Mediation – Silence is not golden

For many years, whenever a party to a dispute has instructed his lawyers about a dispute, they will have (or should have) discussed the need to consider Alternative Dispute Resolution (ADR).

ADR is a core principle of litigation practice. There is clear encouragement to consider, and engage, with it – a court can impose costs sanctions on those who unreasonably fail to do so.

ADR encompasses any means by which a dispute could be resolved, other than through litigation. It can include negotiation, arbitration, adjudication and so on. Often ADR is associated with mediation.

On 23 October 2013, the Court of Appeal delivered a judgment in PGF II SA v OMFS Company 1 Limited that will re-focus attention on mediation. The court considered what the consequences might be if a party to litigation simply failed to respond to a request to mediate.

Halsey – a reminder

There have been many cases about mediation and whether or not the court should impose costs sanctions and in what circumstances, but perhaps the most notable was Halsey v Milton Keynes General NHS Trust in 2004.

It is well known that, in litigation, the court will usually order the loser to pay the costs incurred by the winner (in practice, that usually means a contribution to costs). In Halsey, the Court of Appeal considered whether and when that principle might be departed from when someone failed to take up a request to mediate.

The court stated that to deprive a successful litigant of some or all of his costs on the grounds that he had refused to agree to ADR is an exception to the general rule that costs should be awarded to the winner.

Halsey emphasises that the burden is on the unsuccessful party to show why there should be a departure from the general rule. Such a departure is not justified unless the unsuccessful party shows that the successful party acted unreasonably in refusing to agree to ADR.

Notably, the court in Halsey decided that the question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. Factors that may be relevant to that question will include (but are not limited to) the following:

The nature of the dispute

The court accepted that ADR is not appropriate in all cases: the parties may require the court to determine issues of law or construction, set a binding precedent or give injunctive or other relief. Few cases are unsuitable for ADR.

The merits of the case

If a party reasonably believes he has a strong case (for example, where he believes he would have succeeded in an application for summary judgment) he may act reasonably in refusing ADR. The court should be astute to the danger of claimants seeking to use the threat of costs sanctions to extract a settlement where the claim is without merit.

Other attempts at settlement

The court noted that mediation often succeeds where previous attempts at settlement have failed.

The costs of mediation

Where the sums at stake in the litigation are comparatively small and the costs of mediation disproportionately high, this is a factor to be taken into account.

Delays

If mediation is suggested close to trial and acceptance would delay the trial, this factor may be taken into account.

The prospect of a successful mediation

The burden is on the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful. This is not an onerous burden to discharge and it would be fairer and easier than for the successful party to prove the mediation would not have succeeded.

Judicial encouragement

The stronger the degree of judicial encouragement, the easier it would be for the unsuccessful party to discharge its burden of showing that the successful party's refusal was unreasonable. So although the court must not compel parties to undertake ADR, if it has robustly encouraged ADR, a party who refuses runs a higher risk of being penalised in costs for that reason alone.

PGF II SA v OMFS Company 1 Limited – the background

PGF II SA v OMFS Company 1 Limited was a case about a claim by a landlord for damages against its tenant for what are conventionally known as dilapidations, i.e. a claim that the tenant failed to comply with its obligations about the form and condition of the property let to it, and the landlord had suffered loss.

The landlord (L) had brought proceedings against the tenant (T) for alleged breaches of T's repairing covenants in a lease of a commercial building. L claimed approximately £1.9 million. L made two Part 36 offers, of £1.125 million (before the start of the litigation) and

£1.25 million (in April 2011), which were not accepted by T. It then sent T a detailed invitation to participate in mediation (apparently, also in April 2011). T did not respond, even though the invitation was repeated a few months later (in July 2011). Instead, T made a Part 36 offer of £700,000 (also in April 2011) which L eventually accepted shortly before trial (the Court of Appeal judgment described it as being "at the last minute"). In fact L had made another Part 36 offer in December 2011. The trial was fixed for 11 January 2012, and, perhaps in reaction to a point taken by T in its skeleton argument delivered on 10 January, L accepted T's Part 36 offer. When it did so, it notified T that it would argue that it should have its costs after the Part 36 offer period because of the time at which the new point was raised. By the next day, it also pursued the argument that the usual rule about costs when a Part 36 offer was accepted should be departed from because T could be said to have unreasonably refused to have participated in a mediation.

Ordinarily, upon acceptance of the offer, L would have been obliged to pay T's costs. The judge rejected the assertion that the costs order should reflect the late point being raised. However, he considered Halsey and concluded that T had unreasonably refused to participate in mediation. He therefore deprived T of its costs for the relevant period under the CPR r.36.10, but did not order T to pay L's costs. T appealed, and L cross-appealed against the judge's refusal to award costs to it for the relevant period after T's offer.

PGF II v OMFS – the decision

Both the appeal and cross-appeal were dismissed by the Court of Appeal.

An important difference between Halsey and other cases about a refusal to mediate and PGF II was that in the former there had been a response to proposals to mediate. In PGF II, there was silence.

The Court of Appeal reviewed the cases and learning on the relevance and desirability of ADR and mediation in particular. There is no doubt that for many reasons it is an important and relevant part of the litigation landscape and should be supported.

The court concluded that a failure to respond to a request to mediate would be, as a general rule, unreasonable, even though, had a considered response been made at the time, it could otherwise have been decided that a refusal would have been reasonable. In other words, it was not necessary to work through the Halsey principles. The court acknowledged there may be exceptions, but the onus would be on the recipient of an offer to mediate to explain why any might apply. It asserted that a failure to respond to a request was destructive of the real objective of the encouragement to the parties to engage with ADR.

The PGF II decision goes into more detail and is worth reading. It can be found here: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2013/1288.html&query=pgf+and+II+and+SA&method=boolean

It should be noted that the court acknowledged T's point that a finding of unreasonable conduct (as the court found in this case) does not automatically lead to a costs sanction, so one cannot say that what happened in PGF II would always happen, and indeed, the Court of Appeal expressed some sympathy for the proposition that the trial judge in this case may have gone too far, but it concluded that what he did was within the scope of his discretion.

Halsey and PGF II – the lessons

- At all appropriate times, before and during litigation, consider whether and how ADR might be deployed to resolve a dispute.

- If you are going to propose ADR, do so clearly and carefully
- If you receive a proposal to use ADR, do not ignore it
- If you receive a proposal to use ADR and conclude it should not be taken up, respond to it and explain why it is not appropriate or it is unreasonable to pursue it
- If it is a case of needing more information, or a timing issue, explain that
- Even if you do reject a proposal to use ADR, do not shut off the possibility of coming back to it – keep an open mind about it, and be seen to
- If your proposal to use ADR is rejected, consider why, and consider whether you can answer the objections, or make some adjusted proposal (e.g. as to the sharing of the fees of a mediator, or as to the ADR process put forward) that might overcome the rejection

The Court of Appeal, in giving judgment, noted (at paragraph 56) that it was sending out an important message to litigants (or prospective litigants). It said that to allow the appeal would blunt that message; that its task of encouraging proportionate conduct of litigation was so important that it was appropriate to exercise its sanctions in this case (even if in this case the sanction was tougher than perhaps it could have been). The court specifically said it wanted to “encourager les autres”. Do not ignore it!

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