

# CONSTRUCTION : BULLETIN

## Adjudication Costs

### Are they recoverable through litigation?

Traditionally, if you incurred legal costs in an adjudication, you could not recover those costs from the other party, even if your claim was successful. With the Housing Grants, Construction and Regeneration Act 1996 (the "Construction Act") silent on the issue of who is liable for the legal costs of adjudication and paragraph 25 of Scheme for Construction Contracts 1998 (the "Scheme") holding the parties jointly and severally liable for the adjudicator's reasonable fees and expenses, the starting point is that that each party bears its own legal costs.

Following the 2002 case of *Total M&E Services v ABB Building Technologies*, it is widely acknowledged that a party cannot recover its adjudication costs in subsequent adjudication enforcement proceedings. In that case, the Judge stated "because the statutory Scheme envisages both parties may go to adjudication and incur costs which they cannot, under the Act, recover from the other side, it follows that such costs cannot therefore arise as damages for breach. To permit such claim would be to subvert the statutory Scheme under the Act."

But are the legal costs of adjudication recoverable when adjudication decisions (which are only binding on an interim basis) end up before the court for final determination of the dispute? In such situations, can the costs associated with the earlier adjudication proceedings be damages in their own right? The traditional view is that adjudication costs were not recoverable, even in subsequent litigation. However, following the recent case of *The Board of Trustees of National Museums and Galleries on*

*Merseyside v AEW Architects and Designers Limited and PIHL Galliford Try JV*, this may be set to change.

#### Background

The Board of Trustees of National Museums and Galleries on Merseyside (the 'Museum') engaged PIHL Galliford Try JV (a joint venture between PIHL UK Ltd and Galliford Try Construction Ltd) (the 'Contractor') and the firm of architects AEW Architects and Designers Limited ('AEW') to construct the new Museum of Liverpool.

There were numerous defects in the construction of the Museum of Liverpool. This resulted in the Contractor commencing adjudication proceedings seeking a declaration that it was not responsible for certain defective designs. The adjudicator agreed with the Contractor in this regard and issued a declaration to this effect together with a determination that the Museum should pay the adjudicator's fee. The Museum paid this sum.

The Museum subsequently issued proceedings against AEW seeking to recover damages arising from defective designs. Interestingly, the Museum's claim for damages included, amongst other things, the adjudicator's fees and the legal and expert costs the Museum had incurred in defending the earlier adjudication commenced by the Contractor.

#### The Court's Decision

AEW were proven to be responsible for the construction defects and were held to be in breach of contract and negligent. The Judge held that the Museum was entitled to recover,



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amongst other things, the costs incurred by the Museum as a result of the earlier adjudication – despite the fact that AEW had not been a party to such adjudication proceedings.

AEW argued that the Museum fought the adjudication knowing that the costs would not be recoverable from the Contractor in subsequent proceedings. To hold AEW liable for these costs, it argued, would be a “backdoor method of cost recovery”.

The Judge held that the Museum was put in the position it was in relation to the adjudication because of the defaults of AEW. His decision centred on reasonable foreseeability and causation linking AEW’s breaches of contract and the adjudication. He held that:

- it was reasonably foreseeable that adjudication could be deployed by the Contractor. Adjudication is ‘a fact of life’ in construction contracts and whilst it is not invoked on every project, it was within the bounds of reasonable foreseeability that there could be adjudication in the circumstances that arose between the parties;
- there was sufficient causative link between AEW’s defaults and the adjudication. If AEW had done its job properly, there would not have been any adjudication in relation to the design responsibility of the Contractor as the issue simply would not have arisen; and
- such causative link would only be broken if the Museum had acted unreasonably or its advisers acted negligently in advising the Museum that it had an arguable defence in the adjudication.

As such, the Judge held that the adjudicator’s fees, the legal costs and the expert’s fees were recoverable from AEW and awarded the Museum £53,000 in respect of such costs. However, this was substantially less than the figure of £119,000 the Museum had originally claimed for, as the Judge held the Museum failed to

provide direct evidence explaining how and why the costs incurred were all attributable to the adjudication.

### The Impact of the Decision

Following this decision, it is clear that in some circumstances, legal costs, disbursements and adjudicator’s fees can be recovered as damages in litigation where a party seeks a final determination of an adjudicator’s decision before a court.

It is important to note, however, that in relation to adjudication proceedings themselves and in proceedings to enforce an adjudicator’s decision, the traditional position remains – legal and other costs incurred are not recoverable from the losing party.

Parties who are left out of pocket by adjudication may now be in a position to recover those losses in subsequent proceedings. As a result, it is wise to consider including in your claim the legal and other costs incurred in adjudication proceedings when seeking a final determination by the court of a dispute following adjudication, or when negotiating a final settlement following an adjudicator’s decision.

To successfully claim the legal and other costs incurred in relation to adjudication, direct evidence will be required to show both how and why the costs being claimed are attributable to the adjudication proceedings. It is therefore imperative a detailed record is kept of all fees incurred by legal advisers and experts.

It will be interesting to see the true extent of this decision. Will the decision be confined to negligence claims involving third parties or has this landmark decision abolished the well-established doctrine that adjudication costs are unrecoverable? Only time will tell.

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