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Failure to respond to mediation offer unreasonable conduct

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The Court of Appeal has stated in an important decision that silence in the face of an offer to mediate or to undertake some other form of ADR will generally be deemed to be unreasonable conduct when the question of costs falls to be considered.

In *PGF II SA –v- OMFS Company 1* (2013), a dilapidations dispute concerning a building in the City of London, the landlord, PGF, was pursuing £1.8m for disrepairs. Six months after proceedings had been issued, the tenant, OMFS, made a Part 36 Offer of settlement at the level of £0.7m. The landlord had itself made a Part 36 Offer that same day and did not accept the tenant's Offer. However, the landlord did make a detailed offer to mediate, but the tenant made no response to that offer.

Four months later, the landlord made a further mediation offer to which, after being chased, the tenant responded by saying that it would provide a "full response", but it never responded.

Some nine months after the tenant had made its Part 36 Offer, on the eve of the trial, the question arose as to whether the air conditioning plant in the building might have been outside the tenant's demise and thus some £0.25m of the landlord's claim eliminated. Faced with that risk, the landlord immediately accepted the tenant's Offer.

In the nine month period between the making of the Offer and its acceptance, costs of about £0.25m had been incurred by each of the parties. Under Part 36, the ordinary consequence of the landlord's late acceptance of the tenant's Offer would have been that the landlord was obliged to pay the tenant's costs over the period. However, the judge at first instance was of the view that the tenant had unreasonably refused to take part in ADR and exercised his discretion to deprive the tenant of its costs. The judge refused to go further than this and rejected the landlord's suggestion that the tenant should pay its costs over the period. Both parties appealed the judge's decision.

In considering the matter, the Court of Appeal referred to the principles set down in *Halsey –v- Milton Keynes* (2004) which identified that an unreasonable refusal to mediate was a form of unreasonable conduct to which the court might respond by imposing costs sanctions. The *Halsey* principles were as follows:

Excello Law

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1. The court should not compel parties to mediate even were it within its power to do so.
2. Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.
3. The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes 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. For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of ADR.

The Court of Appeal also referred to a list of supplemental relevant factors which were also discussed in *Halsey* which included: 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; f) Whether the ADR had any reasonable prospect of success.

In the key passage in the *PGF* decision, the Court of Appeal said that "the time has now come for this court firmly to endorse the advice given in … the [Jackson] 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 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." The reasons it gave for this extension of *Halsey* were the forensic difficulty of retrospectively trying to investigate the reasons for refusal and to encourage engagement with the ADR process.

Considering the tenant's silence in this case, the Court was of the view that there had been an unreasonable refusal to mediate. As regards the first instance judge's costs decision, though the Court felt that it was not the decision that it would have made and that the tenant should possibly have been awarded some of its costs, it said that the matter was one of discretion and that the first instance judge had not improperly exercised his discretion in reaching his decision. Thus the appeals of both the landlord and the tenant were refused.

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