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To: Steven Bell, tie Ltd

Fax: 0131 623 8601 Pages: 12 pages plus this page

From: Robert Howie QC Date: 7th June 2010

Subject: Edinburgh Tram Network - Adjudication

Dear Mr Bell,

Please see the attached reasons for Mr Howie's conclusions on the preliminary issues.

Kind regards

Jennifer

EDINBURGH TRAM NETWORK

ADJUDICATION.

DELAYS RESULTING FROM INCOMPLETE MUDFA WORKS

This adjudication is concerned with the effects on the works to the Edinburgh Tram Network of delays which have set in on a contract for the execution of certain diversions of utilities (the "MUDFA Contract"). The works called for under the MUDFA Contract were originally expected to have been substantially carried out in advance of the undertaking of work on site by the Infraco under its contract with tie Ltd dated 14th May, 2008, but as at the date of service of the Notice of Adjudication pursuant to which this adjudication has been held, those diversions had not been completed.

The responding party in the adjudication, tie Ltd (hereinafter referred to as "tie"), is the employer in a contract ("the Infraco contract") for the carrying out of, *inter alia*, the work needed and the services required for, the delivery and subsequent maintenance of, the Edinburgh Tram Network. The other party to that contract is an unincorporated joint adventure (hereinafter referred to, *brevitatis causa*, as "the JV"), the joint adventures in which are Bilfinger Berger UK Ltd, Siemens P.L.C. and Construcciones y Auxiliar de Ferrocarriles S.A. The JV is the referring party in this adjudication. It seeks therein the grant of declarators finding and declaring that it is entitled to a n extension of time so as to substitute for the Planned Sectional Completion Dates presently entered in the contract programme later (though differing) dates for the completion of each of Sections A, B, C and D of the JV's works under the Infraco contract. The grant of such redress is contested by tie, which argues that the JV is not entitled to the extensions of time it seeks, or at least, if, contrary to its primary position, the JV be entitled to some extension of time, that the length of the several extensions of time sought by the JV are greater than any to which it is in fact entitled.

I set out below the reasons, on the basis of which I arrived at the conclusion on the two preliminary issues in the adjudication which I intimated to the parties on 1st June, 2010.

<u>The Initial Procedure</u>

At the outset of the adjudication, I set out a timetable within which the parties were to exchange written statements of their respective cases, with the object that each party should have the opportunity to respond to the contentions of the other. That process of exchange of submissions disclosed that there were two preliminary issues which, if determined in tie's favour, would obviate the need (at least in the context of this adjudication) to address the question of the factual and technical merits of the JV's claims to extensions of time. At a meeting with the parties' solicitors which I held to discuss how best to proceed with this adjudication, I was informed that evidence was likely to be required in connection with both the preliminary questions and the later issue of the quantification of any extension of time to which the JV might be entitled, though the evidence on the preliminary questions would be likely to be very much shorter in compass than that which might have to be led on the technical matters which would arise in relation to the quantification of whatever extensions of time it might prove that the JV was entitled to be awarded. Since Schedule 9 to the Infraco contract, which governs the conduct of adjudications under that agreement (the provisions of the Housing Grants, Construction and Regeneration Act, 1996 being excluded by the private acts under which the Edinburgh Tram Network is being constructed) places me under an obligation to avoid incurring unnecessary expense in the adjudication, I took the view that I would hear the parties' evidence and submissions on the preliminary issues first, lest my view on those mattes should cause me to decide the Dispute as a whole against the JV; in which event the expense of hearing the rest of the case would become "unnecessary", and such, therefore, as I was enjoined by Schedule 9 to avoid.

By paragraph 47 of Schedule 9, I am given power to "make a decision on different aspects of the Dispute at different times", but I am not persuaded that that power extends to more than what might in traditional Scottish arbitration practice be termed a power to make part awards. As a result, I consider that I would be entitled to "decide" the preliminary issues only if the view I came to on those matters were to carry the whole Dispute, and so caused me to decide the Dispute as a whole. As that is not the position in which I have in the event found myself, I have expressed the result of the views set out below as a mere conclusion.

