

Note concerning issues of representation and conflicts of interest

Introduction

I recognise that decisions taken by the City of Edinburgh Council (“the Council”) concerning the provision of financial support and other resources to tie Limited (now CEC Recovery Limited) (“tie”) to enable it to participate in the Inquiry are matters for the Council in the exercise of its discretion, that it is for tie to decide if it is appropriate for tie to participate and that issues of potential or actual conflicts of interest are essentially matters for clients and their solicitors.

However, as I explained at the Preliminary Hearing on 6 October, I have a separate interest to assess and manage the risk that the planned progress of the Inquiry might be adversely affected (a) by the decision of the Council that tie should not participate as a separate entity in the Inquiry or have separate representation or (b) by questions of potential or actual conflicts of interest that might arise. I also have a duty to ensure as best I can that the proceedings are conducted in a manner that is fair to all involved or likely to be referred to in my Report. Having reflected upon the proceedings on 6 October, I am of the opinion that it is appropriate that I should record my understanding of the issues that ought to be considered by core participants and their solicitors before they can be said to have reached an informed decision. There may well be other facts, of which I am currently unaware, that are relevant to an informed decision; if so, these must also be disclosed to the core participant by its officials, employees or solicitors, as the case may be.

Core participants

Prior to the Preliminary Hearing it appeared from information available to the Inquiry that the greatest potential risk to the progress of the Inquiry might be posed by the non-participation of key parties and the possibility that arguments concerning conflict of interest require a legal adviser to withdraw at a late stage. Concerns about such risks arose from, first, decisions taken by the Council and potential conflicts of interest relating to it and, second, potential conflicts of interest arising from the fact that Pinsent Masons are acting for both the Council and Bilfinger Construction UK Limited (“Bilfinger”). At the Preliminary Hearing I raised my concerns with Mr. Martin QC and Mr. Borland QC, who act for the Council and Bilfinger respectively.

Before considering the issues that could have an adverse effect on progress, I wish to record that the Inquiry had no similar information about other core participants that posed any potential risk to its progress. Nevertheless, at the Preliminary Hearing I sought and obtained assurances from each of them that they were unaware of any such potential risk. In view of the importance of this question of potential conflict of interest for the conduct of the Inquiry I have decided that each core participant and their respective legal representatives must give careful consideration to whether or not it exists; if so, the nature of any potential conflict must be disclosed to those affected and an informed decision taken by all affected parties to avoid any action that could impact upon the progress of the Inquiry. Thereafter each core participant

must respond to the Solicitor to the Inquiry no later than 12 noon on 27 November in accordance with Procedure Direction No. 8 – Avoidance of the Risk of Delays to the Inquiry.

The Council

As I explained at the Preliminary Hearing, there are three separate issues of concern relating to the Council, namely the extent of counsel's instructions, the decision that tie should not participate in the Inquiry and potential or actual conflicts of interest. Each of these issues could impact upon the progress of the Inquiry.

Council's consideration

Since at least 17 February 2015 officials in the Council have been aware of my desire that both tie and the Council should take an informed decision about representation for tie and its participation in the Inquiry. While the question of the appropriate procedure for decision making is ultimately a matter for the Council itself, the sensitivity of the issue and the potential implications for elected members of any decision might suggest that it would be an appropriate matter for determination by councillors. In any event, I am unaware of any express decision of the Council prior to 20 August 2015 to delegate authority to officials to take decisions on behalf of the Council relative to the Inquiry. Since 17 February 2015 there were four meetings of the Council prior to 20 August and I suspect that there will also have been several meetings of the relevant committee that could have dealt with this issue. Despite that, it appears that the issue was not considered by councillors sitting in committee or in a Council meeting prior to 20 August. Rather by letter dated 17 July 2015 from solicitors acting for the Council and at a subsequent meeting on 20 July at the Inquiry offices it was explained that the relevant decision had not been taken in committee or at a Council meeting as the Council was in recess and senior officials had agreed a position with the Leader of the Council, the Deputy Leader and Transport Convenor. That decision was similar to the subsequent decision dated 12 August mentioned below. As I have noted above there were numerous opportunities prior to the summer recess when the matter could have been considered by elected members.

Extent of legal representation

The first issue that could affect the progress of the Inquiry arises from the decision taken on 12 August 2015 by the Lord Provost and the Chief Executive under paragraph A4 of the Council's Committee Terms of Reference and Delegated Functions that:

"ii The Council will fund legal advice from an independent law firm to all those current and former Council employees and elected members who are asked by the Inquiry to provide a statement and who wish to have that advice in relation to the provision of their statement. The question of funding of any further legal advice or representation for current and former Council employees and elected members will be considered on a case by case basis as the Inquiry progresses."

The Council is a statutory body consisting of the Lord Provost as convener and elected members (councillors). As Mr Martin properly stated at the Preliminary

Hearing, it bears legal responsibility for acts done by its elected members, officials and others with authority on its behalf. (See transcript page 34 line 17 to page 35 line 9). This is known as vicarious liability. There are very limited circumstances in which the Council can distance itself from decisions or actions taken on its behalf by councillors, officials or others and thereby avoid vicarious liability. The result of this is that the interests of the Council will not differ from those of the person(s) for whom it is responsible. For that reason the normal course of action for any local authority, or indeed any employer, would be to include within its own legal representation at any Inquiry or in any court proceedings all those for whom it had vicarious liability. Apart from any legal consideration, the use of the same legal representatives for councillors, officials and others for whom it is vicariously liable will avoid the risk of duplication of the efforts of the Council's internal and external legal advisers. This, in turn, will avoid the consequent additional expense that will be incurred if the Council funds legal advice from an independent legal firm.

