
From: Anthony Rush [rush_aj@[REDACTED]]
Sent: 27 January 2010 12:44
To: Richard Jeffrey; 'Fitchie, Andrew'
Subject: RE: Infraco behaviour and Clauses 7.316, 7.5.2 and Clause 77.1 .

Please forward it.

Telephone 0 [REDACTED] Mobile 0 [REDACTED]

Replies will also be received on my blackberry

This message is confidential and may contain privileged information. If you are not the addressee (or responsible for delivery of the message to the addressee) any disclosure, reproduction, copying, distribution or use of this communication is strictly prohibited. If you have received this email in error, please notify the sender immediately and then delete it. No liability is accepted for any harm that may be caused to your systems or data by this message or attachments. It is your responsibility to scan for viruses.

From: Richard Jeffrey [mailto:Richard.Jeffrey@tie.ltd.uk]
Sent: 27 January 2010 11:45
To: Anthony Rush; 'Fitchie, Andrew'
Subject: RE: Infraco behaviour and Clauses 7.316, 7.5.2 and Clause 77.1 .

I have a copy of the e-mail to Tom Buchanan!

R

From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 27 January 2010 10:08
To: 'Fitchie, Andrew'
Cc: 'Nolan, Brandon'; torquilmurray@[REDACTED]; Richard Jeffrey; david_mackay@[REDACTED]; Stewart McGarrity
Subject: RE: Infraco behaviour and Clauses 7.316, 7.5.2 and Clause 77.1 .

Thanks Andrew,

I asked the question yesterday "when does Infraco's behaviour become willful"?

In writing u the background to the case I am minded that their behaviour could now be said to be willful – it being clear that it is causing damage to tie and others. Infraco are I suggest required to review their actions in the interests obtaining best value, in the interests of "*economy, efficiency and effectiveness*". and the Project Vision.

Tony

Telephone 0 [REDACTED] Mobile 0 [REDACTED]

Replies will also be received on my blackberry

This message is confidential and may contain privileged information. If you are not the addressee (or responsible for delivery of the message to the addressee) any disclosure, reproduction, copying, distribution or use of this communication is strictly prohibited. If you have received this email in error, please notify the sender immediately and then delete it. No liability is accepted for any harm that may be caused to your systems or data by this message or attachments. It is your responsibility to scan for viruses.

From: Fitchie, Andrew [mailto:Andrew.Fitchie@dlapiper.com]
Sent: 27 January 2010 09:46
To: Anthony Rush
Cc: Nolan, Brandon; torquilmurray@[REDACTED]; Richard Jeffrey; david_mackay@[REDACTED]; Stewart McGarrity
Subject: RE: Infraco behaviour and Clauses 7.316, 7.5.2 and Clause 77.1 .

Legally privileged and FOISA Exempt

Tony - in haste this morning:

Some background and Richard will be better placed on first hand information. What follows about the facts is obviously second-hand and a summary.

As we have discussed, **tie's** confidence in the integrity of BB UK management struggled to recover from the pre Close tension and bad behaviour of BSC. I think this impression is shared by CEC, in front of whom senior BB personnel essentially lied when asked if the supply chain was under contract. In February last year, matters reached a head in terms of relationship breakdown when BSC refused to enter Princes Street. The media picked this up and, as a result, David Mackay's picture appeared in a paper as a tank commander, from memory under a diplomatic title along the lines of 'Crush the Huns' and some fairly one sided commentary. This sparked media briefings by BB. This bushfire died out after an uneasy understanding was reached that direct public airing of differences was inferior to negotiation and, if needed, DRP and would hurt the standing of the Project.

Despite this, there was some clear sniping at intervals. Steven was criticised either in name or title in the papers following his fairly 'as I see it' interview/quotations about BSC performance on site. There were several exchanges of correspondence following this, including one from the Infraco which talked of damage to individuals' and corporate reputation. We advised **tie** on this subject (i.e. to what extent a corporation can, as a matter of law, sue and recover damages for hurt to its reputation: the leading case here concerning public allegation made by individuals about a supermarket's policies). Amidst this, BB (as opposed to BSC) briefed its media adviser to suggest to an elected Council Member that he should ask pointed and negative questions about Richard in an open Council meeting. We advised on defamation - I am not certain whether **tie** were ever shown the email exchange between the consultant and the Councillor, Tom Buchanan, but no action was taken as far as I am aware. Since that time, we have not had close involvement in **tie's** monitoring of BSC media strategy but we have been assisting on FOISA matters where this a clear link to the media's own lines of inquiry on the Project.

