

Edinburgh Tram Network

Note in relation to adjudication decisions

1 Executive Summary

- 1.1 The decision of an adjudicator is binding in relation to the matters decided upon, until the dispute is finally determined by legal proceedings or agreement. Analysing which parts of a written decision are binding depends in part upon:
- (a) Defining the dispute which has been referred to the adjudicator, by reference to the adjudication and referral notices; and
 - (b) Distinguishing between the decision itself (which is binding) and the reasons for that decision (which are not).
- 1.2 Elements of a decision which are not binding may be persuasive on subsequent adjudicators, although this does not so far appear to have been the case in the decisions under consideration in this note.
- 1.3 If a dispute is subsequently heard afresh by the courts, neither the decision nor the reasoning of the adjudicator will be applied.
- 1.4 There have been a number of decisions which bear upon the proper interpretation to be given to Pricing Assumption No.1; those decisions are likely to be binding only in relation to the specific INTCs and Estimates to which they relate. Accordingly, it ought to remain open to tie to advance an interpretation of Pricing Assumption No.1 which is not constrained by those adjudications.
- 1.5 There is no binding decision in relation to whether clause 34.1 empowers tie to issue an instruction in circumstances where there is a disputed Notified Departure, in advance of that dispute being determined.
- 1.6 There is no binding decision in relation to whether clause 80.15 can be invoked in circumstances where Infraco fail to produce an Estimate, irrespective of whether the Notified Departure is disputed or not.
- 1.7 The parties are bound by the decision of Lord Dervaird that tie are not empowered by clause 80.13 to instruct or direct Infraco to proceed with work in circumstances where it is agreed that there is a Notified Departure but there has been no referral to the Dispute Resolution Procedure.
- 1.8 The reasoning adopted by Robert Howie in arriving at his decision in relation to INTC 429 is unlikely to be treated as binding. His award of 154 days in relation to Section A is binding. An exercise will be carried out in order to identify whether any element of INTC 536 which is referred to adjudication can be said to already have been referred to Howie in the first adjudication. That will require an analysis of the facts upon which Infraco rely, as well as the programming analysis they apply and the legal basis of their claim.
- 1.9 Howie's views in relation to sub-contractors are binding so far as they relate to the proper interpretation to be given to clause 28.4. His conclusions in relation to the meaning of the words "*the Infraco*" and "*acting reasonably*" are likely to be binding only in relation to the use of those words in 28.4, but not where those words appear elsewhere in the Infraco Contract.
- 1.10 The decision of John Hunter in relation to Tower Bridge is binding in relation to the valuation of the elements of work referred to him. His findings in relation to the interpretation of which documents constitute the BDDI is unlikely to be binding in relation to any drawings other than those related to the INTC in question, although the position is not a straightforward one.

2 Decisions covered in this note

- 2.1 The following adjudicators' decisions are addressed in this note.
- (a) Hunter: Carrick Knowe Bridge - 16 November 2009

- (b) Hunter: Gogarburn Bridge - 16 November 2009
- (c) Wilson: Russell Road Retaining Wall - 4 January 2010
- (d) Hunter: Tower Bridge - 18 May 2010
- (e) Coutts: Section 7A Track Damage - 24 May 2010
- (f) Howie: MUDFA/INTC 429 - 16 July 2010
- (g) Dervaird: Murrayfield Underpass - 7 August 2010
- (h) Howie: subcontract issues - 13 December 2010

2.2 There are other decisions, in particular that in relation to landfill tax, which have not been addressed. The general principles described in section 3 of this note will apply equally to those decisions.

3 General principles in relation to the binding nature of adjudicator's decisions

3.1 Clause 51 of Schedule Part 9 provides that "*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.*"

3.2 That provision is consistent with the position that applies in relation to statutory adjudications in terms of the Housing Grants Construction and Regeneration Act 1996 (in relation to which there is a body of case law addressing the binding nature of an adjudicator's decision). The significance of this is not only that the parties must give effect to the decision (for example, by complying with an order to pay over money), but they are not entitled to seek a second decision from an adjudicator in relation to a dispute which has already been decided upon.

3.3 There are two principal issues which are of particular relevance in the current context:

3.3.1 Defining the dispute which is the subject matter of the decision, which in turn informs the extent to which the decision is binding; and

3.3.2 The extent to which an adjudicator's *reasons* are to be distinguished from the *decision* itself¹.

3.4 The dispute will be delineated by that which has been referred to adjudication; this has been described as follows:

*"The dispute or difference referred is simply that which the referring party chooses to refer, no more and no less."*²

3.5 This will involve an analysis the terms, scope and extent of what has been referred³: taking the Howie adjudication in relation to INTC 429 as an example, an understanding of what has been referred to adjudication can only be arrived at by examining Infraco's Estimate and the supporting documents – a reading of the Referral Notice alone is unlikely to yield the answer.

