NOTE BY SENIOR COUNSEL

for

tie LIMITED

I refer to the consultation held at Citypoint yesterday. The discussion lasted almost five hours and at the end I agreed to set down in writing the principal conclusions to which we came and the advice which is tendered.

The BDDI and the Infraco Proposals (Schedule Part 30 drawings).

The BDDI is defined in the Infraco Contract Schedule Part 4 as the design information drawings issued to Infraco up to and including 25 November 2007 listed in Appendix H. Appendix H does not include a list as such but comprises the following words: All of the drawings available to Infraco up to and including 25 November 2007. I have been made aware of the way in which design drawings from the SDS Provider were made available to Infraco in the period up to and including 25 November 2007. The words in Appendix H would be construed in light of the "factual matrix" at the time the contract was entered into (*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896). These drawings comprise the BDDI. The Schedule Part 30 drawings do not.

I can see that Infraco may assert legitimately that the Construction Works Price is the price for the work specified in the Employer's

Requirements and the Infraco Proposals (Schedule Part 4, paragraph 3.1), but this does not alter the definition of the Base Case Assumptions and the BDDI.

Relevance of the Schedule Part 30 drawings to the Notified Departures mechanism in Schedule Part 4.

The Schedule Part 30 drawings do not form part of the BDDI and therefore do not form part of the Base Case Assumptions. Accordingly, a departure from the Schedule Part 30 Drawings does not constitute a Notified Departure.

The meaning of clauses 4.2 and 4.3 and their effect on the status of the Schedule Part 4.

Clause 4.2 deals with the priorities of parts of the Infraco Contract in the event of ambiguity or discrepancy. The main body of the Agreement takes priority over the Schedule and the Employer's Requirements take priority over the Infraco Proposals. Clause 4.3, however, provides that nothing in the Agreement shall prejudice Infraco's right to claim "additional relief or payment pursuant to Schedule Part 4 (*Pricing*)." This is a significant provision which affects all provisions in the main Agreement which would otherwise limit or extinguish claims under the Schedule Part 4.

The payment provisions in Schedule Part 4 require to be read discretely, and Infraco's entitlement to payment thereunder are not defeated or limited by the provisions of the main body of the Infraco Contract.

Two provisions of the main body of the Agreement were highlighted as relevant to this. Clause 4.4 provides that Infraco is satisfied that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco Proposals and accepts the risk arising from any such discrepancies. It shall not make any claim against **tie** for an extension of

time, additional payment etc in respect thereof. The clause, however, specifically declares itself to be subject to clauses 4.2 and 4.3.

The effect of Clauses 7.9 and 7.10 which relate to Background Information may also, depending on the circumstances, be limited by the terms of Clause 4.3.

In the event that there is a breach of contract by the SDS Provider, would that constitute an Infraco breach, for example late delivery of drawings?

I note that there is a definition of an "Infraco Default" contained in Schedule Part 1 and Default (a) is a breach by Infraco of any of its obligations under the Agreement which materially and adversely affects the carrying out and/or completion of the Infraco works.

The provision with which this question is concerned, however, is the definition of a Notified Departure in Schedule Part 4, paragraph 2.8 which excludes a difference from the Base Case Assumptions which is caused by a breach of contract by the Infraco.

In terms of the Infraco Contract, Infraco have the responsibility for design, albeit the SDS Provider is the party delivering the design. The Novation Agreement between **tie**, Infraco and the SDS Provider has the effect that the SDS Provider is the subcontractor of Infraco. Infraco, in terms of the Infraco Contract (clauses 10, 11, Schedule Part 14, section C clauses 2.2.1 and 2.1.4 and the definition of IFC Drawings) have responsibility for the delivery of detailed design in a question with **tie**. In the event that Infraco are in breach of their obligations under the Infraco Contract, that is an Infraco Default or breach of contract by Infraco.

That conclusion does not prejudice **tie**'s remedies against the SDS Provider under the Collateral Warranty.

Are breaches of contract on the part of the SDS Provider prior to the Novation agreement breaches by Infraco?

Clause 11.1 provides for the entering into of the Novation Agreement. Clause 11.3 provides that "To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to have complied with its obligations under the Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement." By implication, to the extent that the SDS Services are not and have not (as at the date of the Agreement) been so carried out and completed, Infraco will be deemed not to have complied with its obligations under the Agreement.

