

A background image of a construction crane against a blue sky with light clouds. The crane is a tower crane with a long horizontal jib. An orange semi-transparent box is overlaid on the left side of the image, containing the title text.

Another contractor enters insolvency - Administration in construction contracts

Henry Construction Projects Limited (HCPL) entered administration on 8 June 2023. HCPL is a significant contractor in the social housing sector, handling large projects for a number of Registered Providers, with a turnover of £400m according to their most recently filed accounts.

With an increasing number of contractors and other industry participants entering various formal insolvency processes at the moment, we briefly consider what administration is and the issues that arise for an Employer under a construction contract.

What is administration?

A company enters administration when an insolvency practitioner is appointed as its administrator. An administrator can be appointed by the court, or by the company itself in certain circumstances, or by a party with the benefit of a qualifying floating charge over the company's assets.

Administration provides a statutory moratorium" during which creditors cannot advance court claims against the company without the permission of the administrator or the court. Creditors are still owed money, but are prevented from enforcing debts or realising security. This gives the company breathing space.

During that moratorium, the administrator takes over control of the company from the directors, and may restructure the company and realise assets, in order to achieve one of the statutory 'purposes' or objectives of administration:

1. Rescue the company as a going concern; or
2. Achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or
3. Realising property in order to make a distribution to one or more secured or preferential creditors.

The company can still trade during administration and continuing to do so may be vital to achieving one of the statutory purposes.

Once the company is in administration, the administrator is required to prepare proposals – usually based on a statement of affairs prepared by the company's directors – for how they will conduct the administration. These proposals will be put to the creditors for approval by a decision process. If a majority of creditors reject the proposal, the administrators must report this to the court, which can lead to the company entering liquidation without an administration.

Position of creditors generally

Given the statutory moratorium, creditors will be unable to bring claims against a company in administration. There are rare circumstances in which an administrator or the Court will consent to this, but consent will not be given for run-of-the-mill claims against a contractor.

The fact that administration only puts a moratorium in place, does not mean that creditors will ultimately get paid – it is often a stay of execution for creditors' claims. It is rare for an administration to result in the company returning to normal trading without a Company Voluntary Arrangement (CVA) which almost always vastly reduces the company's liability to with unsecured creditors to a few pence in the pound. Administrations are often converted into liquidations where it becomes clear during the administration that the company must be wound up to protect creditors. In liquidation, it is usually the case that unsecured creditors receive nothing or a dividend of a few pence in the pound.

Position of Employer under construction contract

An Employer may not be considered a creditor by the Contractor or by the administrator. An Employer may need

to contact the Contractor and/or the administrator to notify them of their interest in the administration as a creditor, if they wish to stay informed and participate in the decision process.

Under many forms of construction contract, entry of a contractor into administration gives rise to a right on the Employer's right to terminate. Whether or not it is in an Employer's interest to exercise that right depends on various factors including the circumstances, the stage of the works and the intentions of the administrator.

The insolvency of the contractor may interact with the Employer's wider arrangements regarding the site – for example, development agreements or funding – and may also interact with rights the Employer has relating to the works under bonds, guarantees and insurance policies.

In any insolvency or termination scenario, specific advice should be sought as to the steps that need to be taken to protect their position and to protect the site where works are taking place.

For more information about this matter and related issues, please contact Mark London, Partner or William O'Brien, Solicitor, Construction Engineering & Procurement, Devonshires.



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