3.6 Issues may well arise between the parties during the course of the adjudication (and hence after the referral) and be hotly debated at hearings or in submissions. That will not necessarily convert those issues into being part of the dispute which has been referred. The adjudicator may express a view in relation to those issues, but that will not, of itself, render that view binding.

¹ That distinction is underscored by, for example, clause 49 of Schedule Part 9, which states that "*the adjudicator shall provide written reasons for his decision*", thereby distinguishing between the decision and the reasons. Robert Howie makes a clear acknowledgement of this distinction by issuing his decision and his reason as two separate documents.

² See for example *Barr Limited v Klin* 2010 SCLR 33 and [2010]CSOH 152

³ *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC

3.7 This principle can be examined by setting out a sequence of events which arose in a recently decided case⁴: W H Malcolm raised an adjudication seeking financial redress in relation to 14 separate items of work. During the course of the adjudication, it became a point at issue as to whether SMM7 applied to the contract in question. There had been no mention of SMM7 in the notices of adjudication or referral. The adjudicator's decision stated:

"I find that SMM7 does not apply to the parties' contract."

3.8 A second adjudication was raised in relation to three fresh items of work. The court held that the second adjudicator was not bound by the finding in the first adjudication relation to SMM7, and could form his own view on that point:

"...the dispute referred to [the first adjudicator] was not the issue of whether or not the sub-contract provided for SMM7 measurement. Nor was it what she decided. Her view of that matter is part of the reasoning employed in reaching her decision as to the sum due. But that of itself does not seem to me to be capable of being relied on as making it part of her decision. It was manifestly not an issue which was referred to her, although it could have been. Nor was it part of her decision."

3.9 This was the case even though when W H Malcolm raised the first adjudication, they did not know that the applicability of SMM7 was in dispute; this was a point which first arose in the response and was developed in subsequent submissions. The issue had not been part of the referral, and was therefore not part of the dispute being referred⁵.

3.10 The decision of the adjudicator in relation to the dispute which has been referred will, as has already been noted, be binding. If the adjudicator goes beyond that dispute, and purports to answer a question which has not been referred to him, then he will have exceeded his jurisdiction – and, to the extent that he has done so, that part of his decision will not be binding.

3.11 An illustration of the way in which these principles operate in practice can best be seen in the context of the decisions in relation to Pricing Assumption No. 1 (PA1), which are addressed in the following section.

3.12 The principles outlined in this section relate to the extent to which an adjudicator's decision binds the parties in a formal, legal sense. Distinct from this issue is the extent to the non-binding elements of what an adjudicator says (in particular, his reasons) are likely to be persuasive in subsequent adjudications. That will very much depend on the personal approach of a particular adjudicator: some may be highly persuaded by previous reasoning, others may wish, essentially, to start from scratch.

3.13 Certainly, if they are seeking to persuade an adjudicator that they should depart from reasoning contained in an earlier decision, particular attention should be given to explaining why it should be departed from. That might include highlighting new material which has come to light, or setting out why an earlier approach was misconceived. An example of this point is addressed in below in the context of Robert Howie's decision on INTC 429.

3.14 If the subject matter of an adjudication is subsequently referred to the courts, that will mean that the issue is heard afresh, and there will be no question of the decision being binding upon the court. Furthermore, the courts are unlikely to treat the reasoning of an adjudicator as persuasive in the way that a fellow adjudicator might, and that reasoning is therefore likely to play little or no part in the court proceedings.

4 Pricing Assumption No. 1

4.1 Messrs Hunter, Wilson and Coutts have issued decisions which touch upon the provisions of PA1⁶.

Hunter

⁴ *W.H. Malcolm Ltd* - a decision of Lady Smith in the Outer House of the Court of Session

⁵ This must be contrasted with the situation where, during the course of the adjudication, the parties agree to give the adjudicator jurisdiction to decide a particular issue which was not part of the original dispute. That agreement may be capable of being inferred during the course of the proceedings.

