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United Kingdom

UK Government (Comprising Ministry of Justice, Ministry of Defence and Department for Transport) and Carillion plc

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Claimant: John Doe

para.1 Background

In 2017, John Doe chose to invest almost £1m into Carillion plc based solely upon their online market valuation; and so, was naturally shocked and angered to learn on 15th January 2018, that rather than enjoying an anticipated and projected return on that investment, Carillion were instead to undergo compulsory liquidation and that John Doe was to be left with a significant pecuniary loss, despite having seen no reasonable indication that they were in any serious financial distress.

In fact, the recently published market valuations suggested otherwise, not to mention the fact that Carillion were still undertaking, bidding, and in large part, winning a voluminous number of public sector contracts across the United Kingdom.

When assessing the merits of a civil claim by John Doe against the UK Government, and with full account of the transgressions between Carillion and the government, the likelihood of a successful outcome becomes convoluted, while the reason for this apparent obstruction is that when approximating the distance and therefore weight of this claim, one must include factors such as proximity, foreseeability, causation, liability and the contractual relationship shared between John Doe and the UK Government.

Respondents: UK Government (Comprising Ministry of Defence, Ministry of Justice and Department for Trade)

para.2 Public Enquiry

Resting solely upon the words of former Carillion CEO Richard Howson, there were numerous claims made by Carillion, which suggested that during the period in which both Carillion and the UK Government were contracting, the government was almost consistently slow to honour its duties in line with a previous and public commitment to endorse and observe consistent payment timescale adherence; and while Carillion are equally accountable for the financial health of their particular organisation, when sandwiched between the smaller subsidiary sub-contractors and those firmly controlling the flow of funds (in this instance the UK Government), there would soon become little option open to Carillion, other than to quite literally 'hold on tight' to whatever liquidity it could muster, while being simultaneously awarded large-scale construction and support service contracts by the UK Government; which at first blush appear lucrative to both parties, yet quite clearly came with a heavy price of repeated intolerances exceeding Carillion's financial reach throughout the years leading to its otherwise avoidable insolvency.

More notably, there are, as stated in the parliamentary investigation records, a number of letters written by Richard Howson that attempted to elaborate and thereby 'demystify' the circumstances surrounding Carillion's apparent inability to grasp its financial standing[1], yet those letters have not been made publicly available, which to anybody seeking the truth of any matter, raises grave concerns and in turn, paints quite a different picture indeed.

Directive 2011/07/EU and the Prompt Payment Code

para.3 Legislative Breaches

Turning first to the above Directive, para.3 of the preamble reads that:

> "Many payments in commercial transactions between economic operators or between economic operators and public authorities *are made later than agreed in the contract or laid down in the general commercial conditions*. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. *Such*

> *late payment negatively affects liquidity and complicates the financial management of undertakings*. It also affects their competitiveness and profitability *when the creditor needs to obtain external financing because of late payment*. The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult."[2]

And so prior to their insolvency in 2018, Carillion and the Cabinet Office, Ministry of Justice, Ministry of Defence, Department for Transport (overseeing Highways England and Network Rail)[3], became signatories to the Prompt Payment Code, as was suggested by the European Parliament and European Council in art.8 para.4 of Directive 2011/07/EU, and whose remit was to regulate and enforce the terms of the Code where signatories were found to be in breach of the terms, in particular s.5.1, which reads that the board's primary functions include:

> "*Investigating* and ruling on challenges made against Code signatories by suppliers to decide whether the principles and standards of the Code have been breached (as set out in Annex A)."[4]

While para.12 of the Directive preamble indicates clearly that:

> "Late payment constitutes a *breach of contract*…"[5]

para.4 PPC Breaches

Returning briefly to the Prompt Payment Code, Annex A itself also states that signatories must pay suppliers within the terms agreed at the outset of the contract, while in principle, 30 days was considered normal practice, although a maximum of 60 days was also considered reasonable where such tolerances were found *not to compromise the supply chain*.

