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The construction & energy law specialists

What constitutes an unreasonable failure to mediate?

In the 2013 case of *PGF II SA v OMFS Co & Anr,* [2013] EWCA Civ 1537, the Court of Appeal had to consider whether silence in response to a mediation proposal was the equivalent of a refusal to mediate. It was. There have been two cases in 2017 where it was suggested that one of the parties had, instead of ignoring the mediation proposal, unreasonably delayed or dragged their feet. Was that also equivalent to a refusal to mediate? All three cases provide a valuable reminder of both the circumstances when a party might be considered to have unreasonably refused to mediate and the current position being adopted by the courts.

PGF II SA v OMFS Co & Anr

Here, on 10 January 2012, the day before the trial was due to start, PGF accepted a Part 36 offer that had been made on 11 April 2011. This left the question of costs. PGF at the time OMFS made their Part 36 offer, proposed mediation. No response was received. PGF tried again in July 2011. Again no response was received. PGF relied on the well-known Halsey principle which says that, as an exception to the general rule that costs should follow the event, a successful party may be deprived of its costs if it unreasonably refuses to mediate. In other words, PGF argued that OMFS should not have the benefit of the usual costs protection provided by successful Part 36 offers. At first instance the TCC agreed. It was appropriate to depart from the usual principles and OMFS were not entitled to their costs for the period from 21 days following the date the offer was made.

In the Court of Appeal PGF argued that the silence of OMFS was tantamount to a refusal to mediate and that the silence was itself unreasonable. LJ Briggs stated that:

> "silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable ..."

There was a practical reason for this. The fact of the refusal meant that an investigation of alleged reasons for the (alleged reasonableness of the) refusal advanced for the first time, possibly months or even years later, at a costs hearing, when none had been given at the time of the original invitation, raised forensic difficulties for the court in establishing what had actually happened. Of course, those difficulties fall on the party asserting its refusal to mediate was justified. If, and there can certainly be reasons why ADR is premature, a party refuses an invitation to mediate, then it is sensible to explain why at the time.

Whilst there was nothing especially unsurprising in the decision, it serves as a useful reminder of the support that the courts in general provide to all forms of ADR. Whilst the court cannot compel a party to mediate; it can penalise in costs a party who unreasonably refuses to see whether there is an alternative way to resolve the dispute in question.

There are policy reasons for this, which the CA linked to the April changes to the court rules. LJ Briggs referred to the constraints that now affect the provision of state resources for the conduct of civil litigation, which he said call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really

need it. With proportionality in mind, Lord Justice Briggs also noted:

> *"A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources. The invitation may simply be accepted, and lead to an early settlement at a fraction of the cost of the preparation and conduct of a trial. ADR may succeed only in part, but lead to a substantial narrowing of the issues. Alternatively, after discussion, the parties may choose a different form of ADR or a different time for it, with similar consequences."*

Finally, Lord Justice Briggs said that:

> *"this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal... The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."*

Car Giant Ltd & Anor v London Borough of Hammersmith, [2017] EWHC 464 (TCC)

This was a costs' judgment, where judgment had been given in favour of Car Giant in the sum of £180k. However, LBH had made a Part 36 offer of £250k in April 2014. It was common ground that Car Giant should pay LBH's costs from 7 May 2014 together with interest on those costs at 1% above base rate. However, it was also suggested that these costs should be paid on an indemnity basis. Defendants, unlike claimants, are not presumed to be entitled to indemnity costs from the date of expiry of the relevant period for their Part 36 offers. Instead, the court has a discretion to make an order for indemnity costs depending on the parties' conduct.

Here, it was suggested that there had been an unreasonable delay in agreeing to mediate or take part in some form of ADR. The delay was from 15 May 2015 until October 2016. Deputy Judge Furst QC was clear that a court should be slow to conclude that the delay was unreasonable or such as to justify an order for indemnity costs.

The Judge did not consider that it could be said here that had mediation taken place in about May 2015 it would have been or was likely to have been successful. The delay in mediating could not be shown to have caused any increased costs. In this case, the Judge said that:

> *"The courts should be slow to criticise a party's behaviour where decisions such as when to mediate are matters of tactical importance where different views may legitimately be held".*

Car Giant had taken the view that mediation was more likely to succeed when the experts' views had been fully set out. That, on the evidence before the court, was a perfectly acceptable point of view. Here, LBH had indicated in April 2014 that it would not provide its valuation evidence, even on a without prejudice basis, and that it was without a valuer between about August 2015 and July 2016 which might have made discussions possible.

Whilst there was some delay on the part of Car Giant's solicitors in responding to letters on this topic, that delay was not so great that it justified an order of indemnity costs. At around the time that Deputy Judge Furst was considering this case, the Court of Appeal had a similar case before them.

Thakkar & Anr v Patel & Anr, [2017] EWCA Civ 117

This was an appeal against a costs order. One of the principal issues was the consequences of failure to mediate. The claim in question was a dilapidations claim for £210k which was met by a counterclaim of just over £40k. In their allocation questionnaires, both parties requested a stay for ADR. In the Court of Appeal, LJ Jackson noted that there seemed to have been a desire to settle on both sides. Both

parties initially, at least, expressed a willingness to mediate. The claimants were proactive in making arrangements for a mediation and identifying possible mediators for consideration by the defendants. The trial Judge contrasted that with the approach of the defendants who were "slow to respond to letters and raised all sorts of difficulties." Eventually, the claimants decided that no progress was possible and explained why in a letter as follows:

> *"Our clients have made all reasonable attempts to arrange a mediation but have been thwarted by your clients' conduct. Since April 2012 countless weeks have been lost through having to chase for responses. When your client finally gave a clear window of availability we tried to fix a mediation within that period a variety of excuses have been given as to why that date could no longer go ahead. Understandably, our clients no longer have any confidence that a mediation can be arranged given your clients' conduct..."*

The ADR stay was lifted and the trial took place. The claimants were awarded £45k, the defendants, £17k, leaving a balance owing to the claimants of £28k.

This left the question of costs. The trial Judge described the defendants as having been "relatively unenthusiastic or lacking in preparedness to be flexible" but also noted that it was the claimants who had closed down the ADR. He concluded that there were real prospects of settlement if a mediation had taken place. And this is the crucial difference with the Car Giant case. After weighing up all the circumstances, the Judge ordered the defendants to pay 75% of the claimants' costs of the claim. He ordered the claimants to pay the defendants' costs of the counterclaim. The defendants appealed.

LJ Jackson agreed with the trial Judge that if there had been a mediation there would have been a real chance of achieving a settlement. The dispute was a commercial one, being purely about money. The offers that had already been made were close. The costs of the litigation were vastly greater than the sums in issue. Bilateral negotiations had been unsuccessful. The Judge at first instance had said that:

> *"Any mediator would have had both parties in the room with him. He would have let them have their say. He would then have pointed out (a) the small gap between their respective positions, and (b) the huge future costs of the litigation. In those circumstances I would be astonished if a skilled mediator failed to bring the parties to a sensible settlement."*

LJ Jackson referred to *PGF II SA v OMFS Company* case where the Court of Appeal had held that silence in the face of an offer to mediate was, as a general rule, unreasonable conduct meriting a costs sanction. This was so, even if an outright refusal to mediate might have been justified. Here, the prospects of a successful mediation were good. The defendants did not refuse to mediate, "they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process." LJ Jackson said that the trial Judge's order was a "tough" one, but it was within the proper ambit of his discretion.

Finally LJ Jackson, in a comment which should be read with those of LJ Briggs, said:

> *"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene".*

Parties should take note.

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