Mediation: Time to fly?

From encouragement to compulsion? Mediation in English civil justice after *Churchill* by Bryan Clark & Zora Kizilyurek

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IN BRIEF

- Explores the meaning and significance of *Churchill v Merthyr Borough Council*, where it was held a judge can order parties to mediate. This overturned *Halsey*.
- Asserts the decision leaves several issues yet to be resolved.

Mediation is firmly established on these shores and well-integrated into the civil justice system. With the origins of this embedding found in Lord Woolf's reforms (Harry Woolf, *Access to justice: final report* (1996), mediation has since expanded through court-annexed pilot schemes, via judicial promotion and robust encouragement in the form of cost sanctions for unreasonable refusals to mediate, and most recently through the government's intention to introduce 'automatic referral' to mediation for small claims disputes (Government response to Ministry of Justice (MoJ) consultation, Increasing the use of mediation in the civil justice system, September 2023). Automatic referral to mediation (in essence, compulsion) has also been proposed for family disputes (MoJ consultation, Supporting earlier resolution of private family law arrangements, March 2023) and in special educational needs (SEND) matters (Department for Education/Department of Health and Social Care consultation, SEND review: right support, right place, right time, March 2022).

This shift from encouragement to compulsion, chiefly it seems to accelerate take-up of mediation, is common in other jurisdictions. It represents, however, a step-change in approach domestically. It is also not without controversy. Doubts have been raised around the practical utility of insisting that reluctant parties mediate, and objections have been raised around the disconnect between compulsion and the voluntary ethos of mediation. More importantly perhaps, Lord Dyson's view in the Court of Appeal decision of *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 that 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose unacceptable obstruction on their right of access to the court' has cast a legal shadow over the prospect of leading recalcitrant disputants by the nose into mediation. While the *Halsey* rule has been repeatedly attacked by commentators, the Court of Appeal case of *Churchill v Merthyr Borough Council* [2023] EWCA Civ 1416 represented the first opportunity for the principle to be tackled head on.

The Churchill case

Churchill involved a nuisance claim against the council on the basis it had allowed Japanese knotweed to encroach upon the claimant's land. The council contended the court should stay the action pending the claimant making use of its own complaints procedure. The claimant (Churchill) resisted, believing this internal forum was unsuitable to address his claim. At first instance, Deputy District Judge Kempton Rees decided he was bound by the Halsey rule and thus could not grant the stay. The council was granted leave to appeal. Considering how significant this case potentially was for the future of court-ordered ADR, a range of prominent bodies such as the Civil Mediation Council, Chartered Institute of Arbitrators, CEDR, the Bar Council and the Law Society was granted the right to intervene.

On appeal, Sir Geoffrey Vos MR in providing the court's judgment identified (at para 6) four questions for the court to answer. Was the first instance judge right to think *Halsey* bound him to dismiss the council's application? If not, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process? If so, how should the court decide whether to stay proceedings or make such an order? And finally, should the judge have stayed proceedings to allow Churchill to pursue a complaint under the council's internal complaints procedure?

Was the Halsey rule binding?

In terms of the first question, the court answered firmly in the negative. Crucially, the court viewed Lord Dyson's statement regarding mandatory mediation in *Halsey* as merely obiter. Referring to the view of Lord Justice Legatt in *R (Youngsam) v The Parole Board* [2019] EWCA Civ 229 at para 51 that 'the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached', the court (at para 19) held that Lord Dyson's view on mandatory mediation did not fall within the *ratio*. Four justifications were given: the Halsey cases were concerned with cost sanctions not decisions to mediate; the relevant section of judgment in which the Halsey rule was set out fell under the heading 'general encouragement of use of ADR'; there was no discussion of the issue in written pleadings; and the statement

merely formed part of the general guidance on costs (para 18).

Can the court lawfully stay proceedings to compel participation in ADR?

Despite arguments by Churchill (supported by the Bar Council) that a new statutory power of compulsion was required, importantly, it was held the courts' power to order ADR is already vested in the Civil Procedure Rules (CPR) (s 1(4) (1) s 1.4(2) (e), s 3.1, s 3.1(4), s 26.5(3) & s 26.5 (3)).

The court was mindful, however, of human rights concerns arising from Art 6 of the ECHR and provided a forensic analysis of relevant international and domestic cases. From this review, the broad criteria to be applied was that measures impacting the right to access court should not impede the essence of right to a fair trial, should be made to achieve a legitimate aim and be proportionate. In drawing this out, the court drew a distinction between the imposition of barriers that may impede the essence of the right to trial (such as the form in which fees were introduced in employment tribunals central to the Supreme Court's decision in *R (UNISON) v Lord Chancellor* [2017] UKSC 51) with those that merely require parties to attempt an alternative, non-binding process prior to accessing a trial. Moreover, these requirements align with the overarching, legitimate aim of rationing civil justice in England and Wales, in which parties are expected to seek to settle their dispute if possible. The court held the 'right to a court' is not absolute and is subject to limitations (para 49). Access to court may depend on 'regulation which may vary in time and place according to the needs and resources of the community and of individuals' (*Ashingdane v UK* (1985) 7 EHRR 528, para 57).

