Fenwick Elliott
The construction & energy law specialists

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Welcome to the January edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we provide practical tips on how to proceed when faced with an invitation to mediate.

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Mediation update: remain silent at your peril!

The past two issues of *Insight* concentrated on the changes to litigation practice following the implementation of the Jackson reforms in April 2013.

This month's issue of *Insight* is also Jackson reforms related, but the focus switches to mediation practice following the recent decision of the Court of Appeal in *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288. The expansion of the previous law in relation to mediation is considered, and practical tips are provided on how to proceed when faced with an invitation to mediate.

Background to PGF: Halsey

The settled law prior to PGF was contained in the Court of Appeal's decision in Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002, in which the Court of Appeal considered the extent to which it was appropriate for a Court to use its powers to encourage parties to civil litigation to resolve their disputes on a consensual basis through the use of Alternative Dispute Resolution ("ADR") (of which mediation is a form).

The Court of Appeal gave general guidance in the following terms:

(1) The Court should not compel parties to mediate even if it were within its power to do so.
(2) Nevertheless, the Court may need to encourage parties to embark upon ADR in appropriate cases, and that encouragement may be robust.
(3) The Court's power to consider the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes the power to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to ADR.
(4) The burden is on the unsuccessful party to show that the successful party's refusal was unreasonable.
(5) There is no presumption in favour of ADR.

The Court of Appeal also provided the following list of non-exclusive factors (that have been applied in numerous subsequent decisions) that would be likely to be relevant to the question of whether ADR has been refused unreasonably:

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

PGF - the facts

PGF owned commercial premises in Lombard Street, London and OMFS took assignments of the leases of the first, second and fourth floors, which OMFS subsequently sublet. The leases imposed a full repairing covenant which was limited to the interior of the premises only. The interior of the premises fell into disrepair and notices to repair were served on OMFS in November 2008 but the necessary repairs were never carried out by OMFS. PGF eventually carried out the repairs itself and PGF issued proceedings against OMFS in respect of the costs of repair in October 2010.

PGF invited OMFS to mediate in April 2011 and July 2011 but OMFS failed to respond to the offer to mediate on both occasions. The matter finally settled on 10 January 2012, the day before the trial was due to commence, when PGF accepted a Part 36 offer that OMFS had made in April 2011, which left the question of costs. In its costs submissions, PGF relied on the Halsey principle which provides that, as an exception to the usual rule that the loser pays the winner's costs, the winner can be deprived of its costs if it unreasonably refuses to mediate. PGF argued that OMFS should be deprived of the costs it would otherwise have received in relation to its Part 36 offer.

Decision at first instance

The trial judge accepted that OMFS's silence in the face of two offers to mediate amounted to an unreasonable refusal, and agreed that it was appropriate to depart from the usual order that costs follow the event. In practical terms, this meant that OMFS was not entitled to its costs for the period from 21 days after the date on which its Part 36 offer was made.

OMFS appealed to the Court of Appeal.

Decision of the Court of Appeal

The issue before the Court of Appeal was a novel one. The Court of Appeal had to decide for the first time whether, as a matter of principle, it was acceptable to decline to respond to an invitation to mediate, thus

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extending the principles it had set out in Halsey 9 years earlier.

The Court of Appeal agreed with the first instance Court and held that not only was OMFS's silence tantamount to a refusal to mediate, but that, as a general rule, silence itself was unreasonable. This was the case regardless of whether any refusal to engage in mediation may have been justifiable at the time by the identification of reasonable grounds.

The Court of Appeal emphasised that there were sound practical reasons behind the need for a modest extension to the principles it had laid down in Halsey. First, it is very difficult to investigate and examine any alleged reasons that might have been put forward in support of any refusal to mediate months or even years after the date of the refusal. Mediation might not be appropriate at a particular stage or stages in the case, but the parties should endeavour to discuss any difficulties they perceive they might have, rather than ignore any request to mediate completely. Secondly, if parties fail to provide reasons why they do not wish to mediate, then this would completely undermine Halsey, which encourages parties to engage in ADR.

The Court of Appeal cautioned that there would, however, be exceptional cases where a failure to respond to an invitation to mediate might be acceptable. Where, for example, the failure to respond was due to an administrative error, or in cases where mediation was so obviously inappropriate that a refusal to respond would constitute a mere formality (such as if the case only involved questions of law, or was an appeal on a matter of law). As would be expected, it is for the recipient of the invitation to mediate to prove that the exception applies.

In terms of the nature of the costs penalty that might be appropriate, the Court of Appeal emphasised that no consistent costs sanction should apply. The Court would be entitled to disallow the whole or only a modest part of the otherwise successful party's costs, having regard to the particular circumstances of the case. The successful party would only be ordered to bear the whole of the unsuccessful party's costs in very unusual cases, for example if the successful party had ignored the Court's encouragement to consider mediation or another form of ADR.

Practical tips when faced with an invitation to mediate

Following the decision of the Court of Appeal in PGF, it is no longer possible to ignore an invitation to mediate that might be made by your opponent. Going forward, you should:

- Always respond promptly to an offer to mediate.
- If you are prepared to mediate, then be proactive. Confirm dates on which you are available and make proposals as to the choice of mediator.
- If there are any further documents or further information you require prior to participating in any mediation, request these from the other party without delay.
- If there are any other obstacles to mediation that might exist, say, if one of the parties is based abroad, try and arrive at a practical solution through correspondence.
- If you believe you have reasonable grounds for refusing to participate in a suggested mediation, do not sit on the invitation to mediate as silence is no longer acceptable. Respond promptly and provide full reasons as to why you are declining to participate, having regard to the Halsey criteria mentioned above. Do not wait until you are facing a costs sanction to justify your decision not to mediate: it will be too late.
- A refusal to mediate might be reasonable if (i) the Pre-Action Protocol has not been complied with; (ii) a form of ADR other than mediation would be more suitable for the dispute (such as early neutral evaluation); or (iii) if mediation would be too expensive for one of the parties, in which case the party proposing mediation could offer to bear the mediator's fees in full.
- If you decline to mediate, you should review the reasons for your refusal on an on-going basis to ensure they remain reasonable.
- Never close off the possibility of mediation for all time as your circumstances, and / or the circumstances of the other party, may change in the future, in which case mediation may be worthwhile at a later date.

Conclusion

In PFG, the Court of Appeal has once again reiterated its support for mediation. The decision endorses the post-Jackson approach of avoiding wasting judicial resources by encouraging the parties to discuss settlement in a timely and constructive manner, thus limiting judicial involvement in terms of trials and case management to those disputes that really need it. Even if the dispute cannot be completely resolved through discussions between the parties, the mediation process may serve to narrow the issues, in which case any judicial input would be limited to issues that could not be agreed, saving time and costs for the parties and also the judiciary.

The track record for mediation tends to be very good. The Centre for Effective Dispute Resolution has carried out research in relation to the success rates of mediation which has confirmed that 70% of cases settle on the day of the mediation itself, and a further 20% of cases settle shortly thereafter. Mediation, and the Court of Appeal's current approach to it, should therefore be welcomed.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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