



DLA PIPER SCOTLAND LLP

ADVICE NOTE

relating to

The works authorised by the *Edinburgh Tram (Line One) Act 2006*

and the *Edinburgh Tram (Line Two) Act 2006*

**OPERATION AND ADMINISTRATION OF RELIEFS AVAILABLE TO THE INFRACO
IN TERMS OF NOTIFIED DEPARTURES AND COMPENSATION EVENTS
UNDER THE INFRACO CONTRACT**

24 July 2009



1. INTRODUCTION

- 1.1 Steven Bell of **tie** Limited (hereinafter referred to as "**tie**") at a meeting on Tuesday 14 July 2009 requested DLA Piper Scotland LLP (hereinafter referred to as "**DLA**") to provide advice in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* to be carried out in terms of (1) the agreement dated 19 September 2005 (hereinafter referred to as the "**SDS Agreement**") between **tie** and Parsons Brinckerhoff Limited (hereinafter referred to as the "**SDS Provider**") for the provision of certain services (hereinafter referred to as "**Services**") by the SDS Provider; and (2) the contract dated 14 May 2008 (hereinafter referred to as the "**Infraco Contract**") between **tie** and (1) Bilfinger Berger UK Limited; (2) Siemens plc; and (3) Construcciones Y Auxiliars De Ferrocarriles S.A. (hereinafter collectively referred to as "**Infraco**") for the provision of the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* on or affecting areas of ground at or near Edinburgh Airport and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it (hereinafter referred to as the "**Infraco Works**").
- 1.2 Specifically, DLA were asked to consider the following issues in the context of the above mentioned contractual matrix:
- 1.2.1 the entitlement of Infraco to relief and/or extension of time and/or additional payment on the occurrence of a Notified Departure;
- 1.2.2 the entitlement of Infraco to relief and/or extension of time and/or additional payment on the occurrence of a Compensation Event; and
- 1.2.3 the rights/remedies of **tie**/Infraco to recover losses suffered as a consequence of a breach by the SDS Provider of its obligations under the SDS Agreement.

2. ISSUES

2.1 THE ENTITLEMENT OF INFRACO TO RELIEF AND/OR EXTENSION OF TIME AND/OR ADDITIONAL PAYMENT ON THE OCCURRENCE OF A NOTIFIED DEPARTURE

Step 1. - Identify the relevant parts of the Infraco Contract
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Status of Schedule Part 4 (Pricing)

- 2.1.1 *Clause 4.3* of the Infraco Contract provides that nothing in the Agreement shall prejudice Infraco's right to claim "*additional relief or payment pursuant to Schedule Part 4 (Pricing)*." This provision affects all provisions in the main body of the Infraco Contract which would otherwise limit or extinguish claims by the Infraco under *Schedule Part 4 (Pricing)*. It has to be accepted that the Pricing Assumptions take precedence but we question whether *Clause 4.3* actually intended to work against other conditions which would prevent us from getting into *Schedule Part 4*. We note that *Clause 4.3* does not say "*pursuant to the Conditions which lead to a Notified Departure*" but



only "pursuant to Schedule Part 4". An example is the way *Clause 80.24* is worded. If Notified Departures had been intended to be entirely stand alone events on which Infraco simply told **tie** what the cost/time implication was going to be and were granted that, *Clause 80.24* would be redundant.

2.1.2 Subject to the argument in *paragraph 2.1.1* above, the provisions in *Schedule Part 4 (Pricing)* require to be read discretely, and Infraco's entitlement to relief and/or additional payment under that schedule are not defeated or limited by the provisions of the main body of the Infraco Contract. *Schedule Part 4 (Pricing)*, with all its conditions and qualifications, itself regulates Infraco's entitlement to relief and/or additional payment.

2.1.3 *Schedule Part 4 (Pricing)* then

2.1.3.1 circumscribes relevant provisions in the main body of the Infraco Contract - those which would otherwise have the effect of limiting Infraco's entitlement under *Schedule Part 4 (Pricing)*;

but

2.1.3.2 any relevant claims under *Schedule Part 4 (Pricing)* would be subject to the provisions within *Schedule Part 4 (Pricing)* which themselves circumscribe that entitlement - being Infraco breach, Change in Law or Infraco Change (which exceptions are discussed in more detail below at Step 4).

Step 2. - The basis of Infraco's entitlement

Trigger for Notified Departure

2.1.4 Infraco's entitlement to claim relief and/or extension of time and/or additional payment in respect of a Notified Departure only arises where it can be established that (*paragraph 2.8 of Schedule Part 4 (Pricing)*) "*now or at any time the facts or circumstances differ in any way from the [Base Date Design Information, the Base Tram Information, the Pricing Assumptions and the Specified Exclusions] save to the extent caused by a breach of contract by the Infraco, an Infraco Change or a Change in Law*".

2.1.5 The foregoing contemplates an objective test in terms of which the facts and circumstances encapsulated in the Base Case Assumptions are compared with the facts and circumstances which are subsequently found to exist - Infraco's entitlement (subject to various exceptions considered below) comprises the difference(s) revealed by that comparison.

Step 3. - Information gathering to support / substantiate / rebut the occurrence of a Notified Departure

Provision of Information by Infraco

2.1.6 As can be seen from the trigger set out in paragraph 2.1.4 above, the occurrence of a Notified Departure is not self evident and an assertion (with nothing more) by Infraco that a Notified Departure has occurred is not sufficient to allow **tie** to be able to assess whether there has been a Notified Departure and, if so, the consequences of that Notified Departure (if the



intent had been to permit a unilateral opinion by Infraco, the wording would need to have reflected this).

