Part VI of the 'Staying Virtually Up-to-date' Series delivered by 3PB's Commercial Team

THE PRICE OF AN UNREASONABLE REFUSAL TO ENGAGE: ADR, LITIGATION AND COST CONSEQUENCES

David Parratt QC and Rebecca Farrell

3PB Barristers

THIS GUIDE

This guide is intended to act as an aide-memoire to Part VI of the 'Staying Virtually Up-to-Date' Series delivered by 3PB's Commercial Team on 16th June 2020. Thank you for joining us!

Whilst every effort has been taken to ensure the accuracy of the contents of this guide, the position in relation to Covid-19 is rapidly changing and this document should not be used as a substitute for obtaining legal advice. If you have a particular query, please contact David Fielder (Email - david.fielder@3pb.co.uk), who will be happy to direct your enquiry to the relevant person.

The price of an unreasonable refusal to engage: ADR, Litigation and Cost consequences

By David Parratt QC and Rebecca Farrell

3PB Barristers

Introduction

1. The touchstone of all ADR procedures is that parties enter into them voluntarily. However, there is an increasing body of case law in the English courts that suggests ADR should be seriously considered:

    a. before litigation is entered into. Failure to do so may result in adverse or impacted costs for a client, even if successful; and

    b. in the course of litigation (instigated by the parties and increasingly with court directions) an unreasonable refusal of a request to mediate may have bearing on Part 36 offers and costs.

2. We consider the development of the case law in respect of mediation and other forms of ADR. In light of inevitable delays to litigation during the lockdown, we also explore the duties on legal representatives to consider Alternative Dispute Resolution ("ADR") at this time and how to respond to requests to mediate. Ultimately, we ask whether a party's freedom to forgo ADR has a price.

ADR as a Contractual Remedy

3. A difference can be drawn between (a) using mediation as the mechanism to resolve the dispute without recourse to litigation and (b) use of mediation in the litigation process.

4. There are also contracts which may require parties to engage with ADR in the first instance – they are "stepped" and parties have to engage in various attempts in an escalated process in order to resolve their differences. Mediation is just one form of ADR which may be encompassed in those contracts. There

can be also references to “friendly discussions”; or Early Neutral Evaluation before permitting the parties to engage in their final stop dispute resolution choice – whether that is arbitration or litigation.

5. With arbitration as the backstop, it is important to follow the procedure, as it is possible that parties leaping straight to arbitration may come unstuck later at the point of enforcement when the arbitration might be deemed not to have been conducted in accordance with the Arbitration Agreement (i.e. the condition precedent steps to arbitration were not taken).

6. In *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC), the Court had to examine an agreement to determine whether the parties were required to attempt ADR in terms of a clause, before they could bring court proceedings. On the interplay between the two, it noted:

> ‘[There] *is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement. The Court must consider the interests of justice in enforcing the agreed machinery under the Agreement. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make.*’

Mediation and Litigation and Cost consequences

7. There has also been the development of a body of law relating to the interaction between litigation and mediation, with consequences in costs, which is still developing. A number of very recent cases have examined the position in relation Part 36 offers and the award of costs where the Court had previously given a Direction to the parties to contemplate using mediation in the settlement of their dispute.

The Law and Procedure in the Background: Macro and Micro

Macro:

(i) The EU Directive: Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/ No. 1133) allows the enforcement of cross-border mediated settlement agreements through the national courts of other Member States. Indeed, in case law emanating from the European Case of Justice it has recently been held that where the law of the member states permits it, in disputes involving consumers, mandatory mediation should take place before any court proceedings. (*Menini v Banco Popolare Societa Cooperativa* (C-75/16) European Court of Justice (First Chamber) EU:C:2017:457 EU) (2017)).

The UK left the EU on 31 January 2020. However, the UK continues to be treated for most purposes as if it were still an EU member state during the transition period, and most EU law continues to apply to the UK, including the rules on private international law set out in various European instruments, and indeed some rules will continue to apply after the end of the transition period.. The transition period will end on 31 December 2020 unless extended.

(ii) The Singapore Mediation Convention: The United Nations Convention on International Settlement Agreements Resulting from Mediation was signed on 7 August 2019. It is known as the 'Singapore Mediation Convention'.

