

11 Conclusions

- Unless Infraco is prepared to treat the Infraco Contract as having been brought to an end following the service of a tie termination notice, it is likely that service of such a notice will result in protracted proceedings during which no work can proceed on the project without the co-operation of Infraco. There would be no contractual mechanism by which tie could either force Infraco to continue to work in the interim, or engage others to carry out that work.
- The outcome of such proceedings will turn in significant part on whether tie is able to establish that an Infraco Default has occurred, and that a valid RTN was served in relation to it. The financial parameters will vary significantly depending on tie's success in this respect.
- At present, there is not yet a firm basis upon which to assess the strength of tie's position in relation to establishing whether there has been any Infraco Default. A detailed forensic investigation has not yet been carried out, nor has definitive expert opinion been sought. Both of those actions have now been put in train.
- 11.4 An alternative approach to termination on the basis of existing RTNs and litigation is for tie to seek a declarator from the courts on the existence of Infraco Defaults which provide the basis for existing RTNs as well as new ones. This approach should enable work to proceed in the interim, to the extent that the work relates to undisputed obligations on the part of Infraco, pending resolution of the issues by the courts. The actions referred to in paragraph 11.3 above are equally necessary in relation to this approach.
- This alternative approach could potentially involve similar timescales to proceedings which take place after termination. However, the stakes would be considerably lower because work should continue and tie would be in a position to review its options in the lights of the court's decision.

McGrigors LLP
14 December 2010

Appendix 1 – Opinion of Richard Keen QC dated 22 November 2010

OPINION OF SENIOR COUNSEL

for

tie Limited

in re

EDINBURGH TRAM PROJECT INFRACO CONTRACT

- 1. I refer to the agent's instructions of 10 November 2010; to the consultation which was conducted on 15 November 2010 and to the agent's supplementary instructions of 16 November 2010. I am instructed in accordance with the foregoing to address the following issues:
 - The proper interpretation to be given to the provisions of clauses 88 and 90, and specifically:
 - 1.1 The issues in relation to the "lock in" philosophy which I have identified in the Infraco Contract; and
 - 1.2 Whether this means that a purported termination by tie on grounds which are ultimately not upheld could amount to a repudiatory breach for which Infraco would be entitled to recover damages at common law.
 - The proper interpretation to be given to the phrase "absolute discretion" in clause 90.3 of the Infraco Contract, and the way in which that discretion ought to be exercised.

A further issue which arises out of point 2 above, whether – irrespective of the terms of any Rectification Plan produced by Infraco – one is always driven back to the underlying question of the merits of the Remediable Termination Notice.

CLAUSES 88 AND 90 OF INFRACO CONTRACT

- It is necessary to look at a number of provisions within the Infraco Contract in order to understand how the relevant contractual mechanisms are intended to operate whether in the event of a tie Default (Clause 88) or an Infraco Default (Clause 90).
- In terms of Clause 77.10 the parties to the Infraco Contract acknowledge that the only rights available to them to terminate the Infraco Contract are those expressly set out in that contract. It is particularly provided that neither party may accept a repudiation of the Infraco Contract in order to bring the contract to an end. The only exception in Clause 77.10 is in respect of fraud or fraudulent misrepresentation, which do not arise for present purposes. The exclusion of the right to terminate the Infraco Contract by acceptance of a repudiation of the Contract is reiterated in respect of Infraco at Clause 88.4.
- What the parties have done by virtue of the provisions in Clause 77.10 and Clause 88.4 of the Infraco Contract is to exclude the common law position with respect to

repudiation. The common law position is as follows. If one party to a contract (Party A) considers that the other party to the contract (Party B) is in material breach of contract then A may claim termination of the contract by reason of B's material breach. In doing so A is implicitly intimating that he will not perform his obligations under the contract because he now considers it to be at an end. If A's perception that B is in material breach of the contract is wrong then A's intimation of termination to B will be regarded as a matter of law as a wrongful repudiation by A to perform A's own obligations under the contract. B may treat A's wrongful repudiation as a ground for termination of the contract. This is done by B accepting A's wrongful repudiation of the contract. B is not obliged to adopt this course of conduct but if he does then the contract is terminated by reason of A's breach of contract rather, as A anticipated, by reason of B's material breach of contract. (A wrongful repudiation of contract is always regarded as material).

