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Specialist personal injury mediation

Case Digest 2016

These are reasons put forward in court to justify a refusal to mediate:

1. **There is too big a gap between us on liability / quantum / liability and quantum.**
2. **Mediation would be premature: we need an expert's report/more information on quantum.**
3. **We have held negotiations but no progress was made.**
4. **We take a very robust view of our prospects of success on the merits.**
5. **Both parties have established their "bottom line" with a Part 36 offer.**
6. **The costs of mediation would be too high.**
7. **Mediation is not likely to succeed in this case.**
8. **It would be impossible to mediate here because the parties distrust each other.**

Are any of these reasons good enough to avoid a costs sanction? Keep your answer in mind and see if it is supported by the authorities referred to below.

For many years the only case one needed to know about was the leading Court of Appeal decision, Halsey v Milton Keynes NHS Trust and Steel; Joy v Halliday[1] Quoting a Halsey reason[2] was usually good enough to make ADR go away. Today, *Halsey* needs to be read in conjunction with PGF II SA v OMFS Company 1 Ltd[3] and other recent cases.

Now, the combined effect of the CPR and the case law means that it has never been easier to persuade a party to mediate, even if their initial reaction is negative, lukewarm, non-committal or non-existent. Similarly, it has never been easier to enlist the help of the court in encouraging mediation. The corollary of this is that the risk of incurring a significant costs sanction, including an indemnity costs order, is also at a high water mark.

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1 [2004] EWCA Civ 576, [2004] 4 All ER 920
2 See Chapter 1.
3 [2013] EWCA Civ 1288, [2014] 1 All ER 970

Why read this Digest?

Practitioners who are not aware of the case law referred to in this Digest may:

- fail to persuade their opponents to mediate, notwithstanding that they have the levers at their disposal to make out a strong, if not un-answerable case that this should happen and
- expose their clients, unwittingly, to a significant costs sanction. Rejecting mediation, without carefully drafted written reasons is likely to create significant risk.

Chapter 1 looks at *PGF* and a number of other recent cases where the courts have considered the parties' failure to mediate. The cases are important not only because of the decisions reached but because they analyse and dissect various reasons that are commonly given to justify a refusal to mediate. The "meat" in the sandwich of this Digest is Chapter 2 which explores such reasons and the courts' response. Many of these reasons appear viable and consistent with *Halsey*, at least on the face of it, but they were rejected. Each one of the 8 reasons listed above was rejected in one or more of the cases in Chapter 1. Every case has different circumstances, so it could not be said that these reasons will always fail, but some of them have been rejected on several occasions. The costs risk that arises is accentuated by the need to make a contemporaneous record of your reasons for not mediating – you nail your colours to the mast and risk the consequences of the court deciding that the reasons are inadequate.[4]

Chapter 3 outlines the sanctions imposed by the courts and Chapter 4 deals with practice points, both from the perspective of attempting to persuade an opponent to mediate and from the viewpoint of those drafting contemporaneous written reasons justifying a refusal: are there any "get out of jail" cards? It is useful to have these points and authorities at hand whenever mediation falls to be considered and Chapter 4 also lists some of the many occasions when this occurs.

The foundation for the cases in this Digest can be traced back to both the CPR (see Chapter 4) and senior members of the judiciary who have long advocated a greater focus on ADR (see Chapter 5).

In addition to the disclaimer below, the authors warn that this Digest only purports to be a note about some recent cases with observations upon them. It does not seek to provide a comprehensive statement of the law. Practitioners should carry out their own research and refer to the CPR, case law and more comprehensive texts such as the Jackson ADR Handbook (Oxford University Press), "ADR: Principles and Practice" (Sweet and Maxwell) and the White Book Volume, 2 chapter 14, (Sweet &

4 PGF II SA v OMFS Company [2013] EWCA Civ 1288, [2014] 1 All ER 970

Maxwell). Finally, although the Digest inevitably focuses on costs issues it is worth bearing in mind that our clients find that mediation works best when embarked upon on a voluntary basis. We also find that claimants and insurers like mediation.

Phil Hesketh
Mediator with Trust Mediation, Expedite Resolution and others

Tim Wallis
Mediator with Trust Mediation, Expedite Resolution and others

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Chapter 1: Cases – name, citation and brief summary

1.1 Halsey v Milton Keynes General NHS Trust[5]

The Court of Appeal stated that a party that unreasonably refused to mediate could be penalised in costs. In deciding whether a party's refusal to mediate was unreasonable, all of the circumstances of the particular case had to be considered, as had the advantages of ADR over the court process. Relevant factors are likely to be:

- nature of the dispute;
- merits of the case;
- extent to which other methods of settlement had been adopted;
- whether costs of ADR would be disproportionately high;
- whether delay in setting up or attending ADR would have been prejudicial; and
- whether the ADR had a reasonable prospect of success.

Halsey is the starting point for parties and the courts when considering whether a refusal to use ADR is reasonable or not. This leading decision does, however, need to be looked at in the context of more recent decisions which followed the emphasis on proportionality introduced by the CPR in 2013. In particular consideration should be given to the cases listed in section 2 below which lists cases where the various *Halsey* reasons for refusing to mediate have been rejected.

