FAILURE TO RESPOND TO AN INVITATION TO MEDIATE: THE CONSEQUENCES

In the recent case of **PGF II SA v. OMFS Company 1 Limited [2013] EWCA Civ 1288**, the Court of Appeal upheld cost sanctions imposed on the defendant for failing to respond to an offer of mediation.

The background to this case is that the claimant issued proceedings against the Defendant in the High Court claiming in excess of £1.9m, alleging the defendant had breached repair covenants contained in a number of leases. The claim was compromised, save as to costs, by a last minute acceptance by the claimant of the defendant's Part 36 offer. Mr. Recorder Furst QC, sitting as a Deputy Judge of the Queen's Bench Division in the Technology and Construction Court, acceded in part to the claimant's application for a costs sanction on the ground that the defendant had "*unreasonably refused to mediate*" by depriving the defendant of the costs to which it would otherwise have been entitled under Part 36. However, the Judge refused to order the defendant to pay the claimant's costs for the same period.

The Judge held that the defendant's silence when twice invited to mediate had amounted to a refusal and, applying the *Halsey* guidelines[1], that its refusal had been unreasonable.

Both parties appealed.

- The defendant submitted that the judge had been wrong on both points. Its silence did not amount to refusal, and even if it did, that refusal was on reasonable grounds.
- The claimant submitted that silence in response to an invitation to participate in ADR was itself unreasonable regardless whether it amounted to a refusal, or whether there were reasonable grounds to refuse

In the Court of Appeal, Lord Justice Briggs said: "*In my judgment, the time has now come for this court 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*

[1] *Halsey v Milton Keynes General NHS Trust* [2004] 1WLR 3002

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. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."

He concluded: *"…this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. 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"*.

This case is a stark reminder to all civil litigants of the importance of *at least* engaging with the other side when presented with an invitation of ADR. Contrary to what any 1967 hit may suggest, silence is not always golden, (but it can be very expensive!).

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