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Key case law on mediation and costs

CASE	TOPIC	KEY FINDINGS
Hurst v Leeming [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379 Chancery Division Lightman J [This case went to the Court of Appeal, but not on this issue]	Exception to the general costs sanctions rule	• If one party offers mediation and the other party refuses it, the party refusing mediation has to have good and sufficient reasons for doing so, otherwise may be penalised in costs. • Although mediation is not necessary, dispute resolution is at the heart of the justice system: where a party refuses such a resolution, it is reasonably possible that there will be adverse costs consequences. • A party can refuse mediation where, on an objective view, it has no reasonable prospect of success. However, refusal is a high-risk course to take; if the court finds that there was a real prospect, the party refusing may be severely penalised. • In this case, the defendant reasonably took the view that by reason of the character and attitude of the claimant, mediation had no prospect of getting anywhere.
Dunnett v Railtrack plc [2002] EWCA Civ 303, (Practice Note) [2001] 1 WLR 2434 Court of Appeal Brooke, Robert Walker and Sedley LJJ	Costs sanctions, if party fails to accept offer to mediate	• When the court asked the defendants why they were not willing to contemplate ADR, they said it was because this would necessarily involve the payment of money, which they were not willing to contemplate, over and above what had already been offered. This was a misunderstanding of the purpose of ADR. • Skilled mediators can achieve results satisfactory to both parties in many cases which are quite beyond the power of the courts to achieve. • A mediator may be able to provide solutions which are beyond the powers of the court to provide. • If a party turns down the chance of ADR, when suggested by the court, they may face uncomfortable costs consequences. • It was not appropriate to take into account the offers that had been made, given the defendants' refusal to contemplate ADR. • The encouragement and facilitating of ADR by the court is an aspect of active case management, which in turn is an aspect of achieving the overriding objective under CPR. The parties have a duty to further that objective and to consider seriously the possibility of ADR procedures.
Société Internationale de Télécommunications Aeronautiques SC v Wyatt Co (UK) Ltd and others (Maxwell Batley (a firm), Pt 20 defendant) [2002] EWHC 2401 (Ch) Chancery Division Park J	Conduct of the parties before and during proceedings	• The Part 20 defendant was wholly successful in the case and in normal circumstances would receive an order for its assessed costs, to be paid by the main defendant. However, the Part 20 defendant had on three occasions before the case came to trial declined to participate in mediation: should he therefore be denied some or all of his costs by this refusal? • It would be a grave injustice to deprive the Part 20 defendant of any part of their costs on the ground that they declined the defendant's self-serving demands.
McCook v Lobo and others [2002] EWCA Civ 1760, [2003] ICR 89 Court of Appeal Pill, Judge and Hale LJJ	Exception to the general costs sanctions rule	• Before the appeal hearing, the claimant's solicitors wrote to the solicitors of the first and second defendants suggesting mediation. The solicitors did not reply. They should have done so as a matter of courtesy and because of the risk of having to explain to the court why they had not considered mediation. • In this case, however, mediation would have had no realistic prospect of success and therefore there was no reason to deprive the defendants of any of their costs.

Leicester Circuits Ltd v Coates Brothers Plc [2003] EWCA Civ 333 Court of Appeal Judge and Longmore LJJ and Sir Swinton Thomas	Withdrawal from mediation: bearing on costs	• The whole point of having mediation – and, once you have agreed to it, proceeding with it – is that the most difficult of problems can sometimes, indeed often are, resolved. • It hardly lies on the mouths of those who have agreed to mediation to assert that it had no realistic prospect of success. • The unexplained withdrawal from an agreed mediation was of significance to the continuation of the litigation. While it could not be assumed that mediation would be successful, there was certainly a prospect that it would have done if it had been allowed to proceed: that therefore bears on the issue of costs.
