

**tie Limited – Edinburgh Tram Network  
Summary of discussions with Richard Keen QC (RSKQC) on 4 November 2010  
in relation to Project Resolution**

**1 In attendance:**

Steven Bell (tie)  
Nick Smith (CEC)  
Caroline Campbell (CEC)  
Tony Rush  
Richard Keen QC  
Jo Glover (DLA)  
Brandon Nolan (McGrigors)  
Simona Williamson (McGrigors, by telephone)  
David Christie (McGrigors)

**2 Scope of exercise to be carried out**

2.1 tie have requested that a report be produced (by McGrigors) by the end of November 2010 which will address certain key failures on the part of Infraco which were the subject matter of RTNs. The aim of the exercise is for tie and CEC to understand the various options available and potential exposure flowing from those options.

2.2 In view of this timescale, a critical path approach must be adopted in order to focus on the issues which are of particular significance.

2.3 This exercise will require:

- (a) The ingathering of information to inform a factual matrix;
- (b) Analysis and recommendations based on the termination provisions of the Infraco Contract.

2.4 The starting point for Richard Keen (RSKQC) is to arrive at a consensus on the model that is envisaged by the contract in the event of termination.

**3 Potential outcomes following termination by tie**

3.1 In RSKQC's view, the general philosophy of the contract appears to be to lock the parties into the contract until one or other of them is able to terminate by virtue of the contractual default provisions.

3.2 On this analysis, there would be no other means of exiting the contract beyond the contractual mechanisms. In other words, if tie purport to terminate the contract on a ground which is not properly an Infraco Default, then Infraco are not entitled to treat that as a repudiatory breach which brings the contract to an end.

3.3 The point requires further analysis, but, if it were eventually held that there had been no Infraco default to justify termination, then on this interpretation the contract would be treated as having remained in place throughout, and the parties would still be locked into the contract at the end of the litigation.

3.4 The philosophy which RSKQC identified is in his view complemented by the provisions of clauses 77 and 88. It is also consistent with the proposition that the remedies upon termination are contractually defined so as to exclude common law damages.

- 3.5 On this basis, the best case scenario would be that tie are able to establish an Infraco Default; there is a completed design, and the remainder of the works are let to another contractor. This would mean that:
- (a) Infraco would still be entitled to be paid for work already done, which would involve resolving the underlying claims (e.g. in relation to clause 80, or design development).
  - (b) Infraco would be liable for the additional cost of completing the works, provided that the works were actually undertaken by another contractor. In DLA's view, the provisions of clause 90.16 would operate in such a way as to mean that tie would be entitled to claim for these costs on an interim basis as soon as there was a positive balance to claim against Infraco.
  - (c) tie's ability to make recovery would be subject to Infraco's ability to meet the claim. The bonds *etc* would also be called upon.
- 3.6 If an Infraco Default cannot be established, then the contract might be held to be terminated for tie Default. In this situation, tie has to complete the project at its own cost with no contribution from Infraco. Infraco would be entitled to be paid for the work already done, and would have additional entitlements under clause 88. Clauses 88.4 and 88.5 are difficult to interpret, and this requires further consideration.
- 3.7 However, on the basis of the philosophy outlined above, Infraco would not be *obliged* to terminate for tie Default: this could lead to the outcome that following the litigation that would ensue after the purported termination, the contract would be held to still be in place, and tie would be obliged to proceed with Infraco – even after the (potentially lengthy) period of time that had elapsed in the interim. Infraco would be obliged to re-commence work at this point, subject to all the underlying issues that would remain to be resolved (such as clause 34.1 and so on).
- 3.8 In either of these scenarios (where Infraco Default cannot be established), tie would be responsible for the delay occasioned by the litigation which would follow the issue of tie's termination notice.
- 3.9 During the intervening period of litigation, tie would not be entitled to instruct Infraco to proceed with the works: tie's position would be that the contract had been brought to an end by the termination. However, it is unlikely that tie would be entitled to instruct others to proceed with the work – the courts tend to favour the *status quo*, and Infraco would have strong grounds for seeking an interdict to prevent others from carrying out the work, if it was part of their case that the Infraco contract ought to remain in place.
- 3.10 There was a discussion in relation to what it is, from a commercial perspective, that Infraco are looking for from the contract, and whether they view it as "a goose that lays a golden egg" – this might inform whether they would treat the contract as at an end, or elect to keep it alive. The view of Tony Rush was that whilst initially BB in particular might have viewed the contract as beneficial to them, with the lack of development of the design at the outset being a means to manipulate price, they might now consider themselves as being in a more vulnerable position.
- 3.11 There was also a brief discussion in relation to the invoking the insolvency provisions as a route to extinguishing the contract. However, given the guarantee given by CEC, this route was unlikely to prove fruitful.
- 4 **Court proceedings following termination**
- 4.1 If tie proceed down the route of termination, the question of whether the termination is on valid contractual grounds (*i.e.* whether there has been Infraco Default) will require to be

resolved. Whilst this might initially be referred through the contractual DRP mechanism, the dispute will end up before the courts. Following a decision at first instance, there will almost inevitably be appeals to the Inner House of the Court of Session, and thereafter to the Supreme Court.

4.2 The timescales for this are likely to be measured in years rather than months. If the proceedings are raised by tie in the Commercial Court, it may be possible to seek a final disposal relatively quickly – for example, if a date was sought now, a hearing might be fixed for the first half of next year. The political aspect to the dispute might facilitate this.

4.3 However, Infraco might seek to subvert this approach, engaging in "trench warfare" by raising as many issues as possible that require factual enquiry. This would inevitably increase both time and cost.

4.4 tie could seek to manage this as far as possible by giving careful consideration to which issue is taken forward as forming the basis of a termination notice. RSKQC's advice was that the issue that is picked should be as narrow as possible – thereby seeking to limit the scope for the "trench warfare" approach – whilst still providing a strong basis of establishing that there has been an Infraco Default.

## 5 **Establishing Infraco Default**

5.1 There was some discussion in relation to the issues which require to be investigated in order to establish the strength of tie's position in relation to the various Infraco Defaults that have formed the subject matter of the RTNs.

5.2 In light of the comments above in relation to identifying a "narrow" Infraco Default, particular consideration should be given to the defects at Princes Street and the question of design.

5.3 Robin Blois-Brooke has been instructed to produce an opinion in relation to the question of design management and integrated design. The issues in relation to the strength of this Infraco Default require to be investigated further: for example, the question of whether the design was integrated, whether due skill and care had been exercised by Infraco, roads approval and so on.

5.4 Infraco have refused to produce the SDS agreement as requested, and consideration has been given to whether this could be treated as a fraudulent act giving rise to grounds for termination. There was recognition that this would be an extremely difficult hurdle to overcome.

5.5 An application could be made to the court to recover this document through section 1 of the Administration of Justice Act, on the grounds that proceedings are likely to be brought.

## 6 **Other issues**

6.1 The question of suspension was not to be given further consideration at present.

6.2 tie's discretion in relation to whether to accept a rectification plan is absolute, but must be exercised in good faith. The question must not be pre-judged, and the decision should not be one which no reasonable employer could make in all the circumstances. RSKQC did not consider that this issue would be the real battle ground between the parties: the court will be concerned with whether or not there has been an Infraco Default, and less with whether the rectification plan should or should not have been accepted.

**McGrigors LLP**  
**5 November 2010**