# A KNOTTY PROBLEM: CAN THE COURT STAY PROCEEDINGS AND ORDER THE PARTIES TO ENGAGE IN ADR? YES IT CAN … BUT…

*November 29, 2023 · by gexall · in Appeals, Conduct*

In Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 the Court of Appeal considered the question of whether the courts can stay an action to, effectively, compel the parties to engage in ADR. It was held that the courts do have such power, however there is no definitive guidance on when that power should be exercised.



RECENT POSTS

**“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 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.”**

## THE CASE

The claimant brought an action against the defendant arising from the invasion of Japanese Knotweed onto this property. The defendant said that the claimant should use their own complaints procedure as a means of resolution. When proceedings were issued the defendant applied for a stay. The judge at first instance held that he did not have jurisdiction to order a stay as a result of the decision in *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 (*Halsey*). The judge further held that the claimant had acted unreasonable in failing to follow the defendant’s complaints procedure.

## THE DECISION OF THE COURT OF APPEAL

The Court of Appeal held that the courts do have a power to order a stay for the purpose of “compelling” the parties to mediate. However it would not set down any definitive checklist or guidelines as to how that discretion should be exercised.

Further it would not comment on the merits of the proposed process in the current case. There had been no cross-appeal against the judge’s finding that the claimant had acted unreasonably.

## HOW SHOULD THIS BE DONE?


- THE SUMMARY ASSESSMENT OF COSTS: A PRACTITIONER’S GUIDE: WEBINAR 18th MARCH 2024
- AN APPELLANT CANNOT RE-OPEN THE GROUNDS UPON WHICH IT HAS BEEN GIVEN PERMISSION TO APPEAL: COURT OF APPEAL DECISION
- NEW FORMS FOR ANONYMITY ORDERS: GET THE LINK – SEE THE ORDER
- COURT OF APPEAL – NOT THE CORRECT DESTINATION FOR AN APPEAL RELATING TO THE SENTENCE PASSED ON A JUDGMENT DEBTOR
- COURT ORDERS DISCLOSURE AGAINST HEALTHCARE SAFETY INVESTIGATION BOARD

TOP POSTS & PAGES

- THE SUMMARY ASSESSMENT OF COSTS: A PRACTITIONER'S GUIDE: WEBINAR 18th MARCH 2024
- AN APPELLANT CANNOT RE-OPEN THE GROUNDS UPON WHICH IT HAS BEEN GIVEN PERMISSION TO APPEAL: COURT OF APPEAL DECISION
- BEWARE THE EXPERT WHO "LECTURES" THE COURT (AND TELLS THE JUDGE WHO TO BELIEVE)
- NEW FORMS FOR ANONYMITY ORDERS: GET

Having decided that the courts have a discretion the Master of the Rolls then considered how that power should be exercised.

Issue 3: 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?

LIX. ***In Halsey, the Court of Appeal said at [9] that, even if the court had jurisdiction to order unwilling parties to refer their disputes to mediation, they found "it difficult to conceive of circumstances in which it would be appropriate to exercise [that jurisdiction]". That comment was undoubtedly not part of the essential reasoning of the decision for the reasons given above. Moreover, I would not go so far. Experience has shown that it is extremely beneficial for the parties to disputes to be able to settle their differences cheaply and quickly.*** Even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court-based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. ***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.***

LX. As is already clear, Mr Churchill argued that different legal principles applied when different methods of non-court-based dispute resolution were being considered. I have rejected that argument in deciding issue 2 above. ***As a matter of legal principle, in my judgment, the court can properly regulate its own procedure so as to stay proceedings or order the parties to proceedings to engage in any non-court-based dispute resolution process. I have no doubt, however, that the characteristics of the particular method of non-court-based dispute resolution process being considered will be relevant to the exercise of the court's discretion as to whether to order or facilitate it.***


THE LINK - SEE THE ORDER

- COURT OF APPEAL - NOT THE CORRECT DESTINATION FOR AN APPEAL RELATING TO THE SENTENCE PASSED ON A JUDGMENT DEBTOR

BLOGROLL

- Coronavirus: Guidance for lawyers and businesses
- Fatal Accident Law
- Personal injury: Liability and Damages

