JOINT OPINION OF SENIOR AND JUNIOR COUNSEL

for tie LIMITED

in respect of (i) the Infraco Contract relative to the Edinburgh Tram Project and (ii) INTC 536

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1. We refer to agents' letters of instruction dated 19 January (incorporating the e-mail from Ian McAlister to tie dated 11 January) and 21 January, as well as the subsequent consultation with Junior Counsel on 24 January, all 2011. In terms of those letters, and following discussion as the consultation, we have been asked to address the following questions:-

The Infraco Contract

(i) What is the relationship between Clauses 65 and 80 of the Infraco Contract and, in particular, is the Infraco entitled to elect whether to treat certain events as a Compensation Event (under Clause 65) or a tie Change (inc. Notified Departures) (under Clause 80)?

(ii) Is there a mechanism under the Infraco Contract for granting an extension of time?

INTC 536

(iii) Is the Infraco entitled to seek an EOT in respect of each of the Sectional Completion Dates in the event that the MUDFA Works are not the dominant cause of the delays to those completion dates?

(iv) In seeking an EOT under INTC 536, is the Infraco entitled to ignore delays to the works which are not a risk event for which tie is responsible?

(v) In estimating its claim for an EOT under INTC 536, is the Infraco entitled to ignore the actual progress of the works?

(vi) When forming its opinion with respect to the impact of a tie Change under Clause 80.4, is the Infraco entitled to have regard only to the Infraco Construction Programme?

(vii) Is the Infraco entitled to base such an estimate on the Revision 1 Construction Programme without taking into account actual progress?

(viii) Where the Infraco has indicated that its own internal processes and procedures create delay to the Revision 1 Infraco Construction Programme, is the Infraco entitled to ignore these matters in preparing its Estimate under Clause 80?

(ix) Is the Infraco entitled to insist upon the resource constraints which were built in to the original construction programme, even in circumstances where these constraints need not cause delay to the works in reality?

(x) In preparing its Estimate for INTC 536, how should the Infraco take account of the adjudicator's decision with respect to the MUDFA Rev. 8 (INTC 429) Estimate? In particular, in seeking an EOT under INTC 536, is the Infraco entitled to seek to re-visit matters which were before that adjudicator and formed part of the subject-matter of his decision?

2. We would propose to address these questions in that order. For the sake of clarity, we would note that, whilst Questions 1 and 2 are of general relevance to the overall ongoing disputes between the parties, the issues arising under Question 1 in particular do not impact directly upon a consideration of INTC 536, as that claim currently proceeds wholly on the basis of an Estimate prepared under Clause 80 of the Contract in respect of a Notified Departure.

(i) What is the relationship between Clauses 65 and 80 of the Infraco Contract and, in particular, is the Infraco entitled to elect whether to treat certain events as a Compensation Event (under Clause 65) or a tie Change (inc. Notified Departures) (under Clause 80)?

Clause 65

3. In order to address this question, it is necessary to look in some detail at the provisions of these two clauses and to consider their role in the overall contractual environment. **Clause 65** of the Contract is headed "**Compensation Events**". "Compensation Event" is defined in Schedule Part 1 as including a significant number of matters, for example:-

"(a) any breach by tie…of any of tie's obligations under this Agreement which adversely affects the performance of the Infraco Works;

(b) the failure of tie to give possession or access…

…(d) execution of any Utilities Works or MUDFA Works;

(e) instructions by tie's representative to which Clause 34.3 applies…"

4. **Clause 65.1**. provides that, if and to the extent that a Compensation Event:-

"*65.1.1 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*"; and/or

"*65.1.2 directly and adversely affects Infraco's ability to perform any of its obligations under this Agreement*"; and/or

"*65.1.3 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*;"

then "*the Infraco shall be entitled to apply for an extension of time and/or relief from the performance of its obligations and/or claim for additional costs under this Agreement. The Infraco's sole right [emphasis added] 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).*"

5. **Clause 65.2** then sets out the steps the Infraco must take in order to obtain an extension of time, etc. in respect of a Compensation Event. These steps include giving

tie notice, within a certain period, of any extension of time or additional costs which are likely to be occasioned by the Compensation Event, along with details of the claim, as well as details of what mitigation measures have been adopted and what acceleration measures could be taken. **Clause 65.2A** provides that tie should, in turn, notify the Infraco as to whether it agrees that a Compensation Event has occurred and, if so, its agreement or otherwise with respect to the claimed extension of time or costs. **Clause 65.3** provides that, in the event that the Infraco has complied with its obligations under Clause 65.2.2, then the completion dates shall be postponed, costs paid and/or other relief given.

6. **Clause 65.5** contains further obligations to provide information which are incumbent upon Infraco and **Clauses 65.6** and **65.7** set out the circumstances in which the matter can be referred to the Dispute Resolution Procedure. **Clause 65.8** sets out what tie can and cannot take into account in assessing claims made in respect of a Compensation Event, and we will return to consider this further in due course.

7. The next relevant sub-clause for our purposes is **Clause 65.11** which 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*". Accordingly, the occurrence of an event which falls within the definition of Compensation Event, whilst it may entitle the Infraco to a claim for EOT or costs, etc. will not entitle the Infraco to stop work.

Clause 80

8. **Clause 80** is headed "**tie Changes**". A "tie Change" is defined in the **Schedule Part 1** as "*any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (tie Changes) or any other event which this Agreement specifically states will be a tie Change but which shall not include any Small Works Change or any Accommodation Works Change*".

