A seismic shift in approach to mediation

Mandatory ADR is here to stay, write **Georgina Squire & Camilla Pratt**

IN BRIEF

- In *Churchill*, the Court of Appeal set new standards for court-ordered mediation, allowing a stay of proceedings in some situations.
- The Civil Procedure Rules Committee is currently looking at a CPR rule change to reflect *Churchill* and give the courts greater powers to force parties to mediate their disputes.

There have been many discussions on the topic of mandatory alternative dispute resolution (ADR) and it seems to be an issue that is here to stay, with the courts moving further towards compelling parties to mediate. This is particularly relevant in light of the increasing costs of legal proceedings and proportionality concerns being at the forefront of the judiciary's mind. We see regularly at costs management conferences the courts' desire to look for ways to reduce costs. They are also battling with an ever-present backlog and concerns about wasted resources in the civil justice system in England and Wales.

The Civil Justice Council address this issue head on in their report, 'Compulsory ADR', published in June 2021 (the report), despite the prevalent view being that the courts did not have the power to order parties to mediate. The legality of mandatory ADR had been considered by the Court of Appeal in *Halsey v Milton Keynes* [2004] 1 WLR 30002, [2004] 4 All ER 920. At that time, the Court of Appeal reached the conclusion that to compel parties to mediate would 'impose an unacceptable obstruction on the right of access to the court'. The report disagreed with this, and echoed comments previously made by Sir Geoffrey Vos. We have since seen the courts following suit with judges being vocal proponents of ADR and doing what they can within their powers of case management to ensure that parties engage in ADR in a meaningful way.

Halsey overturned

The Court of Appeal used an opportunity to consider the legality of compelling parties to mediation in November 2023. Their decision is a distinct departure from the views expressed in *Halsey* and reflects what appears to be a widely held view. In *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, [2023] All ER (D) 04 (Dec) the central question was whether a court could lawfully order the parties to court proceedings to engage in a non-court-based dispute resolution process, and, if so, in what circumstances it should do so. Deputy District Judge Kempton Rees in the lower court had been bound to follow the judgment of Lord Justice Dyson in *Halsey* and accordingly refused to grant a stay of the proceedings to allow Churchill to pursue an internal complaints procedure operated by the Merthyr Tydfil County Borough Council (the council). This followed an application made by the council to the lower court.

Kempton Rees DJ stated that the parties ought to consider whether they could agree a temporary stay for mediation or some other form of non-court-based adjudication as a result of Churchill failing to follow their corporate complaints procedure in relation to his claim for loss and damage as a result of Japanese Knotweed. Kempton Rees DJ held 'that Mr Churchill and his lawyers acted unreasonably by failing to engage with the council's complaints procedure. That conduct was contrary to the spirit and the letter of the relevant pre-action protocol'.

HH Judge Harrison granted permission to appeal on 4 August 2022 on the ground that it raised an important point of principle and practice and that there were many other similar cases.

On 29 November 2023 the Court of Appeal (in a judgment delivered by Sir Geoffrey Vos, Master of the Rolls) held that:

- The passages from Dyson LJ's judgment in *Halsey*, relied upon by the judge, were not part of the essential reasoning in that case and had not bound the judge to dismiss the council's application for a stay of the proceedings.
- The court could lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided the order made did not impair the very essence of the claimant's right to proceed to a judicial hearing and was proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.
- The court would not lay down fixed principles as to what would be relevant to determining whether proceedings should be stayed or whether to order the parties to engage in a non-court-based dispute resolution process.
- In the circumstances of the case, a stay of the proceedings would not be granted, albeit this was qualified by the Master of the Rolls when he acknowledged that 'whilst it is obvious that the judge would have stayed the claim back in May 2022, had he been able to see this judgment, things have moved on. There is little point in doing so now, since nothing will be gained if a one-month stay were granted as the council seeks, but the parties ought to consider whether they could agree to a temporary stay for mediation or some other form of non-court-based adjudication'.

It is notable that the Law Society, the Bar Council, the Civil Mediation Council, the Centre for Effective Dispute Resolution and the Chartered Institute of Arbitrators all intervened in the appeal, given its obvious importance across all areas of civil legal practice.

It would appear *Churchill* has put a marker down for a change in direction on the use of ADR to settle disputes out of court. *Halsey* was decided 20 years ago and times have changed, along with the level of resourcing of the civil courts and the increase in cost of litigation in England and Wales. It is time to review the role of ADR in settling disputes. The Civil Procedure Rule Committee is looking at a CPR rule change to reflect *Churchill*, which is under consultation at the moment. We shall wait to see how this manifests itself in the CPR, but no one can ignore that ADR is here to stay. **NLJ**

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