



## Think long and hard about how you spread risk when enforcing an adjudicator's award

by David Toscano

*Redwing Construction Ltd v Charles Wishart [2011] EWHC 19 (TCC)*

Last year in the Technology and Construction Court, Mr Justice Akenhead considered the use of CFA success fees and ATE Insurance in enforcement proceedings.

The addition of success fees on legal costs through Conditional Fee Agreements (CFAs) and the use of After The Event (ATE) Insurance to manage litigation risk has been a recent hot topic. The recoverability of these approaches is one of the focuses of Lord Justice Jackson's review on reforming civil litigation costs in England and Wales and has been in the press lately following the European Court of Human Rights decision in the Naomi Campbell libel case.

In his recent decision in *Redwing*, Mr Justice Akenhead looked at the risk involved in seeking enforcement of an adjudicator's award and how that risk should be reflected in any CFA success fee or ATE premium the successful party may seek to recover as part of its costs.

The usual position for litigation costs is that they should 'follow the event', that is, the successful party will usually recover its reasonable costs of the proceedings. However, the usual position in adjudication is that each party pays their own costs, unless the parties have agreed otherwise.

But if a successful party seeks to enforce the adjudicator's award (almost always in the Technology and Construction Court (TCC)), options for managing litigation risk such as entering into a CFA and/or obtaining ATE Insurance come into play.

A CFA can allow a party to only pay the other side's costs if it loses its claim, with that risk balanced by an 'uplift', often at 100 percent, in their own solicitor's costs if they succeed. ATE Insurance allows a party to insure against its potential liability to pay the other side's costs if they are not successful.

In deciding *Redwing v Wishart*, Mr Justice Akenhead set out a number of key principles, confirming important issues to keep in mind when considering enforcement of an Adjudicator's Award:

The following are some of the points arising:

- Such proceedings are relatively low risk for parties seeking enforcement as "the large majority...are successful"
- As such, "the courts...will think long and hard about allowing substantial CFA mark-ups"
- The courts will look to assess whether funding and risk arrangements were "reasonable and proportionate" and will guard against their use as a "commercial threat" by one party against the other

In these proceedings, Redwing entered into a CFA with their solicitors for the enforcement proceedings which included a 100 percent success fee, meaning the costs they sought to recover would double from £13,282 to £26,565, if they succeeded. Redwing also obtained ATE Insurance for cover against £20,000 of Wishart's costs, in the event Redwing lost the enforcement proceedings. Redwing sought to recover the £8,500 premium it paid for this insurance as part of their costs of the proceedings, if they succeeded, which they did.

In his decision, Mr Justice Akenhead made clear that the key consideration, when looking at whether CFAs and ATE Insurance premiums should be recoverable, is the level of risk facing the parties when such arrangements are entered into. This then informs the court as to whether those arrangements were "reasonable and proportionate" for the purpose of deciding costs.

Given the limited grounds for resisting enforcement of an adjudicator's award and the resulting high rate of success for parties seeking to do so, Akenhead J emphasised that the courts will look very closely at success fee rates and premiums applied in such proceedings. In this case, he allowed Redwing only 20 percent of both its success fee and ATE premium on the basis that the risk of losing "was sufficiently low to undermine the reasonableness of imposing anywhere near [the] 100%" uplift sought.

What does this mean? The treatment given to CFAs and ATE Insurance by Mr Justice Akenhead in Redwing is no different to the treatment given in cases in other courts and types of dispute. However, the judgment makes clear that when seeking to enforce an adjudicator's award, the TCC will "think long and hard" about the actual risk of such litigation and will guard against parties using these steps as "commercial threat" to force a result.

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