9. **Clause 80.1** provides: "*Unless expressly stated in this Agreement, or as may otherwise be agreed by the Parties, tie Changes shall be dealt with in accordance with this Clause 80 (tie Changes). If tie requires a tie Change, it must serve a tie Notice of Change on the Infraco*".

10. **Clause 80.2** goes on to state, *inter alia*, that a tie Notice of Change must give the Infraco enough detail to provide an Estimate in accordance with Clause 80.4. **Clause 80.4**, in turn, provides that, as soon as reasonably practicable and, in any event within 18 business days (or such longer period as agreed) after receiving a tie Notice of Change, the Infraco must provide tie with an Estimate. It continues:-

"*The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:*

80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed tie Change:

80.4.2 any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;

80.4.3 any impact of the Programme and any requirement for an extension of time;...

...80.4.8 proposals to mitigate the impact of the proposed tie Change;...

...80.4.10 any increase or decrease in the sums due to be paid to the Infraco under this Agreement...in order to implement, and as a direct consequence of implementation of, the tie Change, such increase or decrease to be calculated in accordance with this Clause 80".

11. **Clause 80.6** sets out the mechanisms for valuing the tie Change. Clause **80.7** goes on to make further provision with respect to the content of the Estimate to be prepared by the Infraco, as follows:-

"*80.7 The Infraco shall include in the Estimate evidence demonstrating that:*

80.7.1 the Infraco has used all reasonable endeavours to minimise...any increase in costs and to maximise the reduction of costs;

80.7.2 the Infraco has, where required by tie and where appropriate and applicable, sought competitive quotes from persons other than the Infraco parties in pursuance of its obligation under Clause 80.7. above;

80.7.3 the Infraco has investigated how to mitigate the impact of the tie Change; and

80.7.4 the proposed tie Change will...be implemented in the most cost effective manner..."

12. **Clause 80.9** states that, "*as soon as reasonably practicable after tie receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions tie may modify the tie Notice of Change…*". **Clause 80.10** provides that, in the event that parties cannot agree the contents of the Estimate, it may be referred to the Schedule Part 9 Dispute Resolution Procedure.

13. **Clause 80.13** provides that, subject to the provisions of Clause 80.15, after the contents of the Estimate have been agreed, tie may, *inter alia* (save where the Estimate relates to a Mandatory tie Change), withdraw the tie Notice of Change. In addition, it provides that, subject to the provisions of Clause 80.15, the Infraco shall not commence work in respect of a tie Change until instructed to do so by tie. **Clause 80.15** in turn states that, where an Estimate has been referred to the Dispute Resolution Procedure, tie may instruct the Infraco to proceed with the tie Change, notwithstanding the Estimate has not been agreed, in the event that tie considers the work to be urgent or to have a potentially significant impact on the Programme.

14. **Clause 80.17** provides that, as soon as reasonably practicable and in any event within 20 business days of the issue of a tie Change Order (or such longer period of agreed), the Infraco shall, amongst other things, update the Programme in accordance with Clause 60. (The terms of Clause 60 are considered in more detail below.)

15. Finally, **Clause 80.24** provides that "*Where pursuant to paragraph 3.5 of Schedule Part 4 (pricing) or pursuant to Clause 14 (tie Obligations), tie is deemed to have issued a tie Notice of Change as a result of the occurrence of a Notified Departure, the provisions of this Clause 80 (tie Changes)…shall apply.*"

16. Accordingly, one significant difference between the provisions of Clauses 65 and 80 is that, in the event of the occurrence of a Compensation Event occurring under the former, the Infraco is obliged to continue with the Works whereas, in the event of a tie Change under the latter clause, the Infraco (unless instructed otherwise in certain circumstances) is entitled not to carry out that part of the works until the Clause 80 procedure has been operated, the Estimate agreed and the tie Notice of Change issued. We are advised that, perhaps as a result of this distinction, the Infraco has embarked upon a pattern of seeking to characterise certain events, of a type which it previously

sought to have considered under Clause 65, as tie Changes or Notified Departures for the purposes of Clause 80, in order that the Infraco might then claim an entitlement under the Contract to "down tools" until the Estimate has been agreed. It is in these circumstances that the question has arisen as to whether the Infraco is able to elect which clause to apply in certain circumstances.

17. Having set out above the most relevant provisions of Clauses 65 and 80 above, it is useful to have regard to some other provisions of the Contract. For example, **Clause 4.2** provides that, "*In the event of any ambiguity or discrepancy between*" the provisions in the main body of the Contract and those in any part of the Schedule thereto, or between the provisions of any schedules, it is for tie to state in writing which provision is to take priority, which failing the main body of the Contract takes priority. Accordingly, unless otherwise advised, the Contract provisions take precedence over the provisions in the Schedule. However, **Clause 4.3** provides that "*Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing).*" **Schedule Part 4** itself contains provision with respect to the price agreed for the works (the Construction Works Price). Amongst other things it lists matters which have not been taken into account in calculating the price – termed "Specified Exclusions". The Specified Exclusion are listed at Clause 3.3 of Part 4, and include matters such as utilities diversions. Clause 3.3.1 notes that, in the event that the Infraco is required to carry out a Specified Exclusion, this shall be regarded as Notified Departure. As seen above, in terms of Clause 80.24, Notified Departures fall to be addressed under Clause 80.

