

Draft

# REPORT FOR tie LIMITED ON CERTAIN ISSUES CONCERNING EDINBURGH TRAM PROJECT

[2] December 2010

Privileged and confidential – prepared in contemplation of litigation  
FOISA exempt

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1 **Executive Summary**

1.1 *[To be completed following review by tie of the draft report]*

*Draft*

2 **Scope of this report**

- 2.1 This report considers the contractual provisions which relate to termination of the Infraco Contract on the grounds of Infraco Default.
- 2.2 Richard Keen QC has provided written opinions in relation to a number of the key issues which arise, and those opinions<sup>1</sup> are discussed in this report.

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<sup>1</sup> Appendices 1 and 2 of this report

### 3 Termination mechanism in the Infraco Contract

3.1 The various means by which the Infraco Contract can be brought to an end were addressed in the McGrigors LLP Report on Certain Contractual Issues dated 23 March 2010 at paragraphs 1.28 to 1.35 of the Executive Summary, and paragraphs 24 to 35 in the main body of the report.

3.2 For present purposes, the relevant issue is the contractual provisions which relate to termination of the Infraco Contract on the grounds of Infraco Default. The procedural trigger for termination on the grounds of Infraco Default is the service of a Remediable Termination Notice ("RTN"); ten such RTNs have been issued by tie at the date of this report. A summary of the RTNs is at Appendix 3 to this report.

3.3 Each of the RTNs which have been issued relies on the existence of Infraco Default (a), namely:

*"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<sup>2</sup>".*

3.4 Separately, three Underperformance Warning Notices ("UWNs") have been issued which rely on the same factual underpinning as some of the RTNs, namely:

- (a) UWN in relation to the defects at Princes Street, which correlates with RTN 1<sup>3</sup>;
- (b) UWN in relation to programming issues and mitigation of delay, which correlates with RTN 4;
- (c) UWN in relation to the design of the on street trackworks, which correlates with RTN 6.

3.5 The issuing of four or more UWNs within any 12 month period constitutes Infraco Default (g). There are a number of issues which arise in connection with the deployment of UWNs: for example, whether they are to be interpreted as applying to the time period before the issue of the Reliability Certificate. These issues were touched on at paragraph 28 of the McGrigors report referred to above, and are outwith the scope of the current report. The observations in this report in relation to the forensic factual analysis which requires to be carried out to support the RTNs apply equally to the factual basis of the UWNs.

3.6 In the event that Infraco Defaults (a) or (g) have occurred, tie is entitled to issue an RTN<sup>4</sup>, which is described as a "*notice in writing to the Infraco specifying the nature of the Infraco Default.*"<sup>5</sup>

3.7 Following the service of the RTN, Infraco is entitled, but not obliged, to submit a comprehensive rectification plan "*setting out how it intends to remedy the Infraco Default*" in relation to which the RTN has been served.

<sup>2</sup> Schedule Part 1 of the Infraco Contract

<sup>3</sup> And, to a lesser extent, with RTN 3

<sup>4</sup> A failure to maintain Required Insurances can also form the basis of an RTN under Infraco Default (f), as can suspension under Infraco Default (j), but those are not understood to be relevant for present purposes.

<sup>5</sup> Clause 90.1.2

- 3.8 tie is required to consider the rectification plan and "*determine at [its] absolute discretion...whether the rectification plan is acceptable*"<sup>6</sup>:
- (a) If tie accepts the plan, then Infraco proceeds to comply with it. The original RTN falls away and there will no longer be entitlement to termination on the basis of it – unless Infraco fails to comply with their plan.
  - (b) If there is no rectification plan, or tie does not accept the plan, then tie is entitled to terminate upon giving 5 Business Days written notice<sup>7</sup>, and thereafter expel Infraco from the Infraco Works and the Site<sup>8</sup>.

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<sup>6</sup> Clause 90.2

<sup>7</sup> Clause 90.4

<sup>8</sup> Clause 90.6

#### 4 Issues arising from the termination mechanism

4.1 There are a number of issues arising from the proper interpretation to be given to the mechanism outlined above, and from the consequences which might arise from its deployment. Those issues form the subject matter of this report.

4.2 Those issues are shown in the decision tree at Appendix 4 of this report, and can be summarised as follows:

- (a) Whether tie is able to establish that there has been an Infraco Default.
- (b) Whether the RTNs which have been issued are competent, irrespective of whether the facts underpinning them are capable of being evidenced and proved.
- (c) The approach to be taken by tie in relation to Infraco's rectification plan, within the context of the provisions in relation to *absolute discretion*, as well as the decision to terminate itself.
- (d) The likely consequences if tie is successfully able to establish an Infraco Default.
- (e) The likely financial consequences if tie is not able to establish an Infraco Default.



5 **Infraco Default**

5.1 There are a number of key components which require to be in place if tie's entitlement to terminate for Infraco Default is to arise, which include the following:

- (a) tie must establish that an Infraco Default has occurred;
- (b) That Infraco Default must be the subject matter of a valid and competent RTN;
- (c) tie's determination of whether a submitted rectification plan is acceptable must have been exercised in accordance with the Infraco Contract.

5.2 Reference is made to the following extracts from Richard Keen's Opinion dated 22 November 2010 in this respect:

*"If pursuant to Clause 90.4 tie give a notice in writing to the Infraco terminating the Infraco Contract in circumstances where either there is no Infraco Default; or there is no valid RTN; or tie had no contractual basis for rejecting a rectification plan, then tie's actings would amount to a wrongful repudiation of the contract." (paragraph 8)*

*"...irrespective of the terms of any rectification plan, a termination by tie is dependant upon tie being able to prove a relevant Infraco Default and, where required by Clause 90.1.2, that there is a valid Remediable Termination Notice relevant to that particular Infraco Default. If tie fails to establish an Infraco Default then any termination notice will be invalid. If tie establishes an Infraco Default but has not served a valid RTN relevant to the Infraco Default then again the termination notice will be invalid." (paragraph 16)*

5.3 The first component identified in the foregoing paragraphs is the requirement to establish that an Infraco Default has occurred. Irrespective of whether Infraco issue a rectification plan, and irrespective of the merits or otherwise of that rectification plan, tie will only be held to be entitled to terminate following the issue of an RTN if it can succeed in proving that the Infraco Default relied upon has, in fact, occurred. See, for example, paragraph 10 of Richard Keen's Opinion:

*"Tie can only be sure of termination of the Infraco Contract if they can prove an Infraco Default which results in a valid notice of termination."*

5.4 Establishing that an Infraco Default has occurred requires detailed forensic analysis: the issue will be subject to intense, prolonged and extensive scrutiny in the context of any ensuing dispute.

5.5 The factual background requires to be fully interrogated, in order to ensure that all relevant information, documentation and data has been considered and tested. This involves not only a consideration of written material, but also the questioning of witnesses. This process ought to enable tie's position to be put in a robust and coherent manner.

- 5.6 The exercise should be directed not only towards supporting tie's own position, but also towards interrogating arguments which have been, or might be, advanced on behalf of Infraco in their defence.
- 5.7 Where there are issues which turn on expert opinion, that opinion should be sought: by way of example, if tie's case is that a breach committed by Infraco had a material and adverse effect on the carrying out of the Infraco Works, in that it delayed them significantly, then this will require expert planning input in order to determine the impact of the delaying event on the progress of the Infraco Works. Similarly, where the allegation is a failure in relation to design information, expert engineering evidence will be required.
- 5.8 It would appear that this forensic exercise has not been carried out in relation to the RTNs which have been issued by tie: the selection of issues which were to form the basis of the RTNs, and the subsequent production of the RTNs themselves, emanated from a series of discussions between various members of the tie team and external advisers.
- 5.9 Following those discussions, the RTNs were drafted, and then subject to review by members of the tie team and some advisers. Whilst this process involved some element of testing and challenge, it was neither preceded, nor followed, by a rigorous forensic examination based on all relevant documentation and witness evidence. Isolated items of documentation were identified, but these were few in number, and largely consisted of correspondence exchanged between the parties after the events complained of, setting out their arguments. The documents did not consist of the underlying evidence that would support the assertions made by tie. Independent expert evidence was not obtained.
- 5.10 Appendix 5 of this report consists of a worked example of the type of investigation that would be required, using RTN 3 (lack of superintendence at Princes Street) as a sample.
- 5.11 This forensic exercise has now been put in train, specifically:
- (a) Acutus have been engaged to work with tie to undertake the forensic exercise referred to;
  - (b) Robin Blois-Brooke of William J Marshall & Partners has been appointed to produce an expert report in relation to the following issues:
    - (i) The on street track design – which relates primarily to RTN 6, but also to RTN 1;
    - (ii) The Murrayfield retaining wall – which relates to RTN 7;
    - (iii) The Gogarburn retaining wall – which relates to RTN 10.
- 5.12 The outcome of this exercise will enable an informed decision to be taken on whether tie are likely to be able to sustain an argument that an Infraco Default has occurred. Without that exercise, there is no proper benchmark against which the prospects of success can be measured.

