ADR after *Churchill*

Tony Allen takes an in-depth look at *Churchill* & considers its impact

The MR: On life post-*Halsey*

Quite the most significant decision for many years, in terms of influencing the development of mediation within civil justice, is to be found in the judgment of a very strong Court of Appeal in *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416. Sir Geoffrey Vos, Master of the Rolls, sat with Lady Chief Justice Carr and Lord Justice Birss, the Deputy Head of Civil Justice, and gave the lead judgment, which in effect reverses the 2004 Court of Appeal's opinion expressed in *Halsey v Milton Keynes NHS Trust* [2003] EWCA Civ 576 that for a court to order parties to mediate infringed their Art 6 right to a fair trial. *Churchill* now gives judicial authority to the view expressed in the Civil Justice Council's report, 'Compulsory ADR June 2021', that courts may order parties to mediate or use other dispute resolution processes even against party objections, '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 the dispute fairly, quickly and at reasonable cost'.

Some history

The Civil Procedure Rules (CPR) revolutionised civil justice in many ways, one of which was to acknowledge for the first time the place of alternative dispute resolution (ADR) alongside civil justice as a legitimate tool to assist resolution of civil disputes. Aligned with Lord Woolf's Access to Justice reports, its use was not to be mandated. But it was soon argued that to decline unreasonably to engage in mediation (always the prime ADR process) could well give rise to a costs sanction, even against a winning party. This was eventually confirmed by the Court of Appeal in *Dunnett v Railtrack* [2002] EWCA Civ 303.

Halsey was an unsuccessful claim by Mr Halsey's widow against an NHS Trust over his death. She appealed against Judge Harris QC's refusal to impose costs sanctions on the NHS Trust which had steadfastly refused her offers to mediate. Her appeal was conjoined with *Steel v Joy*, a dispute between insured defendants in which one had declined to mediate over successive torts. So these were both cases about the consequences of refusing an inter-party proposal to mediate, not of ignoring a court order to mediate.

We can learn from facts that emerged from the appeal in *Churchill* where matters went somewhat astray in *Halsey*. On the second day of the Churchill appeal, a formal statement agreed by all the parties and interveners was laid before the court. It read: 'The question of whether compulsory mediation is lawful was not in issue at first instance in *Halsey*. In the Court of Appeal proceedings [in *Halsey*], the issue was not raised in the Appellant's Notice and none of the written skeleton arguments addressed that issue.'

The written submission lodged jointly by the Civil Mediation Council, CEDR and Ciarb, who were given joint permission to intervene in *Churchill*, delicately suggested that the court in *Halsey* had been… led into error in respect of Art 6, ECHR, by argument which was addressed to it only in the course of oral submissions, the court and the parties not having been given notice of it in any written submission. The interveners respectfully supported the submission that to order parties to mediate does not, certainly in most circumstances, infringe their Art 6 rights. This is because requiring parties to mediate does not, in most circumstances, impose any obstruction to their right of access to the court, let alone an unacceptable obstruction. Requiring parties to mediate does not require them to settle their dispute, or deny them access to the court if they are unable to do so.

In his oral submission on behalf of the mediation providers, Edwin Glasgow KC was rather more trenchant on this point, making it clear that any fault lay not with Lord Dyson and his fellow judges in *Halsey* (Lords Justice Ward and Laws) but with those who suddenly and improperly sprang an argument on him that was not pleaded, not in any written submission, and was against the instructions from the Law Society.

He noted that both judges had since graciously and honourably accepted that they may have stepped too far in acceding to these submissions, and (as Ward LJ put it in *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234) in being 'persuaded by the silky eloquence of the eminence grise of the ECHR, Lord Lester of Herne Hill QC to place reliance on *Deweer v Belgium* (1980) 2 EHRR 439'.

The late Lord Lester QC was instructed by the Law Society which, it later appeared, had instructed him not to take any point about Art 6. So although *Halsey* was essentially about inter-party offers to mediate, the court accepted an unanticipated invitation to give general guidance on whether courts had the power to order parties to mediate, and declared that to do so contravened ECHR Art 6.

The impact of this part of Halsey

There is no doubt that the impact of this decision was widespread and profound. Courts that had been making ADR Orders—or said they wanted to—ceased to do so (including the High Court in *Guinle v Kirreh* [2000] CP Rep 62; *R (Cowl) v Plymouth CC* [2002] 1 WLR 803; and *Shirayama Shokusan Co Ltd v Danovo Ltd (No 2)* [2004] 1 WLR 2985), with the exception of the Admiralty and Commercial Court, which had been making not-quite-mandatory ADR Orders since 1995 and has continued to do so. Nor was it long before suggestions emerged that this part of *Halsey* was strictly obiter (ie not essential reasoning on which the factual case was to be decided). The decision was criticised widely for suggesting that ordering mediation obstructs a right to trial when the route back to litigation is never barred, mediation content remains confidential, and parties cannot be criticised for not settling.