1.2 PGF II SA v OMFS Company 1 Ltd[6]

The claimant accepted a Part 36 offer about 12 months after it was made. The court disallowed the defendant's costs of approximately £250,000 incurred after the period for accepting the Part 36 offer. The defendant had ignored the claimant's repeated

5 [2004] EWCA Civ 576, [2004] 4 All ER 920
6 [2013] EWCA Civ 1288, [2014] 1 All ER 970

offers to mediate. The Court of Appeal upheld the view that silence in the face of an offer to mediate was, as a general rule, an unreasonable refusal to mediate.

The Court also rejected two *Halsey* arguments put forward by the defendant to justify its refusal. It submitted that the strength or merits of the defendant's case was such that it could refuse to mediate. It also argued that the parties were so far apart in their respective offers that the mediation had no prospects of success (see sections 2.2 and 2.6 below).

1.3 Lynn v Borneos LLP t/a Borneo Linnels[7]

This was a professional negligence claim which, for the purposes of determining the costs, the defendants won. The claimant argued the defendant unreasonably refused to mediate. The court agreed, allowing the defendant to recover only 60% of their costs. The judge noted there was no reasoned refusal to go to mediation, the defendants simply did not respond or made *"a fairly bland refusal to all the invitations to mediate … the effect of authority is now, in my view, that the court should regard a refusal or a failure to engage in a mediation in those circumstances as unreasonable"*.

The costs penalty was imposed notwithstanding the defendant's confidence in its own case, which confidence was borne out by success at trial and the judge's view that "nothing I have seen suggests to me that there would have been any realistic hope that the matter would have settled at mediation" (see comments in section 2.2 and 2.6 below). The court also noted the defendants regarded the claim as a "try-on" and explored the possibility of making allegations of fraud or discreditable conduct against the claimant. This suggests the judge did not consider that cases involving issues of fraud are necessarily unsuitable for mediation.

1.4 Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[8]

The High Court awarded indemnity costs against a defendant that accepted the claimant's Part 36 offer after a trial - but before judgment had been delivered - on the basis it had unreasonably refused offers to mediate. The judge described the case as requiring a fact and evidence intensive exercise where the court would have to decide on the credibility of witnesses and importance of documents. It required the parties to risk assess carefully whether or not their case would prevail. There was an obvious sliding scale of possible awards, it was not an all or nothing case.

The judge rejected four *Halsey* reasons put forward by the defendants to justify their refusal to mediate (see below at sections 2.1, 2.2, 2.4 and 2.6). They argued:

- the nature of the case meant there was no middle ground, either there was or there was not a concluded agreement;
- it believed it had a very strong case;

7 unreported decision of the High Court in Birmingham, 30/1/2014. Contact us for a copy of the transcript.
8 [2014] EWHC 1774 (Ch), paragraph 22

- the parties were so far apart in offers there were no prospects of a mediation succeeding; and
- the costs of a mediation were disproportionately high.

1.5 Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2)[9]

The defendant won at trial but had refused to mediate. Ramsey J said the defendant reasonably considered that it had a strong case on the merits and noted that this was *"a factor which provides some but limited justification for not mediating".* In fact, the court concluded the refusal was unreasonable notwithstanding this belief.

"This is therefore a case where the nature of the case was susceptible to mediation and where mediation had reasonable prospects of success. However, BAE reasonably considered that it had a strong case. On that basis was it unreasonable for BAE to reject NGM's offer to mediate? I have come to the conclusion that it was. Whilst BAE's view of their claim provided some justification for not mediating, I consider that the other factors show that it was unreasonable for BAE not to mediate the dispute. Whilst BAE point out that the matter was resolved by a comparatively short Part 8 hearing, even that would have been likely to have been avoided by the use of mediation."

1.6 Laporte & Anor v The Commissioner of Police of the Metropolis [10]

The defendant, despite being prompted by the court to consider ADR, refused the claimant's offer to mediate. At trial the Defendant succeeded on every substantive issue. Further, the court found that, had there been a mediation, although there was a likely possibility of a settlement it would have been by no means certain.

When exercising its discretion on costs the Court considered the defendant's conduct in the round, including the appropriate *Halsey* factors. The judge allowed the defendant only two-thirds of its costs. The fact that the Defendant asked for £100,000 and the Court awarded interim costs of £50,000 suggested that this sanction was a significant amount of money. The defendant was found to have failed to engage with ADR "…*with proportionate commitment and focus*" and to "...*fully and adequately…engage in the ADR process*".[11]

1.7 Rana v Tears of Sutton Bridge[12]

The defendant defeated a claim for damages for breach of duty as bailee. The judge accepted the claimant's argument that the defendant had not only failed to engage in

9 [2014] EWHC 3148 (TCC)
10 [2015] EWHC 371 (QB)
11 Paragraphs 61 and 66
12 [2015] EWHC 2597 (QB)

ADR, but that failure was an unreasonable failure. He also found the defendant failed to properly engage with the Pre-Action Protocol.

His Honour Judge McKenna said: *"I am not impressed by their arguments that simply because liability was still in issue and because there was not sufficient information as to the quantification of the loss of profits claim, still less that disclosure had not taken place, an attempt at alternative dispute resolution should not have taken place."* Taking everything into consideration the judge disallowed 40% of the defendant's costs.