Paragraph 3.21 of the Report to Council for its meeting on 20 August 2015 states:

“No decision has been taken by CEC about the extent to or circumstances in which current or former elected members and employees may be subject to criticism by CEC.”

Mr. Martin confirmed that “the Council has not decided that anyone is to be criticised”. (See transcript page 36 lines 8/9). In these circumstances, it respectfully seems to me that the interests of the Council and those of current and former employees and Councillors coincide and therefore there is no sensible justification for the wholesale funding of independent legal advice to prospective witnesses associated with the Council, who wish legal advice. The answer, at pages 36 and 37 of the transcript, that the Council is attempting to be even-handed when it is currently unaware of the position that it may adopt at a later stage does not bear scrutiny. It suggests that the Council is unaware of its position in relation to the failures in the tram project, despite being its promoter and one of the principal funders throughout and since 2011 having direct responsibility for its completion. Furthermore, the Council's approach also apparently fails to take into account the obligation to safeguard public funds that was recognised by the Lord Provost and the Chief Executive at paragraph (h) of their decision dated 12 August.

Participation in the Inquiry by tie

The second issue that could affect the progress of the Inquiry relates to the delegated decision of the Council dated 12 August 2015 and noted by the Council on 20 August 2015 that tie should not participate as a separate entity or have separate representation in the Inquiry. It is also apparent that the offer to make available legal representation to individuals does not apply for former employees or officers of tie. This is notwithstanding the decision that must have been taken by the Council that tie should remain in existence as a separate legal entity, subject to a change of name. Tie was one of the principal parties involved in the tram project and since it is still a legal entity distinct from the Council with different obligations and different interests one might reasonably have expected that it would apply to be a core participant to enable it to play a significant role in the Inquiry. This would be by suggesting lines of evidence, responding to any criticism of it and by making a

closing submission responding to other closing submissions that are critical of it and, perhaps, diverting such criticism to other quarters or even criticising others.

Having regard to the role played by tie in the tram project it appeared to me from the outset of the Inquiry that tie had an important contribution to make in assisting the Inquiry in the manner specified in the preceding paragraph, as do the other parties who were actively involved in the delivery of the project. Without wishing to prejudge the evidence that will be given to the Inquiry, I cannot discount the possibility that the relationship between tie and the Council will come under some scrutiny. Tie's participation as a core participant would ensure that the Inquiry had available to it the perspective of tie as well as that of those critical of it, thereby ensuring that I was better able to form a balanced view of tie's actions. By its delegated decision taken on 12 August, noted by the Council on 20 August, the Council has prevented tie from participating in the Inquiry because I may only designate a person as a core participant with the consent of that person, usually in the form of an application for core participant status (Rule 4 of the Inquiries (Scotland) Rules 2007). It has also been confirmed by the sole director of tie, a senior official of the Council, that it will not participate. This latter decision is not surprising as the company is wholly owned by the Council and has not been allocated funding by the Council to enable it to participate.

In 2002 the Council incorporated tie as a wholly owned subsidiary of the Council and, following the enactment of the Edinburgh Tram Acts in 2006, it delegated to tie authority to enter into the contracts necessary for the construction of the tram project. The Council and tie are distinct legal entities, having their own rights and obligations and although tie has been dormant since November 2011, it is still in existence and able to issue instructions to solicitors. It is involved in two separate actions in the Court of Session which were raised in 2013. In order to assess the risk to the progress of the Inquiry but without prejudicing any prospective claims of legal privilege, the Solicitor to the Inquiry wrote a letter dated 25 September 2015 to Pinsent Masons posing certain questions (Appendix 1). By letter dated 5 October a partial response was received (Appendix 2). By letters dated 20 October received from Pinsent Masons and Morton Fraser (Appendix 3 and 4) further information was provided about these actions.

The first action (A299/13) was raised against tie by the Council. The Council was represented by Pinsent Masons, solicitors, in raising that action. The partner in Pinsent Masons who acted for the Council was Brandon Nolan. He was supported by Simona Williamson, a Legal Director and former Senior Associate, as well as by a team of more junior lawyers. The summons was served by messengers at arms, Walker Love, on 9 May 2013. Tie instructed Morton Fraser solicitors to enter appearance on its behalf. They did so on 16 May 2014 when the action was lodged for calling. That action is currently sisted.

Tie has also raised an action (A301/13) against DLA Piper Scotland LLP. In raising this action tie was represented by Pinsent Masons, solicitors. The partner in Pinsent Masons who acted for tie was Brandon Nolan. He was supported by Simona Williamson, a Legal Director and former Senior Associate, as well as by a team of more junior lawyers. The summons was served by messengers at arms, Walker Love, on 9 May 2013. That action is also sisted. In both actions tie must presumably

have instructed solicitors in relation to the motions to sist irrespective of who enrolled the relevant motions.

