Costs Consequences of Refusing to Mediate – Some Key Cases

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Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

1. In this well-known case, the Court of Appeal established that an unsuccessful litigant has the burden of demonstrating why the court should depart from the general rule set out in *CPR 44.2.*

2. The Court considered the below (non-exhaustive) factors to be relevant to the Court's assessment of the parties' conduct, in particular whether a party has refused to engage in ADR and whether that refusal was unreasonable (having regard to all the circumstances of the case):

    - The nature of the dispute;
    - The merits of the case;
    - The extent to which other settlement methods had been attempted;
    - Whether the costs of ADR would be disproportionately high;
    - Whether any delay in setting up and attending the ADR would have been prejudicial;
    - Whether the ADR had a reasonable prospect of success; and
    - Whether a party has refused to enter into ADR despite the court's encouragement.

PGF II SA v OMFS [2013] EWCA Civ 1288

3. The case involved dilapidations claims brought by PGF, the landlord, against OMFS, the tenant. Several Part 36 offers were made by both parties during the course of the proceedings. PGF further invited OMFS to mediate on two occasions. OMFS failed to provide any response to these invitations. When the matter settled (the day before the trial was due to commence), the question of costs fell to be determined, with a Part 36 offer having been accepted that had been made around 9 months earlier.

4. The failure of a party to mediate was one of the reasons that led to both the Court of first instance and the Court of Appeal departing from the general Part 36 costs consequence when deciding to make no order as to costs.

5. It is noteworthy in respect of this matter that the Court of Appeal was prepared *'firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds'.* Briggs LJ did however make clear in his judgment, that a failure to engage, even if unreasonable, does not automatically result in a costs penalty, it is simply a factor to be taken into account by the judge when exercising his costs discretion.

***Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm)**

6. This case demonstrates the need to engage in ADR from the outset of a case.

7. The Claimant successfully established that the First Defendant should be deprived of its costs on the basis that it had unreasonably refused to agree to ADR. This was on the basis that:

    - The first defendant had *'repeatedly declined and, indeed, refused to participate in mediation';*
    - There was a further failure to provide a detailed response to the Claimant's letter of claim, in breach of the Practice Direction for Pre-Action Conduct and Protocols. This denied the parties the ability to engage with the issues between them;
    - The Claimant had a genuine grievance and the First Defendant failing to engage with the Claimant at the pre-action stage meant it had effectively bought the proceedings on itself;
    - There was nothing in relation to the dispute which rendered it unsuitable for mediation or meant that a mediation would not have been successful;
    - No satisfactory explanation was provided as to why the First Defendant had not engaged with the ADR process;
    - At each stage of the proceedings, it was likely that a mediation would have had reasonable prospects of success. A percentage of the First Defendant's costs were therefore disallowed to reflect *'the nature and significance of their failure to engage in mediation'.*

8. HHJ Halliwell ultimately disallowed 50% of the First Defendant's costs to reflect a period of over two years during which they unreasonably failed to engage in ADR. In contrast, the Second Defendant in

this case repeatedly indicated a willingness to engage in mediation. HHJ Halliwell therefore did not disallow any of the Second Defendant's costs for a failure to engage with ADR.

***DSN v Blackpool Football Club* [2020] EWHC 670 (QB)**

9. This case serves as a reminder that over-emphasis on the merits of the case when considering ADR will not be well received by the Court.

10. The Defendant failed to beat the Claimant's Part 36 offer, and the Court made the usual order for indemnity costs in favour of the Claimant from the date of the expiry of the Claimant's Part 36 offer. However, the Judge also ordered that the Defendant pay the Claimant's costs on the indemnity basis from the point in time when the Defendant unreasonably refused to engage with ADR, for the following reasons:

    - The Defendant in this case refused to engage in any discussion whatsoever about the possibility of settlement. It did not respond to any of the three Part 36 offers (except to reject the final one).
    - The Defendant repeatedly stated that it *'continue[d] to believe that it [had] a strong defence'.* However, the Judge found that *'no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution.'*

11. Some noteworthy paragraphs of the judgment are set out below:

'[28] The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability,

a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim. […]

[29] If the Defendant had been correct that it had "a strong defence", its responses to the Claimant's settlement overtures and the statement made in compliance with paragraph 4 of the Order of Master McCloud would still, in my judgment, have fallen short of an acceptable level of engagement with the possibility of settlement or Alternative Dispute Resolution. As Sir Geoffrey Vos C said in OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 at para [39]: "The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."'

***BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 656 (QB)**

12. The Claimant in this case had beaten her Part 36 offer and it was therefore accepted that she should be awarded her costs on the indemnity basis as from 21 days after the offer was made. However, the Claimant sought indemnity costs in relation to the entirety of her costs on the basis that the Defendant had failed to engage in ADR.

13. An earlier direction of the Court had required that:

'At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise.'

14. The judge found that the defendant had breached this obligation, stating at paragraph 8 of the judgment:

'The direction in this case imposed two obligations on the parties: first, an obligation to consider ADR "at all stages"; second, when refusing to engage in a form of ADR suggested by the other party, to serve a witness statement explaining the reasons within 21 days of the proposal. In this case, neither party appears to have suggested ADR for the best part of a year after the direction was made. The Defendants' initial suggestion of a global settlement was rejected for the (good) reason that it would put the Claimant's solicitors in an impossible position. After that, the Claimant suggested a joint

settlement meeting, but the Defendants refused on 25 February 2019. At that stage, they were "not engaging in [a form of ADR] proposed by another" and so should, under the terms of the direction, have served a witness statement explaining why. They did not do so. Indeed, there is still no witness statement explaining why they chose not to have a joint settlement meeting. This is, therefore, a case not just of silence in the face of an invitation to participate in ADR, but of breach of an obligation imposed by court order to explain a refusal so to participate. That conduct is, in my judgment, unreasonable.'

15. The Claimant was therefore awarded indemnity costs in respect of those costs incurred following the date of the Defendant's unreasoned refusal to engage with the invitation to attend a joint settlement meeting (see further paragraph [13] of the judgment).

***Burgess v Penny* [2019] EWHC 2034 (Ch)**

16. This was a contentious probate claim between three siblings (a brother and two sisters). The siblings' mother left a Will splitting her estate equally between her three children. The brother applied to prove this Will in solemn form; the sisters defended the claim on the basis that there were doubts about the validity of the Will.

17. Ultimately, the brother failed to show that the Will was valid and so the mother's estate passed under the intestacy rules to the three siblings equally. However, the sisters had pursued two further issues, on which they lost. Those two further issues had taken significant court time.

18. In deciding what costs order to make, the judge noted that costs were in her discretion and that while the general rule is that costs follow the event, the court can make a different order *(CPR 44.2(2*)) and that the parties' conduct may be relevant in the exercise of that discretion (*CPR 44.2(4*)). She considered that the Defendants had been *'unreasonable in their complete refusal to mediate'.*

19. The judge further observed that the Defendants had taken the stance that mediation would not be successful, noting the following:

    - *'the defendants wanted the claimant to admit what he had done wrong and that was why did they refused to mediate. But mediation is not just about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as a better alternative to litigation. A trained mediator would have told the defendants that in litigation they might well not get the admission they were seeking (and indeed they did not)'* (paragraph [15]).

- *'Refusal to mediate because one party cannot obtain something which even complete success in the litigation cannot guarantee (the admission the defendants wanted) was, in this case, unreasonable. Granting the defendants any part of their costs out of the estate would be an encouragement to obduracy'* (paragraph [16]).

20. The Court considered that the proper starting position was that the brother and the sisters should each pay half of the others' costs. It was recognised that the circumstances in which the Will was executed reasonably called for investigation. However, the court also acknowledged two further central factors in its decision:

    - all the parties had said from an early stage that they were willing to accept an equal division of the estate. This turned out to be the actual outcome following the trial. It had also been the most likely outcome overall, either because of the Will being successfully admitted to probate or the application of the intestacy rules if the Will was held not to be valid. Despite this, the sisters had defended the claim challenging the will (in essence the dispute amounted to no more than who would administer the estate, as the outcome was likely in any event to be an equal division of the deceased's assets); and
    - the sisters refused to mediate.

