



SBCC STANDARD FORMS OF BUILDING CONTRACT AND INSOLVENCY

This note is intended as a user-friendly guide to the nature of insolvency in building contracts, and the consequences of the various types of insolvency. This note is not intended to be a comprehensive commentary on the relevant provisions of the Standard Form of Building Contract and is relevant only to Scotland. This note is of use to employers, main contractors and sub-contractors, where the basic contract regulating the relationship between the parties is the SBCC Standard Form of Building Contract.

1. UNDERSTANDING THE BASICS

1.1 What is liquidation?

1.1.1 Liquidations usually occur where companies cannot pay their debts. A company's creditors, or indeed the company itself, appoints a Liquidator whose function is to ingather as much of the company's assets as possible, and to pay those assets out to the creditors. The company does not usually continue to trade in this form of insolvency.

1.2 What is receivership?

1.2.1 A Receiver (the expression "Administrative Receiver" means largely the same) can only be appointed by the holder of a floating charge. This is normally a bank. A floating charge means that the holder can lay claim to any of the company's assets covered by the Floating Charge (which is usually them all) that exist at the time of the holder of the floating charge exercising its rights to lay such claim. Unlike liquidation, a Receiver's interest is not to distribute assets to all creditors, but only to recompense the floating charge holder. Once the floating charge holder has been paid off, the company can either continue to trade or go into liquidation (see 1.1 above).

1.3 What is administration?

1.3.1 This form of insolvency envisages the possibility of the company continuing to trade. The appointment of an Administrator gives the company breathing space to restructure its business and to see whether or not it is viable for the company to continue to trade. It can, therefore, either come out of administration and go into liquidation.

2. THE EFFECT OF THE TYPES OF INSOLVENCY DESCRIBED ABOVE

2.1 The following diagram explains what happens under SBCC contracts where there is a straightforward relationship of employer and main contractor. Figure 1 deals with the situation when the main contractor becomes insolvent. Figure 2 deals with the situation when the employer becomes insolvent. The knock-on consequences to the sub-contractor, where the terms of the sub-contract are subject to the terms of the main contract is dealt with in Figures 3 and 4, below.

