The ADR duty and costs: Shakir Ali and Another v Channel 5 Broadcast Ltd

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PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386; [2013] 10 WLUK 734 (CA (Civ Div))

C.J.Q. 407 **Abstract**
This note critically considers the recent decision in Ali v Channel 5 Broadcast Ltd *in which Arnold J dealt with, amongst other things, the unsuccessful defendant's argument, relying on the Court of Appeal decision of PGF, that the claimants should be penalised in costs for having wrongfully refused to engage in ADR. It will be argued that the court in Ali adopted the correct approach in assessing the claimants' behaviour towards the ADR invitation which preserved the parties' autonomy to choose the most appropriate time to engage with an ADR process. It will also be argued that the courts should only penalise a party in costs where it has clearly failed to respond to an invitation to ADR, as in PGF, or its behaviour is such that it would be considered as frustrating and undermining the parties' ADR obligations, as in the recent Court of Appeal decision of* Thakkar v Patel. *The courts should not penalise a party where, as in Ali, a party engages in a constructive "ADR dialogue", makes clear its intentions to continue to review the ADR issue and does so, and participates with the ADR process.*

The Court of Appeal's decision in *PGF II SA v OMFS Co 1 Ltd* [1] is the most significant contribution to the burgeoning ADR jurisprudence since the decision in the leading case of *Halsey v Milton Keynes General NHS Trust*. [2] Although rejecting the notion of compulsory mediation, the Court of Appeal in *Halsey* endorsed and promoted judicial encouragement of ADR and established several non-exhaustive factors [3] which the courts should consider when assessing whether ***C.J.Q. 408*** a party is to be penalised in costs for unreasonably refusing to engage with ADR. [4] One of those factors is the nature of the dispute. The Court in *Halsey* acknowledged that there may be some cases in which ADR may not be suitable because, for example, the court is required to determine issues of law or construction; where a binding precedent is necessary or cases where injunctive relief is required. This factor is deliberately formulated in wide terms so that it encompasses a range of issues which may justify rejecting ADR. Those issues may concern the need to obtain relief (which may not necessary be complex but is urgently required by one of the parties) or may concern matters which are truly complex because a point of law may need to be resolved or a legal precedent is necessary. Despite the ide formulation of this factor, a closer examination of the jurisprudence surrounding the

Halsey factors reveals that the majority of Court of Appeal authorities that have considered the nature of the case when assessing unreasonable behaviour concern the defaulting party arguing that the matter was too complex for it to be resolved by ADR. Therefore, the present author prefers to adopt the term "complexity factor" which, it is argued, more accurately describes the nature of the case factor.. Some members of the senior judiciary have strongly dismissed this as a legitimate factor in refusing ADR [5] whilst others have embraced it. [6]

In *PGF*, Briggs LJ (as he then was) made a "modest extension" [7] to the *Halsey* factors when he held that silence in the face of an invitation to engage with ADR would, as a general principle, amount to unreasonable behaviour which may result in adverse cost consequences for the defaulting party. [8] Briggs LJ explained that the policy rationale underpinning the extension to the *Halsey* factors was the need for the courts to encourage the "more proportionate conduct of civil litigation" which was increasingly important "in current economic circumstances". The case was intended to send out an important message to civil litigants "requiring them to engage with a serious invitation to participate in ADR" [9] regardless of any reasonable grounds which may justify a refusal. [10] This last point—that the parties must engage with a serious invitation to participate in ADR—causes tensions with the *Halsey* complexity factor and, as HHJ Coulson QC (as he then was) put it in *Nigel Witham Ltd v Smith*, the "critical moment" to engage with an ADR process. [11]

A ***C.J.Q. 409*** gainst this background, this note critically considers the recent decision in *Ali v Channel 5 Broadcast Ltd* [12] in which Arnold J dealt with, amongst other things, the unsuccessful defendant's argument, relying on *PGF*, that the claimants should be penalised in costs for having wrongfully refused to engage in ADR. It will be argued that the court in *Ali* adopted the correct approach in assessing the claimants' behaviour towards the ADR invitation which preserved the parties' autonomy to choose the most appropriate time to engage with an ADR process. It will also be argued that the courts should only penalise a party in costs where it has clearly failed to respond to an invitation to ADR, as in *PGF*, or its behaviour is such that it would be considered as frustrating and undermining the parties' ADR obligations, as in the recent Court of Appeal decision of *Thakkar v Patel*. [13] The courts should not penalise a party where, as in *Ali*, a party engages in a constructive "ADR dialogue" and makes clear its intentions to continue to review the ADR issue and does so.