The Hearing

On 26th May, 2010, I held a hearing on the two preliminary issues which had been identified, namely, (i) whether the JV had failed to submit an Estimate which complied with the terms of clause 80 of

the Infraco contract and were in consequence presently unable to obtain an extension of time on account of any Notified Departure resulting from delays in the completion of the MUDFA Works; and (ii) whether an agreement had been made between the parties which provided that the material actually provided by the JV to tie as an Estimate would be acted on by tie as an Estimate, whatever deficiencies in terms of the contractual requirements for an Estimate that material might in fact have. Evidence was led from Mr Michael Foerder on behalf of the JV, and from Miss Susan Clark and from Mr Steven Bell on behalf of tie, and thereafter, submissions were made to me by Mr McMillan and Mr Bentley on behalf of their respective clients. In the event, it proved unnecessary for Mr Bentley to address me on the second preliminary issue, because, towards the end of his submissions on behalf of the JV, Mr McMillan departed from the argument which his client had advanced in its Reply to tie's Response to the effect that tie could not raise the first preliminary issue because it had entered into an agreement said to have been embodied in a letter from tie to the JV dated 17th August, 2009, which precluded it from doing so. That departure means that I do not need to consider the second preliminary issue further, and need only record that, of concession, it falls to be decided in favour of tie.

The Evidence

I considered that each of the witnesses who gave evidence before me was to be regarded as being both credible and, in general terms, reliable, but in the event, I have derived little assistance from the evidence they gave. This is not a criticism. Not a little of the evidence led was directed to the question of what agreement (if any) might have been arrived at by the parties on the footing of tie's letter of 17th August, a matter which became irrelevant when the argument underlying the second preliminary point was withdrawn. As not infrequently happens in proofs designed to illustrate the matrix of fact against which a contract is to be construed, much of the evidence turned to be statements by witnesses as to what they believed the contract to mean, or what they sought to communicate through the drafting of various documents. Such evidence is, of course, inadmissible on the kind of construction question which is raised by the first preliminary issue. Perhaps in recognition of this fact, the evidence of the witnesses featured little in the submissions. The evidence of Mr Foerder on the one hand and of Miss Clark and Mr Bell on the other, however, did illustrate one matter; the major difference of view between the contending parties about whether clause 80 of the Infraco Contact obliged the JV to furnish tie with information in the Estimate about the cost of works of acceleration devised to retrieve, in some degree, delays occasioned by a

The agreement between the parties that, in the events which have happened, a Notifiable Departure has occurred, and has been notified within the meaning of the contract, is therefore well-founded. It follows, too, that there is deemed to have been issued on the date of that notification a tie Notice of Change relative to the MUDFA Works delays, which Notice is mandatory and cannot be withdrawn.

The Arguments anent Clause 80.

The true subject of disagreement between the parties concerns the Estimate for which clause 80 provides. The JV identifies as its Estimate within the meaning of clause 80 a document sent by it to tie and dated 6th August, 2009 (Referral, paragraph 5.49). That document is said by tie to be "incompetent" because it does not comply with the demands of clause 80 as to the contents of an Estimate. In particular, tie objects that it fails to provide information as to the cost of implementing the proposed tie Change (contrary to sub-clause 80.4.10) and that it does not include evidence (as required by sub-clause 80.7) to show that the JV has considered how to mitigate the impact of the tie Change and that that change will be implemented in the most cost-effective manner. No point is taken about the timing of the Estimate.

The JV contests these assertions, and argues that even if there be a deficiency in the terms of the Estimate, that is not fatal to the claim for extension of time because compliance with the terms of clause 80 anent Estimates is not a suspensive condition of its entitlement to such extension, which depends, not on the Estimate, but rather on the effects of the Notified Departure on the JV's programme for the carrying out of its Works. That argument is in turn met by tie, which contends that compliance with the contractual provisions anent the content of Estimates is indeed a condition precedent to the right to an extension of time, but that even if it is not, the mutuality principle suspends any such right for so long as the provisions of clause 80 remain uncomplied with. The JV retorts that the mutuality principle is of no relevance in the situation which obtains here.

Does the Estimate Quadrate with the demands of Clause 80?

The first question is whether or not the purported Estimate is fully compliant with the terms of clause 80, for if it be so, the rest of the argument in the case is otiose. As I note elsewhere, there are essentially two areas in which it is said to be deficient – mitigation and the cost of cost information.

