Can the courts compel parties to engage in ADR? - A review of Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416.

By Gavamukulya Charles MCIArb, AICCP.

Introduction

The issue of whether courts can compel parties to engage in ADR has been a subject of debate in the court in England and Wales. This is in the light of increased use of ADR in England and Wales with about 70 to 80 per cent of cases being resolved by mediation for example. The Court of Appeal in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576 had initially commented that compelling parties to ADR would be fettering their right of access to courts and thereby breaching their Article 6 rights under the European Convention of Human Rights. Following this, court used costs sanctions as a way of compelling parties to engage in ADR. There has been criticism on Halsey from different circles and Court has re-looked into Halsey in the case of Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416. This article explores the implications of the Court of Appeal's decision in Churchill.

The overriding objective of the courts in England and Wales

The court, guided by its primary aim to handle cases fairly and at a reasonable cost, as outlined in the Civil Procedure Rules 1998 (herein referred to as "Civil Procedure Rules") from rule 1.1 to rule 1.4 and paragraph 8 of the Practice Direction on Pre-action Conduct and Protocols, has supported and promoted the use of ADR. Specifically, Civil Procedure Rule 1.4(2)(e) permits courts to encourage parties to engage in ADR during active case management in order to further court's overriding objective. In the case of *R (on the application of Cowl) v Plymouth City Council*[1] court emphasized that parties should seek to avoid litigation whenever possible. In *Dyson v Leeds City Council*[2] court recognised that utilising ADR aligns with court's overriding objective leading judges to actively promote use of ADR among parties. This is reinforced in *MD v Secretary of State for the Home Department*[3] where court held that it would not permit proceedings if issues could be resolved outside of litigation. As such, the court may order early or limited document disclosure to support ADR as demonstrated in *Mann v Mann*[4]. Additionally, parties have a responsibility to continually consider ADR throughout the litigation process as held in *Garritt-Critchley v Ronnan*[5]. It is also crucial to acknowledge that both parties and their lawyers have an obligation to assist the court in achieving the overriding objective in Civil Procedure Rule 1.3 as was held in the case *of Gotch & Another v Enelco Ltd*[6].

When can courts encourage parties to engage in ADR?

Courts have the authority to encourage parties to explore ADR during case management conferences or pre-trial reviews (Blake et al., 2016). Mediation is particularly suitable for resolving disputes that involve negotiable issues regardless of the underlying cause of action (Blake et al., 2016). Therefore, courts have emphasized that ADR rather than litigation is the appropriate method for resolving certain cases on various occasions. For instance, in the case of *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41)*[7] court held that mediation is a viable option for resolving disputes involving contractual interpretation. In *R v Hampshire*

[1] [2001] EWCA Civ 1935 (per Lord Woolf at [1] and [25]).
[2] [2000] CP Rep 42 (per Lord Woolf at [16]).
[3] [2011] EWCA Civ 453.
[4] [2014] EWHC 537.
[5] [2014] EWHC 1774 (at paras 25-28).
[6] [2015] EWHC 1802.
[7] [2014] EWHC 3148.

County Council[8], court held that if a reasonable complaints or alternative process exists, then litigation may be disproportionate. In disputes between neighbours, courts have favoured settlement over litigation as shown in the case of *Faidi v Elliot Corporation*[9]. In complex property disputes between individuals where litigation costs are disproportionate to the amount in dispute, ADR is generally preferred as seen in the case of *Dribble v Pfluger*[10].

When is ADR inappropriate?

However, certain factors may render ADR unsuitable for resolving specific disputes. For example, when a case requires setting a legal precedent such as interpretation of a clause in a standard form contract as in the case of *McCool v Lobo*[11]*,* ADR may not be appropriate. Other situations include cases involving allegations of fraud, the need for an urgent injunctive relief, resolving a complex point of law, or instances where the case serves as a test case (Blake et al., 2016). It should be noted that if a party unjustifiably fails to adhere to a rule, Practice Direction, or relevant Pre-Action Protocol, the court may require that party to deposit a sum of money into court under Civil Procedure Rule 3.1 (5). This measure, as held in the case of *Lazari v London and Newcastle (Camden) Ltd*[12]*,* can be used to encourage serious consideration of ADR by the courts.