Whilst far from a statutory instrument, it was no doubt agreed that by becoming a signatory, the signing parties acquiesced to fall subject to investigation where a breach was shown to exist, and so when looking to understand the root of Carillion's collapse, one must turn to the comments made by Richard Howson during the parliamentary investigation, when he stated clearly in chapter 4 that:

> "As a board we relied on cash flow forecasts, working capital projections *and on our customers acting in accordance with the contracts and administering fair and timely cash flows*."[6]

Before adding that:

> "Crucial to a thorough and proper investigation was for the Joint Select Committee to obtain an understanding of *the amounts owed to Carillion by various Government Departments and agencies*."[7]

However, what proved to be the most troubling statement was that when offering Carillion the chance to bid on potential projects, the UK Government and its wider public sector bodies:

> "[F]ailed to provide adequate data and threatened to strike out the company as a contender for future work if Carillion had pursued its claims against the Government by the threat of *litigation*."[8]

para. 5 Non-Mediation

And so it has been contended that Carillion was forced to continue suffering grossly inadequate payment times from the UK Government, while committing to complete large, and thereby costly

projects, despite having to find alternative ways in which to retain its liquidity whilst unable to enforce its own contractual rights within or without the courts, of which it was wholly entitled to do, even if through preliminary alternative dispute resolution (ADR) or mediation, as was endorsed in para.34 of the Directive 2011/07/EU preamble, which read that:

> "Member States should *encourage* recourse to mediation or other means of alternative dispute resolution."[9]

Thus, there remain questions surrounding why there have been no investigations into the alleged breach by the UK Government when failing to adhere to its own payment terms, regardless of the inevitable supply chain disruption that subsequently followed.

UK Government's Statutory Compliance

para.6 Regulatory Breaches

In terms of governmental compliance, s.113(2) of The Public Contracts Regulations 2015 reads that:

> "Contracting authorities shall ensure that every public contract which they award contains suitable provisions to require the following: (a) that *any payment due from the contracting authority to the contractor under the contract is to be made no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed*…"[10]

While s.115(6) also states that:

> "To the extent that a public contract does not contain express provisions dealing with any of the matters which, in accordance with paragraph (2), should have been contained in that contract or subcontract, *it shall be an implied term of the contract* that: (a) any payment due under it from the contracting authority to the contractor is to be made no later than the end of a period of 30 days from the date on which the contracting authority completes any process of verification that the invoice is valid and undisputed…"[11]

Conversely, when looking to chapter 5 of the Joint Select Committee report, The Federation of Small Businesses remarked how their own research had further concluded that:

> "25% of firms…who work on *public sector* infrastructure projects amongst other work, report being paid late *more than half of the time*."[12]

para.7 Failure to Investigate

Yet to date, there appears to be no evidence that the Ministry of Defence, Ministry of Justice or Department for Transport have been held to scrutiny when following up the claims of routinely slow payment as argued by Richard Howson, which, in accordance with s.51 of the Prompt Payment Code, must undoubtedly prove a *prerequisite* to any formal examination of the facts, particularly where claims of prolonged financial strain have been both cited and presented.

NB Research also suggests that at the time of its collapse, Carillion was undertaking around 450[13] public sector contracts accounting for over £1.72bn, or 45% of its domestic revenue, while its three biggest clients were the Ministry of Defence, Ministry of Justice and Department for Transport combined.

Insider Dealing

para.9 Criminal Acts?

In December of 2017, eight Cabinet Office and Government investments officials expressly agreed to become Carillion's 'insiders', thereby gaining access to information that would otherwise be privy only to select lenders; an act which itself is a criminal offence under s 52(2)(b) of the Criminal Justice Act 1993, in the event that an 'insider':

> "*[D]iscloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.*"[14]

Hence on December 15th 2017, the Cabinet Office declined to amend Carillion's strategic supplier risk rating to high risk, (presumably to avoid criminal charges and market destabilisation), which upon closer examination, demonstrates a complicit attempt to prevent culpability, while paradoxically allowing potential investors and shareholders to remain unwittingly at financial risk, and tied to their existing investments based upon a false evaluation and Carillion's wholly misrepresentative market presence, even without the alleged misleading audits.

Research again indicates that when tendering for a lucrative Ministry of Justice prison maintenance contract in 2014, Carillion submitted a costing that by comparison, stood to lose them an estimated £15m per annum, however the UK Government readily accepted the tender, despite s.69(1) of The Public Contracts Regulations 2015 stating quite clearly that:

> "Contracting authorities *shall require tenderers to explain the price or costs proposed* in the tender where tenders appear to be *abnormally low* in relation to the works, supplies or services."[15]

And upon which, there appears to be no immediate evidence that such a discussion ever took place prior to its award, thereby indicating that the UK Government had again neglected to adhere to its own statutory obligations, in lieu of what must have appeared to be a 'bargain'.

