The British Courts and Compulsory ADR—How Did *That* Happen?

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Abstract

On 29 November 2023, the Court of Appeal held in *James Churchill v Merthyr Tydfil County Borough Council*, that the courts of England and Wales are entitled lawfully to order parties to engage in non-court-based dispute resolution processes. This important decision should not come as a surprise. This article will argue by reference to case law, judicial commentary and the Civil Procedure Rules (CPR) that this decision is the most recent expression of an impulse the courts have long maintained: that a case can be dealt with justly by moving (by various means) litigants away from the judgment seat to one of negotiated, consensual outcomes. The decision corrects an anomaly within the CPR that obliges parties to further the overriding objective by considering alternative dispute resolution but deprives the court of a particular remedy to enforce that obligation. This article will trace the roots of the Court of Appeal decision and identify to what extent it is the natural progression in judicial thinking, and it truly breaks new ground.

Keywords: ADR; justice; civil justice; court reforms; overriding objective; *Halsey*; CPR; *Churchill v Merthyr Tydfil*; Article 6; arbitration agreements.

[A] INTRODUCTION

In *James Churchill v Merthyr Tydfil County Borough Council* (2023) the Court of Appeal held that courts can lawfully stay proceedings, or order parties to engage in a non-court-based dispute resolution process.

The case shifts from the orthodoxy evident since the early days of the Civil Procedure Rules (CPR) that alternative dispute resolution (ADR) should not be compelled, which found its most influential expression in *Halsey v Milton Keynes General NHS Trust* (2004). However, this orthodoxy has been uncomfortable for some. As we shall argue, it has presented the courts with the impossible task of enforcing a duty without a power of compulsion.

This article's valuable contribution to this subject is found in its study and possible explanation of how the British Court of Appeal moved from asserting in 2004 that ADR should not be compulsory to asserting emphatically, nearly 20 years later, that it should.

This article will examine: Lord Woolf's *Final Report* (Woolf 1996); the 1996 Department Advisory Committee (DAC) *Report on Arbitration Law* (1996); sections 1 and 9 Arbitration Act 1996; the CPR requirements in relation to ADR; and the development of the case law in relation to compulsory ADR. It will conclude that even though, in the early and mid-years of the CPR, compulsory ADR was not considered acceptable, the legal and regulatory foundations to justify it were laid early on, and it was perhaps a matter of time before there would be an attitudinal shift from ordering ADR being undesirable, to the opposite.

[B] THE WOOLF REFORMS

To understand how *Churchill* came about, we must return to the mid-1990s and the civil procedure reforms of Lord Woolf.[1]

In his *Access to Justice: Final Report* to the Lord Chancellor (1996), Lord Woolf described eight principles necessary for access to justice. Concerned, amongst other things, that litigation was too slow and adversarial (section I, paragraph 2), he proposed that a greater use of ADR would be a solution to the problems litigants faced. He envisaged the courts playing an active role in encouraging the use of ADR (section I, paragraph 9).

Nearly 30 years later, this seems unremarkable but at the time it was in the vanguard of modern dispute resolution. For example, organizations such as the Centre for Effective Dispute Resolution (CEDR) were gaining prominence in London at around the same time. Practitioners who had not heard of mediation six months earlier were enthusiastic about qualifying as "CEDR Accredited" mediators. While the settlement of litigious disputes was long established, ADR and mediation were, in the mid-1990s, relatively new and unfamiliar terms to many in the legal professions.

Lord Woolf envisaged that civil litigation would reside in a "new landscape" (1996: section I, paragraph 8) where the parties (including

[1] This article draws repeatedly on De Girolamo & Spenser Underhill (2022). Readers of the current article may wish to read the earlier one first (written, of course, before the *Churchill* decision was handed down). While each article speaks to a different subject, their material overlaps to a considerable degree.

their lawyers) and the courts were obliged to bring about what he coined the "overriding objective". That phrase, still in use today, means to deal with cases "justly", embodying as Lord Woolf said "the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice" (ibid).

One of the features of the new landscape was to avoid litigation "wherever possible" (1996: section I, paragraph 9). Litigants should be encouraged to litigate "only as a last resort", having first used "other more appropriate means" to resolve the dispute (paragraph 9(a)). Another feature of the landscape is for litigation to be less adversarial and more co-operative (ibid).

He said :

> My approach to civil justice is that disputes should, wherever possible, be resolved without litigation. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage (1996: section III, chapter 10, paragraph 2).