- 2.1.7 The Infraco Contract does not expressly deal with the situation where the Infraco asserts that there has been a Notified Departure but provides little (if any) evidence in support but **tie** either do not accept that submission or do not know whether they should accept it or not. To resolve the impasse between **tie** and Infraco in regard to the lack of supporting information and substantiation offered by Infraco it is arguable, as a matter of legal principle, that terms ought to be implied into the Infraco Contract to provide for a minimum level of information for the Infraco to justify the submission that there has been a Notified Departure. Those implied terms would then form the basis of a contractual right which **tie** could rely upon to request certain information from Infraco. At a practical level it has to be for Infraco to justify its entitlement. Whether or not that amounts to an implied obligation to justify the existence and nature of a Notified Departure, will be important in the follow on question of liability for delay where this impasse exists.
- 2.1.8 As a general proposition, the implied terms would be directed towards
 - 2.1.8.1 putting **tie** in possession of all the information which would have been necessary for **tie** to come to the view that the **tie** Change is required, necessary and valid - Infraco will say that the deeming provision removes any inquiry but this raises the question as to how would a deemed Notice of **tie** Change be something which the parties could use, if it was vacant of any of the detail required under *Clause 80.2.1* and how could **tie** set out how **tie** wishes to pay for the **tie** Change under *Clause 80.2.2*.
- 2.1.9 Assuming that requests by **tie** to the Infraco for it to provide further and better particulars and information to support its assertion falls within the ambit of the foregoing general proposition, it could then be said that those requests were reasonable and justified. Such requests for information could then include:
 - 2.1.9.1 the specific Base Date Design Information relevant to the **tie** Notice of Change under *Clause 80*;
 - 2.1.9.2 who made the design change and what was the technical reason for the change;
 - 2.1.9.3 how the design change process adopted by the Infraco satisfied *Clause 10* and in particular *Clause 10.2* of the Infraco Contract: "*The Infraco shall submit any Deliverables associated with any Permitted Variations to tie's representative for review pursuant to Schedule Part 14 (Review Procedure and Design Management Plan).*";
 - 2.1.9.4 the factual and technical grounds justifying why the changes exceed, say, normal design development from Base Date Design Information to Issued For Construction stage;
 - 2.1.9.5 how Infraco has complied with its duty to mitigate the effect of the Notified Departure and the **tie** Change (if there has been one); and



2.1.9.6 that there has been no Infraco breach or SDS Provider breach, Infraco Change or Change in Law, which has caused or contributed to the occurrence of a Notified Departure.

Sanctions in the event of failure by Infraco to provide information either of its own volition or in response to requests by tie

2.1.10 Failure by Infraco to provide information or comply with reasonable and justifiable requests for information by tie in regard to alleged Notified Departures

2.1.10.1 would entitle tie to withhold the issuing of a tie Notice of Change;

2.1.10.2a tie Notice of Change would not be deemed to have been issued until such information had been provided;

2.1.10.3 if Infraco do have an implied obligation to give the information, the period during which Infraco fails to provide the necessary information may be regarded as being due to a breach by Infraco and not reckonable in calculating any period of delay between the notification of a Notified Departure and the actual date (not the deemed date) that tie issues a tie Notice of Change (*paragraph 3.5 of Schedule Part 4 (Pricing)*) - in other words the Infraco would not be entitled to claim additional loss and expense by alleging that the delay was such that it constituted a Compensation Event; and

2.1.10.4 could give rise to liquidated and ascertained damages being levied by tie on the basis of culpable delay on the part of the Infraco.

These sanctions could be used as a possible "lever" to encourage Infraco to engage with tie and provide the required information - (other levers include such things as material breach of Infraco's general responsibilities to act responsibly and to avoid disputes and progress works).

2.1.11 It should also be noted that (in terms of *Clause 80.24* of the Infraco Contract) the restriction on Infraco's entitlement to relief set out at *Clause 80.19* of the Infraco Contract do not apply in the case of Notified Departures - therefore, considerations of whether it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for a tie Change, given the information known to Infraco at the time do not apply or reduce/alter Infraco's true and proper entitlement when a Notified Departure is being considered.

Step 4. - Exclude certain events which do not constitute a Notified Departure

Exceptions from Notified Departures

2.1.12 Notwithstanding that the Infraco may be able to provide evidence to persuade tie that the facts or circumstances differ from the (1) Base Date Design Information; (2) the Base Tram Information; (3) the Pricing Assumptions; (4) or the Specified Exclusions, Infraco are not entitled to any relief (and it is not a Notified Departure) where the difference(s) result from:



2.1.12.1a breach of contract by the Infraco - this is a very important exception, the significance of which must not be underestimated by **tie**;

consideration of this issue would involve identification of the various obligations undertaken by the Infraco under the Infraco Contract and consideration as to whether or not those obligations have been performed and fulfilled, including evidence to support any conclusion that the Infraco is in breach of contract

Note the effect of Clause(s) 11.3 and 11.4, referred to in section 2.2 and 2.3 below

2.1.12.2an Infraco Change (which is important given what **tie** believes the SDS Provider has been doing in terms of over engineering); or

a change proposed by the Infraco in accordance with *Clause 81.1* and approved by **tie** in accordance with *Clause 80 (tie Changes)* or *Clause 81 (Infraco Changes)*

2.1.12.3a Change in Law

the coming into effect after the 7 August 2007 or, in relation to the Tram Supply Obligations and Tram Maintenance Obligations only, the 14 September 2007 of:

- (a) Legislation, other than any Legislation which on the 7 August 2007 or, in relation to Legislation which affects the Tram Supply Obligations and Tram Maintenance Obligations only, the 14 September 2007 has been published:
 - (i) in a draft Bill as part of a Scottish Executive/Scottish Parliament or United Kingdom Government consultation paper;
 - (ii) in a Bill;
 - (iii) in draft subordinate Legislation within the meaning of section 21(1) of the Interpretation Act 1978; or
 - (iv) as a proposal in the Official Journal of the European Union.
- (b) any Guidance or any changes to Guidance; or
- (c) any applicable judgement of a relevant court of law which changes a binding precedent;
- (d) any new requirement for any statutory Consent other than statutory Consents the need for which had been published on 7 August 2007

Step 5. - Apply the relevant tests

What comprises Base Date Design Information for the purposes of the Infraco Contract?