BOOKS

- Munkman & Exall on Damages for Personal Injuries and Death 14th ed
- The APIL Guide to Fatal Accidents 4th edition

USEFUL LINKS

- Kings Chambers
- Kings Chambers Costs & Litigation Funding
- Kings Chambers Serious Injury
- The Civil Procedure Rules
- The National Archives Recently Published Judgments
- The Senior Court Costs Office Guide 2023
- Website of 4 – 5 Gray's Inn Square
- www.Bailii.org

ARCHIVES

Select Month

LXI. The Bar Council submitted that the following factors were relevant to the exercise of the court's discretion: (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.

LXII. I note that these factors mirror, to some extent at least, the factors discussed by the Court of Appeal in *Halsey* at [16]-[35] as being relevant to the costs question of whether a party had behaved unreasonably in refusing ADR.

LXIII. ***Mr Churchill submitted that the internal complaints procedure in this case was, in any event, a disproportionate fetter on the right of access to court because (a) there was no neutral third party involved and the claim was dealt with by the manager of the Council's own knotweed department, (b) no legal advice was available to the claimant, (c) there was no settled written procedure by which it operated, (d) it had no statutory backing, (e) it was a process that had no fixed timescale and might take an open ended amount of time, (f) the limitation period was not suspended during the process, (g) there was no provision for the payment of a claimant's costs, and (h) there was no express provision allowing for the payment of compensation in addition to eradicating the knotweed.***

LXIV. ***These submissions illustrate the point I have already made as to the relevance of the particular process being considered. In this context, I should mention that we heard some argument about whether an internal complaints procedure of the kind offered by the Council is properly to be regarded as a species of ADR at all. That definitional issue seems to me to be academic. The court can stay proceedings for negotiation between the parties, mediation, early neutral evaluation or any other process that has a prospect of allowing the parties to resolve their dispute. The merits and demerits of the process suggested will need to be considered by the court in each case.***

LXV. Based on what I have said under issue 2 above, the principles can be applied to the situation where an order is sought to facilitate non-court-based dispute resolution in the context of ongoing legal proceedings. ***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 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.***

LXVI. ***I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions. The matters mentioned by the Bar Council and Mr Churchill, and by the Court of Appeal in Halsey are likely to have some relevance. But other factors too may be relevant depending on all the circumstances. It would be undesirable to provide a checklist or a score sheet for judges to operate.*** They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.

## WHAT SHOULD HAVE HAPPENED IN THE CURRENT CASE?

Issue 4: Should the judge have granted the Council's application to stay these proceedings to allow Mr Churchill to pursue a complaint under the Council's internal complaints procedure?

LXVII. I have already set out some of Mr Churchill's complaints about the nature of the Council's internal complaints procedure at [63] above. These demerits led Mr Churchill to submit that the judge was right not to have ordered the stay that the Council sought. Conversely, the Council submitted that this court ought now to order a stay for one month so as to allow Mr Churchill to consider whether or not to engage in the internal complaints procedure and specifically to consider allowing the Council to do what it had offered to do, namely to treat the knotweed in Mr Churchill's garden.

LXVIII. There is, however, a problem with this court resolving these submissions. First, the Council's Notice of Appeal seeks a stay for three months for the parties to engage in the Council's internal complaints procedure. The relevant grounds of that appeal are simply that: (i) the judge was wrong to hold that *Halsey* prevented him from staying the claim for that purpose, and (ii) the CPR, the overriding objective and the principle that litigation should be the last resort, allows the court to stay premature claims for non-court-based dispute resolution and to stay or strike out claims where a party has been found to have unreasonably refused to do so. These points have already been substantively resolved above.

