UK Compulsory Mediation Ruling Still Leaves Courts Leeway

By **Alexander Oddy, Natasha Johnson and Maura McIntosh** (December 11, 2023)

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On Nov. 29, the Court of Appeal of England and Wales delivered a landmark judgment in Churchill v. Merthyr Tydfil County Borough Council,[1] which established that the courts can order parties to mediate or engage in some other form of alternative dispute resolution or stay the proceedings to enable the parties to engage in ADR. The decision overturns what was thought to be a long-standing English law prohibition on courts compelling ADR.

This article looks at the decision and its implications for parties to commercial litigation. In particular, the article considers when the courts will exercise the power to compel ADR, the factors likely to be taken into account and the continued scope for imposing costs sanctions for an unreasonable refusal to mediate.

The stay application was dismissed in the Churchill case.

The Court of Appeal's decision arose in the context of a nuisance action brought by a property owner against the local borough council relating to Japanese knotweed encroaching from the council's adjoining land.

The council argued that the claimant should have made use of the council's complaints procedure before issuing proceedings and applied for a stay to allow that to happen.

The deputy district judge dismissed the stay application. He held that the claimant had acted unreasonably and contrary to the relevant pre-action protocol by failing to engage with the complaints procedure. However, he considered himself bound to dismiss the application as a result of the Court of Appeal's 2004 decision in Halsey v. Milton Keynes General NHS Trust.[2]

In Halsey, Justice John Dyson explained that the court had heard arguments on the question of whether the court has power to order parties to mediate their disputes against their will. He stated:

> It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us 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.

Since Halsey, on the basis of those comments, it has been widely accepted that the English courts can strongly encourage parties to mediate, but cannot oblige them to do so.

What did the Halsey case decide?

A key issue for the Court of Appeal in the Churchill case was the question of what the

Halsey case actually decided and, in particular, whether the comments in that case on the court's power to compel mediation — or the lack of such power — were in fact binding precedent. The court concluded that they were not.

In Halsey, the question that the Court of Appeal had to consider was whether a costs sanction should be imposed against the successful parties in the two cases under appeal on the grounds that they had refused to participate in ADR.

The court held that, in each case, there should be no costs sanction as it had not been established that the refusal was unreasonable. It identified a number of factors as relevant in deciding whether a refusal to mediate was unreasonable, and should therefore result in costs sanctions. These are often referred to as the Halsey factors.

It was in that context that Justice Dyson made his comments on the question of whether the court had power to order parties to mediate against their will. This was not a necessary step in reaching the court's conclusions on the issue decided in the appeals, and therefore the comments were not binding in future cases.

What power do courts have to compel ADR?

The Court of Appeal in the Churchill case was therefore free to decide for itself the question of whether the court could compel ADR and, in particular, whether that would be compatible with the right to a fair trial under Article 6 of the European Convention on Human Rights, or ECHR.

Having considered relevant cases from the European Court of Human Rights, or ECtHR, and pre-Brexit decisions of the Court of Justice of the European Union, as well as domestic case law, the Court of Appeal held that the court does have the power to order parties to engage in ADR, provided that the order:

- Does not impair the very essence of the claimant's right to a fair trial in Article 6 of the ECHR;
- Is made in pursuit of the legitimate aim of settling the dispute fairly, quickly and at reasonable cost; and
- Is proportionate to achieving that aim.

The court noted that its conclusion was supported by the Civil Justice Council's June 2021 report on compulsory ADR.

The report expressed the view that "any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights," and "we think the balance of the argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR."

You can lead a horse to water, but you can't make it drink.

In Churchill, the Court of Appeal noted Justice Dyson's comment in the Halsey case that, even if the court had jurisdiction to order unwilling parties to refer their disputes to

mediation, it was "difficult to conceive of circumstances in which it would be appropriate" to do so, since the hallmark of ADR is that it is voluntary and nonbinding.

If the court did compel parties to mediate in the face of their objections, he suggested, it would do nothing except add cost and potential delay and could damage the perceived effectiveness of ADR.