Very few judgments since have reflected on whether courts should have the power to order unwilling parties to mediate (An exception was Mr Justice Norris in *Bradley v Heslin* [2014] EWHC 3267 (Ch)]. *Halsey* has since been cited mainly over imposing costs sanctions (or not) on a party who declined to mediate. Much of that aspect of *Halsey* has been diluted over the years, but it still remains technically in force, and future cases will still give rise to such issues.

The Churchill case

Mr Churchill's Japanese knotweed played almost as little part in the appeal brought by

Merthyr Tydfil Council as the death of Mrs Halsey's husband in her appeal. On advice, Churchill threatened the council with nuisance proceedings over the escape of knotweed from council land into his garden. He refused to use the council's complaints procedure and issued a civil claim. The council applied for stay on the basis that the practice direction: pre-action conduct had been ignored. The deputy district judge held that he could not order either a stay or participation in the complaints scheme because *Halsey* prevented him from doing so. Importantly he also held that Churchill's refusal to use the scheme amounted to unreasonable litigation conduct, which might later give rise to a costs sanction (though declining to impose one himself at this interlocutory stage). The council appealed and it was immediately recognised that at last this would provide an opportunity for the Court of Appeal to revisit *Halsey* on whether courts could order mediation or other processes.

The Master of the Rolls said that the appeal raised four questions, each of which he answered:

- Was the judge right to think *Halsey* bound him to dismiss the council's application? This involves a consideration of whether the passages in *Halsey* relied upon by the judge were part of the main reasoning of that decision.

  At last, after 19 years, the court found the judge was not bound by it because that passage of Lord Justice Dyson's judgment was indeed obiter, ie not part of the main reasoning for that decision.
- If not, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

  Consequently, the court held that courts can lawfully order a stay or that parties engage in mediation or other processes.
- 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?

  The court held it was a matter for judges in each case to exercise discretion as to what to require of parties. The Bar Council suggested a number of possible considerations for a court in exercising such a discretion. Vos MR acknowledged these and saw parallels between these and the *Halsey* factors for excusing refusal to mediate, but he refused to be drawn into setting fixed principles. So, judges should not necessarily turn to this list when considering such questions in future.
- Should the judge have acceded to the council's application to stay these proceedings to allow Churchill to pursue a complaint under the council's internal complaints procedure?

  The court declined to decide this question, as the essence of the appeal dealt with answering the first three questions above. Answering this one after the passage of time was not easy, and it was made more complicated by the fact the deputy district judge had found that Churchill's conduct was unreasonable, an unappealed finding. Presumably if he had not felt fettered by *Halsey*, he would for that reason have ordered a stay or engagement in the complaints process. But there was no point in ordering a stay now. Vos LJ ends his judgment by suggesting there be no order as to costs between any of the parties and perhaps Churchill and the council might now explore the possibility of mediation to resolve their continuing dispute.

Future implications of Churchill

While both the council and Churchill may have been unhappy not to see an end to their longstanding differences, there is no doubt the mediation provider interveners will be well pleased with the outcome of this appeal. The body of judicial and academic opinion that *Halsey* had always been wrong on this point had become overwhelming. It just feels strange to think that an opinion which has had such a big impact over the past 18 years was always wrong and could have legitimately been ignored by courts throughout.

The Churchill judgment does not purport to authorise 'mandatory' or 'compulsory' mediation as a general concept, something which seems to frighten lawyers in particular. Although the recently coined phrase 'integrated mediation' does not appear in *Churchill* either, this may be a term which gathers pace. *Churchill* simply establishes that a court has a discretion to order a stay or engagement in mediation or another process if it thinks it right, even if parties object, so long as the order 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 the dispute fairly, quickly and at reasonable cost. CPR 3.1(m) already authorises this in relation to judicial evaluation, and it will be surprising if this is not extended to cover all types of dispute resolution process so as to accord with the Churchill judgment.

What of the practical impact of this decision? Now it is clear that judges can order parties to use dispute resolution processes, the likelihood is that parties will simply choose to utilise them voluntarily, as has happened in many other common law jurisdictions when such a power has been identified. With a summary costs order at risk if an application for such an order goes wrong, it will probably seem safer simply to opt to use mediation or another neutrally run process from choice. **NLJ**

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