## 6 Valid and competent RTNs

6.1 An RTN does not require to set out, or be accompanied by, the fully particularised forensic investigation referred to above. However, in order to constitute a valid RTN, the document must specify to Infraco the nature of the Infraco Default which has occurred. This must be done with sufficient particularity to enable Infraco to understand the assertions that are being made against it, and what it is that Infraco is being asked to rectify or remedy.

6.2 Richard Keen's Opinion of 1 December 2010<sup>9</sup> addresses this issue, by reference to three sample RTNs. At paragraph 5 he deals with the question of what is required from a valid RTN:

*"In the event of an Infraco Default involving a breach by the Infraco of an obligation which materially and adversely affects the carrying out and/or completion of the Infraco Works, a notice from tie must meet the following requirements in order to constitute a competent RTN.*

*First, the notice must be in writing.*

*Second, the notice must identify the nature, which I take to mean the character or quality, of the breach of contract which has materially and adversely affected the carrying out and/or completion of the Infraco Works.*

*Third, the specification of the breach complained of must be sufficient to give Infraco notice of what remedial work is required in order to rectify the breach complained of."*

6.3 In relation to RTNs 1 and 3 (Princes Street), Richard Keen concludes that:

*"...there are at least some respects in which these notices can be criticised for lack of specification. In particular the simple reference to work as being "unsatisfactory" or as being "of an inadequate standard" may be criticized as giving Infraco no reasonable notice of the rectification work they require to carry out in order to meet tie's complaint."<sup>10</sup>*

6.4 In relation to RTN 6 (design), the view of Richard Keen is that the RTN contains sufficient specification, but he has other concerns in relation to that RTN:

*"I do not consider that similar criticisms of lack of specification may reasonably be levelled at the RTN in respect of design. However (and although I am not instructed to advise on this point) I would question whether Clause 2.3 of this RTN does properly identify what can be construed as an Infraco Default."*

6.4.1 The breach relied upon in RTN 6 is a failure "to deliver a fully integrated, assured design for the on-street trackworks chainage 100000 to chainage 131247". Various contractual provisions are listed in the RTN,

<sup>9</sup> Appendix 2 to this report

<sup>10</sup> Paragraph 9 at Appendix 2 of this report

but none of those correlate precisely with the obligation articulated in this way. The analysis of the design obligations is outwith the scope of this report, and will be the subject matter of a separate work stream.

6.4.2 RTN 6 also relies on, amongst other things, clause 7.2 in relation to the exercise of a reasonable level of professional skill, care and diligence. A failure to meet this standard would constitute negligence, but no assertion of negligence is made, nor is any particularisation given of how this duty is said to have been breached. Whilst the view of Richard Keen is that he considers sufficient specification to have been given, nonetheless there remains a risk that a court or other tribunal would find this not be the case.

6.5 Richard Keen's conclusion in relation to the three sample RTNs is as follows:

*"In light of the foregoing I would have to conclude that in the event of the giving notice of termination of the Agreement in reliance upon the specified RTNs, there would be a material risk of their acting being found to be a wrongful repudiation of contract."<sup>11</sup>*

6.6 Accordingly, there is a risk that the sample RTNs referred to in the foregoing section of this report would be held not to be competent. In other words, even if all the factual matters referred to in the foregoing sections can be addressed and evidenced, the RTNs may be held not to disclose a sufficient basis for a consequent termination.

6.7 If it were to be held that the RTN which forms the basis of a subsequent termination was incompetent on its own terms, then that termination would not be held to have been made on the grounds of Infraco Default. For the reasons explained below, that may result in the Infraco Contract remaining alive, or in being held to have been terminated on the grounds of tie Default.

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<sup>11</sup> Paragraph 10 of Appendix 2 of this report

7 **Infraco rectification plan**

7.1 Infraco is entitled, but not obliged to issue a rectification plan. They have done so in relation to some of the RTNs (as brought out in the summary of RTNs at Appendix 3).

7.2 Where Infraco has submitted a rectification plan, it has done so without prejudice to their primary assertion that each RTN is invalid. That ought not to be treated as relieving tie from the obligation imposed upon it by clause 90.2 to consider the rectification plan.

7.3 tie is described in clause 90.2 as having an absolute discretion in relation to whether or not the rectification plan is acceptable. The duty in clause 118 to act "*fairly and reasonably*" is expressly disapplied from the exercise of an absolute discretion under the Infraco Contract. In other words, there is no contractual requirement on the part of tie to act reasonably when deciding whether or not the rectification plan is acceptable.

7.4 tie is required to exercise good faith when considering the rectification plan: there should therefore be no element of dishonesty, fraud, irresponsibility or malice. The question of whether or not the rectification plan is acceptable should not be pre-judged. The decision as to whether to accept the rectification plan should be tie's, and not imposed upon it by a third party.

7.5 Richard Keen addresses this point at paragraph 15 of his Opinion dated 22 November 2010, as follows:

*"I turn next to consider the phrase "absolute discretion" where it appears in Clause 90.3 of the Infraco Contract. This concerns the right of tie to decline to accept a rectification plan submitted by Infraco consequent upon an RTN. Where consideration of the rectification plan is to be at tie's absolute discretion, there is a requirement that tie should act in good faith. However there is no requirement that tie's decision on such a matter should be either fair or reasonable. This is confirmed by the terms of Clause 118.1. In summary tie must give genuine consideration to a rectification plan and must decide in good faith that it is going to reject the rectification plan. Tie does not require to justify the rejection of the rectification plan as being either fair or reasonable. If however tie was to intimate in advance of a rectification plan that it had no intention of accepting it then it would not be seen to be acting in good faith and its decision to reject the rectification plan could be open to challenge."*

7.6 In summary on this point, if the decision to reject a rectification plan is made in bad faith, then any subsequent termination notice could be rendered unlawful and ineffective on that basis. However, even if the decision is made in good faith, a purported termination could still be struck at if there is no Infraco Default disclosed by a competently drafted RTN.

7.7 If the rectification plan is accepted, as referred to above, Infraco will be required to implement it. If the rectification plan is not accepted, tie has an option: issue a notice of termination, or proceed with the Infraco Contract.

- 7.8 The Infraco Contract does not expressly provide for any time limit for the service of a termination notice following the rejection of a rectification plan. However, there are two principal ways in which the elapse of time might affect tie's entitlement to rely on an RTN:
- (a) As referred to above, the provisions of clause 118 are expressly disapplied from the way in which tie is to decide whether or not to accept a rectification plan. However, the decision as to whether or not to terminate following the rejection of a rectification plan may be subject to the provisions of clause 118. On that basis, in deciding whether or not to terminate, tie would require to "*act fairly and reasonably within the terms of this Agreement...and having regard to all the circumstances.*" The longer the period of time that elapsed between RTN and termination, the greater the possibility that the decision could be subject to challenge for not having been made fairly and reasonably. However, all the circumstances would require to be taken into account: if tie was using the intervening period to seek a ruling as to whether it was entitled to terminate, it is unlikely that a delay between RTN and termination would be treated as unfair or unreasonable – this issue is addressed in more detail below.
  - (b) tie's conduct during the period between service of an RTN and service of a termination notice might entitle Infraco to proceed on the basis that no such termination notice would be served. Clause 109 provides that a failure or delay in exercising a right under the contract will not operate as a waiver, and that no waiver shall be held to have occurred other than in an express written notice. However, this clause might not be effective to prevent the operation of the doctrine of personal bar: an example of this type of scenario might be where tie allowed Infraco to proceed with their rectification plan, and Infraco did so. It might then be held that tie would be personally barred from proceeding to terminate on the basis of the underlying RTN.
- 7.9 If no termination notice is served, Infraco is required to proceed with the contract<sup>12</sup>. If it fails to do so, that failure may be addressed in other ways: for example, by seeking an order of specific implement from the Court in terms which would require Infraco to fulfil its contractual obligations.

<sup>12</sup> Clause 90.5 provides that Infraco are not relieved from the due and proper performance of their obligations by the submission of a rectification plan, nor tie's consideration of it.

