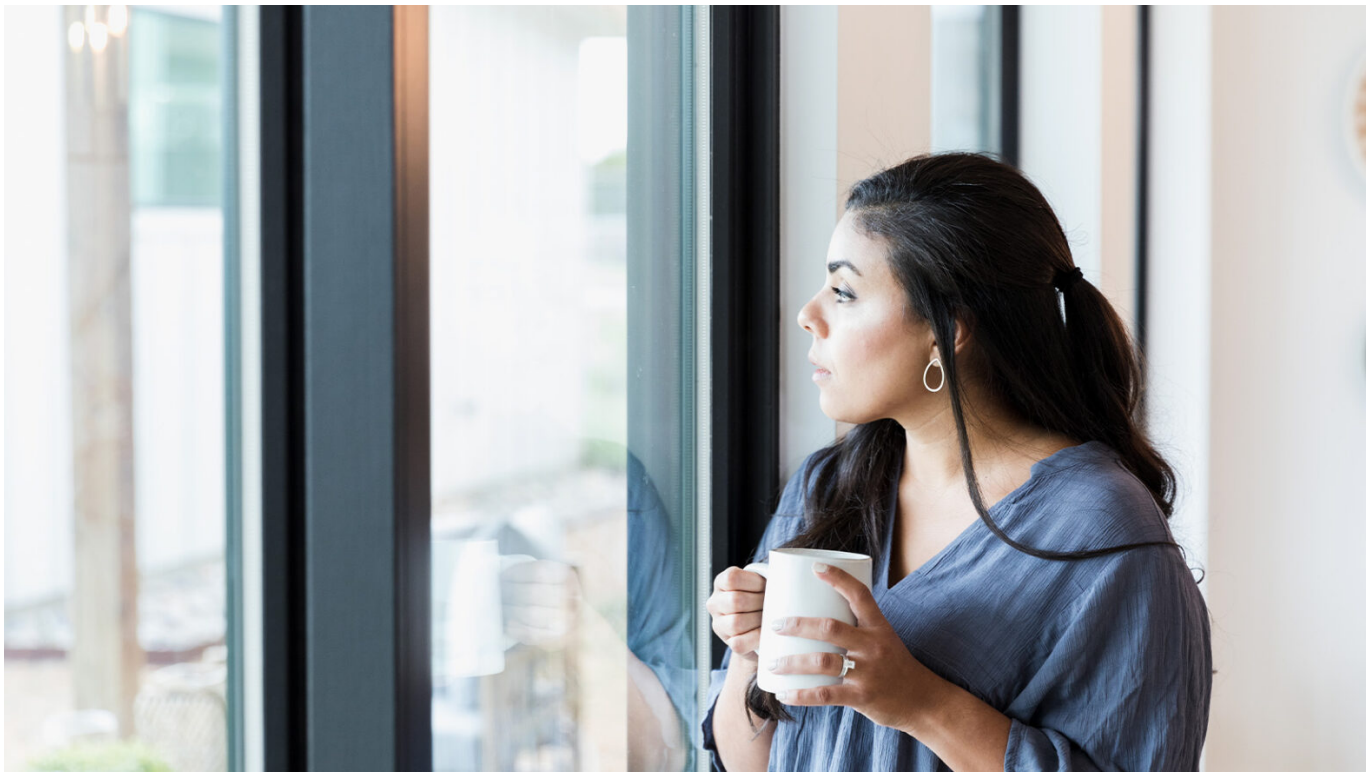
What price for your silence? The decision in Northamber Plc v Genee World Ltd [2024]



What price for your silence? The decision in Northamber Plc v Genee World Ltd [2024] highlights the risks of a costs sanction in not responding to an invitation to attempt mediation.

Since the landmark decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, it is well understood that a party to court litigation who unreasonably refuses to engage with an Alternative Dispute Resolution ("ADR") process, risks being severely sanctioned in costs at trial. Such risks were realised in the recent court of appeal decision in *Northamber Plc v Genee World Ltd and others* [2024] EWCA Civ 428. Here the court not only demonstrated its resolution to impose costs sanctions, but also that the threshold at which a party is deemed to be acting unreasonably in refusing ADR is relatively low.

What happened?

In the Northamber case, the first instance decision of the high court was appealed by the claimant Northamber Plc ("Northamber") on five grounds. The fifth ground concerned the costs order made by the first instance judge against the second defendant ("Mr Singh"). In the first instance decision, Northamber was successful in its primary claim against the first defendant ("Genee"), that Genee breached the exclusive supply agreement it had entered into with Northamber and, that Mr Singh induced Genee's breaches of the same.

In giving the costs judgment after the trial, the judge ordered Mr Singh to pay 70% of Northamber's costs of its claim against him. Northamber appealed this costs award, arguing that Mr Singh should pay 100% of its costs by way of sanction for Mr Singh's failure to respond to Northamber's earlier invitation (via their solicitor's letter in February 2022) to engage in mediation.

The appeal judges declined to order Mr Singh to pay 100% of Northamber's costs, but they did agree "to *impose a modest, but not insignificant, costs penalty by increasing Northamber's costs recovery by an additional 5% to 75%".*

Why is Northamber significant?

The decision in *Northamber* is a potent reminder as to the responsibilities on litigants to conduct litigation reasonably and proportionately (as per the overriding objective in part 1 of the Civil Procedure Rules ("CPR")). This will include compliance with court orders requiring the parties to attempt ADR, as will often be present in most case management directions in multi-track claims (i.e. higher value claims (over £100,000) and more complex claims).

Moreover, *Northamber* suggests the court will be strict as to when a party is deemed to be refusing ADR and thus (as was the case here), acting in breach of a court order calling for the parties to attempt ADR.

The judge in the first instance decision in *Northamber*, was disinclined to award more than 70% of Northamber's claim costs to be paid by Mr Singh, considering that Northamber, in sending one letter to Mr Singh in February 2022 and not chasing for a response, had made a '*half-hearted attempt'* to mediate. The appeal judges, however, overturned this, in upholding the decision in *PGF II SA v OMFS 1 Ltd* **[2013] EWCA Civ 1288**, in which it was held "*that silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable even if a refusal might have been justified by the identification of reasonable grounds*".

On a more general and high-policy level, the decision in *Northamber* is a further example of the court's determination to protect increasingly limited judicial resources and enforce the principle that 'recourse to the court should be the last resort'. Mediation is (under a pilot scheme commenced on 22 May 2024) now compulsory in all small claims (of a value up to £10,000) (see Compulsory mediation on small claims). Decisions such as that in *Northamber* indicate the possible extension of a mandatory requirement to attempt ADR to higher value claims.

Notably, from 1 October 2024 *"promoting or using alternative dispute resolution"* will be added to the court's overriding objective set out in Part 1 of the CPR, as a way of dealing with a case *"justly and at a proportionate cost".* This follows the landmark decision in *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 in which the court of appeal ruled that the courts can stay proceedings and order parties to engage in ADR, even where one or both parties have expressed an unwillingness to engage in the process.

Key takeaways from Northamber

The court will sanction parties who act unreasonably and in breach of court orders by refusing to attempt ADR, and the threshold as to such 'unreasonable conduct' is relatively low; silence or being unresponsive to an invitation to engage in ADR will alone be sufficient.

How can we help?

If you have concerns regarding engagement in mediation or other ADR, or the costs risks in litigation, whether you have issued a claim or are dealing with one, please do get in touch with our commercial dispute resolution team.

Ben Ashworth

Partner