Revisiting Compulsory Alternative Dispute Resolution in the English Civil Justice System

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This note critically considers the landmark decision of Churchill v Merthyr Tydfill County Borough Council *in which the Court of Appeal confirmed that the courts could compel disputing parties to engage with alternative dispute resolution (ADR) processes provided any order or stay in favour of ADR did not undermine their 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. In reaching its decision, the Court of Appeal departed from its previous controversial comments in* Halsey v Milton Keynes General NHS Trust *that to compel parties to engage with ADR would undermine their right to a fair trial. The note considers the impact of* Churchill *on the civil court process and its relevance to the pre-action protocols. It is argued that, for the courts to effectively exercise their discretion in ordering ADR or staying proceedings in favour of ADR, the courts must have an understanding of the full range and nature of ADR procedures beyond mediation, and constructively engage in an 'ADR dialogue' with the parties before referring them to the most appropriate ADR procedure.*

Introduction

In one of the most significant developments in English civil procedure, the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council*[1] declared that the courts could lawfully compel disputing parties to engage with alternative dispute resolution (ADR) processes. The courts could do so provided that the order or stay allowing the parties to engage with ADR did not undermine their right to proceed to a judicial hearing, and it is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. In reaching its decision, the Court of Appeal finally departed from its controversial comments in *Halsey v Milton Keynes General NHS Trust*[2] in which Dyson LJ, giving the judgment of the Court, observed that to compel parties to engage with ADR would be contrary to their right to a fair trial under art. 6 of the European Convention on Human Rights ('ECHR').[3] Those comments were, as the Court of Appeal made clear in *Churchill*, obiter dicta and did not, therefore, bind the courts on the issue of compulsory ADR. This latter point was one which this author had previously made and one which was subsequently endorsed by Lord Dyson10 years after *Halsey*. Speaking extra-judicially, Lord Dyson agreed that his comments were obiter when he said "[Masood] Ahmed of Leicester University….in 2012 suggested that what Halsey had to say about compulsory mediation was obiter (which in my view it was)."[4]

The Court of Appeal's comments in *Halsey* were controversial because it had failed to consider previous case law in which the High Court had acknowledged and, indeed, exercised its powers under the Civil Procedure Rules (CPR) to order non-consenting parties to ADR.[5]

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[1] *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416.

[2] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

[3] ibid *Halsey* at [9].

[4] Lord Dyson MR, 'Halsey 10 Years On—The Decision Revisited', in Justice: Continuity and Change (Oxford; Hart, 2018) at 383.

[5] *Guinle v Kirreh* [2000] C.P. Rep. 62; [1999] 8 WLUK 24 (Ch D); *Shirayama Shokusan Co Ltd v Danovo Ltd (No. 2)* [2004] 1 WLR 2985.

Furthermore, although the comments on art. 6 were clearly obiter dicta as will be discussed in greater detail later, they were incorrectly interpreted by subsequent courts as constituting the ratio of the judgment and therefore binding on the issue of compulsory ADR.[6] It was also controversial because the Court of Appeal appeared to have, when relying on the European Court of Human Rights case of *Deweer v Belgium,*[7] failed to appreciate the difference between arbitration, which places a permanent stay on court proceedings, and mediation, which does not interfere with the right to fair trial but simply imposes a short delay on the trial process. Also, the Court of Appeal failed to appreciate that a number of other jurisdictions had compulsory mediation processes which had not been subjected to an art. 6 challenge.[8]

Halsey had an immediate chilling effect on the pro-ADR approach which began to emerge immediately following the implementation of the Woolf Reforms.[9] The Woolf Reforms formally recognised the importance of ADR by incorporating it within the CPR[10] and the pre-action protocols,[11] and the courts began to actively promote and encourage the use of ADR.[12] Rather than order parties to ADR, the courts instead preferred to penalise parties in costs for unreasonably rejecting ADR. This emphasis on ADR costs sanctions led to the development of two opposing and distinctly divergent judicial approaches.[13] The first, orthodox approach was consistent with *Halsey*: the courts rejected the notion of compulsory ADR in favour of preserving the right of the parties to judicial determination.[14] The second school of thought, although officially rejecting compulsory ADR, impliedly compelled the parties to engage with ADR through the threat of cost sanctions.[15] As a consequence, the case law has been inconsistent, contradictory and confusing.[16]

This note critically considers the decision in *Churchill* and its impact on the civil court process and the pre-action protocols. It is argued that, by confirming the legality of compulsory ADR, the decision is not only justified on the grounds set out by the Court of Appeal in that case but is also justified on the grounds that it is consistent with and reinforces procedural proportionality. In particular, it is consistent with the public aspect of procedural proportionality which requires the courts to ration and manage their finite resources so that no claim uses more than is equitable and only receives a proportionate share of those resources.

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[6] For a recent example, see *Mills & Reeve Trust Corporation Ltd v Martin and others* [2023] EWHC 654 (Ch).
[7] *Deweer v Belgium* [1980] E.C.C. 169.
[8] e.g. Greece and Belgium.
[9] The Rt Hon Lord Woolf*, Access to Justice Interim Report* (Lord Chancellor's Department 1995); The Rt Hon Lord Woolf, *Access to Justice Final Report* (Lord Chancellor's Department 1996).
[10] e.g. CPR r.1.4(2) provides that active case management includes "(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."
[11] e.g. Practice Direction – Pre-action Conduct and Protocols para. 8 provides "Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings."
[12] *Dunnett v Railtrack* [2002] EWCA Civ 303; *Dyson v Leeds City Council* [2000] C.P. Rep. 42; *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; *Muman v Nagasena* [2000] 1 W.L.R. 299.
[13] M. Ahmed 'Implied Compulsory Mediation' (2012) 31(2) CJQ 151-175.
[14] *Gore v Naheed* [2017] EWCA Civ 369; *Swain Mason v Mills & Reeve* [2012] EWCA Civ 498.
[15] *Thakkar v. Patel* [20170 EWCA Civ 117.
[16] M. Ahmed 'Mediation: the need for a united, clear and consistent judicial voice' (2018) 37 *Civil Justice Quarterly* 13.