Public Contracts Regulations 2015

para.10 Publicly Accessible Data

Further research reveals that Directive 2011/07/EU was transposed into the Public Contracts Regulations 2015, wherein s.113(7) reads that:

> "Every financial year, *each contracting authority shall publish on the internet* statistics showing, for the preceding financial year, how far the contracting authority has actually complied with its obligations under this regulation to make payments within 30 days, including: (a) the proportion of invoices that were paid in accordance with those obligations, expressed as a percentage of the total number of invoices that were, or should have been, paid in accordance with those obligations…"[16]

While s.113(8) further notes that:

> "'[P]ublish on the internet' means (a) *make freely available* on the internet…"[17]

Hence, email contact with the Crown Commercial Service (who published Action Note 03/16 on March 21 2015 requesting that all contracting authorities published the required data for the 2015/2016 period once available, with the same process to be applied year-on-year going forward) was answered by the Deputy Director on 10th January 2019, who remarked only that:

> "The information you ask for concerning payment statistics for Ministry of Defence, Ministry of Justice, Network Rail and Highways England is not held by the Cabinet Office. You may wish to direct your request to those authorities."

However, reference to a 2015 National Audit Office report on government payment times[18] indicates there was sufficient evidence to show that prior to the publication of Action Note 03/16, the bodies studied[19] were predominantly failing to evaluate, and thereby follow the payment efficiency guidance notes given to them by the UK Government.

Culpability

para.11 The Source

Consideration of all of the above suggests that the party liable for the undoing and subsequent collapse of Carillion was in fact the UK Government, and this conclusion can be explained in the three counts as below:

1. From the outset, the 'client', or in this instance, the party with the highest level of financial control and influence was unquestionably the UK Government, and this was illustrated earlier in para.4 when discussing the written and verbal contests of Richard Howson, whose statements surrounding cash flow concerns arising from the slow payment by the relevant governmental departments ought to have been sufficient enough to warrant further investigation by the Joint Select Committee, especially with regard to Richard Howson's written submissions, and his reminder that those chairing the investigation should:

> "[B]e under no illusion that this problem *starts at the top*."[20]

While also noting that on several occasions, the UK Government had failed to properly assess the work required, and yet still expected Carillion to continue upholding its own end of the contract(s), which in itself, would have undoubtedly caused significant financial strain, particularly when Carillion was routinely denied prompt payment with which to offset and therefore balance its domestic operations; which is a theory lending greater credence to Carillion's decision to over-extend its payment times with its own suppliers, while also trying to remain viable as both a national and international contractor.

This unreasonable operational demand showed a clear breach of the UK Government's obligations under Directive 2011/07/EU and the Prompt Payment Code, while the absence of any investigative enforcement further indicates the Prompt Payment Code board's failure to regulate both Carillion and the UK Government in accordance with its express duties.

This is further exacerbated by the contention that the UK Government also made implied threats as to the weakening of Carillion's public sector market standing should Carillion have chosen to pursue its debts[21] as any other company would in similar circumstances; which is itself, not something undertaken unless the party issuing the threats feels they have the upper hand and financial dominance, which the UK Government quite obviously did at the time, despite such behaviour being tantamount to an overt abuse of position.

para.12 Statutory Failings

2. When the UK Government elected to stall due payments to Carillion, it chose to breach its *statutory* duty to pay within a reasonable timescale, while also breaching its *signatory* duty under the Prompt Payment Code; which suggests that the UK Government felt entitled to abuse its own position within the supply chain in order to retain monetary control, while simultaneously encouraging and allowing Carillion to continue tendering for future projects, despite what was already proving a one-sided contractual relationship further undermined by the fact that existing

procurement regulations transposed from Directive 2014/24/EU did not prevent a 'high risk' contractor from bidding for future contracts[22] (although this research has so far been unable to substantiate that claim due to a lack of publicly available evidence).

This is something Carillion was still doing shortly before its collapse, thus both of the rules failed to prevent a cessation of trade, therefore the UK Government were able to allow Carillion to continue bidding, while the UK Government was then left free to award to Carillion, despite the obviously inherent risks attached when doing so; which is tantamount to professional negligence bordering recklessness.

