Churchill v Merthyr Tydfil BC [2023] EWCA Civ 1416 – ADR by court order

As is now widely known, on Wednesday last week (29 November) the Court of Appeal ruled that the court can lawfully stay proceedings until the parties engage in ADR, or alternatively can make an order that they do so.

With the proper respect due to the detail of the reasoning in the decision, and the arguments addressed to the court by the battery of eminent counsel for the parties and the 7 interveners, this result will have come as a surprise to very few, with the sole judgment given by Sir Geoffrey Vos[1], Master of the Rolls, whose stated mission as Head of Civil Justice in England and Wales is to modernise and streamline the civil justice process[2].

That is especially so given the platform presented by the Civil Justice Council's conclusion in its report of June 2021 entitled "Compulsory ADR" that it would be lawful to make ADR compulsory. At the time of its publication the Master of the Rolls had welcomed this conclusion in what he described as an "excellent report"[3] and said that the report "opens the door to a significant shift towards earlier resolution". The Master of the Rolls cites the CJC report and its conclusion in his judgment at paragraph [57] [4].

The case itself

The case concerned a claim in nuisance. Mr Churchill alleged that his enjoyment of his residential property, and its value, had been diminished by an invasion of Japanese knotweed from Merthyr Tydfil BC's neighbouring land. MTBC had its own complaints procedure which Mr Churchill had not used and on that basis applied for a stay of Mr Churchill's claim until he had done so. Mr Churchill opposed that. The district judge had held on the basis of *Halsey*[5] that there was no jurisdiction to force Mr Churchill to use the council's complaints process. MTBC had appealed and the Circuit Judge had referred the

[1] Carr LCJ and Birss LJ simply expressed agreement with the judgment of the MR
[2] See for example his interview with the Financial Times 5 April 2021 just after appointment and his Sir Brian Neill lecture to the Society of Computers and the Law: 17 March 2022.
[3] HMCTS Press release 12 July 2021
[4] All paragraph numbers relate to the decision in *Churchill*
[5] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576 [2004] 1 WLR 3002

matter to the Court of Appeal. Recognising the importance of the issue the Court of Appeal had permitted submissions from no fewer than 7 interveners: the Law Society, the Bar Council, the Civil Mediation Council, CEDR, the Chartered Institute of Arbitrators, the Housing Law Practitioners' Association and the Social Housing Law Association.

In passing it is slightly odd that the case requiring the Court of Appeal's pronouncement on such an important issue did not involve one of the familiar types of ADR (eg joint settlement meeting or mediation) but a proposed enforced use of one party's internal procedure that even on its face had real limitations (see the list of 8 concerns raised by Mr Churchill at [63]). It had been submitted to the court that the MTBC complaints procedure was not properly to be seen as ADR at all. The Master of the Rolls considered that "definitional issue" to be academic (see [64]).

The issues

The court had to address 4 issues as set out at [6]:

1. Was the court bound by the decision in *Halsey* from finding that the court had jurisdiction to stay proceedings pending ADR or to order that the parties engage in ADR?

2. If it was not bound by *Halsey* did the court have such jurisdiction?

3. If it had such jurisdiction on what basis should it be exercised?

4. In the particular case should the court allow the appeal and impose a stay?

The decision

The court's answers to those 4 questions were:

1. No.

2. Yes.

3. The court was prepared to identify potentially relevant matters but was not prepared to say more and in particular was not prepared to set out a checklist.
4. The court was bound by the lack of the respondent's notice and the consequent limited ambit of the appeal but in any event the passage of time made MTBC's internal procedure route inappropriate.

Explanation of decision

1st question – *Halsey*

With respect to *Halsey*, the court held that what had been said about an order from the court forcing parties into ADR being a breach of Article 6 rights under the ECHR had not been part of the decision itself and was "*obiter*". Thus it was not binding and the matter could be looked at afresh. The detailed reasoning is at [9] – [21] and in particular at [18]. With respect this was almost bound to be the outcome given the agreement by all parties in *Churchill* that the question of compulsory mediation had not been raised by anyone in *Halsey* prior to oral argument in the Court of Appeal.[6]

I would observe that It is one of the curiosities of the application of the doctrine of judicial precedent that everybody could assume for 20 years that a statement of law had been pronounced by the Court of Appeal, only to find that there had been no such thing.

2nd question – Jurisdiction?

