

Carillion: The Immediate Effect and Next Steps

Every now and again things happen which have far reaching consequences. Brexit is one, but as far as the UK construction industry is concerned, the fact that the Carillion group has been placed into compulsory liquidation is another. Clearly these are very worrying times for anyone who was expecting to get paid by one of the Carrillion group of companies.

Going straight into liquidation is an unusual step; it, perhaps, reflects the seriousness of Carillion's financial position and the fact that immediate liquidation was considered to be more advantageous to Carillion's creditors than the sale of the group (or parts of it) in administration.

The implications of Carillion's liquidation to its enormous supply chain will be very significant. Many are owed very substantial amounts by Carillion and the fact that payment may not now be received will risk the future of many within that supply chain. It has been estimated that between 25,000 and 30,000 firms are owed money by Carillion with total debts running into the hundreds of millions of pounds. Even more stark is the statistic that in previous major contractor insolvencies it is estimated that 18% of those firms owed money did not survive the next 5 years. Therefore, it is necessary for suppliers and sub-contractors to consider their position very carefully in the coming days and weeks.

Given the liquidation of Carillion, most forms of contract, will allow its Employers to terminate the main contracts and substitute Carillion with a replacement contractor. For example in the JCT and NEC suite of contracts, if the contractor is "insolvent" (which would be the case here), the employer has the right to terminate the contract and have the works completed by others. Carillion's sub-contracts and consultancy agreements will likely provide for back to back termination of the sub-contract in the event that Carillion's main contract is terminated on Carillion's insolvency. However, there must be a possibility that sub-contractors and consultants already firmly entrenched within projects will be a valuable resource and employers and any new main contractor may wish to retain the use of that resource so as to mitigate delay and disruption to the project. This may provide at least a negotiating lever for the Carillion supply chain. It may also be that sub-contractors and consultants have granted collateral warranties to Carillion's employers which contain step in rights.

Although, relatively unusual, other contracts may provide for the automatic termination of the contract on the insolvency of a contractor and the back to back automatic termination of any sub-contracts. Therefore it is possible that Carillion's insolvency will have meant that some of the contracts it has with its employers have automatically terminated. If that is the case then it may be that sub-contractors and suppliers are working for Carillion when Carillion's contract with the employer has been terminated and its subcontract is also at an end. It is, therefore, important for the supply chain to immediately understand the status of its contract with Carillion. However, what is clear is that until terminated most sub-contracts will continue and all payment notices should be served strictly in accordance with the contract in question so there can be no doubt as to their validity.

The ability of sub-contractors and consultants owed money by Carillion to recover those un-paid sums from the Employer or replacement contractor is likely to be slight. It is problematic for the Employer to pay sub-contractors directly and this may fall foul of the *pari passu* principle. The position may be different if there is a Project Bank Account (with funds held in trust for the beneficiaries of the PBA) and the sub-contractor is a beneficiary of that account.

The Carillion supply chain will also need to look closely and quickly as to whether it can legitimately retain title to any materials and equipment that have been supplied as part of its works that have not been paid for.

It is, of course, entirely possible that contractors and suppliers may want to look at whether they can terminate their contracts on the basis of pre-existing unpaid debts and/or the insolvency of Carillion. That ability to terminate current contracts may well give suppliers and sub-contractors a better negotiating position when dealing with The Official Receiver, Special Managers or employers of Carillion under main contracts about any future relationship.

The above brings in to sharp focus the overlap between construction law and the law of insolvency. Therefore, it is vital that when considering the position, it is done through the very specific prism of the law relating to insolvency in the construction field. It also seems that the sooner everyone who is owed (or is soon to be owed) money considers their position, the better the outcome will be. This is particularly given that suppliers and sub-contractors may well be able to legally terminate their existing contracts, which may put them in a relatively strong bargaining position in negotiating new contracts. However, that window of opportunity to negotiate with the liquidator will not last for very long.

Given our depth of specialism in construction work and a complimentary insolvency practice, 4 Pump Court are uniquely placed to deal with disputes arising from the complex legal issues raised above. We have a number of barristers who have specific experience in dealing with insolvency in the construction sphere who appear not only in the TCC, but also in the Companies Court acting for a full range of contractors & subcontractors, employers, public bodies and private partnerships.

To find out more about our work in this area, please contact our clerks on 0207 842 555, or email clerks@4pumpcourt.com.