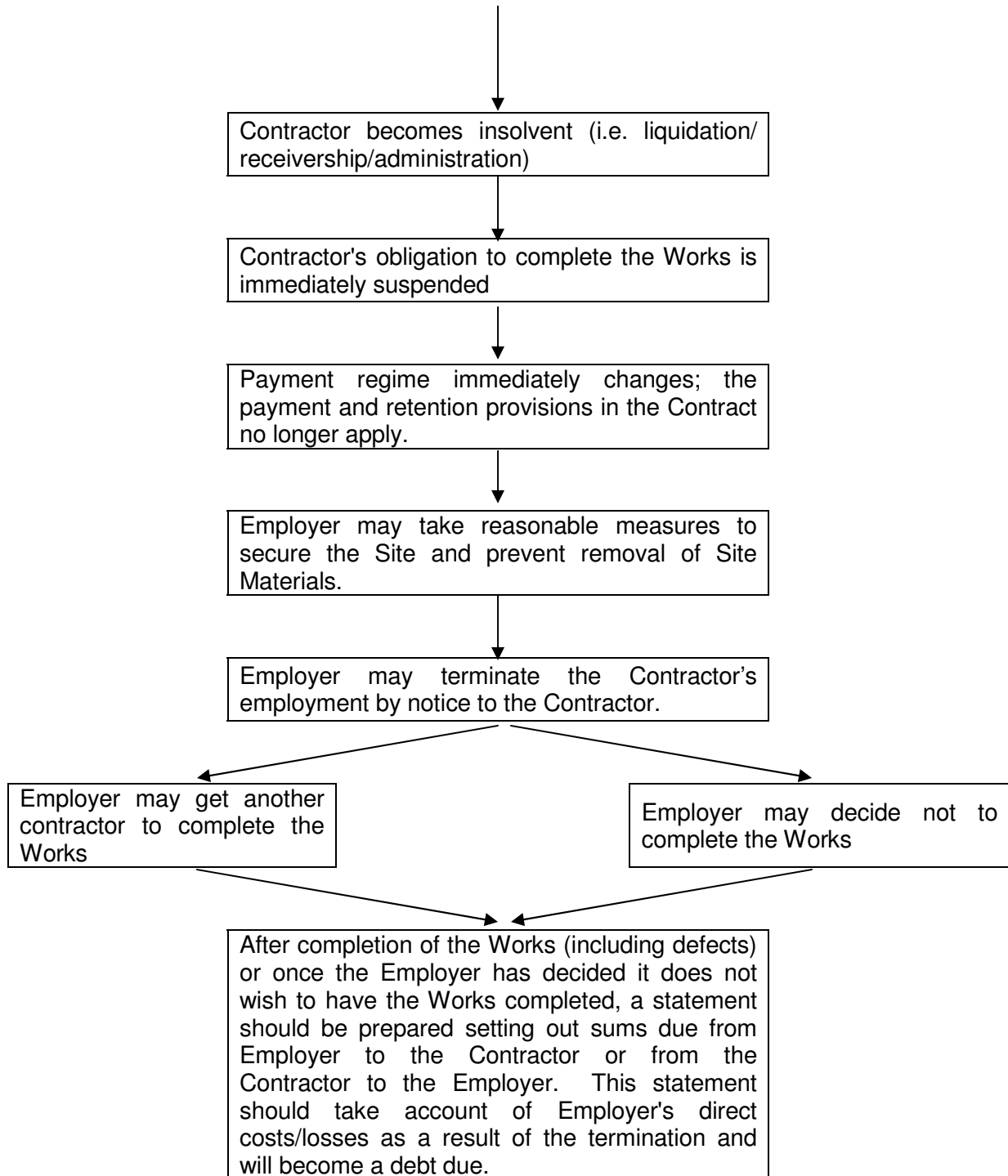
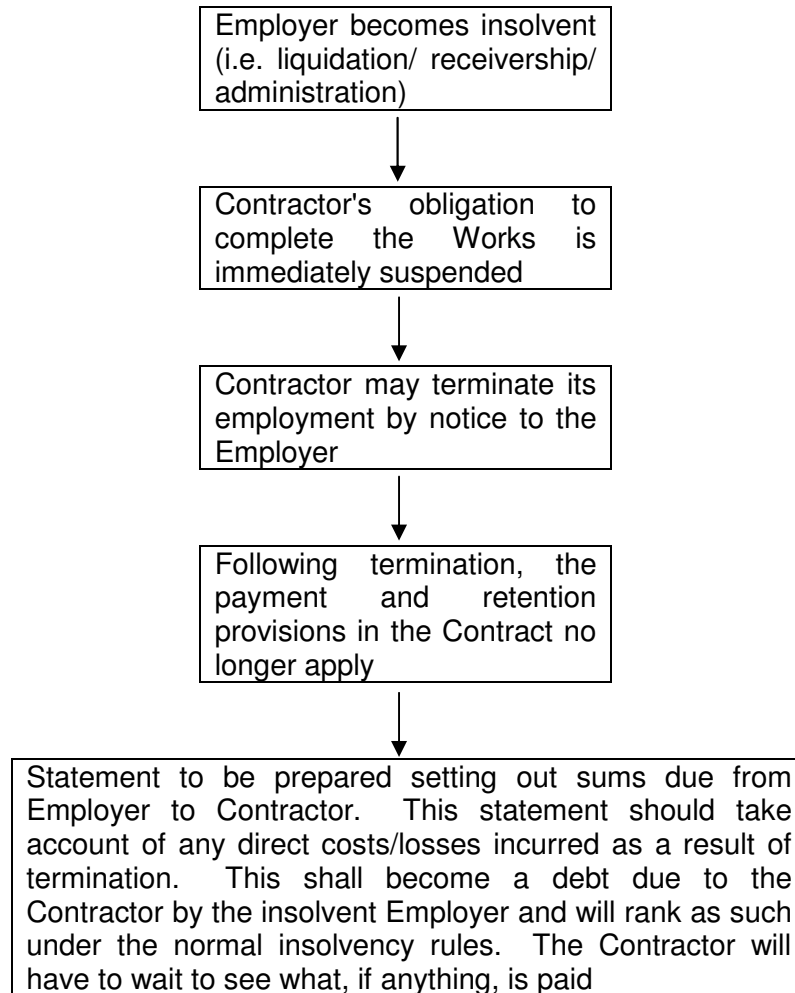
FIGURE 1 – MAIN CONTRACTOR BECOMES INSOLVENT