With regard to the crucial 2nd question - does the court have the jurisdiction to order parties to engage in ADR? - In broad terms the Master of the Rolls decided that it did on the following basis:

a) a necessary first step in the appeal was to consider the existence of the court's power in the abstract - thus submissions on behalf of Mr Churchill as to the potential inadequacies of the scheme of ADR proposed by MTBC were not relevant - the court

[6] - see footnote 3 in paragraph [18] of *Churchill*

either did or did not have the power – how it should exercise that power was a separate question (ie question 3) – see [51] – [52]

b) the court's ability to control its own processes could not be doubted:

   i. it was well established on the firm footing of the CPR which had been created under the authority of primary legislation (see [27] – [31] and [48])

   ii. it was endorsed by European jurisprudence both from the European Court of Human Rights and the Court of Justice of the European Union (pre-Brexit decisions) (see [32] – [39] (ECHR), [40] – [42] (CJEU) and [52] – [54] (both))

   iii. the reality was that in the period since *Halsey* the court - in the exercise of its jurisdiction to control proceedings before it - had in fact been making orders forcing parties into ADR – see the 7 cases between 2000 and 2019 cited at [49] (merely as examples) in fields as varied as judicial review and family

c) that conclusion – not being found in an express statutory provision - was not undermined by anything said in the UNISON case[7] (reasons given at [43] – [49] - the main reason being that the effect of the proposal challenged in UNISON was held to be the prevention of bringing proceedings, not their control once brought)

d) the approach is supported by the conclusions of the CJC report of June 2021 referred to above – see [57].

3rd question – How to exercise the jurisdiction?

It is here that the decision is (I say with respect) disappointing. I feel an opportunity was missed. No one could reasonably expect in this single case a pronouncement of

[7] *R. (UNISON) v. Lord Chancellor* [2017] UKSC 51, [2020] AC 869. The Supreme Court ruled as unlawful the introduction of significantly increased Employment Tribunal fees by Statutory Instrument.

comprehensive and exclusive criteria by which to judge all future applications, but the court could perhaps have gone further.

Mr Churchill had set out 8 criticisms of MTBC's internal scheme which objectively look soundly based: see [63]. The Bar Council in its submissions (at [61]) identified 11 questions as the criteria for assessment by the court of whether ADR should be ordered by the court:

i. form of ADR being considered
ii. whether there was legal advice or representation
iii. whether ADR was likely to be effective without advice or representation
iv. whether it was made clear that if the case did not resolve either party was free to pursue the claim or defence
v. the urgency of the case and the reasonableness of any delay that ADR would cause
vi. the effect of any delay – and any potential effect on any limitation issue
vii. the costs of ADR (in absolute terms and relative to the value of the claim)
viii. whether ADR gave a realistic prospect of success
ix. whether there was any power imbalance between the parties
x. any expressed reason for an unwillingness to mediate (such as earlier failed ADR)
xi. the proportionality of the proposed sanction in the event that a party nonetheless declined ADR ordered by the court.

With respect that seems a sound scaffold around which to build guidance, especially given that – as acknowledged by the Master of the Rolls at [62] - those factors mirrored the approach of the Court of Appeal in *Halsey* in considering the costs implications of an unreasonable refusal to engage in ADR.

There had also been some consideration of similar questions in the CJC report of 2021[8].

However, the Master of the Rolls would go no further than to say that those factors "are likely to have some relevance" – see [66]. He said other factors may be relevant but did not identify any. He deprecated the idea of more specific guidance, saying "it would be undesirable to provide a checklist or scoresheet for judges to operate".

[8] – see paragraphs 90 -105 of that report

With respect that is a pity. In the same paragraph ([66]) the Master of the Rolls identifies "the important objective of bringing about a fair, speedy and cost-effective solution to the dispute in the proceedings, in accordance with the overriding objective". If an adviser is trying to persuade an unwilling client to engage in ADR, clear guidance from the court to say in what circumstances an order to engage is likely to be made (with sanctions attached) would be an invaluable tool in achieving that overriding objective.

It would have been welcome to practitioners to have certain types of ADR (for instance mediation by an appropriate and accredited mediator) identified by the court as presumed proper forms of ADR (that presumption to be rebuttable on evidence in the circumstances of any particular case). For those representing a client unhappy about the prospect of ADR (for whatever reason – good or bad) but concerned by the costs implication of declining ADR, giving advice as to what the court is likely to do may be difficult.

Be that as it may there is at least a potential framework for an approach.

4th question – what to do in the particular case

Resolution of the 4th issue was complicated. MTBC's Notice of Appeal had sought a stay of 3 months (see [68]) but in oral submissions MTBC sought only 1 month (see [67]). Notwithstanding that his criticisms of MTBC's internal procedure in submissions (see [63]) was acknowledged to imply a challenge to the district judge's finding of fact that he had been unreasonable to partake of it, Mr Churchill had not formally served a Respondent's notice to that effect (see [70] – [71]).

Pragmatism came into play in the conclusion that although the combination of the Court of Appeal's ruling and the district judge's findings of fact would have led to a stay, there was "little point in doing so now, since nothing will be gained" (see [72]). For that reason MTBC's appeal succeeded in principle, but Mr Churchill will not have to follow MTBC's procedure and his court claim lives on.

Unsurprisingly in all the circumstances, the Master of the Rolls held (at [75]) there should be no order concerning the parties' costs of the appeal and urged the parties to consider a temporary stay for "mediation or some other form of non-court-based adjudication".