Significantly, however, Lord Woolf did not propose that the courts should compel the parties to engage in ADR. Rather, they should "encourage" and "assist" (eg 1996: section II, chapter 1(7)(d), 16(b)–(c)).

The *Final Report* gave rise to the Civil Procedure Act 1997. That primary legislation, in turn, gave rise to the (CPR), which first came into force in April 1999 and (subject to regular review, variation and amendment) have remained in force ever since.

[C] THE CIVIL PROCEDURE RULES AND THE OVERRIDING OBJECTIVE

This paper will not expound on the CPR in detail.[2] For current purposes, the CPR is a procedural code with the overriding objective of dealing with cases justly and at proportionate cost (CPR part 1.1.1). The courts and the litigants have a duty to further the overriding objective, which they discharge by applying and obeying the rules (CPR parts 1.3 and 1.4.2). In particular, the courts, litigants and their advisors have a duty to consider using ADR to achieve the overriding objective (CPR part 1.4.1.) The CPR defines ADR as a "collective description of methods of resolving disputes otherwise than through the normal trial process" (CPR part 2.2).

[2] Readers may wish to read De Girolamo & Spenser Underhill (2022), especially section C.

[D] DEVELOPMENTS IN ARBITRATION LAW—MID-1990S.

Before we discuss how the courts approached the new landscape from 1999, it is instructive to consider developments in the field of arbitration that were emerging at the same time as Lord Woolf's reports (1995; 1996).

In February 1996, the Departmental Advisory Committee (DAC) published its *Report on the Arbitration Bill 1996* which later became the Arbitration Act 1996. It described three general principles of arbitration. One of them was party autonomy. At paragraph 19 it stated:

> An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen manes. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted.

The DAC went on to observe, when discussing the extent to which the court should intervene in an arbitral process:

> Nowadays, the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards … and changing attitudes generally, have meant that the courts nowadays only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach and it seems to use that it should be enshrined as a principle in the Bill. (DAC 1996: paragraph 19)

That principle appeared in section 1(b) of the Arbitration Act 1996. Section 9(1) of the Act is also instructive. It provides that:

> A party to an arbitration agreement against whom proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

The importance the Act places on the supremacy of the arbitration agreement was and remains consistent with the CPR's position that arbitration is a form of ADR. As we shall see below, the courts have little difficulty perceiving an arbitration agreement as a type of ADR agreement.

[E] THE CASE LAW AND OTHER SOURCES

The first reported case on the CPR was *Sat Pal Muman v Bhikku Nagasena* (1999). Mummery LJ refused to lift a stay that had been placed on some expensive and unproductive litigation. He ordered: "No more money should be spent from the assets of this charity until … all efforts have been made to secure mediation of this dispute in the manner suggested." This appears to be an early example of the court exerting procedural pressure on the parties to make "all efforts" to secure a mediation. The pressure exerted was to refuse to lift a stay of proceedings until (and presumably unless) that was done.

In the same year, Arden J (as she then was) in *Kinstreet v Balmargo Corporation* (1999) (also reported as *Guinle v Kirreh* 1999) directed that a mediation should take place despite one party being concerned about its efficacy and the good intentions of their opponent. As she put it (under the heading "ADR"), "I therefore propose to direct ADR", before directing the parties to choose a mediator, and to "take such serious steps as they may be advised to resolve their disputes by ADR procedures". She directed that the mediation must take place before a certain date, and if the case did not settle, the parties were to tell the court, describe what steps were taken and why ADR had failed.

In the same vein, several years later, but apparently not where one party was reluctant, Smith LJ in *Uren v Corporate Leisure (UK) Ltd* (2011) stated, having remitted an action for retrial: "I would also direct that, before the action is listed for retrial, the parties should attempt mediation" (paragraph 22).

Two years after *Kinstreet*, Lord Woolf gave a judgment in *R (Frank Cowl) v Plymouth City Council* (2001). The case was brought by some residents of an old people's home about a city council decision to close it. Lord Woolf observed that the claimants had brought the case without the parties exhausting a pre-action complaints procedure. With asperity, he said:

> The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible …
>
> The courts should than make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum of involvement of the courts
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> …

> [When describing what courts should do to achieve dispute resolution without the courts] … the parties should be asked why a complaints procedure or some others form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute (*R (Frank Cowl)* 2001: paragraphs 1-3).

