Alternative dispute resolution – Offer of ADR – No response from other party – Effect.

PGF II SA v OMFS Company 1 Ltd

[2013] EWCA Civ 1288

COURT OF APPEAL, CIVIL DIVISION

MAURICE KAY, McFARLANE AND BRIGGS LJJ

23 OCTOBER 2013

O *Effect of failure to respond to proposal of mediation.*

The claimant was the owner of a building in Lombard Street, London. The defendant was the assignee of leases on three floors of the building, which expired in 2009, and which imposed substantial repairing liability. There was a dispute as to the extent of the defendant's liability and the claimant started proceedings in October 2010.

At about the time of starting proceedings the claimant made a Pt 36 offer to accept £1.125m. In April 2011 the claimant made a second Pt 36 offer to accept £1.25m plus interest from June 2009. At the same time, by a separate letter, the claimant proposed mediation. On the same day the defendant made a Pt 36 offer of £700,000 inclusive of interest but did not respond to the proposal of mediation. On 19 July the claimant made a further proposal of mediation to which there was no response.

On 20 December 2011 the claimant made a further Pt 36 offer to accept £1.05m plus interest. On 10 January 2012 (the day before the trial was to start) the defendant for the first time took the point (in its skeleton argument) that an air conditioning system was not part of the demise. About £250,000 was claimed in respect of this.

The claimant on the same day accepted the defendant's Pt 36 offer of £700,000. The trial judge held that the defendant's behaviour in respect of the proposals as to mediation was unreasonable and that therefore it should not recover its costs between 2 May 2011 and 10 January 2012. The defendant appealed.

Held – (1) Silence in the face of a proposal to participate in ADR was usually unreasonable.

(2) The judge had been entitled to treat the defendant's silence as a refusal and as unreasonable. A mediation would have had a reasonable chance of success in April 2011.

EDITORIAL COMMENT

This case is probably the most important discussion of the processes of mediation and ADR in the context of civil litigation since *Halsey v Milton*

Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002. The judgment provides a useful and interesting insight into the mindset of the Court of Appeal in relation to those processes, and also a helpful illustration of how the principles and attitudes behind them have developed over the last ten years. What seems pretty clear from the judgment is that silence in response to an invitation to engage in ADR will almost certainly be open to criticism: it seems that only administrative errors ('some mistake in the office') might be an appropriate excuse for a failure to respond. During the course of complex construction litigation, parties may have good reasons to refuse the form of ADR proposed. For example, they may consider early neutral evaluation (ENE) to be more suitable than mediation, or there may be more straightforward concern about the cost of appointing a mediator and participating in the mediation process. Such concerns and preferences should be aired in correspondence, and it seems that if they are raised for the first time retrospectively and in an attempt to stave off a costs order, they are unlikely to find favour with the court.

Cases referred to in judgments

Burchell v Bullard [2005] EWCA Civ 358.

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002, [2004] 22 LS Gaz R 31.

Hurst v Leeming [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379, [2003] 2 Costs LR 153.

Lumb v Hampsey [2011] EWHC 2808 (QB), [2012] All ER (D) 18 (Feb).

Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215, (2007) 151 Sol Jo LB 396, [2007] All ER (D) 249 (Mar).

Rolf v De Guerin [2011] EWCA Civ 78, [2011] BLR 221, [2011] 5 Costs LR 892.

SG v Hewitt [2012] EWCA Civ 1053, [2013] 1 All ER 1118, [2012] 5 Costs LR 937.

Guy Fetherstonhaugh QC (instructed by *Kingsley Napley*) for the appellant.
Jonathan Seitler QC (instructed by *Browne Jacobson*) for the respondent.

BRIGGS LJ.

