

# Carillion - latest position on insolvency

Carillion went into liquidation on Monday 15th January 2017 when its directors applied to Court for compulsory liquidation. Liquidation, is the process by which a company is terminated. The court then appointed an Official Receiver. Under the compulsory liquidation legal process, PwC is there to support the Official Receiver in meeting its statutory duties to maximise the recovery of funds in administering the liquidation process.

Check carefully the identity of the contract counterparty. The Carillion companies in liquidation are:

1. Carillion plc
2. Carillion Construction Limited
3. Carillion Services Limited
4. Planned Maintenance Engineering Limited
5. Carillion Integrated Services Ltd
6. Carillion Services 2006 Ltd

Further information is available on the PwC website:

<https://www.pwc.co.uk/services/business-recovery/administrations/carillion.html>

Due to the sheer scale of administering the liquidation process, the Official Receiver and the Government have underwritten the cost of PwC's expertise and assistance, in administering the liquidation process.

Certain elements of the Carillion group enterprise (mainly the public sector service elements) are being continued by PwC temporarily as part of the winding-up process. The process involves ensuring the company's assets are realised and the proceeds are distributed to creditors in order of priority. Unsecured creditors will rank at the bottom of the priority list.

The PwC website has been set up to advise the creditors and "to ensure the continuity of public services while securing the best outcome for creditors."

The statement continues to confirm that all parties "will be paid for the work they do during the liquidation." Whilst payment for work undertaken by members during the liquidation is considered an expense of the liquidation process and is therefore guaranteed, payment for work undertaken prior to Monday will, in the vast majority of cases, be considered unsecured debt.

Again, due to the scale of the insolvency process and therefore the costs involved in administering it, it is highly unlikely the liquidation will generate sufficient funds to make any payment (a "dividend") to unsecured creditors. Payments of this nature tend only to be a small proportion of what is owed and even then, not paid for a considerable period of time.

## Unsecured debt

Log on to the PwC website and make sure they are aware of your debt, but before you do, you will need to back up your claim with:

- a copy of your trading terms
- a statement of the Carillion's account as proof of contractual performance
- copy invoices

Then at least they can add you to the list of creditors and keep you informed as the liquidation process progresses.

## Letters of Comfort

The liquidator, to avoid situations where a hiatus in the supply of works or services could breach health and safety requirements, is issuing 'Letters of Comfort'. These may provide an obligation to pay for works from the 15<sup>th</sup> January 2018 but there is some discussion over the legal status of these instructions.

If the letter of comfort: (a) contains statements which can reasonably be construed as a contractual promise arising; (b) after the date of liquidation (15<sup>th</sup> January), this is likely to evidence a binding contract between the liquidator and the party within the scope set out by the terms of the letter – as opposed to a letter containing statements of fact which are meaningless.

Much like letters of intent, whether the letters of comfort giving rise to a contractually binding relationship, depends on the substance and scope of the letter.

Your team at BESA and ECA is here to help with this issue.

### **Are you legally obliged to continue working for Carillion?**

Check your contract – does the clause referring to termination in the event of insolvency mean that your contract automatically terminates in circumstances where Carillion are in liquidation, or is it the case that the contract ‘**may**’ terminate at Carillion’s option.

- If the latter, your contract may continue if the Official Receiver, acting through PwC, chooses to continue the contract.
- If the former, your contract is at an end. You may offer the liquidator or subsequent contractor a price for finishing the remainder of the works – this could recognise not only the value of the remaining works, but also some element of the loss experienced under the original contract. Some private sector clients will off-set increased costs of completion against debts they may owe the liquidator and see them as necessary for continuity of warranties, delivery and insurance coverage. Public sector clients will rarely pay any uplift towards losses as it represents a perceived misuse of public funds.

### **What else to consider**

- Credit checks on existing clients and key suppliers should increase over the next six months. You need to ascertain whether their financial stability is under threat and ensure you do not have too much risk with any one client or group of clients – cross-contract set-off clauses will mean payment issues on one project can infect payment management on other project contracts with any one major client.
- Assure current clients and suppliers of the robustness of your business and your ability to weather any storm – perception drives confidence and trading behaviour.

### **Joint Ventures**

Most Carillion Joint Ventures relate to Government projects, on which we understand that partners were jointly and severally liable. Subject to specific provisions of these agreements, these projects or FM contracts will continue with the remaining partners.

### **Project Bank Account**

PwC have also confirmed, subject to the specific terms of agreements in place, where Carillion was only a trustee (i.e. administrator) of a Project Bank Account, and not a beneficiary (i.e. getting paid), it would have no claim to the cash in the PBA as an asset belonging to Carillion within the insolvency process.

### **Retention of title**

- Consider the retention of title position both up and down stream and make sure it is unambiguous that if a retention of title clause exists, it is actually part of the final contract.
- If access to site is prohibited or restricted, you will risk criminal charges and trespass by forcing entry. Even if you do have access, recovering goods which belong to you and are not yet paid for, but which have been incorporated into the fabric of a building may cause criminal damage.
- If you can’t tell your goods from other similar goods at Carillion’s site premises, you can’t take them back.
- The liquidator who has ascertained that you have been paid for some of your goods, or for some instalments, but not others, may claim that the specific goods you are trying to take back have been paid for, so Carillion now owns those. Unless you can prove the liquidator wrong, you can’t take those goods.

- Ownership in goods will usually pass once those goods have been incorporated into the fabric of a building regardless of any contractual provisions.
- No matter how well drafted and clear they are, your retention of title clauses may be difficult to enforce, because every case depends on the particular circumstances.
- At its simplest, your retention of title clause will say you continue to own goods you have supplied until you are paid, and you can enter the customer's premises to recover them once payment is overdue. But you will need a more sophisticated retention of title clause if, for example, Carillion has:
  - sold your goods
  - processed them in some way
  - incorporated them into the fabric of a building
- But an 'all monies' provision in your retention of title clause means you retain ownership of all your goods until all monies owed to you by Carillion have been paid – as long as the Carillion owes you some money, you can take back the goods you find at Carillion's site (provided you supplied them) whether or not those particular goods have been paid for.
- If your retention of title clause is valid, log it with PwC and take, or threaten to take, legal action straightaway. There is no incentive for a liquidator to deal with your claim unless they know that they will have to incur legal costs if they don't. Don't let the liquidator stall you – creditors who know their rights and pursue them vigorously are more likely to recover their goods than those who delay.
- They are unlikely to defend your claim if it is valid – legal costs will reduce the assets available for creditors, and they are liable for your damages if you win so they may expedite your claim as part of the broader process.
- If you succeed, you become a secured creditor and can take possession of the goods if they are not paid or obtain plant rental payments in priority to unsecured creditors. If Carillion becomes insolvent, you rank higher in the pecking order when a liquidator is paying out than you would as an unsecured creditor.
- Such claims are complex, expensive and rarely succeed. Even if you successfully argue you have a charge over the goods, the charge is likely to be unenforceable because it has not been registered at Companies House.

### **Guarantees**

- If, unusually, you have a bond or guarantee from Carillion, has the guarantor also gone into insolvency? Or can you utilise this security?

### **IP**

- If you have done work for Carillion involving allowing them the ability to use your IP have these rights died with Carillion's liquidation or do they survive.

### **Step-In**

- Where a new main contractor is stepping into your project, read the step-in terms in the relevant collateral warranty carefully. Some will only require the replacement contractor to pay you from the time they step-in. Other warranties may say that the client must cover outstanding payments prior to step-in.

BESA and ECA are here to help with any of your queries on the above.