Clause 88 deals with the termination of the Infraco Contract by reason of a "tie Default". A tie Default is defined as including,

"A breach by tie of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform any material part of its obligations under this agreement for a continuous period of 45 Business Days."

In the event of such a breach of contract by tie Infraco is not obliged to proceed with termination. Clause 88.1 provides that the Infraco "may serve a termination notice". If such a notice is served by the Infraco then the relevant tie Default may

be capable of rectification pursuant to Clause 88.3. In the absence of rectification a termination notice will lead to termination of the Infraco Contract pursuant to Clause 88.3. In the event of such termination tie will not be liable to Infraco for common law damages for breach of contract. Such a remedy is excluded by Clause 88.6. However tie will come under an obligation to pay Infraco in accordance with the provisions of Clause 88.8 of the Infraco Contract.

If Infraco served a termination notice on tie pursuant to Clause 88.1 in circumstances where there was no tie Default then that would constitute a repudiation of the Infraco Contract. If the common law then applied tie would be entitled to accept Infraco's repudiation of the Infraco Contract and bring the contract to an end. However the common law position does not apply because the right to accept such a repudiation is expressly excluded by Clause 77.10 and by Clause 88.4. Consequently, if Infraco serve a termination notice where there has been no tie Default tie cannot employ those actings in order to terminate the Infraco Contract.

Clause 90 deals with the matter of an Infraco Default. The mechanics of this clause are more or less the same as the mechanics of Clause 88. There must be an Infraco Default as defined in the Infraco Contract. The relevant definition includes,

"A breach by the Infraco of any of its obligations under this Agreement which materially and adversely effects the carrying out of the and/or completion of the Infraco Works."

In the event of the foregoing default tie must serve a Remediable Termination Notice (RTN) pursuant to Clause 90.1.2. Infraco may respond to such an RTN with a rectification plan. If tie decides not to accept such a rectification plan then it may proceed to terminate the Infraco Contract in terms of Clause 90.4. In the event of such termination Infraco will have no liability to pay common law damages to tie. Such a liability is expressly excluded by Clause 77.11. Infraco will have a liability to make such payment as is certified pursuant to the mechanism set out in Clause 90.15. However any such sum will be subject to the Liability Cap provided for in Clause 77.7.

If pursuant to Clause 90.4 tie give a notice in writing to the Infraco terminating the Infraco Contract in circumstances where either there is no Infraco Default; or there is no valid RTN; or tie had no contractual basis for rejecting a rectification plan, then tie's actings would amount to a wrongful repudiation of the contract. However such a wrongful repudiation of the contract cannot bring the Infraco Contract to an end even if the Infraco might wish that it did so. That is because, pursuant to Clause 77.10, the Infraco cannot accept a wrongful repudiation in order to terminate the Infraco Contract.

- Subject to issues of fraud and insolvency (for which there is separate provision) and to the provision in Clause 89 for voluntary termination (which cannot apply at the present time) it would follow that the Infraco Contract can only be terminated pursuant to Clause 88 and Clause 90. Accordingly tie can only terminate the Infraco Contract if it proves an Infraco Default. Infraco can only terminate the contract if it proves a tie Default. In the absence of the foregoing both parties are locked into the Infraco Contract.
- Tie can only be sure of termination of the Infraco Contract if they can prove an Infraco Default which results in a valid notice of termination. In such an event Infraco will have to be paid for all work done to date in accordance with the terms of the Infraco Contract. Tie will only be able to recover the additional cost of completing the Infraco Works once they have carried out and completed those works. The sum which tie can then recover for the additional cost of completing the Infraco Works will be subject to the Liability Cap as specified in Clause 77.7. If tie does not complete the Infraco Works after it has terminated Infraco's engagement under the Infraco Contract tie will have no claim against Infraco. In other words the contract does not allow a claim of damages against Infraco for breach of contract even though the partially completed works for which they have been paid may be worthless in their existing form.
- The potential outcome of tie purporting to terminate the Infraco Contract by reason of an Infraco Default may be summarised as follows.