INTRODUCTION

[1] This appeal raises, for the first time as a matter of principle, the following question: what should be the response of the court to a party which, when invited by its opponent to take part in a process of alternative dispute resolution ('ADR'), simply declines to respond to the invitation in any way? An unreasonable refusal to participate in ADR has, since 2004, been identified by this court as a form of unreasonable conduct of litigation to which the court may properly respond by imposing costs sanctions: see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002. After a general review of the progress of ADR, and mediation in particular, with the assistance of intervention by the

Law Society and several bodies engaged in the development of ADR, this court laid down non-exclusive guidelines for deciding whether, in particular cases, a refusal to participate in ADR could be shown to be unreasonable. Those guidelines have stood the test of time, and the crucible of application in subsequent reported cases. A common feature of most of them, including the two cases reviewed in *Halsey v Milton Keynes General NHS Trust* itself, was that the refusing party had communicated its refusal to the inviting party, with succinct reasons for doing so.

[2] In the present case, a serious and carefully formulated written invitation by the claimant's solicitors to participate in mediation was met with complete silence by the defendant. The offer was repeated just over three months later and, despite promising a full response to the letter in which it was contained, the defendant's solicitors thereafter made no reply or comment about it at all. After the case was compromised, save as to costs, by the last minute acceptance by the claimant of the defendant's Pt 36 offer, the trial judge Mr Recorder Furst QC, sitting as a deputy judge of the Queen's Bench Division in the Technology and Construction Court ([2012] EWHC 83 (TCC), [2012] 3 Costs LO 404), acceded in part to the claimant's application for a costs sanction on the ground that the defendant had unreasonably refused to mediate, by depriving the defendant of the costs to which it would otherwise have been entitled under Pt 36, but he declined to take the further step of making the defendant pay the claimant's costs, incurred during the same period. The judge decided first that the defendant's silence amounted to a refusal and secondly, applying the *Halsey* guidelines, that its refusal had been unreasonable.

[3] Both parties appealed. The defendant submitted that the judge had been wrong on both points. Its silence did not amount to refusal, and even if it did, that refusal was on reasonable grounds. For the claimant, Mr Jonathan Seitler QC made what he acknowledged was a novel submission, namely that silence in response to an invitation to participate in ADR was itself unreasonable regardless whether it amounted to a refusal, or whether there were reasonable grounds to refuse. He said that a civil litigant's first duty in response to such an invitation was to engage with it, rather than ignore it, even if such engagement led in due course to a reasonable refusal or to the pursuit of some different, or differently timed, process of ADR than that contained in the invitation.

[4] Although Mr Seitler could rely upon on no direct authority for his submission, he derived considerable support (as will appear) from the contents and general thrust of the recently published *ADR Handbook* by Messrs Blake, Brown and Sime, supported by a distinguished editorial advisory board, and endorsed by the Judicial College, the Civil Justice Council and the Civil Mediation Council. The *ADR Handbook* was prepared and published in response to an invitation in Jackson LJ's review of civil litigation costs, see para 3.8 in ch 36 of his Final Report. His invitation arose from a conclusion that a culture change was needed among the civil litigation community, so that the widespread benefits of participating in ADR were better recognised.

THE FACTS

[5] The claimant (and respondent to this appeal), PGF II SA, is the freehold owner of a mixed commercial and office building at 33 Lombard St, London EC3 (the Building). The defendant (and appellant), OMFS Company 1 Ltd, took assignments of office leases of the first, second and fourth floors of the Building, for the residue of terms expiring in 2009. Each of the leases imposed a full repairing liability on the tenant, limited to the interior skin of the office accommodation on the relevant floor. In due course the defendant sub-let all three floors to other occupiers, so that it had not been in occupation for some time when the leases all expired in 2009.

[6] After notices to repair served by the claimant on the defendant in November 2008, schedules of dilapidations were served in 2009, alleging breaches of the tenant's repairing covenants in the aggregate value (for all three floors) of slightly more than £1.81m. Thereafter, the claimant carried out a substantial refurbishment of the Building for the cost of which the defendant declined to offer any reimbursement.

