



*After Carillion –
protect yourselves from the
collapse of a contractor*

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Who are Hay & Kilner?

Hay & Kilner is one of North East of England's leading independent law firms and provides a comprehensive legal service to clients throughout the UK.

We have one of the leading construction teams in the North East and our experienced solicitors can provide advice on a full spectrum of construction issues.

Independently researched legal guide, Chambers UK, highlights our construction team's delivery of 'superb advice' and singles out 'user-friendly lawyer', Graham Sutton for his 'inside-out' knowledge, placing him in a position whereby he can 'tie the other side in knots'



Welcome

Format of today's presentation:

- Introduction
- General points that apply to all of the parties
- Client Protection
- Consultants
- Sub-Contractor
- After the insolvency of the Contractor
- Case Law Update
- General conclusion



Carillion collapse further delays building at two major hospitals

MPs demand answers as work stops at Royal Liverpool and Midland Metropolitan



Fears that supply chain will be left out of pocket from Carillion collapse

Carillion latest: Former finance directors of collapsed government contractor investigated by accountancy watchdog

FRC is already investigating how KPMG audited Carillion's accounts


Ex-Carillion director viewed pension fund as 'waste of money' **Former Carillion finance directors expected to face investigation**

Comment revealed in meeting earlier as MPs criticise Pensions Regulator and KPMG FRC understood to have agreed there are sufficient grounds for inquiry into conduct of Richard Adams and Julie Khan

Carillion job losses top 1,450 as more redundancies are announced

Before going into liquidation, Carillion employed around 46,000 people worldwide, of which 20,000 were in UK


How to protect yourself before the Insolvency of the Contractor - General points that apply to all of the parties:



a) Do your homework on the contractor, for example:

- Carry out a Company Search for financial information, date of incorporation, shareholders and directors
- Search the names of the directors if a new company, for past or present directorships
- Is the Company registered abroad? There may be problems enforcing a judgment or award
- Check the Company's Website for current/previous contracts
- Is the Company a special purpose vehicle set up for this one-off project?
- Is the Contractor's price realistic? If not, this could lead to financial problems
- Is the Contractor's programme realistic? - if not this could lead to delays and claims

How to protect yourself before the Insolvency of the Contractor - General points that apply to all of the parties:



b) Try to protect your position by including favourable clauses in the contract:

- Include clauses covering the actual/potential insolvency of the Contractor and specify the consequences
- Exercise financial control to ensure that payment made to the Contractor reflects the value of the work carried out (employer) or payment is received for the true value of the work done (consultant and sub-contractor)

Client Protection



- Request the contractor to provide a Performance Bond to provide a degree of financial protection following the contractor's financial demise
- Request a parent company guarantee but bear in mind that the protection afforded will depend on the financial stability of the parent company
- Require collateral warranties to be provided by Consultants engaged by the Contractor and from sub-contractors with design input. Require PI insurance to be obtained and include "step-in" rights to enable the Client to take over the employment of the Consultants and sub-contractors on the demise of the Contractor
- Engage a good Project Manager to properly coordinate site trades and to ensure financial accuracy to avoid overpayments

Client Protection, cont...



- Include relevant contractual provisions enabling all additional costs and expenses incurred due to the contractor's insolvency to be recovered from monies held and retentions etc
- Consider novating the consultants' Appointments to the contractor. This transfers the obligation to pay the consultants to the contractor
- Include a Liquidated Damages clause in the Contractor's contract to incentivise him to complete the work on time
- Where felt appropriate, consider cooperating with the Contractor to assist cash flow e.g. if payment is 60 days this could be reduced to, say, 30 days to ease cash problems
- Where the contract is design/build ensure that PI insurance is obtained by all parties

Consultants



- Expressly reserve and protect copyright and intellectual property rights by relevant clauses in the Appointment
- If there is any concern about the financial stability of the Contractor resist novation to the contractor and require a direct appointment by the client
- If possible include a right to terminate the Appointment at the consultant's discretion as of right
- Avoid "step-in" rights from the client/funder which provide for payment of future invoices but not payment for any past work

Consultants, cont...



