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Lexis®PSL Dispute Resolution Practice Note

Costs sanctions for refusal to mediate

This Practice Note addresses the court's powers to encourage parties to resolve their disputes through mediation. The leading case is *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920 which established the principles to be applied by the court in deciding whether to impose costs sanctions. We also look at how the courts have applied those principles since *Halsey* and when the courts have sanctioned parties in costs.

While under English law the court cannot force parties to settle their differences outside the courtroom, it can certainly impose costs sanctions on those who unreasonably refuse to consider other methods of resolving their disputes.

CPR

The CPR contains a number of mteasures designed to encourage parties to consider ADR. See Practice Note: ADR and the CPR. Where the parties do not accede to this encouragement the court can look at their behaviour retrospectively when assessing who should pay what; it will consider whether or not they should have attempted ADR earlier or at all, and had they done so, whether the dispute would have been settled earlier and at lower cost

The starting point is CPR 44.4(3)(a):

> 'The court will also have regard to the conduct of all the parties, including in particular...
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.'

The courts have interpreted this to include any efforts at resolving the dispute through ADR.

Note: on 6 April 2015, the new Practice Direction Pre-Action Conduct and Protocols came into force. Paragraph 11 includes a new warning that ignoring an offer to mediate/refusing to mediate may be regarded as unreasonable and attract a costs sanction:

> 'If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.'

> Practical tip: the decision whether or not to mediate should be kept under review during proceedings. Further, where a client refuses to enter into a form of ADR, practitioners should be mindful of making an attempt to forward reasonable settlement proposals in order to resolve the matter or to protect their client's costs position.

In Bradley v Heslin [2014] EWHC 3267 (Ch). [2014] All ER (D) 185 (Oct), a case concerning a neighbour dispute, Norris J, whilst not imposing a cost sanction for refusal to mediate, observed:

> 'I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to re-solve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.' (Bradley, per Norris J, paras 22-26)'

Leading authorities

The first case to impose costs sanctions against a successful party for refusing to mediate was *Dunnett v Railtrack [2002] EWCA Civ 303, [2002] 2 All ER 850*. The defendant had refused the unsuccessful claimant's offers to attempt resolve the dispute through ADR. The defendant refused on the basis that such a process would involve an offer to pay over and above what it had already offered and this it was not prepared to do. Despite the defendant's victory on appeal, the court departed from the usual order that the loser pays the winner's costs and made no order as

to costs; the defendant had failed to comply with the overriding objective and had also not acted reasonably in turning down the claimant's suggestion of mediation. In fact, in this case, the claimant may well have accepted an apology by way of settlement.

The leading decision on costs penalties being imposed on parties who refuse to mediate is that of the Court of Appeal in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 4 All ER 920*. Dyson LJ stated:

> 'In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case.'

The court set out six (non-exhaustive) factors that may be relevant in determining whether or not a party has unreasonably refused ADR:

- **nature of the dispute**—some cases are intrinsically unsuitable for ADR:
  - » where there are issues of law or construction where a binding precedent would be useful
  - » cases involving issues important to those in a particular trade or market
  - » where there are allegations of fraud
  - » where there are allegations of commercially disreputable conduct
  - » injunctive relief is necessary
- **merits of the case**—the fact that a party reasonably believes that he or she has a strong case is relevant to the question as to whether or not he or she has acted reasonably in refusing ADR; the test is objective
- **other settlement methods have been attempted**—although it should be borne in mind that mediation often succeeds where other attempts at settlement have failed
- **costs of the mediation would be disproportionately high**—this is particularly pertinent in relation to more modest claims
- **delay**—especially if the suggestion is made late in the day and the mediation would delay the trial
- **whether the mediation had a reasonable prospect of success**—this must be viewed objectively

The court also made the point that the obligation to consider ADR in all suitable cases included those against public bodies.

As Dyson LJ stated in Halsey, it is for the unsuccessful party to show that the successful party unreasonably refused to agree to mediate/use ADR.

The approach of the court since *Halsey*

The first case to impose costs sanctions against a successful party for refusing to mediate was *Dunnett v Railtrack [2002] EWCA Civ 303, [2002] 2 All ER 850*. The defendant had refused the unsuccessful claimant's offers to attempt resolve the dispute through ADR. The defendant refused on the basis that such a process would involve an offer to pay over and above what it had already offered and this it was not prepared to do. Despite the defendant's victory on appeal, the court departed from the usual order that the loser pays the winner's costs and made no order as to costs; the defendant had failed to comply with the overriding objective and had

The following cases involved the court imposing a costs penalty. The most recent cases are listed first.

There has been little in the way of gloss on these principles in judgments handed down since *Halsey*. The courts have simply been applying the *Halsey* factors albeit that the Court of Appeal's decision in *PGF II SA* is worthy of note in its support and extension of some of the principles in *Halsey*. In summary, the courts are now more likely to use costs sanctions against parties who refuse to mediate.