[7] The claimant therefore issued proceedings in the Chancery Division in October 2010, claiming in aggregate slightly more than £1.9m. The defence denied liability entirely, its main point being a denial that such disrepair as might have existed had caused any damage to the reversion, relying for that purpose on s 18 of the Landlord and Tenant Act 1927.

[8] At or shortly before the commencement of proceedings, the claimant made a Pt 36 offer to accept £1.125m in settlement, thereby leaving a substantially narrower gap between the parties than that visible to the court on the face of the pleadings.

[9] Standard directions for disclosure and expert evidence were ordered by Master Price, by consent, on 31 March 2011, pursuant to which the case was transferred to the Technology and Construction Court.

[10] There was an exchange of e-mail correspondence between the parties on 11 April 2011. None of them appear to be responsive to each other, and they may be said to have passed, electronically, in the post. The claimant made a second Pt 36 offer, superseding the first, to accept £1.25m plus interest from June 2009 in settlement. This, incidentally, slightly widened the gap between the parties. By a separate letter the claimant invited the defendant to take part in an early mediation. The letter assumed that the defendant would wish to review the claimant's disclosure, and that a meeting and exchange of information might usefully take place between experts, before a mediation commenced. The claimant offered to send the defendant its s 18 valuation. Numerous specific dates in May and June 2011 were proposed and additions were made to a previously notified list of suggested mediators. The letter concluded by seeking the defendant's agreement to mediate, and an explanation for any refusal. It sought confirmation as to documents and information which the defendant might wish to see before mediation, an exchange of dates and the defendant's list of proposed mediators. It was, overall, a thorough, carefully thought through and apparently sensible mediation proposal, taking full account of the likelihood

that the defendant, which had not been in occupation of any part of the Building for several years, would wish to obtain further information before taking part.

[11] For its part, again on the same day, the defendant sent the claimant a Pt 36 offer of £700,000 inclusive of interest, promising an explanation of its reasoning under separate cover, which was not thereafter provided nor, for that matter, asked for.

[12] The effect of the exchange of Pt 36 offers was, on a without prejudice basis, to narrow the gap between the parties to £550,000 plus interest, little more than a quarter of the difference on the face of the statements of case, and half that which it had been prior to 11 April.

[13] Neither of the competing Pt 36 offers was accepted and the claimant's invitation to mediation received no response from the defendant of any kind.

[14] On 19 July the claimant by its solicitors sent a further invitation to the defendant to mediate. It formed one of four matters raised in a short letter, stating:

> 'Please confirm whether your client is willing to attend a mediation and, if so, provide us with your dates of availability. If you are not prepared to attend a mediation, please could you let us know why.'

After a chasing letter on 1 August the defendant's solicitors promised a 'full response' on 3 August. On 15 August they responded in some detail in relation to one of the matters raised. Again, nothing whatsoever was said by way of response to the invitation to mediate.

[15] On 20 December the claimant made a further Pt 36 offer, to accept £1.05m plus interest, thereby narrowing the gap between the parties' offers to £350,000 plus interest.

[16] The trial had been fixed for 11 January 2012. In its skeleton argument, exchanged on 10 January 2012, the defendant took for the first time the point that an air-conditioning system in respect of which we were told that about £250,000 was claimed by way of dilapidations did not form part of the demise. The defendant gave notice of its intention to seek leave to amend its defence to that effect at the beginning of the trial.

[17] The claimant's response, by e-mail later on the same day, was to accept the defendant's £700,000 offer, thereby settling the proceedings save as to costs. The ordinary consequence of that acceptance would have been that the claimant was obliged to pay the defendant's costs from 2 May 2011 until 10 January 2012 ('the relevant period') unless the court ordered otherwise: see CPR 36.10 (4) and (5). Nonetheless the claimant by its e-mail gave notice that it would seek on the following day an order for costs in its favour in respect of the relevant period on the then sole ground of the defendant's late raising of the point about the air conditioning.