⁶ The two Hunter decisions on Carrick Knowe and Gogarburn Bridge are in similar terms

- 4.2 tie's delineation of the dispute in their Notice of Adjudication in relation to Carrick Knowe⁷ is brief: "*this dispute concerns the contents of the Estimate*" (that Estimate having been defined by reference to the Estimate issued pursuant to INTC 115).
- 4.3 The redress sought is:
- (a) *"The Referring Party requests the Adjudicator to find and declare that the only facts or circumstances notified in the [INTC] which constitute a Notified Departure are those which relate to the Galleries pursuant to Pricing Assumption 3.4.1.1.3;*
 - (b) *The Referring Party requests the Adjudicator to find and declare that the Estimate is to contain only those items of work which relate to the Galleries.*
 - (c) *The Referring Party requests the Adjudicator to find and declare that the Estimate is to be in the amount of...£71,757.37...or such other sum as the Adjudicator considers is the true and proper valuation of the works comprised in the Galleries taking into account the whole of the Infraco Contract."*

Each element of this redress was refused.

- 4.4 In arriving at his decision, Hunter sets out some discussion in relation to the meaning to be given to PA1; for example at paragraphs 7.36 to 7.39, he sets out what he considers to be the proper approach as involving a comparison of the BDDI and the IFC drawings to identify all changes. Those changes should then be assessed in order to conclude whether they are categorised as design development.
- 4.5 Applying the principles referred to in the foregoing paragraph, it will be seen that Hunter's commentary in relation to the approach which he adopts forms part of his reasoning. It is unlikely to be held to form part of the decision itself. That decision is concerned with the specific content of the INTC in question, and whether it falls within the ambit of PA1.
- 4.6 Indeed, the referral appears to have been carefully worded in order to restrict the dispute to a question in relation to the particular INTC, rather than widening it out to any general principles of universal applicability. Applying the reasoning of the decision in *W H Malcolm* referred to above, tie could have chosen to frame their referral in such a way as to invite a decision on the general principles to govern the interpretation to be given to PA1, but they did not do so. The fact that there were lengthy submissions in relation to that interpretation did not render it part of the dispute, and hence the decision.
- 4.7 Infraco themselves appear to have accepted that Hunter's decisions attach to the particular INTCs in question, and not to any general principles: much of the Russell Road adjudication (raised by Infraco) took place after the Hunter decisions had been issued. It appears to have been agreed that Hunter's decisions were not binding – at paragraph 25, Wilson records
- "Mr John Hunter adjudicated two disputes arising from the Contract concerning Gogarburn Bridge and Carrick Knowe Bridge and issued decisions on 16 November 2009. tie provided copies of these decision and the parties referred to them in submissions. However, the parties agree that no part of these decisions is binding upon me in this reference."*
- 4.8 As referred to above, an adjudicator may consider previous reasoning to be persuasive; that does not appear to have been the case with Wilson. He appears to have disregarded the Hunter reasoning, and effectively built up his own approach afresh.

Wilson

- 4.9 As noted above, the Russell Road retaining wall adjudication was raised by Infraco – the initial referral was issued before the Hunter decisions, but the remainder of the submissions was made after the Hunter decisions.

⁷ The wording of the Gogarburn Notice of Adjudication is different, and the definition of the dispute is lengthier. Nonetheless, it has been worded so as to refer the contents of a specific INTC and its related Estimate. The comments made apply equally to Gogarburn

- 4.10 Infraco's referral notice contains a good deal of material in relation to the proper interpretation to be given to PA1 – in contradistinction to tie's notices to Hunter. Nonetheless, Infraco appear to have sought to restrict the scope of the dispute. Under the heading "scope of adjudication", they state:

"There are currently in excess of 350 Infraco Notifications of tie Changes which are yet to be agreed. The Referring Party reserves the right to pursue claims against the Responding Party in due course, but such claims do not form part of this Response [sic – this is presumably intended to refer to "this Referral"]."

It is also noted that the since the issue of the IFC design on which the Estimate was based, the scope of the piling has further increased. As the Estimate was not revised prior to this Dispute Resolution Procedure, the determination sought cannot extend to such additional works, and the Referring Party reserves the right to seek reimbursement for same under the Agreement or as may become necessary under a separate and distinct dispute."

- 4.11 Whilst this description says more about what Infraco are *not* referring than what they *are* referring, it is tolerably clear that the scope of the dispute is intended to relate to a particular INTC and Estimate. That is borne out by the redress sought.
- 4.12 As in the Hunter adjudications, Wilson makes a number of general observations in relation to the proper interpretation to be given to PA1, for example at paragraphs 101 and 104.
- 4.13 Notwithstanding this, it is considered to be more likely than not that the Wilson decision would be treated as being restricted to the INTC and Estimate in question⁸. That view is reinforced by the subsequent decision of Gordon Coutts, which makes no reference to the earlier decisions (indeed, it is not evident whether he was made aware of them), which would suggest that Infraco were not treating Wilson as binding in general terms.

