

October 2024

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London Litigation Insights

CPR Changes Bring Mandatory ADR, From 1 October 2024

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The Civil Procedure Rules (“CPR”) have been amended to reflect the Court of Appeal decision in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ. 141.

The courts in England and Wales can now order parties to engage in alternative dispute resolution (“ADR”) where such an order is proportionate and does not undermine the parties’ right to a judicial hearing.

Mediation: the Decision in *Churchill*

In *Churchill*, the Court of Appeal reversed the longstanding prohibition on courts compelling parties to engage in ADR. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ. 576, the Court of Appeal had stated 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*”.¹

The Court overturned that principle, holding that “*the court can lawfully stay existing proceedings for, or order, the parties to engage in a non-court-based dispute resolution process*”.² However, it provided an important limitation on that power, saying that courts can only require parties to engage in ADR where it “*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*”.³

Expert Determination: the Decision in *Dandara*

In another recent decision, the High Court held that there is no reason in principle why an expert determination clause could not be separable from the contract in which it sits.⁴ The effect of this would be to allow an alternative path to resolution, by the use of expert determination, without resorting to litigation.

Amendments to the CPR

Following *Churchill*, the Civil Procedure Rule Committee commissioned a consultation on the amendment of the CPR, to give effect to the decision.

The amendments, which are now set out in the CPR, mean that, as of 1 October 2024:⁵

1. The overriding objective of enabling the court to deal with cases justly and at proportionate cost now includes “*promoting or using alternative dispute resolution*”.⁶

2. The court's duty to actively manage cases now includes "ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution".⁷
3. The court's general powers of management now include the power to "*order the parties to engage in alternative dispute resolution*".⁸
4. When giving case management directions in claims allocated to the fast track, the intermediate track, or the multitrack, the court should consider "*whether to order or encourage the parties to engage in [ADR]*".⁹
5. When the court exercises its discretion as to whether to make an order as to costs, in considering the conduct of the parties, the court must have regard to "*whether a party failed to comply with an order for [ADR] or unreasonably failed to engage in [ADR]*".¹⁰

How will the Court Exercise its New Power?

The amendments to the CPR do not provide any guidance on: (i) the specific circumstances in which the court will exercise its new power; or (ii) the precise manner in which the court will do so.

This reflects the Court of Appeal's judgment in *Churchill*, where it declined to identify "*fixed principles as to what will be relevant to determining those questions*" on the basis that it would be "*undesirable to provide a checklist or a score sheet for judges to operate*".¹¹ Nonetheless, the Court noted that matters mentioned by the claimant/respondent and the Bar Council (as one of the interveners) in *Churchill*, along with the matters cited by the Court of Appeal in *Halsey*, "*are likely to have some relevance*".

These factors include:¹²

- the form of ADR being considered;
- whether the parties were legally advised or represented and the likelihood of ADR being effective or appropriate without such representation;
- whether it was made clear to the parties that they can pursue their claim or defence if settlement is not reached;
- the urgency of the case and the reasonableness of the delay caused by ADR and whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue;
- the costs of ADR;
- whether there was a realistic prospect of resolving the claim through ADR;
- any significant imbalance in the parties' level of resource, bargaining power, or sophistication;
- the reasons given by a party for not wishing to mediate (such as recent unsuccessful attempts at ADR); and
- the reasonableness and proportionality of the sanction if a party declined ADR in the face of an order from the court.

Key Takeaways

Given the vast spectrum of disputes and the very broad range of issues and parties, a court's decision on whether to require parties to participate in ADR will turn on the particular circumstances of the dispute and "*the nature of the [ADR] process contemplated*".¹³

However, the change in the CPR makes it clear that parties should consider from the outset of a dispute, and on a regular basis as proceedings progress, whether there is an appropriate ADR route.

Courts are very likely to seek assurance that parties have considered these options and may increasingly require parties to attempt ADR before allowing cases to progress to full litigation.

If you'd like to know more about the evolving world of mediation and expert determination, Paul Hastings is hosting an event focused on these topics on 16 October 2024, see details [here](#) and [register here](#).

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings London lawyers:

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¹ Paragraph 9, *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ. 576.

² Paragraph 74(ii), *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ. 141.

³ *Ibid.*

⁴ *Dandara South East Ltd v Medway Preservation Ltd & Anor* [2024] EWHC 2318 (Ch), at paragraph 40.

⁵ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

⁶ CPR 1.1(f).

⁷ CPR 1.4(e).

⁸ CPR 3.1(2)(o).

⁹ CPR 28.7(1)(d); CPR 28.14(1)(f); CPR 29.2(1A).

¹⁰ CPR 44.2(5)(e).

¹¹ Paragraph 66, *Churchill*.

¹² Paragraphs 61-63.

¹³ Paragraph 74(iii).