[18] The hearing duly took place on 11 January before Mr Recorder Furst QC. In the intervening period the claimant alighted on the point (not mentioned in its e-mail of the previous day) that the defendant might be said unreasonably to have refused to participate in ADR. Both the late amendment and ADR points were run and contested before the judge. The

late amendment point failed, and permission to appeal that part of the judge's analysis was refused. 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 accede to the claimant's submission that it should also be paid its costs for that period. Permission to appeal the ADR point was granted by Gross LJ on the ground that the application of *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, [2004] 1 WLR 3002 to the facts might be of potentially wide importance.

LAW AND PRACTICE

Part 36

[19] CPR Pt 36 lays down automatic costs consequences where a Pt 36 offer is accepted (r 10) and where at trial a claimant fails to improve upon it (r 14). In the latter case, r 36.14(2) preserves the court's discretion to order otherwise where 'it considers it unjust' to make an order as prescribed by the rule.

[20] By contrast, r 10(5) provides only that the specified costs consequences will ensue 'unless the court orders otherwise', with no specific reference to an injustice test. Nonetheless the judge, following *Lumb v Hampsey* [2011] EWHC 2808 (QB), [2012] All ER (D) 18 (Feb) concluded that the same test should be applied under r 10 as under r 14, including the non-exclusive guidelines set out in r 14(4). Since then, that approach has been endorsed by this court in *SG v Hewitt* [2012] EWCA Civ 1053, [2013] 1 All ER 1118, [2012] 5 Costs LR 937. Where that threshold test is satisfied, the judge then has a wide discretion as to the form of costs order to be made in substitution for the prescribed consequences: see per Arden LJ in *SG v Hewitt* [2013] 1 All ER 1118 at [76], [2012] 5 Costs LR 937 at [76].

[21] Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR, see para 10.25 of the *ADR Handbook*. It is however also designed to provide parties with a measure of protection against costs risk: see *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215, (2007) 151 Sol Jo LB 396, [2007] All ER (D) 249 (Mar) and *SG v Hewitt* [2012] 5 Costs LR 937 at [75], [2013] 1 All ER 1118 at [75]. It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk. It is a procedure frequently used by parties determined to pursue litigation to trial, precisely for the purpose of obtaining one or more layers of insulation against the costs risk arising from an uncertain outcome.

ADR

[22] *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, [2004] 1 WLR 3002 was the first in which the Court of Appeal addressed, as a matter of principle, the extent to which it was appropriate for the court to use its powers to encourage parties to civil litigation to settle their

disputes otherwise than by trial. It is sufficient to summarise the principles laid down, because none of them were in dispute on this appeal:

(i) The court should not compel parties to mediate even were it within its power to do so. This would risk contravening art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and would conflict with a perception that the voluntary nature of most ADR procedures is a key to their effectiveness.

(ii) Nonetheless the court may need to encourage the parties to embark upon ADR in appropriate cases, and that encouragement may be robust.

(iii) 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.

(iv) 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.

Supplementing those statements of principle, the Court of Appeal adopted and explained a non-exclusive list of factors likely to be relevant to the question whether a party had unreasonably refused ADR proffered by the Law Society (which had intervened):

(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.

Again, none of these guidelines was significantly in dispute on this appeal, although their applicability to the particular facts of this case was hotly debated, both before the judge and on appeal.

[23] The court acknowledged ([2004] 4 All ER 920 at [6], [2004] 1 WLR 3002 at [6]) a continuing debate about the virtues of mediation, being then, as now, the most common form of structured ADR. Nonetheless, it took the view that many civil disputes were suitable for mediation on the basis of encouragement in the Woolf reforms and the CPR, provisions to that effect in the practice guides of the Chancery and Queen's Bench Divisions, the Admiralty and Commercial Court and the Technology and Construction Court, and also support from government.

[24] In the nine and a half years which have elapsed since the decision in *Halsey v Milton Keynes General NHS Trust*, much has occurred to underline and confirm the wisdom of that conclusion, reached at a time when mediation in particular had a track record only half as long as it has now. First, statistical research conducted by the Centre for Effective Dispute

Resolution ('CEDR') in 2010 and 2012 asserts that, when it is undertaken, mediation achieves a remarkable level of success, within a growing market of the order (in 2012) of approximately 8,000 cases per annum. The 2012 reported success rates can be summarised as 70% on the day, with 20% more settling shortly thereafter. In 2010 comparable figures were 75%:14%.

