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To Mediate or Fight, the Choice is Yours; or is it?

By Jumana Rahman

The case of *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002 was a landmark case on the way in which the courts treated mediation. That case clarified that an unreasonable refusal to participate in alternative dispute resolution, such as mediation, was a form of unreasonable litigation conduct, to which the court may respond by imposing costs sanctions.

The court in *Halsey* also developed non-exclusive guidelines likely to be relevant in deciding whether a particular refusal to participate in mediation was unreasonable. Those guidelines require a court to consider the following factors:

- The nature of the dispute
- The merits of the case
- The extent to which other settlement methods have been attempted
- Whether the costs of mediation would be disproportionately high
- Whether any delay in setting up and attending the mediation would have been prejudicial
- Whether the mediation had any reasonably prospect of success

In *PGF II SA v. OMFS Company 1 Limited* [2013] EWCA Civ 1288, the Court of Appeal examined a situation in which a defendant met a serious and carefully formulated written invitation by the claimant's solicitors to participate in mediation with complete silence. The offer to mediate was repeated by the claimant's solicitors three months later, with no substantive response.

The Court of Appeal held that silence in the face of an invitation to participate in mediation is, as a general rule, unreasonable — regardless of whether reasonable grounds for refusal to mediate could have been put forward at that time — and as such could lead to costs sanctions. The only exceptions the Court identified were those rare cases in which mediation is so obviously inappropriate that to characterise silence as unreasonable would be mere formalism, or where there had been some mistake leading to a failure to appreciate that an offer to mediate had been made, which the recipient of the invitation would have to prove.

The obvious takeaway from the *PGF* case is to ensure that you always respond to any requests for mediation, preferably with reference to the *Halsey* guidelines above. However, the underlying aim of the case is in line with that of the recent Jackson reforms to English civil litigation. As the Court of Appeal itself observed, the *PGF* case is designed to send out an important message to civil litigants, requiring them to engage with a serious invitation to participate in mediation — even if litigants have reasons which might justify a refusal — against the broader backdrop of encouraging the more proportionate conduct of civil litigation.