

## Claims from insolvent contractors

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**For more information contact:**

**Peter Laskey**  
**Partner**  
020 8221 8062  
peter.laskey@bowlinglaw.co.uk

When contractors are retained to undertake a project but fail to meet the milestones agreed in the contract, it is normal for there to be a procedure to determine the contract, or bring it to an end.

In a recent case, a local authority sought to determine the contract of a contractor. The contractor referred the dispute to arbitration to test whether the determination of the contract was lawful. The arbitrator found in favour of the contractor.

The Council was concerned that the contractor would seek compensation as a result and that if compensation were paid, it would disappear to the benefit of the contractor's creditors, as the contractor was insolvent on a balance sheet basis. The Council therefore counterclaimed against the contractor and disputed the arbitrator's finding that the determination of the contract was not lawful.

The contractor failed to file a defence to the counterclaim in time, so the Council was given judgment. The contractor applied to have the judgment set aside.

The Court held that the failure to file a defence in time was an oversight. It also considered that where an insolvent party obtains an adjudication, there is a risk that the court will stay its judgment on the ground of insolvency. In other words, the insolvent party could win, but not be able to enforce the decision. This is likely to apply unless the financial situation of the insolvent party was similar at the time the contract was made, in which case the risk was already present for the other party, or the insolvency was due in significant part to the non-payment by the other party.

In many cases, therefore, a “victory” by the insolvent party will be a hollow one. However, simply ignoring claims by a company which may be insolvent is unwise. The ability of an insolvent company to pursue such a claim could be attractive to investors who might seek to inject funds into the company for the specific purpose of fighting (and enforcing) the claim.

Contact Peter Laskey, Partner, for advice on any commercial property dispute or landlord and tenant matter.