21. The court viewed these as the overriding factors which justified a different approach on costs. It was especially critical of the sisters' refusal to mediate (noting that their desire for the brother to admit he had done wrong was not a sufficient reason to refuse mediation). As a result, even though the sisters were reasonable in commencing investigations into the Will, their conduct of the litigation and refusal to mediate worked against them, and each party was ordered to pay its own costs.

***Thakkar v Patel* [2017] EWCA Civ 117**

22. This case concerned an appeal against a costs order. One of the key issues concerned the consequences of failure to mediate. The main claim was a dilapidations claim for about £210,000, with a counterclaim of just over £40,000 having been made. The Court noted that there appeared to have been a desire to settle on both sides, with both parties having requested a stay to pursue ADR. Further, both parties initially expressed a willingness to mediate.

23. It was further noted that the Claimants were proactive in attempting to arrange a mediation, including identifying possible mediators. The Defendants, on the other hand, were *"slow to respond to letters and raised all sorts of difficulties."* Eventually, the Claimants set out within a letter that they had no confidence that a mediation would go ahead due to the Defendants' behaviour. The stay was therefore lifted.

24. At trial, the Claimants were awarded £45,000. The Defendants were also awarded £17,000 on the counterclaim (leaving a balance of £28,000 in favour of the Claimants).

25. On the question of costs, the 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 ultimately shut down the ADR process causing the stay to be lifted.

26. The judge considered that mediation would likely have been successful, noting 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."

27. 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.

28. The Court of Appeal agreed with the trial judge that if there had been a mediation, there would have been a real chance of achieving a settlement. Reference was made within the judgment to *PGF II SA v OMFS Company* (see above) where the Court of Appeal held that silence in the face of an offer to mediate was, as a general rule, unreasonable conduct that merited a costs sanction. This was so even if an outright refusal to mediate might have been justified.

29. Jackson LJ stated that the Order in this matter was a *"tough order, but it was within the proper ambit of the trial Judge's discretion".*

30. It was also noted in the judgment that:

    "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".

No Costs Consequences Imposed for Failing to Mediate

31. On the other hand, there are limited circumstances in which the failure to engage in mediation might not result in a costs sanction, though these cases are unlikely to be as widely applicable as those set out above.

***Philip Warren & Son Ltd v Lidl Great Britain Ltd* [2021] EWHC 2372 (Ch)**

32. This was a passing-off dispute. Lidl had not taken up an early offer to mediate but it had made a Part 36 offer which the claimant had not been beaten.

33. At paragraph 101 of the judgment, it was held that:

'There is some prospect that mediation may have resolved the case earlier but I think, at that stage, it would have had a rather low chance of doing so. Lidl was not unreasonable in not taking up the invitation to mediate at that time. [...] Both parties took different steps to try to avoid a trial, including making offers. Conduct in this respect is therefore a neutral factor in costs. There is therefore no basis for the 50% reduction claimed by PWS or any reduction on this account.'

***Patel v Barlows & Ors (No. 2)* [2020] EWHC 2795 (Ch)**

34. Similarly, in this case the judge refused the request by the losing party to sanction the successful party in costs for its failure to mediate. The judge's view was, again, that mediation would not have been successful (see paragraph [61] (and onwards) of the judgment).

***Pallett v MGN Ltd* [2021] EWHC 76 (Ch)**

35. This case demonstrates the fact-specific nature of the issues that are relevant to penalising a party in costs for its conduct of the case.

36. A key issue for consideration in this case was whether the successful Claimant should be penalised in costs for insisting on disclosure and failing to enter into settlement negotiations at an earlier stage of proceedings. The Court, in holding that the conduct in this matter had not been unreasonable, highlighted that every case turns on its own facts and that this:

"*should not be taken as a green light for all claimants to decline to enter into negotiations before disclosure is complete. Such a posture would not be correct in every case. Each case must turn on its own facts. There may be other cases in which a non-engagement will be unreasonable. That will*

depend on the facts of those cases. Other cases may not involve the burdens of Part 36. The defendant will no doubt be concerned that every case will now go to disclosure. That would be regrettable, and should not be the case, and in any event the defendant can always seek to protect itself by making early offers which are more generous and less combative than they were in this case. Claimants should not seek to apply this case too generally."

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