Lord Woolf went on to say (arguably about judicial review cases only):

> *The parties do not* today, under the CPR, *have a right* to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. *The courts should not permit, except for good reason, proceedings* for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. (*R (Frank Cowl)* 2001: paragraph 14, emphasis added).

[F] DISPUTE RESOLUTION AGREEMENTS ANALOGOUS TO ARBITRATION AGREEMENTS—COMPELLING COMPLIANCE WITH AGREEMENTS FOR ADR

A year later, in *Cable & Wireless plc v IBM United Kingdom Ltd* (2002), IBM applied to the court for some litigation brought by Cable & Wireless to be stayed while the parties complied with ADR provisions they had agreed in their contract. They referred, in terms, to an ADR procedure to be recommended to the parties by CEDR.[3]

At that time, and since the mid-1970s, tiered dispute resolution clauses had been held to be unenforceable because they lacked certainty; they were no more than agreements to agree. So Cable & Wireless argued, amongst other things.

Colman J, in disagreement, said this:

> the English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. This is a firmly established, significant and growing facet of English procedure (*Cable & Wireless* 2002: analysis page 6).

[3] Compare Mostyn J's findings in *Mann v Mann* (2014). For an interesting discussion on the enforceability of mediation agreements, see Suter (2014).

He went on to consider the CPR. Noting the duty of the court to further the overriding objective by actively managing cases, which included encouraging the parties to use ADR, the judge said:

> For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR (2002: analysis page 7).

The judge then went on to say:

> The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. It is further a procedural tool provided for under CPR 26.4 to encourage and enable the parties to use ADR (2002: analysis page 7).

Sat Pal and *Kinstreet* are significant because they are early cases which more than hint that the courts were keen for litigation not to proceed on the grounds of disproportionate cost if they could help it. To bring that about, one judge refused to lift a stay until ADR had been explored and the other directed mediation in the teeth of one party not wanting to participate. *Frank Cowl* went further. It said that the rights and remedies of a judicial review should be denied to litigants who could resolve their dispute outside the litigation process, which includes cases where a pre-action complaints procedure had not been taken up.

Cable & Wireless endorsed this enthusiasm for staying proceedings for ADR to take place. Tellingly, it did so from the perspective not of parties who had no existing dispute resolution *agreement* (such as those in *Sat Pal*, *Kinstreet* and *Frank Cowl*) but from the sophisticated commercial parties who had.

More interesting, to fortify this position, the court in *Cable & Wireless* drew an analogy between agreements to mediate with agreements to arbitrate. Of course, those two methods of dispute resolution are remarkably and profoundly different, but they share one common characteristic: they are, to use the current language, “non-court-based”.

By 2002, the courts had put beyond doubt that they had both the power and the preference to stay proceedings in order for an agreement to engage in ADR to be enforced, even when one party does not want to. The courts had aligned their position on ADR clauses with the position they had already adopted towards arbitration agreements.

Nevertheless, absent such express agreement, in the early 2000s, the established position was that ADR was not compulsory. For example, Lightman J observed in *Hurst v Leeming* (the same year as *Cable & Wireless* and a year after *Frank Cowl*), that: "Mediation in law is not compulsory and [the professional negligence pre-action protocol] spells that out loud and clear" (2002: 12).

[G] *HALSEY* AND THE NON-COMPULSION DEBATE

The case of *Halsey v Milton Keynes General NHS Trust* (2004) arrived two years later. It became a dominant feature in Lord Woolf's new landscape for the next 19 years.

The case is well known and needs little introduction. We shall focus on one issue arising from it. As to the facts, Mrs Halsey sued unsuccessfully in negligence the hospital where her late husband had died. She had invited the hospital to engage in ADR before trial, but it had refused. An issue before the court was whether that refusal was reasonable. It held it was. Mrs Halsey appealed, maintaining that the hospital was unreasonable in refusing to mediate. The issue before it was whether the hospital had acted reasonably. The Court of Appeal made its famous judgment which included what have become known as the *Halsey* Guidelines.

As to the issue which interests us, Dyson LJ (as he then was) said that a court cannot and should not compel a party to engage in ADR, including attending a mediation. To do so would infringe rights under Article 6 of the European Convention on Human Rights 1950 (ECHR). In a passage which has been greatly relied upon and quoted frequently, he said:

> 9. We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be impose an unacceptable obstruction on the right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see *Deweer v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore a violation of article 6. Even if (contrary to our

> view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:
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> "The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be sued but may merely encourage and facilitate."
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> 10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it (*Halsey* 2004: paragraphs and 10).