In terms of the Novation Agreement, the Infraco adopts all the rights and liabilities of **tie** as if the Infraco had been the contracting party from the outset. The SDS Provider warrants to the Infraco that it is liable for any loss or damage suffered or incurred by the Infraco arising out of negligent act, default or breach by the SDS Provider prior to the date of the Novation Agreement (clause 4.2). All rights of action against the SDS Provider under the SDS Agreement vested in **tie** shall from the date of the Novation Agreement vest in the Infraco.

Thus, while I have not found it expressly stated anywhere, it can be seen that the Infraco Contract and the Novation Agreement together constitute an arrangement whereby Infraco steps into the shoes of **tie** in all questions of the provision of the SDS Services and a default on the part of the SDS Provider, even before the date of the Infraco Contract and Novation Agreement, would be deemed a default on the part of Infraco.

BDDI to IFC stage and "normal development and completion of design.

Pricing Assumption 1 in Schedule Part 4 is that the SDS Provider will not change certain things from the BDDI, other than amendments arising from

the normal development and completion of designs. The Infraco, therefore, is assumed to have taken into account, when pricing, all the amendments to the design as at the design freeze date which would result from the normal development and completion of the designs.

I understand that the Infraco has maintained that every change from the BDDI constitutes a Notified Departure. However, such a claim ignores this important qualification.

What constitutes "normal development and completion of design" as opposed to alterations in "design principle, shape, form and/or specification" which do not arise from the normal development and completion of design would require to be a matter of professional opinion and, inevitably, judgement.

I have also been asked if there is any other phraseology which would help an expert to determine whether a change during this phase would or would not arise from "normal development and completion of design". I would be reluctant to put a gloss on the phraseology, whether by supplementing the words of the contract or paraphrasing, as that would invite the criticism that the actual terms of the contract are not being interpreted accurately.

What information is required to be provided by the Infraco when they maintain that there has been a Notified Departure?

Clause 80 envisages, and makes detailed provision for, **tie** issuing a **tie** change. Clause 80.24 states only that where pursuant to paragraph 3.5 of Schedule Part 4 or pursuant to Clause 14 **tie** is deemed to have issued a **tie** Notice of Change as a result of the occurrence of a Notified Departure, the provisions of Clause 80 shall apply. No detailed mechanism is set out for the circumstances in which Infraco maintain there has been a Notified Departure but **tie** either refute that suggestion or do not know whether there has been a Notified Departure or not.

Since the question of whether or not there has been a Notified Departure is not self evident, in order for **tie** to be able to assess whether there has been a Notified Departure and, if so, the consequences of that Notified departure, **tie** needs certain information. The parties have undertaken to deal with variations on a "collaborative and Open Book" basis (clause 6.3.1). I have been provided with a list of pieces of information by DLA which **tie** considers it needs in order to perform its functions under Clause 80 and none of them strikes me as unreasonable.

In relation to the provision in Schedule Part 4, paragraph 3.5 that **tie** is liable in respect of the delay between the notification of a Notified Departure and the actual date (not the deemed date) that **tie** issues a **tie** Change Order, the period during which Infraco fails to provide the necessary information may be regarded as being down to a breach by Infraco and thus not reckonable in calculating that delay period.

In relation to access to sites, what are the consequences of something less than the entire area being made available to the Infraco?

I understand that the Infraco has refused to carry out the Infraco Works in situations where something less than the Permanent Land or Temporary Sites has been made available to them as the Designated Working Area. The Permanent Land and the Temporary Sites are defined in Schedule Part 1 by reference to plans. Clause 18.1 constitutes a warranty by **tie** that the Infraco access will be granted and all necessary Land Consents will be obtained.

Two points arise. The first is that the access is warranted "only in so far as the same is required for the purposes of carrying out the Infraco works. So unless the restriction in the area to which access is granted is such that the Infraco works cannot be carried out there is not breach of the warranty.

Furthermore, in terms of the definition of "Compensation Event" in Schedule Part 1, "the failure of **tie** to give possession or access as referred to in clause 18 (*Land Consents, Permanent Land and Temporary Sites*)

(definition part (b)), is a compensation event and would fall to be dealt with as such in terms of clause 65. So, for example, if such a failure directly and adversely affected Infraco's ability to perform any of its obligations and/or caused Infraco to incur costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event, the Infraco would be entitled to apply for an extension of time and/or relief from the performance of its obligations and/or claim additional costs under the Agreement (Clause 65.1).

I hope the above covers the areas which I was requested to mention. If there are further matters arising, I shall, of course, be happy to provide clarification or additional advice.

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2 June 2009

NOTE BY SENIOR COUNSEL

for

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2 June 2009

DLA
(Ref: KK/KK/310299/15)