1.8 Reid v Buckinghamshire Healthcare NHS Trust[13]

Master O'Hare held that the paying party had unreasonably refused to mediate this costs litigation. All he said about the reasons for this are *"I am persuaded that the defendant's refusal to mediate in this case was unreasonable. It took them six weeks to reply to the offer and they then replied in the negative."* He ordered the defendant to pay indemnity costs on the detailed assessment costs from the date of the claimant's offer to mediate.

Master O'Hare concluded at paragraph 12 *"If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate."*

1.9 Bristow v The Princess Alexander Hospital NHS Trust & Ors[14]

Master Simons accepted the receiving party's assertion that the paying party had unreasonably refused to mediate this costs litigation and was satisfied there ought to be a sanction. He indicated it was difficult to decide what the appropriate sanction should be because "*the beneficiary of any sanctions will be the solicitors who have not suffered any particular loss because they are being compensated for the delay by interest at eight per cent, and of course they are receiving profits on the further work that may have been done, so they do not really lose out as a result of the failure to mediate".*

However, he noted there was a point of principle involved – that a party that unreasonably refuses an offer to mediate should be sanctioned – and he ordered indemnity costs on the whole of the detailed assessment costs. This is a step further than Master O'Hare in *Reid* who limited the indemnity period to the date of receiving the offer to mediate.

13 [2015] EWHC B21 (Costs)
14 [2015] EWHC B22 (Costs)

Chapter 2: Judicial responses to reasons for not mediating

In Halsey v Milton Keynes NHS Trust and Steel[15] Dyson LJ made it clear that the courts can impose a costs sanction on a party that unreasonably refuses to mediate. The judgment went on to say that factors which are relevant to this question include (but are not limited to):

(a) the nature of the dispute;
(b) the merits of the case;
(c) the extent to which other settlement methods have been attempted;
(d) whether the costs of the ADR would be disproportionately high;
(e) whether any delay in setting up and attending the ADR would have been prejudicial; and
(f) whether the ADR had a reasonable prospect of success.

These "Halsey reasons" were routinely offered by parties to justify refusals to mediate. However, from 2014 there have been a number of significant cases which make it clear the courts are now far less likely to accept these reasons, without more, as justifying refusals to mediate. This section will examine the reasons individually and highlight examples of the courts rejecting them.

2.1 The nature of the dispute.

Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[16]

His Honour Judge Waksman QC sitting in the Manchester District Registry of the High Court rejected the submission that the dispute was unsuitable for mediation because it *"is not a claim which provides any natural middle ground between the parties because it centres on whether a concluded agreement was reached."*

He said "*But that is usually the case on liability: it usually is a binary issue. There may be various liability outcomes in a more complex case but in a simple case the question is going to be, "Was there a breach of duty of care? Was there a breach of contract? Was there a contract?"; and so on and so forth. To consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived.*"

Laporte & Anor v The Commissioner of Police of the Metropolis [17]

The defendant argued the case was unsuitable for mediation because the claimants were seeking to litigate a point of legal principle concerning the scope of police powers and were alleging that a police inspector had fabricated his account of the scenario giving rise to those powers.

15 [2004] EWCA Civ 576, [2004] 4 All ER 920
16 [2014] EWHC 1774 (Ch), paragraph 14
17 [2015] EWHC 371 (QB)

Turner J rejected the argument saying at paragraph 44: *"In my view, this was not a case in which the nature of the dispute made it unsuitable for mediation. The claimants could have succeeded in obtaining some level of damages even if they had lost on the law and even if, in addition, the actions of the inspector had been vindicated. There were issues of pure fact to be resolved about what happened on the staircase upon which both sides ran the risk of adverse findings. There was no continuing commercial relationship between the parties and it is unrealistic to suggest that a settlement by way of ADR would have been inappropriate for this type of dispute."*

Rana v Tears of Sutton Bridge[18]

The successful defendant had refused mediation and gave the fact that liability was in dispute as a reason for refusing to mediate. His Honour Judge McKenna disallowed 40% of their costs saying: "*I am not impressed by their arguments that simply because liability was still in issue and …, an attempt at alternative dispute resolution should not have taken place."*

2.2 The merits of the case.

PGF II SA v OMFS Company 1 Ltd[19]

The Appellant submitted that making a Part 36 offer of £700,000 *"and leaving it there until trial without subsequent adjustment, was a living demonstration of the defendant's belief in the strength of its case, a belief which, since the claimant eventually accepted it, cannot have been otherwise than reasonable"*.

