Refusal to mediate may in court litigation deprive successful party of costs

The rise in popularity of private commercial mediation changed the environment in which courts may judicially exercise their discretion on costs.

The general rule is that the costs orders should follow the result, unless there are in all the circumstances of the case reasonable grounds for depriving the successful party of its costs (*Fripp v Gibbon & Co* 1913 AD 354 at 357; *Merber v Merber* 1948 (1) SA 446 (A) 452; *Ferreira v Levan and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) [3]; *Alexander v Minister of Justice and Others* 2009 (2) NR 712 (HC) [80]).

In *PGF II SA v OMFS Co I Ltd* [2013] EWCA Civ 1288 the Court of appeal in the special circumstances of that case upheld the decision of the court of first instance to deprive the successful party, who had ignored an invitation by the unsuccessful party to mediate, of its costs. Patrick Taylor *Failing to Respond to an Invitation to Mediate* (2014) 80 Arbitration 470 summarised the effect of that decision as follows at 471-472:

"1. Parties are now on notice that they cannot refuse to mediate (or ignore a request to mediate, which amounts to the same thing) unless they have a valid and justifiable reason for doing so. If they do refuse they place themselves at risk of having to bear their own costs even if ultimately successful.

2. The scope for arguing that one's reason for refusal is valid and justifiable is narrowing. Briggs L.J. made it clear that one of the benefits of mediation is that fresh thinking is introduced into a situation which to the parties may seem intractable.

3. A costs decision by the court which does not take proper account of any proposals for mediation which have been brought to its attention is not in line with the court's restated policy of encouraging the use of mediation.

Although some may read this judgment as an endorsement of *Halsey*[1] it can equally be read as the evolution of *Halsey* into something more pro-mediation. In order to arrive at that conclusion one has only to imagine what will now be said inside lawyers' consulting rooms—solicitors who fail to advise their clients that mediation is, if nothing else, a sensible precaution, risk criticism. By contrast, lawyers run few risks when advising their clients to mediate. Whilst lawyers who are skeptical about mediation may, in view of this new environment, begin mediation in cynical mood, it is rare for them to fail to engage once immersed in the process. Who knows, even the sceptics may quickly become converts."

(See also Erich Suter *Unreasonable Refusal to Mediate and Costs* (2015) 81 Arbitration 2 a copy of which is attached hereto).

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1 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.