18. Our attention has also been drawn, in particular, to **Clause 34.3** of the Contract. Broadly speaking, Clause 34 itself deals with the obligation upon Infraco to carry out the works in accordance with the Contract and to comply with instructions issued to the Infraco by tie. Clause 34.3 goes on to state:
"*If in pursuance of Clause 34.1..., tie's Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction or so as to cause the Infraco to incur cost then such instructions shall be [emphasis added] a Compensation Event under Clause 65 (Compensation Event) except to the extent that either such instructions have been required as a consequence of the Infraco's breach of its obligations under this Agreement or such delay and/or extra*

cost result from the Infraco's' default. If such instructions require any variation to any part of the Infraco Works, tie shall be deemed to have issued a tie Notice of Change requiring such variation, which tie Change shall be a Mandatory tie Change."
It has been suggested that this sub-clause may permit of the possibility of the same event falling to be regarded either as a Compensation Event or a tie Change, giving the Infraco the ability to choose whether to operate the procedure under Clause 65 or Clause 80.

19. Approaching the matter at a high level, the purposes of Clauses 65 and 80 appear to be different. Clause 65 seems designed to deal with the types of event which might be expected to occur during the course of any large construction project, albeit their actual detail or nature cannot be foreseen. It provides a procedure whereby the contractor might seek redress (compensation) for the consequences of these events whilst ensuring that the works will continue to be progressed. Clause 80, on the other hand, appears primarily aimed at the situation where the employer seeks to vary, or is deemed to have varied (or departed from), the contract works. It gives him the right to seek information from the contractor as to the likely impact of the variation in order that he might, amongst other things, modify or withdraw the instructed variation in the event that the likely consequences are not acceptable. It gives the contractor a mechanism to seek redress for the effects of the variation. And it provides that the contractor is not to execute the instruction for a variation until the employer has had an opportunity to consider its likely impact.

20. In our view, the wording of Clause 65.1 seems expressly aimed at ensuring that any occurrence, which falls within the contractual definition of a "Compensation Event", will be addressed under that clause – "*The Infraco's sole right [emphasis added] 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).*" Indeed, the wording seems aimed to exclude the treatment of a Compensation Event under any other provision of the Contract.

21. In contrast, the wording of Clause 80.1 expressly accepts that other provisions may require to take precedence over it (at least with respect to a tie Change) – "*Unless expressly stated in this Agreement, or as may otherwise be agreed by the Parties, tie*

Changes shall be dealt with in accordance with this Clause 80 (tie Changes)." This wording would allow, amongst other things, for an argument to be advanced that, in the event of any conflict between Clauses 80 and 65, the latter should take precedence. The only part of Clause 80 which appears to be more prescriptive is Clause 80.24 which, as noted above, provides that where, pursuant to, *inter alia*, paragraph 3.5 of Schedule Part 4, tie is deemed to have issued a tie Notice of Change as a result of the occurrence of a Notified Departure, the provisions of Clause 80 shall apply.

22. Accordingly, it is our view that there is *prima facie* no intention on the part of the drafter to permit of an election between Clause 65 and Clause 80[1]. Indeed, an intention to keep Compensation Events and tie Changes separate and distinct is evident in the provisions of Clauses 22.2-4 and 22.5. Furthermore, we would submit that, generally speaking, an event which falls within the terms of Clause 65 must be addressed under that Clause as, on the face of it, Clause 65 takes precedence.

23. For the sake of completeness, we do not consider that Clause 4.2 is of particular assistance in considering this issue.

24. As for Clause 34.3, its wording can be given content, on the basis of the construction discussed above, if read as providing (i) that any instruction which might delay or disrupt the works falls to be treated as a Compensation Event, and dealt with under Clause 65, save to the extent that the instruction requires any variation to the works, in which case the instruction (or relevant part of the instruction) shall fall to be treated as a Mandatory tie Change and be dealt with under Clause 80. Whilst the wording in the definition of "Compensation Event" in Schedule Part 1 includes "(e) instructions by tie's representative to which Clause 34.3 applies…" and thus, on the face of it, includes all instructions referred to in Clause 34.3, including variations, we would suggest that this is not the correct meaning to be given to the definition and that the wording of Clause 34.3 clearly excludes instructions, to the extent that they require a variation to the works, from the ambit of Compensation Events.

[1] To this extent we agree with the views of Robert Howie QC expressed in this regard with respect to the "preliminary issues" in the MUDFA Rev. 8 adjudication (discussed below).

25. The question then arises as to the place of Clause 4.3 in this construction i.e. the words: "*Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (Pricing)*." It is, on the face of it, not entirely clear what is meant by "additional" relief. Additional to what? In the context of Clause 65, it may refer to relief available under Schedule Part 4 which is additional to that available under Clause 65. Such an approach would allow for the situation envisaged under Clause 34.3 above, whereby an event is dealt with under both Clauses 65 and 80, to the extent that the Compensation Event element of the works is addressed under Clause 65 but any part of the event/instruction which falls outwith the definition of a Compensation Event and, for example, was a variation falling within Clause 80, could be addressed under that Clause, in order to provide the "additional relief" to which the contractor was entitled for that element of the work. However, it seems equally likely that Clause 4.3 is aimed at protecting the provisions of Paragraph 3.5 of Schedule Part 4. That paragraph provides that, in the event that facts or circumstances differ from the Base Case Assumptions, this Notified Departure will amount to a Mandatory tie Change and be dealt with under Clause 80, in particular in terms of Clause 80.24. However, Paragraph 3.5 continues; "*For the avoidance of doubt tie shall pay to the Infraco, to the extent not taken into account in the Estimate provided pursuant to Clause 80.24.1, any additional loss and expense incurred by the Infraco as a consequence of the delay between the notification of the Notified Departure and the actual date (not the deemed date) that tie issues a tie Change Order, such payment to be made by tie following evaluation, agreement or determination of such additional loss and expense pursuant to Clause 65 (Compensation Events) as if the delay was itself a Compensation Event.*"