Halsey v Milton Keynes General NHS Trust; Steel v Joy and another [2004] EWCA Civ 576, [2004] 1 WLR 3002 Court of Appeal Ward, Laws and Dyson LJJ	Guidelines for costs when mediation refused	• It is one thing to encourage parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. To oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. • The key to ADR's effectiveness is that these processes are voluntarily entered into by the parties. • If the court were to compel parties to enter into mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. • In deciding whether to deprive the successful party of some or all of the costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The burden is on the unsuccessful party to show why there should be a departure from the general rule. It would need to show that the other party acted unreasonably in refusing to agree to ADR. • In determining unreasonableness, the court must have regard to all the circumstances of the particular case. This will include: (i) the nature of the dispute; (ii) the merits of the case – the fact that a party reasonably believes that he has a strong case is relevant to the question of whether he has acted reasonably in refusing ADR; (iii) the extent to which other settlement methods have been attempted; (iv) whether the costs of ADR would be disproportionately high; (v) whether any delay in setting up and attending the ADR would have been prejudicial; and (vi) whether the ADR had a reasonable prospect of success – this will often be relevant to the reasonableness of one party's refusal to accept the other's invitation to agree to mediation, but is not necessarily determinative of the fundamental question of whether the successful party acted unreasonably in refusing to agree to ADR.

Allen and another v Jones and another [2004] EWHC 1189 (QB) Queen's Bench Division Bernard Livesey QC sitting as a Deputy High Court Judge	Conduct and proportionality as determining factors in assessing costs	• Where there was no issue of conduct and no question of proportionality, and where the court had not itself either ordered or suggested that mediation should take place, the mere failure to submit to a request by the unsuccessful party for mediation, in a case such as this, ought not as a matter of principle of itself result in the successful party being deprived of his entitlement to the usual order for costs. • It was difficult to understand why the successful party should be penalised in costs simply because he had not exposed himself to the pressure of direct arguments from the opposite sides which the judge had by his judgment concluded to be incorrect. • Failure to agree mediation was a relevant factor and any failure should be given such weight as in all the circumstances of the case was appropriate; but to elevate it to the level of a predominant factor ran the risk of fettering the court's discretion.
Reed Executive Plc and another v Reed Business Information Ltd and other [2004] EWCA Civ 887; [2004] 1 WLR 3026 Court of Appeal Auld, Rix and Jacob LJJ	No disclosure of 'without prejudice' communications, in order to determine whether the party was unreasonable in rejecting ADR	• The court could not order disclosure of 'without prejudice' negotiations against the wishes of one of the parties to the negotiations: Halsey considered that the rule in Walker v Wilsher was still good law. • In some cases, when it came to the question of costs, the court would not be able to decide whether one side or the other had been unreasonable in refusing mediation. • Such conclusion was not disastrous or damaging, from the point of view of encouraging ADR. • It was open to either party to make open offers of ADR or offers that were 'without prejudice save as to costs'. The opposite party could respond to such offers, either openly or in the 'without prejudice save as to costs' form. • The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the Calderbank procedure, made available to the court but only when it comes to consider costs. • If an adverse inference were to be drawn against a party refusing disclosure of 'without prejudice' negotiations, there would be clear indirect pressure on it to permit disclosure. That would be contrary to principle.
Re Midland Linen Services Ltd, Chaudhry v Yap and others [2005] EWHC 3380 (Ch) Chancery Division Leslie Kosmin QC sitting as a Deputy High Court Judge	Part 36, ADR and costs	• The court has a wide discretion under CPR Part 36.11(3) [costs consequences of claimant's acceptance of offer from defendant]. In exercising that discretion it must endeavour to come to a determination which is fair and just in all the circumstances. It must obviously pay regard to the circumstances in which the offer was made and accepted, ie late in the day, but it is not disbarred from considering more general matters such as the willingness or otherwise of the parties to resolve the dispute by mediation or negotiation. • An unreasonable refusal to mediate or negotiate is a factor that the court may take into account when deciding whether a successful party should be deprived of all or part of its costs. • There is no power in the court to order parties who are unwilling to mediate to mediate. • In this case, there was no serious engagement in the process of mediation to justify a finding in accordance with Halsey that the petitioner should in some way be deprived of his costs. • There was no evidence that the defendants had a serious intention to go down the route of mediation, communicated to the other side; there had been repeated disputes over the appointment of independent experts; there had been a dispute over the valuation expert; and the case was marked by a pattern of making and withdrawing of offers.

		• Given the atmosphere that had been generated between the parties, the court doubted that a successful mediation could have taken place. While both parties stated their willingness to negotiate, their approach in negotiation was both inconsistent and uncertain.