As at the present time, 52 countries, including the US, South Korea, China, Malaysia, the Philippines, India, Saudi Arabia and Qatar, are now signatories and 3 States have ratified it (Fiji, Qatar and Singapore). As it is an International Convention, it requires both signature and ratification and if a State has done so, a mediated settlement agreement can be enforced in that State, provided the settlement falls within the scope of the Convention. As with arbitration, it can also be invoked as a defence to a claim relating to an issue already decided by the mediated agreement.

(iii) COVID-19: On 31 March 2020, the Civil Mediation Council (CMC) published a letter to members from Sir David Foskett, Chair of the CMC, in light of the ongoing COVID-19 outbreak. The letter highlights that, despite the current situation, "*the need for mediation has not gone away*" and that the outbreak "*could result in a greater demand for the help that*

mediators can bring". In light of mediators beginning to adapt their normal working arrangements to offer online mediation where practicable, the CMC has produced dedicated guidance for members on online mediation.

(iv) HMG Cabinet Office Guidance: On 7 May 2020, the Cabinet Office issued Guidance (for England only) calling for "*responsible contractual behaviour*" in the performance and enforcement of contracts impacted by the Covid-19 emergency stating that "*disputes, especially a "plethora of disputes*", can be "*destructive to good contractual outcomes" and … "the Government strongly encourage[s] parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution*." (para. 17).

Micro (emphasis added):

(v) Civil Procedure Rules r.3.1(2)(m)

CPR 44.2(2) provides that *"if the court decides to make an order about costs-*

(a) the general principle is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order".

(vi) By CPR 44.2(4) *"in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under part 36 apply".

(vii) By virtue of CPR 44.2(5) "*the conduct of the parties includes-*

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction-Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim." [underlining added for emphasis]

(viii) See the Technology and Construction Court Guide and Pre-Action Protocol for Construction and Engineering Disputes, Practice Direction and the Commercial Court Guide.

The Mediation Journey in the English Courts

8. The inter-relationship between mediation and litigation has developed significantly in the last ten years and a body of case law has developed which continues to grow at pace. These cases have predominantly related to the interaction between mediation (and refusals to mediate) and litigation costs. The Courts themselves have actively encouraged mediation and provisions can now be found in Court rules and protocols.

No compulsory mediation

9. It remains the case that a court cannot compel parties to resolve their disputes through mediation (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576). In this, the paradigm case, the Court concluded that it had no jurisdiction to force the parties to mediate, relying on Article 6 of the European Convention on Human Rights (ECHR):

"It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court….it seems to us likely that compulsion of ADR would be

regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6."

10. The court added that, even if they were wrong on that point, they considered it difficult to conceive of circumstances in which it would be appropriate to exercise that jurisdiction:

    "The hallmark of ADR procedures…is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding."

11. The court did, however, approve the use of:

    a. Commercial Court type "ADR Orders" which require the parties to take such serious steps as they may be advised to resolve the matters using ADR procedures (See Draft ADR Order, Appendix 3, The Commercial Court Guide) and;

    b. "Ungley orders" in clinical negligence cases (which require parties to consider ADR before trial, and to file with the court their reasons for objections to mediate, and which can be considered in relation to costs after judgment).

12. Regarding the 'costs issue' the general rule is that the unsuccessful party will be ordered to pay the cost of the successful party but the court may make a different order (see above). Depriving a successful party of some or all of its costs on the grounds that he has refused to agree to ADR is exceptional and the burden is on the unsuccessful party to show why a different order should be provided. Such a departure is not justified unless it is shown that the successful party acted unreasonably in refusing to agree to ADR. The court should not investigate why an agreement did not arise from an ADR process (although see further below). Instead, the Court of Appeal endorsed submissions from the Law Society that:

    "…*factors which may be relevant to the question of whether a party has unreasonably refused ADR will include (but are not limited to) the following*: *(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".

13. Prior to *Halsey,* a line of authority had edged towards compelling parties to mediate through Commercial Court ADR orders, even where one of the parties had been unwilling to mediate (see *Guinle v Kirreh (also known as Kinstreet Ltd v Balmargo Corporation and others*) [2000] CP Rep 62 and *Shirayama Shokusan v Danovo Ltd* [2003] EWHC 3306 (Ch)). *Halsey* set down the principles and has been followed thereafter, albeit that the Court is willing to consider measures which will act as "*strong encouragement*" to consider alternatives to litigating.