In addition to this, it is equally disturbing that no Joint Select Committee investigation into the UK Government's breach has since been instigated nor reported upon, which appears equally negligent, given the thorough examination of Carillion's conduct in the years prior to its compulsory liquidation.

para.13 Mismanagement

3. As previously explained, when the UK Government agreed to over-involve itself in Carillion's financial standing, it chose to ignore its own duty to remain impartial, and instead allowed itself to become embroiled in a situation carrying *serious* criminal implications.

This by extension, prevented the UK Government from rightfully altering Carillion's risk status when faced with the truth of Carillion's financial troubles; an inaction that again shows an abuse of position following an earlier abuse of position when sending eight government employees into Carillion's corporate operations, instead of remaining separate from what was ultimately its own doing.

Examination of the UK Government's apparent ignorance toward its inherent contractual and public requisites, and its effects upon a service provider's cash flow and liquidity, suggests that when dealing with contractors such as Carillion on public sector projects:

> "[T]he Government has contracted with the private sector *without knowing key data about the services it was asking companies to bid for*. In these circumstances, the Government has asked the contractors to absorb any losses resulting from its own ignorance of the initial condition of the service."[23]

Which rings ever true when comparing the financial standing of Carillion from the period 2009 through to mid 2017, particularly where slow if not tortuously prolonged payment from numerous Government bodies in the support service sector quite clearly underpins the increase in Carillion's borrowing in order to remain both solvent and operationally functional (see Fig.1).

para.14 Accountability

As we can see thus far, Carillion were appointed by the UK Government to carry out numerous large-scale construction and infrastructure support agreements (many of which provided low to almost diminished returns), therefore they were directly accountable to the UK Government when completing and honouring the contracts, and likewise the UK Government were directly accountable to Carillion when it came to payment for works undertaken, however Carillion's directors were not accountable to its shareholders beyond those duties assignable to the company, which is a legal entity in and of itself, and so based upon the available evidence, it is worth noting that had the UK Government been sued by Carillion, they would have been potentially liable for:

I. Abuse of Position
II. Breach of Contract
III. Breach of Statutory Duty

IV. Negligence

Also note that the breaches in payment terms were collectively executed by a number of governmental bodies and not a single entity, therefore debt enforcement claims could have easily been brought by Carillion against the UK Government's individual bodies in relation to their annual spending with them:

Carillion plc's Public Sector Revenue, Income and Borrowing 2009-2017[24]

Fig. 1

Financial Year	Total Support Service Revenue	Amounts Owed	Income Received	Total Borrowing
2009	£2.4bn	£361.7m	£11.6m	£242.3m
2010	£2.1bn	£338m	£11.7m	£276.5m
2011	£2.3bn	£321.5m	£16m	£541.4m
2012	£2.3bn	£343.6m	£15.8m	£812.9m
2013	£2.3bn	£386m	£11.1m	£628.9m
2014	£2.3bn	£437.7m	£2.9m	£649.3m
2015	£2.5bn	£386.8m	£2.4m	£632m
2016	£2.7bn	£614.5m	£2.5m	£688.7m
2017	Unknown	Unknown	£1.9m	£570.8m

As mentioned above, proximity instantly reduces the likelihood of any legal recourse for John Doe's pecuniary loss, and so having examined a number of possible approaches including (i) derivative claims, (ii) breach of fiduciary duty, (ii) equitable recovery under a constructive trust and (iii) negligence, it would appear uncertain that John Doe is ultimately left with any legal remedy, while the relevant findings are shown below.

Derivative Claims

para.15 Acting for the Company

Despite the Companies Act 2006[25] providing for minority shareholder claims against the actions or inactions of existing (and former) company directors under a fiduciary breach, there is no evidence that a claim can be made against those previously employed by a now insolvent company, while it is also presumed, albeit not expressly stated under English law that derivative claims are presented by parties acting in *stead* of the company, therefore any awards would be transferred to the remaining company assets for redistribution amongst eagerly awaiting creditors, before last if not least, the shareholders themselves.

