



Forced ADR Revisited

INTRODUCTION

In the case of *Churchill v Merthyr Tydfil* [2023] EWCA 1416, the Court of Appeal reviewed a much-criticised decision from 2004 which suggested that the court did not have the power to order a stay for mediation against the parties' wishes and concluded that the power indeed exists.

This note reviews the decision.

Mills & Reeve

We [reported](#) last year on the case of *Mills & Reeve Trust Corp v Martin* [2023] EWHC 654 in which the High Court revisited the question of whether the court can compel parties to mediate. HHJ Kelly (sitting as a High Court Judge) concluded that she was bound by the indication from Dyson LJ in *Halsey v Milton Keynes* [2004] 1 WLR 3002 that it would likely be a violation of their rights under Article 6 of the European Convention on Human Rights (right to a fair and public hearing), even if it might arguably be *obiter*.

As the Judge acknowledged, considerable academic and judicial doubt had been cast on *Halsey*, including from one of the Lord Justices of Appeal who was on the panel in that case. In *Lomax v Lomax* [2019] 1 WLR 6527, the Court of Appeal concluded that the court did not need the parties' consent to an order for early neutral evaluation. It distinguished *Halsey* on the not entirely convincing basis that it only concerned mediation, not other forms of alternative dispute resolution. In *McParland v Whitehead* [2020] Bus LR 699, Sir Geoffrey Vos C (as he then was) commented *obiter* that *Lomax* raised the prospect that the court might be able to require parties to mediate, notwithstanding *Halsey*.

The Civil Justice Council Report

In a report published in July 2021, the Civil Justice Council published a report which recommended that mediation be made compulsory. Sir Geoffrey Vos MR welcomed the report, observing that "*As I have said before, ADR should not longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute'.*"

Churchill

Churchill v Merthyr Tydfil [2023] EWCA Civ 1416 was a case about Japanese knotweed. The Claimant alleged that there had been a diminution in value of his property by an encroachment of the notorious weed from adjoining land owned by the local authority. He issued proceedings. The Defendant applied for a stay for its complaints procedure to be followed. The Claimant opposed the application.

Deputy Judge Kempton Rees echoed HHJ Kelly in *Mills & Reeve* by concluding that he was constrained by *Halsey* to refuse a stay, but he granted permission to appeal.

Given the previous indications from the Master of the Rolls, one can imagine the collective sinking of hearts among Mr Churchill's legal team when they learned that he was to hear the appeal.

Sir Geoffrey (with whom Lady Carr and Birss LJ) gave the sole reasoned judgment. He was satisfied that the relevant passage of Dyson LJ's judgment in *Halsey* was indeed *obiter* and the Judge was, wrong to conclude that he was bound by it.

It might be questioned whether this really was a case about alternative dispute resolution, but Sir Geoffrey dismissed "*definitional*" arguments as academic.

He went on to review a series of decisions of the European Court of Human Rights, Court of Justice of the European Union and the domestic courts and concluded that none of them was inconsistent with the court having the power to stay proceedings for ADR. He noted (as we picked up in our report on *Mills & Reeve*) that *Deweer v Belgium* which Dyson LJ had characterised as a decision about compulsory arbitration actually turned on a threat to close Mr Deweer's shop if he did not pay a fine. Sir Geoffrey drew a distinction between an *impediment* to access to a judicial determination and a *delay* to access for a legitimate objective, such as promoting settlement.

It was, he concluded, a matter for the discretion of the court whether to grant a stay for what he preferred to call "*non-court-based dispute resolution*". It should only make such an order if it did not "*impair the very essence of the claimant's right to proceed to a judicial hearing*" and is proportionate. He otherwise declined to set out any guidelines as to the exercise of the discretion.

Discussion

The decision is unsurprising on a number of levels. As *Halsey* was an appeal against a costs order after trial, it is not immediately apparent why it should cause much difficulty to determine whether Dyson LJ's comments about compelled mediation were or were not part of the *ratio decidendi*. In contending for *Halsey* to be followed, the Respondent was swimming against the judicial tide. Following the judgment last year in *Mills & Reeve*, it seemed doubtful whether *Halsey* would survive further review by the Court of Appeal. It is a stretch to say that forcing parties to mediate deprives them of their right to a trial. The distinction drawn by the Court of Appeal between impediment and delay is critical. No one is suggesting that parties should be compelled to settle.

Now that it has been confirmed that the courts have the power to order a stay for alternative dispute resolution, it remains to be seen what use they will make of it. The Court of Appeal's unwillingness to set out any guidelines as to how the discretion should be exercised make it hard to predict. It would be regrettable if a court-imposed stay became the default position. Mediation is very often fruitful even if settlement is not possible, but it is not suitable in every case.

It will need to be worked out on a case-by-case basis how the discretion should be exercised, including for example whether it might be appropriate for the court to order a stay for ADR where all parties agree that it would be a waste of time or only when one of them is resistant,

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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