Therefore, in furthering the public aspect of proportionality, the courts should, in appropriate cases, compel parties to engage with ADR. The decision also provides the strongest impetus yet to affect a culture shift among the judiciary in fully embracing their ADR powers and exercising those powers. This culture shift will in turn allow the courts to develop a more consistent, coherent and principled approach to compulsory ADR, and assist in the courts' duty to further the overriding objective in managing cases. Finally, it is argued that, for the courts to effectively exercise their discretion in ordering ADR or staying proceedings in favour of ADR, they must have an understanding of the full range and nature of ADR procedures beyond mediation, and constructively engage in an 'ADR dialogue' with the parties before referring them to the most appropriate ADR procedure.

It should be noted from the outset that this note is not concerned with the well-trodden ground of whether ADR should be compulsory or the virtues or otherwise of compulsory ADR.[17]

A word on dispute resolution terminology

In giving the leading judgment of the court in *Churchill*, Vos MR adopted the term 'non-court-based resolution' ('NCBR') rather than ADR to refer to dispute resolution procedures other than the court process despite specific CPR rules[18] and the CPR Glossary referring to ADR. The CPR Glossary defines ADR as "A collective description of methods of resolving disputes otherwise than through the normal trial process."[19] Sorabji has correctly noted that referring to NCBR is problematic because certain types of ADR procedures, such as early neutral evaluation (ENE), negotiation and mediation, can be both non-court-based and court-based. By drawing such a distinction by using "this neologism", Sorabji argues that "Vos MR could be said to have slightly muddied the waters" and that it would have been better to use either ADR or a new term such as 'consensual dispute resolution' (CDR).[20] I agree with theses helpful comments and observations.

To add, it is difficult to see what the term NCBDR contributes which ADR does not already cover; the term ADR is well established, both within the English civil justice system and internationally. The definition of ADR in the CPR Glossary is adequately wide enough to encompass the full spectrum of adjudicative and non-adjudicative procedures. There is no need, therefore, to interfere with the existing definition of ADR within the CPR and it is welcome to note that the current consultation on the impact of *Churchill* on the CPR does not seek to review the definition of ADR.[21] There is also the danger that the term NCBDR will cause confusion among, in particular, litigants in person who regularly encounter difficulties in understanding technical rules of procedure and navigating the court process. Finally, it is

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[17] M. Milgo 'The Case for Express Compulsory Mediation for England and Wales' (2021) 10(1) *Journal of Law and Jurisprudence* 1-23; D. De Girolamo 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 35(2) *Civil Justice Quarterly162*-185; D. K. Schaffer 'An examination of mandatory court-based mediation' (2018) 84(3) *Arbitration* 229-238.
[18] e.g. CPR r.1.4(2)(e), r. 26.5(1).
[19] *The White Book 2024* (Sweet & Maxwell 2024) Section E Glossary.
[20] J. Sorabji 'Mandatory ADR – Churchill v Merthyr Tydfil County Brough Council (2023)' (2024) 1 *Civil Procedure News* 12 January 2024.
[21] Consultation by the Civil Procedure Rule Committee (CPRC) Alternative Dispute Resolution in the light of Churchill v Merthyr Tydfil: Proposed Rule Changes April 2024 available https://assets.publishing.service.gov.uk/media/661e2f2c0b9916e452bd3d4a/adr-consultation-document.pdf (accessed 4th July 2024).

concerning to note the steady proliferation of technical terms and phrases to describe dispute resolution procedures and the confusion this is likely to cause. Terms such as 'embedded dispute resolution', 'facilitated dispute resolution', and 'negotiated dispute resolution' are just some examples. This phenomenon is being driven by the desire of policy makers and the judiciary to promote more cost effective methods of resolving disputes and a means of reducing the court backlog. There is also a desire to affect a culture change in the way in which the civil court process is understood so that consensual dispute resolution is seen as part of the court process rather than an alternative to it.[22] However, the proliferation of new technical terms in an area of procedure where there are already many contenders, there is the real danger of losing the essential meaning of ADR and deterring rather than encouraging its use.

The problem of Halsey

i. Implied Compulsion

Although successive English civil justice reforms have embraced and enthusiastically promoted the virtues of ADR and encouraged its use,[23] the issue of whether the courts should compel disputing parties to engage with ADR has had a turbulent and difficult procedural history. Prior to *Churchill*, the senior judiciary traditionally rejected the argument that parties should be obliged to engage with ADR because to do so would undermine the fundamental constitutional right of the parties to access the courts in the vindication and enforcement of their legal rights.[24] Judicial resistance to the notion of compulsory ADR has its jurisprudential roots in *Halsey* in which the Court of Appeal observed that to compel non-consenting parties to engage with ADR "would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6"[25] of the ECHR. Rather than laying the foundations for the development of a consistent and coherent jurisprudential body of case law, *Halsey's* misconceived stance on the article 6 point led to the evolution of two divergent and opposing judicial approaches to compulsory ADR. The first is consistent with the 'orthodox' approach: it officially rejects the idea of compelling non-consenting parties to engage with ADR and thereby seeks to uphold and protect their rights to access the courts. The second approach officially rejects the idea of compulsory ADR but *impliedly* compels parties to consider and engage with ADR through the threat and use of cost sanctions.[26]

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[22] e.g. The Right Hon. Sir Geoffery Vos 'The Relationship between Formal and Informal Justice', Hull University, Friday 26 March 2021; The Right Hon. Sir Geoffery Vos, London International Disputes Week 2021: Keynote Speech, London, Monday 10 May 2021; The Right Hon. Sir Geoffery Vos 'Mediated interventions within the Court Dispute Resolution Process' GEMME Lecture, Dublin, Ireland, Friday 28 October 2021.