This unfortunate principle was outlined in *Metcoff v. Lebovics* when the Superior Court of Connecticut stated that:

> "Any benefit to the complaining [shareholder] is, therefore, *derivative* or indirect in the sense that the recovery increases the assets or the economic viability of the insolvent corporation as a whole."[26]

More importantly, and as expressed above, there is currently no UK legislation to indicate that a shareholder can bring a derivative claim against the director(s) of an insolvent company, while over

in the United States this barring of claim is facing stern judicial challenge amongst several States, as was recently shown in *Caulfield v. Packer Group Inc.,* where the Illinois Appellate Court held that:

> "[A] corporation's insolvency expands the class of those eligible to bring a derivative claim to include creditors *in addition* to shareholders."[27]

And so although the path to holding directors liable for fiduciary breaches is potentially available while a company is solvent, this particular route offers no value to John Doe in his search for recovery.

Fiduciary Breach v Shareholders

para.16 Fiduciary Obligations

As previously mentioned, English law does not currently recognise fiduciary relationships between directors and shareholders; and so, the onus for reparation ends within the powers of the company itself, which translates that John Doe has no option for a legal claim under this doctrine.

Constructive Trusts

para.17 Equitable Remedy

In matters where one party takes advantage of its position in order to profit from another's potential loss or detriment, the courts are able to use equitable measures in order to provide a suitable remedy where common law fails.
This is often utilised in the form of a 'resulting' or constructive trust, which is placed over the (tangible or intangible) property considered lost, on the pretence that those in possession are now mere trustees for the rightful beneficiary, which in this instance would be John Doe, while the use of a trust serves to prevent unjust enrichment on the part of the now trustee.

On this occasion, there is compelling evidence to show that the UK Government routinely profited from the deliberately slow payments of Carillion's invoices, despite its legal and statutory obligation to pay its contractors on time, however, given that there is no direct proximity between John Doe as a shareholder and the UK Government as a previous client of Carillion, this particular doctrine cannot be reasonably applied.

Corporate Entities or Government Bodies?

para.18 Private vs Public Law

While government bodies prima facie serve the needs of the public, John Doe's claim itself would be one made against a corporate entity as per para.10 of the Directive 2014/24/EU preamble, which clearly states that:

> "[A] body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have *an industrial or commercial character*."[28]

And so, research shows that each of the three central Government bodies (Ministry of Defence, Ministry of Justice, Department for Trade) all produce annual statements documenting profits and losses for the fiscal year, thereby qualifying as entities governed by *private* and not public law.

A Claim for Negligence?

para.19 Factual Causation

Q. But for the deliberately slow payment of Carillion's invoices, would John Doe have suffered a loss as a result of his investment?

A. Based upon the full order book, and promise of literally many years worth of work for the UK Government, there is no evidence to support the notion that Carillion were at any significant risk of insolvency, particularly given that the UK Government was no doubt perceived to have been a 'safe bet' in terms of payment and long-term trade, while the figures show that the UK Government was accountable for *forty-five percent* of Carillion's domestic revenue during the years prior to their compulsory insolvency.

In fact, this history of extended borrowing stems not from an accounting deficiency, but as a result of having to retain market liquidity, while suffering at the hands of the UK Government's refusal to (i) hold itself accountable, (ii) adhere to is own payment policies, (iii) encourage electronic invoicing[29], and (iv) provide prompt payment for works undertaken in order to recoup long-term financial benefits for the UK economy.

Turning conversely to the HM Treasury report 'Managing public money', s.1.1.3 states clearly that:

> "Public services should carry on their businesses and *account for their stewardship of public resources in ways appropriate to their duties and context and conducive to efficiency*."[30]

While box 4.4 instructs that one of the essential systems used by public sector bodies includes:

> "Accurate payment of invoices: *once and on time, avoiding lateness penalties*…"[31]

And so, when juxtaposed against the non-payment of Carillion's invoices, s.5.11.3 paradoxically reads that:

> "It is essential for central government organisations to minimise the balances in their own accounts with commercial banks. Were each to retain a significant sum in its own account with such banks, the amount of net government borrowing outstanding on any given day would be appreciably higher, adding to interest costs and hence *worsening the fiscal balance*."[32]

However, an evaluation of the 2015 National Audit Office Report 'Paying government suppliers on time' reveals many startling facts that simply cannot be ignored nor reasoned away, starting with their estimation that:

> "[I]f all departments paid all invoices in 5 working days, rather than taking the 30 days allowed by statute, this might benefit suppliers by reducing their interest costs by up to £88 million a year."