[25] These figures need to be treated with some caution. Although the process by which they were generated is described as an audit, it appears to have been based upon a survey of voluntary returns by some 238 mediators. It is open to the criticism that the more successful mediators may be supposed to have been the most enthusiastic voluntary respondents. Nonetheless, results even approaching that level of success are powerful testimony supportive of the value of the process, in the cases where it has been undertaken. Even the Court of Appeal's own pilot scheme, with its 50% current success rate, demonstrates the effectiveness of the process, not least because mediation before trial is, on the face of it, likely to be much more cost-effective than mediation before appeal.

[26] Secondly, the intense focus in Jackson LJ's report into civil litigation costs upon achieving proportionality between the cost of litigation and the value of that which is at stake led, as I have described, to his clear endorsement of ADR as a process which is still insufficiently understood and still under-used.

[27] Thirdly, the constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) 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, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR, wherever that offers a reasonable prospect of producing a just settlement at proportionate cost. Just as it risks a waste of the court's resources to have to try a case which could have been justly settled, earlier and at a fraction of the cost by ADR, so it is a waste of its resources to have to manage the parties towards ADR by robust encouragement, where they could and should have engaged with each other in considering its suitability, without the need for the court's active intervention.

[28] The practice guides of both the Chancery Division and the Technology and Construction Court provided at the time material to these proceedings (and now) that legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by ADR, and that they should ensure that their clients are fully informed as to the most cost-effective means of resolving their dispute.

[29] There are a few small indications in Court of Appeal authority that support the view that, at least in an appropriate case for ADR, a party cannot just ignore a request to participate in mediation. In *Burchell v Bullard* [2005] EWCA Civ 358 at [43], Ward LJ treated *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, [2004] 1 WLR 3002 as making it clear that: 'The parties cannot ignore a proper request to mediate

simply because it was made before the claim was issued …' In *Rolf v De Guerin* [2011] 5 Costs LR 892 at [48], [2011] BLR 221 at [48], Rix LJ described successive offers of mediation as having been 'spurned' by the party's failure to reply.

[30] *The ADR Handbook*, first published in 2013, after the period relevant to these proceedings, sets out at length at para 11.56 the steps which a party faced with a request to engage in ADR, but which believes that it has reasonable grounds for refusing to participate at that stage, should consider in order to avoid a costs sanction. The advice includes:

(a) not ignoring an offer to engage in ADR;

(b) responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the *Halsey* guidelines;

(c) raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome;

(d) not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing.

That advice may fairly be summarised as calling for constructive engagement in ADR rather than flat rejection, or silence. It is apparent from the footnotes that the authors drew heavily on the first instance decision in the present case, to which I now turn.

THE JUDGMENT BELOW

[31] The defendant resisted the 'unreasonable refusal to engage in ADR' basis for a special costs order before the judge on three grounds. First, it denied that its silence amounted to refusal. Secondly, it denied that any deemed refusal was unreasonable. Third, it was submitted that, since the expenditure of £250,000-odd by each side during the relevant period was attributable to the claimant's failure to accept a reasonable Pt 36 offer until the day before trial, no departure from the Pt 36 costs consequences should be ordered.

[32] In a careful judgment which dealt at length with the first two of those three submissions, the judge rejected all of them. The thrust of his reasoning was that the defendant's silence did amount to a refusal and that, applying the *Halsey* guidelines in detail, the refusal was unreasonable. He did not in terms engage with the question whether silence in face of a serious invitation to engage in ADR was itself unreasonable.