26. It has been drawn to our attention that the matters which are contained within the definition of "Compensation Event" for Clause 65 and under the definition of "Specified Exclusion" in Schedule Part 4, which are to be dealt with under Clause 80, are similar. In particular, Compensation Events includes "(d) execution of any Utilities Works or MUDFA Works" to the extent that they are a direct cause of delay, etc. and Specified Exclusions from the Construction Works Price include "(a) Utilities diversions…and protective works associated with utilities save for the Defined Provisional Sums for those utilities diversions that are to be undertaken by Infraco." However, it is submitted that these two matters are distinct from one another. On the

face of it, the Compensation Event described is the situation where the carrying out of the utilities Works by a Utility provider or the MUDFA Works by the MUDFA Contractor causes delay, etc. to the Infraco works. In contrast, the Specified Exclusion appears to envisage the situation where the Infraco is instructed, itself, to carry out utilities works or associated protective works, which have not been included in the contract price, or the provisional sums, and would amount to a variation. This view is supported by the provisions of Paragraph 7 on page 13 of Schedule Part 4, which provides that, in the event that the Infraco is instructed to undertake unforeseen utilities diversion works, the resulting claim for adjustment of the Contract Sum is to be dealt with under Clause 80.

27. In summary, therefore, we would suggest that, in general, an event which falls within the definition of Compensation Event must be dealt with under Clause 65, with tie Changes and other variations or modifications to the works falling to be addressed under Clause 80. The issue as to which clause any particular event properly falls under, however, as a matter of definition, may well be a discrete exercise of contractual construction which requires to be carried out in the individual case. However, we do not consider that the Infraco has a broad power to elect which clause to operate in circumstances where a particular event might seem to fall within the relevant definitions for both. We note that the view we have come to differs slightly from the advice previously given by agents, as well as the opinions expressed by Mr Howie QC as part of the INTC 429 adjudication. However, standing the difficulties inherent in reconciling the clauses considered above, it is perhaps not surprising that a number of different views have been taken.

2. Is there a mechanism under the Infraco Contract for granting an extension of time?

28. Each of Clauses 64, 65 and 80 contain mechanisms by means of which the Infraco might seek an extension of time – as a result of Relief Events, Compensation Events and tie Changes (inc. Notified Departures) respectively. Clauses 64. and 65.1 provide expressly that, if and to the extent that the event is the direct cause of a delay in the achievement of a Sectional Completion date, the Infraco is entitled to apply for an

EOT. Clause 64.3 and 65.3 go on to provide that, in the event that the Infraco has complied with its obligations under the clause, then the relevant Sectional Completion Dates shall be postponed by such time as is reasonable for such an event, taking into account the likely effect of the delay. There is no such express provision in Clause 80, albeit the words of Clauses 80.4 and 80.19 make clear that an entitlement to an EOT is envisaged as an outcome of operating the Clause 80 mechanism. Furthermore, generally, the ability of the tie Representative actively to grant an extension of time can be implied from the words of Clause 62.4. Accordingly, whilst there appears to be no express wording describing the precise mechanism for how such an EOT is to be granted, it is clear from the relevant clauses that the granting of an EOT by tie (or the tie Representative) is envisaged as an outcome of the overall contractual mechanisms.

3. Is the Infraco entitled to seek an EOT in respect of each of the Sectional Completion Dates in the event that the MUDFA Works are not the dominant cause of the delays to those completion dates?

29. INTC 536 is advanced in respect of the period from 1 April 2009 to 31 July 2010. The claim made by the Infraco in respect of INTC 536 is made in terms of Clause 80. Accordingly, it is necessary to construe the terms of that clause in order to answer this question. However, as can be seen above, little guidance is given in Clause 80 as to what is to be taken into account in assessing an EOT, etc, under Clause 80.

30. This is in contrast to Clause 65 (discussed above) which, at 65.8.1 and 65.8.2 sets out what tie shall and shall not take into account in assessing a claim for EOT/costs/other relief. To take those provisions in reverse order, 65.8.2 provides that tie shall only "take into account" an event or cause of delay to the extent that the Infraco is able to show that it took steps to mitigate the delay and/or costs arising from it. In this clause, the phrase "take into account" appears to mean "take into account as giving rise to a claim for EOT, etc." 65.8.1 is less clear in its terms, to the extent that it says tie shall "not take into account an event or cause of delay or costs which is caused by any negligence, default, breach of contract or breach of statutory duty of the Infraco or of the Infraco parties". Read on its own, this could mean either that (a) such an event or cause of delay is not to be taken into account in considering issues of

causation with respect to an application for an EOT, for example with respect to whether the contractor default or the employer default is the dominant or effective cause of the delay, etc., or (b) that no award of EOT or costs is to be made in respect of any period of delay / costs which could be said to have been caused by a contractor as opposed to an employer breach. However, if one construes the phrase "take into account" here as it is used in 65.8.2, this would favour the latter construction. Accordingly, the overall thrust of Clause 65 is that issues of causation are live and that delay or costs which can be shown to have been "caused" by default., etc. of the contractor will not give rise to a Clause 65 claim. This is in line, generally, with the case law usually applied in this field.