Briggs LJ rejected it saying *"it is in my view simply wrong to regard a Part 36 offer, without any supporting explanation for its basis, as a living demonstration of a party's belief in the strength of its case. As I have said, defendants' Part 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risk will encourage it to settle for less than its claim is worth."*

Lynn v Borneos LLP t/a Borneo Linnels[20]

His Honour Judge Cooke said *"The defendants simply did not respond or made fairly bland refusal to all the invitations to mediate. The effect pf authority is now, in my view, that the court should regard a refusal or a failure to engage a mediation in those circumstances as unreasonable.* ***It is something which is, in principle, unreasonable no matter what the strength of a party's case is felt to be.*** *There is an advantage, which is recognised in policy terms by the court, in encouraging the parties to explore the possibility of settlement at mediation."* (emphasis added)

Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[21]

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18 [2015] EWHC 2597 (QB)
19 [2013] EWCA Civ 1288, [2014] 1 All ER 970, paragraphs 44-45
20 unreported decision of the High Court in Birmingham, 30/1/2014. Contact us for a copy of the transcript.
21 [2014] EWHC 1774 (Ch), paragraph 14

The court on the facts did not think it reasonable for the defendant to be so confident in its case. It noted that no application for summary judgment had been made. The judge quoted Lightman J in Hurst v Leeming [22] *"The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants."*

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2)[23]

Ramsey J sitting in the Technology and Construction Court acknowledged the defendant's belief in the merits of its case but found that was only limited justification for not mediating and imposed a penalty. He said: *"I have come to the conclusion, after considering the arguments, that this was a strong case by BAE. I would not call it a borderline case nor one which was suitable for summary judgment. It was a case where BAE reasonably considered that it had a strong case… As stated in Halsey, the fact that a party reasonably believes that it has a watertight case may well be sufficient justification for a refusal to mediate.*

The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant.

However, on the merits of the case, I consider that BAE's reasonable view that it had a strong case is a factor which provides some but limited justification for not mediating."

He concluded at paragraph 72: *"Where a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable. I consider that to be the position here."*

2.3 The extent to which other settlement methods have been attempted.

We take the view that if there has been a thorough well-intentioned attempt at settlement by negotiation there may be some prospect of persuading the court that it is not reasonable to expect the parties to also mediate. This argument, however, is not without risk. See, for example:

Reed Executive Plc v Reed Business Information Limited[24]. Mediation had been offered, but in response a party submitted that refusal was justified because it had been engaged in "serious settlement negotiations". Jacob LJ responded (para 167) that such negotiations were not the same as mediation as "a good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to convey."

22 [2002] EWHC 1051 (Ch)
23 [2014] EWHC 3148 (TCC) paragraphs 58 - 60
24 [2004] EWCA Civ159

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd.[25] There were two attempts to settle, one at a face to face meeting. Further, the parties exchanged "without prejudice save as to costs" offers. Ramsey J commented *"I think that, overall, this factor is neutral or marginally in ... favour (of the party refusing mediation) in its impact in assessing the refusal to mediate."*

The fact that both parties have made Part 36 offers has been held not to be a sufficient reason: see para 2.6 below.

Further, mediators can provide anecdotal evidence that it is not all uncommon to see a case settle at mediation where there has previously been a round table or joint settlement meeting which did not produce a settlement.

2.4 Whether the costs of the ADR would be disproportionately high.

Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[26]

The defendant refused to mediate on the basis that the costs of the mediation were likely to be as much as their latest offer to settle (£10,000). The judge described the argument as misconceived and said "*The point is that you compare the costs of a mediation with the costs of a trial. And the costs of a mediation, on any view, would have been far less than the costs of the trial, as both parties' costs figures demonstrate."*

2.5 Whether any delay in setting up and attending the ADR would have been prejudicial.

It is quite difficult to conceive of circumstances where the delay in setting up and attending mediation would in fact be prejudicial. A mediation can be convened very quickly.

In Elliott Group Ltd (2) Algeco SAS and others[27] the court said that there would rarely be circumstances where a court would be willing to adjourn a trial so the parties can use ADR. In CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd[28] Coulson J. said "*A stay or a fixed 'window' (for mediation) is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered*."

Conversely, the court may, when giving directions, bear in mind that the rigours of case management should not prejudice the opportunity to explore ADR: Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd[29]. Similarly, in *CIP Properties* (see above), Coulson J. considered that "*A timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool*."

25 [2014] EWHC 3148 (TCC)
26 [2014] EWHC 1774 (Ch), paragraph 23
27 [2010] EWHC 409
28 [2014] EWHC 3546 (TCC)
29 [2012] EWHC 38

2.6 Whether the ADR had a reasonable prospect of success.

PGF II SA v OMFS Company 1 Ltd[30]

The Appellant *"…submitted that, mainly because of the monetary distance between the parties' respective Part 36 offers, both of which he characterised as their respective bottom lines, mediation stood no reasonable prospect of success. More generally he submitted that this was a hard-nosed commercial dispute about money between parties with no continuing relationship, and therefore not susceptible to the ability of a mediator to devise solutions beyond the capacity of the court to order."*

Briggs LJ rejected the argument. He said *"Nor do Part 36 offers necessarily or even usually represent the parties' respective bottom lines. There was, accordingly, no unbridgeable gulf between these parties' respective Part 36 offers, which could not in any circumstances have been overcome in a mediation. The gap of some £550,000 which existed in April 2011, after the defendant's £700,000 offer, was little more than a quarter of the gulf separating the parties on their statements at case, and half what it had been before that offer was made. Standing back, the parties may fairly be said to have been converging at a rate which made a mediation or some other form of ADR highly appropriate, not least because, as the parties would have appreciated if given realistic budgets by their respective solicitors, an amount broadly equivalent to that gap would have to be expended in yet further costs in order to have the dispute resolved at a trial."*