The duty to consider ADR

14. Pursuant to the overriding objective, the courts must deal with cases justly and at proportionate cost, and it is now considered that that entails consideration of the use of ADR, prior to, and in the course of, litigation. Consequently, litigators must always keep in mind that they have a duty to further the overriding objective.

15. The duties on litigators therefore arguably include:

    a. consideration of whether alternative dispute resolution is a possible remedy, (*Dunnett v Railtrack plc* [2002] EWCA Civ 303 [2002] 1 WLR 2434; *Cowl v Plymouth City Council* [2002] 1 WLR 803, *Burchell v Bullard* [2005] EWCA Civ 358) and;

    b. a requirement to discuss mediation with their clients.

16. In considering whether to engage in ADR, it is critical for litigators to consider when ADR should be offered, attempted or engaged. By the time proceedings have commenced it may be too late to try to organise a mediation given the court's timetable. In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors* [2014] EWHC 3546 (TCC) (29 October 2014), Coulson J declined to order a four month window prior to disclosure for the parties to engage in ADR, holding that to fix such a long window for purposes unconnected with the preparation of trial would lead to an increase in costs and was bad case management. He referred to the fact that the TCC endeavoured to facilitate ADR at each stage of

the proceedings by allowing a reasonable period between each step in the timetable and it was, therefore, usually inappropriate to build in a specific "window" for ADR, especially if opposed by one of the parties. Staying the proceedings to allow ADR, he thought, was a worse option as it was likely to create uncertainties and the potential for tactical games-playing, in addition to delay and costs. The court held that this approach was not designed to undermine the importance of ADR or the adverse consequences that may apply where parties do not engage in that process. Instead, it was emphasised that parties must take all proper steps to settle a dispute while at the same time preparing for trial. As Coulson J summarised "*it is not an either/or option"*.

Refusals to engage with ADR: reasonable or unreasonable

17. In determining whether a party has been unreasonable in refusing to mediate or use some other form of ADR, the position has not yet been reached where the mere presence of ADR means it is unreasonable to litigate (*Briggs v First Choice Holidays* [2017] EWHC 2012 (QB)). All considerations have to be taken into account (*Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91) adjudged at the time when the decision to refuse ADR was made (*Corby Group Litigation v Corby District Council* [2009] EWHC 2109 (TC)).

Legal Issues

18. Just because a dispute turns on legal points does not automatically mean that mediation is unlikely to succeed. For example, *Royal Bank of Canada Trust v Secretary of State for Defence* [2003] EWHC 1841 (Ch), highlighted the suitability of the case for mediation even where interpretation of a lease was in issue. Likewise, the involvement of a governmental agency is no bar (*Royal Bank of Canada Trust v Secretary of State for Defence* [2003] EWHC 1841 (Ch) and *The Serpentine Trust Limited v HMRC* [2018] UKFTT 535 (TC)).

Belief in strength of case

19. In the older authorities, it was held that the fact that a party "reasonably believes" that it has a watertight case might be sufficient justification for a refusal to

mediate (*Daniels v Commissioner of Police of the Metropolis* [2005] EWCA Civ 1312).

20. However, the approach has moved on from *Daniels*, and the courts now expect parties to make reasonable efforts to settle disputes, the "strength of a case" argument being only one element and any refusal to engage with ADR will have to be justified.

21. The recent decision of *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 656 (QB) is a case in point. Here, the court held that parties must consider alternative dispute resolution (ADR) procedures at all stages of a litigation and a defendant's refusal to engage in settlement negotiations because it was so confident in the "strength of its defence" was properly classified as "unreasonable conduct," with consequences in costs.

Vindication

22. Other reasons for refusing to mediate have included a situation where a party sought formal vindication through the Court process in the public domain. In *Burgess v Penny* [2019] EWHC 2034 (Ch) a family dispute about a the formalities in the execution of a will, the defendants were found to be unreasonable in their complete refusal to mediate where their aim had been to get a sibling to admit to his course of conduct in the administration of the estate.