Whether the Estimate is deficient in the first of these regards is clearly contentious. The letter of 6th August, 2009 said to be the Estimate plainly purports to include in Appendix D thereto the material which the JV considers to be required of it in relation to mitigation. There are also sections of the text of the latter which are no less obviously directed to mitigation. In his evidence, Mr Foerder evinced the view that the Estimate was "fully mitigated", but it is equally evident from the correspondence in late August and early September, 2009 that tie thought the material bearing on mitigation with which it had been provided insufficient to comply with the terms of clause 80. That difference of view may be affected by an underlying difference about the contractual requirements of clause 80, most notably about whether it requires the JV to include in its Estimate acts of acceleration which have not yet been instructed, but I am not able to tell from the material before me whether that is the sole cause of the difference in view. In consequence, I do not think that I am entitled at this stage to find that the Estimate is indeed deficient in relation to the information it provides on the subject of mitigation. I am inclined to think that whether it is so deficient is a matte bound up with the merits of the claim, and therefore something on which I cannot presently decide.

For present purposes, however, that is of no moment, because the provision of information about cost is in a quite different category. I do not think that it was disputed that cost information was not given in the Estimate, and even a cursory examination of the letter of 6th August shows why there would be no such dispute. It extends to tie an invitation to proceed to discuss it at a sub-clause 80.9 meeting notwithstanding the admitted absence from the letter of material on cost. On that showing, it seems to me to be quite apparent that the letter does not comply with the provisions of clause 80 in relation to the provision of information about increases in cost expected by the JV to occur as a result of putting into effect the mandatory tie Change. Accordingly, one has to consider what importance may attach to that non-compliance.

Suspensive Conditions.

Although tie has couched its complaint of the purported Estimate in terms of competency, it became evident in the course of the submissions made to me by Mr Bentley that the word "incompetent" was something of a misnomer. The case advanced by tie is not that the letter of 6th August is, by reason of its deficiencies, deprived of the character of an Estimate (that suggestion he disavowed in answer to a question from me), or that the circumstances of fact were such that no clause 80

Estimate could have been issued, but that it was a suspensive condition of the JV's right to obtain an extension of time under clause 80 that the JV provide tie with an Estimate which complied with the demands of that clause which bore on the contents of an Estimate.

The drafting of clause 80 is not always pellucid, and I have not found it straightforward whether the obligations which that clause undoubtedly place on the JV are suspensive conditions of the right to an extension of time on account of a tie change. In the end, I have come to the view that they are not.

As was observed by the then Phillips, *J.* in **Cox v Bankside Members Agency [1995] 2 L.L.R. 437** in a passage cited by the Court of Appeal in **George Hunt Cranes Ltd v Scottish Boiler & General Insurance Company Ltd [2002] 1 A.E.R. (Comm.) 366**, whether compliance with a conditional clause is a condition precedent to some right or obligation created under a contract is a "matter of construing the [policy] as a whole". **Cox** was an insurance case, but the principle there enunciated holds good for other classes of contract as well, and in my opinion, it applies in this case.

The central argument advanced by Mr Bentley in favour of regarding compliance with the sub-clauses of clause 80 which deal with the content of an Estimate as being a condition precedent was that failure to comply would frustrate the whole object of the clause, namely, to secure consensus about the length of the extension of time which should be accorded the JV in relation to a given tie Change. If one were not given all the information about time and cost for which the clause called, one could not get that agreement. If consensus was to be achieved, it was necessary to know the JV's reasonable view on the matters to which sub-clauses 80.4, 80.5 and 80.7 were directed. He accepted that the Infraco Contract contained no statement that compliance was a condition precedent, but under reference to **George Hunt Cranes Ltd**, submitted that that was not fatal to his argument. Mr McMillan, for his part, stressed the absence from the Infraco Contract of any wording which would create a link between the conditions of the contract about the contents of the Estimate and the JV's ability to obtain an extension of time in the event of a Notified Departure.

It is noticeable that nowhere in clause 80 is there a clause which expressly extends to the JV a right to an extension of time in the event that the regular progress of its works as shown on the

contractual programme is delayed. That an extension of time may be granted in the case of a tie Change has to be inferred from the drafting of disparate portions of clause 80, and in particular, sub-clauses 80.4.3 and 80.19, in which it is implicit that extension of time is possible. The parties are evidently agreed about the availability of extension of time (and in my view rightly so), but it follows from the absence of any express grant of a right to extension of time that that right cannot feature any drafting which would render compliance with any other condition in the contract a *sine qua non* of the right to extension of time – whether that be by use of the words " condition precedent" or any other conditional drafting which would make compliance with the condition in question enter into the description of the right to extension of time. Mr Bentley is, of course, right to say that the absence of the words "condition precedent" is not fatal to his case, but just as the presence of the words was a "starting point" for the consideration whether compliance with another clause was a condition precedent to some right in **George Hunt Cranes Ltd**, so, too, is its absence a starting point for consideration of the same kind of question here.

