SENIOR COUNSEL

Consolidation of Advice relating to SDS

The following is a consolidation of all Counsel advice received to date on the subject of SDS Provider liability and Infraco liability.

From pages 3 and 4 of Counsel's first note of 2 June 2009:

In the event that there is a breach of contract by the SDS Provider, would that constitute an Infraco breach, for example late delivery of drawings?

I note that there is a definition of an "Infraco Default" contained in Schedule Part 1 and Default (a) is a breach by Infraco of any of its obligations under the Agreement which materially and adversely affects the carrying out and/or completion of the Infraco works.

The provision with which this question is concerned, however, is the definition of a Notified Departure in Schedule Part 4, paragraph 2.8 which excludes a difference from the Base Case Assumptions which is caused by a breach of contract by the Infraco.

In terms of the Infraco Contract, Infraco have the responsibility for design, albeit the SDS Provider is the party delivering the design. The Novation Agreement between **tie**, Infraco and the SDS Provider has the effect that the SDS Provider is the subcontractor of Infraco. Infraco, in terms of the Infraco Contract (clauses 10, 11, Schedule Part 14, section C clauses 2.2.1 and 2.1.4 and the definition of IFC Drawings) have responsibility for the delivery of detailed design in a question with **tie**. In the event that Infraco are in breach of their obligations under the Infraco Contract, that is an Infraco Default or breach of contract by Infraco.

That conclusion does not prejudice **tie**'s remedies against the SDS Provider under the Collateral Warranty.

Are breaches of contract on the part of the SDS Provider prior to the Novation agreement breaches by Infraco?

Clause 11.1 provides for the entering into of the Novation Agreement. Clause 11.3 provides that "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 the Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." By implication, to the extent that the SDS Services are not and have not (as at the date of the Agreement) been so carried out and completed, Infraco will be deemed not to have complied with its obligations under the Agreement.

In terms of the Novation Agreement, the Infraco adopts all the rights and liabilities of **tie** as if the Infraco had been the contracting party from the outset. The SDS Provider warrants to the Infraco that it is liable for any loss or damage suffered or incurred by the Infraco arising out of negligent act, default or breach by the SDS Provider prior to the date of the Novation Agreement (clause 4.2). All rights of action against the SDS Provider under the SDS Agreement vested in **tie** shall from the date of the Novation Agreement vest in the Infraco.

Thus, while I have not found it expressly stated anywhere, it can be seen that the Infraco Contract and the Novation Agreement together constitute an arrangement whereby Infraco steps into the shoes of **tie** in all questions of the provision of the SDS Services and a default on the part of the SDS Provider, even before the date of the Infraco Contract and Novation Agreement, would be deemed a default on the part of Infraco.

We then raised two further questions on SDS with Counsel, to which he responded in his note of 18 June 2009:

2. tie request elaboration from Counsel about the implications mentioned in page 4 of the Note and the prospects of successfully mounting these arguments.

The implication referred to on page 4 of my previous Note is that Clause 11.3 provides that, "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 the Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." The implication, therefore, is that to the extent that the SDS Services are not and have not been carried out and completed in accordance with the SDS Agreement, the Infraco will be deemed not to have complied with its obligations under the Agreement" etc. The implication is a necessary one to make sense of Clause 11.3.

I agree with the supplementary statement set out in the email.

3. Given that position, does Counsel consider that the requirements on the SDS Provider in the SDS Agreement are in line with the requirements of the Infraco Contract?

Yes.

Finally, we raised three further questions of relevance which arose from our consolidated advice note to tie. Counsel provided responses in his note of 13 August 2009:

5. Counsel will note that paragraph 2.2 [*scil* 2.3] of the enclosed advice note analyses the position in respect of SDS Provider failures, and draws upon Counsel's previous advice in a number of respects. In

terms of delay culpability, does Counsel agree and/or have comments upon the stated position in respect of compensation event (t)?

I agree with the position as stated in respect of compensation event (t). The material provision in this respect, as has been highlighted, is Clause 65.8.1 which excludes from consideration any event or cause of delay or costs which is caused by any negligence, default of [*sic*] breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties (I think it should read "negligence, default, breach of contract or breach of statutory duty …") coupled with Clauses 11.3 and 11.4. Indeed. even without Clauses 11.3 and 11.4, there remains the fact that the SDS Provider is an Infraco Party.

6. To what extent does Counsel agree with the survey of the options for relief of both tie **and the Infraco in terms of SDS Provider delay, particularly in respect of liquidated damages and/or the collateral warranty, set out in paragraphs 2.3.15 to 2.3.22 of the enclosed advice note?**

This may be a semantic point, but in paragraph 2.3.18, I would prefer to substitute "crystallise upon establishing" with "arise in the event". The underlying meaning, however, is much the same.

I do not have a copy of the original SDS Agreement and clauses 27.3, 27.4 and 27.6 are not altered by the Novation Agreement (of which I do have a copy). However, I shall proceed on the basis of the quotations from those Clauses contained in the advice note.

It is confusing that Clause 27.3 provides that nothing in the SDS Agreement shall exclude or limit the liability of either party for four eventualities and that Clause 27.6 then provides that notwithstanding any other term of the Agreement, except as detailed in three of those eventualities, the liability will be limited to certain figures. However, the proper construction is probably that Clause 27.6 limits the liability of the SDS

Provider for breach of the SDS Agreement or delict (which would most likely be a failure to exercise reasonable skill and care) to £10,000,000 in respect of each and every claim (pollution or contamination claims aside).

The effect of clause 27.9 is that if the Deliverable was not submitted in accordance with the Agreement in terms of packaging, process, content or quality , the limits in Clauses 27.7. and 27.8 shall not apply. The limits in 27.7 and 27.8 are the liquidated damages payable to the Client (ie Infraco) in respect of lateness of delivery. If the breach of the Agreement is in respect of the packaging and so forth, the liability is to the full extent under the Agreement, which, in terms of Clause 27.6 would appear to be limited to £10,000,000 per claim.

7. The potential conflict in relation to compensation event (u) as regards SDS quality failures has received Counsel's attention in previous advice. Does Counsel agree with the position as expressed in paragraphs 2.3.33 to 2.3.36 of the enclosed advice note? Does Counsel have a view as to the likely outcome of a dispute which highlights this conflict?

What is described as a conflict seems to me to be a possible inconsistency between what is described in Compensation Event (u) being a Compensation Event and the fact that, by the time one works one's way through the process to claim compensation and one reaches Clause 65.8, **tie**, in assessing any delay or extension of time or costs or relief shall not take into account any event or cause of delay which is caused by any negligence, default or breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties. The SDS Provider is an Infraco Party and therefore any event described in Compensation Event (u) would fall to be disregarded.

Although Clause 65.8 (unless there are possible circumstances which would make this not the case) would appear to deprive Compensation Event (u) of any value for Infraco, I am not sure that this would qualify as a conflict between contradictory provisions. It seems to me that it is an effect of the

express terms of the Contract that Compensation event (u) would not ultimately lead to an extension of time or additional payment.

For Infraco to exploit a perceived conflict, they would have to argue that Clause 65.8 should be disregarded in whole or in part. I think that that would be an argument which it would be very difficult to make attractive.