sets out arguments that could be advanced on behalf of TIE. Can you comment on these? They appear to be attempts to salvage something from a situation which had not been foreseen. Do you agree? Is this a situation which you consider could / should have been foreseen?**

Yes – this seems to be correct. I cannot recall considering the merits of these arguments. Our primary focus was in relation to the Pricing Assumptions.

Other Activities in 2010

46. **Throughout this year, what role was played by Tony Rush? How did work carried out by him sit alongside the work that you were doing?**

My understanding is that Tony Rush was brought in by Richard Jeffrey because of his lengthy experience at a senior level in the construction industry in order to assist tie in the many issues that confronted them.

Certain streams that McGrigors were involved in dovetailed with Tony Rush's involvement. Other streams that Tony Rush was involved in such as RTNs over the summer of 2010 and Project Carlisle we were not involved in.

47. **Throughout this year, there were a number of different Projects: Carlisle, Pitchfork and Termination. Can you outline what each of them was and how they relate to one another? What was your role in relation to each of these Projects? Which other persons — both within TIE and by way of external advisers — were involved in the projects and what role was played by each person?**

Taking each of these Projects in turn and in chronological order I comment as follows:

Project Pitchfork – commenced end of January 2010

This was the working name for a multi-tiered stream of work which examined various options including termination of the Infraco Contract, an exit option in respect of Bilfinger Berger from the consortium, aggressive application of the Infraco Contract, adopting an accommodating approach to Infraco in return for more certainty on programme and continuity but attempting to achieve a reasonable partnerial relationship with Infraco.

I recall that Graeme Bissett played a principal role in managing the process which involved the senior tie team, Tony Rush, DLA and McGrigors.

Our work stream encompassed:

- the interpretation to be given to Pricing Assumption 1;
- breach/default/behaviour
- delay/mitigation/acceleration.

The work stream developed and the product was our report of 23 March 2010 which was circulated at various stages in draft form and underwent a number of iterations – see question 24.

Carlisle – commenced at the end of April 2010

This was an exploration led by Tony Rush to see if a consensual resolution could be achieved with Infraco. We had no involvement with this but I understand that it involved the senior tie team and DLA.

Termination – commenced in March 2010

This involved various streams including the preparation of Remedial Termination Notices. We were not involved in any of the streams until October/November 2010.

Those involved were the senior tie team, Tony Rush, DLA with input from consultants such as Acutus, Gordon Harris Partnership who carried out a forensic review of the contract price, and advice was taken from Richard Keen QC by DLA and thereafter by McGrigors in November 2010.

This project morphed into Project Resolution in November 2010 which included advice to tie on matters including termination, consequences flowing therefrom, input from Richard Keen QC and an analysis of the RTNs that had been issued to date and the response to these.

48. **Why did Stewart McGarrity send you a series of emails concerned with Project Pitchfork on 15 February 2010 (CEC00605552)? Were you asked to do anything with them?**

These were produced as factual background in relation to the analysis of schedule part 4, leading eventually to the report on certain contractual issues dated 23 March 2010.

49. **Concerns about the interpretation of Part 4 lead to the TIE board concluding in early 2010 that there should be a court action raised to clarify the matter (see email from Richard Jeffrey to you and others dated 26 January 2010 - CEC00551040). No such action was raised. Why was this plan not pursued?**

This was essentially superseded by the Project Pitchfork streams.

50. **Were you the author of CEC00618195 — a document dated 18 February 2010 entitled "Factual Background in relation to Pricing Assumption 1"? If so, from where did you get the information to compile this? What was the purpose in preparing this? When you comment in this Note on the evolution of Part 4 of the Schedule you do not mention the clause that draws attention to the fact that there would be a change as soon as the contract was signed. Is such a clause common in your experience?**

Yes. It was produced by Simona Williamson (then a Senior Associate in my team), under my supervision, on the basis of information produced by tie (including Graeme Bissett), DLA and Torquil Murray.

The note **CEC00649075)** was subsequently updated **(CEC00649074)** and issued under cover of my email to Stewart McGarrity of 26 February 2010 **(CEC00649071)**.

The purpose of producing the document was to assist with the legal analysis in respect of the provisions of Schedule part 4, and in particular Pricing Assumption 1.

The note did not seek to analyse any clauses – it narrates the factual background.

51. **In paragraph 14, you refer to a refusal to enter into negotiations. Whose refusal is this? What evidence had you been given of the refusal?**

The refusal referred to is that of Infraco.

