

# Recovery of Adjudication Costs

*The recent case of Husband and Brown v Mitch Developments Ltd [2015] EWHC 2900 (TCC) (16 October 2015) has once again thrown the spotlight back onto the question of whether a party can recover its costs incurred in bringing or defending Adjudication?*

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## Introduction

The Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") was originally silent in respect of parties' costs and the Adjudicator's fees.

The Scheme for Construction Contracts (England and Wales) Regulations 1998 was also silent on the parties' costs but expressly provided the Adjudicator was entitled to his reasonable fees and costs and Paragraph 25 of Part 1 indicated that he could determine how his own fees were to be apportioned between the parties.

The 'general rule' was therefore that each party would bear their own costs of bring or defending an Adjudication.

There was then a series of cases that, in summary, found although the Adjudicator had no statutory jurisdiction to determine or award the parties' own legal and/or experts costs such power could be given to him by 'agreement' of the parties. This agreement may have been by an express provision in their Contract or even both parties requesting their costs in their submissions to the Adjudicator.

Parliament then intervened by the amendments introduced by the Local Democracy, Economic Development and Construction Act 2009. This inserted Section 108A into the Construction Act, and provided:

"(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to in subsection (1) is ineffective unless—

- (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
- (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication."

Whilst it might be possible to argue that a provision enabling the parties to allocate their own costs amongst them providing it is (1) in writing; (2) is contained in the construction contract and (3) also confers upon the Adjudicator the power to allocate his fees – the general view at the time of its enactment was that it would restrict the allocation of the parties own costs to instances where either the agreement was made after the Notice of Intention to Refer or where made prior to this, was limited to conferring the Adjudicator with the power to allocate his fees and expenses only. (Although it should be noted submissions made by both parties to an Adjudicator for their costs might well satisfy the requirement of 108A(2) (a)).

## Subsequent Case Law

An exception to the general belief, that 'inter-party adjudication cost recovery' was not possible in the absence of a 'Post-Notice-Agreement', was found in the case of *The Board of Trustees of National Museums & Galleries on Merseyside v AEW Architects & Designers Ltd & Another* [2013] EWHC 2403 (TCC) and [2013] EWHC 2576 (TCC) where the Claimant was successful in recovering its Adjudication Costs (including its legal and expert costs) incurred against a 3rd – Party.

The facts were that part of the Works had suffered design problems and the Contractor had referred to adjudication the issue of whether it or the Museum's Architect, AEW, were liable for the design defects.. The Adjudicator held the Architect was liable and, consequently, the Museum was ordered to pay the Adjudicator's costs as well as incurring its own costs in defending the adjudication.

In the subsequent proceedings issued by the Museum against AEW, the Museum was successful and part of its claim was the costs of defending the Contractor's claim in the adjudication. Mr. Justice Akenhead gave judgment for the costs and said:

"I have formed the view that these costs are recoverable. If AEW had done its job properly in the first place, it is inconceivable that there would have been any adjudication in relation to the design responsibility of the Contractor because the issue simply would not have arisen...Adjudication is a fact of life now in construction contracts, albeit that it is not invoked on every project. It was within the bounds of reasonable foreseeability that there could be adjudication in circumstances such as arose here."

It should therefore be noted that this case concerns the recoverability of Adjudication costs not from the other party in the adjudication but from a third party on the basis of a finding that the third party could have foreseen that its breach could lead to an adjudication.

## Husband and Brown v Mitch Developments Ltd [2015] EWHC 2900 (TCC) (16 October 2015)

This case concerned an oral Contract referred to Adjudication. The second Adjudicator had dealt with the referral and found in the Claimants favour.

However, the Court found that the Contract was not a 'construction contract' for the purposes of Section 104 of the Construction Act; the Adjudicator had lacked jurisdiction; and the Claimant was not entitled to recover its costs as part of the court proceedings.

In its judgement the Court distinguished the judgment given in *The Board of Trustees of National Museums & Galleries on Merseyside v AEW Architects & Designers Ltd & Another* finding:

- In this instance it was not reasonably foreseeable that there could be an Adjudication; and that even if the Court was wrong in this then
- "to allow the Claimant to recover its costs of adjudication would subvert the statutory scheme which does not allow for such costs."

## Conclusions and Commentary

The decision in *Husband and Brown v Mitch Developments Ltd* suggests that the Court will now take a much more robust view of Section 108A in interpreting it as the parties are not entitled to recover their own costs in either bringing or defending an Adjudication, although this Section is concerned with Adjudication costs between the same 2 Parties.

It therefore remains to be seen if, when faced with another case with similar facts to *The Board of Trustees of National Museums & Galleries on Merseyside v AEW Architects & Designers Ltd & Another*, this judgement will be further distinguished.

Finally, there appear two further possible routes that may enable a Party to an Adjudication to seek to recover its costs:

- The first being the provisions of Section 5A(2A) of the Late Payment of Commercial Debts (Interest) Act 1998 (as amended by The Late Payment of Commercial Debts Regulations 2013) which provides: *"If the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs"*
- The 2nd possible route being where a contractual provision is included which provides for 1 Party to indemnify the other where an Adjudicator's Decision is subsequently changed, amended or held unenforceable by a Court/Arbitrator.

With costs of some Adjudications now reaching significant sums there may well be further examination, as to the right of recovery by the Court, in the not too distant future.