Examples of reasonable refusals

23. Nevertheless, there are cases where the court has opined that a party's refusal to mediate was reasonable. For example, in the recent case of *Kelly v Kelly* [2020] 3 WLUK 217 there had been two prior mediations. The Defendant alleged that the claimant had not honoured the agreements reached on either occasion and indicated that he was unwilling to mediate further. The Court held that the Defendant was entitled to costs on the indemnity basis after the expiry of his CPR Pt 36 offer as he had beaten that offer at trial and his refusal to engage in further mediation, was reasonable and understandable.

24. Likewise, it may be reasonable to refuse to mediate where it is being used as a dilatory tactic by the other side (*Parker Lloyd Capital Ltd v Edwardian Group Ltd*

[2017] EWHC 3207 (QB) citing *Halsey*, where it was held that when considering the merits of a case and the reasonableness of mediating, there might be inherent risks for "*large organisations, especially public bodies…vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy*".

25. In *Swain Mason v Mills & Reeve* [2012] EWCA Civ 498 the court considered the parties were 'a hundred miles apart' at all stages. The Claimants had sought £750,000.00 and the Defendant's best offer was at best a 'drop hands' approach. The court could not fathom how a mediation could have had a reasonable prospect of success. The Defendant's refusal to agree to a mediation was not 'intransigent'. The Claimants had not demonstrated in this case that the Defendant (the successful party) had acted unreasonably in refusing to agree to mediate.

26. Further, cases concerning allegations of fraud may be intrinsically unsuitable for mediation (see *PJSC Aeroflot - Russian Airlines v Leeds and another (Trustees of the estate of Berezovsky) and others* [2018] EWHC 1735 (Ch)). However, in *Couwenbergh v Valkova* [2004] EWCA 676, the Court of Appeal did not consider that fraud allegations prevented mediation from being appropriate.

Conduct

27. Litigators also must be aware that some forms of conduct can *prima facie* constitute an unreasonable refusal to engage with the ADR process and/or merit a cost sanction. For example:

    a. Silence in response to an invitation to participate in ADR, absent exceptional circumstances, is of itself unreasonable even if there might have been reasonable grounds to justify the absence of engagement (*PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288* [2014] 1 WLR 1386*)*. One of the reasons for this is that a failure to offer reasons for the refusal is destructive of the objective of encouraging parties to consider and discuss ADR *(*see *PGF II SA* [37]).

    b. Delay without justification where mediation is appropriate will merit a cost sanction (see *Thakkar v Patel* ([2017] EWCA Civ 117).

The consequences of an unreasonable refusal to mediate

28. As part of their "*strong encouragement*" to consider mediation and ADR, the Courts have consistently ruled that there may be cost consequences for a party where there has been an unreasonable refusal to mediate or adequate justification given for that refusal (*Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (Costs)* [2018] EWHC 1577 (TCC); *Reid v Buckinghamshire Healthcare NHS Trust* [2015] WL 8131473; *Bristow v The Princess Alexandra Hospital NHS Trust and others* [2015] EWHC B22 (Costs)).

29. This rationale for this can be found in the *dicta* of Sir Geoffrey Vos in *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, [39]:

"The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

Hypothetical mediations

30. In line with the *Hasley* factors, the courts have considered, *ex post facto*, for the purposes of costs, whether the mediation itself was one which had a 'reasonable chance of success' (*Laporte v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB)) (see above).

31. Further even where a claim appears to have little or no merit, mediation might be contemplated - as a mediator could bring "*a new independent perspective*" and not every mediation results in payment to a Claimant (*Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd* [2014] EWHC 3148 (TCC)).

32. In *Northrop* it was noted further that a skilled mediator could find middle ground by analysing the parties' positions and making each reflect on its own and the other's position and a mediator might find solutions that the parties had not

considered, by bringing other commercial arrangements or disputes into the discussion, or by finding future opportunities for the parties.

33. All of this may have a bearing on costs of litigation and whether there has been an adequate justification for not engaging in the mediation process.

