SILENCE IN THE FACE OF INVITATIONS TO MEDIATE

WHAT should be the approach where a party, who has been invited by its opponent to take part in Alternative Dispute Resolution (ADR), simply declines to respond to the invitation in any way? That novel question came before Briggs L.J. in the Court of Appeal in *PGF II SA v OMFS Company 1 Ltd.* [2013] EWCA Civ 1288.

The claimant, at an early stage in the litigation process, wrote to the defendant to participate in mediation and, four months later, the claimant sent a second letter inviting the defendant to ADR. However, the defendant failed to respond to these invitations and instead made a Part 36 offer without providing an explanation as to the basis of that offer.

The matter eventually settled, with the claimant accepting the defendant's Part 36 offer. Although the ordinary consequence of the claimant's acceptance of the defendant's Part 36 offer was that it would have to pay the defendant's costs for the relevant period unless the court ordered otherwise (see Civil Procedure Rules 36.10(4) and (5)), the claimant gave notice that it would seek an order for costs in its favour. At the costs hearing the claimant argued, inter alia, that the defendant was unreasonable to have refused to participate in ADR. The ADR point succeeded in part, in the sense that, while depriving the defendant of its costs for the relevant period, the judge did not accept the claimant's submission that it should also be paid its costs for that period. Gross L.J. gave permission to the defendant to appeal and the claimant to cross appeal the ADR point on the ground that the application of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002 to the facts might be of potentially wide importance. In *Halsey* Dyson L.J. had laid down non-exclusive guidelines for deciding whether a refusal to participate in ADR could be shown to be unreasonable behaviour by the refusing party for the purpose of determining whether that party should be punished in costs.

Giving the leading judgment, Briggs L.J. emphasised the importance of the role and success of ADR in settling civil disputes, especially after Jackson L.J.'s reforms. His lordship made reference to empirical research conducted by the Centre for Effective Dispute Resolution which indicated the high rate of success when disputing parties engaged in mediation and this is also reflected in the Court of Appeal's own ADR pilot scheme which had a success rate of 50%. Briggs L.J. also noted that ADR conferred cost benefits to the parties and to court resources. More significantly Briggs L.J., formally endorsed the advice given in the *ADR Handbook* (S. Blake, J. Browne and S, Sime, *The Jackson ADR Handbook* (2013)) that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable,

regardless of 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. This was a general rule because there may be, Briggs L.J. acknowledged, "rare cases where ADR is inappropriate that to characterise silence as unreasonable would be pure formalism" (at [34]).

The main decision in the *PGF* case is justified on practical and policy grounds. First, investigating reasons for a refusal to engage in ADR some time after the initial invitation can pose forensic difficulties for the court and the inviting party, including whether those reasons are genuine at all. Briggs L.J. also rejected the defendant's argument that unreasonableness should be assessed purely objectively, by reference to the material facts about the litigation at the time, so that it made no difference whether the refusing party provided or withheld its reasons at the time of the invitation. His Lordship held that a party's own perception may play an important part in the analysis of reasonableness. Secondly, if the courts were to acquiesce in failures to provide reasons for a refusal this would undermine the modern policy of requiring litigants to consider and discuss ADR. This second reason also serves the policy of proportionality of costs, a principle which is central to the Jackson reforms. A positive engagement with an invitation to participate in ADR may lead to a number of alternative directions which may save time and resources for the parties and for the court.

The defendant also contended that the judge, having concluded that an offer of mediation had been unreasonably refused, mechanistically deprived the defendant of the whole of its entitlement against the claimant during the relevant period without weighing up all other relevant factors. The claimant, on the other hand, argued that the judge should have ordered the defendant to pay the claimant's costs in respect of the relevant period. Briggs L.J., agreeing with the defendant's arguments, observed that a finding of unreasonable conduct did not automatically result in a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. It followed from *Halsey* and other cases that the proper response would be to disallow some or all of the successful party's costs. Briggs L.J. also noted that *Halsey* did not recognise that the court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs. Although Briggs L.J. recognised that the court must, in principle, have this power, it would only be exercised in the most serious and flagrant failures to engage with ADR. Therefore, the claimant's cross appeal was also dismissed.

The ruling in *PGF* reinforces judicial acceptance and commitment to ADR as a valuable mechanism in reducing costs for those who engage in the civil justice system. However, there are some problems

posed by this decision. Briggs L.J.'s judgment focuses upon the circumstances where a party refuses to respond to "repeated" invitations to engage in ADR and this creates uncertainty. A better approach would have been for the Court of Appeal to have held that silence in the face of any invitation to engage in ADR would be considered as unreasonable and would justify the defaulting party being punished in costs. Secondly, Briggs LJ suggested that it would be highly unusual for the costs sanction to take the form of requiring the party refusing mediation to pay some or all of the other party's costs: "a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR…" (at [52]). This approach is surely too cautious. It would be better if the court had acknowledged that an appropriate costs sanction is that a party in default of an invitation to engage in ADR might be liable to pay the other's costs. Such an approach would be in line with the robust approach which the Jackson reforms have introduced.

MASOOD AHMED

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