The Mediation Mandate: refusal often offends?

Courts have long endorsed the merits of parties settling disputes by way of ADR, but a recent string of judicial decisions indicates that litigants who refuse to mediate may be engaging in a high-risk litigation strategy when it comes to costs.

Over the past twelve months, there have been a number of Court decisions which not only reinforce the notion that mediation should be seriously considered, but also make it very difficult to say ‘no’ to ADR. It is clear that a party’s refusal to participate in mediation should now be the exception to the rule, and that costs sanctions will be imposed for an offer to mediate that is unreasonably declined.

The Halsey principles
For the past decade, the starting point for considering the impact of mediating (or not) on costs has been Halsey v Milton Keynes General NHS Trust [2004]. In Halsey, the Court of Appeal held that the refusal of a litigant to participate in mediation without good cause amounted to unreasonable conduct which could result in costs sanctions. In considering whether or not a party was being unreasonable in rejecting mediation, the Court looked to the following relevant factors:

– The nature of the dispute, and whether or not the issues in dispute are able to be settled by a mediator. For example, mediation may not be appropriate in cases where parties wish to resolve a point of law
– The merits of the case, and whether or not the refusing party has a particularly strong case
– The extent to which other settlement methods had been attempted
– The costs of ADR. If they are disproportionately high, this would be a strong justification for a refusal to mediate
– Delay. If the time required for organising or attending mediation is prejudicial to the case, this may also justify a refusal to mediate
– The prospects of success of the case

The Halsey principles still stand. However, in the past year litigants’ attitudes toward mediation have once again come under the careful scrutiny of the courts and it is clear that refusing to mediate is an increasingly limited option.

Austerity drive?
The judiciary is acutely aware of the current economic climate, and is keen to circumvent undue financial strain on parties and on the courts. In PGF II SA v OMFS Company 1 Ltd [2013], Briggs LJ commented that: “the provision of state resources for civil litigation… call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it.”

In the post-Jackson era, litigation culture has shifted considerably
to focus on costs management and austerity within the litigation regime. Courts are strapped for resources and are seeking relief by encouraging parties to view litigation as a last resort. The current judicial consensus that parties should try to settle disputes by ADR is reflected in current case law.

The current judicial approach

Last year, PGF expanded the scope of the Halsey principles by holding that a party’s failure to respond to a mediation request is tantamount to an unreasonable refusal. In PGF, the claimant had twice written to the defendant proposing mediation, and the defendant simply ignored the requests. Although the defendant was successful at trial, the Court of Appeal held that the defendant’s failure to respond to the invitations to mediate constituted unreasonable behaviour, even if the defendant had good reasons for doing so.

The defendant’s “unreasonable conduct” was sufficient for the court to deviate from the normal costs order, and the defendant was disentitled to the costs it would otherwise have recovered after successfully defending the claim. The court even suggested that there are some circumstances where a successful party’s unreasonable refusal to mediate might result in that party having to pay the losing party’s costs, for example where the court had actively encouraged parties to mediate and that encouragement was ignored.

In the subsequent case of Phillip Garritt-Critchley & Others v Andrew Ronnan & Solarpower PV Limited [2014], the defendants made it clear in rejecting the claimants’ request for mediation that they considered it to be inappropriate because “the parties are too far apart,” and they felt that they had a strong case. The court held that the defendants’ reasons for rejecting mediation did not meet the standard of reasonableness envisioned by the Halsey principles: the court considered that the defendants had not undertaken a proper risk analysis as to “whether their side of the coin would be accepted or not” and that it was entirely unrealistic for the defendants to believe that their case was so strong there was no conceivable point in talking about settlement. As such, the claimants were entitled to the recovery of their costs on an indemnity basis.