- Infraco may simply accept tie's notice of termination. Infraco then walk away from the works. In that event Infraco will be entitled to recover payment under the contract for all work done to date. Tie will not be able to recover any payment from Infraco in respect of the incomplete portion of the works unless or until tie undertakes the completion of the Infraco Works. The Infraco Works would involve the construction of the entire Edinburgh Tram Network.
- Tie issue a notice of termination and Infraco does not accept the notice of termination as valid and instead seeks to challenge it. Such a challenge would proceed by way of adjudication and then litigation. The time involved in such a process would be at least a year and could be a number of years. During the period of such adjudication and litigation tie would probably not be able to secure access to carry on the Works. Any attempt by tie to enter upon the Works while such a challenge was ongoing would probably be the subject of an application for interdict ad interim by Infraco. If Infraco maintained that tie's notice of termination was invalid and that they wished the contract to continue then it is probable that interim interdict would be pronounced against tie from entering up on the works. If Infraco's challenge was ultimately unsuccessful and tie was held to have validly terminated the Infraco Contract then matters would proceed as set out in paragraph 12.

In the event that Infraco successfully challenged the validity of tie's termination notice then not only would there be the delay envisaged above but further consequences would also follow. First, the Infraco Contract would remain valid Infraco could therefore insist on its right to complete the Infraco Works in accordance with the terms of the Infraco Contract including Schedule Part 4. Infraco would have a claim for damages measured by reference to the direct loss and expense which Infraco suffered by reason of tie's wrongful termination notice. In this context it should be noted that while the claim for common law damages is excluded upon termination of the contract such a claim is not excluded where there is a breach of contract which does not result in termination of the contract. In view of the fact that the common law claim for damages could reflect the increased cost of completing the works after the delay for litigation (potentially a number of years) the measure of the damages could be considerable. It follows that unless tie is absolutely certain of being able to serve a valid termination notice such a course of action would carry considerable risk. With particular reference to question 1.2, I would observe that a purported termination by tie on grounds which are ultimately not upheld would amount to a repudiatory breach for which Infraco would be entitled to recover damages at common law. There would however be no termination of the Infraco Contract by virtue of such a repudiatory breach, even if Infraco wished to bring about such a result.

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I turn next to consider the phrase "absolute discretion" where it appears in Clause 90.3 of the Infraco Contract. This concerns the right of tie to decline to accept a rectification plan submitted by Infraco consequent upon an RTN. Where consideration of the rectification plan is to be at tie's absolute discretion, there is a requirement that tie should act in good faith. However there is no requirement that tie's decision on such a matter should be either fair or reasonable. This is confirmed by the terms of Clause 118.1. In summary tie must give genuine consideration to a rectification plan and must decide in good faith that it is going to reject the rectification plan. Tie does not require to justify the rejection of the rectification plan as being either fair or reasonable. If however tie was to intimate in advance of a rectification plan that it had no intention of accepting it then it would not be seen to be acting in good faith and its decision to reject the rectification plan could be open to challenge.

I would agree that irrespective of the terms of any rectification plan, a termination by tie is dependent upon tie being able to prove a relevant Infraco Default and, where required by Clause 90.1.2, that there is a valid Remediable Termination Notice relevant to that particular Infraco Default. If tie fails to establish an Infraco Default then any termination notice will be invalid. If tie establishes an Infraco Default but has not served a valid RTN relevant to the Infraco Default then again the termination notice will be invalid.

