DEKA CHAMBERS

BRIEFING
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ALTERNATIVE DISPUTE RESOLUTION

It has been an exciting six months or so in the case law dealing with ADR – or should we now say NDR?

In November 2023, the Court of Appeal handed down its landmark decision in *Churchill* v *Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 which deals with the power of the Court to order parties to engage in ADR.

Meanwhile, in *Northamber PLC* v *Genee World Ltd & Others* [2024] EWCA 428 the Court of Appeal considered the issue of costs penalties where a party refuses to engage in ADR, including where a party is silent in the face of an invitation to participate in mediation.

Lisa Dobie and William Dean here consider these important decisions in detail. The key message – ADR is becoming ever more entrenched in the litigation process and you ignore it at your peril!

At Deka Chambers, we have a strong and experienced team of mediators, trained by and accredited with leading bodies, including CEDR and the London School of Mediation.

We also offer independent early neutral evaluation, which provides parties to disputes with non-binding evaluation or assessment of the merits and/or quantum issues, either on paper or at a joint meeting.

A list of our mediators and evaluators is attached at the end of this briefing.

If you would like further information about our team of mediators and evaluators, please get in touch at clerks@dekachambers.com or call us on 020 7832 0500.

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INVITED TO ADR? DO NOT FAIL TO RSVP....

Lisa Dobie

On 1 May 2024 the Court of Appeal handed down its judgment in the case of *Northamber PLC v Genee World Ltd & Others* [2024] EWCA Civ 428. It is a stark reminder of the need to engage with invitations to participate in ADR, or (at the very least) explain why ADR is not suitable in the claim at hand.

In the underlying claim, the claimant sought damages for breach of contract and inducing breach of contract. The claimant succeeded, in part, in its claim against the second and third defendant. The outcome was that the second defendant was ordered to pay 70% of the claimant's costs (the discount to reflect the claimant's partial success).

It was not in dispute that the second and third defendant had failed to reply to the claimant's invitation to mediate (beyond stating that they were seeking instructions). The trial judge had refused to adjust/increase the costs percentage to account for the failure to reply to the reasonable request to engage in ADR and/or to file a witness statement explaining why ADR was not suitable (as per the court order).

The trial judge interpreted the request to mediate as half-hearted and placed reliance on the fact the claimant's solicitor did not 'chase up' this correspondence. The trial judge did not regard the defendants' conduct as unreasonable.

The Court of Appeal held that an unreasonable refusal to participate in alternative dispute resolution constituted a form of unreasonable litigation conduct to which the court might properly respond by applying a costs sanction, Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, [2004] 5 WLUK 215 followed.

The defendants had been effectively silent in the face of an offer to mediate. That was in itself unreasonable, as was their breach of a court order requiring them to explain their failure to agree to mediate. The trial judge ignored those points and fell into error.

It was not the claimant's duty to chase the reasonable request to engage in ADR – after the invitation to mediate had been made, the ball was very much in the opposing parties' court.

> *"...It is almost 20 years since this Court held in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002 that an unreasonable refusal to participate in alternative dispute resolution constitutes a form of unreasonable litigation conduct to which the court may properly respond by applying a costs sanction. It is over 10 years since this Court held in PGF II SA v OMFS 1 Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386 that silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable even if a refusal might have been justified by the identification of reasonable grounds. Furthermore, in the present case, DJ Rouine's order required both Mr Singh and IES to explain their reasons for refusing to mediate, but neither did so. In those circumstances Northamber contends that the judge should have held that Mr Singh's and IES's silence in response to its offer to mediate was unreasonable conduct and that this should have been reflected in the judge's costs order.*
>
> *I agree that the judge fell into error. Mr Singh and IES were silent in the face of an offer to mediate. That was in itself unreasonable. To compound matters,*

> *they breached an order of the court requiring them to explain their failure to agree to mediation. If breaches of such orders are ignored by courts when deciding costs, parties will have no incentive to comply with them. That would undermine the purpose of making them, which is robustly to encourage parties to mediate." At 103-104.*

The Court of Appeal held that the correct response was a 5% costs penalty, increasing the claimant's overall costs recovery to 75%:

> "*The more difficult question is how Mr Singh's and IES's conduct should properly be reflected in costs. Although costs sanctions have been imposed in a number of cases for an unreasonable refusal to mediate or for silence in response to an offer of mediation, it does not automatically follow that a costs penalty should be imposed: see Gore v Naheed [2017] EWCA Civ 369, [2017] 3 Costs LR 509 at [49] (Patten LJ). Rather, it is a factor to be taken into account among the other circumstances of the case"* at 106.

> *"... I shall confine attention at this stage to the judge's order that Mr Singh pay 70% of Northamber's costs of the claim against him. He reached this decision taking into account the extent of Northamber's success, the extent to which costs had been incurred on issues where Northamber had succeeded and Mr Singh's conduct. Northamber contends that Mr Singh should be ordered to pay 100% of its costs. In my judgment this cannot possibly be justified by Mr Singh's failure to respond to Northamber's offer to mediate. Equally, however, I do not think that it would be right to impose no sanction at all for Mr Singh's conduct. I consider that the correct response would be to impose a modest, but not insignificant, costs penalty by increasing Northamber's costs recovery by an additional 5% to 75%"* at 107.