2.1.13 Base Date Design Information comprises one of the Base Case Assumptions against which changes in facts and circumstances are to be measured. "Base Date Design Information" is defined in *Schedule Part 4 (Pricing)* as "the design information drawings issued to Infraco up to and including 25th November 2007 listed in Appendix H to this Schedule Part 4". Appendix H to Schedule Part 4 specifically includes "All of the Drawings available to Infraco up to and including 25th November 2007". The words in Appendix H would be construed in light of the "factual matrix" at the time the Infraco



Contract was entered into. These drawings comprise the Base Date Design Information. The *Schedule Part 30 (Infraco Proposals)* drawings do not.

2.1.14 The *Schedule Part 30* drawings do not form part of the Base Date Design Information and therefore do not form part of the Base Case Assumptions. Accordingly, a departure from the *Schedule Part 30* drawings does not constitute a Notified Departure.

Possible Infraco Defence	tie Counter-Defence
List of documents at <i>Appendix A to Schedule Part 30 (Infraco Proposals)</i> comprises BDDI	This list is not, and is not anywhere stated to be, exhaustive of all the design data, information and drawings available to or issued to the Infraco up to and including the 25 November 2007. There is therefore no basis (contractual or otherwise) for saying that Appendix A contains all of the drawings available to or issued to the Infraco at 25 November 2007. Whatever Appendix A is, it is not the set of information which is the Base Date Design Information
The Construction Works Price is the price for the work specified in the Employer's Requirements and the Infraco Proposals (<i>Schedule Part 4 (Pricing), paragraph 3.1</i>) not the BDDI,	This does not alter the definition of the Base Case Assumptions and the Base Date Design Information.
The 21 annotated drawings conflict with other drawings.	The drawings do not create conflict since (i) the annotated drawings are not Base Date Design Information; (ii) the 21 drawings which the Infraco subsequently annotated were not the latest drawings issued by the SDS Provider relevant for the roads specification and therefore the later drawings (which fall within the Base Date Design Information) would trump the 21 drawings in any case irrespective of the annotations; and (iii) the manuscript annotations made by the Infraco contradict the relevant agreed key Pricing Assumptions in <i>Schedule Part 4 (Pricing)</i> and have no contractual status

The concept of "design development" - Base Date Design Information to Issued For Construction

2.1.15 *Pricing Assumption 1* in *Schedule Part 4 (Pricing)* provides

"The Design prepared by the SDS Provider will not (other than amendments arising from the normal development and completion of designs):

1.1 in terms of design principle, shape, form and/or specification be amended from the drawings forming the Base Date Design Information (except in respect of Value Engineering identified in Appendices C or D to this Schedule Part 4);

1.2 be amended from the scope shown on the Base Date Design Information and Infraco Proposals as a consequence of any Third



Party Agreement (except in connection with changes in respect of Provisional Sums identified in Appendix B); and

- 1.3 *be amended from the drawings forming the Base Date Design Information and Infraco Proposals as a consequence of the requirements of any Approval Body.*

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" (emphasis added)

- 2.1.16 From the mediation session in July 2009 it appears that Infraco may take the view this final "for the avoidance of doubt" provision in fact excludes normal design development because the reference to "changes of design principle, shape and form and outline specification" does not expressly go on to say "which do not themselves arise from normal design development.". We do not consider this to be a sustainable argument to exclude normal design development, if indeed this is shown to be Infraco's position.
- 2.1.17 Applying the foregoing, the Infraco is therefore assumed to have taken into account, when pricing, all the amendments to the design as at the design freeze date which would result from the normal development and completion of the designs.
- 2.1.18 Any and every change from Base Date Design Information does not therefore constitute a Notified Departure as it is only those changes which are alterations in "design principle, shape, form and/or specification" which do not arise from the normal development and completion of design which give rise to an entitlement on the part of the Infraco. This test would be a matter of professional opinion.

Step 6. - Determine effect of Notified Departure and issue instructions

Apply Clause 80 (tie Changes)

- 2.1.19 In the event that the foregoing steps are satisfied and a Notified Departure is found to have occurred (resulting in a tie Notice of Change), in summary the Infraco Contract (Clause 80) then contemplates:
- 2.1.19.1 the Infraco delivering the Estimate (comprising the information prescribed in Clause(s) 80.4, 80.5, 80.7 and 80.8 of the Infraco Contract) to tie (within 18 Business Days or such longer period as may be agreed between the parties); then
- 2.1.19.2 the tie Change is valued in accordance with the rules provided for at Clause 80.6 of the Infraco Contract (the restrictions under Clause 80.19 being disapplied in the case of a Notified Departure); then
- 2.1.19.3 as soon as reasonably practicable after tie receives the Estimate, tie and Infraco discuss and agree the issues set out in the Estimate; then
- 2.1.19.4 once agreed tie issues a tie Change Order to Infraco; then



2.1.19.5 within 20 Business Days (or such longer period as is agreed) of issue of a **tie** Change Order, Infraco updates various documents, including the Programme and Milestone Payments.

2.1.20 Where the foregoing process is frustrated or breaks down, consideration can be given to:

2.1.20.1 referral of unagreed Estimate (*Clause 80.10*) to the Dispute Resolution Procedure provided for under *Schedule Part 9 (Dispute Resolution Procedure)*;

2.1.20.2 *Clause 80.13* provides an ability to **tie** to require work to commence in respect of a **tie** Change prior to the issuing of a **tie** Change Order, whilst *Clause 80.15* allows **tie** to require work at demonstrable cost, while Dispute Resolution Procedure is completed;

2.1.20.3 *Clause 80.15* clearly states that Infraco should continue works during the Dispute Resolution Procedure process if **tie** requires Infraco to do so. This clause states that Infraco will receive its demonstrable costs. In the event that a **tie** Change Order is issued under *Clause 80.15*, the Infraco would be obliged to comply with it. It would not relieve Infraco of their other contractual obligations. The only exception to this provision is where re-design work is required and the valuation of that design works is not agreed;

2.1.20.4 performing an audit and requesting information in terms of *Clause 104 (Information and Audit Access)* of the Infraco Contract; and

2.1.20.5 *Paragraph 5 of Schedule Part 9 (Dispute Resolution Procedure)* provides that "Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Schedule Part 9."