## 8 Progressing the Infraco Works

- 8.1 If tie terminate the Infraco Contract, having determined that a rectification plan is not acceptable (or no plan having been produced by Infraco), it is entitled to enter upon the Infraco Works, and expel Infraco.
- 8.2 This course of action is likely to provoke a legal challenge from Infraco. That legal challenge might initially take different forms (for example, seeking an interim interdict, or invoking the contractual DRP). It would be open to tie to raise proceedings themselves: for example, to seek a ruling from the court in relation to whether they were entitled to terminate. Ultimately, however, the substantive issues in relation to the merits of the grounds for termination – if challenged - will come before the court for consideration whichever procedural route is adopted.
- 8.3 If proceedings were raised in the Commercial Court, tie could seek to have the disposal of the dispute fast tracked by the court, and – if successful – that approach might yield a decision within a year, given the broader public and political interest at stake. However, the success of this approach will turn on a number of factors: in particular, the extent to which detailed factual investigation is required and whether Infraco pursue delaying strategies.
- 8.4 Furthermore, given the issues at stake between the parties, the party who is unsuccessful at first instance is likely to appeal the decision. From the Outer House of the Court of Session, the right of appeal would be to the Inner House of the Court of Session, and thereafter to the Supreme Court. Whilst there are procedures available in terms of which tie could seek to have these proceedings concluded as quickly as possible, the overall process will be measured in years rather than months.
- 8.5 During the intervening period of litigation, tie would not be entitled to require Infraco to proceed with the Infraco Works: tie's position would be that the contract had been brought to an end. On that analysis, there would be no entitlement on tie's part to instruct Infraco to proceed. The provisions of clause 5 of Schedule Part 9 would not assist tie in these circumstances. That clause states:
- "Neither Party shall be entitled to suspend the performance of its undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure..."*
- 8.6 Where tie had purported to terminate the Infraco Contract, Infraco's obligation to proceed with the works would not be *undisputed*: by issuing their termination notice, tie would be telling Infraco that Infraco had been terminated. By contesting the termination notice, Infraco would be telling tie that Infraco ought to be allowed to continue to perform.
- 8.7 However, if tie sought to engage others to carry out and complete what had been the Infraco Works, Infraco would be entitled to seek an interim interdict to prevent them from doing so: on balance, it is more

likely than not that the courts would grant such an interim interdict<sup>13</sup>. The court is likely to take the approach of maintaining the *status quo*: if another contractor was permitted to complete the Infraco Works, that would prevent Infraco from being entitled to treat the Infraco Contract as still remaining in place. That will be reinforced by the "lock in" philosophy which runs through the Infraco Contract. This issue is addressed in more detail below.

8.8 Reference is made to paragraph 13 of Richard Keen's Opinion dated 22 November 2010, where he summarises the position as follows:

*"The time involved in such a process would be at least a year and could be a number of years. During the period of such adjudication and litigation tie would probably not be able to secure access to carry on the Works. Any attempt by tie to enter upon the Works while such a challenge was ongoing would probably be the subject of an application for interdict ad interim by Infraco. If Infraco maintained that tie's notice of termination was invalid and that they wished the contract to continue then it is probable that interim interdict would be pronounced against tie from entering up on the works..."*

8.9 It is evident from the foregoing that in the event that Infraco dispute a termination notice issued by tie, the parties could be engaged in proceedings for a number of years, during which time no progress could be made in relation to the works which form the subject matter of the Infraco Contract, until all legal avenues have been exhausted. Control of whether or not the work progresses during this period would rest with Infraco: it would be *Infraco's* option to decide whether or not to accept the termination, and *Infraco's* option to decide whether or not to seek interim interdict to prevent tie from engaging others to complete the project.

8.10 An alternative approach which could avoid this outcome would be if tie were to raise proceedings – in advance of issuing a termination notice – seeking a declarator in relation to whether or not they were entitled to terminate. This would involve consideration of whether there had been an Infraco Default or Defaults and whether an RTN or RTNs were competent and valid.

8.11 A further option would be to refer certain key breaches which are considered to be Infraco Defaults to DRP for determination, and if tie succeeds, to use these as a basis for one or more RTNs.

8.12 The proceedings referred to would require to be initiated in terms of the contractual DRP: accordingly, the internal procedure would require to be followed first, unless Infraco was prepared to agree to let the issue go straight to the Court of Session. Whichever the route which initially required to be adopted, it is highly likely that parties would wish the issues to be finally determined by the Courts, rather than resting with the decision of an adjudicator.

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<sup>13</sup> It is likely that some accommodation would be made to enable sufficient work to be carried out to render the Infraco Works safe.



- 8.13 The observations above in relation to the likely length of such proceedings raised after termination would apply equally to those proceedings raised before termination. Similarly, the requirements for proof, and the need for a rigorous and detailed forensic analysis, as well as expert evidence, would also apply. The difference would be in relation to the issue of whether tie would be entitled to require Infraco to continue with the Infraco Works in the interim.
- 8.14 As explained above, clause 5 of Schedule Part 9 provides that parties are not entitled to suspend the performance of "*undisputed obligations under this Agreement merely by reason of the reference of any Dispute to the Dispute Resolution Procedure...*". This would require careful consideration to be given to which RTN or RTNs were made the subject matter of proceedings: to the extent that Infraco's obligations were disputed in the proceedings, work would be unlikely to be able to progress in relation to those obligations. If far reaching RTNs such as RTN 6 (design) and RTN 9 (course of conduct) were referred to DRP, this might well have an impact on the extent of the work that tie could require to be executed during the course of proceedings.
- 8.15 The better course is probably to concentrate on underlying material breaches which are tested through DRP, which – if upheld – could form the basis of new RTNs.
- 8.16 The forensic analysis referred to above requires to be carried out in order to identify the areas in which tie has the greatest prospect of establishing that an Infraco Default has occurred, as well as what would be the most appropriate material breaches and/or RTN(s) to take to DRP, having regard to the issue of work progressing in the interim. That work would, in any event, be subject to the existing disputes with Infraco in relation to, for example, its obligation to proceed with disputed work in terms of clause 34.1.

9 **Consequences of termination if tie is able to establish Infraco Default**

9.1 In the event that tie is able successfully to establish that the termination was validly executed on the grounds of Infraco Default, then the provisions of clause 90 will apply.

9.2 In terms of clause 90.7, tie will be entitled to complete the Infraco Works using other contractors (although for the reasons explained above, this is only likely to be able to happen once proceedings have run their course, if Infraco seek to prevent others being engaged to complete the Infraco Works whilst those proceedings are ongoing).

9.3 The Infraco Contract also provides for other ancillary entitlements on tie's part in the event of termination for Infraco Default: for example, tie will be entitled to use Infraco's Equipment, Temporary Works, goods and materials, as well as drawings and design information. tie will also be entitled to an assignation of certain sub-contracts.

9.4 Beyond these issues, there are two principal elements of the financial reckoning to be carried out in the event of termination for Infraco Default<sup>14</sup>:

- (a) Payment to Infraco by tie for work done – clause 90.12;
- (b) Payment to tie by Infraco in relation to the costs of completing the work – clause 90.14.

9.5 The payment to tie will be subject to the cap on Infraco's liability in clause 77.7 which provides, amongst other things, that the liability of Infraco on termination is capped at 20% of the Construction Works Price (as adjusted to take account of matters such as tie Changes, Notified Departures and extensions to the ETN). Liability under the Parent Company Guarantees is included within that cap. Liability under the Retention and Performance Bonds falls outwith the cap.

9.6 Clause 90.12 provides for the payment to be made to Infraco:

*"As soon as may be practicable after termination of this Agreement pursuant to Clause 90.1 the Parties shall agree as at the time of such termination:*

*90.12.1 the amount (if any) which has been reasonably earned and not yet paid pursuant to this Agreement by the Infraco in respect of work actually done by it under the Agreement..."*

9.7 The effect of this provision will be to draw a line in the sand for the work done as at the date of termination; however, for all work done up to that date, Infraco will be entitled to payment.

9.8 The timing of that payment is addressed below. In relation to the *extent* of that entitlement, there are substantial disputes between the parties that already exist in this respect, which include matters such as the following:

<sup>14</sup> There are also other ancillary provisions, such as payment for goods and materials in terms of clause 90.12.2.

- (a) All outstanding and disputed INTCs will require to be resolved. In some cases, this will turn on resolving Estimates. In other cases, there will be the more fundamental issue of determining whether there has been a Notified Departure, which will in turn require the underlying dispute in relation to design development and the proper interpretation to be given to Pricing Assumption No. 1 to be resolved.
- (b) Outstanding issues in relation to extension of time will require to be resolved, in order that Infraco's entitlement to the payment of loss and expense for the relevant period can be determined.
- (c) The evaluation of that loss and expense will require to be resolved.
- (d) Any issues in relation to Compensation Events will require to be resolved.
- (e) Liability in relation to Princes Street will require to be resolved.

In each case, where a negotiated agreement cannot be reached, the dispute will require to be resolved by way of proceedings. In the first instance, this may be through the contractual DRP mechanism (which is expressed as surviving termination), and thereafter through court proceedings.

9.9 In terms of clause 90.14.1, tie is entitled to recover from Infraco:

*"the costs of completing the Infraco Works, not including any amount calculated as due to the Infraco pursuant to Clause 90.12 up to and including the Service Commencement Date in accordance with the terms of this Agreement (whether or not the Infraco Works are completed under a separate contract) and all other costs and expenses properly incurred by tie, less such sums as would have been due to the Infraco if the Infraco had completed the Infraco Works up to and including the Service Commencement Date..."*

9.10 There is a broadly equivalent provision in relation to the additional costs of the Maintenance Services in terms of clause 90.14.2.