The evidence that had been provided is as set out in the list of documents at the end of the note.

52. **At paragraph 16, you set out TIE's assumption as to what this part of the Schedule was designed to achieve. From where had you got this information?**

This information had been provided through discussion with tie, in particular with Steven Bell

53. **CEC00328164 is a letter from BSC to TIE dated 1 March 2010. In it, there is a note of the significant volume of correspondence sent by TIE to BSC. This averaged about 75 letters a week. Was this part of the strategy to enforce the contract in an assertive manner? What**

role did McGrigors play in the determination of and implementation of this strategy? What was it intended to achieve? What was the response from BSC? Did this strategy achieve its objective?

Yes. McGrigors' role in relation to enforcing the contract in an assertive manner was restricted to the sequence of events surrounding clause 34.1 and 80.13.

The strategy was, as I understand it, intended to maximise tie's position under the Infraco Contract. The eventual outcome was the mediation.

54. **On 1 April 2010, Steven Bell wrote to Martin Foerder (CEC00328162) in relation to a number of outstanding disputed issues. One of the matters considered was whether the meaning of Schedule Part 4 should be referred to binding determination (page 1). Had you been involved in this proposal? What was the purpose of such a referral? It does not appear that this was pursued. Why was that?**

See answer to question 23 in relation to this letter.

55. **There was a report in Project Pitchfork prepared in March 2010 and it appears that you had input into it (see email from Andrew Fitchie dated 1 March 2010 - CEC00619041 — and email from Graeme Bissett dated 3 March 2010 - CEC00619750). What was your involvement in this report and the project more generally?**

Our involvement in Project Pitchfork is set out in the answer above to question 47.

56. **Why were Remediable Termination Notice (RTNs) served? What was the response from BSC - CEC00218111 and CEC00218113 are two examples of letters rejecting them? Did these Notices achieve their objective?**

This was one of the work streams of Project Termination and was also part of the strategy to enforce the contract in an assertive fashion. We had no involvement in the exercise that resulted in the issue of the RTNs. I am not in a position to say whether or not the notices achieved their objective.

57. **BSC provided a "full and final' proposal for Carlisle on 11 September 2010 (CEC00218042). In this letter, INFRACO state that while they are happy to discuss how their offer has been made up, they are not willing to have any discussions regarding the TIE counter-proposal. What was the reaction to this letter and the refusal even to discuss the TIE proposal? What was the reaction to the statement by INFRACO (page 5) that the proposal involved a substantial transfer of risk and that it would therefore be necessary to increase the prices?**

We had no involvement in this work stream – we had very little involvement during September 2010, and what there was related almost entirely to dealing with clause 34.1 and 80.13.

58. **You attended a consultation with Richard Keen QC on 4 November on what was by then termed Project Resolution (see Note of Consultation - CEC00101459). The purpose was to discuss the basis on which the contract could be terminated. Was there an increased focus on termination of the contract by this TIE? What had brought that about? Was the intention to terminate the contract or to put pressure on BSC by having TIE in a position in which they would be *able* to terminate?**

The focus was to have a clear understanding of the contractual provisions in relation to termination so that informed decisions could be made. By this time work had more or less ground to a halt so all options were being looked at.

59. **At this stage, the view was that termination could only be on the contractual bases and not at common law. The discussion noted the position that would arise if there was an attempt to terminate on the basis that there had been an INFRACO Default but it was later determined that this was not the case. There was discussion as to the issues that would require to be investigated in relation to the issue of whether there has been an INFRACO Default and it was noted that an opinion has been sought from Robin Blois Brooke. An earlier email from Robert Burt of Acutus dated 27 November 2010 (CEC00220108) suggested there was a concern as to the substance of some at least of the Notices. It appears from this that the issue of whether there was a default that could reliably be founded upon had still not been considered in any detail. Do you agree? Why was this the case when there had been so much work over the previous months leading in the direction of termination of the contract?**

This was all part of the work stream that was initiated when McGrigors became involved in termination issues at the very end of October 2010 and consisted of 2 main strands: (1) McGrigors produced a report (see question 60 below); and (2) a forensic exercise in respect of the factual basis for termination and the work done by Acutus formed part of this (see answer to question 47 above).

We were not involved in the exercise that resulted in the issue of the RTNs.