Whatever the procedural instincts in *Sat Pal*, *Kinstreet*, *Frank Cowl* and *Cable & Wireless*, the law (set out, for example, in the pre-action protocols) was that any court could not order a party to engage in ADR, only encourage and facilitate. That approach appeared to be put beyond doubt in *Halsey*. The Court of Appeal's statement held sway for the next 19 years and the *Halsey* Guidelines often followed (De Girolamo & Spenser Underhill 2022: section C). But the case was not without controversy.

Halsey attracted some judicial criticism. In a lecture given at SJ Berwin on 28 June 2007, the late Sir Gavin Lightman argued that *Halsey* was wrong to state that ordering an unwilling party to mediate was a breach of article 6 (2007a).

Sir Gavin gave a speech to the Law Society in December 2007, in which he raised again his concerns about *Halsey* and its view that the court cannot compel mediation because of Article 6. Acknowledging uncertainty amongst lawyers whether *Halsey* actually decided the issue, he thought there ought to be judicial certainty because (with remarkable prescience, as *Churchill* will show):

> whilst judges in London can decide for themselves what (if any) weight should be given to the observations in Halsey, in practice district judges in the country are naturally and understandably treating them as law, refusing to order mediation in the absence of such consent (Lightman 2007b: 16).

On 29 March 2008, Lord Phillips (when he was Lord Chief Justice) discussed Sir Gavin's criticisms in a speech. He considered that Dyson LJ's comments on Article 6 were *obiter dicta* (Phillips 2008: 37). (He also thought that compulsory ADR might breach Article 6 rights depending on the sanction for non-compliance that flowed from any refusal to comply.)

On 8 May 2008, Sir Anthony Clarke MR (as he then was) gave a paper at the Second Civil Mediation Council National Conference. He expressed his opinion about the Article 6 point in the following terms

> Mediation and ADR form part of the civil procedure process. They are not simply ancillary to court proceedings but form part of them. They do not preclude parties from entering into court proceedings in the same way that an arbitration agreement does. In fact, all a mediation does is at worst delay trial if it is unsuccessful and it need not do that if it is properly factored into the pre-trial timetable. If the mediation is successful, it does not obviate the need to continue to trial, but that is not the same as to waive the right to a fair trial … What I think we can safely say, though, without prejudicing any future case, is that there may we be grounds for suggesting that Halsey was wrong on the Article 6 point (Clarke 2008: 38).

Sir Anthony suggested (Clarke 2008: 39) that the Court of Appeal in *Halsey* may have been speaking *obiter* when saying what it did about Article 6. He argued that the CPR (as it was then formulated) bestowed on the courts a jurisdiction to require parties to mediate their disputes. He said: "despite the Halsey decision it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation" (2008: 40).

In a speech he gave at the Third Mediation Symposium of the Chartered Institute of Arbitrators in October 2010, Lord Dyson (as he had become) said that his comments in *Halsey* about Article 6 "need some modification not least because the European Court of Justice entered into this territory in March last year in the case of *Rosalba Alassini*". He partly accepted Sir Anthony Clarke's criticism but still maintained that compulsory ADR would in some circumstances breach Article 6. He also took the view that ADR should remain non-compulsory.

These speeches exposed a fault line which the commentary to the CPR identified. For example, the commentary of the 2015 CPR (to choose but one year) stated:

> In terms of understanding how the court is likely to exercise its case management powers today, we are in the slightly unusual position of having a leading Court of Appeal decision, namely Halsey, which should now presumably be read in the context of the speeches of [Lords Phillips and Clarke] (CPR: Volume 2/14-9).

Nevertheless, compulsory ADR was still not finding judicial favour. For example, Jackson LJ did not favour compulsory ADR in his *Review of Civil Litigation Costs: Final Report* of 1 December 2009 (Jackson 2009: paragraph 3.4).

The courts were also wrestling with the Article 6 point. In *Swain Mason & Others v Mills & Reeve (a Firm)* (2012), the Court of Appeal stressed that parties cannot be compelled to mediate, stating in terms: "In Halsey, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate" (paragraph 76).

However, in the following year, the tone changed. *Colin Wright v Michael Wright (Supplies) Ltd* (2013) was a bitter dispute between two businessmen who had ignored the court's encouragement to mediate. The matter found its way to the Court of Appeal and the bench of Ward LJ (a member of the court in *Halsey*).