9.11 The effect of these provisions is that tie would be entitled to recover from Infraco the *additional* costs of having the work completed. In order to arrive at an understanding of the sums that would have been paid to Infraco for completing the Infraco Works, it will be necessary to resolve some of the underlying issues that have been referred to above: for example, the proper interpretation to be given to Pricing Assumption No.1 will inform the way in which payment for design development would have been made to Infraco. That will be set against the sums due to any new contractor under a freshly negotiated contract.

9.12 That entitlement on tie's part is predicated on the Infraco Works being *completed*. In other words, if the project is abandoned, and tie does not proceed to complete the remainder of the Infraco Works left

unfinished at the time of termination, then no right to recovery will arise. Richard Keen addresses this point at paragraph 12 of his Opinion dated 22 November 2010:

*"Infraco may simply accept tie's notice of termination. Infraco then walk away from the works. In that event Infraco will be entitled to recover payment under the contract for all work done to date. Tie will not be able to recover any payment from Infraco in respect of the incomplete portion of the works unless or until tie undertakes the completion of the Infraco Works. The Infraco Works would involve the construction of the entire Edinburgh Tram Network."*

9.13 If tie proceeds with a different, or truncated, scheme – in other words, one which is not the same as the Infraco Works – then there is a substantial risk that tie would be held not to have completed the Infraco Works, and therefore the entitlement to make recovery from Infraco would not arise. The key question here is likely to be the completion of the physical works (including design). If the same physical works were let to a different contractor on different commercial terms, then this would be likely to come within the ambit of completion of the Infraco Works.

9.14 Clause 90.16 provides for interim certificates to be issued if a sum *"as calculated under [Clause 90.14]...notwithstanding that the Infraco Works have not been completed"*. This is likely to be interpreted as a cashflow mechanism, which allows money to be released whilst the Infraco Works are progressing towards completion. If a different scheme was being constructed, then this would not release any interim payment.

9.15 The position is summarised by Richard Keen at paragraph 10 of his Opinion as follows:

*"...Infraco will have to be paid for all work done to date in accordance with the terms of the Infraco Contract. Tie will only be able to recover the additional cost of completing the Infraco Works once they have carried out and completed those works. The sum which tie can then recover for the additional cost of completing the Infraco Works will be subject to the Liability Cap as specified in Clause 77.7. If tie does not complete the Infraco Works after it has terminated Infraco's engagement under the Infraco Contract tie will have no claim against Infraco. In other words the contract does not allow a claim of damages against Infraco for breach of contract even though the partially completed works for which they have been paid may be worthless in their existing form."*

9.16 There is an argument available to tie that if the Infraco Works are not completed, Infraco's entitlement to recover *"the amount...which has been reasonably earned...in respect of work actually done"* does not arise either. The parties are required to agree the value of this sum as soon as practicable after termination<sup>15</sup>, but clause 90.13 states that:

*"If tie enters upon the Infraco Works...and expels the Infraco in accordance with...Clause 90..., tie shall not be liable to pay the Infraco any money under the Agreement (whether in respect of amounts certified*

<sup>15</sup> Clause 90.12

*by tie's Representative or otherwise including any sums determined under Clause 90.11 unless or until tie's Representative certifies that an amount is due to the Infraco under Clause 90.15."*

- 9.17 An amount can only be certified under clause 90.15 after completion of the Infraco Works, and on that basis, it would appear that Infraco would not be entitled to any payment in its favour until that time. The reference in this wording to clause 90.11, however, is an odd one: that would appear to be mistaken reference to clause 90.12, which is the clause which deals with payment to Infraco. 90.11 is a provision which states that no compensation is to be paid by tie to Infraco for termination on Infraco Default.
- 9.18 If Infraco was able to establish that there was an unequivocal and irreversible intention *not* to proceed with the Infraco Works, then Infraco might be entitled to seek payment of sums already earned at that stage. That intention could encompass the letting of a contract for a truncated scheme, coupled by a public announcement that the remainder of the scheme was being shelved indefinitely.
- 9.19 In summary, even where tie have been able to make out a valid termination for Infraco Default, Infraco will be able to walk away from the project at the end of proceedings, with no further liability unless tie proceeds to complete the tram project on the basis of the same scope of works that was let to Infraco. If the Infraco Works do not proceed with another contractor, it is likely that Infraco will be entitled to recover the value of work actually done prior to termination.
- 9.20 If tie does proceed to complete the Infraco Works, it will be entitled to recover the additional cost of doing so from Infraco, subject to:
- (a) Infraco's entitlement to recover the value of work already carried out by them;
  - (b) The cap on liability in clause 77.7.
- 9.21 In the event that tie is ultimately successful in establishing that the termination had been validly carried out on the grounds of Infraco Default, then it is likely than an order would be made requiring Infraco to be responsible not only for their own litigation costs, but also for those of tie. These would be subject to the being audited in the usual way, and there is a likelihood that tie would recover only a proportion of the actual costs which they had incurred, with the remainder being irrecoverable from Infraco.

10 **Consequences if tie are not able to establish Infraco Default**

- 10.1 If Infraco challenges a termination by tie, and is ultimately successful in establishing that the termination was not properly carried out, then tie's potential exposure is likely to be significantly greater than if it had made out a case to be entitled to terminate for Infraco Default.
- 10.2 At common law, if a party to a contract purports to terminate that contract without lawful excuse, then the other party is entitled either to affirm the contract, and treat it as continuing – or to treat the contract as having been ended, or repudiated, by the other party and claim damages for that repudiatory breach. The damages will be calculated by reference to seeking to restore the "innocent" party in financial terms to the position that it would have been in had the contract been performed. If the "innocent" party would have made a profit in the event that the contract had been allowed to run its natural course, then they are entitled to recover that lost profit from the other party.
- 10.3 The Infraco Contract purports to restrict the entitlement to treat a wrongful termination as a repudiatory breach. Clause 77.10 provides that:
- "The Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall to be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation)."*
- 10.4 Clause 77.11 goes on to state that:
- "Both Parties acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination or expiry. Each Party hereby waives all other rights and remedies arising from such termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 77.11 exclude[s] the right of either Party to claim remedies expressly conferred on them by this Agreement."*
- 10.5 If these clauses bite, they create a contractual regime whereby the contract can only be brought to an end prematurely under one of the specific contractual mechanisms – and in the current factual circumstances being considered, that would be either for Infraco Default or for tie Default. Unless tie can bring themselves within these contractual parameters, they cannot force the contract to an end, even on the basis of the payment of damages.
- 10.6 Richard Keen's Opinion dated 22 November 2010 addresses these issues at paragraphs 3 and 4, and he concludes at paragraphs 8 and 9:

*"...However such a wrongful repudiation of the contract cannot bring the Infraco Contract to an end even if the Infraco might wish that it did so. That is because, pursuant to Clause 77.10, the Infraco cannot accept a wrongful repudiation in order to terminate the Infraco Contract.*

*Subject to issues of fraud and insolvency (for which there is separate provision) and to the provision in Clause 89 for voluntary termination (which cannot apply at the present time) it would follow that the Infraco Contract can only be terminated pursuant to Clause 88 and Clause 90. Accordingly tie can only terminate the Infraco Contract if it proves an Infraco Default. Infraco can only terminate the contract if it proves a tie Default. In the absence of the foregoing both parties are locked into the Infraco Contract."*

10.7 Unless tie can successfully establish an Infraco Default – the option of electing whether or not the Infraco Contract continues following the service of a termination notice by tie will lie with Infraco. If Infraco were expelled from the site, it would be entitled eventually to treat this as a tie Default giving rise to an entitlement to terminate in terms of tie Default (b) – but they would not be *obliged* to terminate. Richard Keen deals with this at paragraph 5 of his Opinion:

*"Clause 88 deals with the termination of the Infraco Contract by reason of a "tie Default". A tie Default is defined as including,*

*A breach by tie of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations under this agreement for a continuous period of 45 Business Days.*

*In the event of such a breach of contract by tie Infraco is not obliged to proceed with termination. Clause 88.1 provides that the Infraco may serve a termination notice. If such a notice is served by the Infraco then the relevant tie Default may be capable of rectification pursuant to Clause 88.3. In the absence of rectification a termination notice will lead to termination of the Infraco Contract pursuant to Clause 88.3. In the event of such termination tie will not be liable to Infraco for common law damages for breach of contract. Such a remedy is excluded by Clause 88.6. However tie will come under an obligation to pay Infraco in accordance with the provisions of Clause 88.8 of the Infraco Contract."*

10.8 The provisions of clause 88.8 in these circumstances would entitle Infraco to payment which would include the following:

- (a) The value of all work carried out prior to termination. As explained above, this would include sums to which Infraco are entitled for matters such as loss and expense, Pricing Assumption No. 1 and so on;
- (b) Amounts payable in relation to preliminary items in terms of clause 88.8.1;
- (c) The cost of materials or goods which have been reasonably ordered, following which title will pass to tie in terms of clause 88.8.2;

- (d) The reasonable cost of removing Infraco's Equipment from site in terms of clause 88.8.3;
- (e) All other expenses properly, demonstrably and reasonably incurred by Infraco arising from the termination, including payments made to sub-contractors to terminate sub-contracts, provided that the sub-contracts were entered into on reasonable commercial terms – all in terms of clause 88.8.4;
- (f) Loss of profit at 10% on civils and 17% on track and systems, described as being "*calculated with reference to demobilisation costs*" in terms of clause 88.8.5. There is no contractual definition of the distinction between "civils" on the one hand, and "track and systems on the other". Furthermore, it is not clear what the reference to demobilisation costs is intended to mean: on one reading, it purports to restrict any loss of profit claim in the event of termination for tie Default to the profit that would have been made on the costs of demobilisation. However, that would appear to be an odd provision: Infraco would be entitled to recover their proper expenses in relation to demobilisation in any event in terms of clause 88.8.4.