Wills v Mills & Co Solicitors [2005] EWCA Civ 591 Court of Appeal Mance LJ	Reasonableness in refusing mediation	• The factual circumstances overall in the case were such that the applicant could not hope to discharge the burden on her of showing that the defendants acted unreasonably in refusing mediation. • Although the court in Halsey had stated that prior encouragement by the court to mediate would, where it existed, be a relevant factor, the court did not believe that the court below had given such encouragement; even if it had, it was extremely weak and so informal that it had not been recorded in the judge's order. • The defendants were entitled and bound to take the view that they needed to know how the case was put before considering mediation. Once they knew, they were also entitled to take the view they did, that the claimant's application was bound to fail.
#Burchell v Bullard and others [2005] EWCA Civ 358, [2005] BLR 330 Court of Appeal Ward and Rix LJJ	Reasonableness prior to Halsey	• Appeals against orders for costs are notoriously difficult to sustain. That is because the trial judge has a very wide discretion with the result that the court will only interfere with his decision if he has exceeded the generous ambit within which there is usually much room for reasonable disagreement; or because (even more unusually) he has erred in principle. • The small building dispute is par excellence the kind of dispute which lends itself to ADR. The merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. The stated reason for refusing mediation – that the matter was too complex for mediation – was plain nonsense. The costs of ADR would have been a drop in the ocean compared with the fortune that was spent on this litigation. The court was of the view that mediation would have been successful. • However, one must judge the reasonableness of their actions against the background of practice, a year earlier than Halsey. In the light of the knowledge at the times and in absence of legal advice, the court could not condemn the defendants as having been so unreasonable that a costs sanction should follow many years later. • The profession must take no comfort from this conclusion. Halsey 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, simply because it was made before the claim was issued. • The defendants, in this case, escaped the imposition of a costs sanction; but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.

Daniels v Metropolitan Police Commissioner [2005] EWCA Civ 1512, [2005] All ER (D) 225 Court of Appeal Ward and Dyson LJJ	Principles on which discretion to be exercised	• It is difficult to envisage circumstances where it would ever be right to deprive a successful defendant of some or all of its costs, where it had refused to accept a Part 36 offer. • It would be entirely reasonable for a defendant, especially a public body, to take the view that it would contest unfounded claims and wanted to take a stand; the court should be slow to categorise such conduct as unreasonable and penalise that party through the payment of costs if the litigation was successful. • The court applied Halsey. The court must have regard to all the circumstances including: (i) the conduct if the parties; (ii) whether a party has succeeded on part of its case; (iii) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention. • The conduct of the parties includes: (a) conduct before, as well as during the proceedings, and in particular the extent to which the parties followed any relevant PAP; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
Askey v Wood [2005] EWCA Civ 574 Court of Appeal Chadwick and Longmore LJJ	Mediation a sterile exercise if seeking to apportion liability of an unknown quantum	• The court noted Halsey, which provided that the factors relevant to a decision as to whether there should be a departure from the general rule as to costs following the event include the nature of the case and whether ADR would have had a reasonable prospect of success. • Mediation would be a sterile exercise, where parties are seeking to apportion liability, if the parties do not know, at least in broad terms, what quantum figure is to be apportioned. The court would not therefore depart from the usual order for costs.
Brown v MCASSO Music Productions [2005] EWCA Civ 1546 Court of Appeal Baker and Neuberger LJJ	Conduct of the parties	• In light of what was said in Halsey, a party's unpreparedness to negotiate at a time when the judge was encouraging negotiation could be said to be a more significant matter in relation to costs than the claimant's earlier refusal to mediate.
The Wethered Estate Ltd v Michael Davis and others [2005] EWHC 1903 (Ch), [2006] BLR 86 Chancery Division Clive Freedman QC sitting as a Deputy High Court Judge	Circumstances in which it may be reasonable to refuse mediation	• The substantially successful claimant sought costs against the defendants, who sought to resist such an order, in whole or in part: they had raised mediation as a proposal on a number of occasions; the claimant had delayed going to mediation until well into the proceedings; and on the basis of what happened at the mediation itself. • In the first stage of the dispute, the defendants had kept a van on the claimant's land to put pressure, which was unjustified. Accordingly it was not unreasonable to refuse mediation. In the second period (once the van had been removed but the proceedings had not been begun), there was no communication between the parties, so no points could be taken against the claimant. In the third period (after proceedings had begun), the claimant's solicitors were justified in refusing mediation, because there was a controversy about the factual matrix and in their view the prospects of settlement would be higher once the factual evidence was exchanged. In addition, the nature of the dispute was at that stage difficult to fathom. In the final period, the claimant did proceed to mediation once it believed that the allegations had been adequately set out. This indicated that their objections were bona fide.