The Garritt-Critchley decision was echoed by yet another case this year, Northop Gruman Mission Systems Europe Limited v BAE Systems (Al Diriyah) Limited [2014]. This case turned on the interpretation of a contract clause, and BAE was successful in the end. Northop argued, however, that BAE’s earlier refusal to mediate warranted a departure from the normal result that costs follow the event. In order to determine if a reduction in the costs recoverable by BAE was to be made, the court reviewed each of the Halsey principles and concluded that, despite the claim hinging on contractual interpretation, a mediator would nonetheless have been able to assist in resolving the dispute. Furthermore, the fact that BAE had made a without prejudice offer during the course of proceedings was not enough to justify its refusal to mediate. However, Northop’s rejection of the without prejudice offer (which was a better offer than they achieved in the end) was sufficient to “cancel out” BAE’s unreasonableness because, just as mediation could have resolved the matter early, so too could Northop’s acceptance of the without prejudice offer.

Although the court’s interest in promoting ADR is by no means a new development, the combined influence of PGF, Garritt-Critchley and BAE Systems weighs heavily on litigants who refuse to mediate and then find themselves subject to an analysis of “unreasonable conduct” under the Halsey principles.

Where are we now?

The recent decisions have served to narrow the scope of the Halsey principles, making it more difficult for parties who refuse mediation to argue that it was reasonable to do so. For example, in BAE Systems the court held that a black-and-white point of contractual interpretation was suitable for resolution by a mediator, shutting down the argument that the nature of the dispute was inappropriate for mediation. In another time, this type of dispute may have been seen as better suited to a judge, such that mediation could be dismissed as inappropriate.

In the same case, the court also held that a without prejudice offer made (i.e. another form of settlement of the dispute) was not enough in itself to justify a rejection of a mediation offer.

The conduct which courts consider to be “unreasonable” in responding to a mediation request has also expanded. Halsey stated that it was unreasonable to refuse to mediate without good reason to do so. Garritt-Critchley echoed that any “point blank” refusal to mediate amounted to unreasonable conduct. And the case of PGF added that it was unreasonable even to simply ignore a mediation request.

Furthermore, these recent decisions force litigants to fundamentally reassess their positions, not just as part of the usual appraisal of the inherent strengths and weaknesses of one’s case, but also in light of what a judge might say in contemplating whether or not a party was unreasonable in rejecting mediation on the basis that it believed it had a strong case. As is apparent from the case law, the thresholds for these two assessments may differ. The major risk in relying on the merits of a case in rejecting mediation is that the court will disagree with a party’s analysis of either the strength of their case or its prospect of success.
In Garritt-Critchley, the court suggested that if a party felt so confident about winning its case such that mediation was unwarranted, it would have brought an application for summary judgment. The fact that such an application was not made indicated that there was room in the parties’ assessments of the case for mediation. Therefore, if a party seeks to rely on the strengths of their case as a reason to reject mediation, the threshold that it must meet to prove reasonableness is incredibly high (and, short of an application for summary judgment or exceptional circumstances, arguably no longer applicable).

Finally, it is still the case that the courts will not directly order parties to mediate. However, the recent judicial decisions may now have the effect of indirectly compelling parties to do so. In addition to refining the Halsey principles, courts are adopting non-traditional methods to persuade parties to attempt mediation. For example, in Garritt-Critchley, when directions to trial were ordered, the District Judge took the rather unusual decision to require the parties to explain by way of a witness statement in a sealed envelope why mediation was refused. Requiring reasons to be given for a refusal to participate in mediation forces parties to engage in a meaningful way with the concept of ADR, and serves as a strong indicator that costs sanctions may follow any unreasonable refusal to mediate.

Summary
There is a clear onus on parties to attempt ADR and, even though the court cannot order mediation, these recent cases demonstrate a recent trend towards a narrower interpretation of what may constitute a “reasonable” rejection of mediation, as well as a willingness to impose costs sanctions for failure to mediate. This means that refusing to mediate is a high-risk strategy, even where a party believes it has good reason to do so.

It is clear in light of these cases that it is important for litigants and practitioners not to consider reasons for mediating, but rather to consider any reasons for not mediating. If there are no compelling reasons, mediation or another form of ADR should be attempted, or litigants should brace themselves for significant cost penalties even if they are ultimately successful.