10.9 If, contrary to the opinion of Richard Keen, the contractual mechanisms which purport to restrict the ability to end the Infraco Contract on the basis of repudiatory breach are not effective, that would mean that Infraco would be entitled to treat the contract as at an end, and seek damages for breach of contract.

10.10 Infraco's entitlement in these circumstances would include the following:

- (a) Payment for the value of all work carried out prior to termination. As explained above, this will include sums to which Infraco are entitled for matters such as loss and expense, Pricing Assumption No. 1 and so on;
- (b) The payment from tie of damages so as to put Infraco in the position that it would have been in had the contract been performed. This will be calculated by reference to the profit that Infraco would have made on the remainder of the Infraco Works had they been allowed to continue to completion.

10.11 For the reasons explained above, Infraco is entitled to choose to treat the Infraco Contract as continuing notwithstanding the service of a termination notice (which ultimately is held not to have been valid). The consequences of its so doing would include the following:

- (a) Infraco would be entitled to insist on being allowed to complete the Infraco Works in accordance with the Infraco Contract<sup>16</sup>;
- (b) tie would remain liable to Infraco for the value of work done before the purported termination;

<sup>16</sup> See, for example, paragraph 14 of Richard Keen's Opinion.



- (c) There would be an intervening period of litigation during which tie would not be entitled to require Infraco to proceed with the Infraco Works;
- (d) During that intervening period, it would be unlikely that tie would be entitled to instruct others to proceed with the Infraco Works;
- (e) At the end of litigation, the Infraco Contract would remain in place – in other words, tie would be locked in to the Infraco Contract with Infraco;
- (f) The underlying disputes between the parties in relation to contractual interpretation and the operation of the Infraco Contract would remain in existence – for example, the issues around Pricing Assumption No.1, or the progressing of work which is the subject matter of a disputed Notified Departure;
- (g) The delay and cost of the intervening period of delay where no work progressed would be the responsibility of tie, with no recovery from Infraco;
- (h) tie would require to resolve the question of consents and approvals that might have expired during the intervening period.

10.12 Dealing with point (f) in the foregoing paragraph in more detail, it is evident that the consequences of delay would be borne by tie. This would either be as a function of the underlying provisions of the Infraco Contract, which would treat the intervening period as one for which Infraco were entitled to an extension of time and the payment of loss and expense, or as damages for breach of contract. This last point is addressed at paragraph 14 of Richard Keen's Opinion:

*"...Infraco would have a claim for damages measured by reference to the direct loss and expense which Infraco suffered by reason of tie's wrongful termination notice. In this context it should be noted that while the claim for common law damages is excluded upon termination of the contract such a claim is not excluded where there is a breach of contract which does not result in termination of the contract. In view of the fact that the common law claim for damages could reflect the increased cost of completing the works after the delay for litigation (potentially a number of years) the measure of the damages could be considerable. It follows that unless tie is absolutely certain of being able to serve a valid termination notice such a course of action would carry considerable risk... I would observe that a purported termination by tie on grounds which are ultimately not upheld would amount to a repudiatory breach for which Infraco would be entitled to recover damages at common law."*

**11 Conclusions**

- 11.1 Unless Infraco is prepared to treat the Infraco Contract as having been brought to an end following the service of a tie termination notice, it is likely that service of such a notice will result in protracted proceedings during which no work can proceed on the project without the co-operation of Infraco. There would be no contractual mechanism by which tie could either force Infraco to continue to work in the interim, or engage others to carry out that work.
- 11.2 The outcome of such proceedings will turn in significant part on whether tie is able to establish that an Infraco Default has occurred, and that a valid RTN was served in relation to it. The financial parameters will vary significantly depending on tie's success in this respect.
- 11.3 At present, there is not yet a firm basis upon which to assess the strength of tie's position in relation to establishing whether there has been any Infraco Default. A detailed forensic investigation has not yet been carried out, nor has definitive expert opinion been sought. Both of those actions have now been put in train.
- 11.4 An alternative approach to termination on the basis of existing RTNs and litigation is for tie to seek a declarator from the courts on the existence of Infraco Defaults which provide the basis for existing RTNs as well as new ones. This approach should enable work to proceed in the interim, to the extent that the work relates to undisputed obligations on the part of Infraco, pending resolution of the issues by the courts. The actions referred to in paragraph 11.3 above are equally necessary in relation to this approach.
- 11.5 This alternative approach could potentially involve similar timescales to proceedings which take place after termination. However, the stakes would be considerably lower because work should continue and tie would be in a position to review its options in the lights of the court's decision.

**McGrigors LLP**  
**[2] December 2010**

Appendix 1 – Opinion of Richard Keen QC dated 22 November 2010

**OPINION OF SENIOR COUNSEL**

**for**

**tie Limited**

**in re**

**EDINBURGH TRAM PROJECT**

**INFRACO CONTRACT**

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1. I refer to the agent’s instructions of 10 November 2010; to the consultation which was conducted on 15 November 2010 and to the agent’s supplementary instructions of 16 November 2010. I am instructed in accordance with the foregoing to address the following issues:
  - 1 The proper interpretation to be given to the provisions of clauses 88 and 90, and specifically:
    - 1.1 The issues in relation to the “lock in” philosophy which I have identified in the Infraco Contract; and
    - 1.2 Whether this means that a purported termination by tie on grounds which are ultimately not upheld could amount to a repudiatory breach for which Infraco would be entitled to recover damages at common law.
  - 2 The proper interpretation to be given to the phrase “*absolute discretion*” in clause 90.3 of the Infraco Contract, and the way in which that discretion ought to be exercised.

- 3 A further issue which arises out of point 2 above, whether – irrespective of the terms of any Rectification Plan produced by Infraco – one is always driven back to the underlying question of the merits of the Remediable Termination Notice.

## **CLAUSES 88 AND 90 OF INFRACO CONTRACT**

- 2 It is necessary to look at a number of provisions within the Infraco Contract in order to understand how the relevant contractual mechanisms are intended to operate whether in the event of a tie Default (Clause 88) or an Infraco Default (Clause 90).
- 3 In terms of Clause 77.10 the parties to the Infraco Contract acknowledge that the only rights available to them to terminate the Infraco Contract are those expressly set out in that contract. It is particularly provided that neither party may accept a repudiation of the Infraco Contract in order to bring the contract to an end. The only exception in Clause 77.10 is in respect of fraud or fraudulent misrepresentation, which do not arise for present purposes. The exclusion of the right to terminate the Infraco Contract by acceptance of a repudiation of the Contract is reiterated in respect of Infraco at Clause 88.4.
- 4 What the parties have done by virtue of the provisions in Clause 77.10 and Clause 88.4 of the Infraco Contract is to exclude the common law position with respect to

repudiation. The common law position is as follows. If one party to a contract (Party A) considers that the other party to the contract (Party B) is in material breach of contract then A may claim termination of the contract by reason of B's material breach. In doing so A is implicitly intimating that he will not perform his obligations under the contract because he now considers it to be at an end. If A's perception that B is in material breach of the contract is wrong then A's intimation of termination to B will be regarded as a matter of law as a wrongful repudiation by A to perform A's own obligations under the contract. B may treat A's wrongful repudiation as a ground for termination of the contract. This is done by B accepting A's wrongful repudiation of the contract. B is not obliged to adopt this course of conduct but if he does then the contract is terminated by reason of A's breach of contract rather, as A anticipated, by reason of B's material breach of contract. (A wrongful repudiation of contract is always regarded as material).

5 Clause 88 deals with the termination of the Infraco Contract by reason of a "tie Default". A tie Default is defined as including,

"A breach by tie of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations under this agreement for a continuous period of 45 Business Days."

