Churchill & the truth about mediation

Secretary of State: time to re-read *Churchill*?

Churchill has confirmed a court may order ADR, but we need more believers, says David Burrows

The fallout from *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, [2023] All ER (D) 04 (Dec) continues to scatter, but in an odd way. The UK's own Ministry of Justice (as reported in 'Compulsory mediation ruled out for separating couples', *The Law Society Gazette*, 26 January 2024) seems not to have read—or at least not to have understood—the judgment in *Churchill*.

Sir Geoffrey Vos MR defined the issue for the Court of Appeal in *Churchill* at [1] as 'whether a court can 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'. After reciting a variety of case law, including European jurisprudence, he concluded at [58] that 'as a matter of law, the court can lawfully stay existing proceedings for, *or order*, the parties to engage in a non-court-based dispute resolution process' (emphasis added). As I read that, Sir Geoffrey's words summarise simply and elegantly the common law of England and Wales: that parties can be ordered to attend non-court dispute resolution (NCDR), or at least that proceedings can be stayed for them to attempt NCDR.

But no—an issue remains, it seems. On the one side are the Master of the Rolls (as shown in the previous paragraph) with *NLJ* columnist Professor Dominic Regan. The professor defines the outcome of *Churchill*—perhaps without Sir Geoffrey's elegance—as 'That old tosh about judges being powerless to order ADR [is] sent to recycling!' (see 'The insider', 173 *NLJ* 8053, p9). Opposite this is the Secretary of State for Justice, whose advisers do not seem to have appreciated the significance of *Churchill*, nor that it applies equally to family as to other civil proceedings.

PAPs & family proceedings

Churchill turned on the failure of Mr Churchill (C) and his lawyers to take advantage of—or at least to try—the mediation scheme which was available as part of a pre-action protocol (PAP) available in cases such as his (where he was claiming damages for a Japanese knotweed problem from the local council). Could NCDR settle C's claim? Sir Geoffrey explained fully the 1990s genesis of PAPs and their importance in civil litigation and considered that C should at least have tried NCDR.

In *Jet 2 Holidays Ltd v Hughes and another* [2019] EWCA Civ 1858, [2020] 1 WLR 844, 169 NLJ 7865, [2019] All ER (D) 66 (Nov), PAPs (the modern list is set out in para 18 of Section C annexed to Civil Procedure Rules 1998 (CPR 1998)) were described at [36] as 'now an integral and highly important part of litigation architecture'. In his report *Access to Justice* (1996)—nearly 30 years ago—Lord Woolf explains his views on protocols in Chapter 10. He points out (in para 4) that what is needed 'is a system which enables the parties to engage in meaningful negotiation as soon as litigation seems likely and ensures then that they exchange relevant information'. (Surely an excellent working definition of 'mediation'?)

That is as true of family as of all civil proceedings. Yet what is truly disappointing to report is that the Family Procedure Rules 2010 (FPR 2010) offer only one more or less meaningless PAP ('annexed' to FPR 2010, Pt 9 on financial relief). To make the stay proposals of *Churchill* work properly, there must be an effective system of PAPs for most sets of family proceedings.

For all parties to any civil litigation—generally, and the ghettoised parties to family litigation alike—this judgment applies to any proceedings where mediation may help to resolve the outcome of their case. As I read the justice secretary's contribution, he has overlooked this critical development of the common law as it is set out by the Master of the Rolls and explained by Professor Regan thus: '*Churchill* has confirmed a court may order ADR. Any order must be reasonable and proportionate. Look at the judgment and be amazed at how Sir Geoffrey Vos glides through a forest of decisions, domestic and European, to arrive at a sane conclusion.'

A way forward

What is now needed for family law (in which mediation all started in Bristol in 1976) is a practical lead by family law rule makers, building on what the common law (ie, *Churchill*) offers: (i) a clear system of PAPs (in family proceedings) on which judges and parties can rely for an order for stay of proceedings; (ii) a system which is understood by private parties for how mediators are to be paid (eg, by one or both parties), and by court order as need be; and (iii) a clear procedure by which application for a stay or mediation order can be made (eg, defined by a practice direction under CPR 1998, Pts 3 or 23, or FPR 2010, Pts 4 or 18).

The question remains: how do you force a reluctant party to mediate if that party does not want to? Maybe costs penalties?

Oh, and what happens if a justice minister says one thing, and the common law seems to say the opposite—or at least, to say something else? NLJ

David Burrows is a *NLJ* columnist, solicitor advocate and author of *Open Justice and Privacy in Family Proceedings* (2020, The Law Society).