Sanctions for parties that unreasonably refuse to engage in ADR

In *Halsey v Milton Keynes General NHS Trust*[13], court outlined six non-exhaustive factors to determine whether a winning party acted unreasonably by refusing to engage in ADR. These factors are: (1) the nature of the dispute, (2) the strength of the case on its merits, (3) the extent to which other settlement efforts have been made, (4) whether the costs of the ADR process would be disproportionately high, (5) whether setting up and attending ADR would have caused prejudicial delays and (6) whether the ADR process had a reasonable likelihood of success (Blake et al., 2016). In the case of *R (on the application of Cowl)*[14], court emphasized the need for parties to justify their refusal to pursue ADR. As such, court may impose sanctions on parties who unreasonably decline to comply with an order to attempt ADR as shown in the case of *Wilson v Haden (t/a Clyne Farm Centre)*[15] where a defendant incurred a cost penalty for failing to engage in ADR despite the presence of a court directive to do so.

Following *Halsey*[16], the courts have most commonly used adverse cost orders against successful claimants who refuse to engage in ADR as a means of compelling parties to engage in ADR (Milgo, 2021). Under Civil Procedure Rules 44.2(6) and 44.2(7), courts possess broad authority to issue cost orders. For instance, in *Thornhill v Nationwide Metal Recycling*[17] , the claimant was ordered to cover 80 per cent of the defendant's costs for failing to comply with the provisions of the then applicable Practice Direction on Pre-action Conduct. Courts may also impose other sanctions such as striking out proceedings, as seen in the case of *Binns v Firstplus Financial*

[8] [2009] EWHC 2537 (Admin).
[9] [2012] EWCA Civ 287 (per Jackson LJ).
[10] [2010] EWCA Civ 1005.
[11] [2002] EWCA Civ 1760.
[12] [2013] EWHC 97 (TCC).
[13] [2004] EWCA Civ 576.
[14] R (on the application of Cowl) (n 3).
[15] [2013] EWHC 1211 (QB).
[16] Halsey (n 15).
[17] [2011] EWCA Civ 919.

Group Plc[18], staying litigation proceedings, as in *Andrew v Barclays Bank Plc*[19] or awarding indemnity costs as demonstrated in *Forstater v Python (Monty) Pictures Ltd*[20].

Can courts compel parties to engage in ADR? - Outlook from *Halsey*

The issue of whether courts can compel parties to engage in ADR has been a subject of debate (Milgo, 2021). In *Halsey*[21] , Dyson LJ commented that forcing parties to use ADR would constitute an unacceptable restriction on their right of access to the courts as established in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*[22], and would therefore breach Article 6 of the European Convention on Human Rights. Following this, in *Mann*[23], court declined to enforce an agreement that barred a party from seeking judicial enforcement until mediation had occurred, ruling that such a requirement would unjustifiably limit the right of access to the courts. Consequently, the court held that it could not compel parties to participate in mediation.

The Court of Appeal's reasoning in *Halsey*[24] sparked controversy since it overlooked earlier rulings in cases such as *Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*[25], *Muman v Nagasema*[26] and *Guinle v Kirreh*[27] where it had been established that courts could direct parties to attempt ADR even if one party objected. Ahmed (2024) criticized *Halsey*[28] for its reliance on the European Court of Human Rights case *Deweer v Belgium*[29], arguing that the Court of Appeal failed to distinguish between arbitration, which permanently halts court proceedings and mediation, which merely imposes a temporary delay without infringing on the right to a fair trial. As a result, *Halsey*[30] led courts to favour penalising parties through cost sanctions for unreasonably refusing ADR (Milgo, 2021). This focus on cost penalties gave rise to two divergent judicial approaches (Ahmed, 2024). The first, exemplified in *Gore v Naheed*[31],aligns with *Halsey*[32] by rejecting compulsory ADR in favour of safeguarding the parties' right to judicial determination. The second, seen in *Thakkar v Patel*[33], effectively compels parties to engage in ADR through the threat of cost sanctions. Consequently, the case law following *Halsey*[34] has been marked by inconsistency and contradiction (Ahmed, 2024).

