# One year on from *PGF*

**Mediation** John Dagnall and Beverley Vara ask whether "*les autres*" have been "encouraged"?

On 23 October 2013, the Court of Appeal delivered its judgment in *PGF II SA* v *OMFS Company 1 Ltd* [2013] EWCA Civ 1288; [2013] 3 EGLR 16 upholding a first instance decision in a dilapidations dispute where a successful defendant's silence in the face of a proposal to mediate resulted in that defendant being deprived of its subsequent costs. In coming to its conclusion, the Court of Appeal both confirmed and extended the previous *Halsey* v *Milton Keynes* guidelines ([2004] EWCA Civ 576), holding that silence in the face of, or a refusal to engage with, a proposal for alternative dispute resolution ("ADR") was at first sight unreasonable, and intimating that an unreasonable refusal ought generally to attract some sort of costs sanction.

### *PGF*

However, while the decision in *PGF* produced a flurry of comment, there are few references to *PGF* in reported decisions. Indeed, in *R (Crawford)* v *The University of Newcastle-upon-Tyne* [2014] EWHC 1197, *PGF* was distinguished on the basis that the parties, by already engaging in an unsuccessful independent adjudication process, had reasonably exhausted the potential for ADR; and there are now two decisions in the TCC, *Courtwell Properties Ltd* v *Greencore PF (UK) Ltd* [2014] EWHC 184 (TCC); [2014] PLSCS 90 and *Northrop Grumman Systems Europe Ltd* v *BAE Systems Ltd* [2014] EWHC 3148, where refusals to mediate failed to attract a costs consequence. Nevertheless, in two other High Court decisions – *Garritt-Critchley* v *Ronnan* [2014] EWHC 1774 and *Clegg* v *Pache* (unreported, September 2014) – *PGF* has been applied so as to result in a costs sanction against the party who refused to mediate.

In *PGF,* the Court of Appeal summed-up the *Halsey* guidelines as being: the court should not compel parties to mediate but may need to encourage ADR "in appropriate cases" and be "robust"; costs sanctions could follow an unreasonable refusal to agree to ADR; and the burden is on the party hoping to alter the usual costs order to show that the other party's refusal to mediate was unreasonable with no presumption to that effect.

On the key issue of "reasonableness", relevant factors were: the nature and merits of the dispute; the extent to which

other settlement methods had been attempted; the costs of ADR in terms of both expense and delay; and the prospects of success of ADR. The mediation process would enable very sizeable gaps either of matters of principle or of quantum to be bridged, and such differences would not of themselves necessarily justify a refusal to engage in mediation.

While the Court of Appeal would not itself have refused all the refusing successful party's relevant costs, such an outcome was within the first instance judge's discretion "*pour encourager les autres*".

### Recent cases

*Courtwell* and *Garritt* both involved a successful party seeking to use a refusal to mediate to justify an award of indemnity rather than standard basis costs. In *Courtwell* that party had proposed but had not pressed mediation, and the judge held that this, combined with a very bad relationship between the parties, which suggested that a mediated resolution would have been unlikely, was not sufficient to lead to a costs penalty.

However, on the facts of *Garritt* it was held that: (i) the existence of substantial arguments as to both liability and quantum enhanced rather than detracted from the chances of a mediation resulting in a negotiated settlement; (ii) the serious dislike between the parties would not prevent them from negotiating a commercial settlement; and (iii) the argument of the parties being too far apart to settle could only be tested in a mediation and ignored both commercial reality and the ability of the mediation process to produce resolutions. Although past serious negotiations might justify dispensing with mediation, the mere making of "unrealistic" offers would not normally do so. The judge held the reasons given for refusal to have been misconceived; and indemnity costs were ordered.

*Clegg* and *Northrop* were both cases of an unsuccessful party seeking a reduction in the successful party's costs because of their refusal to mediate. In *Clegg* the successful party had first agreed and then refused to mediate. While it was argued that the claimant had refused to specify what order of money he wanted, the gap was far too wide to bridge, and the defendants had no available money to pay over; it was held that these matters could all have been explored in mediation, and the refusal to mediate was unreasonable. However, the judge did not regard a general disallowance of the successful defendant's costs (as in *PGF*) as being appropriate, and took the view that as the defendant had succeeded it was right for the reduction to be relatively small.

In *Northrop* the judge emphasised the ability of mediators, at relatively low cost, to bridge gaps and promote constructive solutions, notwithstanding that there had been settlement offers and that the successful party believed correctly that it had a strong case, the refusal to mediate was held to have been unreasonable. However, this was balanced against a refusal to accept a "*Calderbank*" offer that was not bettered, with the result that the twin refusals were held to balance each other out resulting in a standard basis costs award.

### Don't take the risk

It may well be that the dearth of reported cases referring to *PGF* simply reflects the success of the courts in encouraging mediation, both by reference to the merits of mediation as a process and by threats (sometimes implemented) of costs sanctions. Notwithstanding the variation in outcome, the courts clearly favour the proposition that the mediation process is there to bridge even apparently insurmountable gaps, a proposition which the authors would argue is frequently what actually happens in mediation.

*Halsey* directions, requiring the parties to consider ADR and, if such does not take place, to file "without prejudice save as to costs" witness statements explaining why, are now relatively standard form. A refusal to mediate is thus clearly at a party's own risk. This risk is one which there seems little merit in running when mediation can so often result, relatively cheaply, in a constructive solution advantageous to all parties and one that the courts could not order.

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