60. **On 2 December 2010, you emailed Richard Jeffrey, Steve Bell and Tony Rush with a draft report on Project Resolution (TIE00683962 and TIE00683963). Who had asked for this? Did they express the reasons for wanting it? Was a final version ever prepared? If not, why not?**

Tie instructed us to produce the report as a matter of urgency. It involved us having to get up to speed on all the matters covered by the report very quickly. CEC's lawyers also asked for the report and given the urgency we produced it as a draft in the first instance. A further version was circulated on 10 December 2010. It included the executive summary and certain minor edits to reflect points made by Steven Bell at tie. A final version **(TIE00080959)** was issued on 14 December 2010 **(TIE00080958)**.

61. **Paragraph 5.8 records that no forensic exercise had been carried out to determine whether there had been a default prior to service of the RTNs. Why was this? The RTNs were served with the intention that they be relied on. Did that not make it essential to know whether there was a proper basis in fact for them? Paragraph 5.11 notes that reports have been instructed from Acutus and from Robin Blois Brooke. Were these reports obtained? It appears that the matters to be covered in those reports were the factual basis that would determine whether it was possible to use the Remediable Termination Notice Procedure in the Infraco contract. Do you agree?**

Paragraph 5.8 states that "*It would appear that this* [as referred to in the preceding paragraphs of the report] *forensic exercise has not been carried out in relation to the RTNs which have been issued by tie…*". I am not in a position to say why the exercise that we considered to be necessary had not been carried out. In the final sentence of paragraph 5.8 and in paragraph 5.9 we set out our understanding of the exercise that had been carried out:

"*5.8…the selection of issues which were to form the basis of the RTNs, and the subsequent production of the RTNs themselves, emanated from a series of discussions between various members of the tie team and external advisers.*

5.9 Following those discussions, the RTNs were drafted, and then subject to review by members of the tie team and some advisers. Whilst this process involved some element of testing and challenge, with external expert engineering views being sought, it was neither preceded, nor followed, by a rigorous forensic examination based on all relevant documentation and witness evidence. Isolated items of documentation were identified, but these were few in number, and largely consisted of correspondence exchanged between the parties after the events complained of, setting out their arguments. The documents did not consist of the underlying evidence that would support the assertions made by tie. Formal independent expert evidence of the type that would be required in the context of court or other proceedings was not obtained."

Acutus were instructed to produce reports, and certain draft documents were produced by them. This exercise was not completed by the time of mediation.

Robin Blois-Brooke was instructed to produce a report on design but was stood down after the mediation. See also question 81 below.

The position in respect of the above experts was confirmed in numbered paragraph 5.11 of the report:

"*5.11 This forensic exercise has now been put in train, specifically:*

(a) Acutus have been engaged to work with tie to undertake the forensic exercise referred to;

(b) *Robin Blois-Brooke of William J Marshall & partners has been appointed to produce an expert report in relation to the following issues:*

(i) *The on street track design – which relates primarily to RTN 6, but also RTN 1;*

(ii) *The Murrayfield retaining wall – which relates to RTN 7;*

(iii) *The Gogarburn retaining wall – which relates to RTN 10.*

5.12 *The outcome of this exercise will enable an informed decision to be taken on whether tie are likely to be able to sustain an argument that an Infraco Default has occurred. Without that exercise, there is no proper benchmark against which the prospects of success can be measured.*"

62. **Section 6 of the Report notes that, irrespective of the content of the RTNs served to date, the advice that had been received was that the form was inadequate. Was this a surprise? It seems strange that contractual notices would be served in relation to such an important matter that there in a form that meant that they could not be relied upon. Can you comment?**

The report reflects our views and those of Richard Keen QC and sets out what we thought required to happen. Beyond that I am not in a position to comment.

63. **At paragraph 11.3, the Report concludes**

"At present, there is not yet a firm basis upon which to assess the strength of tie's position in relation to establishing whether there has been any Infraco Default."

What effect did that have on the strategy pursued up to that date and what was the effect on the determination of strategy in future? Is it fair to say that, taken overall, the Report pours cold water on the possibility of termination that had been pursued for some time?

The effect of our report was that a significant forensic exercise was commenced to consider whether there was a factual basis for termination. That exercise was still continuing when agreement was reached on heads of terms at Mar Hall and it was subsequently halted.

64. **There is an Opinion from Richard Keen QC appended to the Report. At paragraph 9, it concludes that TIE can only terminate the Infraco Contract if it proves an Infraco Default and Infraco can only terminate the contract if it proves a TIE Default. In the absence of such default(s) both parties are locked into the contract. Is this situation unusual? What problems did it present to TIE?**

In my experience, yes. The consequences to tie of the nature of the termination provisions in the Infraco Contract are set out in paragraphs 9 and 10 of the report.