Coutts

- 4.14 The decision of Gordon Coutts in relation to Section 7A drainage was issued in May 2010, some time after the Hunter and Wilson decisions. Care appears to have been taken to restrict the scope of the dispute to a number of narrow issues relating to PA1.

- 4.15 In the third paragraph of his reasons, Coutts states:

"My remit is, I consider, restricted to the question of how these provisions in the contract [i.e. Schedule Part 4] apply to the Section 7A drainage issue before me; and I do not proffer any general view as to the interpretation of the contract as a whole."

- 4.16 The issue which had been placed before Coutts was described in the notice of adjudication as follows:

"In this Adjudication, the Referring Party is seeking certain orders and declarations. The Referring Party intends to pursue further claims against the Responding Party in due course."

Accordingly, any additional declarations, orders or claims for damages or loss which are additional to the redress sought in this Notice of Adjudication and the Referral to follow hereon fall outwith the scope of the present Adjudication, being reserved for future agreement or Adjudication, legal or other proceedings and the Referring Party does not seek any orders for payment or otherwise in the present Adjudication. The Referring Party reserves the right to do so."

For the avoidance of doubt, the issue of whether the items of work which relate to Notified Departures 1 to 5 inclusive constitute a Notified Departure in terms of any of the other Pricing Assumptions or Specified Exclusions provided for in the Infraco Contract falls outwith the scope of the present Adjudication, being reserved for future agreement or Adjudication, legal or other proceedings."

⁸ See paragraph 10 of McGrigors Report on Certain Contractual Issues dated 23 March 2010

- 4.17 Whilst this wording (in particular in the second paragraph) might be interpreted as being rather circular, when put together with the redress sought, which relates to specific items of work, it is likely that the decision would be held to be binding only in relation to those specific items, with no broader application.

Conclusion in relation to Pricing Assumption No.1

- 4.18 There have been decisions issued which bear upon the proper interpretation to be given to PA1. Those decisions are likely to be binding only in relation to the particular Estimates and INTCs to which they refer, but provide no general principles which would bind the parties in relation to other INTCs.
- 4.19 The three adjudicators have reached differing views on the proper interpretation, and Wilson did not appear to treat the earlier Hunter reasoning as persuasive. Coutts makes no reference to either of the other adjudicators.
- 4.20 Accordingly, it ought to remain open to tie to advance an interpretation of PA1 which is not constrained by those adjudications. Reference is made to the previous advice on the proper interpretation to be given to PA1⁹, which was in any event given in the light of the Hunter and Wilson decisions.

5 Progress of the Infraco Works

- 5.1 The decision of Lord Dervaird in relation to Murrayfield Underpass touches on issues in relation to clause 80.
- 5.2 The scope of that decision was addressed in McGrigors note dated 9 August 2010. To summarise the conclusions of that note:

(a) **Lord Dervaird's decision:**

- (i) This is a decision on whether clause 80.13 empowers tie to instruct/direct Infraco to proceed with the work in the context of a Notified Departure (there being no dispute as to the existence of a Notified Departure).
- (ii) Lord Dervaird decides that tie are not empowered by clause 80.13 to instruct/direct as set out in (i).
- (iii) Lord Dervaird's decision offers no meaning to the words at the end of clause 80.15 "...unless otherwise directed by tie."

(b) **What Lord Dervaird did not decide**

- (i) The question whether clause 34.1 empowers tie to issue an instruction where the claimed Notified Departure is disputed and in advance of that dispute being determined.
 - (ii) What happens where there is no Estimate (whether the Notified Departure is disputed or not). Can clause 80.15 be invoked?
- 5.3 There is no binding decision in relation to these last two points. It therefore remains open to both parties to seek a ruling on them through the contractual DRP mechanism.

6 Decision in relation to INTC 429

- 6.1 Robert Howie's decision relates to Infraco's claim under INTC 429 to be entitled to an extension of time in relation to delays associated with utilities. That decision has been thrown into focus as a consequence of Infraco's claim to be entitled to a further extension of time and associated loss and expense in terms of INTC 536, which also relates to delays associated with utilities.