		• In relation to the claimant's conduct at the mediation itself, this was an entirely 'without prejudice' process and privilege had not been waived. Evidence as to what happened at the mediation was inadmissible.
LMS International Ltd and others v Styrene Packaging and Insulation Ltd and others [2005] EWHC 2113 (TCC), [2006] BLR 50 TCC Judge Peter Coulson QC	When may an unsuccessful defendant be ordered to pay indemnity costs, having unreasonably refused mediation?	• The judge noted that Halseyconcerned the issue of the possible deprivation of an otherwise successful party of his costs. It was not concerned with the differences between standard and indemnity costs and he was aware of no authority in which a losing party's refusal to mediate on its own justified an order for indemnity costs. • In an exceptional case, a refusal to mediate might justify an order for indemnity costs, such as where the refusal was on any view wholly unjustified, or where it was motivated by completely commercial considerations: not the case here.
#Hickman v Blake Lapthorn and another [2006] EWHC 12 (QB) Queen's Bench Division Jack J	Refusal to negotiate	• The main issue was whether the conduct of the second applicant was unreasonable. Although the situation was different from cases concerning a refusal to agree to mediate, since a refusal to negotiate was also involved, the same test was applicable. • The insurers were not prepared to pay more than they thought the claim was worth because, if costs were taken into account, it would save them money. That was a legitimate stance, since otherwise the threat of a costs consequence could be used to extract more than a claim was worth. In those circumstances it had not been demonstrated that the their position as to negotiation and mediation was unreasonable. • It is not an answer that the unsuccessful party could have protected itself by a Part 36 offer or a payment into court. • The potential saving of costs in comparison with the amount in issue between the parties was not something that was relevant to the reasonableness of a refusal to agree to mediation. It is a factor that can be taken into account but it must be watched carefully.
P4 Ltd v Unite Integrated Solutions Plc [2006] EWHC 2924 (TCC), [2007] BLR 1 TCC Ramsey J	Refusal to mediate unreasonable by reference to Halsey factors	• The claimant's solicitors made a number of offers to mediate, both before issuing proceedings and afterwards, which were rejected in terms. The court held that this rejection was unreasonable, by reference to the particular factors laid down in Halsey. These were: (1) the defendant could not reasonably have thought they had a watertight case: the sums in dispute were large and there were a number of issues which the claimant might have disputed substantially, but only at the hearing; (2) letters from solicitors could not be a proper substitute for ADR, which involves clients engaging with each other and a third party, such as a mediator, to resolve a dispute; there was no proper engagement in the correspondence on the central issues and concerns which are usually the focus of ADR; (3) ADR was not expensive, compared to the total costs of proceeding to trial; (4) there was no delay by the claimant in offering mediation; (5) the case not only had a reasonable prospect of succeeding in settling at mediation but a good prospect. • In normal circumstances, considering the small amount awarded to the claimant, the defendant would have been entitled to its costs from the beginning of the action. However, due to the refusal of the defendant to attend mediation, the claimant was entitled to its costs up to the date of the defendant's Part 36 offer.

Jarrom and another v Sellars [2007] EWHC 1366 (Ch) Chancery Division Christopher Nugee QC sitting as a Deputy High Court Judge	Special circumstance justifying the exceptional course of no order as to costs	• The lack of agenda, lack of detailed proposals, lack of witness statements and the costs involved were not sufficient to justify a refusal to attend a settlement meeting prior to proceedings being issued. • Halsey was applied: while the initial meeting would not have led to the complete settlement of all claims, it would have been preferable to explore what was in issue between the parties and how best the matters could be taken forward without the necessity for litigation.