The nature of the action by the Council against tie has not been disclosed, as the contents of the summons are at this stage protected by legal privilege and the Council have made it clear that they wish to invoke this. However, even without such disclosure it is possible to ascertain the subject matter and the nature of that action. The projects in which tie were involved were the Edinburgh Airport Rail Link (EARL), the Stirling-Alloa-Kincardine railway (SAK) and the Edinburgh tram project. The Council had no direct relationship with tie about EARL as that was a project to be promoted by the Scottish Government. In any event that project was abandoned in 2007, following the election of the minority government of the Scottish National Party. SAK concerned a project affecting local authorities other than the Council and the Council would have no interest to litigate about that. Thus the subject matter of the action by the Council against tie must relate to the tram project. From the court reference number, it is also possible to deduce that this is an ordinary action. In an ordinary action relating to a construction project, various remedies are possible, including enforcing specific performance of obligations to fulfil the terms of the contract, obtaining an interdict against carrying out certain works, challenging decisions of adjudicators and seeking an award of damages for an alleged breach of some legal relationship between the parties. As the project has been completed, albeit to a more limited extent than originally planned by the Council, it is possible to exclude specific implement and interdict as the remedies in this case. Moreover, as a compromise agreement was reached at Mar Hall in 2011 involving the Council, tie and Bilfinger, the action cannot be founded upon a challenge of adjudicators' decisions. Thus I have concluded that the only basis for this action can be an action of damages for an alleged breach of some legal relationship between the Council and tie and relating to the tram project.

The presumed nature of the action and its relationship to the tram project is significant for two reasons. First, the solicitors instructed by tie to defend that action cannot assume that the court will continue to assent to motions to sist the action, even if they are unopposed. In the letter dated 20 October Morton Fraser state that they continue "to be instructed on behalf of [tie] to deal with the procedural aspects of the action". As I have observed they entered appearance on behalf of tie, which is an indication that tie intends to defend the action. They have also assented to motions to sist the action, presumably on the instructions of tie. Solicitors engaged in litigation in the Court of Session will be aware that the court expects parties to progress actions with appropriate expedition. Before granting a motion to sist an action the court will require to be satisfied that there is sound justification to do so. Justifiable reasons might include necessary delays to enable the determination of a legal aid application, the conduct of settlement negotiations or the completion of investigations to enable defences to be drafted and lodged or, if it is at a later stage in the action, to enable pleadings to be adjusted or amended. In this case legal aid cannot be an issue; nor can the prospect of negotiations for settlement where tie is wholly owned by the Council, as the Council could simply accede to its own demands. Indeed if the issue were simply one of negotiation between the Council and its wholly owned subsidiary, litigation would be unnecessary. It would appear that the only justification for this action being sisted at this stage is to enable tie's solicitors to investigate matters prior to lodging defences. In responding to the Council's claims against it, tie may also wish to explore the possibility of blaming a

third party for any breach of tie's obligations towards the Council in an effort to pass responsibility to the third party for any failures by tie towards the Council, thus enabling the Council to recover damages indirectly from the third party that it would otherwise be unable to recover from it.

Even if the object of the action is to seek to recover damages from a third party through the medium of tie, the first requirement is for tie's solicitors, as opposed to the Council's solicitors, to investigate the Council's claims against tie and the extent to which the responsibility for the consequences of any alleged breach of a legal relationship between the Council and tie can be transferred to a third party. Those investigations are a prerequisite of the preparation of defences by tie to the action that the Council has raised against it that are anything other than skeletal. Any other arrangement involving the Council's solicitors might call into question the bona fides of the Council's action against tie and could amount to an abuse of process.

Thus, the involvement of tie in defending the action imposes obligations on Morton Fraser, as its independent solicitors, to the court and to their client. It involves tie in much more than merely "assenting" to the individual legal acts that would be necessary in the context of legal proceedings which have gone no further than simple calling and then sisting", as Mr. Martin suggested. (See transcript page 52 lines 10 to 20). Rather what is required in the context of litigation is similar to what the Council has asserted that tie could not do without being "revived". It has already given instructions to defend the action and to agree to the action being sisted without being revived. If this action is genuine and not a fraud on the court, tie will require to instruct investigations, similar to those required for the Inquiry, if such instructions have not already been issued.

Tie has also raised an action in the Court of Session against DLA Piper LLP (A301/13). This too will have necessitated tie in instructing solicitors to commence proceedings and to enrol motions to sist the action or to agree to such motions enrolled on behalf of the other party.

The factual position of the ability and necessity of tie to instruct solicitors to defend the action at the instance of the Council, as well as its ability simultaneously to instruct solicitors to raise the action against DLA Piper, and presumably to incur the costs of investigation, is in stark contrast to the understanding of the Chief Executive and the Lord Provost about the need to "revive" the company by appointing other officers and about tie's inability to instruct solicitors in connection with participation at this Inquiry. (See delegated decision paragraphs 3.12 to 3.14). In fairness to the Lord Provost and to the recently appointed Chief Executive I assume that they were relying on information provided to them by other officials. It does not appear from the narrative in the delegated decision that the Lord Provost and Chief Executive were made aware of the existence of either of the court actions, particularly the action by the Council against tie or the implications of those actions for tie's ability to instruct solicitors without being "revived".

