Assensus Limited v Wirsol Energy Limited [2025] EWHC 503 (KB)

(Weighing & assessing oral evidence and costs following the event notwithstanding a refusal to mediate.)

By Arran Dowling-Hussey[1] & Andrew Singer KC[2]

Construction disputes, as indeed is the case with other types of disputes, can have a heavy financial cost for both sides. 'Victory' can in defined circumstances take on a pyrrhic taste if the costs of the proceedings don't go to the winning party. The March 2025 decision in *Assensus* is part of a sequence of important cases dealing with the issue of how costs are, or may be, treated when there has been a refusal to mediate. The case itself arose following the development of the Cleve Hill Solar Park in Kent. Claimant Assensus Limited lost its claim that it was entitled to a bonus of £2.5 million from the defendant's Wirsol Energy Limited who successfully rebutted the contention that the claimed entitlement to the bonus was either contractual (or otherwise). The core issue in the case required the Court to consider oral evidence. Mr. Justice Constable recapped the doubt that can be attributed to oral evidence as seen in decisions such as **Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)**. Notwithstanding that memory can be fallible the court also noted that whilst contemporaneous documents may be an extremely valuable source of evidence they do not 'demand uncritical primacy.' Any contemporaneous documents have to be tested against the facts in their full context. However, for the purposes of this article the straightforward dispute between the parties leading to the substantive decision of **Assensus Limited v Wirsol Energy Limited [2025] EWHC 503 (KB)** is of less interest than **Ascensus Limited v Wirsol Energy Limited (Re Consequential Matters) [2025] EWHC 503 (KB).** The secondary decision on consequential matters was not just defined to the issue of costs but this is the point that will be focussed on below.

In the normal way after Constable J's decision in their favour *Wirsol* sought their costs on the traditional 'costs follow the event' basis. *Assensus* in response argued that *Wirsol* should be penalised due to their refusal to mediate. As has been set out in other articles on the *4-5 Gray's Inn Square* Information Hub there has been an increased emphasis, in recent years, on penalising parties who decline an offer to mediate. In this instance the Court was invited by the claimant to award the successful defendant 70% of their costs as there had been a refusal

[1] Arran Dowling-Hussey is a barrister practising from 4-5 Gray's Inn Square Chambers. He can be contacted at adhussey@4-5.co.uk

[2] Andrew Singer KC is a barrister in the 4-5 Gray's Inn Square Chambers Construction Group. He can be contacted at asingerkc@4-5.co.uk

to mediate. Contrary to the approach in other recent cases which have recently been discussed on the 4-5 Gray's Inn Square Information Hub this submission did not succeed. Costs followed the event. The Court took the view that it was 'improbable' that any mediation would have been successful due to the gap between each sides Part 36 offer (the prospects were " vanishingly small" [para.8]). Defendant *Wirsol* had offered £100,000 and Claimant Assensus had offered £1,041,589. The Court held that whilst *Wirsol* had refused to mediate; the £100,000 Part 36 offer was a 'meaningful sum' in the context of the finding made as to Assensus's 'entitlement.' Where *Wirsol* was unlikely to up its offer, and *Assensus* was unlikely to Moreover, it was found '..the decision not to incur costs (some of which would be irrecoverable) in mediating was not unreasonable.' As a result 'the absence of a mediation in this case does not justify any reduction in Wirsol's costs.'

Josep Galvaz and Arran Dowling-Hussey have previously discussed in their March, 2025 commentary, *Mediation: Cracking The Hardest Nuts- Some Thoughts After DKH Retail Ltd and Others v City Football Group Ltd [2024] EWHC 3231 (Ch), '* DKH rejected arguments that had traditionally been used to resist compulsory mediation. There is now a clear trend towards court-ordered mediation, and parties must carefully consider whether they will oppose such orders. If they maintain that position, they must present a substantive justification beyond vague assertions that mediation is unlikely to succeed or is too late in the day. Following DKH, old 'buzz word' excuses like 'unlikely to succeed' or 'too late in the day' carry far less weight.' It is suggested that Assensus is not in reality a change in the position, just described, but rather an example of a 'substantive justification.' The tide is going in one direction, but it can from time to time be pushed back. Parties can at times refuse to mediate on justifiable grounds particularly where there have been other attempts to settle but need to be sure that their approach is well thought out and objectively likely to succeed.