LXIX. The judge, as I have said, decided at [41], in addition to the *Halsey* point, that Mr Churchill and his lawyers had acted unreasonably and contrary to the spirit and the letter of the PD in refusing to use the internal complaints procedure. He said at [42] that he disagreed with Mr Churchill that true ADR had to be a wholly independent process. He rejected at [43]-[46] Mr Churchill's three other complaints at that stage, namely that (i) it was an inappropriate process, (ii) it did not deal with matters more than 12 months old, and (iii) it did not allow for the recovery of the claimant's costs. At [47]-[48], the judge declined to make any further immediate findings or costs orders, but left the costs orders to the trial judge. None of these findings has been the subject of a Respondent's Notice from Mr Churchill, as implicitly acknowledged in his first skeleton.

LXX. In these circumstances, resolving issues 1-3 deals with everything that has been properly raised before the court. ***The question of what should happen now is more complicated. The difficulty is that Mr Churchill's criticisms of the internal complaints procedure carry the implication that he was not unreasonable to refuse to engage in it, when the court has found that he was, and he has not appealed that finding. Had he challenged the finding, it would have been open to us to reach the opposite conclusion on the question of reasonableness, and the arguments before the court would have been different.***

LXXI. With those points in mind, I will say briefly what I think about issue 4. ***First, it is plain that, had the judge not concluded that he was bound by Halsey to refuse a stay, he would have granted one; as I have said, the basis on which he would have done so is not appealed. Secondly, in fact, things have now moved on considerably. Mr Churchill has refused to allow the Council to treat the knotweed in his garden, standing on his right to seek compensation and costs from the court. Thirdly, whilst the stay was sought after the issue of legal proceedings, the Council's internal complaints procedure is plainly intended to operate before proceedings have been issued. We are told that it is in a form that is in widespread use by Councils. Fourthly, the procedure itself seems, predominantly at least, to envisage a complaint about the Council's services to council tax payers as opposed to private law claims against the Council as a neighbour. Finally, whilst the Council submits that its internal complaints procedure is crucial, because the total value of all knotweed claims brought by adjoining owners against the Council is very high indeed, it may not be the most appropriate process for an entrenched dispute of this kind.***

LXXII. ***In these circumstances, whilst it is obvious that the judge would have stayed the claim back in May 2022, had he been able to see this judgment, things have moved on. There is little point in doing so now, since nothing will be gained if a one-month stay were granted as the Council seeks. This court cannot properly grant a mandatory injunction against Mr Churchill requiring him to allow the Council to treat his knotweed. That has been neither formally sought nor argued.***

LXXIII. ***It is better in my judgment to allow the appeal to the extent already stated and to allow the merits and demerits of this particular internal complaints procedure to be resolved on another occasion.***

## CONCLUSIONS

Conclusions

LXXIV. For the reasons I have given, I have decided that:

i) [9]-[10] of *Halsey* was not part of the essential reasoning in that case and did not bind the judge to dismiss the Council's application for the stay of these proceedings.

ii) ***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 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.***

iii) **I decline to lay down fixed principles as to what will be relevant to determining the questions of a stay of proceedings or an order that the parties engage in a non-court-based dispute resolution process.** Many of the factors mentioned at [61]-[63] above and the nature of the process contemplated will be relevant, as will other circumstances.

iv) ***I would decline to make any order for a stay of these proceedings at this stage for the reasons given at [67]-[73] above.***

75. ***I would allow the appeal in part as indicated above. I would also indicate that it is my provisional view that: (i) there should be no order as to costs of this appeal as between the parties to the proceedings, and (ii) the parties ought to consider whether they can agree to a temporary stay for mediation or some other form of non-court-based adjudication.***

Tags: ADR, Appeals, Civil Procedure

← GRIFFITHS -v- TUI: SUPREME COURT FINDS FOR THE CLAIMANT: THE TRIAL WAS UNFAIR: POINTS SHOULD HAVE BEEN PUT TO THE EXPERT

SERVICE OF THE CLAIM FORM CASES: THE PAST 14 MONTHS: ANOTHER SEASON OF THE DREARY & UNLOVELY CROP OF PROCEDURAL SERVICE ISSUES: WEBINAR 5th FEBRUARY 2024 →