Background

The claimants succeeded on their claim against the defendant for misuse of private information in a programme in which the claimants were featured. The claimants were awarded damages of £10,000 each. The court was then required to resolve the issue of the costs of the proceedings.

In its letter of claim, the claimants sought an undertaking to remove the programme from any websites; an undertaking not to publish the programme in future; compensatory damages; an apology; and their costs. The defendant replied by indicating that, although it intended to robustly defend the matter, it was prepared to engage with ADR to resolve the issues in dispute. The claimants replied approximately four months later to the defendant's letter of reply by stating that ADR was not appropriate at this stage because fundamental issues of law and regulation remained in dispute but that they would keep it under review once those issues had been addressed. The defendant responded stating that the claimants' claim for injunctive relief was suitable for ADR "especially in view of the Pre-action Protocol".

The claimants then proceeded to issue their claims and then replied to the defendant's earlier letter by repeating that ADR was not, at this point, appropriate but remained prepared to engage with ADR at an appropriate time and invited proposals for ADR. The defendant did not make proposals for ADR and the usual procedural steps were taken with various Pt 36 offers being made.

Following the exchange of witness statements, the defendant's new solicitors wrote to the claimants proposing mediation and expressing dismay as to why settlement through ADR had not previously been explored. The defendant's solicitors went on to explain that, in their view, mediation would provide the claimants with the opportunity to explain why they felt they were entitled to an apology and that the defendant would "consider seriously any reasonable solution on this issue". [14] The claimants replied by agreeing to mediation and agreeing th ***C.J.Q. 410*** at the issue of the defendant's apology could be further explored at the mediation. The mediation took place but did not settle the matter. Prior to trial, the claimants' costs budgets were approved, which included costs relating to the mediation.

Decision on ADR and costs

On the issue of costs and mediation, the defendant contended that there should be no order as to costs, alternatively that the claimants should only recover 50% or 75% of their costs because the claimants wrongly refused to engage in ADR. In support of this contention, the defendant relied upon *PGF* and *Thakkar v Patel*. [15] In *Thakkar* the principal issue in the appeal was the defendants' failure to engage with the claimants' invitation to mediate. Both parties had requested a stay for ADR on their respective allocation questionnaires and both parties had expressed a willingness to try to mediate. The claimants made arrangements for a mediation and identified possible mediators, but the defendants were slow to respond to the claimants' letters. Eventually, the claimants wrote to the defendants stating that they no longer had confidence that a mediation could be arranged given the defendants' failure to co-operate. Finding that there was a real prospect of settlement if that matter had proceeded to mediation, the trial judge awarded the successful claimant 75% of its costs. Jackson LJ dismissed the defendants' appeal on costs. Although recognising the fact that the defendants had not refused to mediate outright, they had "dragged their feet and delayed for so long that the claimants lost confidence in the process". [16] Jackson LJ concluded in the following terms:

"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction." [17]

Did the claimants' behaviour in *Ali* fall within the scope of the *PGF* principles and therefore justify a costs sanction? Arnold J rejected the defendant's arguments that the claimants should be penalised in costs because the claimants' conduct throughout the litigation demonstrated that they did not refuse to engage in ADR. The judge noted that, whilst it was true to say that the claimants did not "embrace" the defendant's initial suggestion of ADR, the claimants did respond by stating that they would keep the issue under review. Further, Arnold J held that the claimants' response to the defendant's second suggestion of ADR (which on its face was confined to the question of an injunction) was to state that they were fully prepared to engage in ADR at a suitable time and invited ADR proposals from the defendant. However, the defendant failed to make proposals for mediation until much later. When the defendant did propose mediation, the claimants, Arnold J observed, "promptly agreed ***C.J.Q. 411*** ".

Analysis

Although the decision on the ADR point is short, it raises several importance issues concerning the application of *PGF*, the parties' autonomy to choose the most appropriate time to engage with an ADR procedure, and the relevance of the complexity factor.