2.2 THE ENTITLEMENT OF INFRACO TO RELIEF AND/OR EXTENSION OF TIME AND/OR ADDITIONAL PAYMENT ON THE OCCURRENCE OF A COMPENSATION EVENT

Step 1. - Identify the relevant parts of the Infraco Contract
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Sole Remedy

2.2.1 The Infraco is not free to elect whether a particular event or occurrence is to be classified, for the purposes of the Infraco Contract, as a Notified Departure or as a Compensation Event. *Clause 65.1* provides "The Infraco's sole right to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (Compensation Events)."

2.2.2 We note that, on the face of it, this is a condition which is affected by Clause 4.3 as it would prejudice Infraco's entitlement to treat an event as a Notified Departure. It has to be conceded that the intent of Clause 4.3 may have been to give Infraco exactly this sort of comfort that their entitlement to a Notified Departure would not be cut down in unforeseen ways. Equally it is arguable



that Clause 4.3 intends to ensure that the mechanism of Schedule Part 4 are allowed to work in full and unaffected by the contract conditions where a Notified Departure has occurred, but does not intend to create a route to a Notified Departure where, by other contract conditions, one has arisen.

2.2.3 Subject to the foregoing, it is therefore the case that should one of the events listed under the definition of "Compensation Event" at *Schedule Part 1 (Definitions and Interpretation)* of the Infraco Contract occur, the Infraco's remedy lies under *Clause 65* and not *Schedule Part 4 (Pricing)*.

2.2.4 It should also be noted that *Clause 65.11* of the Infraco Contract provides

"Notwithstanding the occurrence of a Compensation Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 65 (Compensation Events)." (emphasis added)

Step 2. - The basis of Infraco's entitlement

Trigger for Compensation Event

2.2.5 It is not the case that the occurrence of a Compensation Event will of itself automatically give rise to an entitlement on the part of the Infraco to additional relief or payment. Entitlement to relief/extension of time/additional costs arises only if and to the extent that a Compensation Event:

2.2.5.1 is the direct cause of a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or the Certificate of Service Commencement on or before the Planned Service Commencement Date (as appropriate); and/or

2.2.5.2 directly and adversely affects Infraco's ability to perform any of its obligations under this Agreement (including its ability to perform the Maintenance Services); and/or

2.2.5.3 causes the Infraco to incur costs beyond such costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event.

Step 3. - Information gathering to support / substantiate / rebut occurrence of a Compensation Event

Provision of information by Infraco

2.2.6 In terms of *Clause 65.2* of the Infraco Contract, the Infraco is obliged to provide certain prescribed information in the form of a Compensation Event Notice within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs - interim written particulars being provided in the event that the Compensation Event has a continuing effect or that the Infraco is unable to determine the effect.

Sanctions in the event of failure by Infraco to provide information

- 2.2.7 Failure by Infraco to comply with its obligations concerning the provision of information under *Clause 65.2* has the consequence that the Infraco is not be entitled to any relief in respect of or during the period for which the information is delayed (*Clause 65.4*).

Step 4. - Exclude certain effects from the consequences of the occurrence of a Compensation Event

Exceptions from Compensation Events

- 2.2.8 Notwithstanding that the Infraco may be able to provide evidence to persuade **tie** that a Compensation Event has occurred, **tie** is obliged, in assessing any delay or extension of time or costs or relief to which the Infraco may be entitled as a consequence of that Compensation Event:

2.2.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties - this issue has particular relevance in the case of failure by the SDS Provider (which is considered in more detail below); and

2.2.8.2 take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs.

- 2.2.9 In addition to the foregoing, the Infraco is not entitled to any relief in respect of any failure by the Infraco to:

2.2.9.1 identify any long lead time works and/or order any long lead time materials; or

2.2.9.2 identify any enabling works which are required in order to commence any part of the Infraco Works; or

2.2.9.3 subject to the process for consents and TTROs manage the required interface with CEC in so far as this forms part of the Infraco Works; or

2.2.9.4 subject to the process for consents and TTROs manage any required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or

2.2.9.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme,

provided that following the occurrence of a Compensation Event nothing shall prevent any long lead times, enabling works, required interfaces with

CEC, any Approval Body and/or third party, or instructions which are required from **tie** from being taken into account when considering extensions of time and/or additional costs in accordance with *Clause 65 (Compensation Events)*.

Step 5. - Apply the relevant tests

Condition Precedent

2.2.10 The Infraco could be deprived of any entitlement it may have following the occurrence of a Compensation Event (*Clause 65.2*), in the event that the Infraco does not

2.2.10.1 as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs give a notice to **tie** in the form prescribed under *Clause 65.2* of the Infraco Contract.

2.2.11 Whilst it is not free from potential challenge, clauses of this type (condition precedent) which are directed to a time-bar have been enforced by the courts. By way of example

2.2.11.1 *City Inn Ltd -v- Shepherd Construction Ltd [2003] S.L.T. 885 - "... if he [the contractor] wishes an extension of time, he must comply with the condition precedent";* and

2.2.11.2 *Multiplex Construction (UK) Ltd -v- Honeywell Control Systems Ltd [2007] EWHC 447 (TCC) - "If the facts are that it was possible to comply with [the time-bar] that Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large".*

2.2.12 In regard to the issue of who needs to be "aware" the case *Tesco Supermarkets Ltd -v- Natrass [1972] A.C. 153, HL* is of assistance where it was observed that "Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not." Applying this principle, in the absence of delegation, it is arguable that those who must be "aware" are the directors and managers who constitute the "directing mind" of the Infraco not lower level employees and therefore possible to argue that the "thinking" part of the Infraco did know about particular events.