[23] *Woolf* (n 6); Sir Rupert Jackson *Review of Civil Litigation Costs Final Report,* 14 January 2010; Lord Justice Briggs, *Chancery Modernisation Review*: *Final Report* December 2013; Lord Justice Briggs *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, 2015); Lord Justice Briggs *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016).

[24] Lord Woolf did not recommend that ADR be made compulsory because of the strongly held view that citizens should not be denied their constitutional right of access to the courts. It is interesting to note, however, that Lord Woolf later alluded to the possibility of revisiting the idea of compulsory mediation when discussing his reforms in Hong Kong in 1996. Lord Woolf noted that, although he had not gone so far as to recommend compulsory mediation in the English system, he was "encouraged to think that that is something which I should look at again." The Rt Hon the Lord Woolf 'A New Approach to Civil Justice' (1996) Hong Kong Lecture. See also *Bremer Vulcan v South India Shipping Corporation Ltd* [1981] AC 909 at [917] in which Lord Diplock stated that "every citizen has a constitutional right to access."

[25] ibid at [9].

[26] M. Ahmed "Implied Compulsory Mediation" (2012) 31(2) CJQ 151-175.

Thus, the jurisprudence has been highly unsatisfactory state: it is contradictory, inconsistent and confusing. Take, for example, the following two Court of Appeal decisions by way of illustration. In *Thakkar v Patel*[27] the defendant appealed against a costs order in favour of the claimants who had taken active steps in organising a mediation which was ultimately abandoned because of the defendant "dragging" its feet and its failure to cooperate with the process. Following the trial, the judge ordered the defendants to pay 75 per cent of the claimants' costs of the claim because of the defendant's failure to engage with mediation. On appeal, Jackson LJ agreed with the judge's finding that there was a real chance that the matter would have settled because, inter alia, a skilled mediator would have assisted the parties by pointing to the small gap between their respective positions and the huge future costs of the litigation. Jackson LJ held

> The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene.[28]

A mere four months after *Thakkar*, the Court of Appeal reached the opposite conclusion in *Gore v Naheed.*[29] In that case, the defendants' invitation to mediation was rejected by the claimant. Having lost at first instance, the defendants appealed both on the substantive issues and the costs order which was made against them. On the issue of costs, the defendants argued that the judge should have made some allowance in their favour for the fact that the claimant had refused to engage with their invitation to mediation. Adopting the opposite approach to that of Jackson LJ in *Thakkar*, Patten LJ rejected the defendant's arguments and emphasised the judge's finding that the matter was too complex for mediation and that the claimant had the right to have the issues determined by the court. As his Lordship put it

> Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.[30]

ii. Judicial criticism

The *Halsey* article 6 point has also been criticised extrajudicially. The late Sir Gavin Lightman convincingly argued that the Court of Appeal in *Halsey* appeared to have been unfamiliar with the mediation process and to have confused an order for mediation, a non-adjudicative process, with an order for arbitration, an adjudicative process.[31] He explained that an order for mediation did not interfere with the right to a trial: at most it merely imposes a short delay to allow an opportunity for settlement and in the event that a settlement cannot be reached, the parties may revert to the court. Sir Gavin argued the Court of Appeal appeared to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes was prevalent elsewhere throughout the Commonwealth, the

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[27] *Thakkar* (n 12).
[28] ibid at [30].
[29] *Gore* (n 11).
[30] ibid at [49].
[31] Lightman J. 'Mediation: An Approximation to Justice' S.J. Berwin, 28th June 2007.

United States and other jurisdictions. In 2008, Sir Anthony Clarke MR recognised the court's jurisdiction to require parties to engage in mediation when he said "Despite the Halsey decision it is at least strongly arguable that the court retains jurisdiction to require parties to enter into mediation" and that mediation could "be factored into and become an integral part of standard directions and the court's power would derive from its general case management powers under the CPR."[32]

The Court of Justice of the European Union (CJEU),[33] has also recognised the compatibility of compulsory ADR with art. 6 rights. In *Alassini v. Telecom Italia SpA*,[34] the CJEU considered whether Italian law which mandated compulsory engagement with ADR infringed article 6 rights. The CJEU decided that it did not and concluded that "it is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."[35] *Alassini* was applied in *Menini v Banco Popolare Societa Cooperativa*[36] in which the CJEU confirmed the legality of compulsory mediation "provided that the procedure does not result in a decision which is binding on the parties, that does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs…for the parties."[37]

In view of the jurisprudential developments that followed *Halsey*, Lord Dyson, in his speech at the *Chartered Institute of Arbitrators Third Mediation Symposium*,[38] acknowledged the courts' powers to order the parties to engage in mediation when he said, "in and of itself compulsory mediation does not breach article 6 "but that "compulsory mediation is more effective when it is voluntary."[39]

More recent decisions have also casted doubt on *Hasley.* In *Lomax v Lomax*,[40] the Court of Appeal confirmed that the courts could compel non-consenting parties to engage with judicial ENE under CPR r.3.1(2)(m). Moylan LJ noted that, because the wording of CPR r.3.1(2)(m) did not contain an express requirement for party consent before an ENE could be ordered, the issue was whether such a limitation could be implied by the rule. Moylan LJ explained that Halsey did not assist in the task of interpreting CPR r.3.1(2)(m) because it was concerned with whether parties could be compelled to take part in mediation that was outside the court process, whereas ENE formed a part of the court process. Despite distinguishing Halsey, Moylan LJ appeared to indirectly cast doubt on the continuing validity of the reasoning in Halsey when he said "I would only comment that the court's engagement with mediation has