The second significance of the action by the Council against tie is that it has a bearing upon the issue of conflict of interest between the Council and tie. That, in turn, affects the perception of the Council's ability to act with impartiality when it considered the question of tie's participation in the Inquiry as a core participant. As I observed at the Preliminary Hearing, it appears from investigations so far by the

Inquiry team that at least as early as 2010, senior officials of the Council, including senior members in the Council's legal department, considered that there was a possibility of a potential conflict of interest between the Council and tie. (See transcript page 47 line 17 to page 48 line 3). The effect of the action by the Council against tie is that it crystallises that perception into a reality. Thus by 2013 there existed an actual conflict of interest between the Council and tie. The action is still current, thereby maintaining the existence of that conflict but it is sufficient to note that the action was current at the date of the delegated decision and the Council meeting on 20 August when that decision was noted and certain actions were approved by the Council relating to the Inquiry. It is difficult to imagine a clearer example of a conflict of interest between two parties than a court action where one is seeking a remedy against the other based upon an alleged breach of duty arising out of the subject matter of the dispute. That conflict is underlined by the fact that it would be contrary to the professional obligations of counsel and solicitors to act for both parties in such a dispute, even where one of the parties can exercise control over the other. Neither the delegated decision nor the Report to the Council meeting mention the action or the existence of any potential or actual conflict of interest between the Council and tie arising from that action. The relationship between the Council and tie and the coincidence of interest between them, mentioned by Mr. Martin at pages 57 and 58 of the transcript, do not seem to me to be an answer to a conflict of interest arising from litigation in which the Council is suing tie.

As I note above, paragraph 3.21 of the Report to the Council meeting dated 20 August states that:

"No decision has been taken by CEC about the extent to or circumstances in which current or former elected members and employees may be subject to criticism by CEC."

Paragraph 3.25 contains a similar statement in respect of former tie employees. I note that no similar statement is made in respect of tie, presumably because the Council is, in fact, criticising tie in the court action. Paragraph 3.10 deals with the Council's position that tie will not participate in the inquiry but that the Council will assist the Inquiry by providing information to it about tie. This paragraph concludes with the following sentence:

"This will not preclude the Council from taking a position in the Inquiry which is critical of any person or organisation."

If the Council is critical of tie in the court action or if it intends to criticise tie at the Inquiry, as might be the implication in the final sentence of paragraph 3.10, the decision to prevent tie from responding to such criticism as a core participant seems to be contrary to basic principles of fairness that underpin our legal system. Surely someone accused of breaches of duty or other failures is entitled to answer such accusations. The denial of the right of response to an accusation is compounded where that right is effectively denied by the accuser. There is also the possibility that, given the opportunity to do so, tie might offer criticism of the Council. Thus the existence of the conflict and the control exercised by the Council over tie are relevant to the perception of the fairness or otherwise of the Council's actions in preventing tie from participating as a core participant.

The suggestion by the Council at paragraph 3.10 of the Report that “it has used and will continue to use all proper endeavours to assist the Inquiry and provide information to it in relation to the role of tie” is no substitute for tie’s participation. Presumably in using its best endeavours to assist the Inquiry the Council will not highlight any criticisms of the Council that tie might have advanced if it had been allowed to participate in the Inquiry.

Pinsent Masons LLP

The issue of potential conflict of interest, as it affects the Council and Bilfinger, arises in the different context of the identity of their legal representatives. Apart from the Council solicitor and members of her department, the Council has instructed Pinsent Masons LLP, solicitors, as part of the legal team representing the Council at the Inquiry. Bilfinger has also instructed Pinsent Masons as its solicitors at the Inquiry.

During the tram project McGrigors, solicitors, acted for tie in connection with various matters, including adjudications and the mediation at Mar Hall in 2011 arising from disputes between tie and Infracore, a consortium including Bilfinger, who had contractual obligations to construct the tram line. Pinsent Masons represented Bilfinger throughout the project, including at the mediation where McGrigors represented not only tie but also the Council. In 2012 Pinsent Masons took over the firm of McGrigors. Since then, Pinsent Masons have continued to act for Bilfinger, the Council and tie about different issues arising from the tram project, including acting for tie in the action against DLA Piper and simultaneously acting against tie in the action at the instance of the Council.

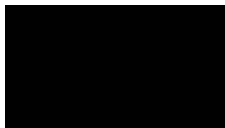
Mr. Martin relied upon the fact that any dispute between Bilfinger and the Council was resolved in 2011 at the time of the mediation and that no dispute or current litigation exists between them, as well as the consent of the Council that Pinsent Masons could continue to act for Bilfinger and the Council at the Inquiry. Mr. Borland, on behalf of Bilfinger, made similar submissions and confirmed that Bilfinger also consented to Pinsent Masons acting for both parties to the Inquiry.

My concern is not that past disputes have been settled as a result of adjudications and the mediation but rather that the Inquiry may well explore in evidence the reasons for such disputes, the decisions in the adjudications and the circumstances and terms of the mediation. These are central to my terms of reference. Such an exploration will raise issues that parties have resolved and may even wish to forget. The reality is that the scrutiny of the Inquiry will resurrect the causes of the disputes, resulting in a real risk that parties might seek to exculpate themselves by blaming others. It is not inconceivable that the Council, either on its own account or in providing information about the role of tie, will seek to blame Bilfinger and vice versa. Any evidence critical of any core participant or other party involved in the project, if it is accepted by me, might have adverse implications for the reputation and professional standing of those criticised. If any such evidence is provided by Bilfinger or the Council, even in its “representative capacity” for tie, I anticipate that there is a real possibility that issues of potential conflicts of interest could arise as a result of the same firm of solicitors acting for both parties.

