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From: Anderson, Richard [Richard.Anderson@mcgrigors.com]
Sent: 02 March 2011 14:02
To: Steven Bell
Cc: Dennis Murray
Subject: The Dervaird Decision on the Preliminaries Adjudication

Steven / Dennis

Having taken some time to read through the Decision from Lord Dervaird, my preliminary thoughts are as follows:

Summary

The split on costs is misleading as it only reflects that fact that Infraco's arguments succeeded as a starting point. The reason why **tie** picks up 25% of its costs is, ultimately, because Infraco does not get the relief it sought. In fact, it is **tie** which succeeds in getting the overall result it sought. I would therefore summarise this as a win for **tie** through the back door. In other words, Infraco's contractual argument succeeded but **tie's** common sense arguments won the day.

Put another way, ignoring the logic and argument used by Dervaird, the effect is that he finds for **tie** notwithstanding that Infraco's interpretation was correct.

The Arguments

Infraco fought for the interpretation that (1) prelims were simply a listed entitlement which became payable solely as a result of the efflux ion of time and (2) the actual sums payable were effectively agreed pre-estimates written into the contract; therefore, in respect of each Reporting Period, all Infraco needed to do was confirm that a month had passed since its last application, point to the sum in the table in Schedule Part 5 and thereby the stated sum automatically became payable.

tie had a different interpretation which was to say that (1) prelims were to be operated as milestones and required a Construction Milestone Completion Certificate ("*CMC Certificate*") before they could be acted upon; (2) thereafter it was necessary for the application to be processed through the payment provisions of clause 67. Only after those hurdles were cleared would any payment become due.

Dervaird's Reasoning

Dervaird has somewhat "fudged" the issue and started by following Infraco's argument but then placing a sort of "moral" interpretation on to the end of that process. He has, however, rejected **tie's** interpretation of the contract. In short he has found that **tie's** view is pretty much wrong, but that Infraco's view is not completely right (hence the 75:25 cost split in Infraco's favour). However, because of the argument/interpretation which Dervaird adds to the argument advanced by Infraco, the Decision effectively reverses what Infraco sought and puts the process into **tie's** hands (although through the back door).

As I see it, Dervaird begins by saying that you follow Infraco's arguments about the effluxion of time and thus, at the end of each Reporting Period, Infraco can apply to be paid for its preliminaries. Specifically, Infraco does not need a CMC Certificate. So far, this finds in Infraco's favour, but I suspect that, in dismissing **tie's** argument, Dervaird realised that this could lead to the unfair and completely unreasonable position whereby Infraco gets paid substantial sums when, clearly, no work is being undertaken. Similarly, if the Contract was terminated, it could lead to a position whereby Infraco would be significantly overpaid with no ability to recover that overpayment (in effect, these were the moral arguments put forward by **tie**).

It is at this point that I believe Dervaird fudges his Decision to produce the answer he wanted to find.

He appears to try to seek a contractual hook on which to rest the obligation to pay as he clearly does not like the logical result of the effluxion of time argument. He therefore reasons that the right to money must come from somewhere other than Schedule Part 5, as that, of itself, does not give rise to an obligation to pay or a right to be paid. The only hook he can logically find is the payment provisions within clause 67 and he specifically tries to work out what form of payment this would be by reference to the types of payment set out therein. As it is not a *Critical Milestone* or a "genuine" *Milestone* it cannot fall under clause 67.4.1. As it is not a variation, it cannot fall under clause 67.4.2. This simply leaves the sweep-up provision under clause 67.4.3 of "*any other sum due...under this Agreement*".

The reason I detect a "fudge" has happened is because the remainder of clause 67.4.3 refers to the Infraco needing to provide "...reasonable supporting documentation establishing the basis of the sums being claimed..". What this provides, for Dervaird, is a satisfactory mechanism by which he can avoid the bizarre conclusion of Infraco receiving money just because of the passage of time and in circumstances where it has no moral right to the money. It is also probably the reason why Dervaird's decision is Back-to-front, in that he begins by concentrating on clause 67.4 before he deals with the effluxion of time point.

What does this mean?

I understand that Pinsents have asked Dervaird to expand upon what he means by "...reasonable supporting documentation.." and the answer to this must simply be: "...exactly the sort of documentation that (1) you would expect to provide under clause 67.4 - because that's where the words come from - and (2) which would be enough to allow tie to make a proper, reasoned assessment...". I have every sympathy with their attempt to get Dervaird to relax what he has decided, as the general effect of the Decision is that the Infraco argument wins in part, but the tie view of the overall effect is correct (but through a different argument). That said, I cannot see Dervaird changing the force of the Decision, given the reason for the "fudge".

At present, I think the current tally for "missing" prelims (under Infraco's argument) is around £8 million. However, given that the calculation, under clause 67.4.3 must be a cumulative one, I take the view that tie needs "reasonable supporting documentation" to understand what the cumulative figure should be before it even starts to consider the "missing" applications. However, whilst I suspect this would lead to Infraco returning money and not tie paying-out money, the Decision does lead to the Infraco applying for its "real" prelims and I do not know if this figure is higher than what we have paid to date.

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