Moreover, the case for a suspensive condition is noticeably weaker here than it was in **George Hunt Cranes Ltd**. For not only is express reference to a condition precedent or a suspensive condition missing, there is no drafting of the kind which would necessarily imply a suspensive condition by qualifying, under reference to the contingency said to be the *sine qua non*, the right to extension of time. There is no equivalent here to the proviso in **Steria Ltd v Sigma Communications Ltd [2008] B.L.R. 79**, to which I was referred by Mr McMillan. Nor is there a statement attached to the grant of the right to seek an extension of time, such as is sometimes met with in building contracts, that no extension will be available unless some procedural condition (here, compliance with the contents sub-clauses in connection with Estimates) be met.

I am impressed, in that connection, by sub-clause 80.19, which <u>does</u> make such a statement, reducing, or altogether excluding, if the JV should fail to do certain things, any right to receive an extension of time which might otherwise arise on account of a tie Change. It is true that sub-clause 80.19 is said not to apply to deemed tie Changes such as the present one, and that, as Mr Bentley pointed out, the circumstance to which sub-clause 80.19 would apply in the case of an actual tie Change is unrelated to the procedure for obtaining an extension of time, but that does not seem to me to reduce its significance for the purposes of this argument. Although the contract expressly excludes the use of the *ejusdem generis* canon of construction, it does not preclude the adoption of

the *expressio unius* one. If one considers the case of an actual tie Change, the express mention of two circumstances in which rights to extension of time will be cut down implies that other failures on the part of the JV will not serve to exclude or reduce rights to such extension. Had the parties intended to make compliance with the contents sub-clauses of clause 80 a condition precedent to the obtaining of an extension of time, here was the opportunity to make that provision (which, indeed, they were making for other failures), and yet they did not take it. That seems to me to imply that, for actual tie Changes, compliance with sub-clauses 80.4 and 80.7 was not to be a suspensive condition of the right to an extension of time. If that be the case in relation to actual tie Changes, I do not see why the importance attaching to such compliance should be so far increased in the case of deemed Changes that such compliance should be rendered a condition precedent to extension of time in relation to that kind of Change when it has not been thought necessary for it to be so in the case of an actual Change. Cost-effectiveness, on which I understood tie to place much emphasis in this connection, would seem to be of not less importance in relation to actual Changes than in relation to deemed ones.

Mr Bentley's counter to this was to argue that the purpose of the Estimate was to assist the parties in coming to a common view about the length of any extension of time which was to be awarded and that since that purpose would be stultified if the Estimate did not comply with sub-clauses 80.4 and 80.7, such compliance had to be treated as being a condition precedent to the obtaining of any such extension. I accept that the purpose served by a condition may be an indicator as to whether or not that condition operates as a suspensive condition (**George Hunt Cranes Ltd** shows as much), but I do not think that in the present case, the weight of this point is sufficient to outweigh the considerations arising from the drafting of clause 80 which point the other way.

I am not entirely persuaded by Mr Bentley's contention that the philosophy of clause 80 is that the process leading to extension of time is to be a consensual one; still less am I persuaded by the more thorough-going version of that argument which appears in the Response, *videlicet* that the JV's entitlement quoad extension of time is to so much as is agreed with tie pursuant to sub-clause 80.9. That would not allow for sub-clause 8.10, which expressly provides for the determination by a third party of the appropriate length for an extension of time to which a tie Change Order in virtue of a disputed Estimate would give rise were it to be issued. The very existence of sub-clause 80.10 detracts significantly from the consensual nature of the clause 80 process and is inconsistent with

the contention that the measure of the JV's right to an extension of time is the length of time agreed by the parties. If the consensual nature of the process is undermined, then so, too, is the importance to be attached to the need for an Estimate which is fully compliant with sub-clauses 80.4 and 80.7. The consequence of an Estimate which omits some entry called for by the sub-clauses may be that agreement on the contents of that Estimate cannot be agreed, but as the contract provides for that eventuality, it cannot be said that an Estimate which gives rise to that result would frustrate the purpose of the clause 80 provisions. No more can it be maintained that compliance with the terms anent the contents of an Estimate is on that account impliedly made a suspensive condition of obtaining whatever remedy clause 80 might otherwise afford.

The Mutuality Principle.