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[32] Lord Clarke M.R., 'The Future of Civil Mediation' (2008) 74 *Arbitration* 419.
[33] Formerly the European Court of Justice.
[34] *Alassini v. Telecom Italia SpA* (Joined Cases C-317/08, C-301/08, C-319/08 and C-320/08) [2010] 3 CMLR 17. The decision in *Alassini* was subsequently applied in *Menini v. Banco Popolare Società Cooperativa*[34] in the context of Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes.
[35] ibid *Alassini* at [63].
[36] *Menini v Banco Popolare Societa Cooperativa* [2018] CMLR 15.
[37] ibid at [61].
[38] Lord Dyson, Chartered Institute of Arbitrators Third Mediation Symposium, The Chartered Institute of Arbitrators.
[39] ibid.
[40] *Lomax v Lomax* EWCA Civ 1467.

progressed significantly since *Halsey* was decided".[41] Similarly, in *McParland & Partners Limited & Anor v Whitehead*, Sir Geoffrey Vos C recommended ENE to the parties and in doing so he explained that *Lomax* "inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey."[42]

Following the decision in *Lomax*, the Civil Justice Council (CJC) commissioned a report on the legality of compulsory ADR. In its report *Compulsory ADR*[43] the CJC expressed the view that "any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights."[44] It went on to say that "we think the balance of the argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR."[45] In the meantime, the courts continued to interpret *Halsey* as binding.[46]

Churchill provided the Court of Appeal with a rare and valuable opportunity to revisit *Halsey* and to finally provide the much needed judicial authority, clarification and guidance on the issue of compulsory ADR.

Churchill

Background and first instance decision

The claimant commenced proceedings against the defendant local authority for damages to his property caused by Japanese knotweed which had spread to the claimant's property from neighbouring land owned by the defendant local authority. In response to the claimant's pre-action letter of claim, the defendant invited the claimant to use its internal Corporate Complaints Procedure ('CCP') to resolve the matter. The defendant also made clear that, if the claimant decided to issue proceedings without engaging with its CCP, it would apply to the court for a stay and would also seek its costs in doing so. The claimant did not, however, engage with the CCP and issued proceedings against the defendant. In response, the defendant applied for a stay of proceedings.

The deputy district judge dismissed the stay application. Although the judge found that the claimant had acted unreasonably by failing to engage with the defendant's CCP and behaved contrary to the general pre-action protocol,[47] he concluded that he was bound by Dyson LJ's comments in *Halsey*. Given the important issues of principle and practice which the case raised, the judge referred the matter to the Court of Appeal.

Court of Appeal decision

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[41] ibid at [27].
[42] In *Telecom Centre (UK) Limited v Thomas Sanderson Limited* [2020] EWHC 368 (QB) Master McCloud provided valuable guidance on the procedure for conducting judicial ENE in the Queen's Bench Division.
[43] *Civil Justice Council Compulsory ADR June 2021.*
[44] ibid at [58].
[45] ibid at [60].
[46] *Mills & Reeve Trust Corp v Martin* [2023] EWHC 654.
[47] Practice Direction on Pre-Action Conduct and Protocols.

The leading judgment of the Court of Appeal was given by Vos MR with whom Lady Carr LCJ and Birss LJ agreed. The Court identified three issues of principle:[48]

(i) was the judge right to think that *Halsey* bound him to dismiss the defendant's application?
(ii) if not, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process? and
(iii) if so, how should the court decide whether to stay the proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

On issue (i), Vos MR held that the judge at first instance was not bound by *Halsey* because the passage on which the judge relied was not a necessary part of the reasoning that led to the Court of Appeal's decision in that case[49] i.e. Dyson LJ's passage was *obiter dicta*, rather than *ratio decidendi*. This was so because the Court of Appeal in *Halsey* was not concerned with whether or not the courts had the power to compel ADR, rather it was concerned with whether a costs sanction should be imposed against the successful parties on the basis that they had refused to engage with mediation. The Court in *Halsey* also identified a number of factors as relevant in deciding whether a refusal to mediate was unreasonable. It was in that context that Dyson LJ had made his comments on compulsory ADR which was not a necessary step in reaching the court's conclusions on the costs questions decided in the appeals.

Vos MR identified four elements of Dyson LJ's judgment in *Halsey* which indicated that his comments were not to be regarded as binding. First, Dyson LJ's own statement of the issue made clear that the decision was about costs sanctions, and not whether to order parties to participate in mediation. Secondly, Dyson LJ's comments were in a section of the judgment entitled "[g]eneral encouragement of the use of ADR". Thirdly, the issue of compulsory mediation had not formed part of the appeal in *Halsey*; that was an issue which had only been raised for the first time in oral argument, and not by the parties but only by the intervenors. Fourthly, Dyson LJ provided guidance as to the general approach in dealing with the costs issues raised by the appeals and the factors that should be considered in deciding whether a refusal to agree to ADR was unreasonable. Thus, the question of whether the court had power to mandate ADR was no part of "the best or preferred justification for these conclusions" and, therefore, was not necessary to dispose of the appeal. As Vos MR explained:

> 19. In my view, in considering Dyson LJ's full reasoning, it is even clearer that his ruling on whether the court had power to order the parties to mediate was not expressly or impliedly a necessary step in reaching the conclusions on the costs questions decided in the two cases. The costs questions were, as I have said, as to how the court decided whether a refusal to mediate was unreasonable. The factors

[48] Although not an issue of principle, the court also considered whether to allow the defendant's application for a stay to allow the claimant to engage with the CCP.
[49] *R (Youngsam) v. The Parole Board* [2019] EWCA Civ 229 in which Leggatt LJ explained the meaning of the Latin terms "ratio decidendi" and "obiter dicta" "It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as "necessary" for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that *the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached:* it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted." (emphasis added).

identified by the court as relevant to that question were relevant whether or not the court had power to require the parties to mediate.

20. Accordingly, I have reached the clear conclusion that [9]-[10] of the judgment in Halsey was not a necessary part of the reasoning that led to the decision in that case (so was not part of the ratio decidendi and was an obiter dictum).