65. **In summary where did matters stand in light of this report? What was the reaction within TIE to the Report? The version referred to above is marked "draft". Was a final version prepared? If so when and to whom was it provided? If not, was this on the basis of instruction from TIE? Who gave the instruction and on what basis was it given?**

In light of the report the forensic exercise set out in paragraph 5.11 of the report was put in train. I cannot recall what the reaction of tie was to the report. The final report was issued on 14 December 2010 to Richard Jeffrey and Tony Rush.

66. **You were keen that advice should be sought from Nicholas Dennys QC in London. Why did you wish to have his advice? A consultation was arranged by CEC. The solicitors instructed for this were Shepherd & Wedderburn. Why had they been instructed? What was the working relationship between McGrigors and Shepherd & Wedderburn in relation to the project? CEC00013529 is a note of the consultation that took place on 23 November 2010. The clear advice was that the contract should not be terminated on the basis of the RTNs served to date. What was the reaction to this within TIE / CEC (CEC00127059 is an email string copied to you which contains Richard Jeffrey's views and may assist).**

I had no involvement at all in the advice that was sought from Nicholas Dennys QC. I had no involvement with Shepherd & Wedderburn. I am unaware of the reaction of tie beyond what is set out by Richard Jeffrey in his email.

Move to Mediation

67. **Throughout 2010 it seems that TIE had been considering renegotiating or terminating the contract with an increasing emphasis over time on the latter. Do you agree? Then, in the final stages of the year, there was a move to mediation. How did this come about? Who suggested it? Was the Scottish Government involved? Who was involved in making the decision to pursue mediation as the strategy? What were the alternatives?**

I think all options were under constant consideration during the course of 2010. When work more or less came to a standstill in September/October 2010 and the Project Carlisle initiative to find a solution had faltered at the end of October 2010 there was a growing recognition among BSC, tie and CEC that the deadlock had to be broken and this led to the move to mediation in mid November 2010. I had no involvement with the Scottish Government and do not know if they were involved in the initiative. The alternatives to mediation were those which had first been considered in Project Pitchfork and the forensic exercise described in the report referred to in question 60 above.

68. **An email from Richard Jeffrey in 26 November 2010 notes that there was apparent willingness from the BSC camp to enter into mediation (CEC00126852). By 12 January 2011, Susan Clark is sending an email to you and others with an agreed mediation timetable (TIE00105960 and TIE00105961). What had happened in the interim period?**

In the interim period I provided names and details of potential mediators to Nick Smith at CEC and to Richard Jeffrey. These names were passed on to Richard Walker of Bilfinger on 9 December 2010. Further exchanges took place which resulted in agreement on the mediator and dates for the mediation. Bilfinger Berger were requested to provide "walk away" figures prior to the mediation so that these could be considered in advance of the mediation in case the discussion at the mediation moved away from a solution to separation.

On 10 January 2011 a meeting took place at tie's office. Richard Jeffrey, Steven Bell, Susan Clark and Gregor Roberts (the new finance director) of tie were present.

Tony Rush and Nigel Robson (a retired former senior partner of an international law firm whom Tony Rush had brought into assist with the mediation) were also present as was my colleague Simona Williamson. Various actions were agreed including an action for tie to prepare a paper setting out what they considered Infraco's entitlement for work done to date.

On 12 January 2011 **(TIE00699110)**, I circulated the mediation timetable **(TIE00699111)** which is referred to in the question with some amendments.

Beyond the foregoing in relation to mediation we were still taking forward the forensic work stream referred to in our report of 14 December 2011 as well as taking over a number of key work streams from DLA. With regard to the latter see answer to question 71 below.

2011 should be 2010
Doc ID: TIE00080959

69. **Had you been involved in consideration of the various steps that would have to be undertaken by TIE in order to be in a position to mediate?**

The various steps to some extent involved a continuation of those that were taken in relation to Project Carlisle which I had not been involved in but various actions were identified following the decision to mediate including those referred to in the mediation timetable.