34. However, in spite of the dicta in *Halsey* which provided that the court should not investigate why ADR was unsuccessful, in *Earl of Malmesbury & Ors v. Strutt & Parker* [2008] EWHC 424 (QB), the Court somewhat journeyed beyond the above and determined that the Claimant's position in the mediation itself had been "*clearly unrealistic and unreasonable*." Nevertheless, the court considered this was something the court could take account of in accordance with the *Halsey* principles. Here the relevant party had agreed to mediate but then took an unreasonable position in the mediation which caused it to fail. The court considered this was "*in reality in the same position as a party who unreasonably refuses to mediate"* (see paragraph 72). Whilst this case has received no substantial subsequent judicial treatment, and so the approach might be treated with caution, it nevertheless demonstrates that the court might even investigate conduct in the mediation itself, for the purposes of costs.

Recent Case Law

35. As discussed above, recent case law has emphasised that a belief in the strength of a party's case is often an insufficient basis to refuse to mediate. Likewise, the court appears to take into account the existence of Part 36 offers as evidence that the other side were willing to settle the case providing a springboard for the exploration of ADR between the parties.

i. *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 656 (QB)

36. In *BXB v Watch Tower* (see also above), the court was required to determine costs following the claimant's successful claim for damages for personal injury against the defendant religious group and its trustees.

37. In terms of the conduct of the parties, initially the Claimant's solicitor suggested a joint meeting and invited the Defendant to provide a written explanation if the

offer of a joint meeting was rejected. The Defendant rejected this offer and did not intend to engage in settlement negotiations owing in part to the strength of its defence. Subsequently, the court gave a standard direction that the parties must consider settling by ADR and any party refusing to do so must supply reasons within 21 days of the proposal.

38. Following the Direction, the Claimant's made a Part 36 offer which was rejected without a reason and eventually the Claimant's claim succeeded.

39. The Court had to consider: (1) whether the defendants should pay all of the claimant's costs on an indemnity basis in view of their refusal to engage in ADR; (2) whether that was at an enhanced rate of interest and if so, what rate, pursuant to CPR r.36.17(4). The court held that Indemnity Costs should be awarded.

40. The court opined following the defendants' refusal to participate in a joint settlement meeting, they should have served a witness statement explaining why. They did not do so, and that breach of the direction was "*unreasonable conduct*."

41. The court had to consider whether it was therefore appropriate to order indemnity costs. The court considered in all the circumstances, it was appropriate to make an order that the Claimant's costs be assessed on the indemnity basis but it should not apply to the whole of the Claimant's costs for the following reasons:

    a. Whilst it was accepted that the defendants could reasonably present the strength of the arguments in the case, this did not mean that "*there was nothing to discuss*". A joint settlement meeting could have focused on agreeing quantum subject to liability and as a result shortened the trial and avoided some of the intrusive questioning which in the event was necessary.

    b. Although the Claimant recovered less than the amount sought, this did not "*excuse the failure to engage at all with the proposal of a joint settlement meeting"*. The first Part 36 offer demonstrated that the Claimant was prepared to settle the case for less than was eventually awarded. Had the

Defendants considered the proposal at an earlier stage "*there is every reason to think that… that willingness would have become known"*.

c. The award of indemnity costs would not prevent the Defendant from raising arguments that costs had been inappropriately apportioned between the Claimant and third parties during the detailed assessment process. However, on the indemnity basis, the starting point was that the Defendant had to prove the alleged unreasonableness of the cost.

ii. *DSN v Blackpool [2020] EWHC 670*

42. Part 36 offers also arose in the context of mediation in another very recent case. In *DSN v Blackpool* the Claimant's solicitors made a Part 36 offer to settle the claim for £50,000. The Defendant did not respond to this offer at all. Subsequently at a hearing the court made the standard ADR direction. Further the Claimant provided another Part 36 offer and invited the Defendant to enter into settlement negotiations. The Defendant responded by confirming that it did not intend to engage in settlement negotiations "*and remains confident in the strength of its defence"*. Another Part 36 offer was also rejected.