21. As a matter of law, therefore, the judge was not bound by what Dyson LJ had said in those paragraphs.

On issue (ii), Vos MR considered domestic case law, ECtHR case law and pre-Brexit cases from the CJEU, as well as relevant legislation and rules under the CPR. On the CPR, Vos MR referred to, for example,[50] CPR 1.4(1) which obliges the court to further the overriding objective by actively managing cases by "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

The Court also referred to a number of ECtHR cases[51] including *Deweer v Belgium*[52] which Dyson LJ relied upon in *Halsey. Deweer* concerned a Belgian butcher who had allegedly committed an offence of selling meat at an illegal profit. The public prosecutor ordered the butcher to close his shop until either his prosecution was completed, or he paid a fine of 10,000 Belgian Francs. He paid the fine under protest, but brought successful proceedings before the ECtHR for breach of art. 6(1). The ECtHR held that the pressure brought to bear on the butcher by the threat to close his shop if he did not pay the fine was a constraint that was incompatible with art. 6. In contrast, the ECtHR has found that compulsory ADR does not undermine art. 6 where it pursues a legitimate aim and is proportionate with the aim to be achieved. In *Momcilovic v Croatia,*[53] the national legislation in question required a potential claimant against the state first to submit a request for settlement to the State Attorney's Office before proceeding to court. The claimants wanted to bring a claim for damages for the unlawful killing of a relative, but they had failed to submit the necessary request. The national court denied their claim and the ECtHR found that there had not been a breach of art. 6. The ECtHR made clear that the right of access to the court might be subject to legitimate restrictions. It found that the settlement procedure did not prejudice the claimants' claim – the process paused the limitation period, and the delay did not cause actual prejudice. [54]

Vos MR also referred to the decisions of *Alassini v. Telecom Italia SpA*[55] and *Menini v Banco Popolare Societa Cooperativa*[56] in which the CJEU recognised the compatibility of compulsory ADR with art. 6 rights. Vos MR then turned his attention to domestic case law and, in particular, the leading modern authority on the constitutional right of access to the court as an essential element of the rule of law: *R (UNISON) v Lord Chancellor.*[57] In

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[50] Vos MR also referred to various rules in the CPR which deal with ADR and the courts' case management powers including r3.1(4), r3.1(5), 26.5(1), r26.5(3), r44.4.
[51] Other cases include *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 EHRR 442; *Z and others v. United Kingdom* (2002) 34 EHRR 3; and *Momcilovic v. Croatia* (2019) 69 EHRR 14.
[52] *Deweer* (n. 7).
[53] *Momcilovic v Croatia* (2019) 69 EHRR 14.
[54] See also *Alassini v. Telecom Italia SpA* (Joined Cases C-317/08, C-301/08, C-319/08 [2010] 3 CMLR 17.
[55] *Alassini* (n 34).
[56] *Menini* (n 36).
[57] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

UNISON, the UK Supreme Court held that the right of access to the courts could only be curtailed by express primary legislation and, therefore, the statutory instrument increasing fees to bring claims in the Employment Tribunal was unlawful because it prevented access to justice. However, Vos MR noted that *UNISON* was concerned with an impediment that prevented access to a judicial determination and not with the circumstances in which it might be considered proportionate to delay such access for a legitimate objective such as achieving resolution of the dispute by other means. Vos MR explained that *UNISON* was not authority for the proposition that a statutory basis was required for the court to mandate ADR because (i) it was not concerned with either staying existing proceedings for other dispute resolution processes to take place, or with mandating the parties to participate in them; (ii) it did not contradict the long-established right to control its own process; (iii) none of the authorities referred to in *UNISON* suggested that the court cannot make orders that delay or prevent the resolution of existing proceedings in aid of making the court system accessible, fair and efficient; (iv) whilst the CPR itself is not primary legislation, nothing in *UNISON* suggests that one of the fundamental premises of the overriding objective and even the CPR itself could be unlawful without primary legislation authorising it expressly. The overriding objective requires the court to manage cases actively and to encourage and facilitate ADR, and expressly contemplates stays for such processes to be undertaken; and (v) a number of authorities that were not cited to the UK Supreme Court in *UNISON* support the proposition that the court can, and indeed should, in an appropriate situation, stay cases whilst out of court attempts to resolve the disputes take place.[58]

Vos MR concluded that the courts do have the power to lawfully stay proceedings for, or order the parties to engage with ADR. As Vos MR held

> 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 made: (a) does not impair the very essence of the claimant's right to a fair trial (b) is made in pursuit of a legitimate aim, and (c) is proportionate to achieving that legitimate aim.[59]

On issue (iii), the Court refused to provide a list of factors which would assist the courts in determining when to exercise its powers to compel parties to engage with ADR; it would be a matter for the courts to determine in the circumstances of each case. Vos MR put it

> Whether the court should order or facilitate any particular method of non-court-based dispute resolution in a particular case is a matter of the court's discretion, to which many factors will be relevant….it would be undesirable to provide a checklist or a score sheet for judges to operate.[60]

His Lordship went on to state that the court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order provided that the order made "does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling

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[58] See e.g. *Guinle v. Kirreh* [2000] CP Rep 62; *R. (Cowl) v. Plymouth CC* [2002] 1 WLR 803 at [14], *Blackburne J in Shirayama Shokusan Co Ltd v. Danovo Ltd (No 2)* [2004] 1 WLR 2985 at [12]-[20], Smith LJ in *Uren v. Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66 at [73], *Mann v. Mann* [2014] EWHC 537 (Fam) at [16]-[17] and [36]), *Bradley v. Heslin* [2014] EWHC 3267 (Ch) at [24], and *Lomax v. Lomax* [2019] EWCA Civ 1467.
[59] *Churchill* (n 1) at [54].
[60] ibid at [60].

the dispute fairly, quickly and at reasonable cost."[61] As for the factors that a court should consider, Vos MR explained that the overriding objective, the factors identified by the claimant, the Bar Council[62] and the *Halsey* factors were all likely to be relevant.

