

MDA PRESENTS



FIRST AID FOR CONTRACTS



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THE AWARD OF A PARTY'S COSTS IN ADJUDICATION, WHEN IS THIS POSSIBLE?

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One of the issues that needs to be considered when embarking on the resolution of a disputed claim, is how much will the process cost?

Such costs (or at least some of the cost at least) is recoverable in either arbitration or court, but not usually in adjudication.

There are two types of cost that will be incurred.

The first is the cost of the Adjudicator. Although this is usually shared between the parties, there are circumstances where this may be awarded against the losing party.

The second group of costs are the party costs, being fees of legal representatives, specialist consultants and experts but not the costs of a parties' own people working on the claim.

In most circumstances in arbitrations and court proceedings, it is the losing party that must pay the winning party's costs, and this is sometimes subject to being taxed by a taxing master. Unfortunately, the taxed costs are usually considerably less than the actual cost that would be incurred since the rates applied by the taxing master are less than market related rates.

But what is the position in an adjudication? Is it possible for a party to an adjudication to seek an award for the Adjudicator's costs or the party costs that have been incurred?

The NEC3 Adjudicator's Contract is a useful example of how payment to an Adjudicator is managed under Clause 3 of which provides:

- For an advance payment
- The Adjudicator to assess the amount due and submit an invoice
- Unless otherwise agreed, the Parties pay the Adjudicator the amount due in equal shares.

If one party fails to pay its share, the other party may pay the Adjudicator the unpaid amount and the defaulting party repays the paying party.

Generally speaking, the parties remain liable to pay for their own costs, together with their share of the cost of the Adjudicator's fees and expenses.

This is probably acceptable for small matters but when very substantial and complicated matters are referred to adjudication, it may be more attractive to include a provision into the adjudication agreement that would enable the Adjudicator to make an award, not just of his own costs but also of a party's costs where they are substantially successful.

In an English case, *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL 1662, the parties entered a written agreement, which included a clause that provided for the party notifying an adjudication, to be liable to cover all the costs and expenses incurred by both parties in such adjudication including legal costs and experts' fees. This was expressly agreed and both parties had full knowledge of the risk of agreeing to such a condition. Accordingly, when the party notifying the adjudication challenged this provision, the court upheld the terms of the contract. Apparently, the reason that such a provision was included into the contract was to discourage reference

of disputes to adjudication.

In another English case, *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd* [2017] EWHC 2159 (TCC), reference to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("*Construction Act 1996*") was raised. In this case, it confirmed that in the adjudication, the claimant sought reasonable costs to recover a debt, including its legal party costs. To support such claim, the claimant relied on the Late Payment of Commercial Debts (Interest) Act 1998. The Adjudicator granted such request. The defendant objected thereto on the basis that the Adjudicator had no power to grant such costs. It further stated that the relevant provision in the Late Payment Act was contrary to Section 108A of the Construction Act 1996.

Costs of adjudication will only be recoverable where an agreement to that effect was made in writing after giving of the notice of intention to refer the dispute to adjudication.

It was decided that the attempt to recover the party's adjudication costs, relying on the Late Payment Act, required the implication of a contract term. Absent such implied term, it was found that the Adjudicator had no power to make an award in relation to the claimant's party costs incurred in the adjudication.

In *Northern Developments v J&J Nichol* [2000] BLR 158, a party was successful in recovering its adjudication costs, because the one party had experienced attorneys representing it, and the opposing party was represented by experienced claims consultants. Both sides made a written request for recovery of their respective party costs, and neither raised any objection that the Adjudicator had no jurisdiction to award such costs. The court took the view that the parties, by doing so, broadened the jurisdiction of the Adjudicator. It thereby gave him the power to make an order requiring one party to pay the other party's costs as well as the Adjudicator's fees and expenses.

The conditions stipulated in adjudication agreements and relevant provisions of constructions contracts, all differ from each other, particularly where there are heavy handed particular conditions, or whether you are dealing with a bespoke contract. It is therefore crucial that parties, are aware of, and do not overlook the possibility of cost awards in adjudication in a contract. A party wishing to enter a construction contract, should not hesitate to seek specialist advice which can assist to address these possible areas of uncertainty.