THE OPINION OF RICHARD KEEN QC

Parliament House Parliament Square Edinburgh Scotland

22 November 2010

OPINION OF SENIOR COUN	USFI
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for

tie Limited

in re

EDINBURGH TRAM PROJECT

INFRACO CONTRACT

MCGRIGORS LLP

Ref: BEN/T10003.01

Appendix 2 – Opinion of Richard Keen QC dated 1 December 2010

OPINION OF SENIOR COUNSEL

for

tie Limited

in re

EDINBURGH TRAM PROJECT

INFRACO CONTRACT

- 1. I refer to the agents instructions of 10 and 16 November 2010 and to my Opinion of 22 November 2010.
- 2. I am instructed to address a particular issue with respect to the merit of certain Remediable Termination Notices issued on behalf of tie pursuant to Clause 90.1.2 of the Infraco Contract. Particular reference is made to three Remediable Termination Notices ("RTN's") namely two RTN's dated 9 August 2010 in relation to defects at Princes Street and one RTN dated 8 September 2010 in relation to the matter of design. The matter that I am instructed to address is specified as follows by the agents,

"Setting aside any issues in relation to whether the assertions set out in the RTN's are capable of being supported by factual evidence, your advice is sought on whether these RTN's are, on their terms, competent, and whether

they contain sufficient relevancy and specification to be capable of forming the foundation of any subsequent termination."

- 3. Clause 90 of the Infraco Contract addresses the matter of termination on the occurrence of an Infraco Default. An Infraco Default includes the following event, "A breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works".
- 4. Clause 90.1.2 provides that in the event of such an Infraco Default tie may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred. This is defined as a Remediable Termination Notice (RTN). Clause 90.2 then provides that following the service of a RTN the Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default in respect of which the RTN has been served.
- 5. In the event of an Infraco Default involving a breach by the Infraco of an obligation which materially and adversely affects the carrying out and/or completion of the Infraco Works, a notice from tie must meet the following requirements in order to constitute a competent RTN. First, the notice must be in writing. Second, the notice must identify the nature, which I take to mean the character or quality, of the breach of contract which has materially and adversely affected the carrying out and/or completion of the Infraco Works. Third, the specification of the breach

complained of must be sufficient to give Infraco notice of what remedial work is required in order to rectify the breach complained of.

6. The RTN's dated 9 August 2010 refer to what are described as "seriously defective works on Princes Street". It is stated at Clause 2.2 of each notice that the faults in the works pose an appreciable health and safety hazard and will severely reduce the life of the pavement. (There is also a reference to "creating further hazards" but it is not clear what this refers to). The nature of the faults relied upon are then set out at Clause 2.3.1 to 2.3.6 of each notice. Clause 2.3.1 refers to "a considerable number of locations" and Clause 2.3.2 to "many locations" where particular defects appear in the works. While the specification of those complaints might be criticised I consider that Infraco will be able to determine what rectification work was required in respect of the specified defects. I have greater difficulty with the complaints referred to in Clause 2.3.3 and Clause 2.3.4 of the notices. The former refers to work which is "unsatisfactory" and the latter to work which is "of an inadequate standard". It appears to me that such specification (or lack of it) would entitle Infraco to at least argue that the RTN did not give them fair notice of the rectification work which they were required to carry out. There are other parts of the notice which in my opinion are sufficiently specific. I would refer for example to Clause 2.3.6 which specifies that the road surfacing is not technically compatible with the track form installation in Princes Street. If however tie had to rely on only Clause 2.3.6 in order to establish that sufficient specification of an Infraco Default had been given, I would question

whether, notwithstanding the wording in Clause 2.5, such a breach did of itself materially and adversely affect the carrying out and completion of the Infraco Works.