31. Returning then to Clause 80, as noted above, that clause is not explicit as to how an award of EOT or costs is to be made. However, as noted above, a finding of an entitlement to an EOT or costs is clearly envisaged – see, for example, Clauses 80.4.3 and 80.4.10. As regards whether and, if so, how causation or culpability should be considered when assessing any award of EOT or costs, the terms of Clause 80.19 suggest that these matters are relevant. Further, the use of the word "impact" in Clause 80.4.3 and "as a direct consequence of" in Clause 80.4.10 are suggestive of a causation requirement. In any event, absent clear wording to the contrary, there is no reason to assume other than that the usual rules applied to issues of causation in the assessment of EOT's, etc. in construction contracts ought to be applied here also.

32. As agents are aware, the most recent and authoritative decision in this field in Scotland is ***City Inn Limited v Shepherd Construction Limited [2010] BLR 473***. We would propose to analyse the relevant causation issues under reference to this decision in the first instance, as it is currently binding on the courts of first instance in Scotland. However, we will also address any criticisms that might be made of that judgment which may be relevant in the present context. We do, of course, recognise that the relevant parts of the ***City Inn*** judgment relate expressly to the proper construction of Clause 25 of the JCT Standard Form conditions. Nonetheless, the judgment falls to be considered in the broader causation setting.

33. In paragraph 42 of his Opinion, Lord Osborne (who provided the leading judgment), having considered the usual leading authorities in this area, noted that it

was "possible to formulate certain propositions as regards the proper approach to be taken to the application of clause 25.3 of the Standard Form conditions". He then listed 5 propositions, the first 4 of which were as follows:-

1. before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed thereby or has in fact been delayed thereby;
2. the decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of common-sense;
3. the decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him – the absence of a critical path analysis does not mean that an EOT claim must necessarily fail; and
4. if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material – thus, depending upon whether or not the dominant cause is a relevant event, the claim for an EOT will or will not succeed.

We would submit that, subject to one caveat, this application of what can be regarded as the general principles of causation would be appropriate in the context of Clause 80 of the Infraco Contract also. The caveat we would attach is this – it is difficult to see, in a modern complex construction contract, how a party, seeking to establish as a matter of fact that an employer's risk event caused a delay to the works, will be able to do so in the absence of an analysis of the critical path. It is interesting to note that this view is supported by Lord Drummond Young in the case of ***Castle Inns (Stirling) Limited v Clark Contracts Limited 2010 SCLR 270*** at para. [35], albeit he had found to the contrary 2 years earlier at first instance in ***City Inn***.

34. It is necessary then to consider the fifth proposition advanced by Lord Osborne, that:

5. where a situation exists in which two causes are operative, one being an employer's risk event and the other some event for which the contractor is responsible, and neither of which could be described as the dominant cause, the claim for an EOT will not necessarily fail – in such as situation, being one

> of concurrent causes, it will be open to the decision-maker to apportion the delay in the completion of the works occasioned thereby as between the employer's risk event and the other event.

It is submitted that there is no proper support for this "apportionment" exercise in the authorities, and certainly not in the case of ***John Doyle Construction Limited v Laing Management (Scotland) Limited 2004 SC 713***, which is the case prayed in aid in support of an apportionment exercise by Lord Osborne (see para. 40). Accordingly, it is our view that it is not legitimate to enter into such an apportionment exercise under Clause 80. We note, however, that real difficulties might arise before a Scottish court of first instance in seeking to have the apportionment approach rejected, albeit there may be limited scope to seek to have ***City Inn*** distinguished as being properly only of application in the context of Clauses 25/26 of the JCT Standard Form.

35. It is relevant also to consider the issue of what are concurrent causes, properly defined. We would submit that the correct analysis of concurrency is as set out at para. 1.16 of agents' briefing note contained within our papers – namely that concurrent delay occurs where two events, one which is a contractor's risk event and one which is an employer's risk event, impact on the critical path of the works at the same time and produce a common period of delay. Furthermore, we would accept that, on the basis of the prevailing English case law, there would, in general terms, be scope for an award of an EOT in favour of the contractor in those very limited circumstances. The issue of what is meant by "concurrency" was addressed by Lord Osborne in the Inner House in ***City Inn***. As can be seen from a consideration of the comments made by Lord Osborne regarding the Lord Ordinary's use of the term "concurrent causes" under Ground of Appeal 3 (paras. 49-52) it is clear that the Lord Ordinary at first instance used the term differently in different contexts. However, in conclusion in addressing this topic, Lord Osborne notes[2]: "*In paragraph 157 of his Opinion…the Lord Ordinary is using the expressions 'concurrent events' and 'true concurrency' to refer to a situation in which relevant and non-relevant events, neither of which can be said to be dominant, are contributory towards, or co-operative in producing, delay in the completion of the works…In other words, the focus of attention has moved, rightly in my opinion, from the events themselves and their*

[2] at para. [52]

points and durations in time to their consequences upon the completion of the works." Accordingly, whilst Lord Osborne suggests it "may not be of importance" to attempt to put a more narrow construction on concurrency or concurrent causes – as we would contend for above – he does nonetheless at least appear to come towards an analysis which requires focus upon the consequences of the event relied upon, as opposed to the time or duration of the event itself. To that extent, this is in line with our own view.

