Can ADR be refused and a costs penalty avoided?

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The Court's wide discretion on costs in litigation means a successful litigant can be penalised in costs if they unreasonably refuse to engage in mediation. ADR is often useful, but may be proposed purely for tactical reasons, including to pressure a party to settle to avoid disproportionate ADR costs. So when can a litigant refuse ADR, and avoid the risk of costs sanctions?

Beattie Passive Norse Ltd and another v Canham Consulting Ltd [2021] EWHC 1414

Beattie was a £3.7M claim against engineers for negligent design of foundations at a residential site. The claim largely failed on causation grounds: buildings on the site had been demolished for reasons unconnected with the foundations.

The Defendant sought its costs, arguing the £2,000 recovered was derisory, and the Claimant had refused to narrow the issues. However, the Claimant argued the Defendant should be penalised in costs for refusing to mediate, and then only agreeing to a narrow form of mediation (blind bidding).

The Court found the Defendant's refusal to mediate was reasonable as the Claimant was advancing a factually untruthful case. The Judge also declined to criticise the form of ADR ultimately adopted.

The Judge took into account the negligence finding, and that some damages were awarded, but that the claim was exaggerated, and the Claimant had failed to respond to a Notice to Admit Facts. It was decided that there should be no order as to costs, up to the date where the Claimant responded to the Defendant's Request for Further Information, but the Defendant was awarded indemnity costs thereafter, as from then the Claimant was conducting the claim on false factual basis.

Implications

Deciding to decline ADR can be a finely balanced given the risks of costs sanctions if the Court finds that unreasonable. The facts in *Beattie* are unusual. A refusal to mediate may be difficult to justify in other circumstances, especially as the full picture often does not emerge until trial. Instead of refusing, it may be advantageous to suggest a different mode of ADR/mediation, for example blind bidding, or a time limited telephone mediation. Arguments on costs are often fact sensitive, and we recommend seeking advice before refusing ADR.

The Civil Justice Council's report in 2021 considered whether ADR can be made compulsory. It concluded that litigants can be compelled to participate, and discusses the conditions needed to make ADR compulsory. It remains to be seen if ADR is to be made compulsory in the future.

What is Blind Bidding? This is a quicker and cheaper ADR process. There are no position papers or joint sessions. The parties agree the number of bidding rounds. In each round the parties make a blind offer (bid). If there is a match, the claim is settled. If there is no match after the final round, but the final offers are close (within a pre-agreed range), the parties are informed that they are close. The parties may then go on to settled outside of the process, or at least leave the process better informed.

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