



**In the light of the Carillion collapse, are  
on-demand performance bonds  
worthwhile?**

**What other forms of performance security  
should clients consider?**

**David Sears QC**

# Route Map



- Performance Bonds
  - - on demand bonds
  - - default (conditional) bonds
- Parent Company Guarantees
- Project Bank Accounts

# On Demand Bonds



- Only requires a written demand
- Rarely seen in the UK
- Risky and costly for contractors

# Default Bonds



- Requires proof of default and proof of loss
- A form of guarantee
- Less costly than on demand bond
- But more difficult to obtain payment

# Common Pitfalls with Bonds



- Expiry Date
- Terms of the underlying contract
- Insolvency as an event of default

# Simon Carves Ltd v Ensus Ltd



- *“This bond is irrevocable. This bond will be valid up to the earlier of:  
6.1 1400 hours London time on 31 August 2010...  
3.7 Upon the issue of the Acceptance Certificate the performance bond shall become null and void (save in respect of any pending or previously notified claims).”*

# Ziggurat (Claremont Place) v HCC International Insurance Company



- *“(1) The Guarantor [the defendant] guarantees to the Employer [the claimant] that in the event of a breach of Contract by the Contractor [County] the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the losses and damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provision of or by reference to the Contract and taking into account all sums due or to become due to the Contractor.*
- *(2) The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor.”*

# Parent Company Guarantees



- Guarantees the due and punctual performance by the contractor, including payment of money
- Not limited to a percentage of the contract sum
- No fixed term: usually concurrent with the contractor's liability
- Can be on demand or on default

# Parent Company Guarantees



- The distinction between an indemnity and a guarantee requires care when drafting
- See *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* (2010)
- Clear words are required in order to create an on demand guarantee

# PCGs v Bonds



- No express financial cap on a guarantor's liability cf the financial limit imposed by a bond
- A PCG should come at no cost to the employer cf the cost of obtaining a performance bond
- A bond should allow recovery of the costs of completing the works if the contractor becomes insolvent cf PCG if the Group fails

# Project Bank Accounts



- A ring-fenced bank account from which payments are made directly and simultaneously by a client to members of his supply chain
- PBAs have trust status which secure the funds in them and can only be paid to the beneficiaries; i.e. the supply chain members named in the account.
- The advantage of trust status is that in the case of insolvency, monies in the accounts due for payment to the supply chain are secure and can only be paid to them.

# Conclusions



- On demand bonds provide comfort up to a certain limit but costly and unpopular with contractors.
- Default bonds less costly but less certain prospects of recovery
- PCGs are less expensive, longer lasting and unlimited but will provide no protection in the event of a group insolvency
- PBAs will offer only a limited degree of protection in the event of insolvency