Lynn v Borneos LLP t/a Borneo Linnels[31]

The court ordered a costs sanction despite the following comment *"I am bound to say that nothing I have seen suggests to me that there would have been any realistic hope that the matter would have settled at mediation…I think, realistically, I must approach this on the footing that. Whilst it cannot be said there was no value in going to mediation, I cannot assume that there was a high possibility that there would have been a settlement achieved at any recognisable point in time which would have have saved a significant amount of costs in preparation for the trial."*

Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[32]

The judge rejected the defendant's belief that the parties were too far apart for a mediation to be successful. He said *"Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience."*

Laporte & Anor v The Commissioner of Police of the Metropolis [33]

30 [2013] EWCA Civ 1288, [2014] 1 All ER 970, paragraphs 44-46
31 unreported decision of the High Court in Birmingham, 30/1/2014. Contact us for a copy of the transcript.
32 [2014] EWHC 1774 (Ch), paragraph 22
33 [2015] EWHC 371 (QB), paragraphs 54 to 56

The judge found the defendant's view was that the claimants would only accept a financial offer and that the defendant was unlikely to make one and so ADR was not appropriate. He rejected that saying:

"55. I would make the following observations:

i) At no time had the defendant excluded the possibility of making a money offer;

ii) At no time had the claimants insisted that the making of a money offer would be a formal precondition of engaging in ADR;

iii) It is always likely that those representing any given party to a dispute will seek to lower the expectations of the other side in preparation for ADR. Simply because one side makes a prediction of what it might take to reach a settlement does not entitle the other side to treat such a prediction, without more, as a formal pre-condition. Tactical positioning should not too readily be labelled as intransigence.

iv) I do not agree that Ms Fowler was entitled to take the view that Mr Dutta's approach to ADR was purely tactical. It had been on the claimants' agenda from the outset and was pursued with appropriate vigour throughout.

v) It is difficult to escape the conclusion that Ms Fowler was repeatedly on the procedural back foot in the months leading up to the hearing as a result of which the pursuance of ADR was deprioritised to help her to meet the demands of preparing the case for trial

56. On the evidence before me I am satisfied that there was a reasonable chance that ADR would have been successful in whole or in part. The defendant was not justified in coming to a contrary conclusion."

Rana v Tears of Sutton Bridge[34]

The successful defendant refused to mediate on grounds, amongst others, that there was insufficient information as to the quantification of the loss of profits claim and that disclosure had not taken place. The judge said these grounds did not justify a refusal to mediate and applied a costs penalty.

Bristow v The Princess Alexander Hospital NHS Trust & Ors[35]

The paying party in this costs litigation sought to justify its refusal to mediate *"because the parties were so far apart. The claimants were unreasonable in their offers, and the offers that were put forward by the defendants were much closer to the actual settlement than in fact were the offers made by the claimant"*. Master Simons said *"It took three months for them to reject and they gave no good reason other than the fact that the case had already been set down for a detailed assessment."*

34 [2015] EWHC 2597 (QB)
35 [2015] EWHC B22 (Costs)

The Master concluded:
"We now come to the question of mediation and, as I have indicated, in principle the defendants have not given any reasonable reason why they refused to engage in mediation and I am satisfied that there should be an appropriate sanction… However, there is a point of principle involved and in my judgment there should be a sanction. I am not satisfied that the sanction should be increased interest because eight per cent interest in this day and age is already a penal rate of interest and the defendant has to bear this very high rate of interest and they are being punished already by their actions because this case could have been settled by mediation.

Nevertheless I am satisfied there should still be a sanction and I think that the correct sanction is that the claimant should receive their costs on an indemnity basis on their 80 per cent costs as a sanction for the defendant's failing to engage in mediation."

2.7 Other reasons rejected by the court.

Distrust between the parties

In Garritt-Critchley v Ronnan[36] it was argued that a key factor in the decision not to mediate was ".. *that there was a considerable dislike and mistrust between the parties, …"* The court said: *"And in any event it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most usefully. They are well trained to diffuse emotion, feelings of distrust and other matters in order that the parties can see their way to a commercial settlement. So I consider that that is a reason which does not have any real foundation either."*

Offering to mediate is just a tactic

In *PGF*[37], the court considered whether the offer to mediate was merely tactical but found, on the contrary that it was: "*a serious and carefully formulated written invitation"* and was *"couched in such detailed and sensible terms that it could not reasonably have been regarded as a mere tactic*".

36 [2014] EWHC 1774 (Ch)
37 [2012] EWHC 83 (TCC)

Chapter 3: Sanctions imposed by the courts for failing to mediate

The following cases are examples of where the court has imposed a costs sanction on a party for unreasonably refusing to mediate.

PGF II SA v OMFS Company 1 Ltd
Lynn v Borneos LLP t/a Borneo Linnels
Garritt-Critchley and Others v Ronnan and Solarpower PV Limited
Laporte & Anor v The Commissioner of Police for the Metropolis
Rana v Tears of Sutton Bridge
Gresport Finance Ltd v Battaglia
Reid v Buckinghamshire
Bristow v Princess Alexander

3.1 PGF II SA v OMFS Company 1 Ltd [38]

The usual Part 36 rule was amended and the defendant was disallowed its costs from the expiry of its Part 36 offer to the date of settlement (approximately 12 months and £250,000 costs).

