

# redloft

in collaboration with



## **Forewarned is Forearmed:**

**Preparing for, and dealing with, distressed projects**

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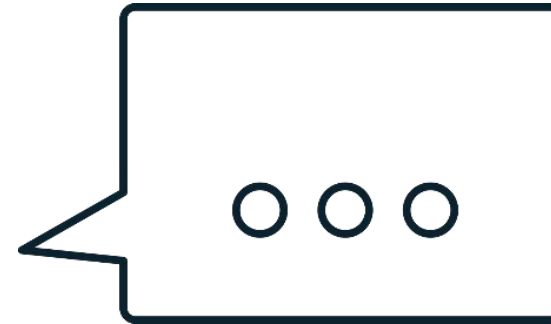
11 June 2024

# Housekeeping



**There will be a short Q&A session at the end.**

**Use the chat function to send your question in...**



**A short feedback survey will be sent to you post webinar.**

**We would love to know your thoughts!**

# Presenter Introductions

## Lois English



Lois is a Senior Development Consultant and has been working with Red Loft since July 2022.

She has been working in the affordable housing industry for 15 years, having carried out a variety of roles in both the public and private sectors.

Lois is a hands-on problem solver, providing project management services for both large and small RPs

## Adam Woolsey



Adam is a Chartered Building Surveyor and a Fellow of the RICS and he has been working in the housing sector for over 22 years.

Adam is passionate about the provision and delivery of safe and sustainable affordable housing and has a great deal of experience in regeneration and new build construction.

He is an expert in procurement and advises clients regularly on joint venture opportunities and alternative forms of procurement including construction management and modular & MMC strategies.

## Mark London



Mark is Senior Partner & Head of the Construction, Engineering and Procurement team at Devonshires.

Mark specialises in dispute resolution work which involves litigation in the Technology and Construction Court, adjudication and arbitration. This work covers all aspects of construction and asset management.

Mark also advises clients on all aspects of European procurement law and regularly act for contracting authorities and economic operators in procurement disputes.

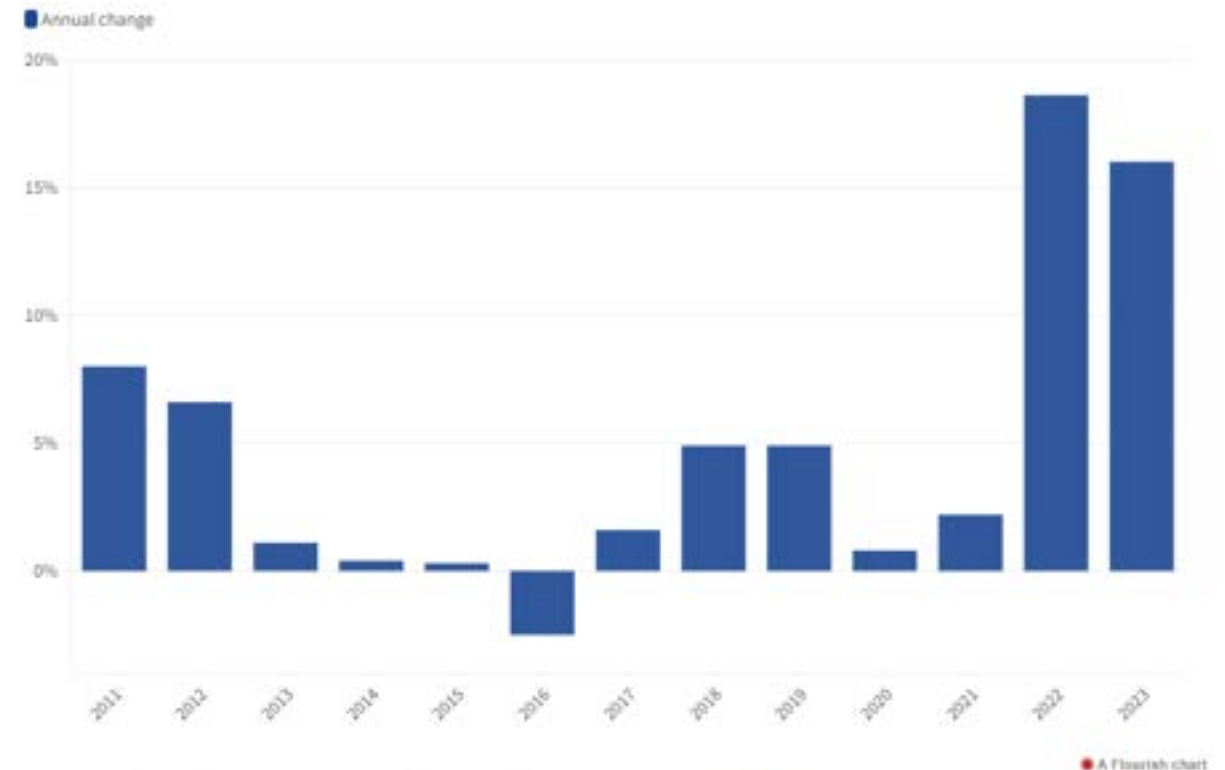
# What we will cover

1. Introduction - Setting the Scene
2. What is “insolvency”?
3. The different types of insolvency
4. Pre-Contract Due Diligence
5. Contractual Matters
6. Forearmed is Forewarned
7. Early Warning Signs
8. The “Twilight Period”
9. Immediate Actions & Practical considerations (when insolvency occurs)
10. Implications of Insolvency
11. Completing the Project
12. Conclusion – Key Takeaways
13. Q&A