The court (at para 40) discussed *Alassini*, a Court of Justice of the European Union case in which it was held that provisions requiring parties to participate in a settlement procedure were not contrary to the European law principles of effective judicial protection, equivalence and effectiveness where that process is free, reasonably quick, settlement is voluntary and access to court remained available (*Alassini v Telecom Italia SpA* [2010] 3 CMLR 17, para 2). Consideration (at para 35) was also given to the European Court of Human Rights case of *Miloslavsky* in which it was decided the obligation of paying security for the costs of an appeal did not inherently impair the essence of a right to access to court and, moreover, was proportionate (*Miloslavsky v UK* (1995) 20 EHRR 442).

The court also addressed the contention of Churchill that reference to the council's internal complaint system should be distinguished from more established forms of ADR—an issue that received significant airing in oral pleadings. By referring to the definition of ADR in the CPR Glossary as a 'collective description of methods of resolving disputes otherwise than through the normal trial process', the court, however, chose not to make a strict distinction between different ADR methods subject to court order. As we note below, the type of ADR procedure in question, including, as in this case, one which may be said to lack neutrality and entail no right of legal representation, may be relevant in determining the circumstances in which it would be correct for a court to order parties to participate therein.

What factors should guide the court in deciding to stay proceedings to compel participation in ADR?

The court declined to lay down fixed principles here in favour of leaving this task on a case-by-case basis to judges who were 'well qualified to decide whether a particular process is or is not… appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution… in accordance with the overriding objective' (para 66). Nonetheless, the court referenced the criteria against which to judge this question set out by the Bar Council and noted that 'they are likely to have some relevance'. This lengthy list of factors include: the form of ADR being considered; the availability of legal advice and representation; urgency of the case, delay caused by ADR and impact on any limitation periods; costs of ADR; prospect of success; balance of power between the parties; reasons for parties not wanting to mediate; and the sanctions to be imposed for non-compliance.

Should the judge have allowed the council's application for the stay of these proceedings?

While it was noted that 'had the judge not concluded that he was bound by *Halsey* to refuse a stay, he would have granted one', for practical reasons linked to the continuation of the court action, the court viewed there was now little practical value in granting a stay of the proceedings.

The future of court-based, mandatory mediation after *Churchill*

It is a decade since Sir Alan Ward issued his cri de coeur in *Wright v Michael Wright (Supplies) Ltd* [2013] CP Rep 32 that '[p]erhaps some bold judge will accede to an invitation to rule on [the Halsey principle]'. With *Churchill* that time finally came. Undoubtedly this is a seminal decision. The Court of Appeal's ruling has been greeted with open arms by mediation organisations as finally putting the ghost of *Halsey* to rest and doubtless offering up the promise of more work. Others may be satisfied the court nonetheless recognised the limits of compulsion in ADR. Several stones remain unturned, however. The circumstances in which it would be improper for a judge to order parties to undertake an ADR process remain unclear with the matter of proportionality likely to be a live issue in cases to come.

The government plans to integrate free mediation into small claims procedure seem unlikely to overstep the boundaries *Churchill* established, although it's possible we could see challenges around the Bar Council's criteria of power imbalances between parties and lack of legal advice around the scheme. Any move to extend automatic mediation to all county court money claims with cases farmed out to external mediators (as indicated in the government's response to the MoJ consultation) would need to be carefully calibrated as to avoid the imposition of disproportionate costs. The issue of sanctions for non-compliance may also represent a contested issue. Compulsion without fear of sanction seems toothless. But would striking out for non-compliance with a mediation order be deemed disproportionate? If cost sanctions were applied for non-compliance, would we see a rehashing of the *Halsey* factors for unreasonable refusals to mediate? The nature of participation required by parties was also raised in oral pleadings. 'Good faith' requirements may ensure that parties attending ADR do so in a meaningful fashion, but such approaches are fraught with policing difficulties and may undermine the confidentiality central to processes such as mediation.

Finally, outside of any organised scheme, the practical consequences of *Churchill* will depend largely on individual judges' proclivity towards mediation. Some judges will doubtless order mediation freely and others will choose not to. In terms of appealing such orders, as has occurred with unreasonable refusals to mediate, we may see judges taking very different views on the rights and wrongs of compulsion to ADR in particular circumstances. There is hence much more to come, and we watch this space with interest! NLJ

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