3.2 Lynn v Borneos LLP t/a Borneo Linnels[39]

The successful party's costs were reduced by 40%. The court took into account the fact that although it could not be said there would be no value in going to mediation there was not a high possibility that a settlement would have been achieved.

3.3 Garritt-Critchley and Others v Ronnan and Solarpower PV Limited[40]

The unsuccessful defendant was ordered to pay the claimant's costs on the indemnity basis.

3.4 Laporte & Anor v The Commissioner of Police of the Metropolis[41]

The defendant's costs were reduced by 33%, notwithstanding he was successful on every substantive issue.

3.5 Rana v Tears of Sutton Bridge[42]

The successful defendant's costs were reduced by 40%.

38 [2013] EWCA Civ 1288, [2014] 1 All ER 970
39 unreported decision of the High Court in Birmingham, 30/1/2014. Contact us for a copy of the transcript.
40 [2014] EWHC 1774 (Ch)
41 [2015] EWHC 371 (QB)
42 [2015] EWHC 2597 (QB)

3.6 Gresport Finance Ltd v Battaglia[43]

In this case the defendant failed to attend an agreed mediation. This was described by the court as serious misconduct. It was also sufficient to entitle the court to dismiss the application for security for costs.

3.7 Reid v Buckinghamshire Healthcare NHS Trust[44]

The paying party was ordered to pay indemnity costs on the detailed assessment costs from the period after the receiving party's offer to mediate.

3.8 Bristow v The Princess Alexander Hospital NHS Trust & Ors[45]

The paying party was ordered to pay indemnity costs on the whole of the detailed assessment costs.

43 [2015] EWHC 2709 (Ch) (30/9/2015)
44 [2015] EWHC B21 (Costs)
45 [2015] EWHC B22 (Costs)

Chapter 4: Practice Points

This Chapter outlines some practice points arising from recent cases. It also lists some of the points in time during the litigation when either the case law or the CPR may trigger the issue of whether to mediate.

In general terms the issue of whether or not to mediate may arise because:

- You instigate mediation:
  - in your professional judgement, as a matter of client care or litigation strategy, you advise the claim be referred to mediation; or

- A third party instigates mediation:
  - the court encourages the parties to mediate;
  - the opposing party offers mediation.

If you instigate the proposal to mediate, it is probably best not to raise any reference to the CPR or the cases in the first instance. An amicable decision to mediate, made jointly in a case discussion on the basis that mediation may well settle the case, is undoubtedly the best foundation for mediation.

If, however, you meet with a refusal, resistance or a "perhaps, but later" response you may wish to use the case law to persuade the other party to reconsider and/or the court to make a direction to encourage and facilitate mediation. Such persuasion will normally involve a number of steps:

1. An unambiguous written offer to mediate, noting that previous discussions have not reached agreement on this point, citing the particular reasons why the case is appropriate for mediation and why now is a suitable time to mediate.

2. A review of the reasons given for any refusal:

   a. If detailed written reasons for a refusal are not given, call for them, referring to *PGF* (see below), which clearly articulates the requirement for contemporaneous written reasons, and reserve the right to refer to the correspondence when costs fall to be considered.

   b. If detailed written reasons for a refusal are stated, these should be scrutinised and compared with the reasons previously put before the courts (see Chapter 2). If the reasons do not "stack up" in light of the authorities, set out why this is so and invite reconsideration of the offer to mediate. Again reserve the right to refer to the correspondence when costs fall to be considered.

c. If no agreement to mediate is forthcoming and you remain of the view that the reasons said to justify refusal are insufficient, the issue can be referred to the court next time you are before it.

d. If there is no response at all to the offer to mediate, write again, at least twice, referring to *PGF* (see below) as authority for the proposition that silence in the face of an offer to mediate will usually amount to an unreasonable refusal which should sound in costs.

The leading Court of Appeal decision of PGF II SA v OMFS Company 1 Ltd[46] is particularly helpful when persuading parties, or the court, that mediation should take place. For example, Briggs LJ said (at para 56):

"*…this case sends out an important message to civil litigants,* ***requiring them to engage with a serious invitation to participate in ADR*** *…. 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."* (emphasis added)

Briggs LJ also stated (at para 30):

"*The ADR Handbook, … sets out at length at paragraph 11.56 the steps which a party faced with a request to engage in ADR, but which believes that it has reasonable grounds for refusing to participate at that stage, should consider in order to avoid a costs sanction. The advice includes*:

a.) "*Not ignoring an offer to engage in ADR;*

b.) *"****Responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the Halsey guidelines****;*

c.) *"Raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome;"*

"That advice may fairly be summarised as calling for constructive engagement in ADR rather than flat rejection, or silence …" (emphasis added).

If the opposing party or the court instigates the proposal to mediate and your client, on advice, wishes to reject the proposal, it will be necessary to draft and send written reasons justifying the refusal, which reasons must be consistent with *Halsey*, *PGF* and the recent cases. Where you seek to rely on reasons which are similar to those outlined in Chapter 2, which have previously been rejected by the court, it will be necessary to establish why the stated reasons are sufficient and distinguishable from those that have been rejected.