Step 6. - Determine the effect of Compensation Event

Apply Clause 65 (Compensation Events)

2.2.13 In summary, the Infraco Contract (*Clause 65*) then contemplates:

2.2.13.1 within 20 Business Days (or such other period as may be agreed between the parties) of receipt of the Infraco's notification/submissions **tie** informs the Infraco (1) whether or not it



agrees that a Compensation Event has occurred; (2) whether or not it agrees with Infraco's assessment of the effects of the Compensation Event and, if not, provide **tie's** own assessment; and (3) what further information **tie** requires (in the case of further information **tie** is to complete its review within 20 Business days of receipt); then

2.2.13.2 in the event that Infraco has complied with its obligations concerning notice/submission then it is awarded a reasonable extension of time; reasonable relief; and/or the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event.

2.2.14 Where the foregoing process is frustrated or breaks down, consideration can be given to:

2.2.14.1 referral of the issue (*Clause 65.6*) as to whether or not a Compensation Event has occurred to the Dispute Resolution Procedure provided for under *Schedule Part 9 (Dispute Resolution Procedure)*;

2.2.14.2 referral of the issue (*Clause 65.7*) as to the effect of a Compensation Event to the Dispute Resolution Procedure provided for under *Schedule Part 9 (Dispute Resolution Procedure)*;

2.2.14.3 performing an audit and requesting information in terms of *Clause 104 (Information and Audit Access)* of the Infraco Contract; and

2.2.14.4 *Paragraph 5 of Schedule Part 9 (Dispute Resolution Procedure)* provides that "Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure contained in this Schedule Part 9."

2.3 THE RIGHTS OF TIE/INFRACO TO RECOVER LOSSES SUFFERED AS A CONSEQUENCE OF A BREACH BY THE SDS PROVIDER OF ITS OBLIGATIONS UNDER THE SDS AGREEMENT

<p>Treatment of failure by the SDS Provider under the Infraco Contract - Notified Departure - Time for Performance of Services</p>

Application of *Schedule Part 4 (Pricing)*

2.3.1 *Schedule Part 4* to the Infraco Contract comprises, amongst other things, a list of *Pricing Assumptions* at *paragraph 3.4*, which Pricing Assumptions could result in the notification of a Notified Departure. In the context of the time for performance of Services by the SDS Provider, the following Pricing Assumptions could be relevant:

"2 *Design delivery by the SDS Provider has been aligned with the Infraco construction delivery programme as set out in Schedule Part 15 (Programme).*



- 4 That the Design Delivery Programme as defined in the SDS Agreement is the same as the programme set out in Schedule Part 15 (Programme).
- 5 That the Infraco shall not suffer any loss and expense of whatever nature as a consequence of any matter identified in the "Assumptions and Constraints Report" in Appendix 2 of the SDS Novation Agreement, including without prejudice to the foregoing generality the following:
 - 5.1 the modifications to the SDS Provider's design process and approvals and consents periods;
 - 5.2 any assumptions or dependencies;
 - 5.3 any matter identified as being at the risk of tie or subject to instruction from tie;
 - 5.4 any instruction issued by tie;
 - 5.5 subject to Clause 10.18, any acceleration (save where Infraco itself decides to accelerate); or
 - 5.6 any strategy.
- 22 That in circumstances where, to maintain the Programme, the Infraco carries out works or procures materials or works prior to the issue of Issue for Construction drawings, no amendment to the works carried out, or works or materials procured shall be required as a consequence of the subsequent issue of the relevant Issue for Construction drawings.
- 32 That the programming assumptions set out in Schedule Part 15 (Programme) remain true in all respects." (emphasis added)

2.3.2 It is therefore conceivable that the Infraco could seek to demonstrate that a difference in the facts and circumstances arose as a consequence of delay in the performance of Services on the part of the SDS Provider thereby triggering a Notified Departure. The particular facts and circumstances relied upon by Infraco would however need to be investigated as a mere allegation of delay on the part of the SDS Provider by the Infraco would not, of itself, be sufficient.

2.3.3 Taking into account the matters considered at Step 4 above in regard to Notified Departures, it is also the case that consideration would need to be given to whether or not there had been a breach of contract by Infraco, in particular with respect to Infraco's obligations vis-à-vis the SDS Provider, including:

2.3.3.1 Clause 11.3 of the Infraco Contract, which provides "The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to



have complied with its obligations under this Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." (emphasis added);

2.3.3.2 *Clause 11.4 of the Infraco Contract, which provides "The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services." (emphasis added)*

2.3.4 It should also be noted that (in terms of *Clause 80.24* of the Infraco Contract) the restriction on Infraco's entitlement to relief set out at *Clause 80.19* of the Infraco Contract do not apply - therefore, considerations of whether it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for a **tie** Change, given the information known to Infraco at the time do not apply or reduce/alter Infraco's true and proper entitlement when a Notified Departure is being considered.

Relief available to tie

2.3.5 A potential right of relief would be available to **tie** as beneficiary under the collateral warranty granted in its favour by the SDS Provider:

2.3.5.1 if the SDS Provider was not in breach then **tie** would not be able to obtain any relief from the SDS Provider as any such right would only crystallise upon establishing that the facts and circumstances giving rise to a Notified Departure were caused by a breach by the SDS Provider of its obligations under the SDS Agreement - meaning that **tie** would bear the additional costs to which the Infraco becomes entitled to under the Infraco Contract; or

2.3.5.2 if the SDS Provider was in breach it ought then to be the case that the event would not be a Notified Departure under the Infraco Contract (thereby Infraco would be disentitled from claiming relief) and **tie** may not suffer a loss (in the form of additional costs due to the Infraco).

Relief available to Infraco

2.3.6 Under the Infraco Contract, the Infraco are entitled to a reasonable extension of time; reasonable relief; and/or the amount of any additional cost measured and valued in accordance with the terms of the Infraco Contract.

2.3.7 Under the SDS Agreement, Infraco could seek to rely upon the indemnities granted in its favour by the SDS Provider, assuming that Infraco can demonstrate and prove that the SDS Provider is in breach of its obligations under the SDS Agreement (as to which see below).

