

Edinburgh Tram Inquiry – Chairman repeats demand to revive former tram company



The Chairman of the Edinburgh Tram Inquiry Lord Hardie has raised further questions over the council's decision not to give the former tram company **tie** the kiss of life and allow it a voice in the inquiry proceedings.

Lord Hardie questioned the manner in which the council took its decision. The company is dormant with one senior council official in the position of a company officer, but it is still an entity, easily proved by its involvement in court actions in the Court of Session.

The council have until 27 November to respond to the chairman's queries and they have now drafted a proposed answer to be approved by all councillors at next week's council meeting. This will be published on the council website on Friday, but it is clear that the council has not changed its mind.

The Inquiry first advised the council in February 2015 that they wanted **tie** to participate on the basis that the company may be dormant but it still exists. The council refused.

DELEGATED DECISION

The council's decision not to bring back **tie** was delegated to senior members of the council including the Chief Executive, the Leader and Deputy Leader of the council, Transport and Finance Conveners and the leaders of the three opposition groups.

Lord Hardie has queried both the delay in deciding the matter,

and the manner of the decision. The council made the decision at a meeting convened under urgency procedures and Lord Hardie questions the validity of that. There is no real substantive answer to why the decision was made at this time, during a council recess, and under delegated procedures, except that the Inquiry was due to convene and so the decision had to be ratified. At this time in August the council was not due to meet so the matter was then delegated to the senior group.

The decision was intimated to the Inquiry just before it was first due to meet on 20 August 2015, although the council has made it clear that many informal meetings had been convened between February and August to discuss the issue at the City Chambers. For the Chairman to say that all councillors did not have the facts is at odds with what the council now claims.

LEGAL AND BINDING

The council report does make it clear that the council considers any decision made this way to be both legal and binding upon the whole council, and in any case the matter was then reported to the next full council meeting.

At that council meeting the council in full session noted the decision intimated to the Tram Inquiry, and promptly delegated responsibility for any future decisions relating to the Edinburgh Tram Inquiry which do not exceed £2million, to the Chief Executive, Andrew Kerr.

The Edinburgh Reporter understands that it should not have been a surprising decision to the Inquiry chairman anyway, as many meetings are said to have taken place between representatives of the council and the Inquiry between February and August. The council's position on **tie** has remained the same throughout.

Lord Hardie appears to be most troubled about the non-participation by key players, and it is clear that **tie** was a

key player in the tram affair. He makes it clear that the persons who must shoulder the responsibility for taking the decision about **tie** are the councillors themselves, and cites this as a reason for querying the manner in which the council came to their decision. He also states that he is unaware of any governance which allows officials to take decisions relative to the inquiry instead of councillors, but the council maintains that it has urgency procedures which were invoked in this case.

PUBLIC PURSE

The council maintains that the decision not to repopulate the tram company is a purely financial one, and that it is mindful of its obligations to protect the public purse.

In a lengthy and scathing note published on the Edinburgh Tram Enquiry website the Chairman has said that his duty is to assess the risk to the progress of the Inquiry if the council do not revive **tie**.

He makes it clear that this note was published in an effort to ensure that everyone who might be involved in the inquiry will now be fully aware of all facts.

The council's firm stance is that it is willing to assist and fully cooperate with the Inquiry, but that the resurrection of a defunct company could cost the public millions. Company officers would have to be appointed and then the company would have to be represented at the Inquiry. It has no assets or income to fund these from. In the era of financial hardship the council asserts this would be a misuse of public funds.

Instead the council has offered the Edinburgh Tram Inquiry a secure room at Waverley Court to examine hard copies of certain documents. The council says it has transferred enough documents to the Inquiry to fill four floors of an academic library.

LEGAL REPRESENTATION

The council has offered to pay for the separate legal representation for any existing or former council employees who are asked by the inquiry to make a statement. In law the local authority bear 'vicarious responsibility' for these employees, but it is criticised by the Chairman for thinking of using separate firms of solicitors for itself and for previous members of staff.

Lord Hardie also explains his views on areas of potential conflicts of interest between participants and their legal representatives which are both complex and lengthy.

He writes in his note: "It respectfully seems to me that the interest 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." He goes on to say that this does not square with the council's claim that it must look after the public purse, and suggests the council ought to use the same legal representatives for itself and its employees.

While the council will offer to pay for lawyers for councillors and employees, it does not appear to be extending that same help to former employees of **tie**. The Inquiry Chairman wants to be able to question any representatives of the company, level criticism against it if appropriate, but allowing **tie** through its representatives to answer such criticism.

This will not happen if the council does not reinstate the company, and the Chairman explains he will be prevented from looking in any detail at the relationship between the council and the former tram company. He states as an aside that it is not surprising that the council have taken this decision as it

owns the company.

The inquiry Chairman is also critical of the various court actions already in place, questioning the independence of the parties involved and raising potential conflicts of interest between them. The main action which he refers to in detail is that raised by the council against **tie**. While these actions are said by the council to have been raised on a protective basis, it clearly vexes His Lordship as he suggests that the parties cannot be wholly independent one of the other.

He asserts: "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." So not only does he query the roles of the council and its wholly-owned company in this action, but he also suggests that the lawyers involved may have a conflict of interest.

The main thrust of the Chairman's position is that it is unfair of the council to sue the company **tie** in one place, but prevent it or its officers from answering for itself in another. He also infers that the council by preventing **tie** from rising from the ashes is in effect silencing what could be its main critic.

The inquiry was set up by the Scottish Ministers in June 2014 and aims to "establish why the Edinburgh Trams project incurred delays, cost more than originally budgeted and through reductions in scope delivered significantly less than projected."

The preliminary hearing originally planned for 20 August 2015

was delayed till 6 October, due to Lord Hardie's spell of ill health, and no timetable has been set for any evidence sessions. The Chairman has awarded Core Participant status (someone or an organisation which will have a key role during the inquiry and actively participate in the proceedings) to the following:

Bilfinger Construction UK Ltd

Carillion Utility Services Limited

City of Edinburgh Council

DLA Piper Scotland LLP

Parsons Brinckerhoff

The Scottish Ministers

Siemens plc