Is ADR an aspiration in light of Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416?

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1. ADR promises to help reduce the cost of litigation and speed up the resolution of disputes. Indeed, at the top of nearly every court order generated in the County Court is the following paragraph:

> *"At all stages the parties must consider settling this litigation by any means of alternative dispute resolution. Any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."*

2. In the context of housing disrepair cases, the question is whether the ADR is a real alternative to litigation.

3. Paragraph 4.1 of the Pre-Action Protocol for Housing Disrepair Cases states:

> *"4.1 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and if so, try to agree which form to use. Both the landlord and the tenant may be required by the court to provide evidence that alternative means of resolving their dispute were considered.*
>
> *The courts take the view that litigation should be a last resort, and that claims should not be issued while a settlement is still actively being explored. Parties should be aware that the court will take into account the extent of the parties' compliance with this Protocol when making orders about who should pay costs."*

4. The brief facts of Churchill v Merthyr Tydfil County Borough Council are as follows.

5. In 2015, Mr Churchill bought 9 Gellifaelog Terrace, Penydarren, Merthyr Tydfil. The Council owned the land adjoining the property. Mr Churchill claimed that since 2016, Japanese knotweed had encroached from the Council's land onto his property and caused damage to it, loss of value, and enjoyment.

6. Mr Churchill instructed solicitors who sent the Council a letter of claim on 29 October 2020. Notably, the Council's response was to query why he had not made use of its Corporate Complaints Procedure. The Council warned Mr Churchill that if he were to issue proceedings without having done so, the Council would apply to the court for a stay and seek its costs. Nevertheless, Mr Churchill issued proceedings in nuisance against the Council.

7. The Council followed through with what it had intimated in its response to the claim and applied for a stay. The application was dismissed.

8. At first instance, the DDJ hearing the matter found that he was bound by the decision of Dyson LJ in *Halsey v Milton Keynes General Hospital NHS Trust [2004] EWCA Civ 576* that it seemed:

> *"…likely that compulsion of ADR would be regarded as unacceptable constraint on the right of access to the court".*

9. The case eventually made its way to the Court of Appeal after HJJ Harrison granted the Council permission to appeal on the grounds that it raised an important point of principle and practice.

10. The Court of Appeal considered four questions:

    i) Was the judge right to think that Halsey bound him*?*
    ii) If not, could the court lawfully stay proceedings or order the parties to engage in a non-court-based dispute resolution process?
    iii) If so, how should the court decide whether to stay the proceedings or order the parties to engage in a non-court-based dispute resolution process?

iv) Should the judge have acceded to the Council's application to stay these proceedings to allow Mr Churchill to pursue a complaint under the Council's internal complaints procedure?

11. On the first question, the Court of Appeal decided that *Halsey* did not bind the DDJ. The question in *Halsey* was, *"should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution".* The Court of Appeal decided that Dyson LJ's decision was about costs sanctions, and not whether to order parties to participate in mediation. As a consequence, the DDJ was not bound by the decision in *Halsey*.

12. The second question is the most interesting from a litigation perspective. Can the court lawfully impose a stay on proceedings or order the parties to engage in a non-court-based dispute resolution process? After reviewing domestic and EU authorities, the Court of Appeal decided it could. However, the key to any such order is that:

> *"..it must be exercised so that it does not impair the very essence of the Claimant's article 6 rights, in pursuit of a legitimate aim, and in such a way that it is proportionate to achieving that legitimate aim."*

13. If a court were required to consider such a question, the nature of the process needs to be examined, for example, whether the complaints procedure is satisfactory. It would be a good reason for not ordering a stay if it is not.

14. Other factors that might be relevant to deciding whether to grant a stay may include:

a) is representation available;
b) payment of legal costs of the process; and,
c) independence of the process.

15. On behalf of the court, Sir Geoffrey Vos MR found, "*… I would conclude 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.*" (§58)

16. Turning to the third question, should the court decide whether to stay the proceedings or order the parties to engage in a non-court-based dispute resolution process? This is again an interesting question from the housing lawyer's point of view, as in 99.9% of cases, the internal complaints procedure is not utilised.

17. Relevant arguments advanced by Mr Churchill, amongst other things, included that the Council's internal complaints procedure was a disproportionate fetter on the right of access to court and could not be regarded as a species of ADR. The Court of Appeal found:

> "*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.*"

18. Although legal teams may be thinking that the Court of Appeal's comments are a real boon for providing cheaper and swifter resolution to housing disputes, the Court of Appeal went on to say that:

> "*The merits and demerits of the process suggested will need to be considered by the court in each case.*"

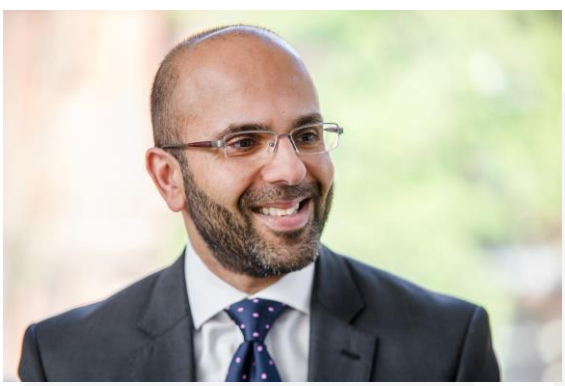
19. In short, if a party fails to present evidence that the offer of ADR is an early neutral evaluation of the case, which does not prevent the Claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost, a court is likely to find that the matter should not be stayed.

20. The last question the court was asked to decide was, should the judge have acceded to the Council's application to stay these proceedings to allow Mr Churchill to pursue a complaint under the Council's

internal complaints procedure? The answer to that question was yes. However, there was little point in doing so now (§63-73).

21. From a practical perspective, it is all very well for Defendants to be hoping that lengthy housing litigation can be diverted to a swifter and cheaper complaints process; however, even if a party could persuade a judge that it had a suitable ADR mechanism in place, could it cope with the increase in workload? Is it adequately resourced to be able to cope with an increase in caseload?

22. Lastly, in my view, unless a party is able to produce evidence which shows the independence of the ADR process and addresses what is likely to be the most critical issue of whether the process allows for legal representation and the recovery of the associated costs to ensure the parties are on an equal footing, persuading a court to stay a claim will mean that ADR will be an aspiration rather than a reality.



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