

## NOTE OF CONSULTATION WITH SENIOR COUNSEL: EXECUTIVE SUMMARY

### 1. Introduction

On Thursday 8 July 2010, the following met with Richard Keen QC, Dean of the Faculty, for a consultation in relation to grounds for termination of the Infraco Contract ("**Consultation**"): Steven Bell (**tie**), Tony Rush (Consultant), Nick Smith (CEC Legal), Andrew Fitchie (DLAP); and Joanne Glover (DLAP).

DLAP had issued a full set of instructions and papers to Senior Counsel in advance of the Consultation, which Senior Counsel had reviewed and to which he responded at the Consultation. A full note of the Consultation has been prepared. This Executive Summary highlights very briefly the key advice flowing from the Consultation.

### 2. Key Advice

- 2.1 **Repudiation** - Senior Counsel's opinion is that this is not an issue in this case. If **tie** serves a Remediable Termination Notice ("**RTN**"), that of itself cannot constitute repudiation. Even if it did, it is not a repudiation capable of acceptance by the Contractor. Senior Counsel referred to clauses 77.10 and 88.4 and the definition of "**tie Default**".
- 2.2 "**Prohibited Act**" - Senior Counsel considers that the burden of proof necessary to demonstrate fraud (to trigger clause 92 of the Infraco Contract) is extremely high and the documentation which he has seen (the Minutes of the Meeting between Infraco and SDS (July 2009) and draft collateral agreement between BB and SDS) would not be sufficient proof for the Court. Senior Counsel recommended that **tie** write a letter to the Infraco letting the Infraco know that **tie** has the draft collateral agreement between BB and SDS and is making further inquiry, considering its options and reserving its rights under clause 92.
- 2.3 **Underperformance Warning Notices ("**UWN**")** - Senior Counsel considers that it would be open to **tie** to issue to the Infraco an UWN under clause 56.7.1 of the Infraco Contract for a "material breach" of the Infraco Contract (something which goes to the root of the contract) and, if **tie** issues 4 UWNs in any 12 month period (before the issue of the Reliability Certificate), this would trigger clause 90.1.1, which would enable termination forthwith on 7 Business Days' notice (i.e. without giving the Infraco the opportunity to submit any proposal to rectify). It is irrelevant whether or not the Infraco try to, or successfully, rectify the material breach subject of the UWN - it is the issue of the UWN which counts. Senior Counsel did not view the clerical error in the definition of UWN in the Infraco Contract as problematic. It was noted by **tie** that it may be confusing to apply clause 56.7 where the better route was under clause 90.12.
- 2.4 **Infraco Default (d)** - delay of over 12 months in achieving a Planned Sectional Completion Date. Senior Counsel considers that termination on this ground would be difficult, given the complicated situation with **tie**'s culpable delay on utilities diversions. It was noted that **tie** has offered an extension of time of up to 11 months between EoT1 and 9 months proposed in 13 November 2009.
- 2.5 **Infraco Default (j)** - suspension of the Infraco Works for 15 Business Days when the Infraco has been instructed by **tie** to progress them. Senior Counsel considers that this means "or any material part of the Infraco Works". Noted that **tie** has a strong case on this ground and that there is correspondence in place on which **tie** can rely.
- 2.6 **Infraco Default (a)** - Senior Counsel considers the test is "*a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works*". This is any breach (and not a breach which has to go to the root of the contract). This has to be read in the context of clause 90.1.2. The breach can be capable of rectification. The default may include a material and adverse effect on **tie**'s performance insofar as

**tie** has a role in the Infraco Works e.g. the Infraco's failure to produce Estimates is a breach which has a material and adverse effect, because **tie** is not able to manage (and deliver) the intended contractual mechanism.

- 2.7 **Separate RTNs** - Senior Counsel recommends that each breach of Infraco Default limb (a) is the subject of a separate RTN, for legal/construction and tactical reasons. If any one RTN falls, it will not prejudice others.
- 2.8 **Issue RTNs together** - Senior Counsel recommended that **tie** issues all the RTNs at the same time (tactically this would be stronger). Senior Counsel does not consider that the length of time which it has taken to raise complaints about the defaults is problematic - there is no waiver or personal bar (reference to clause 109 ('no waiver') and **tie** is entitled to manage the contract as it wishes).
- 2.9 **Cumulative breaches** - Senior Counsel's view is that if any one breach is not sufficient to satisfy the test in Infraco Default limb (a) ('MAE') then, even as part of a package of breaches, this would not be sufficient. Senior Counsel considers that there is a distinction between 'cumulative breaches' and a 'course of conduct'. It is possible to refer to a course of conduct which amounts to one breach e.g. breach of clause 7 (duty of care/expertise) demonstrated by various well-evidenced examples, defined by reference to clear contractual obligations (referenced by clause numbers).
- 2.10 **Good faith** - Senior Counsel noted the terms of clause 90.2, that **tie** has absolute discretion to determine whether or not the Infraco's rectification plan is acceptable. Although **tie** does not need to act fairly (pursuant to clause 118), this discretion needs to be exercised *bona fide* i.e. **tie** must not have predetermined the outcome. An allegation of bad faith demands a very high standard of proof (e.g. a clear statement from **tie** management/governance that **tie** will terminate the Infraco whatever the Infraco does). Senior Counsel did not consider the public statements from CEC/politicians or the press releases to be fatal to **tie**'s position at all (especially as they are not from **tie**, the contracting party), but care should be taken to ensure there is no suggestion of pre-determination going forward.
- 2.11 **DRP** - Senior Counsel stated that it is not a problem for the issue of a RTN that the Infraco has referred the interpretation of clauses 34.1 and 80.13 to DRP. **tie** is entitled to exercise different contractual mechanisms in parallel; this will not amount to repudiation (albeit that the Infraco may dispute the RTN, in which case the discussion can be had at the time).
- 2.12 **Timing of issuing the RTNs** - Senior Counsel noted that this is a strategic/commercial decision, but recognised that there is value in **tie** considering timing carefully as to how it may impact upon the ongoing commercial negotiations.
- 2.13 **Performance and Retention Bond** - Senior Counsel agreed that the issue of an RTN would be a satisfactory trigger to call on the Bonds (subject to notice to the bondsmen). Senior Counsel noted that this is ultimately a strategic decision, but he would suggest waiting until the negotiations have broken down and call on the Bonds when/if **tie** issues the RTN.

### 3. Actions following the Consultation

- 3.1 DLAP to prepare a Note of Consultation (for Senior Counsel to acknowledge).
- 3.2 DLAP to update the RTNs - separate into individual RTNs, refresh 'chosen' breaches (with **tie** input as required).
- 3.3 **tie** to write letter to the Infraco in relation to the SDS - BB draft Agreement (with DLAP input as required). (Note: now included as part of **tie** letter ref: 5526).

DLA Piper Scotland LLP, 15 July 2010