70. **A revised timetable was provided by Susan Clark in TIE00685292 and TIE00685291. The timetable notes that by 21 January, McGrigors were to produce a note on the various Adjudication decisions and where they leave TIE's position on various matters. Did you carry out this work? If so, can you provide a copy and indicate to whom it was sent and when?**

Yes – the note is produced. It was sent by email dated 21 January 2011 to Richard Jeffrey, Steven Bell, Gregor Roberts, Susan Clarke, Dennis Murray (all tie) and Tony Rush and Nigel Robson.

Doc ID: WED00000618 & WED00000619

71. **What role was performed by McGrigors in relation to the lead up to and conduct of the mediation? Did you provide advice to the CEC officers and, in particular, the new Chief Executive, Sue Bruce?**

A "hand over" meeting took place with DLA at tie's offices on 13 January 2011 and our work scope comprised:

- All matters of general disputes with Infraco arising out of the Infraco Contract;
- General advice in relation to the administration of the Infraco Contract;
- Any DRP work other than an ongoing adjudication in relation to preliminaries which DLA were continuing with;
- Advising on any specific matters which tie requested us to provide to CEC;
- Matters arising from ongoing work streams including Project Resolution, Project Phoenix which was the focus for the mediation as well as in relation to Project Separation;
- Ad hoc matters arising in relation to public law/EU and data protection.

Most of our time from mid January 2011 to the commencement of the mediation on 8 March 2011 was taken up with organising the mediation, developing ongoing streams which led to Exhibits 1, 2, 3, 4 and 31 which formed part of the mediation statement (these are referred to in the answer to question 72), drafting and finalising the mediation statement which was approved by tie and CEC. The mediation statements were exchanged on 24 February 2011. We were then involved in reviewing the Infraco mediation statement.

During January and February 2011 there were numerous meetings with tie and also some with CEC. Tie were heavily engaged in assessing the cost of work done to date and I recall examining certain issues which included an advance payment that was made by tie to Infraco and the extent to which some of this could be recovered if parties agreed to separate.

There were ongoing major streams involving:

INTC 536 which was an extension of time claim by Infraco with loss and expense of £40m. We took advice in relation to this from Richard Keen QC and Roisin Higgins. This culminated in their joint option dated 4 February 2011.

There were also a number of ongoing DRPs which were principally handled by Richard Anderson These included:

- Princes Street – this was an adjudication.
- INTC 577 which involved the interaction between clauses 65 and 80.
- INTC 594 and related cable ducts.
- INTC 212 and related street lighting.

Beyond the foregoing there were various other ongoing issues including tie's consideration of approximately 800 INTCs.

There was also a work stream in terms of which Acutus were interrogating the factual matrix to identify areas of potential Infraco default which could lead to the service of fresh RTNs.

Robin Blois-Brooke was releasing various sections of his report on an incremental basis which required to be considered with tie.

Drysdale Graham, who was a partner at that time in the Projects team at McGrigors, drafted and finalised the Project Phoenix Statement (Exhibit 31) which is referred to in my answer to question 72.

Tony Rush and Nigel Robson were involved with the tie team and CEC in relation to Project Phoenix and a number of the streams referred to above.

I recall that my first meeting with Sue Bruce was at a meeting at tie's offices on Saturday 29 January 2011. From memory also present were Dave Anderson, Alastair Maclean, Donald McGougan and Ritchie Somerville from CEC, Vic Emery, Richard Jeffrey and Steven Bell from tie, Tony Rush, John Robson and myself. My slot at the meeting was to provide a summary of the key legal issues which had emerged through DRP (the Pricing Assumptions, clause 80, clause 80.13, 80.20 and clause 34.1) and the further legal analysis in relation to termination rights and consequences.

72. **BFB00053300 is the TIE mediation statement. Was this drafted by you? Who else provided input or gave approval? To what extent did TIE/CEC seek to maintain the various arguments noted in this Paper and to what extent did they depart in order to het agreement?**

The tie mediation involved a synthesis of many of the work streams that had been ongoing for some time. I was responsible for drafting the mediation statement which was approved by both tie and CEC. McGrigors also drafted a number of the Exhibits namely:

Exhibit 1 – Design Development and Pricing Assumption 1

This paper put forward an interpretation of the exclusionary words at the end of Pricing Assumption 1 which mitigated against a narrow literal interpretation of the words in question. This was the product of our earlier work on this topic.

Exhibit 2 – Progress of the Works - clauses 34.1 and 80.13

This paper set out the basis for arguing that Infraco required to proceed with work where a Notified Dispute was disputed pursuant to instructions under clause 34.1 and in accordance with clause 80.20. Again this was a product of work which we had primarily carried out.