The court in *Ali* adopted the correct forensic approach in carefully dissecting the facts of the case and analysing the behaviour of the parties both at the pre-action stage and during the proceedings. Rather than simply applying the principles of *PGF* mechanistically, the court correctly noted that, although the claimants did not agree to take part in an ADR process during the pre-action stage, they constructively responded to the defendant's invitations and made clear their intentions to keep the matter under review. Indeed, shortly after issuing proceedings, the claimants responded to the defendant's second invitation to ADR by requesting that the defendant make proposals on the ADR procedure. When a subsequent invitation to mediation was made, the claimants agreed and participated with the mediation process. The claimants conduct was also consistent with their ongoing ADR obligations under the CPR. [18] Further, there was nothing to suggest that any of the parties behaved unreasonably when organising the mediation (as was the case in *Thakkar*) or during the mediation process (as was the case in *Carleton (Earl of Malmesbury) v Strutt & Parker*). [19] The claimants never rejected ADR outright nor did they remain silent to the various ADR invitations nor did they do anything to frustrate the respective parties' ADR obligations.

A further, interrelated point raised by *Ali* is the timing of ADR. The defendant's arguments focused on the claimants' refusal to engage with ADR during the early stages of the dispute—at the pre-action stage and immediately after the claim form was issued. For the defendant, these were the crucial time-frames for the assessment of unreasonable refusal and therefore justifying the application of *PGF* and *Thakkar*. Indeed, the courts have acknowledged that timing of the ADR participation can be an issue to consider when dealing with costs. The difficulty that this issue raises for the courts and litigating parties is the need to strike the correct balance between the need for parties to discharge their ADR obligations and the need to uphold the parties' autonomy to choose the most appropriate time to engage with an ADR procedure. In *Witham*, HHJ Coulson QC (as he then

was) explained the difficulties in parties engaging in mediation early in the process (possible waste of costs if the matter does not settle) and later (the incurring of substantial costs) and said this regarding timing:

"The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible." [20]

The potential adverse consequences of trying to achieve the correct timing with ADR has been highlighted by Sorabji who had observed that "the difficulty th ***C.J.Q. 412*** at exists in identifying the critical time when mediation and other forms of ADR might prove most beneficial and where a refusal to enter into such a process is most likely to be found to be unreasonable is a serious limiting factor to the successful development of the culture of settlement which Lord Woolf proposed in the two Access to Justice reports. [21]

Although not directly dealt with by Arnold J, the conclusion in *Ali* appears to strike the correct balance on the issue of timing and unreasonable behaviour—the claimants continued to respond constructively to the defendant's ADR invitations and they participated in mediation. Although the claimants raised the complexity factor at the pre-action stage, that issue was not used in any way to completely resist or frustrate or undermine the parties' respective ADR obligations. In fact, despite raising the complexity factor, the claimants agreed with the defendant's observations that some of those issues could be explored further during the mediation. If, however, the claimants had raised the complexity factor and relied on it to completely reject ADR or to frustrate the ADR dialogue or process, then the courts would be justified in penalising this behaviour in costs. In *Burchell v Bullard* [22] the defendant had refused to engage with mediation and attempted to justify its refusal by invoking the complexity factor. However, Ward LJ dismissed the defendant's argument that the case was too complex for mediation as "nonsense". As his Lordship explained:

"The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. … There was clearly room for give and take. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense." [23]

In conclusion, the courts should remain vigilant when confronted with PGF arguments on costs and should, as illustrated by Ali, take a careful forensic approach when assessing unreasonable conduct. A party may be justified in raising the complexity factor but that would not justify a complete rejection of ADR. The ADR duty is an on-going one and as such litigating parties are required to actively engage in an ADR dialogue. This on-going duty and dialogue will mean that, if the matter is not ripe for ADR at a particular time, it may be at a later stage when the issues have matured. Therefore, in exercising its discretion on costs, the courts should only penalise a party when it is clear that a party has clearly failed to respond to an invitation to ADR; to engage in a constructive ADR dialogue or where its behaviour is such that it undermines or frustrates the parties' ADR dut ***C.J.Q. 413*** y.

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Footnotes

1 *[2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386*. For a critique of the *Halsey* decision from various perspectives, see A. Cheevers, "Voluntarism in court-connected mediation in Ireland —is it time for a rethink?" (2018) 37 C.J.Q. 98; D. Girolamo, "Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales" (2016) 35 C.J.Q. 162; M. Ahmed, "Silence in the face of invitations to mediate" (2014) 73 C.L.J. 73; G. Meggitt, "PGF II SA v OMFS Co and compulsory mediation" (2014) 33 C.J.Q. 335; A.K.C. Koo, "Unreasonable refusal to mediate: the need for a principled approach—PGF II SA v OMFS Co 1 Ltd" (2014) 33 C.J.Q. 261; P. Taylor, "Failing to respond to an invitation to mediate" (2014) 80 Arbitration 470; E. Suter, "Unreasonable refusal to mediate and costs" (2015) 81 Arbitration 2.

