EDINBURGH TRAM NETWORK

ADJUDICATION

DELAYS ARISING FROM INCOMPLETE MUDFA WORKS.

By letters dated 4th August and 6th August, 2010, Messrs Pinsent Masons and D.L.A. Piper on behalf of their respective clients, the JV and tie, wrote to me in connection with two errors which are said to have crept into my Decision of 16th July, 2010. The first of these is a patent arithmetical error affecting the completion date which emerges from the extension of time which I awarded in relation to Section A of the Infraco Works. As the Reasons I issued explaining my Decision will have made plain, I intended to extend the time for Section A by 154 days, and did so, but then miscounted when I inserted the new completion date. As both parties agree, in light of the extension I granted for Section A, the completion date for that Section should be 2nd November, 2010. I, too, agree that that is the correct date, and, with my apologies for the original error, I enclose a corrected form of interlocutor to supplant the original erroneous Decision.

The second matter is contentious. Messrs Pinsent Masons assert in their letter that, having regard to the evidence led at the hearing to the effect that the critical path for Section B ran through Section A, and the necessity to complete the depot so as to be able to able to give the trams their 28 days' testing (which formed part of the Section B work), I had fallen into error by awarding no extension of time for Section B when I had granted an extension for Section A. An extension of time for Section A implied an extension of time of the same length for Section B. I ought, therefore, to have granted an extension of time of 154 days in duration for Section B as well as Section A. Messrs D.L.A. Piper, on the other hand, state that I have made no error, and that even if I had done so, I could not now correct it in the way that the JV's solicitors suggest, as to make such a correction would exceed the powers accorded me by the slip rule. Tie characterises that which I am invited by the JV to do as a reversal of my Decision rather than a correction of some clerical error which is required in order to give effect to my first thoughts on the issue affected by the proposed amendment of my Decision. It also refers, though somewhat tangentially, to the provisions of sub-clause 44.3 of the Infraco Contract.

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That last point I can deal with fairly shortly. Sub-clause 44.3 does not seem to me to have any relevance to the question of the length of any extension of time to which the JV might be entitled. It is concerned with a *causa sine qua non* of the issue of a Sectional Completion Certificate for Section B, an issue which arises independently of actual completion or of the time allowed for the completion of that Section. For present purposes, it is immaterial.

It is obviously implicit in the parties' above-mentioned correspondence that they believe that there is available to me some power to correct errors. In language reminiscent of the decision in **Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd [2000] B.L.R. 314**, tie asserts that I have such a power, but that it extends only to the correction of errors where that correction does not amount to "second thoughts " altering in substance that which I originally set out to do. I am inclined to agree with that view, which I suspect is not controversial. As there is no express provision thereanent to be found in Part 9 of the Schedule, the foundation for a slip rule in this adjudication, as in other Scottish ones, must be a term implied into the contract on one or other of the well-known bases for implication. One can readily see that, given the time limits which attend that procedure, and the consequent likelihood of mistakes being made, the parties to an adjudication can be taken to have treated as "going without saying" in an agreement to remit to adjudication that the adjudicator should be able to correct mistakes (including omissions) which creep into his Decision and which, if left uncorrected, would cause to be misrepresented his intended Decision on the dispute put before him. However, I can see no reason to assume that the parties would have implicitly agreed to an unlimited power of revision, as that would defeat the temporary finality of adjudication decisions provided for, in this case, by paragraph 51 of Part 9 of the Schedule.

As I hope that my Reasons made plain, I was not persuaded that the JV had established that it was entitled to any longer than the period of time which the Rev.1 Programme already allowed it to do that work which is encompassed within Section B of the Works. As I sought to explain, because of the error about Designated Working Areas which beset Appendix C to the Estimate, I was not satisfied on the evidence I had heard that MUDFA delays necessitated the JV being awarded any more days than it already possessed to do Section B work. I therefore awarded no extra time in respect of alleged MUDFA delays to Section B. There is no error in that regard in my Decision.

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In their letter, Messrs Pinsent Masons point to the evidence in the documents and in the oral testimony of Mr Sharp to the effect that the Completion Date for Section B should be 28 days after the completion of Section A, as that period was needed to test the trams, and such testing could not begin until the depot was finished. Although I have no recollection of evidence explaining why the depot had to be finished before the trams could be tested, my notes of the evidence do not record, and I do not recall, that Mr Sharp was cross-examined about that proposition by tie, and I therefore took it that that point was accepted, and was therefore probably true. It was certainly the case, as I note in the Reasons , that the JV was contractually obliged to work to the Programme, and that Programme shows a finish/start link between the end of Section A and the beginning of tram testing in Section B. I accordingly accepted that there was a hard logic link between the completion of Section A and the commencement of the testing of the trams.

In consequence of the extension of time which I awarded in relation to Section A, it follows that my Decision meant that the latest date on which the last part of Section B, the tram testing, could start without culpable delay setting in was the day after the programmed completion of Section A, namely, 3rd November,2010. Allowing 28 days for the testing to be carried out, the date by which Section B would have to be completed pursuant to that Decision (since I have awarded no extension of time for Section B work) is 30th November, 2010. But it is only the activity of testing which is subject to the above-mentioned hard logic link, and it is the only Section B activity which I consider has been shown to be affected by the delay to Section A caused by the late completion of the MUDFA work there. The JV having failed to establish any extension of time for Section B, it remains contractually bound to carry out the other Section B activities in accordance with the present Programme: it is only the start date for the tram testing- and, therefore the completion date for Section B- which moves out to November, 2010.

That moving out, however, will be an automatic consequence of the extension of time I have awarded the JV, and so it seemed to me that, in a case where the Programme is contractually binding and I was not allowing any extension of time for other activities in Section B, I did not need to make any reference to this moving out in relation to Section B. The other activities in Section B were still to be carried out as they were programmed to be done in the Rev. 1 Programme, and the one activity which would have to move would be put into November, 2010 as a necessary programming consequence of my award in relation to Section A in the new programme which, I was

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told at the end of the hearing, would be drawn up after my Decision came out in order to take account of it. Since that new programme would put the end of the testing period at 30th November, 2010, and would be contractually binding, the JV would get a contractual completion date for Section B on which it could rely, and there would be no inadvertently created extension of time for carrying out any of the Section B activities. The moving out of the dates for the testing activity, and the gap in the performance of Section B work which might arise from that, I regarded as a piece of consequential mechanics on which I did not need to comment in my Reasons.

With the benefit of hindsight, I was wrong about that, and it would have been preferable had I written on the point in my Reasons as I have done above, in order to obviate the misapprehensions about my Decision which have in the event arisen. I apologise for my not having done so. I hope that the inconvenience which has resulted has not been great.

Edinburgh,

9th August, 2010.

EDINBURGH TRAM NETWORK
DELAYS FROM INCOMPLETE MUDFA WORKS
ADJUDICATOR'S DECISION

I find and declare that the period of extension of time to which Infraco is entitled under clause 80 of the Infraco Contract in relation to the several sectional completion dates therein provided for is as follows:

i) Section A – 154 calendar days (to 2nd November, 2010)
ii) Section B – nil
iii) Section C – nil
iv) Section D – nil

In relation to sections B, C and D I find that the Referring Party has failed to prove its entitlement (if any) to any extension of time.

I find that my fees and expenses for the adjudication, save insofar as already awarded by me, shall be borne by the parties in equal shares of one-half.

RBM Howie
Edinburgh
11th August 2010