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From: Anderson, Richard [Richard.Anderson@mcgrigors.com]
Sent: 03 March 2011 10:03
To: Dennis Murray; Fiona Dunn; John Nicolson; donny@mackinnonconsult.com; Steven Bell
Cc: Nolan, Brandon
Subject: Preliminaries Adjudication: Dervaird's Further Comments

I have seen that Lord Dervaird has decided to address Pinsent's request to clarify what information is required to support the Infraco's application for preliminaries.

On the whole, I am surprised that Dervaird has said little more than: "you are the experts; you decide!". That said, I do not think he has done any damage in providing the answer he gives; indeed his comment are actually neutral, if not quite helpful, for **tie**.

The following points should be taken into consideration:

1. Having made and published his Decision, Dervaird's powers have been exhausted (that is, he is *functus officio*) save for one matter and that is to deal with corrections under the *slip rule*. He has corrected a typographical error (replacing Schedule 9 for Schedule 4 in the Decision) which binds the parties. Having exhausted his jurisdiction, any further comments are simply observations and whilst they may well be persuasive (as far as a subsequent Adjudicator is concerned) they have no effect on the Decision itself.
2. Whilst the reference, in the second paragraph, to his finding that preliminaries are "time-based costs", may initially seem to rob **tie** of the victory we had yesterday (or, at least dilute that victory), any damage is immediately repaired by Dervaird expanding upon his comment. In effect, he says that the parties need to start by delving into Schedule Part 5 and establishing rates and periods. Clearly, this part of the Contract (Part 5) is progress-related and it seems to me that **tie** would begin by assessing whether or not a time-related sum has actually been incurred or fallen due. However, if there is any doubt as to what this means, he concludes this section of his comments with the words: "...together with any adjustments and variations made thereto..". The starting point is therefore, to take the information in Schedule Part 5 and assess this against progress and then further assess this against any adjustments necessary.
3. If any doubt still remains, as to the effect of these comments on the original Decision, Dervaird then goes on to make the comment: "...consideration may also have to be given to the items referred to as Preliminaries in Schedule Part 4 page 39 headed Method Related Charges...". I interpret this as confirmation that Dervaird's thinking is along the lines that **tie** can reflect the reality (that there has been no progress) by looking into Schedule Part 4.
4. Of course, Dervaird does not want to be pulled into complicated commercial/surveying principles, and I translate his comment: "...but no issue was raised before me in respect of those items..." to be his way of avoiding getting into complex theories on the grounds that neither party provided any analysis of this part of the Contract and (when he enjoyed jurisdiction) he never got to grips with this part of the Contract - thus all he can do is express general principles and leave the parties to work it out for themselves.

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