36. In summary, then, to answer the question:-

(a) in the event that the dominant cause of delay was shown to be a contractor's risk event, as opposed to the MUDFA Works, the Infraco would have no entitlement to an extension of time; but

(b) the Infraco may still be entitled to seek an EOT if it could be shown that the delay caused by the MUDFA Works was concurrent with that caused by an event for which the Infraco bears the risk.

In these latter circumstances, under ***City Inn*** the Infraco would be entitled to ask for an appropriate apportionment of the period of delay between the competing, concurrent causes of delay. However, our own view, as noted above, is that ***City Inn*** is wrongly decided to the extent of permitting this apportionment exercise. That having been said, in a situation of true concurrency between contractor and employer risk events, the English authorities would suggest that an EOT might nonetheless be awarded, albeit with no need for an apportionment exercise.

4. In seeking an EOT under INTC 536, is the Infraco entitled to ignore delays to the works which are not a risk event for which tie is responsible?

37. Our answer to this question is "No", for the reasons discussed at Question 3 (above). In addition, such an approach on the part of the Infraco is unlikely to be in line with their Clause 80.4 obligation to "act reasonably" in providing an opinion in the Estimate with respect to impact on the Programme and any requirement for an extension of time.

5. In estimating its claim for an EOT under INTC 536, is the Infraco entitled to ignore the actual progress of the works?

38. Again, this would not appear to be in line with the Infraco's Clause 80.4 obligation to act reasonably in providing its opinion on delay in the Estimate. Further, as noted above, generally speaking whether or not an event causes delay to the works is a question of fact to be resolved by the application of the principles of common-sense. In addition, it will normally proceed upon a critical path analysis. Both of these would require the claimant party and the assessing party to take into account the actual progress of the works in order to determine, as matter of fact, whether any particular event had a causative delaying event. In particular, it is difficult to see how the Infraco can operate Clause 80 in a vacuum, as it were. For example, in terms of Clause 80.4.8, the Infraco must include within its Estimate its proposals as to how to mitigate the impact of the proposed tie Change. We would suggest that this requirement pre-supposes both a consideration of the actual state of progress of the works and, in addition, an updated Programme. We will return to this latter issue further below.

39. In passing, it is relevant in the context of the present question to note that, in para. [32] of his Opinion in ***City Inn***, Lord Osborne made reference to the judgment of Dyson J in ***Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited (1999) 70 Con LR 32***. In that decision, at para. 15, Dyson J noted that it was "a question of fact in any given case" whether a relevant event had caused or was likely to cause delay to works beyond the completion date. He also regarded as relevant the twin defences advanced by the employer in that case to a claim for an EOT, being (i) that the alleged delaying event did not in fact cause delay as the work affected was not on the critical path and (ii) the true cause of the delay was another matter which was not an employer's risk event. His ultimate conclusion on this issue was "*In my judgment, it is incorrect to say that, as a matter of construction of clause 25 when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events.*" Lord Osborne does not comment on the excerpt set out by him – however, we would contend that this analysis of Dyson J is correct. In any event it accords with the summary provided by him in para. [42] (above).

6. When forming its opinion with respect to the impact of a tie Change under Clause 80, is the Infraco entitled to have regard only to the Infraco Construction Programme?

40. The Programme is defined (Schedule Part 1) as "the programme set out in Schedule Part 15 (*Programme*) as developed and extended from time to time in accordance with this Agreement which shall include, the Maintenance Programme, the Consents Programme and Design Delivery programme but shall exclude any programme developed in respect of the completion of any Accommodation Works Changes". Accordingly, it can be seen from this definition that the contractually defined "Programme" (i) consists of a number of parts and (ii) is not static, but rather can be developed and extended as required by the provisions of the Contract.

41. Schedule Part 15 provides that the "Programme" consists, *inter alia*, of the following documents:-

(i) the Infraco Construction Programme;

(ii) the Programming Assumptions;

(iii) the On Street Construction Works Methodology;

(iv) SDS Design Delivery programme V26; and

(v) SDS Consents Programme (derived from item (iv)).

Accordingly, in Clause 80.4.3 where it provides that the Infraco, in preparing its Estimate, shall include in that Estimate its opinion as to "any impact on the Programme and any requirement for an extension of time", there is no apparent basis for restricting the reference to Programme to solely the single constituent part represented by the Infraco Construction Programme.

7. Is the Infraco entitled to base such an estimate on the Revision 1 Construction Programme without taking into account actual progress?

42. We are advised that the Revision 1 Construction Programme is the only version of the Programme which has currently been agreed in terms of Clause 60. Subsequent to

that version, the Infraco has submitted versions 1A, 2 and 3, all of which have been rejected as being inaccurate. This submission of revised programmes would, however, appear to acknowledge the definition of the "Programme" as something which can be developed and extended as the works progress. We are also advised that the Infraco has regularly submitted updated versions of the Infraco Construction Programme and the SDS Design Programme, albeit these two programmes have not been collated or cross-referenced, with the result that, for example, design delays apparent from the latter are not reflected in the former.