In the event of such a breach of contract by tie Infraco is not obliged to proceed with termination. Clause 88.1 provides that the Infraco "may serve a termination notice". If such a notice is served by the Infraco then the relevant tie Default may

be capable of rectification pursuant to Clause 88.3. In the absence of rectification a termination notice will lead to termination of the Infraco Contract pursuant to Clause 88.3. In the event of such termination tie will not be liable to Infraco for common law damages for breach of contract. Such a remedy is excluded by Clause 88.6. However tie will come under an obligation to pay Infraco in accordance with the provisions of Clause 88.8 of the Infraco Contract.

6 If Infraco served a termination notice on tie pursuant to Clause 88.1 in circumstances where there was no tie Default then that would constitute a repudiation of the Infraco Contract. If the common law then applied tie would be entitled to accept Infraco's repudiation of the Infraco Contract and bring the contract to an end. However the common law position does not apply because the right to accept such a repudiation is expressly excluded by Clause 77.10 and by Clause 88.4. Consequently, if Infraco serve a termination notice where there has been no tie Default tie cannot employ those actings in order to terminate the Infraco Contract.

7 Clause 90 deals with the matter of an Infraco Default. The mechanics of this clause are more or less the same as the mechanics of Clause 88. There must be an Infraco Default as defined in the Infraco Contract. The relevant definition includes,

“A breach by the Infraco of any of its obligations under this Agreement which materially and adversely effects the carrying out of the and/or completion of the Infraco Works.”

In the event of the foregoing default tie must serve a Remediable Termination Notice (RTN) pursuant to Clause 90.1.2. Infraco may respond to such an RTN with a rectification plan. If tie decides not to accept such a rectification plan then it may proceed to terminate the Infraco Contract in terms of Clause 90.4. In the event of such termination Infraco will have no liability to pay common law damages to tie. Such a liability is expressly excluded by Clause 77.11. Infraco will have a liability to make such payment as is certified pursuant to the mechanism set out in Clause 90.15. However any such sum will be subject to the Liability Cap provided for in Clause 77.7.

- 8 If pursuant to Clause 90.4 tie give a notice in writing to the Infraco terminating the Infraco Contract in circumstances where either there is no Infraco Default; or there is no valid RTN; or tie had no contractual basis for rejecting a rectification plan, then tie’s actings would amount to a wrongful repudiation of the contract. However such a wrongful repudiation of the contract cannot bring the Infraco Contract to an end even if the Infraco might wish that it did so. That is because, pursuant to Clause 77.10, the Infraco cannot accept a wrongful repudiation in order to terminate the Infraco Contract.

- 9 Subject to issues of fraud and insolvency (for which there is separate provision) and to the provision in Clause 89 for voluntary termination (which cannot apply at the present time) it would follow that the Infraco Contract can only be terminated pursuant to Clause 88 and Clause 90. Accordingly tie can only terminate the Infraco Contract if it proves an Infraco Default. Infraco can only terminate the contract if it proves a tie Default. In the absence of the foregoing both parties are locked into the Infraco Contract.
- 10 Tie can only be sure of termination of the Infraco Contract if they can prove an Infraco Default which results in a valid notice of termination. In such an event Infraco will have to be paid for all work done to date in accordance with the terms of the Infraco Contract. Tie will only be able to recover the additional cost of completing the Infraco Works once they have carried out and completed those works. The sum which tie can then recover for the additional cost of completing the Infraco Works will be subject to the Liability Cap as specified in Clause 77.7. If tie does not complete the Infraco Works after it has terminated Infraco's engagement under the Infraco Contract tie will have no claim against Infraco. In other words the contract does not allow a claim of damages against Infraco for breach of contract even though the partially completed works for which they have been paid may be worthless in their existing form.
- 11 The potential outcome of tie purporting to terminate the Infraco Contract by reason of an Infraco Default may be summarised as follows.



- 12 Infraco may simply accept tie's notice of termination. Infraco then walk away from the works. In that event Infraco will be entitled to recover payment under the contract for all work done to date. Tie will not be able to recover any payment from Infraco in respect of the incomplete portion of the works unless or until tie undertakes the completion of the Infraco Works. The Infraco Works would involve the construction of the entire Edinburgh Tram Network.
- 13 Tie issue a notice of termination and Infraco does not accept the notice of termination as valid and instead seeks to challenge it. Such a challenge would proceed by way of adjudication and then litigation. The time involved in such a process would be at least a year and could be a number of years. During the period of such adjudication and litigation tie would probably not be able to secure access to carry on the Works. Any attempt by tie to enter upon the Works while such a challenge was ongoing would probably be the subject of an application for interdict *ad interim* by Infraco. If Infraco maintained that tie's notice of termination was invalid and that they wished the contract to continue then it is probable that interim interdict would be pronounced against tie from entering up on the works. If Infraco's challenge was ultimately unsuccessful and tie was held to have validly terminated the Infraco Contract then matters would proceed as set out in paragraph 12.

14 In the event that Infraco successfully challenged the validity of tie's termination notice then not only would there be the delay envisaged above but further consequences would also follow. First, the Infraco Contract would remain valid and binding. Infraco could therefore insist on its right to complete the Infraco Works in accordance with the terms of the Infraco Contract including Schedule Part 4. Infraco would have a claim for damages measured by reference to the direct loss and expense which Infraco suffered by reason of tie's wrongful termination notice. In this context it should be noted that while the claim for common law damages is excluded upon termination of the contract such a claim is not excluded where there is a breach of contract which does not result in termination of the contract. In view of the fact that the common law claim for damages could reflect the increased cost of completing the works after the delay for litigation (potentially a number of years) the measure of the damages could be considerable. It follows that unless tie is absolutely certain of being able to serve a valid termination notice such a course of action would carry considerable risk. With particular reference to question 1.2, I would observe that a purported termination by tie on grounds which are ultimately not upheld would amount to a repudiatory breach for which Infraco would be entitled to recover damages at common law. There would however be no termination of the Infraco Contract by virtue of such a repudiatory breach, even if Infraco wished to bring about such a result.

15 I turn next to consider the phrase “absolute discretion” where it appears in Clause 90.3 of the Infraco Contract. This concerns the right of tie to decline to accept a rectification plan submitted by Infraco consequent upon an RTN. Where consideration of the rectification plan is to be at tie’s absolute discretion, there is a requirement that tie should act in good faith. However there is no requirement that tie’s decision on such a matter should be either fair or reasonable. This is confirmed by the terms of Clause 118.1. In summary tie must give genuine consideration to a rectification plan and must decide in good faith that it is going to reject the rectification plan. Tie does not require to justify the rejection of the rectification plan as being either fair or reasonable. If however tie was to intimate in advance of a rectification plan that it had no intention of accepting it then it would not be seen to be acting in good faith and its decision to reject the rectification plan could be open to challenge.

16 I would agree that irrespective of the terms of any rectification plan, a termination by tie is dependant upon tie being able to prove a relevant Infraco Default and, where required by Clause 90.1.2, that there is a valid Remediable Termination Notice relevant to that particular Infraco Default. If tie fails to establish an Infraco Default then any termination notice will be invalid. If tie establishes an Infraco Default but has not served a valid RTN relevant to the Infraco Default then again the termination notice will be invalid.

**THE OPINION OF RICHARD KEEN QC**

**Parliament House  
Parliament Square  
Edinburgh  
Scotland**

**22 November 2010**

**OPINION OF SENIOR COUNSEL**

**for**

**tie Limited**

**in re**

**EDINBURGH TRAM PROJECT**

**INFRACO CONTRACT**

**MCGRIGORS LLP**

**Ref: BEN/T10003.01**

Appendix 2 – Opinion of Richard Keen QC dated 1 December 2010

**OPINION OF SENIOR COUNSEL**

**for**

**tie Limited**

**in re**

**EDINBURGH TRAM PROJECT**

**INFRACO CONTRACT**

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1. I refer to the agents instructions of 10 and 16 November 2010 and to my Opinion of 22 November 2010.

2. I am instructed to address a particular issue with respect to the merit of certain Remediable Termination Notices issued on behalf of tie pursuant to Clause 90.1.2 of the Infraco Contract. Particular reference is made to three Remediable Termination Notices (“RTN’s”) namely two RTN’s dated 9 August 2010 in relation to defects at Princes Street and one RTN dated 8 September 2010 in relation to the matter of design. The matter that I am instructed to address is specified as follows by the agents,

**“Setting aside any issues in relation to whether the assertions set out in the RTN’s are capable of being supported by factual evidence, your advice is sought on whether these RTN’s are, on their terms, competent, and whether**

**they contain sufficient relevancy and specification to be capable of forming the foundation of any subsequent termination.”**

3. Clause 90 of the Infraco Contract addresses the matter of termination on the occurrence of an Infraco Default. An Infraco Default includes the following event, **“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”**.
4. Clause 90.1.2 provides that in the event of such an Infraco Default tie may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred. This is defined as a Remediable Termination Notice (RTN). Clause 90.2 then provides that following the service of a RTN the Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default in respect of which the RTN has been served.
5. In the event of an Infraco Default involving a breach by the Infraco of an obligation which materially and adversely affects the carrying out and/or completion of the Infraco Works, a notice from tie must meet the following requirements in order to constitute a competent RTN. First, the notice must be in writing. Second, the notice must identify the nature, which I take to mean the character or quality, of the breach of contract which has materially and adversely affected the carrying out and/or completion of the Infraco Works. Third, the specification of the breach

complained of must be sufficient to give Infraco notice of what remedial work is required in order to rectify the breach complained of.