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The following cases did involve a costs penalty

Case	Information	Further information
Laporte & Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] All ER (D) 232 (Feb)	The claimants lost their action against the police for assault and battery, false imprisonment and malicious prosecution (amongst other matters), but asserted that there should be no order for costs because the defendant refused to engage in ADR. The defendant sought an award of costs assessed on an indemnity basis. The High Court (Turner J) considered each of the *Halsey* factors in turn while specifically recognising that this was not to be approached as a mechanistic exercise and that the factors are not to be regarded as being exhaustive in any given case. The judge concluded that the defendant failed, without adequate (or adequately articulated) justification to engage in ADR which had a reasonable prospect of success, which would have an impact on the exercise of the court's discretion on costs. Nevertheless, the court looked at the matter in the round and considered the claimants' criticisms of the defendant's failure to respond to the letter before action and of flaws and inaccuracies in the defendant's costs schedules. In relation to the failings in respect of the costs schedules, the court decided that this would not have an influence on the discretion in this case. In relation to the defendant's failure to conform to the preaction protocol by failing to respond to the letter before action, on the facts this in and of itself would not have justified 'any substantive costs consequences'. However, the judge considered that this proved symptomatic of the defendant's sustained inability to prioritise the progress of the case (including in relation to dealing with ADR), with the defendant '[stumbling] past ADR on the way to the hearing rather than engaging with it with proportionate commitment and focus', which the court took into account in its costs discretion. The result: the defendant was awarded 2/3 of costs to be assessed on the standard basis. *Note:* the judge endorsed the approach of the Court of Appeal in *PGF II SA* (see below)	
PGF II SA v OMFS [2013] EWCA Civ 1288 *PGF II SA v OMFS [2012] EWHC 83 (TCC), paras 44-45*	The failure of a party to mediate was one of the reasons that led to both the TCC and the Court of Appeal departing from the general Part 36 costs consequence when deciding to make no order as to costs in *PGF II*. The court dismissed arguments put forward by the defendant as reasons why it did not mediate in this dispute and highlighted some practical considerations for practitioners involved with parties who do not wish to mediate. Of particular note is 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'.	For a detailed analysis of *PGF II* see: Bill Wood QC on unreasonable refusal to mediate (*PGF II*) and TCC departs from general Part 36 cost consequences (*PGF II SA* v OMFS), 2 February 2012
James Carleton Seventh Earl of Malmsebury v Strutt and Parker [2008] EWHC 424 (QB), [2008] All ER (D) 257 (Mar)	It is not enough simply to agree to mediation (where it would be reasonable to do so), parties must also conduct the process sensibly, or they risk costs consequences.	For a detailed analysis of this case see Late agreement to mediation may attract adverse costs (News, 22 January 2008)

Case	Information	Further information
Nigel Witham v Smith [2008] All ER (D) 101 (Jan), [2008] All ER (D) 101 (Jan)	There might be exceptional circumstances in which a successful party was penalised in costs for delaying in agreeing to mediate where it could be shown that an earlier mediation would have been successful.	For a detailed analysis of this case see Late agreement to mediation may attract adverse costs (News, 22 January 2008)
Jarrom v Sellars [2007] EWHC 1366 (Ch), [2007] All ER (D) 202 (Apr)	Where a claim was discontinued by consent, the court took the exceptional step of making no order as to costs on the basis that the claimants failed to take up the defendant's offer of a meeting that could have resolve matters	
P4 v Unite Integrated Solutions [2006] EWHC 2924 (TCC)	Mr Justice Ramsey found that the refusal to consider mediation before the issue of proceedings was material in the costs order he made. In fact, he had recommended mediation himself nine months after proceedings had been issued	
Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch)v	HHJ Waksman QC ordered indemnity costs where the defendant accepted a part 36 offer out of time. It was 'not just a matter of not seizing the opportunity to negotiate at the late stage .... It was a continuing failure to engage with the process from the word go....'. In the judgment, the court dismissed the defendant's *Halsey* reasons for refusing to mediate.	For more information, see our analysis: Indemnity costs for refusal to mediate (Garritt-Critchley v Ronnan)

The following cases did not involve a costs penalty

The most recent cases are listed first

Case	Information	Further information
Murray v Bernard [2015] EWHC 2395 (CH)	In this case, the claimants (the successful parties in the litigation) initially refused to mediate, but subsequently 'had a change of heart' and proposed mediation to the defendant. At the costs assessment stage, the unsuccessful defendant argued that there should be no order for costs in favour of the claimant because they failed to take an opportunity or to accept an offer to mediate. The court did not accept the defendant's submissions. The judge (Mann J) stated that this was not a case in which it could be said that the claimants had failed to mediate. Although they initially did decline to mediate they subsequently indicated their preparedness to mediate, and the reason that the mediation did not happen was that the defendant did not feel ready to mediate although he had wished to do so. The court stated that the claimants were not to be 'fixed with a once stated but changed intention in relation to mediation. The relevant question is not a game in which the claimants will have one and one opportunity only to mediate for the purposes of the cost rule.' Accordingly, the court stated that the defendant would be under the usual order as to costs pursuant to CPR 44.2(2) (ie the losing party, the defendant, would pay)	