43. The Court held the Defendant in this case failed and refused to engage in any discussion whatsoever about the possibility of settlement. It did not respond to any of the three Part 36 offers (except to reject the final one). It was required by paragraph 4 of the Order of the Master "*to consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation)".* It was warned by the same Order that if it did not engage in any such means proposed by the Claimant it would have to give reasons, and it was also warned that the reasons it gave might in due course be shown to the trial judge when the question of costs arose. The court continued:

"*The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they*

consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim……

If the Defendant had been correct that it had "a strong defence", its responses to the Claimant's settlement overtures and the statement made in compliance with paragraph 4 of the Order of Master McCloud would still, in my judgment, have fallen short of an acceptable level of engagement with the possibility of settlement or Alternative Dispute Resolution…

As it turned out, the Defendant did not have a strong defence. It lost the case. That alone would not justify an award of indemnity costs but the conduct I have set out, in my opinion, does. It is conduct which 'takes the case out of the norm'"

iii. *Richard Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd* [2020] EWHC 1050 (Comm)

44. In *Richard Wales v CBRE Managed Services Ltd* the claimant sued two defendants but ultimately failed after trial. The question of costs arose. The Claimant had offered mediation prior to trial. The First Defendant was not prepared to enter into mediation, the Second Defendant was prepared to engage in some form of ADR.

45. The court included a standard ADR clause within some directions. In response, the First Defendant filed a witness statement which considered mediation was premature but would be considered after the conclusion of pleadings. The Second Defendant was willing to mediate.

46. The Claimant offered formal mediation again. Similarly, the Second Defendant expressed a willingness albeit reiterated that they did not consider the mediation was likely to be productive if the First Defendant was not also in attendance. The First Defendant subsequently filed a witness statement confirming that the Second Defendant had chosen not to mediate on the grounds that there was insufficient time to prepare for and attend a mediation and that "*it was unlikely that a mediation [on] the dates proposed would have resulted in a settlement given the number of factual issues remaining in dispute between the parties as the parties would not have had the opportunity to exchange witness evidence prior to the mediation*."

47. Regarding costs the unsuccessful Claimant argued that he was not liable to pay the First Defendant's costs (under reference to *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 and the judgment of Briggs LJ in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, at [34]), submitting that an unreasonable refusal to agree to ADR warrants a departure from the general rule in CPR 44.2(2) and "*silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable*".

48. He accepted that the burden was on him, as the unsuccessful party, to show that the First Defendant had unreasonably refused or, in the light of *PGF II* , declined to participate in ADR and, by reason of such conduct, there should be a departure from the general rule.

49. The court agreed and within its justification the following reasons were included:

    a. The First Defendant had repeatedly refused to mediate.

    b. The Witness Statement did not contain a satisfactory explanation for the First Defendant's failure to participate in the mediation at a formative stage. Witness evidence was not required for the purposes of a successful conclusion of a mediation.

    c. The First Defendant's failure to participate in the proposed mediation could be characterised as 'a refusal and the refusal was unreasonable'.

d. The dispute here was suitable for mediation and was not a tactical ploy to buy off the cost of a mediation.

e. In terms of the other *Halsey* factors, the costs were not disproportionality high and there was " *a reasonable prospect that common ground could have been found on at least some of the issues and, indeed, that a wider basis could have been found for compromising the litigation as a whole"*

50. The First Defendant's costs were disallowed for different periods of the dispute, up to as much as 50%. The court also found there was good reason to deprive the Second Defendant of part of its costs.

COVID-19

51. It is suggested that the recent case law demonstrates a particular trend whereby acts which are deemed 'unreasonable' are determined to constitute unreasonable refusals to mediate under existing case law. Even the failure to respond to a Part 36 Offer alongside an offer to mediate, can of itself potentially signify an unreasonable refusal to engage with ADR. The recent judgments have also emphasised the need to provide adequate witness evidence required to explain why a party has declined to engage in ADR. Further, parties cannot rely on the strength of their case alone to justify embarking on a blinkered trajectory towards trial.

52. The court is likely to maintain its current approach and impose serious cost consequences where parties have unreasonably refused to engage in ADR.

53. In fact, with the pressure on the court's resources ever increasing and a backlog of cases likely accumulating, the court may be even more critical of parties who pay no regard to settling the dispute through ADR. At the start of this article, in the context of the COVID-19 emergency, we drew attention to the very recent Government guidance as to approaching disputes at this time and its emphasis on considering ADR and mediation as alternatives to litigation.