Analysis:

I have no doubt that an allegation by **tie** of breach of 7.3.16 would be met by a counter-assertion that **tie** kicked off a war of words on BSC's performance and it would be unreasonable for **tie** to be able to rely upon the predictable outcome of its goading BSC. However, I consider that **tie's** position is that BSC lack of responsiveness and breach of partnering obligations made it essential to capture BSC senior (German) management's attention to the crisis and that the contract deliberately does not contain a reciprocal provision about protection of the contractor's image. The fact that **tie** felt compelled to permit/spark media comment supports the level of dissatisfaction about Infraco's abuse of the Change mechanism and their aim to bring the contract to a standstill. **Wilful:** I consider that the contact with the Councillor went well beyond the 'self defence' or 'fair comment' argument. This was a BB instructed move - using an agent - which made a deliberate choice of contact with an influential political third party, with no direct remit on the Project. The fact that Councillor Buchanan reported this to **tie** and refused to do what was proposed does not remove the breach; it dilutes its effect and therefore goes to what damage might have flowed. If there have been further instances like this, then that pattern can and should be relied upon to prove wilful breach. Please also refer to Clause 77.1 - where **tie/CEC** benefit from an indemnity for wilful acts of Infraco and Infraco Parties.

Depending on what has been occurring in terms of **tie's** own media strategy, I consider that a short exercise in assembling evidence of blatant unprovoked attacks which can be traced to BSC is worthwhile. This would support breach of 7.3.16 (and its link to 7.5.2 *minimising the disruption to the city of Edinburgh*), the significance of which, in my view, lies within (a) the public duty and Best Value role which **tie** has to discharge (b) the potential to establish argument for the recoverability of damages for abortive expenditure if the project were to fail. The additional reason for these provisions was to create a specific duty on the contractor in the vein of the additional controls exerted by funders on PFI schemes. The difficulty in this evidence, of course, will be attribution and accuracy of what is reported as having been said about **tie/CEC** or the ETN.

The significance of BSC's media strategy is relevant to what their desired outcome really is. If the most elegant solution for BSC is that the project funding is cancelled by Transport Scotland or that the political will for the ETN evaporates, then a plan may involve careful generation of comments leading to a poor opinion of **tie**, the unaffordability of the project or the chaotic conditions of contract. This would be Wilful and actionable, in my opinion.


Recommended Action

Short discussion with tie's media team to gauge likelihood of and quality of evidence

Hope this is useful.

kind regards

Andrew Fitchie
Partner, Finance & Projects
DLA Piper Scotland LLP
T: +44 (0) [REDACTED]
M: +44 (0) [REDACTED]
F: +44 (0) [REDACTED]

 Please consider the environment before printing my email

From: Anthony Rush [mailto:rush_aj@[REDACTED]]
Sent: 26 January 2010 20:43
To: Fitchie, Andrew
Cc: 'Nolan, Brandon'; torquilmurray@[REDACTED] Richard Jeffrey'
Subject: Infraco behaviour.

Andrew,

Clause 7.3.16 requires Infraco to carry out and complete the Works in such manner as not **wilfully** to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Ministers, Transport Scotland or the Edinburgh Tram Network.

In view of the ongoing publicity when does Infraco's actions become willful?

Tony

Telephone 0 [REDACTED] Mobile 07 [REDACTED]

Replies will also be received on my blackberry

This message is confidential and may contain privileged information. If you are not the addressee (or responsible for delivery of the message to the addressee) any disclosure, reproduction, copying, distribution or use of this communication is strictly prohibited. If you have received this email in error, please notify the sender immediately and then delete it. No liability is accepted for any harm that may be caused to your systems or data by this message or attachments. It is your responsibility to scan for viruses.

This email is from DLA Piper Scotland LLP.

The contents of this email and any attachments are confidential to the intended recipient. They may not be disclosed to or used by or copied in any way by anyone other than the intended recipient. If this e mail is received in error, please contact DLA Piper Scotland LLP on +44 (0) 8700 111111 quoting the name of the sender and the email address to which it has been sent and then delete it.

Please note that neither DLA Piper Scotland LLP nor the sender accepts any responsibility for viruses and it is your responsibility to scan or otherwise check this email and any attachments.

DLA Piper Scotland LLP is a limited liability partnership registered in Scotland (registered number SO300365), which provides services from offices in Scotland. A list of members is open for inspection at its registered office and principal place of business Rutland Square, Edinburgh, EH1 2AA. Partner denotes member of a limited liability partnership.

DLA Piper Scotland LLP is regulated by the Law Society of Scotland and is a member of DLA Piper, an international legal practice, the members of which are separate and distinct legal entities. For further information, please refer to www.dlapiper.com.

The information transmitted is intended only for the person to whom it is addressed and may contain confidential and/or privileged material. If you are not the intended recipient of this e-mail please notify the sender immediately at the email address above, and then delete it.

E-mails sent to and by our staff are monitored for operational and lawful business purposes including assessing compliance with our company rules and system performance. TIE reserves the right to monitor emails sent to or from addresses under its control.

No liability is accepted for any harm that may be caused to your systems or data by this e-mail. It is the recipient's responsibility to scan this e-mail and any attachments for computer viruses.

Senders and recipients of e-mail should be aware that under Scottish Freedom of Information legislation and the Data Protection legislation these contents may have to be disclosed to third parties in response to a request.

tie Limited registered in Scotland No. SC230949. Registered office - City Chambers, High Street, Edinburgh, EH1 1YT.