European jurisdictions have addressed the issue of whether courts can mandate parties to engage in mediation as a prerequisite to initiating proceedings. In *Alassini v Telecom Italia SpA*[35], the Court of Justice of the European Union (CJEU) held that requiring parties to participate in a non-adjudicative process would not violate Article 6 provided they retain the option to proceed to court if no settlement is reached. This principle was reaffirmed in *Menini v Banco Popolare Societa*

[18] [2013] EWHC 2436 (QB).
[19] [2012] CTLC 115.
[20] [2013] EWHC 3759 (Ch).
[21] Halsey (n 12).
[22] [1981] E.C.C 151 at [9].
[23] Mann (n 6).
[24] Halsey (n 15).
[25] [2004] EWHC 390 (Ch).
[26] [2000] 1 WLR 299 CA.
[27] [2000] C.P. Rep. 62 Ch D.
[28] Halsey (n 12).
[29] (A/35) [1980] E.C.C. 169; (1979-80) 2 E.H.R.R. 439 ECtHR.
[30] Halsey (n 15).
[31] [2017] EWCA Civ 369.
[32] Halsey (n 12).
[33] [2017] EWCA Civ 117; [2017] 2 Costs L.R. 233.
[34] Halsey (n 15).
[35] (C-301/08, C-319/08 and C-320/08) EU:C:2010: 14; [2010] C.M.L.R. 15.

Cooperativa[36] where the CJEU upheld the legality of compulsory mediation. In a more recent development, *Lomax v Lomax*[37], confirmed that courts could compel unwilling parties to participate in judicial Early Neutral Evaluation under Civil Procedure Rule 3.1(2)(m). However, despite these advancements, courts continued to treat *Halsey*[38] as binding as seen in the case of *Mills and Reeve Trust Corp v Martin*[39] (Milgo, 2021).

The Court of Appeal's decision in Churchill v Merthyr Tydfil CBC

In *Churchill v Merthyr Tydfil CBC*[40] court examined whether *Halsey*[41] was binding and whether court could stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process. Court held that *Halsey*[42] was not binding because Dyson LJ's comments were *obiter dicta* as defined in *R (on the application of Youngsam) v Parole Board*[43], rather than *ratio decidendi*. This was so because the Court of Appeal in *Halsey*[44] focused on whether cost sanctions should be imposed on successful parties who refused mediation rather than on whether courts had the authority to compel parties to engage in ADR (Ahmed, 2024). Court further held that it has the authority to lawfully stay proceedings or direct parties to engage in ADR provided such orders do not undermine the essence of a claimant's right to a fair trial, are aimed at a legitimate objective, and are proportionate to achieving that objective (Ahmed, 2024). Staying proceedings is a power of the court under Civil Procedure Rules 3.1(2)(f) and 26.4 and proceedings can resume automatically when the stay no longer applies as seen in the case of *UK Highways A55 Ltd v Hyder Consulting (UK) Ltd*[45]. While courts can initially stay proceedings for one month, they may extend this period under Civil Procedure Rule 26.4(3). Lastly, court declined to create a definitive list of factors to guide decisions on compelling ADR reasoning that such determinations should be based on the specific circumstances of each case.

Implications of the Court of Appeal's decision in *Churchill*.