Although Justice Dyson did not express it in these terms, the underlying thesis might be summed up in the old adage, "You can lead a horse to water, but you can't make it drink."

In the Churchill case, the Court of Appeal took a different view — in essence, although you can't make the horse drink, once it gets to the water it might well find it's thirsty. As the court put it:

> Experience has shown that it is extremely beneficial for the parties to disputes to be able to settle their differences cheaply and quickly. Even with initially unwilling parties, mediation can often be successful.

When will the court exercise its power?

In Churchill, the Court of Appeal deliberately did not lay down fixed principles as to when the court should order the parties to engage in ADR. It noted that many factors may be relevant, depending on all the circumstances, and it "would be undesirable to provide a checklist or a score sheet for judges to operate."

It agreed, however, that various factors suggested by the Bar Council, which intervened in the appeal, were likely to have some relevance. These included, among other things:

- Whether the parties were legally represented;

- The urgency of the case and the reasonableness of the delay caused by ADR;

- Whether there was any realistic prospect of the claim being resolved through ADR; and

- The reasons a party gave for not wishing to engage in ADR, for example, if there had already been a recent unsuccessful attempt.

Churchill raises questions on costs sanctions for unreasonable refusal.

Where does Churchill leave the court's decision in Halsey as regards potential costs sanctions for an unreasonable refusal to mediate? Is there still room for the court to impose sanctions where a party has refused to mediate, but the court has not exercised its powers of compulsion?

The interplay between the decisions will no doubt be played out in the courts, but there would not appear to be any logical inconsistency in a court declining to order the parties to engage in ADR, but nonetheless determining that a party's refusal to do so was unreasonable and should result in costs sanctions.

In Churchill, the Court of Appeal noted that the factors suggested by the Bar Council, which the court agreed were likely to be relevant to the discretion to compel ADR, mirrored — at least to some extent — the factors discussed by the Court of Appeal in Halsey as being relevant to whether a party should have costs sanctions imposed for unreasonably refusing ADR.

However, that does not mean the questions are identical or that the factors, and other relevant circumstances, will necessarily lead to the same conclusion on the two questions.

One size does not fit all.

The Court of Appeal's decision not to seek to dictate how courts should exercise the power to compel parties to engage in ADR is welcome. The power applies to a very broad range of disputes, and it is helpful that the court has recognized that one size will not necessarily fit all.

Parties to complex commercial litigation, in particular, will generally be both sophisticated and well-advised, and will almost invariably decide of their own initiative to mediate, or engage in some other form of ADR, at an appropriate stage. The point at which a mediation is likely to be valuable, and will have the greatest chance of success, is something the parties and their lawyers will be best placed to assess in most cases.

This was recognized by the Civil Justice Council in its August 2023 review of pre-action protocols, which recommended a new mandatory obligation to engage in pre-action ADR.

The council said it would consider in stage two of its review whether there should be a more flexible approach for commercial proceedings in the Business and Property Courts. This was prompted by "something approaching a chorus" of commercial lawyers raising concerns that the recommended approach would be too prescriptive in that context.

Similarly, it seems likely that judges in complex commercial cases will take into account the nature of the dispute and the sophistication of parties in determining whether and when it may be appropriate to exercise the power to compel mediation. It may be expected that the courts will, in most cases, allow parties to determine for themselves when the time is right, using compulsion only with the most intransigent parties and only as a last resort.

Perhaps the real challenge for judicial case management is to spur litigants to use mediation or another appropriate ADR process at as early a stage in the dispute as is likely to be constructive.

While mediation earlier in the dispute cycle in complex commercial disputes may mean that the event is a staging post on the road to resolution outside the courtroom, it will very rarely be a waste of time and effort. Decision makers can connect, issues can be assessed and the route to consensual resolution explored in contrast to the road to trial.

Since settlement rates in complex commercial mediation "on the day" have in practice been in decline for several years at least, litigants will often benefit from encouragement by the court to get round the table and make a start.

After all, the sooner an ADR process starts, the greater the potential for saving in costs, litigant management time and, of course, court resources.

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[1] Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416.

[2] Halsey v Milton Keynes General NHS Trust[2004] EWCA Civ 576.