Analysis and conclusion

The relationship between the courts and compulsory ADR has been a difficult one as illustrated by the ADR case law and extra-judicial statements. The root cause of those difficulties and tensions was *Halsey* which has, for so long, stifled the development of ADR within the civil court process and has been a judicial straitjacket which has prevented the courts from fully embracing compulsory ADR despite the existence of precedents in which some courts have ordered parties to engage with ADR.[63] The constraining impact of Halsey can be illustrated by two examples. In *AB & Ors v Ministry of Defence*,[64] the High Court considered various applications, including one which asked the court to make an order requiring the parties to attempt to resolve the dispute by mediation. However, the court declined to provide a definite answer on whether it had the power to make an order referring the parties to mediation and stated that, 'whether I have the power to order mediation or [65]merely to encourage it.' Milgo has argued that the decision in *AB* "further shows the confusion caused by diverging judicial views" on the issue of compulsory ADR. More recently, in *Mills and Reeves v Martin*,[66] HHJ Kelly said

> In my judgment…the dictum of the Court of Appeal in that case are binding on me. Even if the decision of mandatory mediation is technically obiter, the Court of Appeal expressed a very clear view on the lawfulness of mandatory mediation when given the opportunity to do so.[67]

Increasing judicial discontent with *Halsey* is also evident from a number of Court of Appeal cases. Ward LJ, who also formed part of the Court of Appeal that heard *Halsey*, questioned *Halsey* on the issue of ADR compulsion when he said "Perhaps…it is time to review the rule in *Halsey v Milton Keynes General NHS Trust*…for which I am partly responsible…"[68] Moylan LJ's comments in *Lomax* further undermined *Halsey*, and the *CJC Compulsory ADR Report* strengthened the call for a change in the courts' approach to compulsory ADR. It was no longer possible to continue to simply ignore or defend *Halsey.* By confirming that the art.

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[61] ibid at [65].
[62] The factors identified by the Bar Council are: (i) the form of ADR being considered, (ii) whether the parties were legally advised or represented, (iii) whether ADR was likely to be effective or appropriate without such advice or representation, (iv) whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence, (v) the urgency of the case and the reasonableness of the delay caused by ADR, (vi) whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue, (vii) the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim, (viii) whether there was any realistic prospect of the claim being resolved through ADR, (ix) whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication, (x) the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR, and (xi) the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court.
[63] e.g. *C v RHL* [2005] EWHC 873 (Comm) and the cases at (n 58).
[64] *AB & Ors v Ministry of Defence* [2009] EWHC 3516 (QBD).
[65] Milgo (n 17) at p8.
[66] *Mills & Reeve Trust Corp v Martin* [2023] EWHC 654.
[67] ibid at [56].
[68] *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 at [3].

6 comments are not binding, *Churchill* has finally liberated the courts from *Halsey* and paved the way for the development of a more positive and constructive relationship between ADR and the courts.

Clarification, guidance and proportionality

The distinction between compulsory engagement with ADR and the right to revert to the courts in the event that the matter does not settle (i.e. adjudicative procedures e.g. mediation, early neutral evaluation), and compulsory engagement *and* compulsory resolution in ADR (i.e. non-adjudicative procedures e.g. arbitration, construction adjudication), has not always been fully appreciated nor has it been adequately explored or explained by the courts. As a consequence, there has been a tendency to simply perceive all compulsory forms of ADR as encompassing an obligation to engage *and* an obligation to resolve the dispute during the ADR process without the possibility of reverting to the civil court process as was evident from the Court of Appeal's misunderstanding of compulsory mediation as being adjudicatory in nature and therefore preventing the parties from access the court. The decision in *Churchill* finally puts that misunderstanding of compulsory ADR to rest by confirming that the courts have the power to control and regulate their own processes and therefore they have the power to delay judicial determination to allow ADR to take place. That power is not unfettered, and the courts must ensure that they do not hinder the parties' art. 6 rights. This distinction between the existence of the courts' power to compel parties to ADR and the *exercise of that power* is an important one in reinforcing the courts' duty to further the overriding object and the right of the parties to continue to have access to the courts.

The decision in *Churchill* can also be justified on the grounds that it is consistent with and reinforces procedural proportionality which underpins the civil justice system and is central to the overriding objective. In particular, it is consistent with the public aspect of procedural proportionality: the need for the courts to ration and manage their finite resources so that no claim uses more than is equitable and only receives a proportionate share of those resources.[69] Accordingly, the courts should consider the effect decisions in individual cases have on the civil justice system as a whole. In this respect, compulsory ADR provides a unique opportunity for the parties to explore the possibility of settlement whilst also upholding the public aspect of the principle of proportionality. The significance of the relationship between ADR and the principle of proportionality was explained by Briggs LJ in *PGF II SA v OMFS Co 1 Ltd.*[70] In that case, the Court of Appeal held that silence in the face of an invitation to ADR would, as a general principle, be considered as unreasonable behaviour for the purposes of costs sanctions. He went on to explain that the economic virtues of ADR furthered the principle of proportionality by assisting the parties and, in particular, the court to manage its finite resources. As Briggs LJ explained

> the constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really

[69] J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: a critical analysis* (CUP, 2014); J. Sorabji, 'The Road to New Street Station: Fact, Fiction and the Overriding Objective' (2012) EBLR. 77; J. Sorabji, 'Prospects for proportionality: Jackson implementation' (2013) 32 CJQ 213.
[70] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288.