# 1. Introduction – Setting the Scene

## Factors behind the spike in insolvencies

- High interest rates
- Inflation
- Rising energy costs
- Pressures on supply chains
- And the aftermath of...
  - Trussonomics
  - Covid
  - Brexit
  - War in Ukraine



## 2. What is 'Insolvency'?

A company is insolvent if it has ***insufficient assets to discharge its debts and liabilities***

Section 123 Insolvency Act 1986 sets out what "*unable to pay its debts*" means

There are different tests to determine insolvency which depend on the context in which the expression is used

Two of these tests are:

- The Balance Sheet Test – if a company's liabilities are greater than its assets, then it is insolvent
- The Cashflow Test – a company is insolvent if it is unable to pay its debts as and when they fall due
  - put simply, creditors are chasing for amounts that are owed to them, and there are insufficient monies to pay them at the time
  - While a company may have significant capital assets, if it does not have sufficient cash to pay a bill when it falls due then it is considered insolvent

## 3. The Different Types of Insolvency

1. Administration

2. Liquidation

3. Compulsory Voluntary Arrangement (CVA)

## 4. Pre-Contract Due Diligence

### Financial checks on contractors

- Establish what checks to carry out, when and how frequently
- Figures from Companies House will not necessarily be up-to-date (companies obliged to file accounts one year after the end of each financial year)

### Insolvency Risk

- Monitor contractors for warning signs, such as:
  - deterioration in performance/ service quality
  - increasing inability to pay off debt, taking longer to meet their financial obligations
  - failure to file accounts, filing late or altering the accounting period (adjustment of accounting dates usually done to mask financial difficulties)
  - Having statutory demands, winding up petitions and/or county court judgments filed against them



## 5. Contractual Matters

**1.** How does JCT define insolvency?

**2.** How does JCT deal with insolvency?

**3.** What are the automatic provisions within the JCT that kick in upon insolvency?



## 6. Forewarned is Forearmed...(1)

You are in contract - what you should already be doing?

### (!!!!) Project Health Check (!!!!)

- Audit of contract documentation & identify what protections measures are in place
- Copies of Executed Contracts
- Bonds
- Parent Company Guarantees
- Retention
- Insolvency Cover
- Insurances
- Collateral Warranties
- Guarantees
- Building Control Tracker
- Building Warranty Tracker
- Planning Tracker
- S106 Tracker
- Site Meetings
  - Minutes & Agendas
  - Contractors Reports
  - Programme (contract v drop line and look ahead)
  - Sub-consultant information / directory
  - Sub-contractor procurement status & packages
- Risk Register (Separate Meetings)
- Project Directory
  - Construction Team
  - Internal version inc Stakeholders

## 6. Forewarned is Forearmed...(2)

- Employers Agent / Cost Consultant Reports
  - Contract Sum
  - Spend to date & retention held
  - Variations – Instructed
  - Variations – Anticipated
  - Early Warning Notices log
  - EOT claims
  - L&E claims
  - Forecast Final Account
- Design Information
  - Where is it?
  - Has it been saved? (not just PDF!)
  - Drawing comments & derogations tracker
  - Schedule of Accommodation
  - Design Compliance Trackers
  - Funding waiver information
  - Specifications / Finishes (contract v actual)
  - Sample & colour choices
  - Surveys & Reports
  - Statutory Authorities & Utilities
  - Meter numbers
  - Telephone & internet supply

## 7. Contractor Insolvency – Early Warning Signs

### On Site

- Lack of progress / materials / people on site
- Untidy site
- Changes in personnel / sub-contractors
- Any wilful damage to works on site
- Contractor Behaviour – undue aggression or evasiveness

### Off Site

- Design team – unrest regarding unpaid fees
- Noises from other colleagues/industry colleagues re difficulties on other sites
- Whistleblowers

### Programme

- Cashflow against forecast

### Administration

- Third party paperwork not being provided

### Financial

- The late filing of accounts/annual returns at Companies House
- Aggressive tactics through valuation
  - Over valuation
  - Promise of works completion
  - Materials on site
  - “Smash and Grab”