[33] Nonetheless he did say this ([2012] EWHC 83 (TCC) at [44], [2012] 3 Costs LO 404 at [44]):

> 'In general it would seem to me that … the court should be wary of arguments only raised in retrospect as why a party refused to mediate or as to why it cannot be demonstrated that a mediation would have had a reasonable prospect of success. First such assertions are easy to put forward and difficult to prove or disprove but in this case unsupported by evidence. Secondly, and in any event, it is clear that the courts wish to

encourage mediation and whilst there may be legitimate difficulties in mediating or successfully mediating these can only be overcome if those difficulties are addressed at the time. It would seem to me consistent with the policy which encourages mediation by depriving a successful party of its costs in appropriate circumstances that it should also deprive such a party of costs where there are real obstacles to mediation which might reasonably be overcome but are not addressed because that party does not raise them at the time.'

DISCUSSION

[34] In my judgment, the time has now come for this court firmly to endorse the advice given in Ch 11.56 of the *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. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good.

[35] There are in my view sound practical and policy reasons for this modest extension to the principles and guidelines set out in *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, [2004] 1 WLR 3002, which concerned reasoned refusals, provided in prompt response to the request to participate in ADR. The first is that an investigation of alleged reasons for refusal advanced for the first time, possibly months or even years later, at the costs hearing, where none were given at the time of the invitation, poses forensic difficulties for the court and the inviting party including, in particular, the question whether the belatedly advanced reasons are genuine at all. The manner in which this issue was debated both before the judge and on this appeal is illustrative of those difficulties.

[36] The thrust of Mr Guy Fetherstonhaugh QC's submission for the defendant was that the *Halsey* tests for the unreasonableness of a refusal were to 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. I disagree. When the question concerns the reasonableness or otherwise of a party's conduct, the party's own perceptions may play an important part in the analysis, as is apparent from the treatment of a party's reasonable belief in the strength of its case, in *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920 at [26], [2004] 1 WLR 3002 at [26], rejecting as too narrow the purely objective approach applied by Lightman J in *Hurst v Leeming* [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379, [2003] 2 Costs LR 153.

[37] Secondly, a failure to provide reasons for a refusal is destructive of the real objective of the encouragement to parties to consider and discuss ADR, in short to engage with the ADR process. There are many types of reasonable objection to a particular ADR proposal which, once raised, may be capable of being addressed. Mediation may be resisted on the basis that some other type of ADR, such as early neutral evaluation, may be equally suitable and preferred by the objecting party. A proposed mediation may be expensive to the other party if, as is usual, the mediator's fees are shared equally. In such a case it is not unknown for the proposing party to offer to bear the whole fee, or for some cheaper form of ADR, including judicial early neutral evaluation or financial dispute resolution, to be provided more cheaply by the court. ADR may be proposed before the other party has the requisite information, a difficulty capable of being addressed either by limited voluntary disclosure, or by ADR at a later date than that proposed.

[38] Difficulties of this kind constantly arise in civil litigation, and the culture is now well established under which the parties should discuss these difficulties, and seek to narrow their differences, before those which are irreconcilable are put to the court for determination. This occurs routinely in relation to expert issues, and is now prescribed practice ahead of case management conferences and pre-trial reviews. I can see no reason why the same should not apply to ADR, thereby saving valuable court time in the case management process which, as the practice guides now all make clear, extends to the encouragement of ADR rather than merely to the giving of directions for trial.

[39] This second reason is partly a matter of practicality, but also serves the policy of proportionality. A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources. The invitation may simply be accepted, and lead to an early settlement at a fraction of the cost of the preparation and conduct of a trial. ADR may succeed only in part, but lead to a substantial narrowing of the issues. Alternatively, after discussion, the parties may choose a different form of ADR or a different time for it, with similar consequences. In some cases the exchange of views may lead to an early appreciation that the interests of the parties would best be served by the earliest possible trial of an issue of law or construction, as indeed occurred in the second of the cases under review in *Halsey* where, in the event, the trial lasted a mere two hours.