> need it, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR, wherever that offers a reasonable prospect of producing a just settlement at proportionate cost. Just as it risks a waste of the court's resources to have to try a case which could have been justly settled, earlier and at a fraction of the cost by ADR, *so it is a waste of its resources to have to manage the parties towards ADR by robust encouragement, where they could and should have engaged with each other in considering its suitability, without the need for the court's active intervention.*[71]

Briggs LJ's final point also goes to the issue of proportionality. Thus, the parties should actively consider and engage with ADR earlier on in the litigation process without the courts' intervention. The decision in *Churchill* reinforces Briggs LJ's point and allows the courts to further the principle of proportionality by making raising the issue of ADR at the first case management hearing rather than dealing with it at a later stage in the litigation process[72] by which time the parties and the courts would have incurred considerable resources. By having ADR on the case management agenda, the courts will be able to engage in a constructive 'ADR dialogue' (see further below) with the parties which may include discussion concerning the most appropriate ADR procedure for the dispute, the views and wishes of the parties and whether previous invitations to engage with ADR have been ignored or unreasonably refused and whether a party should suffer any sanctions. Furthermore, any party wishing to engage with ADR will also have the opportunity to raise that issue directly with the court.

Exercise of the courts' discretion

It will be recalled that *Churchill* makes clear that the courts should only make ADR orders or stay proceedings in circumstances where the order or stay does not impair the parties' right to proceed to a judicial hearing, and it is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. The type of ADR procedure that a court may order will be a matter for the courts' discretion and the characteristics of the particular ADR process will be relevant to the exercise of that discretion. The Court of Appeal's refusal to lay down fixed principles on how the courts should exercise their discretion is sensible - fixed principles and checklists have a tendency to be perceived as exhaustive and definitive and can eventually restrict the courts' discretion.[73]

The courts must ensure that they have the necessary knowledge and skills to be able to exercise their discretion effectively. For the courts to do this, they must (i) have an understanding of the nature and function of the full range of ADR procedures (both adjudicative and non-adjudicative); and (ii) actively and constructively engage in an ADR dialogue with the parties before referring them to the most appropriate ADR procedure.

i. ADR procedures

The particular characteristics of an ADR procedure will be relevant when the courts is seeking to exercise its discretion. The courts must, therefore, have a detailed knowledge and understanding of the full range of ADR procedures. It will, in particular, be important for the

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[71] ibid at [46].
[72] e.g. at an interim hearing or at the end of trail as part of the costs assessment exercise.
[73] I. Levy 'Lightening the overload of CPR rule 3.9' (2013) 32(2) *Civil Justice Quarterly* 139-152.

courts to distinguish between adjudicative and non-adjudicative ADR procedures to ensure that the parties' right to revert to the courts for judicial hearing is preserved. The training of judges in ADR will be crucial in ensure that the courts are referring the parties to the correct and most appropriate ADR procedure. It is pleasing to note that the Judicial College's *Strategy 2021-2025*[74] includes a commitment to "increase knowledge of and prepare judicial office holders for the use of all types of alternative dispute resolution, including formal negotiation, mediation, conciliation, early neutral evaluation and arbitration, as well as online dispute resolution and online courts."[75] It will be important for judges to put that training into practice and to fully embrace their ADR powers and to actually make ADR orders. In doing so, it will also be important for judges to avoid the temptation of simply ordering the parties to mediation as the default ADR procedure and to consider the full range of non-adjudicative procedures.

There are early signs of a judicial culture change in how ADR procedures are perceived and promoted. In *Jones v Tracey,*[76] for example, the Master said this

> Although it is common to conflate ADR with mediation it is not right to do so because ADR encompasses a range of approaches including Chancery FDR, ENE and conventional negotiations at a round-table meeting, or otherwise, as well as mediation.[77]

The Master's comments reflect a wider judicial understanding and appreciation of the concept of ADR as encompassing a *variety* of procedures and not simply equating to mediation. Mediation is the most favoured form of ADR procedure among the judiciary, and it dominates the ADR jurisprudence, however, this creates a distorted perception of a two-tiered civil justice system which simply consists of litigation and mediation. Furthermore, this preference for one particular type of procedure over other forms of ADR restricts the courts' ability to effectively further the overriding objective in encouraging and facilitating *appropriate* ADR procedures.

ii. ADR dialogue

More should be done by the courts to engage with the parties and to explain the nature and importance of ADR, their ADR duties, the role of the third party neutral, the consequences of not engaging with ADR, and, more significantly, the freedom of the parties to withdraw from the process (before a settlement is concluded) and to have their dispute heard by a judge. Guidance can be taken from the *Statement of the European Law Institute and of the European Network of Councils for the Judiciary*[78] which recommends greater training of the judiciary on ADR matters. In particular, art. 18 provides that the courts should ensure that the parties understand whether the ADR process that is being recommended is mandatory or voluntary,

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[74] *Judicial College Strategy 2021-25* available https://www.judiciary.uk/guidance-and-resources/judicial-college-strategy-2021-25-launched/ (accessed 4th July 2024).
[75] ibid at p7.
[76] *Jones v Tracey* [2023] EWHC 2242 (Ch).
[77] ibid at [42].
[78] *The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution - Statement of the European Law Institute and of the European Network of Councils for the Judiciary (2018)* available https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf (accessed 4th July 2024).

and art. 19 recommends that the courts explain the nature of ADR and its relationship with the court process. The process of informing and educating the parties of ADR should not simply be left to the parties, their lawyers and the appointed their party neutral, but should also include and be led by judges. The parties will be better informed of the nature of ADR which will, in turn, encourage a more constructive approach to ADR. It will also reinforce procedural justice by ensuring that the parties understand and feel part of the decision making process. In addition to explain the economic virtues of settling through ADR, the courts should also explain the winder benefits of engaging with ADR, including the possibility of narrowing the issues in dispute which can assist more efficient judicial case management if the matter does not settle and reverts to the court process.