## 8. The 'Twilight Period' (1)

### Key considerations / actions once warning signs are identified

#### Financial

- Valuations - Ensure payment and pay less notices are served correctly – and pay only what the contractor is entitled to under the building contract
- Understand/consider LAD position (if relevant)

#### Programme

- Review actual vs forecast
- Gather programme information to have a clearer understanding of any issues concerning the Works (which will help with any counterclaims or deductions)

#### Site Visits

- Increase site visits
- Involve Clerk of Works
  - Start keeping clear records of the status of the Works on
  - Report on activity levels
  - Quality (and any other other) issues

#### Notices

- Sectional completion
- Non-Completion

## 8. The 'Twilight Period' (2)

### Key considerations / actions once warning signs are identified

#### Review Contract

- Check terms of building contract that relate to security (and how it responds to contractor insolvency) – performance bonds and PCGs

#### Insurance

- Ask Contractor for evidence that insurances it is required to maintain under building contract are being maintained
- Ask Contractor to notify its insurers of any potential claims Employer may have against Contractor (so that they are likely to be covered by the relevant insurances)

#### Off Site Materials

- Increase site visits
- Check status of materials which have been paid for, but are not yet on-site – including
  - (1) where the materials are stored
  - (2) whether there is vesting certificate in place (that transfers title to Employer) and
  - (3) compliance of materials with contract requirements (such as insurance, labelling and storage requirements)

This is all to assist the Employer in the event the Contractor does become insolvent

# 9. Immediate Actions & Practical Considerations

## 1. Notify key stakeholders

## 2. Secure the site

- Security / CCTV / Hoarding
- Theft / damage / loss of plant

## 3. Insurance

- Notify

## 4. Stop payments

## 5. Assemble your team

- Employers Agent / QS
- Clerk of Works
- Solicitor
- Insurance
- Health & Safety audit

- Clerk of Works - Condition survey
  - Progress to date
  - Identify weak points in security/water ingress & weather
- Employers Agent / Quantity Surveyor
  - Value the works (smash & grab defence)
- Health & Safety
  - Audit, don't forget Public Safety
  - Notify HSE
  - Client Duties under CDM
  - Principal Designer to suspend F10
- Building Warranty Provider
  - Notify of potential claim
  - Early warranty provider involvement
- Building Control - Transfer over registration ASAP
  - Meet & review file / latest status

# 10. Implications of Insolvency

- Termination
- Notifying the Bondsman / Parent Company Guarantor
- Effect on Collateral Warranties
- Bringing a claim in Insolvency / Claims by the Administrator/Liquidators
- Dealing with site security, materials and plant on site
- Continuation of Latent Defects insurance



# 11. Completing the Project – No ONE SIZE FITS ALL

- No template!
- Brainstorm your options (considering...)
  - Stage of construction
  - Construction type
  - Project specifics
- Design team
  - Are they still around?
  - Do you have Collateral Warranties in place?
  - Stage of Design
  - Performance / Quality
  - Information Management – where is it all?
  - Building Safety Information
- Independent Specialist Reports / Information
  - Structural & Civil
  - M&E

- Fire
- Warranty gaps for specialist works (roofs / windows / lifts etc)

## Re-Procurement

- Consider the project completion options
  - Construction Management (CM)
  - Cost Plus (Main Contractor)
  - Hybrid – Phoenix option
  - Start again?
  - Fixed price D&B – not likely!!
- Cost, Quality & Time considerations
- Securing Value
- Risk management rather than risk removal



## 12. Conclusion – Key Takeaways

- Early Due Diligence is essential
- Look for warning signs
- Effective project and contract administration is key – a good relationship between the client and its consultants is key
- Project audits are a MUST! Not a witch hunt – no point burying your head in the sand.
- Create a team environment where it is OK for team members to admit when something isn't right
- No one size fits all

# Thank You

## Q&A

**redloft**



**Lois English**

Senior Development Consultant

**m** 07758 364 362

**e** [lenglish@redloft.co.uk](mailto:lenglish@redloft.co.uk)

**Adam Woolsey**

Director

**t** 020 4534 0007

**e** [awoolsey@martinarnold.co.uk](mailto:awoolsey@martinarnold.co.uk)

**Mark London**

Senior Partner & Head of  
Construction

**t** 020 7880 4271

**e** [mark.london@devonshires.co.uk](mailto:mark.london@devonshires.co.uk)

# Red Loft's Bitesize Broadcasts

*Our series of informative discussions around key topics in the property, development and construction industry.*

**1** **Developing during uncertain times:**  
Approaches to strategic and project risk management

**2** **To retrofit or redevelop:**  
Considering options and making the best use of assets

**3** **Forewarned is Forearmed:**  
Preparing for, and dealing with distressed projects

**4** **Planning & Viability:**  
Shining a light on viability in planning

**5** **The intelligent client:**  
Understanding your role as the client

**6** **A quality handover for client and customer:**  
Navigating the challenges