7. I do not consider that similar problems of specification attend the RTN which was issued on 8 September 2010 in respect of the design of track works. The nature of the Infraco Default relied upon is in my opinion adequately specified at Clause 2.3 of the Notice which provides,

"Despite the Infraco having constructed approximately one kilometre of onstreet track works between Lothian Road and Waverly Bridge, the Infraco has not delivered an integrated, assured, design for these on-street track works. As a consequence, tie does not have an integrated, assured, design as it ought to have from the Infraco and tie is unable to issue a Permit to Commence Works pursuant to the Code of Construction Practice for onstreet track works."

It is in my opinion reasonably apparent that what Infraco requires to do in order to rectify the Infraco Default complained of is deliver an integrated design for the onstreet track works in order that the appropriate Permit to Commence Works for onstreet track works may be issued.

8. I would however caution that it is not entirely clear to me from the terms of the Infraco Contract that Infraco does require to have delivered an integrated design for the on-street track works as a necessary pre-requisite to the issuance of a

Permit to Commence Works. If tie are unable to establish that Infraco was obliged to deliver an integrated design before tie could issue a Permit to Commence Works for on-street track works, then there would be no relevant Infraco Default for the purposes of this RTN.

- 9. In summary, the RTN's in respect of the Princes Street works are in competent form i.e. they are in writing. The RTN's identify a relevant Infraco Default namely, an alleged breach by the Infraco of its obligations with respect to the standard of the Works. However, there are at least some respects in which these notices can be criticised for lack of specification. In particular the simple reference to work as being "unsatisfactory" or as being "of an inadequate standard" may be criticized as giving Infraco no reasonable notice of the rectification work they require to carry out in order to meet tie's complaint. I do not consider that similar criticisms of lack of specification may reasonably be leveled at the RTN in respect of design. However (and although I am not instructed to advise on this point) I would question whether Clause 2.3 of this RTN does properly identify what can be construed as an Infraco Default.
- 10. In light of the foregoing I would have to conclude that in the event of tie giving notice of termination of the Agreement in reliance upon the specified RTN's, there would be a material risk of their acting being found to be a wrongful repudiation of contract.

THE OPINION OF RICHARD KEEN QC Parliament House Parliament Square Edinburgh Scotland

