From: Steven Bell
Sent: 09 August 2010 11:46
To: Richard Jeffrey; david_mackay@[redacted] Mandy Haeburn-Little
Subject: RE: DRAFT NOTE to CEC for comment

Some thoughts

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From: Richard Jeffrey
Sent: 09 August 2010 11:28
To: david_mackay@[redacted] Steven Bell; Mandy Haeburn-Little
Subject: DRAFT NOTE to CEC for comment

LEGALLY PRIVILIGED, STRICTLY PRIVATE AND CONFIDENTIAL AND FOISA EXEMPT, PREPARED IN ~~ANTIOCIPATUION~~ CONTEMPLATION OF LITIGATION

Dear all,

Last night at 9pm we received the ruling from Lord Dervaird on the dispute over our ability to instruct Infraco to proceed with the works under certain circumstances. This dispute was raised by Infraco utilising one example (Murrayfield Underpass structure). Lord Dervaird has ruled in favour of Infraco in this case. This is surprising, contrary to all the advice we have had, and needless to say very disappointing. It also highlights the risks of legal disputes.

The full details of the ruling are, as always, high level and complex, and need to be read carefully, and I will send a copy to Nick Smith under legal privilege, along with various relevant comments.

Important points to note are:

- The ruling is specific to the circumstances of the dispute
- This decision only covers the position where it is agreed that a Notified Departure exists and no estimate has been agreed to cover this notified departure. In this situation Lord Dervaird holds that Clause 80.13 cannot be the basis for an instruction to proceed, that in such circumstances clause 80.15 should be used. This would mean putting every change notice into the dispute procedure.
- He does not rule on the use of Clause 34.1 in the situation where we disagree that a notified departure has occurred.

- Extending the adjudicator's logic would suggest that ~~He suggests that,~~ in the event that we agree that a notified departure has occurred, but no estimate has been received, we should use clause 80.15 as above. This needs careful consideration.
- McGrigors (who led this one for us) do not consider Lord Dervaird's reasoning to be compelling. His approach is narrow and fails to recognise that if Infraco did proceed in accordance with a direction under Clause 80.13 or 34.1 they would be protected by 34.3. The link from Clause 34.3 to Clause 80 does not disapply the protection contained within Clause 34.3.
- Lord Dervaird has not chosen to address the commercial absurdity arguments made by McGrigors on our behalf in relation to this specific Dispute.

As always with adjudications, the adjudicator has narrowly examined the question posed, and not necessarily considered the wider consequences of their ruling (they are not required to). Despite the fact that we disagree with some of the reasoning and believe the consequences of the ruling simply create more questions, we do not, at this stage propose to challenge it through the courts.

We have this morning agreed a way forward in discussion with our advisors, and I will discuss this with you when we meet tomorrow.

Had we been successful in responding to this Dispute ~~ruling~~, it would have provided us with a very strong case going forward. The fact that the ruling was in Infraco's favour is a setback, but not to the extent that it changes our overall approach. As always, there are elements of the ruling, and of the evidence submitted by Infraco that ~~can~~ will be used to feed our overall strategy, again I am happy to discuss this at our meeting tomorrow. As one door closes...

Happy to discuss by phone or in person today if you wish.

Regards

Richard

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