43. **Clause 60** of the Contract is headed "**Programme**". **Clause 60.1** provides that: "*The Infraco shall progress the Works with due expedition and in a timely and efficient manner without due delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme…*"

44. **Clause 60.2** goes on to state: "*The Infraco shall update the Programme in accordance with the requirements of Schedule Part 2 (Employer's Requirements)*." Paragraph 12.2 of that schedule (page 231) makes provision with respect to "Programme Management". Amongst other things, this paragraph oblige the Infraco to "*undertake programme management including the implementation, regular updating and management of a fully detailed, comprehensive Programme illustrating how the Infraco proposes to execute the whole of the Infraco Works in compliance with the Project Programme*." Further, the second last paragraph of 12.2 (on page 234 of Schedule Part 2) provides that the Infraco "*shall update the Programme every four weeks in line with tie reporting periods to take full account of the Infraco progress in completing the Infraco Works*".[3]

45. **Clause 60.3** provides that the Infraco require to submit to tie for its acceptance any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the works, and **Clause 60.4** entitles tie to accept or reject the Programme as submitted.

[3] We would note also that para. 12.1.1 of the Employer's Requirements in Schedule Part 2 provides that the Infraco is to arrange regular meeting in order to update tie as to the current state of progress of the Infraco Works. The Infraco is also subject to obligations with respect to reporting on progress and, for example, actual vs. planned progress in terms of para. 12.1.2.

46. **Clause 60.6** states that, in the event that a revised programme is accepted, the revised programme shall form and become the Programme. However, **Clause 60.7** provides that, if it should appear to tie that the actual progress of the works does not conform with the Programme, tie can require the Infraco to produce a revised programme.

47. In summary, we consider it can fairly be said that Clause 60, at least from Clause 60.2 onwards, envisages a continual updating of the Programme to reflect the position on the ground. Indeed, in the event that the Infraco fails to update the Programme, they are in breach of contract. It cannot then be the case that, as a result of this breach – giving rise to the lack of an updated Programme – the Infraco puts itself in the position of being entitled to base its Clause 80 Estimate on an out-of-date version of the Programme. As a matter of legal principle a party is not entitled to rely upon its own breach of contract in order to secure a benefit under that contract. Accordingly, it is open to tie to argue that, the absence of an up-to-date revised programme being due to breach of contract on the part of the Infraco, the Infraco is not then entitled to rely upon an outdated programme to its advantage in an EOT application, as it will then be benefitting from its own breach.

48. However, albeit that it is the Infraco's breach of contract which has given rise to the present situation, the Revision 1 Construction Programme is nonetheless the only extant approved Programme under the Contract. That being so, it is technically the programme upon which any EOT application under the Contract should be based. It is also, at present, the only version of the Programme which would be available for consideration by, for example, an adjudicator or the court in relation to any claims for an EOT. In these circumstances, it would be prudent to anticipate an argument from the Infraco to the effect that it is therefore entitled to rely upon the Revision 1 Construction Programme in making its current applications under Clause 80. In support of such an argument, the Infraco may also seek to suggest that any difficulties which tie claims arise from the use of the Revision 1 Construction Programme, in fact arise solely as a result of tie's own failure to agree the revised programmes which have been submitted to it.

49. If such an argument were to be made, the onus would be on tie to show that it had acted reasonably in not accepting the other revised programmes which have so far been submitted. In that regard, tie would require to show that it was unable to agree the Infraco's revised programmes due to material defects contained within them and, thus, were acting reasonably in rejecting them. In this context, it would likely be important for tie to be able to underline the full scope of the Infraco's breach by identifying the deficiencies in those programmes which led to their being rejected.

50. The possibility of this argument being taken by the Infraco raises two issues. Firstly, in the event that an accurate, comprehensive Programme were to be produced by the Infraco, tie should be alert to accept it. But secondly, tie may also wish to consider utilising its Clause 60.7 power at this stage to compel the Infraco to produce such a programme. If the Infraco complies and produces a Programme which accurately reflects the progress of the works, etc., this would clearly be of assistance to tie in the current situation. However, if the Infraco fails to do so, then the resulting breach of contract would hopefully throw into sharp focus the Infraco's failures/breaches in this regard.

51. Also in this context, we would note that the use of an outdated Programme for an EOT application under Clause 80 sits ill with the wording of Clause 80 itself. For example, Clause 80.4 requires the inclusion in the Estimate of "the opinion of the Infraco (acting reasonably) in all cases on;… (80.4.3) any impact on the Programme and any requirement for an extension of time." Standing the comments made earlier about the need for a causation approach to issues of extension of time, it would be difficult for the Infraco to suggest that it was "acting reasonably" in basing its analysis of the likely impact on the Programme, and consequent requirement for an EOT, on a version of the Programme which was known to be significantly out-of-date. Here again, the Infraco would require to argue that it was bound by the contract to utilise the agreed Revision 1 Programme – and again this would have to be countered by the argument that the Infraco should not be entitled to benefit from its own breach.

52. We note, for the sake of completeness, that, in terms of Clause 80.17.1, the Infraco is obliged, as soon as reasonably practicable and, in any event, within 20 business days of the issue of a tie Change Order, to update the Programme in

accordance with Clause 60. We are advised, however, that the Revision 1 Programme has not been so revised by Infraco, in spite of the issue of more than 200 tie Change Orders. We would submit that any Estimate submitted by the Infraco under Clause 80 must be assessed against a Programme which has been updated to take account of these orders, at least as at the base date for the Estimate.