[40] The foregoing analysis is enough, on the face of the correspondence between the parties, to justify a conclusion that the defendant's silence in face of two requests to mediate was itself unreasonable conduct of litigation sufficient to warrant a costs sanction, without the need for the detailed point by point analysis of the *Halsey* guidelines, carried out both before the judge and on this appeal, on the basis of the allegation that silence amounted to a deemed refusal. But the sanction imposed by the judge followed his determination that there had indeed been a refusal, and that it had been unreasonable. On those two points I find myself in full agreement with the judge's analysis at paras [42]–[46] of his judgment ([2012] EWHC 83

(TCC), [2012] 3 Costs LO 40), subject to one small point to which I refer below. Nonetheless, I shall briefly address the main submissions made by Mr Fetherstonhaugh for the defendant on this appeal.

Was there a refusal?

[41] Mr Fetherstonhaugh made two main points. First, the silence was equivocal and might be attributable to various explanations, only one of which was a refusal. The second was that at no time did the claimant complain about the silence, suggest in correspondence that it amounted to a refusal, or raise the matter with the court, for example at the directions hearing which occurred in May 2011.

[42] While, in agreement with the judge, I find it a little surprising that the claimant did none of these things, it would in my view be perverse not to regard silence in the face of repeated requests as anything other than a refusal, all the more so because the first request was couched in such detailed and sensible terms that it could not reasonably have been regarded as mere tactics.

Was the refusal unreasonable?

[43] The judge correctly regarded the burden of proof in this respect as lying squarely on the claimant although, following *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920 at [28], [2004] 1 WLR 3002 at [28], he described the burden of demonstrating that ADR stood a reasonable prospect of success as not being an onerous one.

[44] Mr Fetherstonhaugh's main points on this part of the appeal really boiled down to two, both based heavily on his client's Pt 36 offer of £700,000. First, he submitted that the making of that offer, and leaving it there until trial without subsequent adjustment, was a living demonstration of the defendant's belief in the strength of its case, a belief which, since the claimant eventually accepted it, cannot have been otherwise than reasonable. Secondly, he submitted that, mainly because of the monetary distance between the parties' respective Pt 36 offers, both of which he characterised as their respective bottom lines, mediation stood no reasonable prospect of success. More generally, he submitted that this was a hard-nosed commercial dispute about money between parties with no continuing relationship, and therefore not susceptible to the ability of a mediator to devise solutions beyond the capacity of the court to order.

[45] I have not been persuaded by any of these submissions. First, it is in my view simply wrong to regard a Pt 36 offer, without any supporting explanation for its basis, as a living demonstration of a party's belief in the strength of its case. As I have said, defendants' Pt 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risk will encourage it to settle for less than its claim is worth.

[46] Nor do Pt 36 offers necessarily or even usually represent the parties' respective bottom lines. There was, accordingly, no unbridgeable gulf between these parties' respective Pt 36 offers, which could not in any

circumstances have been overcome in a mediation. The gap of some £550,000 which existed in April 2011, after the defendant's £700,000 offer, was little more than a quarter of the gulf separating the parties on their statements at case, and half what it had been before that offer was made. Standing back, the parties may fairly be said to have been converging at a rate which made a mediation or some other form of ADR highly appropriate, not least because, as the parties would have appreciated if given realistic budgets by their respective solicitors, an amount broadly equivalent to that gap would have to be expended in yet further costs in order to have the dispute resolved at a trial.

[47] More generally, I consider that the dispute was, by April 2011, eminently suited to mediation. Breach of the repairing covenants was not seriously denied, and the only issue which might have been said to go to liability arose from the defendant's reliance upon s 18 of the Landlord and Tenant Act 1927, a matter heavily dependent upon competing valuation evidence. The dispute gave rise to complicated matters of detail eminently likely to cost a disproportionate amount to litigate to trial, even ignoring the attrition upon management time likely to be required for that purpose.