FIGURE 2 - EMPLOYER BECOMES INSOLVENT

- 2.2 Where the relationship is one of employer/main contractor/sub-contractor, and the terms of the main contract and sub-contract are SBCC, the following figures show what happens where the main contractor or employer becomes insolvent.

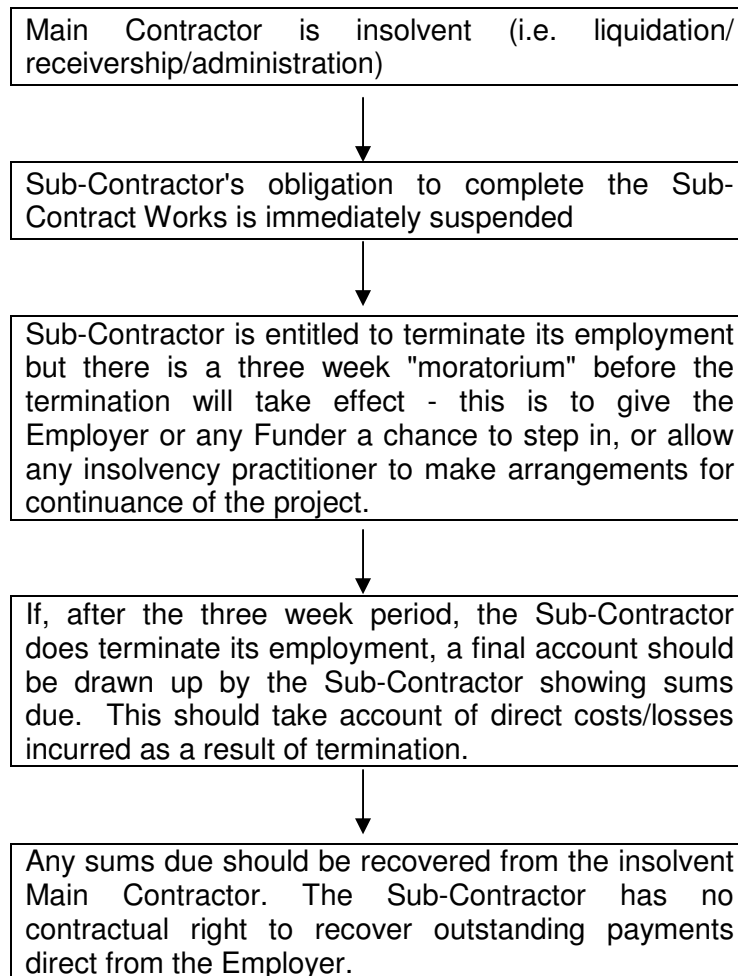
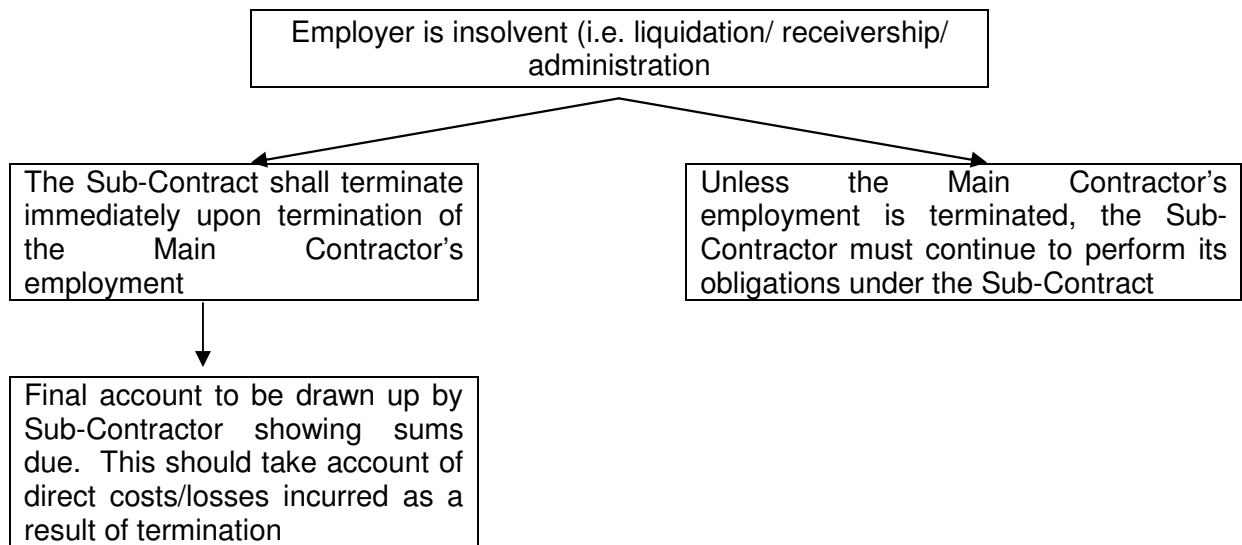
FIGURE 3 – WHAT HAPPENS TO THE SUB-CONTRACTOR WHERE THE MAIN CONTRACTOR IS INSOLVENT