The reasoning in *Churchill*[46] is supported by its alignment with the public aspect of procedural proportionality which emphasizes the equitable use and management of the courts' finite resources (Ahmed, 2024). This principle ensures that no single claim consumes more than its fair share of these resources and is consistent with the overriding objective outlined in Civil Procedure rules 1.1 to 1.4 and affirmed in *Gotch & Another*[47]. The connection between ADR and the principle of proportionality was explained in *PGF II SA v OMFS Co 1 Ltd*[48] where court highlighted that ADR's cost efficiency contributes to proportionality by helping parties and the court to manage limited resources effectively (Ahmed, 2024). Consequently, courts can engage in constructive dialogue early in the process to identify the most suitable ADR procedure for the dispute which facilitates significant resource savings for both the parties and the judicial system.

---

[36] (C-75/16) EU:C: 2017:457.
[37] [2019] EWCA Civ 1467.
[38] Halsey (n 15).
[39] [2023] EWHC 654.
[40] [2023] EWCA Civ 1416; [2024] Costs L.R. 249.
[41] Halsey (n 15).
[42] Ibid.
[43] [2019] EWCA Civ 229.
[44] Halsey (n 12).
[45] [2012] EWHC 3505 (TCC).
[46] Churchill (n 42).
[47] Gotch & Another (n 8).
[48] [2013] EWCA Civ 1288.

The decision in *Churchill*[49] clarifies the misunderstanding surrounding compulsory ADR by affirming the courts' authority to control and regulate their own processes (Ahmed, 2024). This effectively overcomes the restrictive interpretation in *Halsey*[50] which had been noted in *AB v Ministry of Defence*[51] and highlighted through the conflicting judicial approaches in *Thakkar*[52] and *Gore*[53]. It confirms that courts have the power to delay judicial determination to facilitate ADR (Ahmed, 2024). This aligns with the ruling in *Watson v Sadiq*[54] where it was held that courts encouraging settlement through frequent adjournments for negotiation does not violate common law principles of fairness of Article 6 of the European Convention on Human Rights.

Churchill[55] also addresses the challenges arising from using cost sanctions as an indirect method for compelling parties to engage in ADR. Courts can now impose appropriate sanctions for breaches of ADR orders which may include penalising the defaulting party in costs as shown in *Conway v Conway*[56]. This sets the stage for courts to adopt a more consistent and principled approach to compulsory ADR (Ahmed, 2024).

The decision in *Churchill*[57] also encourages a shift in how the judiciary views and promotes ADR procedures. For instance, in *Jones v Tracey*[58] court made a distinction between mediation and ADR in general. This indicates a broader judicial understanding and appreciation of ADR as involving various methods and not just mediation as had earlier been construed which allows to further the overriding objective in encouraging and facilitating appropriate ADR procedures. (Ahmed, 2024).

Although *Churchill*[59]primarily addresses the authority of courts to stay proceedings in favour of ADR, it also has significance for the pre-action stage of disputes. This is because pre-action protocols which govern how parties behave before going to court have become more closely linked with the court process as noted by the court in *Jet2 Holidays Ltd v Hughes*[60]. Therefore, by moving away from *Halsey*[61] and confirming that compulsory ADR is lawful, the *Churchill*[62] decision has not only boosted ADR's role within the civil justice system but it has also reinforced the connection between ADR and the civil court process (Ahmed, 2024).

In conclusion, the decision in *Churchill*[63] is important since it departs away from the controversy that was initiated by Dyson LJ's comments in *Halsey*[64] which have led to contradicting case law on the issue of the ability of courts to compel parties to engage in ADR. Churchill is even more important because it aligns with the court's overriding objective to deal with cases justly and in a proportionate manner since it allows for the use of ADR which already espouses virtues of fairness, cost-effectiveness and time-efficiency.

---

[49] Churchill (n 42).
[50] Halsey (n 15).
[51] [2009] EWHC 3516 (Admin).
[52] Thakkar (n 28).
[53] Gore (n 27).
[54] [2013] EWCA Civ 822.
[55] Churchill (n 42).
[56] [2024] EW Misc 19 (CC).
[57] Churchill (n 42).
[58] [2023] EWHC 2242 (Ch).
[59] Churchill (n 42).
[60] [2019] EWCA Civ 1858.
[61] Halsey (n 15).
[62] Churchill (n 42).
[63] Ibid.
[64] Halsey (n 15).