In making the above observations, I have taken into account Mr. Borland's statement that, following the take-over of McGrigors, Pinsent Masons put in place arrangements so that the teams of solicitors acting for the Council and Bilfinger respectively are, in effect, operating as separate and distinct legal firms. While such arrangements are recognised as appropriate to maintain the confidentiality of the respective clients of a firm and might address the concern of conflict between a former client and a current one, different considerations might apply where the same firm is acting for two clients with conflicting interests at the same time in connection with the same issue. The firm, as opposed to its individual partners, owes to each client fiduciary duties, the most notable feature of which is a duty of loyalty. If either client adopts a position of blaming the other for delays, increased costs or other failures in the tram project, how can its solicitors pursue that fiduciary duty of loyalty to it without traducing the duty of loyalty to the other client?

Conclusion

I have raised the above issues now so that core participants and others, who might be affected by them, can consider them and decide what, if any, action they wish to take in advance of the commencement of oral hearings in public.



Lord Hardie,

28 October 2015

Appendix 1

Letter dated 25 September 2015 from the Solicitor to ETI to Pinsent Masons

Appendix 2

Reply dated 5 October 2015 from Pinsent Masons to the Solicitor to ETI

Appendix 3

Letter dated 20 October 2015 from Pinsent Masons to the Solicitor to ETI

Appendix 4

Letter dated 20 October 2015 from Morton Fraser to the Solicitor to ETI

Brandon Nolan
Pinsent Masons LLP
141 Bothwell Street
Glasgow
G2 7EQ

Your ref: 63508115.11\swilliamso\ED0385.07036

25 September 2015

By e-mail only : *brandon.nolan@pinsentmasons.com*

Dear Mr Nolan

**EDINBURGH TRAM INQUIRY – PRELIMINARY HEARING
CITY OF EDINBURGH COUNCIL**

You wrote on 13 August 2015 helpfully enclosing a copy of the report prepared for the Council meeting on 20 August seeking endorsement of the position adopted regarding participation at the Edinburgh Tram Inquiry. That report refers at paragraph 3.8 to a “hive-up agreement” entered into in September 2011. We have been unable to trace a copy of such a document in the papers supplied by the Council to the Inquiry, although these papers do include a copy of an agreement between TiE Ltd and City of Edinburgh Council which is described as a Hive-Up Agreement but is dated 9 November 2011. The 20 August Report infers that Transport Edinburgh Limited might also be a party to the Agreement but it is not a party to the Agreement dated 9 November 2011 that we have seen. Our searches of the material supplied to date have not disclosed the existence of any other similar Agreements although the terms of the 20 August Report might suggest that there is another Agreement.

It is possible that Lord Hardie may raise this matter with Counsel appearing on behalf of the Council at the Preliminary Hearing and I thought that you might wish to have advance notice of this issue, since clearly there is nothing to be gained in such issues be raised without advance notice.

Lord Hardie may also wish to explore with your Counsel certain matters relating to the Actions currently before the Court of Session between City of Edinburgh Council, TiE Ltd and DLA Piper Scotland LLP. These are issues that have at least in general terms been discussed with you previously.

To assist your preparations for the Hearing I attach a note of the issues that we anticipate that Lord Hardie may wish to raise. Some of the issues are probably best answered with advance notice rather than relying on Counsel providing the information orally in the course of the hearing.

I should say of course that in drawing these matters to your attention now it should not be assumed that Lord Hardie will raise no further issues with your Counsel. However I hope that this is of some assistance to you.

Yours sincerely

A solid black rectangular box used to redact the signature of Gordon McNicoll.

GORDON McNICOLL
Solicitor to the Edinburgh Tram Inquiry

1. Having regard to the Report for Item 8.1 of the agenda for the meeting of the Council on 20 August 2015 please confirm that the “hive up agreement” mentioned in paragraph 3.8 as having been entered into in September 2011 is in fact the agreement dated 9 November 2011 produced to the Inquiry and stated to be the relevant hive up agreement?
2. If the answer to the preceding question is in the negative, please produce a copy of the hive up agreement mentioned in paragraph 3.8 of the Report?
3. Which firm of solicitors, and individual named solicitor(s), acted for each of the parties to the hive up agreement?
4. Please provide the following information about the Court of Session action (A299/13) raised by CEC against Tie Limited which called on 16 May 2014:
 - (a) the date, place and method of service of the Summons upon the defenders;
 - (b) the name of the firm of solicitors and of the individual solicitor(s) who acted for CEC in raising the action;
 - (c) the name of the firm of solicitors and of the individual solicitor(s) who acted for Tie Limited in entering appearance in the action on behalf of the defenders;
 - (d) the date on which appearance was entered;
 - (e) do the same solicitors continue to act for each of the parties respectively?
 - (f) have any motions been enrolled and interlocutors pronounced?;
 - (g) if so, please provide details of the dates and terms of the motions and interlocutors;
 - (h) who instructed (and, if appropriate, continues to instruct) the respective solicitors?

5. Please provide the following information about the Court of Session action (A301/13) raised by Tie Limited against DLA Piper Scotland LLP which called on 16 May 2014:

- (a) the date, place and method of service of the Summons upon the defenders;
- (b) the name of the firm of solicitors and of the individual solicitor(s) who acted for Tie Limited in raising the action;
- (c) the date on which appearance was entered;
- (d) do the same solicitors continue to act for Tie Limited?;
- (e) have any motions been enrolled and interlocutors pronounced?;
- (f) if so, please provide details of the dates and terms of the motions and interlocutors;
- (g) who instructed (and, if appropriate, continues to instruct) the solicitors acting for Tie Limited?