Exhibit 3 - The interpretation of clauses 65 and 80

This paper set out the analysis which concluded that Infraco was bound to proceed under clause 65 and therefore that it had to satisfy its requirements.

Exhibit 4 – Time

This paper was aimed at rebutting INTC 536 in terms of which a substantial extension of time was being claimed with a financial claim of c. £40m.

Exhibit 31 – Project Phoenix Statement

This paper set out what CEC and tie were in principle willing to agree to and the essential requirements to be met by any agreement arising from the mediation. The table at the end was provided by tie.

All the arguments available to tie were utilised for the purpose of the mediation. The last question is I think impossible to answer because the settlement was not as far as I am aware arrived at by giving up certain arguments.

73. **What preparation was carried out for the mediation? In particular, were there reports or discussions considering the options and range of possible outcomes? Was there discussion of the tactics and strategies that might be adopted? Who was involved in these? What records were kept of meetings? What financial information was obtained as part of the preparation and who was it sought from? Were you asked to provide legal advice to inform the discussions at mediation?**

The preparation that was carried out for the mediation in terms of various work streams is referred to in answer to questions 71 and 72 above.

Trackers were used to provide updates in relation to outputs from work streams and various reports were developed including financial calculations. These were known as the "deck chair" spreadsheets and were the product of work carried out principally by tie. Those involved included Steven Bell, Dennis Murray, Gregor Roberts, Richard Jeffrey and Vic Emery at tie, Alan Coyle and Colin Smith from CEC and Tony Rush and John Robson acting as facilitators in terms of ensuring work streams were kept on track. There were notes of certain meetings with action points. Other than that there was a constant and substantial stream of emails. My legal input and that of McGrigors was in respect of the various streams that I had referred to in my answers to questions 71 and 72 above.

74. **Did the role performed by Tony Rush, and the relationship between you, change in the run-up to the mediation in 2011. For example, it appears from the email he sent to you on 27 February 2011 (CECO2084651) that he was responsible for producing notes for a meeting to**

take place next day. What is correct that he took a lead role in this? What was your role in relation to the meeting?

Tony Rush's role in relation to the mediation was essentially a development of the key role that he had in relation to the earlier attempt to settle matters in the Project Carlisle exchanges and discussions. I am not aware of any change taking place in terms of his relationship with me/McGrigors. I think Tony Rush sent his email of 27 February 2011 to those whose names appear as recipients because he wanted to share his observations on the Phoenix proposal from Infraco which had just been received. He was unable to attend the meeting the following day because he was abroad. I would say that Tony Rush did have a lead role in this as he did in Project Carlisle. My principal role, beyond simply keeping abreast of actions emerging from the discussion, was to go back to the lawyers for Infraco with any specific questions that tie/CEC wished to ask. This is in fact what I did – see my answer to question 77 below.

75. **Who attended the meeting referred to in Tony Rush's email? The contents of the email suggested the subject of discussion was the offer that had been made by the consortium. Was anything else discussed? Were records kept of this meeting? If so, by whom and where were they kept? At the meeting, what was said about the offer from the consortium? Were different views taken in relation to the components of the offer represented by each of the consortium parties? What was the approach taken in relation to the part of the offer from CAF?**

I cannot call who attended the meeting and have been unable to find a note which records this. My assistant prepared a note of issues **(WED00000197)** which were identified at the meeting as potential threshold tests which required consideration.

76. **Paragraph 13 in the email notes that the Bilfinger price is greater the current market price and their entitlement under the contract. Nonetheless the suggestion is that there would be a risk for the Council in rejecting it that there would be further delay and that the increased costs of that would exceed the difference. Was this a consideration discussed at the meeting? Did it remain one that was current and informs the thinking at the commencement of the mediation? What role did this factor have to play in the agreement ultimately struck?**

I cannot recall what was discussed at the meeting. The notes of the meeting referred to above is the only record that I have been able to locate. I am unclear as to what Tony Rush meant by Infraco's entitlement under the Infraco Contract. Their claim included all the notified departures that they had intimated up to that point in time. I think principally Tony Rush is simply flagging up the risk of delay and cost growth if tie had to go back out to the market if a solution with Infraco could not be achieved. However, this is simply my observation on reading this paragraph at the present time. I cannot recall what discussion took place at the time. I am unable to say what role, if any, this factor had in relation to the agreement which was ultimately struck.