46 [2013] EWCA Civ 1288

So, is a refusal to mediate always going to lead to trouble? Are there any "get out of jail" cards?

There were a number of post-*Halsey* decisions where a refusal to mediate was found to be reasonable. Some examples are given below, but it might be prudent to note the dates that they were decided and look at them through the prism of the *PGF* Court of Appeal judgment.

In Society Internationale de Telecommunications Aeronautiques S.C. v Wyatt & Co (UK) Limited[47] the court found that it was reasonable for a Part 20 Defendant to refuse to participate in a mediation offered by the Claimant shortly before the trial of the Part 20 claim.

In S v Chapman[48] a Defendant was found to be entitled to await the outcome of its application to strike out before deciding whether or not it was necessary or advantageous to enter into mediation.

What about the "Perhaps we will mediate, but later" response? In Mobiqa Ltd v Trinity Mobile Ltd[49] the defendant's refusal to mediate was not unreasonable. The Defendant argued that mediation should take place once "*the parties' expert evidence had been exchanged, so it could be seen whether in fact the Claimant had any case*." Contrast this, however, with the remarks of Mr Recorder Furst QC in PGF II SA v OMFS Company 1 Ltd[50] at para 45: "*Experience suggests that many disputes, …are resolved before all material necessary for a trial is available. Either parties know or are prepared to assume that certain facts will be established …. The rationale behind the Halsey decision is the saving of costs and this is achieved (or at least attempted) by the parties being prepared to compromise without necessarily having as complete a picture of the other parties' case as would be available at trial*."

In R (Royal Free London NHS Foundation Trust) v Secretary of State for the Home Department[51] it was held that an offer to mediate which is made subject to an unreasonable pre condition will be disregarded.

In Murray & Another v Bernard[52] the claimants originally refused to mediate but later changed their minds. The court said they were not to be fixed with a once stated but changed intention in relation to mediation.

A costs sanction will not always follow an unreasonable refusal to mediate. One reason for this is that mediation issues are sometimes merely one of a number of factors relating to conduct which fall to be considered by the court. In Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd[53] Jackson J made a comprehensive review of costs authorities from which he derived (at para. 72) 8 principles. These included:

47 [2002] EWHC 2401
48 [2008] EWCA Civ800
49 [2010] EWHC 253
50 [2012] EWHC 83 (TCC)
51 [2013] EWHC 4101it
52 [2015] EWHC 2395 (CH)
53 [2008] EWHC 2280

(v) *"In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.*

(vi) "*In considering the circumstances of the case the judge will have regard not only to Part 36 offers made but also to each party's approach to negotiations (in so far as admissible) and general conduct of the litigation*."

So, in Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No 2)[54] Ramsey J decided that an unreasonable refusal to mediate should not result in a costs sanction because of other relevant conduct by the refusing party.

The CPR – when does mediation fall to be considered?

The short answer is: at the outset of the case and throughout.

Here are some general trigger points:

- On taking instructions and throughout. The SRA Code of Conduct provides:
  - "the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances;" O(1.5)
  - clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them;" O(1.12)
- There is a general duty to attempt settlement from the earliest stage. See, for example, the Pre-Action Protocol for Personal Injury Claims, which makes it clear that the duty includes the pre litigation phase.[55]
- Pursuant to the overriding objective, the court may encourage ADR, at any stage of the proceedings.[56]
- The court may make an ADR direction, particularly when dealing with case management, cost management and budgets.
  - The court may order a stay upon the written request of a party or of its own initiative when considering completed directions questionnaires (r.26.4). (See also Standard Directions Model Paragraph B05-stay for settlement.doc which provides:

    "1) .....

    2) "*The claim is stayed until xxxx, during which period the parties will attempt to settle the matter or to narrow the issues.*

    3) "*By 4pm on xxxx the Claimant must notify the court in writing of the outcome of negotiations (without disclosing any matters which remain subject to 'without prejudice' terms) and what, if any, further directions are sought. Failure to comply with this direction or to engage properly in negotiations may result in the application of sanctions. If settlement*

54 [2014] EWHC 3148 (TCC)
55 Pre-Action Protocol for Personal Injury Claims, para 2.16.
56 CPR, r 1.4(2)(e).

has been reached, the parties must file a consent order signed by all of them."[57]

- The court may order the parties to consider mediation using, for example a direction in the form of Standard Directions Model Paragraph A03-ADR.doc, whether at the time of giving standard directions or otherwise as follows:

  2) "*At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any 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.*

  ('21 days' can be altered manually. (The words 'and not less than 28 days before trial' can always be added after the word 'proposal' by the managing judge if appropriate. Not necessary for every Order."[58]

- See also Precedent H relation to budgeting. Might an omission to deal with ADR indicate that a party is giving no consideration to the subject?

- Notwithstanding the absence of any order or direction relating to ADR, there is a duty to keep ADR under review on a continual basis.[59]

- There is a continuing duty to engage with the process of considering ADR together with the other party.[60]

- The fact that there is a Court of Appeal mediation scheme is a reminder that ADR should be considered before proceeding with any appeal.

