

**COURT OF APPEAL OVERTURNS COSTS AWARD IN CONSTRUCTION
DISPUTE**

Walker Construction (UK) Ltd v Quayside Homes Ltd & Anor [2014] EWCA Civ 93

Introduction

In *Walker Construction (UK) Ltd v Quayside Homes Ltd & Anor* [2014] EWCA Civ 93, the English Court of Appeal considered the binding nature of an adjudicator's decision, and overturned a costs award where a party only recovered a small percentage of the value of its counterclaim.

This decision will be of particular interest to those in the construction industry, or those interested in the issue of division of costs between litigant parties where claims and counterclaims are involved.

Background

Walker Construction is a civil engineering contractor, which carries out, amongst other things, drainage and highway works. Quayside is a developer of residential homes.

In December 2004, Walker signed two contracts with Quayside under which Walker would complete drainage and highway works in relation to the construction of 300 residential properties. At the conclusion of the works, Quayside sought to retain part of the payment on the grounds that the works by Walker were defective.

Walker issued both court proceedings (in February 2008) and a notice of adjudication (in August 2008). On 2 December 2008, the adjudicator rejected Quayside's claims and awarded Walker over £24,000. Despite attempts by the parties to settle, the court proceedings continued to trial in September 2012 at which the trial judge awarded a net judgment sum of £10,035.91 to Quayside but dismissed Quayside's claim to recover £8,941.16 awarded to Walker by the adjudicator.

The principal issue for the Court of Appeal was whether the judge was right to make an order for costs which required Walker (subject to certain exceptions) to pay Quayside's costs.

Decision

The Court of Appeal overturned the costs order.

Costs order

Delivering the principal judgment of the Court of Appeal, Lady Justice Gloster noted that the Court of Appeal should not lightly interfere with a trial judge's exercise of discretion in relation to costs.

However, in this case, she held that the judge had got it “*plainly wrong*” by failing to adequately take into account the commercial reality of the litigation, how it was conducted on each side, its ultimate outcome, and who, on an objective basis was the most successful party (as he was required to do under the relevant parts of Part 44(3) of the Civil Procedure Rules; the respective conduct of the parties of the litigation and adjudication processes; and the impact of previous settlement offers.

In her view, it was “impossible” that Walker should have been subjected to a liability to pay Quayside's costs in an amount of £345,758.73 in circumstances where Quayside had failed to establish all but a very small part of its counterclaim.

Status of an adjudicator's decision

Lady Justice Gloster also considered the binding nature of the adjudicator's decision, and in particular, the status of the adjudicator's decision after it has been complied with and payment has been made pursuant to the award, but prior to the final determination of the relevant dispute in court or arbitration proceedings.

During the Court of Appeal hearing, Quayside sought to argue that the judge had been wrong to reject Quayside's claim for £8941.16 which it had sought on the basis that this amount was not properly due to Walker and should not have been awarded by the adjudicator.

On the facts of the case, Lady Justice Gloster rejected this point. As Quayside's claim was effectively a claim (or counterclaim) to set off damages in respect of allegedly defective works, the burden of proof at trial was on Quayside. As Quayside had not called any evidence at trial in support of its contention that Walker's original drainage works had been in breach of contract as defective, the judge had no basis, on the material before him, on which he could reach a final determination in relation to Quayside's claim for damages for breach of contract and therefore the adjudicator's award was bound to stand.

In obiter comments, Lady Justice Gloster said that it was clear that the court in subsequent litigation is not bound by the decision of the adjudicator and may come to a completely different conclusion on the relevant issues; but that was not to say that the adjudication had no effect on the onus of proof in subsequent proceedings. On the facts of the present case, however, that issue did not need to be determined.

18th March 2014