77. **The email also notes the mark increase in price from Siemens and the fact that their element of the offer was in essence a re-tender. What was the content of the discussions regarding this? Your email of 1 March 2011 (TIE00685892) queried the apparent increase in the Siemens element of the price. What was your view in relation to this?**

As indicated in my preceding answers I cannot recall what was discussed at the meeting. This led to my email of 1 March 2011 requesting more detailed information. I cannot recall having a view on this issue.

78. **TIE00671963 is a document apparently prepared by Denis Murray that sets out the Entitlement of the INFRACO contractors to payment (it was sent to you under cover of an email from Julie Smith dated 16 February 2011). What use was made of this in the run up to and conduct of the mediation?**

Doc ID: TIE00671962

The email of 16 February 2011 from Julie Smith of tie was addressed to Nigel Robson, Tony Rush, Steven Bell, Susan Clark, Richard Jeffrey, Gregor Roberts and Dave Anderson of CEC. It represents one of the work streams that Dennis Murray was working on and it fed into the deck chair costs that the senior team at tie were developing. These were used by tie and CEC in assessing Infraco's Project Phoenix proposal. Dennis Murray's paper included reference to milestone and advance mobilisation payments.

79. **The email from Tony Rush dated 27th February 2011 (CECO2084651) says that he was already of the view that the cost of separation was likely to be substantially more than had been forecast by TIE. Did you have a view on the cost of separation? We are aware of the basis of which the TIE estimates or the estimate prepared by Tony Rush had been calculated.**

I did not have a view on the cost of separation. I recall that I was involved with tie and Tony Rush in examining specific entitlement issues such as the advance mobilisation payment that Infraco received at the outset, milestone payments and preliminaries but beyond that the deck chair costs were built up and developed by tie.

80. **One of the matters that had to be considered before mediation was the cost of pursuing matters through the courts. Estimates were given and are referred to in the email chain in CEC00043521. Did you consider that these estimates are accurate or are they unduly heavy? If these estimates were on the heavy side, what effect did that have on the decision making by TIE?**

I have not been able to find any reply from me to Stewart McGarrity's email of 4 November 2010. I think the question was raised in the context of the RTN strategy and termination and which was overtaken by the subsequent report that we prepared on termination based on advice from Richard Keen QC. I think all sight of the cost estimate which DLA provided was lost. I do not think it had

any effect on the decision making by tie. I cannot recall being asked subsequently for any litigation cost estimates.

81. **Can you explain the email to you from Robert Burt to you dated 23 February 2011 (TIE00685750 and attachments TIE00685751-TIE00685755)? Why had this work been carried out? What use was it to the mediation? It appears to identify failures in the INFRACO obligations relating to design. Do you agree? How did this fit with the approach that the principal problems concerned late running of the MUDFA works?**

This relates to the work stream referred to in my answer to question 61 above in relation to RTNs. Robert Burt's notes were deployed in Exhibits 19, 20 and 21 to the Mediation Statement and are referred to in numbered paragraph 9.2 of the mediation. Numbered paragraph 8 of the Mediation Statement deals with time. It is asserted that delay was caused to the project by *inter alia* the issues covered by Robert Burt's notes.

82. **Is CECO2084685 signed Heads of Terms for what has been agreed during the days of mediation. What was meant by the Target Price Mechanism referred to in paragraph 2? How was the price of £362.5m determined? Was it based on some quantification or was it purely a 'horse trade'? To what extent did the price which it was agreed would be paid to BSC reflected the profits that they would have earned in completing the route all the way to Newhaven?**

There are two documents at CECO2084685. The document which is referred to in the question is the "Agreed Points of Principle" which was signed on the morning of 10 March 2011. This document was prepared very quickly because Dr Schneppendahl of Siemens had to catch a flight. Numbered paragraph 2 (in contrast to the fixed price referred to in numbered paragraph 1 for the Airport to Haymarket section) provided for a target price of £39 million for the Haymarket to St Andrew Square section which was to be adjusted by reference to a price mechanism which had yet to be agreed. The mediation continued from 10 March and concluded with the signing of the Heads of Terms (the second document at CEC02084685) on 12 March 2011. Clause 6.3 picks up the price for the Haymarket to St Andrew Square section and states that the sum of £39 million is a target sum and that the mechanism for calculating and amending this sum will be agreed.

The sum of £362,500,000 was the price that was negotiated at the mediation. I cannot recall being aware of how the figure was quantified. It will have been informed by all the work streams that were carried out in advance of the mediation, including in particular the deck chair cost analysis that was produced by tie. I am unable to answer the 2 final questions regarding profits.