[48] It is no small irony that the dispute did indeed settle before trial. Mr Fetherstonhaugh submitted that this was because of a defect in the claimant's case upon which neither party had alighted until just before trial. In a perhaps unguarded moment, he submitted that it needed a fresh mind to spot it. I agree, but that is precisely the sort of insight which a trained and skilled mediator, experienced in the relevant field, can bring to an apparently entrenched dispute. In that small respect I do not share the judge's view that this point would probably not have emerged at a mediation. He was nonetheless right in my judgment to conclude that mediation had a reasonable prospect of success when offered by the claimant in April 2011.

Discretion

[49] The defendant's final criticism of the judgment was that, having concluded that an offer of mediation had been unreasonably refused, the judge then mechanistically deprived the defendant of the whole of its costs entitlement against the claimant during the relevant period, without weighing all other relevant matters in the balance, including the claimant's responsibility for failing to accept the defendant's well-judged Pt 36 offer until the eve of the trial. By its cross-appeal, the claimant asserted that the judge should not merely have deprived the defendant of its costs, but ordered the defendant to pay the claimant's costs as well, in respect of the relevant period.

[50] Neither of these points was pursued beyond a mere mention in counsel's oral submissions, although the defendant's point was sufficiently fleshed out in Mr Fetherstonhaugh's skeleton argument and by no means abandoned at the hearing.

[51] I agree with the general thrust of Mr Fetherstonhaugh's submission, that a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or, which is more serious in my view, a

refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. It is plain both from *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, [2004] 1 WLR 3002 itself and from Arden LJ's reference to the wide discretion arising from such conduct in *SG v Hewitt* [2013] 1 All ER 1118, [2012] 5 Costs LR 937, that the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs.

[52] There appears no recognition in *Halsey v Milton Keynes General NHS Trust* that the court might go further, and order the otherwise successful party to pay all or part of the unsuccessful party's costs. While in principle the court must have that power, it seems to me that a sanction that draconian should be reserved for only the most serious and flagrant failures to engage with ADR, for example where the court had taken it upon itself to encourage the parties to do so, and its encouragement had been ignored. In the present case the court did not address the issue at all. I therefore have no hesitation in rejecting Mr Seitler's submission that the judge did not go far enough in penalising the defendant's refusal to engage with ADR.

[53] I have had more difficulty with Mr Fetherstonhaugh's submission. It is true that, reading the judge's careful reserved judgment, he gives the impression of moving straight from his conclusion that there was an unreasonable refusal to depriving the defendant of its costs, without any express balancing of all relevant considerations. That may have been no more than a reflection of the way in which the matter had been argued before him, both orally and in supplemental written submissions. That is certainly how the matter was argued orally on appeal.

[54] Had I been free to do so, I would have concluded that, notwithstanding a blameworthy failure to engage with a serious invitation to participate in ADR, and indeed an unreasonable refusal to do so, the overall responsibility for the expenditure of a further £500,000-odd in costs during the relevant period nonetheless still lay primarily with the claimant. While, viewed from the perspective of Pt 36, the judge's order only deprived the defendant of half the benefits which would otherwise have accrued from its use of that procedure, I would nonetheless have concluded that this was a case in which only some proportion of its costs as the successful party, rather than the whole of them, should have been disallowed.

[55] Nonetheless, the discretion is clearly that of the judge. He was plainly conscious throughout that he was exercising a broad discretion, and his approach to the basis upon which the court could properly depart from the otherwise automatic consequences of Pt 36 was entirely correct. To deprive the defendant of the whole of its costs during the relevant period was within the range of proper responses to the seriously unreasonable conduct which the judge identified, and the lack of an express balancing exercise, after a lengthy analysis of the points put before him by counsel, by no means demonstrates that he did not in fact carry it out in his mind.

[56] Finally, as is recognised by the weight placed on the judge's decision in the passage in the *ADR Handbook* to which I have referred, this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates *pour encourager les autres*.

[57] I would therefore dismiss both the appeal and the cross-appeal.

McFARLANE LJ.

[59] I agree.

MAURICE KAY LJ.

[59] I also agree.