<p>Treatment of failure by the SDS Provider under the Infraco Contract - Compensation Event - Time for Performance of Services</p>

Application of Clause 65

- 2.3.8 *Schedule Part 1* to the Infraco Contract provides, amongst other things, that Compensation Event (t) is "save as excluded by Clause 19.19, failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme for the release of such Issued for Construction Drawings." (emphasis added)
- 2.3.9 The aforementioned reference to Programme includes the Programme set out in *Schedule Part 15* to the Infraco Contract and the Consents Programme and Design Delivery Programme annexed to the Novation Agreement all as may be extended.
- 2.3.10 Delay in the performance of Services by the SDS Provider could therefore give rise to a Compensation Event and the delay would be measured against the various programmes.
- 2.3.11 One limitation placed upon Infraco's entitlement in regard to time for performance by the SDS Provider - and on which basis Infraco would be unable to claim that a Compensation Event has occurred - is where the Infraco Design is (i) not submitted by the SDS Provider in accordance with the Consents Programme and *Schedule Part 14 (Review Procedure and Design Management Plan)*; or (ii) is rejected by the Approvals Body on grounds of content or quality but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals.
- 2.3.12 A further limitation placed upon Infraco's entitlement in regard to time for performance by the SDS Provider, which could have the effect of reducing or negating Infraco's entitlement, is that **tie** when assessing Infraco's entitlement is not to take into account "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.
- 2.3.13 Infraco could therefore be disentitled from any relief in the event that it has breached its obligations in regard to management of the SDS Provider (*Clause 11.3*) and/or that Infraco is liable for a failure by the SDS Provider to perform services in accordance with the terms of the SDS Agreement (*Clause 11.4*).
- 2.3.14 It can therefore be said that Compensation Event (t):
- 2.3.14.1 is heavily circumscribed;
 - 2.3.14.2 the circumstances in which it could be found that any entitlement flows to Infraco are limited;
 - 2.3.14.3 does operate in certain limited circumstances; and
 - 2.3.14.4 does not operate where the Infraco is in culpable delay.

Relief available to tie

- 2.3.15 In terms of the novation agreement dated 14 May 2008 (hereinafter referred to as the "**Novation Agreement**") among **tie**, Infraco and the SDS Provider, **tie** are entitled to deduct the sum of £8,928.57 from the Incentivisation Payment (amounting to £1,000,000) on each occasion that the SDS Provider does not achieve the provision of Issued for Construction Drawings by the

dates identified in the Design Delivery Programme, save where **tie** and the SDS Provider otherwise agree.

- 2.3.16 For the purposes of *Clause 8.8* of the Novation Agreement, any extension of time granted to the SDS Provider is to be ignored except where the cause is a circumstance or occurrence entitling the Infraco to an extension of time and that such occurrence is a **tie** Change.
- 2.3.17 In terms of the Infraco Contract **tie** are entitled to deduct from any additional costs which Infraco is entitled to recover as a consequence of the occurrence of Compensation Event (t) the amount of liquidated damages recoverable from the SDS Provider pursuant to *Clause 27.7* of the SDS Agreement - which amounts to £8,928.57 (up to a total aggregate of £1,000,000) in respect of each failure by the SDS Provider to achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme. The deduction is made irrespective of whether or not Infraco are in breach and whether or not Infraco are found to have any entitlement as a consequence of the occurrence of the Compensation Event.
- 2.3.18 A potential right of relief would be available to **tie** as beneficiary under the collateral warranty granted in its favour by the SDS Provider:
- 2.3.18.1if the SDS Provider was not in breach then **tie** would not able to obtain any relief from the SDS Provider as any such right would only crystallise upon establishing that the facts and circumstances giving rise to a Compensation Event were caused by a breach by the SDS Provider of its obligations under the SDS Agreement - meaning that **tie** would bear the additional costs to which the Infraco becomes entitled to under the Infraco Contract; or
- 2.3.18.2if the SDS Provider was in breach it ought then to be the case that the consequences of the Compensation Event would be ignored under the Infraco Contract (thereby Infraco would be disentitled from claiming relief) and **tie** may not suffer a loss (in the form of additional costs due to the Infraco).

Relief available to Infraco

- 2.3.19 Under the Infraco Contract, the Infraco are entitled to a reasonable extension of time; reasonable relief; and/or the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event.
- 2.3.20 In terms of the SDS Agreement (*Clause 27.8*) Infraco are entitled to payment by the SDS Provider of £8,928.57 (up to a total aggregate of £1,000,000) in respect of each failure by the SDS Provider to achieve the provision of Issued for Construction Drawings by the dates identified in the Design Delivery Programme.
- 2.3.21 Whilst it would usually be the case that the amount of liquidated and ascertained damages would operate as a limit/cap on the amount of losses which could be recovered from a party in breach (in this case the SDS Provider for the purposes of the SDS Agreement) by an innocent party (in

this case Infraco for the purposes of the SDS Agreement), it is to be noted that *Clause 27.3* of the SDS Agreement provides

"*27.3* Nothing in this Agreement shall exclude or limit the liability of either Party for:

27.3.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable;

27.3.2 fraud or fraudulent misrepresentation; or

27.3.3 any breach of warranty given as to valid and marketable title, freedom from unduly onerous burdens and conditions or entitlement to possession by action of prescription; or

27.3.4 of the SDS Provider, for any breach of this Agreement or any delict (including negligence) or other liability arising prior to termination of this Agreement;

27.3.5 provided that nothing in this Clause 27.3 shall confer on either Party rights or remedies that they would not otherwise have." (emphasis added)

and *Clause 27.4* of the SDS Agreement provides

"Subject to Clause 27.3, neither party shall be entitled to claim damages for breach of this Agreement, in delict (including negligence), breach of statutory duty or on any other basis whatsoever to the extent that such damages claimed by that Party are for Indirect Losses suffered by that Party provided that for the avoidance of doubt, nothing in this 27.4 shall affect either Party's liability to the other Party, in respect of any claim, action, proceedings or demand against such other Party by a third party in connection with Indirect Loss suffered." (emphasis added)

and *Clause 27.6* of the SDS Agreement provides

"Notwithstanding any other term of this Agreement, except as detailed in Clauses 27.3.1, 27.3.2 and 27.3.3, the SDS Provider's total liability hereunder whether in contract, delict or howsoever arising shall not exceed the sum of £10,000,000 in respect of each and every claim other than in respect of claims arising from pollution or contamination where the limit of indemnity of £10,000,000 applies to any one claim and in aggregate during the policy period." (emphasis added)

and *Clause 27.9* of the SDS Agreement provides

"In the event that it is agreed by the Parties or determined pursuant to Clause 28 (Dispute Resolution Procedure) that the Deliverable (including the relevant Issued for Construction Drawings) was not submitted in accordance with the Agreement in terms of packaging, process, or the content or quality was inadequate or insufficient, the limits set out in Clause 27.7 and 27.8 shall not apply and the SDS Provider shall be liable to the full extent under this Agreement."



