

## CONSTRUCTION ALERT COSTS THROWN AWAY IN ADJUDICATIONS: ARE THEY AS IRRECOVERABLE AS WE THINK?

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### INTRODUCTION

A recent decision in the United Kingdom matter of *National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025* has provided some food for thought in relation to Australia's approach to legal costs, disbursements and other costs associated with adjudications in Australia. It is commonly accepted that costs incurred by parties to adjudications are irrecoverable in Australia, however Justice Akenhead's decision in the United Kingdom's Technology and Construction Court to award adjudication costs as damages against the losing party could potentially change the way the Courts approach this issue in Australia.

### FACTS

National Museums and Galleries on Merseyside Board of Trustees (**Museum**) engaged AEW Architects and Designers Ltd (**AEW**) and PIHL Galliford Try (**the Contractor**) to construct the Museum of Liverpool between 2007 and 2011. As a result of various complications that arose during the construction of the works, Museum brought proceedings against AEW particularly in relation to defects associated with the design and construction of the steps and seats. Included in those proceedings was a claim for damages that were the adjudication costs that Museum had incurred in an earlier adjudication with the Contractor.

In its adjudication against Museum, the Contractor claimed that the design of the steps and seating did not fall within its scope of work under the Contract. The adjudicator made his decision accordingly, and Museum was ordered to pay the adjudicator's fee.

The Court held that the adjudication between the Contractor and Museum would not have occurred had AEW performed its obligations under the Contract correctly; there was a sufficiently causative link between AEW's defective work and the adjudication.

AEW was subsequently ordered to pay Museum's costs in relation to its adjudication with the Contractor.

### IMPLICATIONS

Whilst the decision is only persuasive in Australia, the Court's willingness to award adjudication costs as damages against the losing party could potentially open the floodgates for parties to make claims seeking to recover adjudication costs. This may have the effect of deterring claimants from agitating adjudication applications in certain circumstances, particularly

where they are at risk of a court order making them responsible for the respondent's adjudication costs.

Principals and head contractors are especially well positioned to take advantage of the Court's potential willingness to alter its view in relation to the costs of an adjudication. For example, a principal or head contractor may include a clause in their contracts which makes a claimant liable for costs which were incurred as a result of a claimant's attempt at adjudication in circumstances where it did not have jurisdiction to do so.

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