2 *[2004] EWCA Civ 576; [2004] 1 W.L.R. 3002*. For a recent discussion of *Halsey* and whether the cost sanctions available under the Irish Mediation Act 2017 for a party's unreasonable refusal to engage in civil or commercial

mediation are compatible with ECHR art.6 and the Constitution of Ireland art.40.3, see R. Feehily, "Creeping compulsion to mediate, the Constitution and the Convention" (2018) 69 N.I.L.Q. 127.

3 The non-exhaustive factors are: the nature of the dispute; the merits of the case; whether other settlement methods have been attempted; whether the costs of mediation would be disproportionately high; whether any delay in setting up and attending ADR would have been prejudicial; whether the ADR process has a reasonable prospect of success.

4 CPR r.44.4 sets out the factors the court will take into account when assessing costs. CPR r.44.4(3)(a) states the factors include "(a) the conduct of all the parties, including in particular — (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".

5 For example, Ward LJ in *Burchell v Bullard [2005] EWCA Civ 358; [2005] C.P. Rep. 36*: "The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. … There was clearly room for give and take. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense" (at [41]). See also the comments of Rix LJ in *Rolf v De Guerin [2011] EWCA Civ 78; [2011] C.P. Rep. 24*.

6 For example Patten LJ in *Gore v Naheed [2017] EWCA Civ 369; [2017] 3 Costs L.R. 509* that the dispute raised quite complex questions of law which made it unsuitable for mediation.

7 *PGF [2014] 1 W.L.R. 1386* at [35].

8 *PGF [2014] 1 W.L.R. 1386* at [34]. In *R. (on the application of Crawford) v Newcastle upon Tyne University [2014] EWHC 1197 (Admin)* the defendant, who remained silent to the claimant's offer of mediation, was not found to have been unreasonable because at the time the parties were fully engaged with another ADR process, namely adjudication before the Independent Adjudicator.

9 *PGF [2014] 1 W.L.R. 1386* at [56].

10 *PGF [2014] 1 W.L.R. 1386* at [56].

11 *Nigel Witham Ltd v Smith [2008] EWHC 12 (TCC); [2008] T.C.L.R. 3* and *S v Chapman [2008] EWCA Civ 800; [2008] E.L.R. 603*. For a detailed critical analysis of *Nigel Witham Ltd* and *Chapman*, see J. Sorabji, "Costs—further developments from Halsey: Nigel Witham Ltd v Smith & Isaacs and S v Chapman" (2008) 27 C.J.Q. 427.

12 *[2018] EWHC 840 (Ch); [2018] 2 Costs L.R. 373*.

13 *[2017] EWCA Civ 117; [2017] 2 Costs L.R. 233*. For a critical analysis of the decisions in *Thakkar* and *Gore* see M. Ahmed, "Mediation: the need for a united, clear and consistent judicial voice" (2018) 37 C.J.Q. 13.

14 *Ali [2018] 2 Costs L.R. 373* at [29].

15 *Thakkar [2017] 2 Costs L.R. 233*.

16 *Thakkar [2017] 2 Costs L.R. 233* at [27].

17 *Thakkar [2017] 2 Costs L.R. 233* at [31].

18 The parties must consider ADR during the pre-action stage and if the matter cannot be settled at that stage then the ADR duty is a continuing one for both parties—see, for example, CPR r.1.

19 *[2008] EWHC 424 (QB); 118 Con. L.R. 68*.

20 *Witham [2008] T.C.L.R. 3* at [32].

21 J. Sorabji, "Costs—further developments from Halsey: Nigel Witham Ltd v Smith & Isaacs and S v Chapman" (2008) 27 C.J.Q. 427, 430–431.

22 *Burchell [2005] C.P. Rep. 36*.

23 *Burchell [2005] C.P. Rep. 36* at [41]. Similar approaches were taken in *Rolf v De Guerin* and in a number of neighbour boundary disputes such as *Bramwell v Robinson [2016] EWHC B26 (Ch)* and *Faidi v Elliott Corp [2012] EWCA Civ 287*. However, in the recent decision of *Gore v Naheed*, which adopted a completely divergent approach to *Thakkar*, Patten LJ upheld the *Halsey* merits factor in justifying a refusal to mediate and by extension his Lordship reinforced the complexity factor when he stated that the dispute raised quite complex questions of law which made it unsuitable for mediation.