1 December 2010

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for

tie Limited

in re

EDINBURGH TRAM PROJECT

INFRACO CONTRACT

1st December 2010

MCGRIGORS LLP

Ref: BEN/TI0003



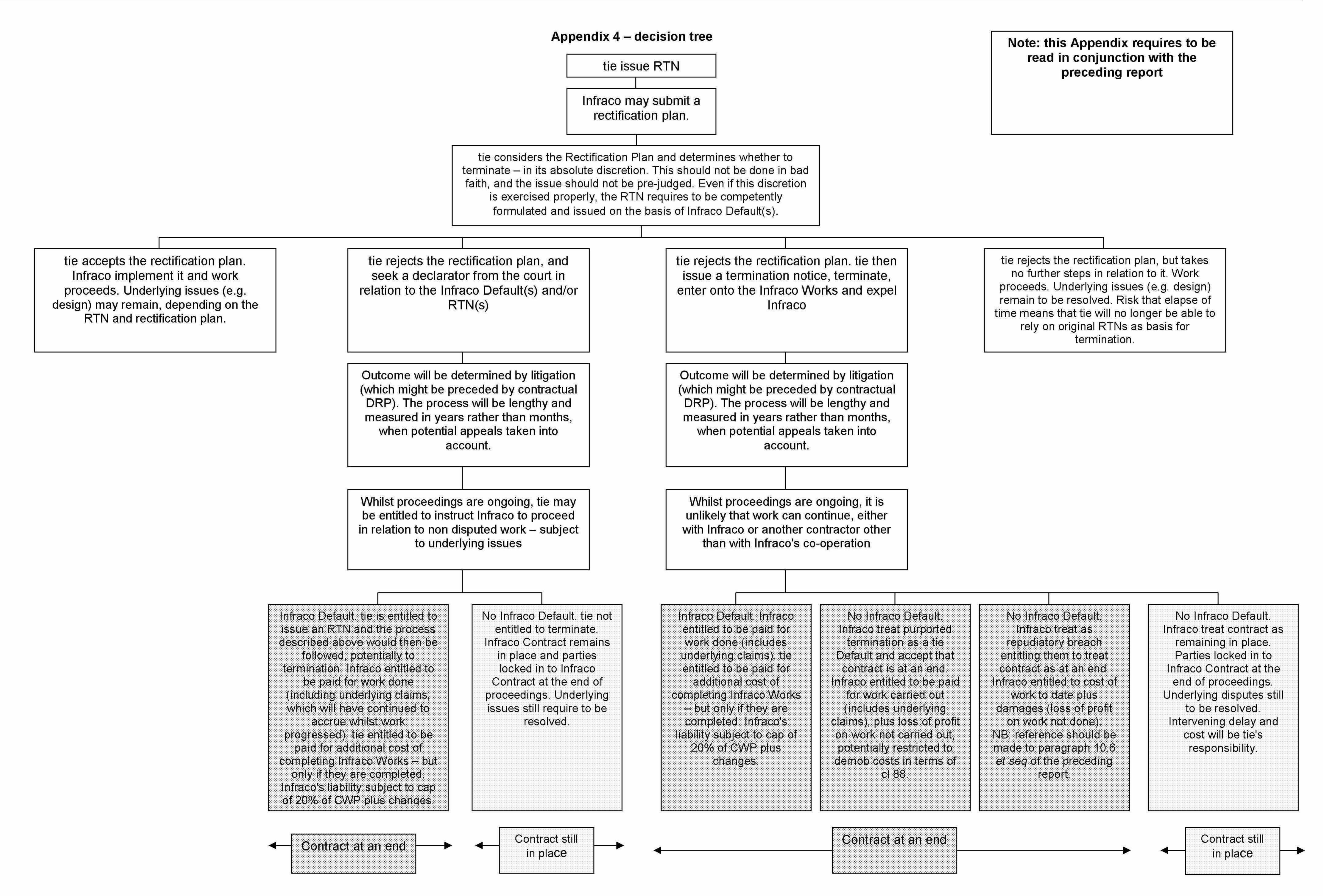
Appendix 3 – summary of RTNs

RTN	Description	Infraco Default	Rectification Plan?	Response by tie
	Princes Street (Defects)	(a) A breach by the Infraco which has a material and adverse affect on the carrying out and/or completion of the Works.		Rejected – with reasons
2	Clause 10.4 and 10.16 – Failure to Provide Extranet	(a) – as above	Yes (without prejudice to rejection of RTN)	Further information sought
3	Princes Street (Lack of Superintendence)	(a) – as above	Yes – as in RTN 1	Yes – as in RTN 1
4	Clause 60 (not updating Programme and not mitigating delay)	(a) – as above	Yes – without prejudice to rejection of RTN and only in respect of the failure to record progress properly	Rejected – with reasons
5	Bilfinger Berger/SDS Provider Minute of Agreement	(a) – as above	No – there is no agreement in place to rectify.	Notifying that further response will follow in due course
6	Design (Trackworks)	(a) – as above	Yes – without prejudice	Rejected – with reasons
	Failure to progress demolition works at Plots 97 and 102 Russell Road		No – response requests further information from tie	No response
8	Clause 80 – tie Change	(a) – as above	No – no default is identified	No response
9	Breaches evincing a Course of Conduct	(a) – as above	No – no default identified	No further response



10	Failure to manage design at	(a) – as above	No – delay is not attributable to Infraco	No response
	Gogarburn Retaining Wall W14C			
	and W14D			







Appendix 5 - summary of forensic analysis and expert input required in relation to sample RTNs

This Appendix addresses the forensic analysis and expert input required in order to enable a view to be formed on the merits of sample RTNs. This Appendix does not address issues in relation to the competence of those RTNs, which are covered in the main body of this report.