Impact on pre-action conduct

Although *Churchill* concerns the power to compel parties to ADR during court proceedings, it is also relevant to the pre-action stage of disputes. It is relevant because the pre-action protocols, which govern the parties' pre-court behaviour, have become increasingly interconnected with the court process. In *Jet2 v Hughes*,[79] the Court of Appeal observed that the pre-action protocols "are now an integral and highly important part of the litigation architecture" [80] and that a number of protocols were closely integrated with the CPR.[81] That decision led to the current Civil Justice Council review of the pre-action protocols[82] which is considering the reform and future role of the protocols within the civil justice system. In its *Final Report (Part I)*,[83] which was published three months prior to the *Churchill* decision, the CJC has recommended the introduction of a new General Pre-action Protocol[84] which requires the parties to complete the following three sequential procedural steps before issuing proceedings:

i. the early exchange of relevant information;
ii. engagement with a dispute resolution procedure; and
iii. if the matter cannot be settled, the parties should complete a stocktake with a view to narrowing the issues in dispute.

In respect of the parties' dispute resolution obligation, paragraph 4.14 of the proposed General Pre-action Protocol exempts parties from any future requirement to engage with ADR if they have attempted ADR at the pre-action stage. Paragraph 4.14 states

> Where the parties have engaged in mediation under this protocol [or any other dispute resolution process involving the assistance of a neutral third party such as early

[79] *Jet2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858. See also *Shah v Barnet LBC* [2021] EWHC 2631 (QB).
[80] *Jet 2* at [36].
[81] e.g. the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Protocol for Low Value Personal Injury (Employers' Liability and Public Liability Claims), which are the subject of specific provisions in Section II of CPR 36 (dealing with offers to settle) and Section III of CPR 45 (concerning fixed costs). e.g. the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Protocol for Low Value Personal Injury (Employers' Liability and Public Liability Claims), which are the subject of specific provisions in Section II of CPR 36 (dealing with offers to settle) and Section III of CPR 45 (concerning fixed costs).
[82] *Civil Justice Council Review of the Pre-action Protocols Interim November 2021; Civil Justice Council Review of the Pre-action Protocols Final Report (Part 1) August 2023.*
[83] ibid *Final Report (Part I)*
[84] See chapters 3 and 4 and Annex 2 of the *Final Report (Part I).*

> neutral evaluation, an Ombudsman etc.], and the dispute does not settle, *then the parties will not be required to engage in another mediation if court proceedings are started.*[85]

The intention behind this exemption is to avoid low value disputes that have been through an ADR process at the pre-action stage from having to engage in the current opt-out mediation process after proceedings have been issued which would be disproportionate. However, *Churchill* potentially alters the position in paragraph 4.14 for higher value claims because once proceedings have been issued the courts retain the power to order the parties to engage with ADR regardless of whether they have attempted ADR at the pre-action stage. Two very recent post-*Churchill* decisions support this observation. In *Heyes v Holt*,[86] the parties had attempted mediation before issuing proceedings but were unable to settle. HHJ Matthews, sitting as a judge of the High Court, ordered the parties to engage in a further mediation when he said

> This is a case which cries out for mediation by the parties. I am aware that mediation has already been attempted between the parties (in November 2022), and on that occasion it failed. I commend them nevertheless for trying. But that was before the claim had even been issued. Now that the parties have full pleadings and disclosure, as well as (for what it may be worth) this judgment, the parties should try again. I will order a stay for that purpose. In entering such a mediation, the claimants would now be aware that, on the materials that I have so far seen and heard, their case is weak, and the costs of the whole trial would, on the claimants' own evidence, ruin them if they lost. I can also see considerable scope for cross-examination of the claimants on their evidence at trial. In a case where summary judgment has been sought, but not obtained, there is always a (real) risk at trial for the party or parties that survived the application. On her side, the defendant would be aware of the difference between, on the one hand, simply looking at documents presented to the court on their own, and, on the other, hearing and seeing witnesses and cross-examination at trial. She would also take full account of litigation risk. In litigation, whatever the lawyers say, nothing is certain.[87]

Similarly, in *Francis v Pearson*,[88] HHJ Matthews, sitting as a judge of the High Court, recommended that the parties engage with a second mediation. As HHJ Matthews explained

> 88. Experience shows that it is often in entrenched cases such as this that ADR can make a real difference, often requiring honest conversations with parties as to the merits of their respective cases, and the potential downsides, as well as looking at pragmatic ways forward.
>
> …..
>
> 91. The parties need to reflect on the reasons why the cases did not settle at mediation, and the costs of continuing this litigation – not just in terms of money, but the personal costs to each party for example from the time and energy spent fighting,

[85] Emphasis added.
[86] *Heyes v Holt* [2024] EWHC 779.
[87] ibid at [50].
[88] *Francis v Pearson* [2024] EWHC 605 (KB).

> the stress and worry the proceedings might cause, particularly in respect of outcomes, and the impact that it is going to have on the wider community in which they live.
>
> 92. *I would strongly recommend that the parties re-consider some form of alternative dispute resolution process – which might include further mediation, or some other way of facilitating agreement - before matters in this case move forward and further costs are incurred.*[89]

Therefore, the pre-action protocols should take account of the impact of *Churchill* on the parties' pre-issue and post-issue obligations in higher value claims to make clear that (i) the courts have the power to compel parties to ADR and this may be in the form of an ADR order or a stay to allow ADR to take place; and (ii) the courts may refer the parties to ADR during proceedings even though the parties may have previously engaged with an ADR process which did not result in a settlement. Clearly, whether the court decides to refer the parties will be an issue for the courts discretion and will be dependent on the circumstances of each case.

By departing from *Halsey* and confirming the legality of compulsory ADR, the decision in *Churchill* has not only enhanced the role and visibility of ADR within the civil justice system, but it has also strengthened the relationship between ADR and the civil court process. It also lays the founds for the courts to develop a more coherent and principled approach to the issue of compulsory ADR. To do this, the courts must fully embrace and *exercising* their ADR powers.

[89] Emphasis added.