Legal Briefing

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd

(Judgment No. 2), [2014] EWCA 3148 (TCC), Mr Justice Ramsey

The Facts

During December 2010 BAE Systems (Al Diriyah C41) Ltd ("BAE") entered into a Licence Agreement with Northrop Grumman Mission Systems Europe Ltd ("NGM") for the use of certain software. On 11 November 2011, BAE terminated the Licence Agreement. NGM disputed BAE's right to terminate for convenience only and claimed some £3m in compensation.

During 2012 and 2013 the parties engaged in without prejudice exchanges including a lawyers' meeting. NGM made several written proposals to mediate but BAE repeatedly refused asking NGM to first provide substantiation of its money claims. During October 2013 NGM commenced Part 8 proceedings seeking a declaration that on a proper interpretation BAE was not entitled to terminate the Licence Agreement for convenience only. On 20 January 2014 BAE made a "without prejudice save as to costs" offer that the proceedings should be brought to an end without payment to NGM and with each party paying their own costs.

On 8 September 2014 Mr Justice Ramsey decided the interpretation point in favour of BAE.

On the subsequent application for costs, NGM accepted that BAE was entitled to its costs assessed on a standard basis if not agreed, but argued that those costs should be reduced by 50% on account of BAE's unreasonable refusal to mediate.

BAE responded that it had reasonably rejected mediation for proper and sensible reasons, including that:

(i) it was confident it had a strong defence; and,

(ii) there was no realistic possibility of settlement through mediation where the contractual interpretation point was "all or nothing".

The Issue

Should the usual costs award to BAE as the successful party be reduced by 50% (or otherwise) in consequence of its refusal to mediate?

The Decision

The Judge reviewed the parties' exchanges and made the following findings vis-à-vis the factors identified by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576:

Nature of the dispute: the Judge agreed that the fact that the dispute involved a point of contractual interpretation did not make the dispute unsuitable for mediation *per se*.

Merits of the case: the Judge held that BAE's reasonable view that it had a strong defence provided some but limited justification for not mediating.

Other methods of settlement: the Judge considered that BAE's other attempts to settle the case, including the lawyers' meeting and "without prejudice save as to costs" offer were neutral or marginally in BAE's favour.

Costs of ADR: the Judge did not consider the anticipated mediation costs of £40,000 to be disproportionately high for a claim of £3 million.

Prospects of successful ADR: The Judge thought that this was a situation where a mediator might have brought the parties together and found a middle ground or acceptable commercial solution even if the parties' respective positions indicated that there would not be a settlement.

Overall, the Judge concluded that whilst BAE's view of the merits provided some justification for not mediating, other factors showed that BAE was unreasonable in rejecting NGM's offer to mediate.

However, the Judge acknowledged that NGM's conduct in not accepting BAE's 20 January 2014 offer was also a relevant factor under CPR 44.2(4)(c). He therefore thought a fair and just outcome would be to apply the general rule on costs without taking into account either party's conduct, so that BAE was awarded its costs on a standard basis without discount.

Commentary

In contrast to *PGF II SA v OMFS Company 1 Ltd* [2013], this was not a case in which one party had simply ignored a proposal to mediate. BAE could show that on each occasion it had rejected NGM's mediation proposals following due consideration, including assessing the strength of its defence and the prospects for settlement. Nevertheless, having weighed up each factor in *Halsey*, the Judge concluded that BAE's reasonable belief that it had a strong defence was not in itself enough to make the rejection of mediation reasonable.

This decision supports the position set out in the Jackson ADR Handbook that parties must engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal. The judges have frequently stressed – and parties cannot disregard - the positive effect mediation can have in resolving disputes even in the most difficult and hostile circumstances. All of which means that it is becoming increasingly difficult to conceive of a set of circumstances that might reasonably justify rejecting ADR.

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