2.3.22 In terms of the foregoing clauses, it is arguable therefore that Infraco would not be limited to the amount of the liquidated damages and Infraco ought to be able to seek to recover the whole amount of the losses it has suffered as a consequence of the SDS Provider's failure to perform services timeously. Such an argument ought to encourage and embolden the Infraco in to pursuing claims for losses it has suffered against the SDS Provider, rather than endeavouring to seek recovery under the Infraco Contract.

**Treatment of failure by the SDS Provider under the Infraco Contract -
Notified Departure - Quality**

Application of Schedule Part 4 (Pricing)

2.3.23 The Pricing Assumption described at *paragraph 3 of section 3.4 of Schedule Part 4 (Pricing)* to the Infraco Contract provides

"The Deliverables prepared by the SDS Provider prior to the date of this Agreement comply with the Infraco Proposals and the Employer's Requirements." (emphasis added)

2.3.24 It is conceivable that the Infraco could seek to demonstrate that a difference in the facts and circumstances arose as a consequence of the quality of the designs prepared by the SDS Provider thereby triggering a Notified Departure. The particular facts and circumstances relied upon by Infraco would however need to be investigated as a mere allegation of poor quality on the part of the SDS Provider by the Infraco would not, of itself, be sufficient.

2.3.25 Taking into account the matters considered at Step 4 above in regard to Notified Departures, it is also the case that consideration would need to be given to whether or not there had been a breach of contract by Infraco, in particular with respect to Infraco's obligations vis-à-vis the SDS Provider, including:

2.3.25.1 *Clause 11.3 of the Infraco Contract, which provides "The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to have complied with its obligations under this Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." (emphasis added);*

2.3.25.2 *Clause 11.4 of the Infraco Contract, which provides "The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services." (emphasis added)*

2.3.26 It should also be noted that Infraco's entitlement to relief is not the same with a Notified Departure as with Compensation Events or Relief Events when impacted by SDS (therefore Infraco) failure - this difference arises as a consequence of *Clause 80.24* of the Infraco Contract Conditions which in the



case of a Notified Departure excludes the restrictions on relief listed in *Clause 80.19* of the Infraco Contract Conditions.

Relief available to tie

2.3.27 A potential right of relief would be available to **tie** as beneficiary under the collateral warranty granted in its favour by the SDS Provider:

2.3.27.1if the SDS Provider was not in breach then **tie** would not be able to obtain any relief from the SDS Provider as any such right would only crystallise upon establishing that the facts and circumstances giving rise to a Notified Departure were caused by a breach by the SDS Provider of its obligations under the SDS Agreement - meaning that **tie** would bear the additional costs to which the Infraco becomes entitled to under the Infraco Contract; or

2.3.27.2if the SDS Provider was in breach it ought then to be the case that the event would not be a Notified Departure under the Infraco Contract (thereby Infraco would be disentitled from claiming relief) and **tie** may not suffer a loss (in the form of additional costs due to the Infraco).

Relief available to Infraco

2.3.28 Under the Infraco Contract, the Infraco are entitled to a reasonable extension of time; reasonable relief; and/or the amount of any additional cost measured and valued in accordance with the terms of the Infraco Contract.

2.3.29 Under the SDS Agreement, Infraco could seek to rely upon the indemnities granted in its favour by the SDS Provider, assuming that Infraco can demonstrate and prove that the SDS Provider is in breach of its obligations under the SDS Agreement (as to which see below).

**Treatment of failure by the SDS Provider under the Infraco Contract -
Compensation Event - Quality**

Application of Clause 65

2.3.30 *Schedule Part 1* to the Infraco Contract provides, amongst other things, that Compensation Event (u) is "any material breach (as distinct from (t) above) by the SDS Provider of its obligations under the SDS Agreement or in delict in relation to the quality of the Deliverables under the SDS Agreement". (emphasis added)

2.3.31 In the first instance it is to be noted that Compensation Event (u) is qualified in that the breach must be "*material*". It is not therefore every instance of alleged failure by the SDS Provider where the quality of Deliverables can be called into question which will give rise to a Compensation Event. The courts have described the concept of "*material breach*" in various ways – a failure to perform the obligations under the contract "*in any material respect*"; a violation of stipulations which are "*material or essential*" as opposed to "*minor and incidental*"; "*substantial failure*"; a breach of stipulations going "*to the root of the contract*"; a breach which is "*of the essence of the contract*"; or which affects "*the root and substance of the*

contract". Whether a breach is material is a question of fact and degree. In this context "*material*" then means serious as opposed to trivial. It will therefore be for Infraco to demonstrate that any such breach on the part of the SDS Provider is "*material*".

