

**PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288, Implications for  
Case Management and Dispute Resolution**

**The New Court of Appeal Mediation Directive**

I recently had the pleasure of speaking with Sir Bernard Rix. Lord Justice Rix, as he was, is one of the true visionaries in the civil justice system. Lord Justice Rix gave the seminal Judgment in *Rolf v De Guerin* in 2011. He also sat in the case of *Burchell v Bullard* in 2005 which endorsed the principle enunciated by Lord Justice Dyson in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 that:

*'All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.'*

In *Rolf v De Guerin* [2011] EWCA Civ 78 Lord Justice Rix stated that:

*'Parties should respond reasonably to offers to mediate or settle and...their conduct in this respect can be taken into account in awarding costs.'*

Indeed *Rolf v De Guerin* demonstrated the cost sanctions that could be imposed against a party who did not participate in mediation.

Sir Bernard Rix believes that another milestone has now been reached with the landmark case of *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 which was decided in October 2013. I share Sir Bernard's view as do most leading practitioners.

**Background to PGF II**

The Claimant PGF II was the freehold owner of an office building at 33 Lombard St, London. The Defendant OMFS took assignments of leases for several floors of the Building. The leases which expired in 2009 imposed full repairing liability on the tenant, albeit limited to the interior skin of the office accommodation on the relevant floors. On expiry of the leases in 2009 the Claimant took issue as to dilapidations. A schedule of dilapidations was served and proceedings eventually issued claiming approximately £1.9 million.

The Claimant made invitations to the Defendant to participate in Mediation on several occasions during the course of the proceedings with a view to resolving the dispute. The Defendant failed to respond to such invitations. Both parties made Part 36 offers.

In its skeleton argument, exchanged the day before trial, the Defendant for the first time took the point that an air-conditioning system in respect of which about £250,000 was claimed by way of dilapidations did not form part of the demise. The Claimant responded by accepting the sum set out in the Defendant's Part 36 offer made almost 9 months before.

Approximately £500,000 of costs was incurred (£250,000 by each side) in the period between the relevant Part 36 offer and settlement and was accordingly at stake. Ordinarily the Defendant would receive its costs incurred after the 21 day expiry of its

Part 36 offer until settlement. This was not however the approach adopted by the trial judge.

In PGF II the trial judge Mr Recorder Furst QC, acceded 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 Part 36. The Defendant appealed.

Permission to appeal this ADR point was granted by Lord Justice Gross on the ground that the application of the Halsey case to the facts might be of potentially wide importance.

### **Question for the Court of Appeal**

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?

As the Court of Appeal noted in its introduction *'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.'*

### **Part 36**

Part 36 is designed to encourage parties to make, and promptly to accept, realistic offers of settlement. Part 36 was described as lying at the interface between litigation and ADR. CPR Part 36 lays down automatic costs consequences where a Part 36 offer is accepted and where at trial a claimant fails to improve upon it. In the latter case, rule 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.

### **Approach of the Court of Appeal in PGF II**

The Court of Appeal examined the Jackson reforms, the development of Mediation in the 9 year period since Halsey, its documented success in resolving disputes and the ADR handbook published in 2013.

As Lord Justice Briggs observed the *'advice may fairly be summarised as calling for constructive engagement in ADR rather than flat rejection, or silence.'*

The court referred to research from CEDR and others demonstrating the clear evidence of success of mediation in resolving disputes. Even as long ago as 2005 Lord Justice Ward was warning practitioners in *Burchell v Bullard* [2005] EWCA 358 to pay heed to mediation:

*'Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation, and*

*it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued.'*

Lord Justice Jackson's report into civil litigation, emphasizing the need for proportionality was described as a clear endorsement of ADR and the Court of Appeal referred to an ever-increasing responsibility on parties to civil litigation to engage in ADR.

Lord Justice Briggs noted that it would *'be perverse not to regard silence in the face of repeated requests as anything other than a refusal'* to mediate.

## **Judgment**

Lord Justice Briggs giving judgment in PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 stated:

*'In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 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.'*

Lord Justice Briggs concluded by sending a clear message to legal practitioners and their clients:

*'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.'*

Whilst Lord Justice Briggs may have imposed a less severe sanction on the Defendant, he regarded a sanction as appropriate and did not regard it as being outside of the discretion or reasonable range of responses of the trial judge. The Defendant was in consequence penalised its costs recited as £250,000 by failing to mediate.

## **The Parties are too far Apart!**

In PGF II when mediation was proposed the parties were approximately £500,000 apart. The Defendant argued that the parties were too far apart to engage in mediation and that mediation stood no reasonable prospect of success. That argument was roundly rejected by the Court of Appeal which took the view that there was *'no*

*unbridgeable gulf.*’ Indeed the Court of Appeal described the dispute as ‘*eminently suited to mediation.*’ Few cases will be regarded as inappropriate for mediation.

## **The Outlook**

The words of the Judgment are clear and telling and deserve reading. The Court of Appeal could not have delivered a clearer carrot and stick message. Mediation Works. Mediation should be used. Cost sanctions will be employed against those who do not pay heed to this message. Mediation will therefore be ignored at a party’s peril.

PGF II signals a seismic shift towards regarding mediation as the starting point where parties have not otherwise been able to resolve their differences. Indeed Lord Justice Briggs clearly indicates that a failure to respond positively to an invitation to participate in ADR will, as a general rule, be considered unreasonable.

PGF II signals a hard line approach by the judiciary to those who do not take dispute resolution seriously. Courts now expect parties to engage in serious settlement discussions and to engage in mediation. Indeed the Court of Appeal now appears to have decided that the default position is to impose cost sanctions in the event of a refusal to mediate.

It is easy to see, within this context and in particular the adoption by the courts of a significant cost sanctions armoury, how a case could ostensibly be won and lost at the same time. It is important that practitioners take this to heart and actively engage in case management, case reviews, client dialogue, mediation and settlement discussions. A failure to do so will inevitably result in a surge of professional indemnity claims and complaints

We have come a long way since *Halsey v Milton Keynes NHS Trust*. *Halsey* began the trend towards encouraging parties to mediate. PGF II has taken this to a new level.

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