

Court Ordered ADR in Commercial Disputes: The Court of Appeal's Pivotal Decision in *Churchill v Merthyr Tydfil County Borough Council*

by Joseph Lewin

The Court of Appeal has ruled that courts can order parties in commercial disputes to engage in ADR.

In a decision in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 (“**Churchill**”), the Court of Appeal ruled that the court could stay proceedings for and order the parties to engage in a non-court-based dispute resolution process, provided that the stay or order does not impair the essence of the claimant’s right to proceed to a judicial hearing.

Many commentators have described this as a pivotal moment for Alternative Dispute Resolution (“**ADR**”). It shows a clear direction from a higher court in contrast to previous decisions that had at times indicated that, whilst the Courts would advocate in favour of ADR, they would not compel unwilling parties to undertake it.

The Court emphasised the cost-effectiveness and expediency of methods like mediation and early neutral evaluation, but declined to impose fixed principles, opting for flexibility in considering relevant factors.

With a clear endorsement of ADR’s benefits and the court’s broad discretion, parties must now carefully assess the suitability of ADR in their case to prevent potential court-ordered participation.

Background to *Churchill*

James Churchill, a property owner, alleged that Japanese knotweed from land owned by the Merthyr Tydfil County Borough Council had encroached onto his property, causing damage.

When Churchill initiated legal proceedings, the council sought a stay, arguing that Churchill was obligated to use the council’s corporate complaints procedure.

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The initial application for a stay was rejected, with the deputy district judge citing the court's lack of power to issue such an order, referring to Lord Justice Dyson's statement in *Halsey v. Milton Keynes General NHS Trust* ("**Halsey**") that "*to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right to access the court*" (*Halsey v. Milton Keynes General NHS Trust*,^[2])

In light of the importance of this point of principle, the appeal was referred directly to the Court of Appeal.

The decision of the Court of Appeal

The Court of Appeal determined that Lord Justice Dyson's statement in *Halsey* lacked binding authority because it was not essential to the judgment. This was because *Halsey* primarily dealt with whether the court should impose penalties on a successful litigant for refusing ADR, rather than addressing the specific issue of ordering a stay for parties to participate in ADR.

In the absence of binding authority in Lord Justice Dyson's statement, the court assessed its power to order stays or direct dispute resolution, focusing on potential violations of a litigant's right to a fair and timely hearing under Article 6 of the European Convention on Human Rights, finding substantial alignment among various legal precedents.

The Court of Appeal found that the court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process, provided that the order:

- Does not impair the very essence of the claimant's right to a fair trial.
- Is made in pursuit of a legitimate aim.
- Is proportionate to achieving that legitimate aim

In terms of how, and in what circumstances, the court should make such an order, the court concluded that it should not lay down fixed principles, and is a matter of the court's discretion in any particular case. It did, however, note that the following factors submitted by the Bar Council (which was an intervener in the case) and Churchill were likely to be relevant:

- The form of dispute resolution procedure being considered.
- Whether the procedure involves a neutral third party and whether the parties are legally advised or represented.
- Whether the procedure is likely to be effective or appropriate without such advice or representation.
- Whether there is any realistic prospect of the claim being resolved through the procedure.
- Whether there is a significant imbalance in the parties' levels of resources, bargaining power or sophistication.
- Whether it is made clear to the parties that, if they do not settle, they are free to pursue their claim or defence.

- The urgency of the case and the reasonableness of the delay caused and whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue.
- The costs of the procedure – both in absolute terms and relative to the parties' resources and the value of the claim.
- The reasons given by a party for not wishing to mediate; for example, if there had already been a recent unsuccessful attempt at dispute resolution.
- The reasonableness and proportionality of the sanction, in the event that a party declines to engage in dispute resolution in the face of a court order.

This list is not exhaustive.

Takeaway

Undoubtedly, non-court-based dispute resolution can lead to quicker and more cost-effective dispute resolutions, when employed appropriately.

The debate surrounding the wisdom of compelling unwilling parties to participate in such processes has been longstanding. The Civil Procedure rules have for a long time now required that parties attempt to use or at least give serious consideration to using ADR before beginning court processes.

The direction towards the prospect of court-ordered dispute resolution has been evident for some time, especially since the Civil Justice Council's June 2021 Compulsory ADR report, which deemed it compatible with Article 6.

Despite the development in Churchill, many commentators have suggested that the courts are likely to remain cautious in exercising the power to compel parties to participate in ADR, given the potential impact on litigants and the likelihood of success where one or more parties are not willing participants.