8. Where the Infraco has indicated that its own internal processes and procedures create delay to the Revision 1 Infraco Construction Programme, is the Infraco entitled to ignore these matters in preparing its Estimate under Clause 80?

53. In terms of Clause 60.9, the Infraco is under a general obligation to take all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works. Accordingly, the Infraco would be obliged to alter its internal processes and procedures, insofar as reasonable, in order to mitigate any delay.

9. Is the Infraco entitled to insist upon the resource constraints which were built in to the original construction programme, even in circumstances where these constraints need not cause delay to the works in reality?

54. It is questionable whether these resource constraints could even be said to form part of the contractually agreed Programme. However, in any event, this issue would also fall to be considered in the context of the duty to mitigate contained in Clause 60.9 (and, indeed, the obligation to consider mitigation measures which is built in to Clause 80.4). Accordingly, to the extent that the effect of the resource constraints could be mitigated, or the works (reasonably) re-scheduled so as to avoid any resulting delay, the Infraco would be obliged to do so.

10. In preparing its Estimate for INTC 536, how should the Infraco take account of the adjudicator's decision with respect to the MUDFA Rev. 8 (INTC 429) Estimate? In particular, in seeking an EOT under INTC 536, is the Infraco

entitled to seek to re-visit matters which were before that adjudicator and formed part of the subject-matter of his decision?

55. We have seen, included within our papers, the decision of the adjudicator, Robert Howie QC, dated 16 July 2010 in respect of the MUDFA Rev. 8 Estimate, also known as INTC 429. In addition to this, we have seen copies of his decision on the "preliminary issue" dated 4 June 2010, the reasons for his formal decision dated 26 July 2010 and the "slip rule correction" dated 9 August 2010.

56. INTC 429 arose out of the utilities delays during the period up until 31 March 2009. The adjudicator's decision (subject to correction of the date and the comments contained in his "slip rule correction") is that the Infraco have been held entitled to an EOT in respect of Section A of 154 days, which takes the relative Sectional Completion Date to 2 November 2010. However, the Infraco failed to establish an entitlement to an EOT in respect of sections B, C and D with the result that the respective Sectional Completion Dates remain unaltered. In our view, it is quite clear from Mr Howie's decision, reasons and "correction" that he was not making a finding of an entitlement to an EOT in respect of Section B. Indeed, he says this explicitly in the penultimate paragraph of his document dated 9 August 2010. What he does appear to say is that the logical outcome of his decisions in respect of Section A is that the Infraco would not be able to commence the tram testing works until 28 days later than originally planned. However, this is not the only piece of work involved in Section B and Mr Howie explains that "the other activities in Section B were still to be carried out as they were programmed to be done in the Rev. 1 Programme."

57. How then is this finding to be applied in the context of INTC 536? INTC 429 was referred to adjudication in terms of the Dispute Resolution Procedure set out in Schedule Part 9. Both parties are bound to follow this procedure[4]. Paragraphs 14 to 54 of Schedule Part 9 cover the referral of disputes to adjudication. Paragraph 51 states: "*The decision of the adjudicator shall be binding on the Parties and they shall comply with it, until the Dispute is finally determined by legal proceedings or by agreement between the parties.*" The question then arises as to how the parties are to "comply"

[4] Schedule part 9, paras. 1-3

with the adjudicators' decision. As regards tie, they will be bound to treat the Sectional Completion Date for Section A as being 2 November 2010 and should, accordingly, grant the Infraco the extension of time to which the adjudicator held the latter was entitled. With respect to the Infraco, amongst other things, one would expect that their Clause 80.4 obligation to act reasonably in preparing the Estimate would necessitate them in updating the Programme to show the altered Sectional Completion Date for Section A. However, for the avoidance of doubt, the adjudication decision would not entitle the Infraco to move out the Sectional Completion Dates for Section B, C and D as it purports to do in its letter of 23 September 2010.

58. With respect to the issue of whether the Infraco can seek to put in issue by means of INTC 536 matters which were included within the INTC 429 adjudication, Paragraph 33 of Schedule Part 9 provides that, following his appointment, an adjudicator "must resign where the Dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication." Accordingly, it would appear that it will not be competent for either party to the Contract to seek to refer the same (or substantially the same) dispute to adjudication for a second time. This is supported by the terms of Paragraph 51 of Schedule Part 9 (above). As regards the steps prior to adjudication which are envisaged by the Dispute Resolution Procedure – negotiation followed by mediation – we would suggest that the logic of this provision above with respect to what can competently be adjudicated should apply and it should not be regarded as legitimate for the Infraco to include within INTC 536 matters which were considered by the adjudicator in the context of INTC 429. That having been said, in any event, as a matter of practicality tie can, either in negotiations or at mediation, refuse to consider these matters, safe in the knowledge that they cannot then be referred to adjudication.

59. Agents should not hesitate to contact us further in the event they have any questions arising out of the above.

SENIOR COUNSEL **JUNIOR COUNSEL**

4 February 2011

JOINT OPINION OF SENIOR AND JUNIOR COUNSEL

for tie LIMITED

in respect of (i) the Infraco Contract relative to the Edinburgh Tram Project and (ii) INTC 536

February 2011

Messrs McGrigors LLP (Ref. SMW/BEN)

Solicitors for tie Limited