57 See http://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/docs/sd-paragraphs/pre-case-management/B05-stay-for-settlement.doc

58 See http://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/docs/sd-paragraphs/allocation,-docketing,-adr/A03-ADR.doc

59 Practice Direction Pre-Action, para 8.4 and PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, [2014] 1 All ER 970, per Briggs LJ, para [27].

60 Garritt-Critchley v Ronnan [2014] EWHC 1774 (Ch), para [25].

Chapter 5: Statements and Propositions encouraging the use of mediation

5.1 Judicial encouragement of ADR and mediation

5.1.1
"The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

Dyson LJ, Halsey v Milton Keynes NHS Trust and Steel; Joy v Halliday[61]

5.1.2
"(ADR) must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any expert evidence is required and whether a Part 36 Offer ought to be made and at what level."

Sir Anthony Clarke MR (as he then was)[62]

5.1.3
"It is not a sign of weakness to suggest [mediation]. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."

Ward LJ, Egan v Motor Services (Bath) Ltd [63]

5.1.4
"The aim is that, in general, no case should come to trial without the parties having undertaken some form of alternative dispute resolution to settle the case."

Jackson LJ, preface to the Cumulative First Supplement to the 2013 edition of the White Book (*Civil Procedure*, Sweet & Maxwell), p ix.

5.1.5
"…*this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR***."**

Briggs LJ, PGF II SA v OMFS Company 1 Ltd.[64]

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61 [2004] EWCA Civ 576, [2004] 4 All ER 920
62 http://www.civilmediation.org/downloads-get?id=128
63 [2007] EWCA Civ 1002, [2008] 1 WLR 1589
64 [2013] EWCA Civ 1288, [2014] 1 All ER 970

5.1.6
"No dispute was too intractable for mediation."

Lord Chief Justice, N J Rickard Ltd v Holloway, unreported, Court of Appeal (Civil Division) 03 November 2015

5.2 Mediation and personal injury claims

5.2.1
"My own view is that [mediation] has a valuable role in most types of case, including PI [personal injury] cases and that the courts can play a valuable rule in promoting it, without any change in the present CPR."

Sir Anthony Clarke MR (as he then was).[65]

5.2.2
"There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation."

Jackson LJ[66]

5.3 Mediation and proportionality

5.3.1
"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".

Briggs LJ, PGF II SA v OMFS Company 1 Ltd.[67].

5.3.2
"… the constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) 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."

Briggs LJ, PGF II SA v OMFS Company 1 Ltd[68].

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65 http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/media/speeches/2008/speech-clarke-lj-mor-11042008

66 "Review of Civil Litigation Costs: Final Report", published by HMSO in 2010, Executive Summary, para 3.1(iii), p 361).

67 [2013] EWCA Civ 1288, at para [56]

5.3.3
"(It) is partly a matter of practicality, but also serves the policy of proportionality. 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."

Briggs LJ, PGF II SA v OMFS Company 1 Ltd[69].

5.3.4
"This is already a case in which the parties' effort and expense has been seriously disproportionate to the amounts at stake. The parties are therefore firmly encouraged to pursue mediation or some other form of ADR to resolve their remaining differences."

Briggs LJ, Grace v Black Horse Ltd[70].

5.4 Mediation v Negotiation

5.4.1
"Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve."
Brooke LJ, Dunnett v Railtrack plc [2002] EWCA Civ 303[71].

5.4.2
"We can and we do encourage mediation, the earlier the better. It does have an extraordinary knack of producing compromise, even where the parties appear, at the start, to be intractably opposed."
Ward LJ, sitting with Dyson LJ, in Daniels v Commissioner of Police for the Metropolis[72].

5.4.3
"In cases of difficulty, by reason of the ability of a mediator to oil the wheels of settlement in various ways, it is more likely to be effective than the simpler process of negotiation by discussion and offer and counter-offer."
Jack J in Hickman v Blake Lapthorn[73]

5.5 Unreasonable refusal to engage in ADR.

5.5.1
"A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR."
Dyson LJ, Halsey v Milton Keynes General NHS Trust[74].

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68 [2013] EWCA Civ 1288, [2014] 1 All ER 970, para [27]
69 [2013] EWCA Civ 1288, [2014] 1 All ER 970, para [29]
70 [2014] EWCA Civ 1413, [2015] Bus LR 1
71 [2002] 2 All ER 850
72 [2005] EWCA Civ 1312, [2005] All ER (D) 225
73 [2006] EWHC 12 (QB), [2006] 3
74 [2004] EWCA Civ 576, [2004] 4 All ER 920 at para [33]

Phil Hesketh
Mediator with Trust Mediation, Expedite Resolution and others

Tim Wallis
Mediator with Trust Mediation, Expedite Resolution and others

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Trust Mediation Limited

Trust Mediation is a provider of specialist personal injury, clinical negligence and costs dispute mediators.

Trust Mediation can provide mediation training for claims handlers.

Contact:

Registrar@trustmediation.org.uk

Tel: 0207 353 3237

218 Strand
London
WC2R 1AT

www.TrustMediation.org.uk