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Can the Court order parties to mediate? The Court of Appeal rules in *Churchill v Merthyr Tydfil*

Summary

The Court of Appeal's judgment in *Churchill v Merthyr Tydfil* has been reported as marking something of a watershed in the English Court's attitude to negotiated alternative dispute resolution ("**ADR**"). But what does it mean in practice for parties to commercial litigation?

The facts

- The dispute originated as a claim by Mr James Churchill against Merthyr Tydfil County Borough Council (the "**Council**") for damage caused by Japanese knotweed encroaching onto his land from land owned by the Council. When Mr Churchill's solicitors sent the Council a letter of claim, the Council asked why Mr Churchill had not made use of the Council's Corporate Complaints Procedure (the "**CCP**"). The Council warned Mr Churchill that, if he commenced proceedings without using the CCP, it would apply to Court for a stay of proceedings. Mr Churchill issued proceedings in nuisance against the Council in July 2021 without using the CCP, and the Council applied for a stay.
- In May 2022, the Deputy District Judge dismissed the Council's stay application, holding that he was bound to follow the Court of Appeal's judgment in *Halsey*¹, that: "*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 Council sought permission to appeal, and permission was granted by the Court of Appeal. Due to the importance of the points of principle under discussion, several parties intervened in the Court of Appeal proceedings, including the Bar Council of England and Wales and the Law Society.

The issues

The Court had to decide four issues:

1. Was the judge right to think that *Halsey* bound him to dismiss the Council's application for a stay?
2. Can the Court lawfully stay proceedings for, or order, the parties to engage in a non-court-based ADR process?
3. If so, how should the Court decide whether to exercise these powers?
4. Should the judge have acceded to the Council's stay application in this case?

The Court of Appeal judgement

- On Issue 1, the Court of Appeal held that the judgment of Dyson LJ in *Halsey* was not a necessary part of the reasoning that led to the decision in that case.² *Halsey* was primarily a case about costs orders arising out of fatal accident and personal injury claims, and whether parties had acted unreasonably in refusing to mediate. It was not a case about whether parties should be ordered to mediate. The judge was therefore not bound by it.

¹ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, esp. [9-10]

² Also referred to by the Latin term "*obiter*".

- In deciding Issue 2, the Court considered cases from the European Court of Human Rights, pre-Brexit cases from the Court of Justice of the European Union, and domestic cases. The Court held that, as a matter of law, the Court can lawfully exercise the relevant powers provided that the order: (i) does not impair the very essence of the claimant's right to a fair trial; (ii) is made in pursuit of a legitimate aim; and (iii) is proportionate in achieving that aim.
- Regarding Issue 3, the Court elected not to lay down fixed principles as to what factors would be relevant to determining how the Court's power should be exercised, holding that the judge who is considering whether to make the order will be best placed to decide what is relevant to the proceedings in hand.
- As to Issue 4, the Court declined to make any order regarding the Council's application as, among other things, the events underlying the Council's claim had moved on considerably since July 2021.

Comment

- This judgment confirms that, in appropriate circumstances, English Courts can order the parties to take part in a compulsory ADR process (and stay proceedings in order for this to happen) as long as the order: (i) does not impair the very essence of the claimant's right to a fair trial; (ii) is made in pursuit of a legitimate aim; and (iii) is proportionate in achieving that aim.
- It is currently unclear what that might look like in practice, and what the consequences might be for parties who refuse to comply. The Bar Council, as intervener, submitted that eleven factors were relevant to the exercise of the Court's discretion, including the form of ADR proposed, the urgency of the case and whether the delay may cause any limitation issues.³ The Court said that these factors were "*likely to have some relevance*", and it is possible that they may form a starting point for Courts considering whether to order ADR.

Author



Lois Day

Knowledge development lawyer, London

D: +44 20 7809 2537

E: lois.day@shlegal.com

Contact us

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³ For the full list of factors, see [61].