6. The RTN's dated 9 August 2010 refer to what are described as "seriously defective works on Princes Street". It is stated at Clause 2.2 of each notice that the faults in the works pose an appreciable health and safety hazard and will severely reduce the life of the pavement. (There is also a reference to "creating further hazards" but it is not clear what this refers to). The nature of the faults relied upon are then set out at Clause 2.3.1 to 2.3.6 of each notice. Clause 2.3.1 refers to "a considerable number of locations" and Clause 2.3.2 to "many locations" where particular defects appear in the works. While the specification of those complaints might be criticised I consider that Infraco will be able to determine what rectification work was required in respect of the specified defects. I have greater difficulty with the complaints referred to in Clause 2.3.3 and Clause 2.3.4 of the notices. The former refers to work which is "unsatisfactory" and the latter to work which is "of an inadequate standard". It appears to me that such specification (or lack of it) would entitle Infraco to at least argue that the RTN did not give them fair notice of the rectification work which they were required to carry out. There are other parts of the notice which in my opinion are sufficiently specific. I would refer for example to Clause 2.3.6 which specifies that the road surfacing is not technically compatible with the track form installation in Princes Street. If however tie had to rely on only Clause 2.3.6 in order to establish that sufficient specification of an Infraco Default had been given, I would question



whether, notwithstanding the wording in Clause 2.5, such a breach did of itself materially and adversely affect the carrying out and completion of the Infraco Works.

7. I do not consider that similar problems of specification attend the RTN which was issued on 8 September 2010 in respect of the design of track works. The nature of the Infraco Default relied upon is in my opinion adequately specified at Clause 2.3 of the Notice which provides,

**“Despite the Infraco having constructed approximately one kilometre of on-street track works between Lothian Road and Waverly Bridge, the Infraco has not delivered an integrated, assured, design for these on-street track works. As a consequence, tie does not have an integrated, assured, design as it ought to have from the Infraco and tie is unable to issue a Permit to Commence Works pursuant to the Code of Construction Practice for on-street track works.”**

It is in my opinion reasonably apparent that what Infraco requires to do in order to rectify the Infraco Default complained of is deliver an integrated design for the on-street track works in order that the appropriate Permit to Commence Works for on-street track works may be issued.

8. I would however caution that it is not entirely clear to me from the terms of the Infraco Contract that Infraco does require to have delivered an integrated design for the on-street track works as a necessary pre-requisite to the issuance of a

Permit to Commence Works. If tie are unable to establish that Infraco was obliged to deliver an integrated design before tie could issue a Permit to Commence Works for on-street track works, then there would be no relevant Infraco Default for the purposes of this RTN.

9. In summary, the RTN's in respect of the Princes Street works are in competent form i.e. they are in writing. The RTN's identify a relevant Infraco Default namely, an alleged breach by the Infraco of its obligations with respect to the standard of the Works. However, there are at least some respects in which these notices can be criticised for lack of specification. In particular the simple reference to work as being "unsatisfactory" or as being "of an inadequate standard" may be criticized as giving Infraco no reasonable notice of the rectification work they require to carry out in order to meet tie's complaint. I do not consider that similar criticisms of lack of specification may reasonably be leveled at the RTN in respect of design. However (and although I am not instructed to advise on this point) I would question whether Clause 2.3 of this RTN does properly identify what can be construed as an Infraco Default.

10. In light of the foregoing I would have to conclude that in the event of tie giving notice of termination of the Agreement in reliance upon the specified RTN's, there would be a material risk of their acting being found to be a wrongful repudiation of contract.

**THE OPINION OF  
RICHARD KEEN QC  
Parliament House  
Parliament Square  
Edinburgh  
Scotland**

**2 December 2010**

**OPINION OF SENIOR COUNSEL**

**for**

**tie Limited**

**in re**

**EDINBURGH TRAM PROJECT**

**INFRACO CONTRACT**

**1<sup>st</sup> December 2010**

**MCGRIGORS LLP**

**Ref: BEN/TI0003**

**Appendix 3 – summary of RTNs**

<b>RTN</b>	<b>Description</b>	<b>Infraco Default</b>	<b>Rectification Plan?</b>	<b>Response by tie</b>
1	Princes Street (Defects)	(a) A breach by the Infraco which has a material and adverse affect on the carrying out and/or completion of the Works.	Yes (without prejudice to rejection of RTN on other grounds)	Rejected – with reasons
2	Clause 10.4 and 10.16 – Failure to Provide Extranet	(a) – as above	Yes (without prejudice to rejection of RTN)	Further information sought
3	Princes Street (Lack of Superintendence)	(a) – as above	Yes – as in RTN 1	Yes – as in RTN 1
4	Clause 60 (not updating Programme and not mitigating delay)	(a) – as above	Yes – without prejudice to rejection of RTN and only in respect of the failure to record progress properly	Rejected – with reasons
5	Bilfinger Berger/SDS Provider Minute of Agreement	(a) – as above	No – there is no agreement in place to rectify.	Notifying that further response will follow in due course
6	Design (Trackworks)	(a) – as above	Yes – without prejudice	Rejected – with reasons
7	Failure to progress demolition works at Plots 97 and 102 Russell Road	(a) – as above	No – response requests further information from tie	No response
8	Clause 80 – tie Change	(a) – as above	No – no default is identified	No response
9	Breaches evincing a Course of Conduct	(a) – as above	No – no default identified	No further response



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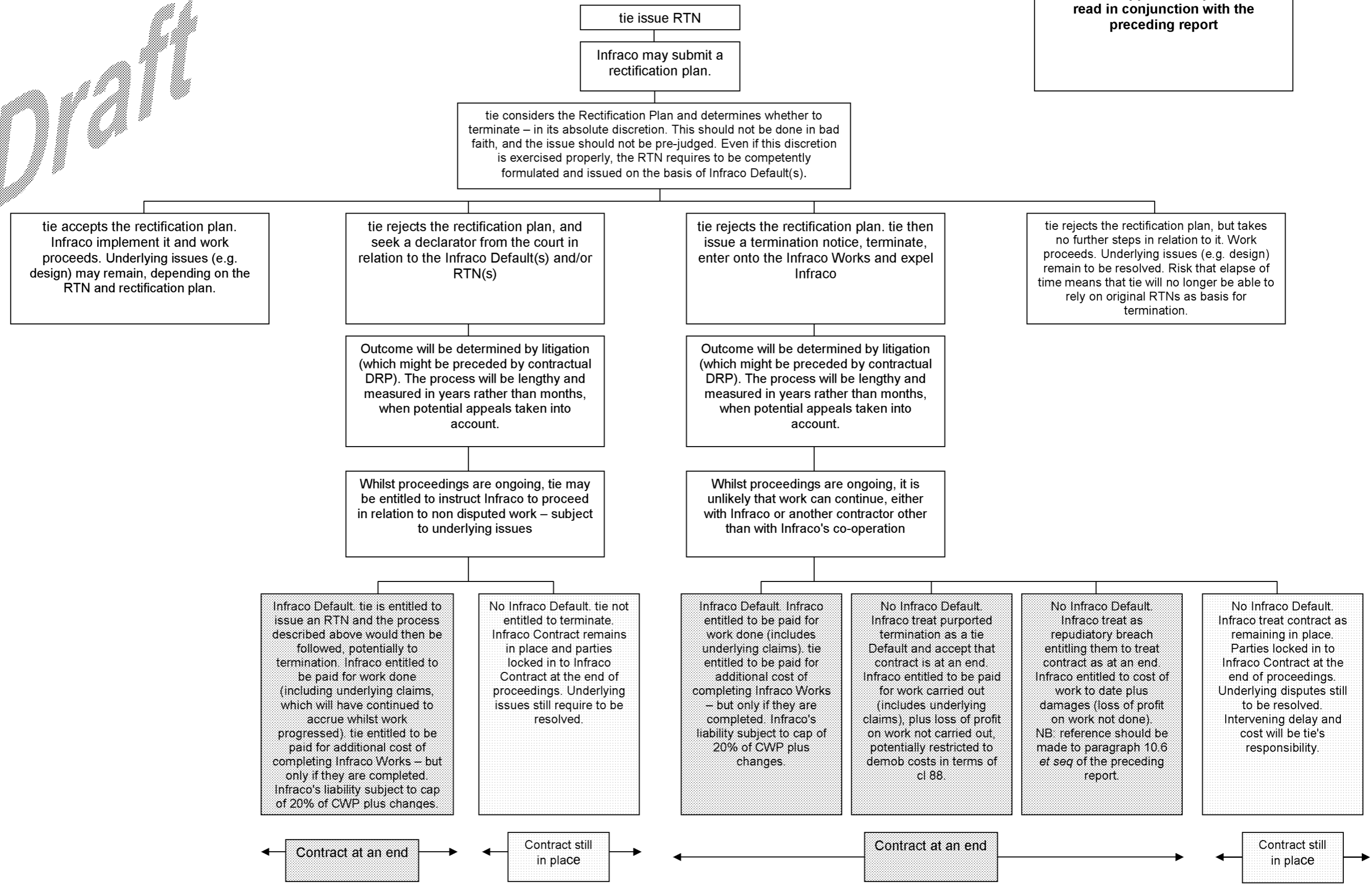
10	Failure to manage design at Gogarburn Retaining Wall W14C and W14D	(a) – as above	No – delay is not attributable to Infracore	No response
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Appendix 4 – decision tree