Yet it was also noted that the government had taken no steps to evaluate the effects or benefits of the Prompt Payment Code at the time of the report's publication, which would also explain the UK Government's continued breach as mentioned in para.3, no doubt in large part because the Department for Business Innovation & Skills and Cabinet Office themselves:

> "[W]ere *unable to locate the official papers* setting out the policy's original objectives and its estimated costs and benefits."[33]

And so, if this were to prove representative of the Government bodies' attitudes towards fiscal efficiency, the case for negligence grows ever stronger, while in s.1.3, the report stresses that:

> "In extreme cases, late payment can result in a profitable company going bust and *this can have a knock-on effect triggering the insolvency of other companies further down the supply chain.* To avoid the downsides of late payment, businesses may be able to use a factoring service which, for a fee, will exchange unpaid invoices for cash…however when using a factor, the supplier suffers a discount on the value of the unpaid invoice."

Which was a system[34] used by Carillion when attempting to retain its liquidity, while consistently facing either overly protracted payment times, or even non-payment (see Fig.1); both of which, demonstrate the UK Government's fundamental negligence to follow payment protocols and governing legislation when transacting with Carillion in the years preceding their collapse, not to

Defendant's negligence to pay invoices due as required → foreseeable risk of debtors insolvency with consideration of overall dependency upon defendant's revenue → liability for any resulting losses incurred at the point of compulsory insolvency

mention Carillion having to pass such losses on to those sub-contracting within the supply chain.

Perhaps ironically, a 2014 National Audit Office report titled 'Managing debt owed to central government' summarily stated that a:

> "Lack of attention to debt means that government's working capital *is larger than necessary*, and government has to borrow more."[35]

Thus, it was clear at the point of publication that the UK Government was not honouring its duty to lead by example and reduce over-borrowing in lieu of increased profitability and expedient use of public funds; all of which, points again towards collective negligence, with the reasonable foresight that casualties will doubtless occur over time.

Returning again to the 2015 National Audit Office report 'Paying government suppliers on time', Part Two discusses the performance reports submitted by seventeen central government departments including the Ministry of Justice and Ministry of Defence; and which, indicated that both departments claimed the prompt payment of between 92% (Ministry of Justice) and 95% (Ministry of Defence) of supplier invoices between 2013-2014; however, it was suggested by the National Audit Office that these figures were deemed overstated[36], while it was further stated that the Ministry of Defence had in fact paid only 14% of its supplier invoices within 5 days, whilst it was also claimed that 80% of those invoices were paid almost five weeks[37] after submission.

Furthermore, it was also estimated in s.2.23 that £1.8bn worth of public sector supplier invoices were paid *beyond* the maximum 30 day threshold; and that subsequently, the liability for late payment interest fell at around £18m for that period alone, which it must be remembered, was only pertinent to the four central government departments studied, not those of the Ministry of Justice, Department for Trade and beyond.

para.20 Legal Causation

Q(1). Was John Doe's loss of investment too remote from the UK Government's (negligence) failure to pay Carillion on time and in accordance with its statutory duty?

With due consideration of the evidence relating not only to the UK Government's requisite duty to oversee the financial health of its suppliers, its duty to pay those suppliers on time and in most cases before time (so as to save the government and general public money throughout each year),

the compulsory insolvency of Carillion was clearly and easily preventable, had the four relevant government bodies acted within their capacity and professional obligations (see Fig. 2 below).

Fig. 2

para.21 Novus Actus Interveniens

Q(2). Could any subsequent event have broken the chain of causation between the UK Government's negligence's and John Doe's loss?

While Carillion's excessive borrowing was undoubtedly symptomatic of financial difficulties, their refusal to seek legal recourse for the recovery of the UK Government's debts might serve to impinge upon John Doe's claim; however, there is more to this particular inaction than meets the eye.

Reference to para.11(1) shows that Carillion did give due consideration to litigation, but had been expressly informed that any efforts to enforce their debts against the UK Government would be met with exclusion from future contracts; which is itself, an overt *abuse* of position and one great enough to negate the inaction of Carillion in lieu of a recognition that in so many respects, Carillion were financially and operationally impotent in the face of the UK Government's bullying and manipulation; and that in and of itself, this vulnerability would demonstrate further causation on the UK Government's part, while also adding additional weight to John Doe's overall claim.