BY EMAIL AND POST

STRICTLY PRIVATE & CONFIDENTIAL
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Our Ref SMW/BEN/ED0385.07036

DDI [REDACTED]

E brandon.nolan@pinsentmasons.com

05 October 2015

Dear Mr McNicoll

**EDINBURGH TRAM INQUIRY
THE CITY OF EDINBURGH COUNCIL ("CEC")
PRELIMINARY HEARING**

Thank you for your letter of 25 September 2015, the terms of which are noted.

Hive-up agreements

In relation to the issues raised in relation to the hive-ups, there are two hive-up agreements as follows:

- Hive-up agreement between tie Limited and CEC dated 9 November 2011
- Hive-up agreement between Transport Edinburgh Limited and CEC dated 9 November 2011

The reference in the report to the hive-up agreement being dated in September 2011 is an error, and should have referred to November 2011.

McGrigors LLP acted on behalf of CEC in relation to both hive-up agreements which was part of the process of winding down the operations of tie Limited and Transport Edinburgh Limited. Consistent with the usual approach taken to internal reorganisations of this type tie Limited and Transport Edinburgh Limited were not separately represented. The partner of McGrigors acting in the matter was Kevin Devanny, supported by a team of more junior lawyers.

Actions

Both of the actions which you refer to were sisted following calling with no defences having been lodged and the actions remain sisted as a result of a series of consensual motions. The actions are covered by privilege and are confidential to the parties. However, the following information is in the public domain by virtue of the court process in respect of the sists to date (the numbering below correlates with the note of issues enclosed with your abovementioned letter):

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For a full list of our locations around the globe please visit our website: www.pinsentmasons.com



The City of Edinburgh Council v tie Limited (A299/12)

4(b) Pinsent Masons LLP.

4(e) Pinsent Masons LLP acted for CEC in respect of the motions which have been enrolled and which are referred to in 4(g) below.

4(f) Yes.

4(g) (i) An unopposed motion enrolled by Pinsent Masons LLP on behalf of CEC was granted on 20 May 2014.

(ii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of CEC was granted on 13 November 2014.

(iii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of CEC was granted on 11 May 2015.

tie Limited v DLA Piper Scotland LLP (A301/13)

5(b) Pinsent Masons LLP.

5(d) Pinsent Masons LLP acted for tie Limited in respect of the motions which have been enrolled and which are referred to in 5(f) below.

5(e) Yes.

5(f) (i) An unopposed motion enrolled by Brodies LLP on behalf of DLA Piper Scotland LLP was granted on 22 May 2014.

(ii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 11 July 2014.

(iii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 28 August 2014.

(iv) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 23 October 2014.

(v) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 28 November 2014.

(vi) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 2 February 2015.

(vii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 2 April 2015.

(viii) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 5 June 2015.

(ix) An unopposed motion enrolled by Pinsent Masons LLP on behalf of tie was granted on 7 August 2015.

Yours faithfully

Brandon Nolan

Partner

for Pinsent Masons LLP

BY EMAIL AND POST

Our Ref SMW/BEN/ED0385.07036

Gordon McNicoll
Solicitor to the Edinburgh Tram Inquiry
Floor 1, Waverley Gate
2-4 Waterloo Place
Edinburgh
EH1 3EG

DDI [REDACTED]

E brandon.nolan@pinsentmasons.com

20 October 2015

Dear Sirs

**EDINBURGH TRAM INQUIRY ("THE INQUIRY")
THE CITY OF EDINBURGH COUNCIL ("CEC")
PRELIMINARY HEARING**

Thank you for your letter of 13 October 2015.

We have obtained the consent of the solicitors representing tie Limited and DLA Piper Scotland LLP to the provision to you of the answers to the outstanding questions raised in your letter of 25 September 2015.

Morton Fraser LLP, on behalf of tie Limited, have produced a letter setting out answers to the outstanding questions in section 4 in relation to which tie is able to assist. They are content for us to lodge that letter with you, and a copy is attached.

CEC's answers to questions 4 and 5 are set out in the undernote to this letter. CEC is content both for this letter and our letter of 5 October 2015 to be published on the Inquiry's website.

The provision of the answers and the publication of our above mentioned letters is under full reservation of privilege and confidentiality in respect of the subject matter of the actions referred to in the answers set out below.

Yours faithfully



Brandon Nolan
Partner
for Pinsent Masons LLP

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Undernote:

The numbering below refers to the numbering in the undernote to your letter of 25 September 2015.

4. ***Please provide the following information about the Court of Session action (A299/13) raised by CEC against Tie Limited which called on 16 May 2014:***

- (a) *the date, place and method of service of the Summons upon the defenders*

The summons was served by messengers at arms, Walker Love, on Hugh Dunn, director of tie Limited at tie's then registered office at City Chambers, High Street, Edinburgh, EH1 1YJ on 9 May 2013 (see also letter attached from Morton Fraser LLP).

- (b) *the name of the firm of solicitors and of the individual solicitor(s) who acted for CEC in raising the action*

Pinsent Masons LLP acted for CEC in raising the action. The partner acting was Brandon Nolan, supported by Simona Williamson (a Legal Director, formerly a Senior Associate) and a team of more junior lawyers.

- (c) *the name of the firm of solicitors and of the individual solicitor(s) who acted for Tie Limited in entering appearance in the action on behalf of the defenders*

Please see letter attached from Morton Fraser LLP.

- (d) *the date on which appearance was entered*

Appearance was entered on 16 May 2014 (see also letter attached from Morton Fraser LLP).