Implication

I am sure the decision will have the intended effect – to force parties to have a discussion about ADR in every single case. It will also provide a greater "stick" to encourage the unwilling party to take part. That actually can prove useful to those finding themselves advising parties with unrealistic expectations about the proposed litigation.

So far so good.

A worry – satellite litigation

One can understand the frustration of those charged with administration of civil justice that parties and/or their representatives who do not take a proper approach to efficient resolution/adjudication disproportionately clog up the system to the detriment of others. The thinking understandably goes that it is time to take serious measures. But the problem is that serious measures sometimes create their own complications. I can remember the huge amount of litigation that arose out of "automatic strikeout" in the County Court and there is now a whole jurisprudence on relief from CPR sanctions.

There are 2 areas for potential argument, one acknowledged in the judgment in *Churchill* and one not mentioned.

The one acknowledged is the issue at question 3. As I say it is unfortunate the court did not give more explicit guidance. There is prior case law upon applications for a stay for ADR (see the cases at [49] in Churchill referred to above) but this is arguably a new context. I'm afraid I can see some district judges or Masters taking a robust view and applying a presumption of ADR, and others being more circumspect and ready to accept parties' objections. Then after say 12 months of regional variability a whole host of cases has to be listed for guidance from the Court of Appeal.

More concerning is the 2nd potential question, that the decision in *Churchill* does not define what is meant by "engage" in ADR. What of the party that says Yes to a mediation and then refuses to speak to anyone at the meeting? That might be easy to castigate as "non-

engagement" but what about the party that (to the other side) is resolutely fixed throughout an expensive mediation to an objectively unsustainable position? Has that person "engaged" in mediation?

The CJC in their report identified this 2nd potential difficulty, calling it "perfunctory performance". At their paragraphs 112 and 113 they essentially acknowledged that depending upon the type of ADR different considerations may apply as to what constitutes compliance with an order to engage, and that "careful thought must be given" to what sanctions should apply in such circumstances. They conclude that the court's response "may depend on the context and the stage of proceedings". They were no more specific. It is not difficult to see some satellite litigation on the horizon.

It may be that I am being unfairly pessimistic and that the court's enforcement of the adoption of ADR will be a massive net benefit. The context here is that there are surely only very few parties or representatives who do not voluntarily embrace the idea of genuine ADR[9] - even in cases where one party perceives they have a very strong case.

I think all we can do as practitioners is encourage our clients as best we can to engage in ADR. In my professional practice this presents little difficulty as the stakes are high and that whatever the perceived merits of one's own case the unpredictability of a trial looms large.

Further improvement?

I do think there's room for improvement though, regardless of this decision. That is in regard to time – particularly the duration of claims.

There are some cases which simply cannot go quickly, such as where a young infant has suffered brain damage and the child needs to be of a certain age before an assessment of disability and consequent needs can be made. There are others where the issue is highly technical and the parties have to await the availability of leading experts. But it is my view that duration of time from event to settlement is being undervalued as a yardstick.

[9] Speaking for myself I'm not surprised that Mr Churchill was unimpressed with the MTBC complaint procedure

All who work in the field of large claims know how keen insurers are to see the matter resolved sooner rather than later. To achieve early resolution Insurers are often willing to pay a premium in the sense of giving the claimant the benefit of the doubt on one or more heads of claim. It sometimes puzzles me that some claimant firms do not see that as a virtue that they can offer their own clients.

I would like to think that the notion of claimant firms making claims last longer to "run up the bill" is an old-fashioned one. Surely it is better for a firm to promote itself by advertising that it has a record of getting claims arising from serious injuries to acceptable resolution within a given period. As someone who has acted for very many claimants in such situations, I can say that those with capacity to express a view certainly want proper compensation, but most of all they want the whole thing to be over.

It is my view that some claimant firms are missing an opportunity to embrace ADR more aggressively right from the beginning. Those with experience will know immediately the likely parameters of the case and can instantly start working towards a resolution within those.

Footnote – terminology

The Master of the Rolls considers that the phrase "alternative dispute resolution" is now no longer appropriate, because dispute resolution by negotiation should be seen as a starting point rather than an alternative. This echoes the approach of the CJC in its 2021 report at paragraph 63[10].

To that end he has coined the phrase non-court-based dispute resolution, and it peppers the judgment in *Churchill* in various places. With respect I am not sure that is precisely apposite because in many cases the court is already involved and does what it can to assist settlement discussion (postponing directions for instance). In others it is only the involvement of the court and its timetable that gets the parties negotiating. As the Master of the Rolls acknowledges the term "ADR" is already firmly entrenched in the CPR and even in the European jurisprudence. My own view is that if anything there is a virtue in keeping with the

[10] 63. "…. ADR can no longer be treated as external, separate, or indeed alternative to the court process."

name ADR, as it emphasises that it has been with us many years and simply needs to be more centre stage.

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