From a judicial perspective, in *Home Office v Dorset Yacht Co.,* the House of Lords iterated that:

> "[W]here human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation."[38]

And so, examination of the intervening actions of Carillion's over-extensive borrowing when faced with a stark and continuous reduction in annual revenue (see Fig.1) and coupled with the fact that the UK Government's dealings with Carillion amounted for almost half of Carillion's domestic income[39], it would be relatively academic to anybody looking at a shortfall of revenue in the hundreds of millions of pounds per year, that either insolvency or some irreparable hardship would befall Carillion in the near or approximate future, while it was also held in *The Oropesa,* that:

> "*[H]uman action does not per se sever the connected sequence of acts*. The mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer."[40]

para.22 Foreseeability

When discussing foreseeability and eventual liability for loss, the Court of Appeal in *Conarken Group Ltd v Network Rail Infrastructure Ltd,* held that:

> "[T]he scope of the duty in each case depends upon the purpose of the rule imposing the duty and the purpose of the rule that one must take reasonable care not to cause harm to other people or their property *is to impose responsibility on people for governing their actions in a way that prevents reasonably foreseeable harm*."[41]

Before the court added how:

> "[L]iability depends only on foreseeability of the kind of loss suffered *rather than the manner in which it was caused*."[42]

And so, conclusively held that :

> "[I]t is not necessary *for the exact course of events which produces the injury to be predictable*, provided the injury is foreseeable…."[43]

Furthermore, when assessing the nature of a tortious claim for financial loss, it is equally important to note that shareholder investments essentially constitute intangible assets (or choses in action); and so, once purchased and subsequently held under ownership by way of title, any resulting loss of that property ought to be readily redressed under tortious recourse, while more importantly in *Smith v Leurs,* the Australian High Court held that:

> "[O]ne man may be responsible to another for the harm done to the latter by a third person; *he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty*."[44]

Therefore, we return again to the notion that had the UK Government payed its invoices in a timely and consistent fashion, there would have doubtless been no need for Carillion to revert to exorbitant bank loans in order to 'bridge' the glaring revenue deficit, so as to retain its rightful liquidity.

This translates that the UK Government's breach consequently created an act which *but for* the breach, would have proved unnecessary; hence, it is likely that Carillion would still be trading with reasonable financial health, while John Doe would then be left either (i) benefitting from a calculable return on his investment, or (ii) free to relinquish his shares for profit; or at the very least, for the market rate upon which he paid for them in May of 2017.

Pure Economic Loss

para.23 An Argument for Change

In *White v Jones,* the House of Lords held that:

> "The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss *even if economic damage to the plaintiff was foreseeable*."[45]

Yet, within the same matter it was contrastingly held that:

> "The purpose of the courts when recognising tortious acts and their consequences *is to compensate those plaintiffs who suffer actionable breaches of duty*…."[46]

And so, we begin this section faced with an obvious contradiction in terms and one largely underpinned by the speeches and doctrines so frequently referred to in both *Donoghue v Stevenson*[47] and *Hedley Byrne & Co Ltd v Heller and Partners*[48]*.*

In *Donoghue,* the House of Lords expanded upon the right to claim pure economic loss, thereby allowing a third party to recover against manufacturer error resulting in a defective product, while *Hedley* endorsed an 'incremental'[49] approach following the misstatement of a third party resulting in pure *economic* loss; whilst on this occasion, John Doe was instead reliant upon the words of parties *deemed* to owe a duty of care and yet in *Caparo Industries Plc v Dickman,* the House collectively agreed that:

> "[T]here is *no simple formula or touchstone* to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law

> will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability."[50]

However, in *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd,* the Court of Appeal remarked that:

> "Outside the sphere of simple physical injury to person, all loss is "economic" and its character and quality is not altered by adding to it the word "purely.""[51]

Which in itself, suggests that economic loss currently occupies its own realm, while it is equally important to note that when evaluating a direct negligence claim by a third party against a defendant, the court must also remember that:

> "[W]hen C has a direct right of action in tort against A in respect of damages caused by A's breach of his duty to B, C's rights against A *must be regulated by any provisions which controlled or limited B's rights against A*."[52]

Which on this occasion, fails to fetter John Doe's right to recompense for economic loss any more than Carillion would have been lawfully entitled to enforce for payments of the UK Government's debts during the years shown above (see Fig.1); therefore, this preliminary obstacle is essentially of minor hindrance when asserting a negligence claim in keeping with proximity, foreseeability and finally, an inherent duty of care to pay on the part of the UK Government.