1 RTN 1

- 1.1 RTN 1 relates to allegations of "seriously defective works on Princes Street". The defects are listed at paragraph 2.3 of the RTN. There are a number of strands to the exercise that requires to be carried out:
 - (a) All relevant documentation should be identified and collated;
 - (b) Any relevant witness evidence should be obtained;
 - (c) Any relevant expert evidence should be obtained.
- 1.2 This approach should be applied both to tie's position, and Infraco's defence to it.
- 1.3 By way of example, the following matters ought to be addressed.
- The specific contractual requirements in relation to each element of each defect require to be identified: for example, what does the specification say in relation to compaction? What is said in relation to the pavement materials? What is said in relation to the existence of steps?
- 1.5 What is the evidence that these defects exist? Reference should be had to:
- 1.6 Documentary evidence: e-mails, letters, minutes, progress reports and so on;
- 1.7 Photographic evidence;
- 1.8 Witness evidence from relevant personnel.
- 1.9 This evidence should include all instances of the defects having been brought to the attention of Infraco, and their response thereto. Any attempts to rectify the issues should also be addressed.
- 1.10 How are the contractual requirements said to have been breached? There requires to be a clear understanding of the way in which the contractual requirements are said to have been breached in connection with each defect: there is a general allegation that the defects have been caused by poor workmanship, ill advised choice of materials, inappropriate design and the lack of supervision. Which of these apply to each particular defect?



- 1.11 This can only be established by collating the evidence to support the proposition that the relevant breaches took place: how does tie evidence that there was poor workmanship, both factually, and in terms of the requisite standard of care having been breached? The same point applies to the selection of materials.
- 1.12 The RTN refers to "inappropriate design" and to Infraco's obligation to exercise reasonable skill and care.

 Is it asserted that Infraco have been negligent? If so, expert opinion requires to be obtained in this respect. Is other expert opinion required to support allegations in relation to workmanship or design failings?
- 1.13 Which defects does the general allegation in relation to a lack of superintendence relate to? How is the lack of superintendence relevant to each defect? See the comments below in relation to RTN 3 in connection with the superintendence issue.
- 1.14 The defects are said to be *serious*: what is the foundation for this assertion, in relation to each defect, and how is it to be proved?
- 1.15 There is a general allegation that the defects at Princes Street pose an appreciable health risk. Which defects does this allegation relate to? What is the evidence that supports this assertion? Is expert health and safety evidence required?
- 1.16 There is a general allegation that the defects are capable of creating further hazards. Which defects does this allegation relate to? It requires to be evidenced factually and possibly also by expert evidence.
- 1.17 There is a general allegation that the life of the pavement has been severely reduced. Which defects does this allegation relate to? What is the evidence that supports this assertion? Expert evidence is likely to be required in connection with life span issues.
- 1.18 It is asserted that individually and cumulatively, the defects have materially and adversely affected the carrying out and completion of the Infraco Works. How is this said to have happened? If the impact is said to be in terms of delay to completion, a programming exercise requires to be carried out to assess the impact of each defect on the critical path both on its own, and in conjunction with the other defects complained of. This exercise cannot be carried out in isolation from the existing work stream which has been on going for some time in relation to delays to the project, and in particular whether MUDFA delays can be said to have been the dominant cause of delay for the relevant periods.
- 1.19 If the impact is not said to have arisen in terms of delay, what is the material and adverse impact, and how is it to be measured?
- 1.20 Defences raised by Infraco require to be analysed and evaluated. By way of example, the rectification plan produced by Infraco accepts that there are defects, but attributes responsibility for those defects to others. Their position requires detailed investigation. By way of further example, Infraco has asserted that



causes of the problems include heavy wear from traffic, adverse weather, a forced early opening, and so on. Each of these allegations requires to be considered.