Case	Information	Further information
Northrop Grumman Mis-sion Systems Europe Ltd v BAE Systems (Al Diri-yah C4I) Ltd [2014] EWHC 3148 (TCC); [2014] All ER (D) 66 (Oct)	The judge (Ramsey J) concluded that this was a case suitable for mediation and would likely to have been settled at mediation. The judge advocated mediation even in cases, like this one, where construction of a contract was in dispute. The claimant refused to mediate because it believed it had an 'irresistible' case. The judge acknowledged this fact in his judgment, but as he considered the case would likely to have settled at mediation (and thus avoided incurring significant costs), he stated that one party's refusal to mediate, regardless of strength of case, did not provide a reasonable basis to refuse to mediate when weighed against the efficiency of mediation in resolving a dispute such as this. However, although the claimant's refusal to mediate was found to be unreasonable, because the claimant had failed to beat an offer to settle made by the defendant, the judge decided that the appropriate order was that no deduction should be made on the defendant's costs and it should be awarded its costs in full to be assessed on the standard basis.	For a detailed analysis of the case, see: Refusal to mediate can be unreasonable even with an irresistible case
ADS Aerospace v EMS Global Tracking [2012] EWHC 2904 (TCC), [2013] All ER (D) 235 (Oct)	The TCC held that a defendant who 'won' the litigation, the claimant lost on all issues, was entitled to costs assessed on a standard basis. Whilst the claimant had offered to mediate this had come very late in the day and whilst the defendant had rejected it, the defendant had consistently sought to discuss settlement with the claimant through invitations to engage in without prejudice discussions.	For a detailed analysis of this case, see: No costs consequences despite refusal to mediate (ADS Aerospace v EMS Global Tracking)
Mason v Mills & Reeve [2012] EWCA Civ 498	A defendant refused to mediate or engage in any other ADR procedure. The Court of Appeal overturned the decision of a first instance judge who penalised a successful party on costs for refusing to mediate. The successful defendant had refused to mediate in the case on the grounds that the claim was entirely without merit. The judge at first instance accused the defendant of intransigence as he felt that there was a real possibility that a mediation would have identified weaknesses in both parties' cases and that it was not unrealistic that a settlement could have been reached. He awarded the successful defendant 50% of its costs. In overturning the judge's decision on costs, the Court of Appeal expressed concern that the judge had not fully expressed the reasoning for his decision (eg, not explaining what weaknesses he thought mediation could have identified) and held that the defendant's position in refusing mediation had in fact been vindicated at first instance and on appeal, and was therefore not unreasonable. The Court of Appeal increased the defendant's costs award to 60%.	For a detailed analysis of this case, see: Court of Appeal acknowledges reasonable refusal to mediate (Mason v Mills & Reeve)

Case	Information	Further information
Beechwood House Publishing T/A Binleys v Guardian Products [2012] All ER (D) 43 (Mar), [2012] EWPCC 8	A claimant refused to mediate prior to issuing proceedings. It was held that it was reasonable for the claimant to do so and so there would be no costs penalty. It was held that the key to an effective mediation is to conduct it at the right time. At the stage that the defendants suggested mediation the costs were very low and whilst mediation is cost effective there is a cost attached to it. The fundamental issue in that case was disclosure as to the source of information in a database which the defendant refused to provide and which the claimants were entitled to insist on this being an action for infringement of a database right. The claimant's position was that this disclosure was the only real issue between the parties and the parties efforts were best focused on sorting out that issue. Note: this is in interesting judgment from the then Patents County Court and whilst it is a county court its judgments are generally regarded with respect	
Board of Trustees of National Museums and Galleries of Merseyside v AEW Architects and Designers [2013] EWHC 3025 (TCC	This case dealt with a multitude of issues, including engagement with the mediation process. Akenhead J considered the circumstances in which such reluctance would not attract the criticism of the court. The court will look at all the circumstances in determining whether a party should have engaged in the mediation process. In this case, the claimant was a public and charitable organisation which considered that it needed to understand the expert position in relation to the point in issue, which was complex remedial work to steps and terraces of amphitheatres, before entering into mediation. This was an understandable position for such a claimant to take given that any focus of the mediation was likely to be in relation to the remedial work required. The court may also consider whether a reluctance to engage in mediation is due to the other side not engaging in a process of seeking to agree elements of the dispute so as to simplify any negotiations that would need to be undertaking during the mediation itself. It was held that since the claimant did not recover the level of settlement which it had offered, nor did the defendant 'beat' any of the offers which it made at any stage, the issue of a reluctance to settle would not be determinative as to the issue of indemnity costs.	For a detailed analysis of this case, see: Insights for those dealing with interest and costs (The Board of Trustees of the National Museums and Galleries of Merseyside v AEW Architects)