Refusing to mediate: a risky strategy

Mediation sir? No, no and thrice no. But, sir, that is the wrong answer. One must say yes.

Can a party in litigation say 'no' to mediation? In *Northrop Grumman Mission Systems Europe Limited v BAE Systems Limited* the Technology & Construction Court found the Defendant’s refusal to mediate was unreasonable. However, that was cancelled out by the fact that the Claimant refused to properly consider and engage with a settlement offer. The case contains interesting commentary about whether a party to litigation can legitimately say ‘no’ to mediation and what the consequences of that might be.

The decision

The Claimant brought Part 8 proceedings against the Defendant in relation to a dispute over the proper legal construction of a Licensing Agreement. The Defendant obtained a favourable judgement. The court then considered the matter of costs. The Claimant accepted that the Defendant was entitled to costs assessed on a standard basis but submitted that the costs should be reduced by 50% by reason of the Defendant's refusal to mediate.

Submissions were made by both parties on the reasonableness of refusing to mediate. The Claimant contended that they had made many attempts to mediate with the Defendant, which were unreasonably rebuffed. The Claimant submitted that they did not have to prove that mediation would have succeeded, only that it could have achieved a settlement.

The Defendant argued it was not obliged to agree to mediate because both parties were commercial enterprises who believed their case to be strong and only the court could decide the true construction of the contact. It was asserted any mediation had no prospect of success. It
was also argued that costs of attending mediation would have been wasted because it had no prospect of success.

Mr Justice Ramsey restated the factors, set out in the Court of Appeal decision in *Halsey*, for consideration in deciding whether to mediate:

- The nature of the dispute: did a party fairly believe that the nature of the case precluded its suitability for mediation?
- Merits of the case: did a party reasonably believe their case was 'watertight'?
- To what extent were other settlement methods attempted?
- Cost of ADR: where these disproportionately high?
- Would engaging in ADR cause prejudicial delay?
- What were the prospects of successful ADR?

The judge emphasised the benefits of mediation. He focused upon the independent perspective a mediator can bring, even to claims that are considered by each side to be very strong. In all the circumstances, it was held that the Defendant’s refusal to mediate had been unreasonable. The costs incurred by both parties amounted to £500,000 and an order to mediate may have only cost £40,000. Therefore the costs were not found to be disproportionately high. Further it was noted that the published success rate of mediation at paragraph 13.03 of the Jackson ADR Handbook shows that it is generally successful and that this was in fact a case were mediation would have been likely to succeed.

Ramsey J then went on to consider the Defendant’s ‘drop hands’ offer to settle the dispute on the basis of no payment with each party bearing their own costs. The Claimant had refused the Defendant’s offer. In considering this point Ramsey J looked at CPR 44.2(4)(c): one of the circumstances to be considered when making an order in relation to costs included “any admissible offer to settle made by a party which is drawn to the courts attention, and which is not an offer to which costs consequences under Part 36 apply.” The claimant should have engaged with this offer.

In all the circumstances, it was held that the Defendant’s refusal to mediate had been unreasonable. The costs incurred by both parties amounted to £500,000 and an order to mediate may have only cost £40,000.

To read the decision on the BAILII website please click on the following link.
Therefore the Claimant’s application to have costs reduced by 50% was rejected. Whilst the Defendant had unreasonably refused to mediate, the Claimant’s refusal to better the previous offer made by the Defendant effectively cancelled this out. For this reason neither party’s conduct should be taken into account when assessing costs. As such the general rule (CPR 44.2 (2)(a)) was applied and costs were awarded to the defendant on a standard basis.

Comments

It is clear from this judgment that refusal to mediate will not be looked on favourably by the court when it comes to awarding costs. If the Defendant had not made an offer to settle it is likely that they would have been faced with an unfavourable cost order. Nay saying is a risky approach. There is almost always good reason to mediate. Even if the prospects of success look bleak, a skilled mediator can be effective. Having said all that, if a sensible settlement offer has been made that may be a reason that justifies not mediating in certain circumstances. If a party says no to mediation it should always set out its reasons for doing so very clearly with an eye on future cost awards.

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