

Received an invitation to mediate? What is the cost of burying your head in the sand?

"Oh no, they want to mediate! Let's bury our heads in the sand and hope they forget about the idea."

"There's no point mediating, we are too far apart!"

Both feelings may be common sentiments of parties in dispute.

But what view does the Court take of such sentiments?

Sanctions on Parties who refuse to Mediate

It has long been established in [Halsey v Milton Keynes NHS Trust \(2004\) EWCA Civ 576](#) that sanctions may be imposed on parties who unreasonably refuse to mediate.

Until recently case law was largely about penalties for failure to mediate being imposed on parties who go to court and win. In those cases, the legal costs the winner recovered from the loser could be reduced by approximately one third.

What if the party unwilling to mediate is the losing party?

Two very recent cases have considered this.

In [Reid v Buckinghamshire Healthcare NHS Trust \(2015\) EWHC B21](#) an offer to mediate by the Claimant was refused, apparently with no reasons being given, about six weeks later. The Claimant ultimately won at court, and there followed a hearing about how much of its legal costs it was entitled to recover from the Defendant. Master O'Hare ordered the Defendant who refused to mediate to pay the Claimant's costs on an indemnity basis from the date when they received the offer to mediate. He said in his judgment:

"If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate."

In a further recent case [Bristow v Princess Alexandra Hospital NHS Trust \(Case HQ 12X02176\)](#) the Master took an even stronger view and ordered all costs from the outset on an indemnity basis to be paid by the party who had refused to mediate.

Here, the Claimant's offer to mediate was refused three months later, giving no reason other than that the case had been set down for detailed assessment. At the hearing, the defendant told the Master they did not enter into mediation because the parties were so far apart. The Master held on these facts that the defendant was unreasonable in failing to enter into mediation.

How quickly must you reply to an invitation to mediate?

In [PGF II SA v OMFS Company 1 Limited \(2013\) EWCA Civ 1288](#) the court held that ignoring an offer to mediate amounted to an unreasonable refusal to mediate. It further commented that this could arise by not replying within two weeks.

TOP TIPS

- Invite the other party to mediate at a reasonably early stage.
 - If they agree, you may avoid the costs and heartache of prolonged litigation or arbitration;
 - If they refuse unreasonably, you will be protecting your legal costs to some extent.

- If you receive an invitation to mediate:
 - consider it promptly and seriously;
 - reply within two weeks;
 - if you refuse the invitation, give genuine and reasonable reasons. *Halsey* (referred to above) stated reasonableness will depend on:
 - The nature of the dispute
 - The merits of the case
 - The extent to which other settlement methods have been attempted
 - Whether the costs of the ADR would be disproportionately high
 - Whether any delay in setting up and attending the ADR would have been prejudicial
 - Whether the ADR had any reasonable prospect of success.

WIFM as an adviser?

Finally, a cautionary note: in *Bristow* the Master commented: “the solicitors...do not really lose out as a result of the failure to mediate.”

A recent survey of what clients are looking for in their solicitors found “having a real understanding of the client’s needs” was the top criterion, and “a reputation for obtaining results” was also important. A solicitor who discusses mediation with their client at an early stage is likely to be addressing the first criterion, and one who goes to mediation with their client has an excellent chance of achieving the second one. Therefore for solicitors, also, much is at stake when there is an invitation to mediate on the table.

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