- Clearly define the services to be provided and ensure full payment is received for each stage before moving on to the next
- Include a right to suspend and/or terminate the Appointment in the event of non-payment
- Consider Adjudication to recover outstanding payments as Consultants' contracts usually fall within the definition of "a construction contract" for the purposes of the Construction Act

Sub-Contractor



- In order to minimise the amount of work in progress and financial exposure, consider including stage payments in the contract
- Include an express right to suspend or postpone work until payment for a particular stage has been made
- Where possible, increase the contract sum to include the retention figure (usually 5%) to anticipate the fact that the contractor's demise may result in no retention payments
- Consider requesting the retentions to be paid into a separate Trust fund which will take them beyond the reach of the contractor's insolvency practitioner. Note the recent Government consultation on retentions and the private members Bill

Sub-Contractor, cont...



- Include a retention of title clause where materials are supplied to the Contractor retaining ownership of the materials until payment is made. Note this will not defeat a claim where the materials are incorporated into the development
- Rely upon the implied terms of the Construction Act or express terms of the contract regarding disputes and non-payment such as Adjudication. If no "Pay Less" Notice has been served consider a "smash and grab" Adjudication

After the insolvency of the Contractor



Client:

- On the demise of the Contractor a thorough examination of the work executed and the value of that work is required
- A new contractor will want to know the extent of the work to be carried out and negotiate a relevant contract sum for completion of the works
- Implement the clauses in the contract relating to Insolvency e.g. entitling a postponement of further payments until the work has been completed by the new contractor etc. and enabling a full accounting exercise involving retentions, completion costs and additional expenses to be carried out
- If possible, consider novating the original building contract with the insolvent contractor to the new building contractor and impose liability on the new contractor for the work carried out by the original contractor
- Where collateral warranties have been provided by consultants and sub-contractors, consider the exercise of step-in rights or engagement directly of the consultants and sub-contractors

After the insolvency of the Contractor



Consultant:

- On the demise of the contractor implement the termination provisions in the Appointment where appropriate
- Remind the Employer of the Consultants' retention of all design and IP rights in the Appointment and that he must bear this in mind when engaging any new contractor/designer
- Consider negotiating a new Appointment directly with the Employer, to include any additional costs and/or expenses incurred due to the insolvency as well as any additional services that may be required due to the demise of the Contractor
- Lodge a claim with the liquidator for any outstanding fees

After the insolvency of the Contractor



Sub-Contractor:

- Enforce any retention of title clause by contacting the Liquidator to attend site to remove materials not paid for
- Approach the Client or completion contractor to enquire about a direct appointment for an increased contract sum
- Lodge a claim with the liquidator for any outstanding payments
- Chase retention payments if not a lost cause

Case Law Update



Overpayments could be disastrous in an insolvency situation

Danger of the 'smash and grab' adjudication



Case Law Update



ISG Construction Ltd v Seevic College and the consequences of not serving a valid Pay Less Notice: 'deemed acceptance'

Until recently, only recourse was to wait for a later interim application or Final Account to counter-adjudicate on a 'merits' basis

The end of the smash and grab? Grove v S&T [2018] EWHC 123 (TCC)

Immediate entitlement to adjudicate on the true value

Smashing 'Smash and Grab' – Coulson J delivers significant blow to smash and grab tactic



(Nearly) the end of smash and grab adjudications

Smash and grab adjudication 'essentially over' after TCC Judgment

ANALYSIS: A well-reasoned judgment by Mr Justice Coulson could put an end to the trend of 'smash and grab' adjudications, where the payee pursues the other party for the full amount where no valid payment or pay less notice is served. 01/11/2018

The end of "smash and grab" adjudications?

The decline of "smash and grab" adjudication: Seevic and Estura wrongly decided

Case Law Update



6 reasons why the 'smash and grab' is not dead yet

- Circumvent speculative contracharges
- Speed of merits-based adjudications
- 'smash and grab' still means immediate payment
- No merits until "sum stated as due" is paid
- Bargaining chip in negotiations
- Unconscious bias

Case Law Update



Practical Tips

- Maintain relationships
- Key date schedule
- Check Pay Less Notices
- Be prepared

Conclusion



- No winners from the insolvency except for the accountants and the lawyers
- Self-protectionism will remain the most effective tool unless the construction model of self interest changes

Any questions?
Contact us...



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