- (e) *do the same solicitors continue to act for each of the parties respectively?*

Pinsent Masons LLP continue to act for CEC.

Brandon Nolan continues to be the partner acting at Pinsent Masons LLP, supported by Simona Williamson (a Legal Director, formerly a Senior Associate) and a team of more junior lawyers.

Please see letter attached from Morton Fraser LLP in relation to tie.

- (f) *have any motions been enrolled and interlocutors pronounced?*

A number of motions have been enrolled by CEC of consent, and interlocutors pronounced, sisting the action. Please also see letter attached from Morton Fraser LLP.

- (g) *if so, please provide details of the dates and terms of the motions and interlocutors*

- (i) Unopposed motion enrolled on behalf of CEC on 20 May 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C and thereafter to sist the cause for a period of 6 months."

- (ii) Interlocutor dated 20 May 2014 issued in the following terms:



"The Lord Ordinary, on the unopposed motion of the Pursuer, dispenses with the period of intimation in terms of Rule of Court 23.1C and thereafter Sists the cause for a period of 6 months from today to allow investigations to take place."

- (iii) Unopposed motion enrolled on behalf of CEC on 13 November 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 20 November 2014 and thereafter grant a further sist for a period of 6 months until 20 May 2015."

- (iv) Interlocutor dated 13 November 2014 issued in the following terms:

"The Lord Ordinary, on the unopposed motion of the pursuers and of consent, dispenses with the usual requirements of intimation; recalls the sist granted 20 May 2014 and thereafter re-sists the cause for a period of six months until Wednesday 13 May 2015 to allow for investigations."

- (v) Unopposed motion enrolled on behalf of CEC on 11 May 2015 in the following terms:

"Of consent, to recall the sist which is due to expire on 13 May 2015 and thereafter grant a further sist for a period of 6 months until 13 November 2015."

- (vi) Interlocutor dated 11 May 2015 issued in the following terms:

"The Lord Ordinary on the unopposed motion of the pursuer, on cause shown, recalls the sist granted on 13 November 2014 and thereafter re-sists the cause for a period of six months until 13 November 2015."

Please also see letter attached from Morton Fraser LLP.

- (h) *Who instructed (and, if appropriate, continues to instruct) the respective solicitors?*

City of Edinburgh Council: Carol Campbell, Head of Legal and Risk

tie Limited: Hugh Dunn, director – please also see letter attached from Morton Fraser LLP

5. ***Please provide the following information about the Court of Session action (A301/13) raised by Tie Limited against DLA Piper Scotland LLP which called on 16 May 2014:***

- (a) *the date, place and method of service of the Summons upon the defenders*

The summons was served by messengers at arms, Walker Love, on DLA Piper Scotland LLP at their registered office at Collins House, Rutland Square, Edinburgh EH1 2AA on 9 May 2013.

- (b) *the name of the firm of solicitors and of the individual solicitor(s) who acted for Tie Limited in raising the action*

Pinsent Masons LLP acted for tie Limited in raising the action. The partner acting was Brandon Nolan, supported by Simona Williamson (a Legal Director, formerly a Senior Associate) and a team of more junior lawyers.

- (c) *the date on which appearance was entered*



Confirmation was given on 13 May 2014 By Brodies LLP, solicitors appointed for DLA Piper Scotland LLP, that appearance would be entered. The precise date on which that appearance was entered is not known.

- (d) *do the same solicitors continue to act for Tie Limited?*

Yes

- (e) *have any motions been enrolled and interlocutors pronounced?*

A number of motions have been enrolled by tie of consent, and interlocutors pronounced, sisting the action.

- (f) *if so, please provide details of the dates and terms of the motions and interlocutors*

- (i) Unopposed motion enrolled on behalf of DLA on 22 May 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C and thereafter to sist the cause for a period of 6 months."

- (ii) Interlocutor dated 22 May 2014 issued in the following terms:

"The Lord Ordinary on the unopposed motion of the defenders, on cause shown and of consent, dispenses with the normal requirements of intimation and sists the cause for a period of eight weeks from today's date until 17th July 2014 to allow discussions between parties to continue."

- (iii) Unopposed motion enrolled on behalf of tie on 11 July 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 17 July and thereafter grant a further sist for a period of 8 weeks until 1 September 2014."

- (iv) Interlocutor dated 11 July 2014 issued in the following terms:

"The Lord Ordinary, on the motion of the Pursuers, of consent, dispenses with the period for the intimation of motions, in terms of Rule of Court 23.1C; recalls the sist granted on 22 May 2014 and of new sists the cause until 1 September 2014 to allow parties to undertake further investigation and enquiry."

- (v) Unopposed motion enrolled on behalf of tie on 28 August 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 1 September 2014 and thereafter grant a further sist for a period of 8 weeks until 27 October 2014."

- (vi) Interlocutor dated 28 August 2014 issued in the following terms:

"The Lord Ordinary, on the motion of the pursuers, of consent, dispenses with the period for the intimation of motions, in terms of Rule of Court 23.1C; recalls the sist granted on 11 July 2014 and of new sists the



cause until 27 October 2014 to allow parties to undertake further investigation and enquiry."

- (vii) Unopposed motion enrolled on behalf of tie on 23 October 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 27 October 2014 and thereafter grant a further sist for a period of 5 weeks until 1 December 2014."