Nigel Witham Ltd v Smith and another (No 2) [2008] EWHC 12 (TCC) TCC Judge Peter Coulson QC	Unreasonable delay in consenting to mediation may have adverse costs consequences	• The starting point in the consideration of costs is CPR rule 44.3. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order. • In this case, it was not that the defendants refused to mediate at all but that they only consented to mediate very late in the litigation process, when the vast majority of costs had been incurred. • It was not unreasonable for the defendants to consider mediation but only once the claimant had properly set out its claim, particularly given that the claimant was obliged to make some radical amendment to the claim following the commencement of proceedings. • Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. • A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides, which make any subsequent attempt of settlement doomed to fail. • Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. • Compromise and reconciliation did not feature predominantly in the claimant's correspondence; as a result, early mediation had little or no chance of success. • The principles in Halsey might, in an exceptional case, be applicable to the situation where there was a mediation, but very late, when its chances of success were very poor; if it could be shown that the successful party unreasonably delayed in consenting to the mediation, this might lead to an adverse costs order. • In this case, there was nothing to demonstrate that the defendants unreasonably delayed in consenting to the Judicial Settlement Conference (under the CSP); even if there had been an earlier mediation, the claimant's uncompromising attitude meant that it would not have had a reasonable prospect of success.
Carleton and others v Strutt and Parker (a partnership) [2008] EWHC 424 (QB), 118 Con LR 68 Queen's Bench Division Jack J	Causing a mediation to fail because of unreasonable position same as refusing to mediate	• Where a failure to mediate was due to the attitudes taken on both sides, it was not open to one party to claim that the failure should be taken into account in the order as to costs. • The party who agreed to mediation but who then caused the mediation to fail because of his unreasonable position was in the same position as a party who refused to mediate: such conduct could and should be taken into account in the order for costs. • The claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded.

TJ Brent Ltd and another v Black & Veatch Consulting Ltd [2008] EWHC 1497 (TCC) TCC Akenhead J	Application for costs prior to hearing, for failure to comply with PAP	• In circumstances where there had been compliance with the substance of the PAP, the judge was unwilling to order costs for lack of compliance with the detail, especially where: (1) the defendant had not raised the issue when the matter had last been before the judge; and (2) there was no evidence to establish that there was some realistic prospect of success prior to the issue of proceedings of a mediation taking place and that some resolution would have been reached at that mediation. • Halsey and Midland Linen were not of much assistance, as they related to orders being made at the court at the end of the case, when the court is fully informed of the rights and wrongs of the case.
Vale of Glamorgan Council v Roberts [2008] EWHC 2911 (Ch) Chancery Division, Cardiff District Registry Lewison J	Duty on public authorities to suggest mediation?	• Any adjustment of the costs order was not warranted on the ground of settlement; it would be going too far to disallow costs incurred by a local or public authority because that authority did not initiate suggestions for a mediation. • In this case, any reduction in costs on account of partial success and exaggeration would be no more than nominal.
Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC) TCC Coulson J	PAP – withdrawal from mediation	• A party was wrong to cancel a mediation, because: (1) it was an agreed part of the PAP process; (2) without the mediation, there was no way in which the requirement for a 'without prejudice' meeting between the parties could be fulfilled; (3) the mediation was arranged before there was any question of inviting a third party and should have gone ahead without their involvement, especially since the third party had been identified to the defendant much earlier on than the planned date of the proposed mediation; (4) the third party had not participated because of the later service of the defendant's expert report. This was not a reasonable position for them to take. • The judge did not, however, consider that costs should be paid on an indemnity basis, because this 'was a bona fide, but incorrect decision made, perhaps, without any real thought of the ultimate consequences.'
Register of the Corby Group Litigation v Corby Borough Council (Costs) [2009] EWHC 2109 (TCC) TCC Akenhead J	One must judge the decision to refuse ADR at the time that it was under consideration	• The statement in Halseythat the fact a party believes that he has a watertight case is no justification for refusing mediation should be qualified. The fact that a party unreasonablybelieves that his case is watertight is no justification for refusing mediation; but the fact that a party reasonably believes that he has a watertight case may well justify refusing to mediate. • By reference to Hurst, did the defendant acted unreasonably in refusing mediation? The defendant formed the view, based on the claimant's expert reports, that mediation would be 'highly unlikely to be productive in reaching a conclusion'. Whilst hindsight shows that they were wrong, one must judge the decision to refuse ADR at the time that it was under consideration. Given that the defendant had material evidence to support its stances on every material aspect of the Group Litigation issues and that the claimants were adopting a 'scattergun approach', it was not unreasonable to form the view that mediation would not have produced a settlement.