It was also argued on behalf of tie that the mutuality principle served to prevent the JV from obtaining an extension of time in this adjudication. I was referred to chapter 20 of Professor McBryde's book on contract for the legal basis of that principle. It was argued that since the JV was in breach of contract in failing to include all the requisite information in its Estimate, it could not , for so long as that breach continued, enforce performance from tie by demanding of it an extension of time for the tie Change to which the Estimate related. The case provided what Mr Bentley described as "a simple example" of the mutuality principle in operation. Though this argument had been foreshadowed in neither tie's Reply nor its Retort, no objection was taken by the JV to its being taken, and so I allowed it to be pursued. On behalf of the JV it was maintained that reliance on the mutuality principle was misplaced: this was not a case of mutual withholding of obligations.

In the frequently encountered case of the argument as to whether want of compliance with the notice provisions of the J.C.T. standard form contract is a bar to the award of an extension of time or of direct loss and expense, recourse is not made to the mutuality principle, and so it is something of a surprise to find it resorted to in the present context. That, however, does not mean that it is wrong. The reason why this argument is not usually met with in the J.C.T. context is that under the 1998 contract and its predecessors the contractor was given the right, under certain conditions, to seek an extension of time or direct loss and expense. He was placed under no obligation to do so, with the result that he could not be said to be in breach of his obligations if he did not. Since the contractor breached no obligation imposed upon him if he failed to serve the requisite notice, there was no question of the mutuality principle applying: the essential prerequisite that the contractor

should be in breach of contract was not satisfied (see McBryde, *op. cit.*, paragraph 20-47 and the cases there cited). In this case, by contrast, clause 80 does oblige the contractor to deliver to tie the Estimate, and so the possibility of its being in breach of contract exists. So, therefore, as tie argues, does the possibility of appealing to the mutuality principle.

That argument I accept, and I also accept the distinction on which it proceeds. But I think that there may nevertheless be a reason why reliance on the mutuality principle would be misplaced in the circumstances of this case.

As Mr Bentley pointed out, the effect of successful appeal to the principle is to suspend, during the period of the other party's breach of the contract, one's own obligation to perform those obligations which are the counterparts of those being breached by the other party (see McBryde, *supra*, paragraph 20-47). The qualification on the operation of the principle that it is only the performance of the counterpart obligation which can be withheld is important. Although the main commercial obligations in a contract may often be regarded as packages of counterpart obligations (albeit that the obligation to build and that to pay interim payments in a building contract are well –known exceptions to that general proposition), I do not think that the same holds good for procedural obligations such as those under study in the instant case. In contrast to the main commercial terms of a contract, these are unlikely, as it seems to me, to enter into the calculation of commercial benefits which cause a man to decide whether or not to enter into a given contract which is offered to him. The only counterparts of such procedural conditions are those contractual provisions the coming into operation of which depends on whether the procedural condition in question is satisfied or not.

In that regard, the only obligation of tie which stood as a counterpart to the obligations of the JV *quoad* the contents of a clause 80 Estimate relative to a mandatory tie Change was the obligation to hold the sub-clause 80.9 meeting and there to discuss, and , it may be, agree, the contents of the Estimate. If agreement did not materialise, the Estimate could be put to determination. Once it was determined, tie could not but issue a tie Change Order, which the JV would then put into effect. The only duty of tie triggered by the delivery to it by the JV of a fully completed Estimate – as opposed to agreement or determination upon its contents – was the duty to hold the sub-clause 80.9 meeting and to participate therein with a view to reaching the agreement reefed to in that sub-clause.

As a matter of fact, it is clear from the Minutes of the meeting of 3rd September, 2009 and the evidence as a whole, that tie elected to perform its counterpart obligation, and since agreement did not result from that meeting, the JV acquired, and chose to exercise, a new right under sub-clause 80.10 to send the estimate for determination. Mr Bentley may therefore be correct in his argument that, in this case, tie became entitled to avail itself of the mutuality principle, but it did not actually do so. As a result, Mr Bentley's argument is no longer germane: irrespective of whether or not it might have served to bar a claim in specific implement to force a sub-clause 80.9 meeting to be held, it cannot now be used to bar a determination on the Estimate.

Conclusion

For the foregoing reasons, I have concluded that the first preliminary issue should be answered in the JV's favour, and that the adjudication should therefore proceed to a consideration of the factual and technical merits of the JV's several claims for extensions of time. In view of the JV's substantial success on the issues at the hearing, I shall find that my fees and expenses in relation to those issues are to be paid to the extent of 90% by tie. The remaining 10% of those fees and expenses are to be paid by the JV in order to reflect the element of work devoted to the second preliminary issue before it became otiose.

Robert B. M. Howie.

Edinburgh,

4th June, 2010.