Note: this Appendix requires to be read in conjunction with the preceding report



## Appendix 5 - summary of forensic analysis and expert input required in relation to sample RTNs

This Appendix addresses the forensic analysis and expert input required in order to enable a view to be formed on the merits of sample RTNs. This Appendix does not address issues in relation to the competence of those RTNs, which are covered in the main body of this report.

### 1 RTN 1

1.1 RTN 1 relates to allegations of "*seriously defective works on Princes Street*". The defects are listed at paragraph 2.3 of the RTN. There are a number of strands to the exercise that requires to be carried out:

- (a) All relevant documentation should be identified and collated;
- (b) Any relevant witness evidence should be obtained;
- (c) Any relevant expert evidence should be obtained.

1.2 This approach should be applied both to tie's position, and Infraco's defence to it.

1.3 By way of example, the following matters ought to be addressed.

1.4 The specific contractual requirements in relation to each element of each defect require to be identified: for example, what does the specification say in relation to compaction? What is said in relation to the pavement materials? What is said in relation to the existence of steps?

1.5 What is the evidence that these defects exist? Reference should be had to:

1.6 Documentary evidence: e-mails, letters, minutes, progress reports and so on;

1.7 Photographic evidence;

1.8 Witness evidence from relevant personnel.

1.9 This evidence should include all instances of the defects having been brought to the attention of Infraco, and their response thereto. Any attempts to rectify the issues should also be addressed.

1.10 How are the contractual requirements said to have been breached? There requires to be a clear understanding of the way in which the contractual requirements are said to have been breached in connection with each defect: there is a general allegation that the defects have been caused by poor workmanship, ill advised choice of materials, inappropriate design and the lack of supervision. Which of these apply to each particular defect?



- 1.11 This can only be established by collating the evidence to support the proposition that the relevant breaches took place: how does tie evidence that there was poor workmanship, both factually, and in terms of the requisite standard of care having been breached? The same point applies to the selection of materials.
- 1.12 The RTN refers to "inappropriate design" and to Infraco's obligation to exercise reasonable skill and care. Is it asserted that Infraco have been negligent? If so, expert opinion requires to be obtained in this respect. Is other expert opinion required to support allegations in relation to workmanship or design failings?
- 1.13 Which defects does the general allegation in relation to a lack of superintendence relate to? How is the lack of superintendence relevant to each defect? See the comments below in relation to RTN 3 in connection with the superintendence issue.
- 1.14 The defects are said to be *serious*: what is the foundation for this assertion, in relation to each defect, and how is it to be proved?
- 1.15 There is a general allegation that the defects at Princes Street pose an appreciable health risk. Which defects does this allegation relate to? What is the evidence that supports this assertion? Is expert health and safety evidence required?
- 1.16 There is a general allegation that the defects are capable of creating further hazards. Which defects does this allegation relate to? It requires to be evidenced factually and possibly also by expert evidence.
- 1.17 There is a general allegation that the life of the pavement has been severely reduced. Which defects does this allegation relate to? What is the evidence that supports this assertion? Expert evidence is likely to be required in connection with life span issues.
- 1.18 It is asserted that individually and cumulatively, the defects have materially and adversely affected the carrying out and completion of the Infraco Works. How is this said to have happened? If the impact is said to be in terms of delay to completion, a programming exercise requires to be carried out to assess the impact of each defect on the critical path – both on its own, and in conjunction with the other defects complained of. This exercise cannot be carried out in isolation from the existing work stream which has been on going for some time in relation to delays to the project, and in particular whether MUDFA delays can be said to have been the dominant cause of delay for the relevant periods.
- 1.19 If the impact is not said to have arisen in terms of delay, what is the material and adverse impact, and how is it to be measured?
- 1.20 Defences raised by Infraco require to be analysed and evaluated. By way of example, the rectification plan produced by Infraco accepts that there are defects, but attributes responsibility for those defects to others. Their position requires detailed investigation. By way of further example, Infraco has asserted that

causes of the problems include heavy wear from traffic, adverse weather, a forced early opening, and so on. Each of these allegations requires to be considered.

- 1.21 Infraco have obtained their own expert opinion on various matters at Princes Street (see for example, their letter of 25.1.201/KDR/6728 of 17 September 2010); that expert evidence needs to be considered and tested both against factual material and against tie's own expert evidence.
- 1.22 In any proceedings, Infraco will not be restricted to raising defences which have already been advanced by them. Accordingly, the forensic investigation needs to ensure that all relevant material has been identified, and any other areas of defence considered.
- 1.23 In the context of this exercise, regard ought to be had to whether there is any cross over between the subject matter of the RTN and any other contractual work streams which are ongoing – for example, INTCs, or disputes which have been referred to DRP.

## 2 RTN 3

- 2.1 RTN 3 is predicated on the same factual basis as RTN 1, but concludes that Infraco are called upon to replace their engineering superintendence staff. Setting aside the competence of this request, there are a number of factual issues which would require to be addressed to support this RTN. In each case, both documentary and factual evidence will be required.
- 2.2 All the contractual requirements in relation to supervision require to be established as a baseline for measuring Infraco's performance.
- 2.3 The relevant periods of complaint require to be established – the RTN refers to a period between March 2009 and November 2009.
- 2.4 Clarification requires to be brought to whether the complaint is one of quantity (numbers of supervisory personnel present at relevant times), or quality of supervision. It is presumed for present purposes that the complaint relates to both.
- 2.5 In relation to quantity of supervision, it requires to be established what supervisory staff were on site, and when. This should be supported by documentary evidence.
- 2.6 This then needs to be plotted against work being carried out on specific days or weeks. The nature of the work being carried out also needs to be evidenced.
- 2.7 Witness evidence should be obtained in relation to whether sufficient supervision was in place, by reference to activities being carried out. Consideration should be given to whether expert evidence is required in this respect.

- 2.8 The quality of the supervision also requires to be addressed: this may be by reference to the seniority and experience of the personnel involved, or evidenced by specific problems caused by their approach to supervision.
- 2.9 The consequences of the failures in relation to supervision require to be specified and evidenced. In order to make out a ground of Infraco Default, there must have been a material and adverse impact on the carrying out and completion of the Infraco Works. How did the lack of supervision cause this (as distinct from the existence of any defects)?
- 2.10 If the impact is said to be a time related one, that will require to be supported by expert programming input (see comments in relation to RTN 1 above).
- 2.11 There is reference to a general allegation in relation to physical health and safety hazards: is it said that the lack of superintendence caused such a hazard? If so, in what way? How is that to be evidenced? The same point applies to the allegation of the creation of further hazards and the allegation of a shortened pavement life.
- 2.12 As in connection with RTN 1, the forensic exercise requires to be undertaken not only with regard to tie's case, but with regard to defences which have been, or might be, raised by Infraco.
- 3 RTN 6**
- 3.1 The Infraco Default complained of in RTN 6 arises in relation to Infraco's alleged failure to deliver a fully integrated, assured design for the on-street trackworks at chainage 100000 to 131247.
- 3.2 A key aspect to establishing Infraco Default in this respect is the expert evidence which is being sought from Robin Blois-Brooke in relation to the on street track design.
- 3.3 In order to enable Robin Blois-Brooke to produce that report, the documentary evidence necessary to enable him to form a view is being collated.
- 3.4 Beyond the exercise being undertaken by Robin Blois-Brooke, other investigations are also required.
- 3.5 Each instance of Infraco's alleged failure requires to be identified, so that all relevant documentation can be compiled. Infraco's defence to these allegations requires to be interrogated in detail.
- 3.6 In order to establish that an Infraco Default has occurred, there must have been a material and adverse impact on the carrying out and completion of the Infraco Works. In the case of design, that is likely to involve a detailed programming analysis being carried out. Reference is made to the comments in relation to RTN 1 above.

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