- 2.3.32 A further limitation placed upon Infraco's entitlement in regard to quality, which could have the effect of reducing or negating Infraco's entitlement, is that **tie** when assessing Infraco's entitlement is not to take into account "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.
- 2.3.33 Infraco would therefore be disentitled from any relief in the event that it has breached its obligations in regard to management of the SDS Provider (*Clause 11.3*) and/or that Infraco is liable for a failure by the SDS Provider to perform services in accordance with the terms of the SDS Agreement (*Clause 11.4*).
- 2.3.34 It ought to be acknowledged that, on the face of it, the foregoing gives rise to an apparent conflict in the operation of Compensation Event (u). That conflict arises as a consequence of the tension amongst (1) the obligations undertaken by the Infraco vis-à-vis the SDS Provider under the Infraco Contract (in terms of which Infraco is liable for a failure by the SDS Provider and Infraco would be in breach of the Infraco Contract if there was a failure by the SDS Provider); (2) the right of the Infraco to relief under the Infraco Contract in the event of a material breach by the SDS Provider; and (3) when assessing the effect of a Compensation Event **tie** is to ignore "*any event or cause of delay or costs*" which is caused by a breach of contract by Infraco.
- 2.3.35 This may be an issue which Infraco could attempt to exploit and seek to argue that the conflict ought to be resolved in the Infraco's favour.
- 2.3.36 Extracts from the relevant clauses are as follows:

Clause 11.4 of the Infraco Contract provides

"The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services." (emphasis added)

Schedule Part 1 to the Infraco Contract provides, amongst other things

"(u) any material breach (as distinct from (t) above) by the SDS Provider of its obligations under the SDS Agreement or in delict in relation to the quality of the Deliverables under the SDS Agreement." (emphasis added)

Clause 65.8 of the Infraco Contract provides, amongst other things

"65.8 tie shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (Compensation Events)

65.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of

contract or breach of statutory duty of the Infraco or any of the Infraco Parties." (emphasis added)

Relief available to tie

2.3.37 In terms of the Infraco Contract (*Clause 65.13*) tie are entitled to deduct from any additional costs which Infraco is entitled to recover as a consequence of the occurrence of Compensation Event (u) the full amount recoverable by Infraco (up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement as a result of the occurrence of such Compensation Event.

2.3.38 A potential right of relief would be available to tie as beneficiary under the collateral warranty granted in its favour by the SDS Provider:

2.3.38.1if the SDS Provider was not in breach then tie would not able to obtain any relief from the SDS Provider as any such right would only crystallise upon establishing that the facts and circumstances giving rise to a Compensation Event were caused by a breach by the SDS Provider of its obligations under the SDS Agreement - meaning that tie would bear the additional costs to which the Infraco becomes entitled to under the Infraco Contract; or

2.3.38.2if the SDS Provider was in breach it ought then to be the case that the consequences of the Compensation Event would be ignored under the Infraco Contract (thereby Infraco would be disentitled from claiming relief) and tie may not suffer a loss (in the form of additional costs due to the Infraco).

Relief available to Infraco

2.3.39 Under the Infraco Contract, the Infraco are entitled to a reasonable extension of time; reasonable relief; and/or the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event.

2.3.40 In terms of the SDS Agreement (*Clause 27.1*)

"The SDS Provider shall indemnify the Client and its officers, agents and employees ("Indemnified Parties") from and against any and all claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation any legal costs of defence) which any of the Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of or in connection with:

27.1.1 any of the SDS Provider's, or its employees' or any SDS Provider Party's negligent or wilful acts or wilful omissions in the performance of the Services; or

27.1.2 breach of any term or provision of this Agreement ; or

27.1.3 breach of any Law; or

27.1.4 any non-performance or delay in performance of the SDS Provider's obligations under this Agreement." (emphasis added)

2.3.41 In summary, the SDS Provider therefore indemnifies the Infraco from losses the Infraco may suffer as a consequence of a breach / non-performance by the SDS Provider of its obligations under the SDS Agreement.

2.3.42 Whilst the SDS Agreement does provide for certain caps on liability under *Clauses 27.4 and 27.6* (as noted above), it is also noted that *Clause 27.3* provides

"27.3 Nothing in this Agreement shall exclude or limit the liability of either Party for:

27.3.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable;

27.3.2 fraud or fraudulent misrepresentation; or

27.3.3 any breach of warranty given as to valid and marketable title, freedom from unduly onerous burdens and conditions or entitlement to possession by action of prescription; or

27.3.4 of the SDS Provider, for any breach of this Agreement or any delict (including negligence) or other liability arising prior to termination of this Agreement;

27.3.5 provided that nothing in this Clause 27.3 shall confer on either Party rights or remedies that they would not otherwise have." (emphasis added)

and *Clause 27.9* of the SDS Agreement provides

"In the event that it is agreed by the Parties or determined pursuant to Clause 28 (Dispute Resolution Procedure) that the Deliverable (including the relevant Issued for Construction Drawings) was not submitted in accordance with the Agreement in terms of packaging, process, or the content or quality was inadequate or insufficient, the limits set out in Clause 27.7 and 27.8 shall not apply and the SDS Provider shall be liable to the full extent under this Agreement." (emphasis added)

2.3.43 In terms of the foregoing clauses, it is again arguable that Infraco would not be limited to the amount of the liquidated damages and Infraco ought to be able to seek to recover the whole amount of the losses it has suffered as a consequence of the SDS Provider's failure to perform services to the appropriate standard. Such an argument ought to encourage and embolden the Infraco in to pursuing any such claims against the SDS Provider, rather than endeavouring to seek recovery under the Infraco Contract.

3. CONCLUSION

3.1 The key issues which tie ought to consider when administering the process of Notified Departures and Compensation Events are:

3.1.1 the quality/sufficiency/adequacy of the information provided by the Infraco in support/substantiate its entitlement - compliance with express/implied terms of the Infraco Contract - use of audit and information requests;



- 3.1.2 the timing of the provision of information by Infraco in support of its entitlement - sanctions available in the event of failure;
- 3.1.3 the application of the appropriate tests as to Infraco's entitlement;
- 3.1.4 the performance by the SDS Provider of the whole of its obligations - is the SDS Provider in breach of its obligations under the SDS Agreement;
- 3.1.5 the performance by the Infraco of the whole of its obligations - is the Infraco in breach of its obligations under the Infraco Contract - is the Infraco liable for a failure by the SDS Provider (negates a Notified Departure - reduces the effects of a Compensation Event); and
- 3.1.6 the use of the Dispute Resolution Procedure.

DLA Piper Scotland LLP

24 July 2009