83. **Why was it determined that TIE would assume all responsibility for utility works in the Haymarket to Princes Street part of the line (the on-street works)?**

A target price was agreed for this section and the mechanism including risk allocation was the subject matter of the binding Settlement Agreement that was eventually entered into.

84. **These Heads are dated 10 March. The Mediation was set down for 8 to 12 March. It is very often the case that agreement is reached only at the last minute when the parties come to accept that what is on the table really is the other party's best position. How did it come to be that the agreement was reached after just 3 of the 5 days available? What was the remainder of the time used for?**

The mediation was not set down for 8 to 12 March. It was set down for 8 to 10 March. The agreed points of principle were signed on the morning of 10 March 2011. Further discussions then took place culminating in the Heads of Terms that were signed on 12 March 2011.

85. **It appears from emails dated 8 and 10 February 2012 from of your colleagues, David Christie, and copied to you (CEC01942032 and CEC01969564), that McGrigors had preserved electronic data created in the course of the Mar Hall discussions. This data includes the contents of Sue Bruce's laptop. What was done with this data and where it is now? Please provide a copy of all data taken from Sue Bruce's laptop?**

The emails which are referred to do not say that McGrigors had preserved electronic data created in the course of the Mar Hall discussions and that this data includes the contents of Sue Bruce's laptop.

I am informed that the data retrieved from Sue Bruce's laptop consists of approximately 230 emails all of which are either test emails or generic CEC communications to all staff. There are also c. 170 documents, of varying descriptions – some are manuals for office equipment, some are draft press releases relating to other matters. Of these, when duplicates are excluded, there are 13 documents which relate in some way to the Trams project. I have received authority from CEC to produce these **(TIE00108463, CEC01725885, WED00000196, TIE00371582, CEC01914431, CEC02086747, WED00000195, WED00000198, WED00000201, WED00000200, WED00000199, WED00000202 and WED00000203).**

Reports after Mediation

86. **In June 2011 — post mediation — you prepared a report for CEC and TIE setting out what options were available to them (CEC01942218). Why and on whose instructions was this prepared? This was a draft, was a final version prepared? If so can you provide a copy and indicate to whom it was provided and when?**

The report was prepared on the instructions of CEC. It was prepared in order to assess on a comparative basis tie/CEC's exposure on the basis of a number of potential outcomes/options.

The report was issued in draft because the negotiations in relation to the Settlement Agreement were still ongoing, and therefore the relevant sections of the report dealing with it could not be completed - see paragraph 1.8 and section 4 of the draft report.

We were never asked to produce a final or updated version of the report.

87. **The report contemplated that TIE/CEC might not enter into a settlement agreement on the basis agreed at Mar Hall. Why had this option become live? Was there a feeling that the deal done was not the right one? What was the problem and who was expressing this view? To whom was this report sent and or discussed? What use was made of it by TIE or CEC?**

The Heads of Terms required to be reflected in a fully negotiated agreement, and it was always recognised that the agreement was subject to approval by members and available funding. This is reflected in the Prioritised Works Agreement - MoV4, agreed on 17 April 2011 and signed on 20 May 2011:

"*3.3 If on or before 1 July 2011 the Parties have not entered into an MoV5 on an unconditional basis or on a conditional basis in either case because tie and/or CEC do not have sufficient funding to meet tie's obligations under the Infraco Contract:-*

3.3.3 the Infraco Contract shall automatically terminate at 5pm on 1 September 2011 and the Parties shall have no rights or obligations in respect of the future performance of the Infraco Works save as provided in Clause 94.6 of the Infraco Contract".

88. **In paragraph 8.19 you say**

> **Infraco's argument is the more straightforward, since it proceeds on a literal interpretation of the words which are used in the Infraco Contract. tie is undoubtedly confronted with the more difficult argument.**

Is this a polite way of saying that TIE's argument is weak and that there was, by this time, a realisation that there is a fundamental problem with the terms of the contract entered into?

The words used reflected my view. I was neither endeavouring to be polite nor impolite.

I confirm that the facts to which I attest in the answers contained within this document, consisting of this and the preceding 34 pages are within my direct knowledge and are true. Where they are based on information provided to me by others, I confirm that they are true to the best of my knowledge, information and belief.

Witness Signature ..... [redacted].

Date of signing ..... 8 August 2017