FIGURE 4 – WHAT HAPPENS TO THE SUB-CONTRACTOR WHERE THE EMPLOYER IS INSOLVENT



3. OWNERSHIP OF MATERIALS

3.1 This is an area which can cause particular concern and confusion. The issue can be summarised thus: “When does ownership in materials pass from the sub-contractor to the contractor or employer?” The following paragraphs will hopefully assist in answering this question:

3.1.1 As a general rule, ownership of materials **does not pass** until the materials become part of the building. Therefore, on-site materials which are for example simply being stored when an insolvency occurs, will normally entitle the sub-contractor to remove them.

3.1.2 Once materials become part of the building, ownership passes even **if payment for them has not been made.**

3.1.3 Having said that, it is important to know that under the SBCC terms, if on-site materials had been included in a Certificate, and the Certificate has been paid by the employer, **ownership to the materials passes to the employer.** This can be particularly unfair to the sub-contractor, where on-site materials may have been included in a Certificate and paid to the main contractor, **but the main contractor has not paid the sub-contractor and subsequently becomes insolvent.**

3.1.4 Contracting parties should consider signing **a retention of title clause**, which is evidence that on-site materials which have not been included in a paid Certificate **do not transfer into the ownership of the employer.**

3.2 Payment for Work Done

- 3.2.1 Unfortunately, there is usually little prospect of receiving any payment for unpaid goods and materials where a Liquidator has been appointed. **A request should be made to the Liquidator for a standard claims form**, in the hope that there are sufficient ingathered assets to make a payment to creditors. The position is different in the case of administration and receivership, where the company may continue to trade. In this case, the sub-contractor is normally in a strong position to argue that all sums due should be paid before continuing with the contract. However, it is possible that administration or receivership could result in liquidation and the end of the company. There, again, a request has to be made to the liquidator for a standard claims form which requires to be completed, in the hope that the assets ingathered will result in a pay-out.

4. INABILITY TO BRING PROCEEDINGS AGAINST COMPANIES IN ADMINISTRATION

- 4.1 As has already been noted, administration affords breathing space to a company. In practice, this means that for as long as the company is in administration, no legal proceedings can be brought against it without the consent of the administrator or the court. "Legal proceedings" covers all court actions, and will almost certainly include adjudications.

Karyn Watt, Partner, Anderson Strathern LLP
For Scottish Building Contracts Drafting Committee
27 July 2010