The judge was dismayed at the unreasonable conduct of the parties and the parties' ignoring the court's attempt at encouragement to engage in ADR. He was moved to question Dyson LJ's view on behalf of the Court of Appeal that compulsory ADR was an "unacceptable obstruction" to justice, or a breach of Article 6 and he seemed less than certain the comment was not *obiter* (*Wright* 2013: paragraph 3). He speculated that:

> Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of development in this field (ibid).

In *Bradley v Heslin* (2014), the following year, another judge was signally unimpressed with the way two highly disputatious litigants had behaved in a dispute over whether to keep a gate of a shared driveway open or closed. Norris J said:

> I think it is no longer enough to leave the parties the opportunity to mediate and warn of costs consequences if the opportunity is not taken … The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for trial should be regarded as an acceptable obstruction on the right of access to justice (*Bradley* 2014: paragraph 24).

Notwithstanding these remarks, ADR still remained non-compulsory. For example, Briggs LJ (as he then was) appeared to support non-compulsory ADR in his *Interim Report* on civil courts (2015: eg paragraphs 2.86 and 2.87). In addition, the *Interim Report* (2017) and the *Final Report* (2018) of

the ADR Working Party of the Civil Justice Council (in broad terms) did not recommend compulsory ADR.

[H] MOVING TOWARDS COMPULSORY ADR—2019 ONWARDS

In 2019, there was a small breakthrough for the exasperated judges in *Colin Wright* and *Bradley*. The Court of Appeal in *Lomax v Lomax* (2019) held that a court has the power under CPR part 3.1(m) to order the parties to attend a form of ADR called an early neutral evaluation. Discrete and prescriptive the case may have been, but it began to open the door onto what happened next.

A year later, Vos LC (as he then was) seriously considered the possibility that a court might compel mediation in *McParland v Whitehead* (2020). He declined to do so, but the door continued to open.

In January 2021, the same judge, in his new role as Master of the Rolls, requested the Civil Justice Council to consider the issue of compulsory ADR and report on its legality (if any) and desirability.

The Council duly reported in July 2021. We shall not parse the contents of the report at length.[4] It is enough for our purposes to record that in the Council's view, mandatory ADR was both lawful and desirable, subject to certain safeguards, the main one being to ensure that parties will, in the last, not be coerced and remain be "free to refuse any settlement offer and revert to the adjudicative process" (paragraph 84). It would be "potentially an extremely positive development" (paragraph 118), it opined.

At paragraph 58 it stated:

> The authors of this report suggest 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. If there is no obligation on the parties to settle and the remain to choose between settlement and continuing litigation then there is not, in the words of Moylan LJ in *Lomax*, "an acceptable constraint" on the right of access to the court. We think the logic of the Lomax decision is capable of applying to other forms of ADR as well as ENE [Early Neutral Evaluation].

And at paragraph 60:

> Subject to that important proviso [in paragraph 59], we think the balance of argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR.

[4] The report deserves to be read in full.

And at paragraph 69:

> The authors are not aware of any other legal principle [than Article 6] – whether in legislation or at common law – which may impede the introduction of compulsory ADR generally.

[I] *CHURCHILL*

The door finally opened all the way in 2023, onto the case with which we began this paper: *Churchill*.

It began with notoriously destructive and obstinate Japanese knotweed, which had infested land owned by Merthyr Tydfil County Borough Council and from there, it was alleged, had encroached and damaged the adjoining property of Mr Churchill.

With facts reminiscent of *Frank Cowl* 22 years earlier, the Council had a corporate complaints procedure. Like the residents of the old people's home, Mr Churchill did not avail himself of that, but simply instructed his solicitors to send a letter of claim threatening proceedings.

The Council warned Mr Churchill that if he commenced proceedings before using the complaints procedure, it would apply to the court for a stay. Mr Churchill ignored that warning. The Council applied to stay the proceedings.

The district judge who heard the stay application dismissed it. He considered that Mr Churchill and his lawyers had acted unreasonably by failing to use the complaints procedure which was contrary to the spirit and the letter of the relevant pre-action protocol. However, the judge also considered he was bound by *Halsey* and in particular Dyson LJ's statement (quoted in full above at paragraphs 9 and 10) that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right to access to the court".

The Council was given permission to appeal, which is how and why the case came before the Court of Appeal.