54. As a result, the present task for litigators is to ensure they proactively and carefully engage with ADR. Not only does a failure to do so create an unacceptable cost risk for the client, it also potentially exposes the litigator to

claims by the client if adverse cost orders are made. Fortunately, it is understood that remote mediations during this period are possible and proving successful. Although care does need to be taken in deciding whether settlement is in the best interests of the client in this uncertain period and the associated terms of any settlement order.

Enforcing Mediation Agreements

55. In terms of enforcement of mediation agreements, this is simply treated as a breach of contract (*Pedriks v Grimaux* [2019] EWHC 2165 (QB).

56. The courts have had to rule on whether 'heads of terms' agreed in mediation are enforceable as a binding contract (*Abberley v Abberley* [2019] EWHC 1564 (Ch)).

57. Indeed, the courts have responded to mediation enforcement actions in a manner not unlike that adopted in arbitration. In *Beauty Star Ltd v Janmohamed* [2014] EWCA Civ 451 the parties had agreed to the appointment of an accountant in a mediation which was reflected in their Mediation Agreement and the court ordered parties to appoint the accountant under that agreement rather than by court order.

58. There have also been cases where a party has entered into a mediation without the power or *vires* to do so. In *The Serpentine Trust Limited v HMRC* [2018] UKFTT 535 (TC) the Court found that there were constraints imposed on an HMRC mediation as a non-departmental government agency and whilst it had purported to enter a mediation agreement and that was held to constitute a contract, it was, nevertheless, *ultra vires* HMRC's powers and therefore the court held that it was void.

The Appearance of Early Neutral Evaluation as part of the Court's Procedures

59. Aside from mediation, ENE is a process whereby the dispute is referred to a third party neutral (judicial or non-judicial) who will adjudicate on the parties' claims to provide a likely outcome, based on the Evaluator's experience and will state their

view on the merits, which is without prejudice and non-binding, unless the parties consent to make it binding upon themselves.

60. An ENE hearing is part of the court process (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Seals v Williams* [2015] EWHC 1829 (Ch))

61. In *Lomax v Lomax* [2019] EWCA Civ 1467 it was held that a court had the power pursuant to CPR r.3.1(2)(m) to order Early Neutral Evaluation even though one party had not consented to it. It was held that the rule did not impose a limitation to the effect that consent of all the parties was necessary as the power to do so came from the CPR themselves and therefore incorporated the overriding objectives.

62. In *McParland & Partners Limited v. Fairstone Financial Management Limited & Anr.* [2020] EWHC 298 (Ch) Sir Geoffrey Vos referred to Lomax:

> *"42.Finally, the court encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred, since both sides agreed that it was necessary to see from disclosure whether their suspicions were justified before a useful mediation could take place. The claimants suspected more extensive breaches by the defendant, and the defendant suspected an absence of loss of business by the claimants. In this connection, I mentioned the recent Court of Appeal decision of Lomax v. Lomax [2019] EWCA Civ 1467 ("Lomax") to the parties. The question in Lomax was whether the court had the power to order parties to undertake an early neutral evaluation under CPR r.3.1(2)(m). It was held that there was no need for the parties to consent to an order for a judge-led process. I mentioned that Lennox(*sic*) inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002. In the result, the parties fortunately agreed to a direction that a mediation is to take place in this case after disclosure as I have already indicated."*

63. The use of ENE is likely to continue and Sir Geoffrey Vos raises an interesting point reflecting on the court's approach to ENE.

Conclusion

64. It would appear that the Courts are still not prepared to compel parties to mediate against their wishes but the use of ENE, deployed as part of the Court's procedure, to take cases away from litigation may continue to develop and coupled with the above measures relating to costs, points towards the "strong encouragement" to use mediation and other ADR processes, that was discussed originally in *Halsey*. In the writers' view, this is set to continue. For the present, it is now clear that unreasonable refusals to mediate may well, ultimately, come at a cost.

16 June 2020

David Parratt QC

Barrister
3PB

0330 332 2633
david.parratt@3pb.co.uk

3pb.co.uk

Rebecca Farrell

Barrister
3PB

0330 332 2633
rebecca.farrell@3pb.co.uk

3pb.co.uk