- (viii) Interlocutor dated 23 October 2014 issued in the following terms:

"The Lord Ordinary, on the unopposed motion of the pursuer, on cause shown and of consent, dispenses with the usual period of intimation set out in Rule of Court 23.1C continues the period of sist in the action for a further period of five weeks from today's date until 01 December 2014."

- (ix) Unopposed motion enrolled on behalf of tie on 27 November 2014 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 1 December 2014 and thereafter grant a further sist for a period of 10 weeks until 2 February 2015."

- (x) Interlocutor dated 28 November 2014 issued in the following terms:

"The Lord Ordinary, on the unopposed motion of the pursuers, on cause shown, dispenses with the normal requirements of intimation, recalls the sist granted on 23 October 2014; thereafter, sist the cause of new for a further period of 10 weeks until 2 February 2015 for investigations."

- (xi) Unopposed motion enrolled on behalf of tie on 2 February 2015 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 2 February 2015 and thereafter grant a further sist for a period of 9 weeks until 6 April 2015."

- (xii) Interlocutor dated 2 February 2015 issued in the following terms:

"The Lord Ordinary, on the motion of the pursuer, of consent and on cause shown, dispenses with the normal requirements of intimation; sists the cause for a further period of nine weeks, until 6 April 2015, for investigations."

- (xiii) Unopposed motion enrolled on behalf of tie on 2 April 2015 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 6 April 2015 and thereafter grant a further sist for a period of 2 months until 8 June 2015."

- (xiv) Interlocutor dated 2 April 2015 issued in the following terms:

"The Lord Ordinary on the unopposed motion of the pursuers, further sists the cause until 8 June 2015 for investigations."



- (xv) Unopposed motion enrolled on behalf of tie on 2 June 2015 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 8 June 2015 and thereafter grant a further sist for a period of 2 months until 10 August 2015."

- (xvi) Interlocutor dated 5 June 2015 issued in the following terms:

"The Lord Ordinary, on the unopposed motion of the pursuers, on cause shown, recalls the sist granted on 2 April 2015; thereafter, sists the cause of new for a further period of two months until 10 August 2015."

- (xvii) Unopposed motion enrolled on behalf of tie on 6 August 2015 in the following terms:

"Of consent, to dispense with the period of intimation in terms of Rule of the Court of Session 23.1C, and then to recall the sist which is due to expire on 10 August 2015 and thereafter grant a further sist for a period of 8 months until 11 April 2016."

- (xviii) Interlocutor dated 7 August 2015 issued in the following terms:

"The Lord Ordinary, on the unopposed motion of the pursuer, on cause shown, recalls the sist granted in terms of interlocutor dated 5 June 2015; thereafter, sists the cause of new, for a period of eight months until 11 April 2016."

- (g) *who instructed (and, if appropriate, continues to instruct) the solicitors acting for Tie Limited?*

Carol Campbell, Head of Legal and Risk

20 October 2015

CL7/JG7/CEC555 X001

Solicitor to the Tram Inquiry

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Dear Sirs

**Edinburgh Tram Inquiry
Questions regarding Court of Session action - City of Edinburgh Council v TIE Limited
(A299/13)**

Morton Fraser are instructed by TIE Limited to deal with the procedural aspects of the above court action. The following are responses to questions which we understand have been released by the solicitor to the Edinburgh Tram Inquiry.

- (a) *The date, place and method of service of the Summons upon the defenders*

The Summons was served directly on the defenders. It was served on 9 May 2013.

- (c) *The name of the firm of solicitors and of the individual solicitor(s) who acted for TIE Limited and entered appearance in the action on behalf of the defenders.*

Morton Fraser entered appearance on behalf of the defenders. The individual who entered appearance is Kate McGarrity, who was a trainee with the firm at the time and was assisting with the court run on that day. Appearance was entered on 16 May 2014. The solicitor instructing appearance to be entered was Claire Logue, Senior Associate. The file is supervised by Jenny Dickson, Partner.

- (d) *The date on which appearance was entered.*

Appearance was entered on 16 May 2014.

- (e) *Do the same solicitors continue to act for each of the parties respectively?*

Morton Fraser continued to be instructed on behalf of TIE Limited (now known as CEC Recovery Limited) to deal with the procedural aspects of the action. The action is sisted at present.

- (g) *Please provide details of the dates and terms of the motions and interlocutors.*

There have been three motions, all enrolled by the pursuers. The details of the 3 interlocutors are set out below.

Interlocutor 1

20 May 2014 - Lord Glennie

The Lord Ordinary, on the unopposed motion of the Pursuer, dispenses with the period of intimation in terms of Rule of Court 23.1C and thereafter Sists the cause for a period of 6 months from today to allow investigations to take place.

Interlocutor 2

13 November 2014 - Lord Brailsford

The Lord Ordinary, on the unopposed motion of the pursuers and of consent, dispenses with the usual requirements of intimation; recalls the sist granted 20 May 2014 and thereafter re-sists the cause for a period of six months until Wednesday 13 May 2015 to allow for investigations.

Interlocutor 3

11 May 2015 - Lord Uist

The Lord Ordinary on the unopposed motion of the pursuer, on cause shown, recalls the sist granted on 13 November 2014 and thereafter re-sists the cause for a period of six months until 13 November 2015.

(h) *Who instructed (and, if appropriate, continues to instruct) the respective solicitors?*

Morton Fraser receive instructions from Hugh Dunn, Director of TIE Limited (now known as CEC Recovery Limited).

We trust this information is of assistance.

Yours faithfully



For Morton Fraser LLP