List of Cases

AB v Ministry of Defence [2009] EWHC 3516 (Admin).

Aird v Prime Meridian Ltd [2006] EWCA Civ 1866 (per May LJ at [5]).

Alassini v Telecom Italia SpA (C-301/08, C-319/08 and C-320/08) EU:C:2010: 14; [2010] C.M.L.R. 15.

Andrew v Barclays Bank Plc [2012] CTLC 115.

Binns v Firstplus Financial Group Plc [2013] EWHC 2436 (QB).

Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] E.C.C 151 at [9].

Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416; [2024] Costs L.R. 249.

Conway v Conway [2024] EW Misc 19 (CC).

Deweer v Belgium (A/35) [1980] E.C.C. 169; (1979-80) 2 E.H.R.R. 439 ECtHR.

Dribble v Pfluger [2010] EWCA Civ 1005.

Dunnet v Railtrack [2002] 1 WLR 2434 (per Brooke LJ at [14]).

Dyson v Leeds City Council [2000] CP Rep 42 (per Lord Woolf at [16]).
Faidi v Elliot Corporation [2012] EWCA Civ 287 (per Jackson LJ).

Forstater v Python (Monty) Pictures Ltd [2013] EWHC 3759 (Ch).

Garritt-Critchley v Ronnan [2014] EWHC 1774 (at paras 25-28).

Gotch & Another v Enelco Ltd [2015] EWHC 1802.

Gore v Naheed [2017] EWCA Civ 369.
Guinle v Kirreh [2000] C.P. Rep. 62 Ch D.

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

Jet2 Holidays Ltd v Hughes [2019] EWCA Civ 1858.

Jones v Tracey [2023] EWHC 2242 (Ch).

Lazari v London and Newcastle (Camden) Ltd [2013] EWHC 97 (TCC).

Lomax v Lomax [2019] EWCA Civ 1467.

Mann v Mann [2014] EWHC 537

McCool v Lobo [2002] EWCA Civ 1760.

MD v Secretary of State for the Home Department [2011] EWCA Civ 453.

Menini v Banco Popolare Societa Cooperativa (C-75/16) EU:C: 2017:457.

Mills and Reeve Trust Corp v Martin [2023] EWHC 654.

Muman v Nagasema [2000] 1 WLR 299 CA.

Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) [2014] EWHC 3148.
PGF II SA v OMFS Co 1 Ltd [2013] EWCA Civ 1288.

R v Hampshire County Council [2009] EWHC 2537 (Admin).
R (on the application of Cowl) v Plymouth City Council [2001] EWCA Civ 1935 (per Lord Woolf at [1] and [25]).

R (on the application of Youngsam) v Parole Board [2019] EWCA Civ 229.

Shirayama Shokusan Co Ltd v Danovo Ltd (No.2) [2004] EWHC 390 (Ch).

Thakkar v Patel [2017] EWCA Civ 117; [2017] 2 Costs L.R. 233.

Thornhill v Nationwide Metal Recycling [2011] EWCA Civ 919.

UK Highways A55 Ltd v Hyder Consulting (UK) Ltd [2012] EWHC 3505 (TCC).
Watson v Sadiq [2013] EWCA Civ 822.

Wilson v Haden (t/a Clyne Farm Centre) [2013] EWHC 1211 (QB).

List of Statutes

The Civil Procedure Rules 1998

Bibliography

Ahmed, M. (2024). Revisiting compulsory alternative dispute resolution in the English civil justice system. *Civil Justice Quarterly*, (43(4)), 265-282.

Blake, S., Browne, J., & Sime, S. (2016). *The Jackson ADR Handbook*. 2nd ed. Oxford University Press.

Milgo, M. (2021). The case for express compulsory mediation in England and Wales. *UCL Journal of Law and Jurisprudence*, (10(1)), 1-23.

Richbell, D. (2009). *Mediation of Construction Disputes*. Wiley-Blackwell.