All requests to mediate (or engage in any ADR) need to be carefully considered and engaged with. There will, of course, be cases where there is good reason to decline mediation. But this is a cautionary tale to remind you to reply and give good reasons. If the court has ordered those reasons to be contained in a witness statement, do not overlook this or treat it as optional; it is an order of the court and failure to do so may result in cost sanctions. Indeed, this issue was raised again last week when judgment was handed down in *Conway v Conway & Anor*—see here.

CHURCHILL V MERTHYR TYDFIL COUNTY BOROUGH COUNCIL [2023] EWCA CIV 1416

William Dean

The much anticipated judgment of the Court of Appeal in *Churchill* v *Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 considered the extent to which a court can encourage, or even mandate, parties to a claim to take part in ADR.

The case arose from the (alleged) encroachment of Japanese knotweed from the Defendant's to the Claimant's land. In reply to the letter before claim, the Defendant indicated that the Claimant should avail himself of the Defendant's corporate complaints procedure and threatened to apply to stay the proceedings, pending engagement with the same, if the claim were issued. The Claimant issued and the Defendant applied.

The first instance judge ruled that he was bound by *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, in which the Court of Appeal had said that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court". The Court of Appeal is ordinarily bound by its own decisions (save in three circumstances classically articulated in *Young v Bristol Aeroplane*) insofar as such decisions decide points of law. Accordingly, the first question before the strong bench hearing the appeal (the Lady Chief Justice, the Master of the Rolls and the Deputy Head of Civil Justice) was whether the words of Dyson LJ were part of a "ruling or reason which is treated as 'necessary' for [the court's] decision" (part of the *ratio decidendi*); and the Master of the Rolls found that they were not.

Thus able to determine the issue itself, the Court of Appeal turned to the relevant authorities on access to the courts and resolution of disputes. Article 6 of the ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The overriding objective in the Civil Procedure Rules is stated to include "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure" (r.1.4 (2)(e)), and the rules on allocation provide that when filing a directions questionnaire a party may "make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means" and the court has the power to stay the proceedings (r.26.5(1) and (3)).

The court also considered international and domestic case law, including *R. (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, described as "the leading modern authority on the constitutional right of access to the court as an essential element of the rule of law". Lord Reed's judgment in that case considered an important factor to be whether an "impediment or hindrance [to the right of access to the courts] … had been clearly authorised by primary legislation" and indicated that such legislation should be "interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question".

The Master of the Rolls held that the decision in *UNISON* did not "[mandate] the conclusion that existing proceedings may not be stayed or delayed to allow such steps to occur without primary legislation allowing it", noting that it had focussed on prevention of access to a judicial determination rather than "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". He gave five reasons for distinguishing *UNISON* from the Claimant's claim in *Churchill*: (i) *UNISON* had not dealt with staying existing proceedings for ADR (or requiring parties to participate in it); (ii) there was nothing in *UNISON* standing against the court's "long-established right to control its own process"; (iii) the authorities referred to in *UNISON* did not suggest that orders delaying or preventing resolution of a dispute could not be made (citing as examples staying for security for costs or striking out for non-compliance); (iv) there was nothing in *UNISON* to suggest the overriding objective (and the Civil Procedure Rules as a whole) was unlawful without its express authorisation by primary legislation; and (v) various authorities suggesting that a court can and should stay proceedings to permit attempts at ADR were not cited to the Supreme Court in *UNISON*.

Having thus identified a jurisdiction to decide the question at hand, the Master of the Rolls held that a court does have the power to order (or stay the proceedings for) the parties to engage in ADR, notwithstanding that the same does not have statutory footing. Again, he provided a number of reasons: (i) the fact there was criticism of the ADR scheme put forward did not affect the question in principle of the power to order ADR (rather, that was a factor to be considered when deciding whether to exercise that power); (ii) the European human rights jurisprudence (see, for example, *Deweer* v. *Belgium* (1980) 2 EHRR 439) did not indicate that making such an order would be an unacceptable restraint on the right of access to a court, and indeed more recent ECtHR and CJEU cases suggested the opposite; (iii) the domestic authorities did not apply only to statutory forms of ADR and did not limit the types of ADR that the parties can be required to engage with.

The Court doubted another line in *Halsey*, that even if the jurisdiction to compel ADR existed it would be "difficult to conceive of circumstances in which it would be appropriate to exercise" it. Noting that ADR can be quicker and cheaper than court-based decision-making, the Master of the Rolls declined "to lay down fixed principles as to what will be relevant" in deciding whether the court should exercise its newly-confirmed jurisdiction, though he referred to 11 suggestions put forward by the Bar Council, which intervened in the appeal. (On the issue between the parties in the appeal, the court noted that "things have now moved on" and the Defendant's internal complaints scheme was not the best vehicle for resolution of the parties' dispute.)

Churchill demonstrates the increasingly robust judicial approach to ADR. It is now unambiguous that courts have the power to order parties to engage with ADR and even to stay proceedings for that purpose. Practitioners and litigants should expect these arguments to be raised more often, and perhaps routinely in high-value litigation.

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