- 1.21 Infraco have obtained their own expert opinion on various matters at Princes Street (see for example, their letter of 25.1.201/KDR/6728 of 17 September 2010); that expert evidence needs to be considered and tested both against factual material and against tie's own expert evidence.
- 1.22 In any proceedings, Infraco will not be restricted to raising defences which have already been advanced by them. Accordingly, the forensic investigation needs to ensure that all relevant material has been identified, and any other areas of defence considered.
- 1.23 In the context of this exercise, regard ought to be had to whether there is any cross over between the subject matter of the RTN and any other contractual work streams which are ongoing for example, INTCs, or disputes which have been referred to DRP.

2 **RTN 3**

- 2.1 RTN 3 is predicated on the same factual basis as RTN 1, but concludes that Infraco are called upon to replace their engineering superintendence staff. Setting aside the competence of this request, there are a number of factual issues which would require to be addressed to support this RTN. In each case, both documentary and factual evidence will be required.
- 2.2 All the contractual requirements in relation to supervision require to be established as a baseline for measuring Infraco's performance.
- 2.3 The relevant periods of complaint require to be established the RTN refers to a period between March 2009 and November 2009.
- Clarification requires to be brought to whether the complaint is one of quantity (numbers of supervisory personnel present at relevant times), or quality of supervision. It is presumed for present purposes that the complaint relates to both.
- In relation to quantity of supervision, it requires to be established what supervisory staff were on site, and when. This should be supported by documentary evidence.
- 2.6 This then needs to be plotted against work being carried out on specific days or weeks. The nature of the work being carried out also needs to be evidenced.
- 2.7 Witness evidence should be obtained in relation to whether sufficient supervision was in place, by reference to activities being carried out. Consideration should be given to whether expert evidence is required in this respect.



- The quality of the supervision also requires to be addressed: this may be by reference to the seniority and experience of the personnel involved, or evidenced by specific problems caused by their approach to supervision.
- The consequences of the failures in relation to supervision require to be specified and evidenced. In order to make out a ground of Infraco Default, there must have been a material and adverse impact on the carrying out and completion of the Infraco Works. How did the lack of supervision cause this (as distinct from the existence of any defects)?
- 2.10 If the impact is said to be a time related one, that will require to be supported by expert programming input (see comments in relation to RTN 1 above).
- There is reference to a general allegation in relation to physical health and safety hazards: is it said that the lack of superintendence caused such a hazard? If so, in what way? How is that to be evidenced? The same point applies to the allegation of the creation of further hazards and the allegation of a shortened pavement life.
- 2.12 As in connection with RTN 1, the forensic exercise requires to be undertaken not only with regard to tie's case, but with regard to defences which have been, or might be, raised by Infraco.

3 RTN 6

- The Infraco Default complained of in RTN 6 arises in relation to Infraco's alleged failure to deliver a fully integrated, assured design for the on-street trackworks at chainage 100000 to 131247.
- 3.2 A key aspect to establishing Infraco Default in this respect is the expert evidence which is being sought from Robin Blois-Brooke in relation to the on street track design.
- In order to enable Robin Blois-Brooke to produce that report, the documentary evidence necessary to enable him to form a view is being collated.
- 3.4 Beyond the exercise being undertaken by Robin Blois-Brooke, other investigations are also required.
- Each instance of Infraco's alleged failure requires to be identified, so that all relevant documentation can be compiled. Infraco's defence to these allegations requires to be interrogated in detail.
- In order to establish that an Infraco Default has occurred, there must have been a material and adverse impact on the carrying out and completion of the Infraco Works. In the case of design, that is likely to involve a detailed programming analysis being carried out. Reference is made to the comments in relation to RTN 1 above.