The two issues that fell to be determined by the Court of Appeal were:

1. Was the judge right to think that *Halsey* bound him to dismiss the Council's application for a stay?
2. If the judge was not right, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

We shall not parse the Court of Appeal's judgment. Space does not allow it, and there is no need. However, we shall set out the salient arguments and reasons.

Was *Halsey* binding?

The court began its analysis by establishing the *ratio decidendi* of *Halsey*.

It clarified what it meant by that term and adopted the reasoning of Leggatt LJ in *R (Youngsman) v The Parole Board* (2018). The judge in that case cited the usual definition (paragraph 48) of what a *ratio decidendi* is, as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him". He added a proviso (at paragraph 51), which the Court of Appeal in *Churchill* adopted and quoted at:

> 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 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 thee justification for that conclusion would be, if not altogether lacing, then at any rate weaker if a different rule were to be adopted (*Churchill* 2023: paragraph 17, emphasis in original).

The Court of Appeal in *Churchill* found four indications in paragaphs 9 and 10 of *Halsey* which were, in its view not "part of the best or preferred justification for the conclusion" Dyson LJ reached (paragraph 18). The important one for our purposes is that, as Dyson LJ said, the issue before his court was a decision about costs sanctions, not about whether to order parties to mediate. The Court of Appeal said this:

> 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 identified by the court as relevant to that questions were relevant whether or not the court had power to require the parties to mediate. (*Churchill* 2023: paragraph 19)

And went on to conclude (at paragraphs 20 and 21):

> 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).

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

The reader will notice that the Court of Appeal agreed with the views of Sir Gavin Lightman in 2007 and Lord Clarke MR in 2008, who considered that Dyson LJ's comments were, indeed, *obiter dicta*.

Can the courts compel ADR?

The Court of Appeal considered whether it can lawfully stay proceedings for, or order, the parties to engage in ADR. In Mr Churchill's submission, it could not. He made three submissions (at paragraph 22):

1. His right to bring proceedings could not be impeded by a requirement to follow an internal complaints procedure that was not designed for his complaint.
2. Any impediment to his right of access to the courts required a "secure statutory footing" which did not exist in this case.
3. Even if there were such a footing, it should be interpreted as authorizing only such a degree of intrusion as is reasonably necessary to fulfil the objective of the statutory provision in question.

The relevant law, for this purpose, came from three separate but coinciding streams: domestic cases, ECHR cases and pre-Brexit cases from the European Court of Justice (ECJ). We shall not parse at length the Court of Appeal's reasoning as it is not necessary as readers can read it for themselves.

In summary, however:

1. It was common ground that if the court has power to stay proceedings for, or to order, ADR, it must exercise that power so that it does not impair the very essence of the client's Article 6 rights, in pursuit of a legitimate aim, and in such a way that it is proportionate to achieving that legitimate aim.
2. The issue was that Mr Churchill submitted no such power can exist because (i) of the nature of the corporate complaints procedure in this case and (ii) without express secure statutory footing, which he says did not exist (paragraph 22).
3. The Court of Appeal held there is no doubt courts have the power to adjourn hearings and trials to allow the parties to discuss settlement (paragraphs 27-31). This power is exercised regularly. The court has had the long-established right, entrenched in the Civil Procedure Act 1997, and the power, derived from the CPR, to control its own

process. That includes staying and delaying any existing proceedings whilst any other settlement process is undertaken.[5]

4. The fact that the corporate complaints procedure may or may not be fit for purpose is distinct from whether the court has the power to order a stay or to order ADR. The procedure's defects may or may not be a good reason not to grant a stay, but they are not determinative of whether there is the power to grant a stay (paragraphs 51-52).
5. The case of *Deweer v Belgium* (1980), which was cited by Dyson LJ in paragraph 9 of *Halsey*, does not compel the conclusion that directing the parties to engage in a non-court-based dispute resolution process would, in itself, be an unacceptable restraint on the right of access to the court. *Deweer* did not decide that, but something else. Mr Deweer was told either to pay a civic fine or close down his butcher's shop. That threat prevented him from defending his refusal to pay a fine if he wanted to keep trading. It was the *threat* which infringed his Article 6 rights and not, as *Halsey* seems to consider, because he had agreed to arbitrate (paragraphs 32-33 and 55).
6. The more recent cases in the ECHR and the ECJ (including *Alassini v Telecom Italia* referred to by Lord Dyson in his 2010 speech (see above) support the propositions that a court can lawfully stay proceedings for, or order, the parties to engage in non-court based dispute resolution processes (paragraphs 54-55). This is subject to the proviso that the order (i) does not impair the very essence of the claimant's right to a fair trial, (ii) is made in pursuit of a legitimate aim and (iii) is proportionate to achieving that legitimate aim (paragraph 65). Those non-court-based dispute resolution processes do not have to be exclusively statutory ones (paragraph 55).
7. The Court of Appeal's analysis (paragraph 57) is supported by the Civil Justice Council's June 2021 report on *Compulsory ADR* at paragraphs 58 and 60 (quoted above).
8. As to how the court should decide whether to stay proceedings or order the parties to engage in ADR, the Court of Appeal refused to be drawn. It said, at paragraphs 64 and 66:

   > The court can stay proceedings for negotiation between parties, mediation, early neutral evaluation or any others 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.

[5] The Court considered CPR 1.4(1), 3.1, 3.1(5), 26.5.(1) and 26.5(3). See paragraphs 27-31 of the judgment.

And:

> 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… [Halsey Guidelines] are likely to have some relevance. But other factors too may be relevant depending on 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.

[J] COMMENTARY

The courts had, long before the CPR, the power to stay or adjourn proceedings to enable settlement discussions to occur. Colman J observed as much in *Cable & Wireless* (2022: paragraph 7). This is not new.

The CPR created a new landscape, in which ADR would, intentionally, play a much more prevalent role in civil procedure to achieve the overriding objective. ADR was intended to be, and became, mainstream within civil process in England & Wales. Litigation was intended to be a "last resort" where ADR will have failed. Even after litigation had begun, ADR should remain in the forefront of litigants' minds.

It is therefore not surprising that soon after the CPR came into force the courts began to discharge their duties to fulfil the overriding objective by bringing ADR to the attention of litigants and encouraging its use. *Pal Sat*, *Kinstreet* and *Frank Cowl* are early examples of this.

We consider, however, there to be a latent tension within the CPR, between the principle that parties should not be compelled to engage in ADR while being under an express *duty* to further the overriding objective by engaging in it whenever possible.

It was, we suggest, inevitable that this latent tension would become patent. It did so in *Halsey*, where the court had to grapple with, on the one hand, what constituted parties' reasonable refusal to engage in ADR when, on the other, they could not be compelled to do so. To further the overriding objective by engaging in ADR was an obligation, in other words, that could not be enforced. It was a circle that could not be squared.

From 2004 and for the next 19 years, and despite measured judicial criticism, *Halsey* regulated and informed the way the litigants manoeuvred over Lord Woolf's new landscape. The courts could encourage, often in strong terms, they could facilitate, but they could not compel.

Frustrations began to show as courts had to try to fulfil the overriding objective with litigants who could not be compelled to engage in ADR to do so. *Colin Wright* and *Bradley & Heslin* are examples. *Churchill* was a timely and inevitable correction. It is important in several respects.

First, it changed the paradigm which existed at the inception of the CPR, namely that a court cannot compel parties to engage in ADR, merely encourage.

Secondly, the decision placed beyond doubt that to stay litigation for ADR and to order the parties to engage in it would not (properly done) infringe Article 6. It is important not to mischaracterize this. The decision did not "make ADR compulsory". It held:

> (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 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 (*Churchill* 2023: paragraph 74, emphasis added).

Thirdly, it placed beyond doubt that Dyson LJ's comments about Article 6 were *obiter dicta* (paragraph 74(i)). It came down on the side of Sir Gavin Lightman, Lord Phillips and Sir Anthony Clarke in that debate. It gave clarity to Sir Gavin's hypothetical "district judges in the country", as well as to the actual district judge in the country, in the *Churchill* case.

Fourthly, it is not desirable to prescribe how the court would exercise this power (although the *Halsey* Guidelines will be relevant when a court comes to consider this) (paragraph 74(iii)).

Fifthly, the courts no longer have impossibly to square the circle by furthering the overriding objective (by dealing with cases justly, including resolving them by ADR), while being unable to compel parties to do so when they risk not discharging their duties to do the same thing.

We consider it likely, now that the spectre of Article 6 has finally been laid to rest, that the courts will rediscover the robust confidence of the courts found in the early CPR cases such as *Pal Sat*, *Kinstreet* and *Frank Cowl*.

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