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MORE REASONS TO MEDIATE - IGNORING OR REJECTING WITHOUT GOOD EXPLANATION TO THE OFFEROR IS "UNREASONABLE CONDUCT"

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Those who are familiar with "Ungley Orders" (after Master Ungley) will have to change their approach. To ignore or refuse mediation without explanation is now unreasonable conduct. The idea of the Ungley Order was anyone refusing should prepare a witness statement setting out reasons for the refusal in a sealed envelope for the trial judge to read when deciding costs. No one took the trouble. The point was to take up the offer. Now there is even less excuse. If declining or deferring mediation, a recipient must inform the offeror of specific detailed, cogent and honest reasons for refusal capable of withstanding "forensic scrutiny". The offeror can write challenging such reasons from the date of receiving them up to submissions on costs at trial. In due course a Judge will will review the correspondence and rule whether there was a good reason to refuse.

For nearly 10 years we had general guidelines encouraging litigants to go to ADR "in appropriate cases" in the leading case of Halsey – v – Milton Keynes General NHS Trust [2004] 1 WLR3002. Those guidelines stood as a useful encouragement for litigants to get on with mediation or other forms of ADR but had not been revised or refined. The Courts have been anxious not to make mediation or ADR compulsory yet so as not to risk infringement of Article 6 Human Rights Convention obligations, Perhaps a reason for lack of review or refinement is that so many invitations to mediate are inept. Consequentially, they have little prospect of enabling a party seeking to rely upon them to derive practical cost benefit when they are declined.

The Jackson reforms have heralded a "wind of change" of hurricane force. The refinements to the Over-riding Objective and the Court of Appeal decision in the Mitchell case put across a message loud and clear that the court's procedural time and effort up to trial and even more so during trial is a highly valuable resource which should not be wasted. Arguably, the sub-text is that court resources should not be used at all. It was therefore inevitable that there would be some guidance on the role of mediation and ADR within the new regime. It has arrived. It's called PGF ii SA – v – OMFS Company Limited [2013] EWCA CIV 1288 2nd October Court of Appeal.

The decision is described by Lord Justice Briggs as a modest extension of the Halsey principle. Practical consequences may be more significant. The claim concerned a property dispute. Initial proceedings claimed £1.81million. Ultimately, the claim settled by the claimant's acceptance of the defendant's Part 36 offer to pay £700,000 but only after ignoring two separate and carefully prepared

invitations to mediate. While the case concerns chiefly the consequences of failing to respond to mediation, the facts offer helpful guidance on how to put forward a well-drafted and effective offer to mediate;-effective in the sense that if the recipient ignores or refuses the offer, they are more likely than before to suffer costs consequences.

Reversing Part 36 consequences
Properly done, such offers will trump and potentially reverse the usual expectation that if you accept a Part 36 offer late, you pay the other side's costs for the period of delay. Why so? In the PGF case, it was because the defendant ignored two invitations to mediate and gave no reason or explanation to the offeror at the time. The court had a discretion under both CPR 36. 10(4) and (5) and also 36.14(2) "if it considers it unjust" to follow the usual rule on late acceptance of part 36 offers. Thus, the defendant was deprived of its costs which it would otherwise have received. There was a strong hint, obiter, that had the defendant also ignored any active encouragement from the court to mediate as well as the claimant's encouragement, it might even have been ordered to pay the claimant's costs for the same period. Ignoring both the offeror and the court will risk a double loss. This provides a real incentive for those inviting mediation to keep the court fully informed of any failure of the recipient to accept or to respond.

Exercising freedom not to mediate now makes as much sense as exercising freedom not to look both ways when crossing the road.

TIPS

Offering Invitation

(1)	When to offer	- always and often.
(2)	How to offer	- under cover of a separate letter independently of any Part 36 offer, "without prejudice save as to costs" with an open mind and without (pre-)conditions attached.
(3)	What to offer	- specific dates, specific mediators, specific meeting facilities, prior perusal of any helpful documents, acknowledgement of anticipated reasonable enquiries, prior meetings of experts and other advisors.
(4)	When offering	- make a specific request for immediate and clear reasons from the other party if the invitation is ignored or refused. Include a gentle reminder that the letter may be drawn to the Courts attention not only when the matter of costs comes to be considered but also at all CMCs and in any hearing before trial.

Declining Mediation

(1)	When to decline	- never -unless you have an absolutely stunning reason why not. Even that rare (probably endangered) species of hard-nosed individual or company who has neither confidence nor interest in the process steel themselves to sit through it.
(2)	How to refuse	- you must offer an alternative means of ADR. In PGF ii SA – v – OMFS Company Limited [2013] EWCA CIV 1288 2nd October this seems to be limited to "judicial evaluation"- of very limited use and consequently not often seen. So why not just mediate.
(3)	Timing	- arguably, it is reasonable to defer but not reject mediation if it's necessary to conduct preliminary enquiries such as perusal of documents, site investigations and the like. Conceivably there may be some external event which needs to be awaited.

If you need further help or advice on this subject then please contact Jeremy Dable who is a Barrister with Clerksroom at: **dable@clerksroom.com**