In closing, it would also be prudent to note that in *Junior Books Ltd v Veitchi Co Ltd*, the House of Lords held that:

> "[I]n principle and depending on the facts of a particular case, purely pecuniary loss may be recoverable in an action founded on delict alone."[53]

Therefore, while precedent suggests John Doe might well fail to recoup his loss of investment, there has yet to be a successful benchmark claim spanning both indirect economic loss; and so, had this matter been pressed through to its natural conclusion, history might well look starkly different today than during the years preceding this financial debacle; and yet, without any litigation by those left wanting, the potential remains hypothetical and little more besides.

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[2] Council Directive 2011/07/EC of 16 February 2011 on combating late payment in commercial transactions OJ L48/1 (3) (emphasis added)

[3] Along with many other governmental bodies.

[4] Chartered Institute of Credit Management, 'Prompt Payment Code - Code Compliance Board Terms of Reference' March 2015 (emphasis added)

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[7] ibid para 2. (emphasis added)

[8] ibid para 3. (emphasis added)

[9] Council Directive 2011/07/EC of 16 February 2011 on combating late payment in commercial transactions OJ L48/1 (34) (emphasis added)

[10] The Public Contracts Regulations 2015, SI 2015/102 s.113(2). (emphasis added)

[11] TPCR s.115(6).

[12] Business, Energy and Industrial Strategy and Work and Pensions Committees, *Carillion: Responses from Interested Parties to the Tenth Report of the Business, Energy and Industrial Strategy Committee and the Twelfth Report of the Work and Pensions Committee of Session* (HC 2017-19, 1392) page 53 (emphasis added)

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[14] Criminal Justice Act 1993, s.52(2)(b). (emphasis added)

[15] The Public Contracts Regulations 2015, SI 2015/102 s.69(1). (emphasis added)

[16] TPCR s.113(7). (emphasis added)

[17] TPCR s.113(8). (emphasis added)

[18] Cabinet Office and Department for Business, Innovation & Skills, *Paying government suppliers on time* (HC 2014-15, 906) para 1.22

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[21] *ibid*. p.43 para 3

[22] National Audit Office *Investigation into the government's handling of the collapse of Carillion* (HC 2017-19, 1002) para 3.11

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[24] Figures sourced from Carillion plc Annual Statements 2009-2017

[25] Companies Act 2006, s.260(3).

[26] 51 Conn.Supp. 68, 76 (2007). (emphasis added)

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[29] Cabinet Office and Department for Business, Innovation & Skills, *Paying government suppliers on time* (HC 2014-15, 906) para 2.13

[30] HM Treasury, *Managing Public Money* (Annexed) (July 2013) p.5 (emphasis added)

[31] ibid p.25. (emphasis added)

[32] ibid p.38. (emphasis added)

[33] Cabinet Office and Department for Business, Innovation & Skills, *Paying government suppliers on time* (HC 2014-15, 906) para 8 p.6 (emphasis added)

[34] Commonly known as a 'reverse factoring arrangement' as typically facilitated by banks including Royal Bank of Scotland, Lloyds plc and Santander.

[35] National Audit Office, *Managing debt owed to central government* (HC 2013-14, 967) para 19 p.10 (emphasis added)

[36] ibid p.21 para 2.6

[37] ibid p.29 Fig.9

[38] [1970] AC 1004, 1030 (Reid LJ).

[39] See para. 7 p.6

[40] [1943] p.32, 37 (Wright LJ). (emphasis added)

[41] [2010] EWHC 1852 (TCC) 95 (Moore-Bick LJ). (emphasis added)

[42] ibid 102. (emphasis added)

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[44] (1945) 70 CLR 256, 261 (emphasis added)

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[46] ibid 278 (Mustill LJ). (emphasis added)

[47] [1932] AC 562 (HL).

[48] [1964] AC 465 (HL).

[49] A concept first introduced in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424

[50] [1990] 2 AC 605 (HL). (emphasis added)

[51] [1986] AC 785 (HL) 375 (Oliver LJ).

[52] ibid 397 (Goff LJ). (emphasis added)

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