⁹ See in particular paragraphs 1 and 4-10 of McGrigors Report on Certain Contractual Issues dated 23 March 2010 and McGrigors draft note supplemental to that report dated 31 March 2010

6.2 The position in relation to Howie's decision on INTC 429 is complicated by the way in which that decision emerged. It consisted of four documents:

- (i) A note produced in relation to a preliminary issue;
- (ii) The "main" Decision;
- (iii) A document described as reasons; and
- (iv) A note issued pursuant to a perceived slip rule.

6.3 The extent to which Howie's views are binding has been addressed in the note produced by McGrigors dated 17 January 2011. In summary, it is concluded that the reasons are unlikely to form part of the binding decision for the reasons set out at section 3 above¹⁰.

6.4 On this basis, the effect of the decision is that Infraco are entitled to an extension of time of 154 days in relation to Section A, but have no entitlement in relation to Sections B, C or D. However, if Infraco has presented a Programme to tie, which extends the time for completion of Section B to 30 November 2010, and if that Programme has been accepted by tie then an extension of time for Section B will have been validly granted, notwithstanding that the binding element of the Howie decision did not extend Section B.

6.5 As part of the work to be done in relation to INTC 536 and its referral to DRP, an exercise will require to be carried out in order to identify whether any element of INTC 536 which is referred to adjudication can be said to already have been referred to Howie in the first adjudication. That will require an analysis of the facts upon which Infraco rely, as well as the programming analysis they apply and the legal basis of their claim.

7 Subcontractors

7.1 Infraco's referral to adjudication before Robert Howie in relation to subcontractor issues sought two declarators:

- (a) That tie has "*no entitlement to withhold its approval to the form of the proposed sub-contract...on the ground that not every Infraco Member is a party to the sub-contract*"; and
- (b) That tie has "*failed to act reasonably in withholding its approval...where such has been withheld on the ground that not every Infraco Member is a party to the sub-contract.*"

7.2 As with the MUDFA dispute, Howie separated out what he described as his decision, and his reasons. His decision simply rejects both declarators and makes a finding in relation to expenses. The reasons contain a number of observations in relation to various matters.

7.3 The elements of the reasons which relate to the proper interpretation to be given to clause 28.4 are binding. As Howie himself points out, that is the central or cardinal issue in dispute and cannot be divorced from the dispute which has been referred.

7.4 Where Howie has reached a conclusion in relation to the meaning that the words "the Infraco" should be given, that conclusion is likely to be treated as binding only in relation to the way in which those words are used in clause 28.4. His conclusion about the meaning of those words is unlikely to be binding where they appear in other contexts.

7.5 Similarly, where Howie expresses his views in relation to the words "*acting reasonably*", his comments are likely to be binding in relation to the use of those words in 28.4, but not where those words appear elsewhere in the Infraco Contract.

8 Tower Bridge

¹⁰ In addition, the reasons were issued significantly later than the decision

- 8.1 tie referred to the adjudication of John Hunter a dispute in connection with the proper valuation of what was accepted to be a Notified Departure in relation to the Tower Place Bridge. The decision of Hunter in relation to that valuation itself is clearly binding in relation to the structure in question.
- 8.2 However, the Hunter decision also touches on other issues, in particular whether the information which made up the BDDI was to be interpreted by reference to what had been uploaded to the virtual data room by 25 November 2007 (tie's position) or by reference to drawings contained on various CDs (Infraco's position). It is understood that this issue arises in the context of a number of INTCs, where there may be a dispute in relation to whether a particular drawing is included within the BDDI.
- 8.3 Hunter concludes in this respect:
- "In summary my finding is that having carefully considered all of the conflicting evidence in relation to the operation of the electronic data room I am unable to conclude with certainty either that those drawings were in the system and available to the Responding Party on the date upon which the Referring Party rely or that the whole content of the electronic data room constitutes information issued to or made available to the Responding Party."¹¹*
- 8.4 Section 5 of the referral is headed up "The Dispute"; paragraphs 5.12 to 5.16 make reference to the definition of the BDDI, explaining the factual background to the way in which information was exchanged prior to contract formation. However, paragraph 5.16 concludes:
- "Accordingly, the Tower Place Bridge BDDI Drawings form part of the Base Date Design Information and fall to be considered for the purposes of the operation of the Notified Departure mechanism, as it relates specifically to the Tower Place Bridge Notified Departure."*
- 8.5 On balance, it is considered that Hunter's finding would not be held to binding in relation to any drawings other than those specifically related to the particular INTC in question, although the position is not a straightforward one.

McGrigors LLP
21 January 2011

¹¹ Paragraph 7.22