Kluwer Mediation Blog

Saying goodbye to Halsey – at last!

Alan Limbury (Strategic Resolution) · Friday, December 22nd, 2023

Mediation has long been used as a method of resolving disputes. Indeed, the practice of combining mediation and arbitration by the same neutral has been traced back to ancient Greece and Ptolemaic Egypt[1].

In his paper "Varieties of Dispute Processing", presented to the 1976 Pound Conference, Harvard Professor Frank E.A. Sander proposed that, instead of regarding litigation as the default, disputants might be steered to the dispute resolution processes appropriate to the circumstances of their dispute. His paper envisioned "by the year 2000, not merely a courthouse but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case", such as mediation, arbitration, fact finding, litigation and ombudsman.

Beginning in the 1980s, thanks in many respects to the teaching of Professors Roger Fisher and Frank E. A. Sander at Harvard Law School, law students in many countries have been taught negotiation skills and have learnt to appreciate the role of mediation and other forms of dispute resolution in avoiding the costs, time and stress of litigation, while achieving outcomes that meet the interests of the parties, without the need to determine who is right and who is wrong.

Once it became apparent to lawyers and arbitrators that mediation could not be dismissed as a passing fancy, judges in various jurisdictions who were concerned to improve the judicial system to make it "just, quick and cheap" (note the comma) would initially recommend mediation by a mediator chosen by the parties; direct that no hearing date for the trial would be allocated until mediation had been attempted; and impose costs sanctions on successful litigants who had

unreasonably declined to mediate before trial.

Many countries, of which Australia is one, began to introduce legislation requiring mediation before commencing litigation and empowering courts to order mediation, with or without the consent of the disputants.

The Halsey Case

In the UK however, this trend was abruptly halted by the Court of Appeal decision in Halsey v Milton Keynes, in which Dyson LJ stated: "It seems to us 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."

That statement was based on the UK procedural White Book, which incorrectly described the hallmark of ADR procedures as being that they are voluntarily entered into, whereas the hallmark is their voluntary outcome, irrespective of how they are entered.

The Churchill Case

The recent England and Wales Court of Appeal decision in Churchill v Merthyr Tydfil County Borough Council has put to rest the idea that UK courts may not lawfully stay proceedings for, or order parties into, mediation or other ADR processes, whether or not they consent.

This long-awaited outcome is due primarily to the submissions of the intervenors: The Law Society, The Bar Council, The Civil Mediation Council, The Centre for Effective Dispute Resolution, The Chartered Institute of Arbitrators, Housing Law Practitioners' Association and The Social Housing Law Association, as well as the advocacy of Michel Kallipetis KC, representing the Defendant/Appellant,

Mr. Churchill claimed that Japanese knotweed, one of the world's most invasive plants, had encroached onto his land from adjoining land owned by the Council, causing damage, reduction in his land value and loss of enjoyment. He commenced court proceedings without having first made use of the Council's internal Corporate Complaints Procedure, which is intended to operate before proceedings have been issued. The Council applied to the court for a stay of the court proceedings and for costs.

The primary judge dismissed the stay application, holding that he was bound to follow Dyson LJ's statement in Halsey. In holding that statement to be *obiter dicta* as distinct from the *ratio decidendi* of the case, Sir Geoffrey Vos, Master of the Rolls, with whom Lord Justice Birss and Lady Carr, Lady Chief Justice agreed, decided in Churchill that:

- the judge was not bound by Halsey to dismiss the Council's application;
- the court may lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process. The court declined to lay down fixed principles as to what will be relevant to determining whether to do so;
- the characteristics of the particular method of non-court-based dispute resolution process being considered will be relevant to the exercise of the court's discretion as to whether to order or facilitate it;
- the court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made 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; and

- in the particular circumstances of the Churchill case, the court declined to make any order for a stay of the proceedings, while indicating that the parties ought to consider whether they can agree to a temporary stay for mediation or some other form of non-court-based adjudication.

What does this mean for the future?

The Churchill decision opens the door to the reforms proposed in the July 2021 UK Civil Justice Council Report on Compulsory ADR , which concluded, contrary to Halsey, that parties can be lawfully compelled to participate in ADR and identified conditions in which such compulsion could be a desirable and effective development.

The Australian Experience

The Churchill decision is also in line with the Australian experience.

Most Australian courts have statutory power to refer cases to mediation and other forms of ADR, in some instances with the consent of the parties and in others without consent. Some legislation requires mediation to be undertaken or offered before a claim is filed. Settlement rates and degrees of satisfaction are similar, whether participation be voluntary or compelled. Often, parties who are concerned that agreeing to mediate might be a sign of weakness see compulsion into mediation as a way to save face.

Further, the power of the Court to order parties into mediation often persuades them to agree to mediate when they otherwise would not. See my blog here.

It's Time to Celebrate

We have waited nearly 20 years for Halsey to be dumped (not quite the delicate Latin language of the Court of Appeal in Churchill).

Hooray!

[1] Roebuck, D The Myth of Modern Mediation (2007) 73 Arbitration 1, 105 at 106.

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data of leading arbitral institutions, to uncover potential conflicts of interest.

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