Kluwer Mediation Blog

Compulsory Mediation in English Court Proceedings – Implications for Litigants and their Lawyers

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The Court of Appeal decision in *Churchill v Merthyr Tydfil Borough Council* [2023] marks a significant development in the area of mediation and other forms of alternative dispute resolution (ADR) in the context of Court proceedings. For clients involved in litigation, this case represents a shift in the Court's approach to mediation, potentially impacting how cases are managed and resolved moving forward. Specifically, this ruling confirms that Courts have the power to pause proceedings and compel parties to mediate or engage in other forms of ADR, marking a shift from previous case law, which emphasised the voluntary nature of mediation, as compulsory mediation/ADR could be seen to be a denial of justice and the right to a public trial.

The High Court decision in *DKH Retail Ltd v City Football Group Ltd EWHC* 3231 (Ch) to order compulsory mediation despite the defendant's objections is an example of the application of *Churchill* in subsequent cases. In that case, the claimant made an application for compulsory mediation at a pre-trial review. One of the reasons why the defendant objected was because it was too close to trial and that the parties had already spent a large amount in legal costs. The High Court acknowledged this, but ordered mediation nevertheless.

Legal Reforms

Earlier in 2024, the Ministry of Justice introduced compulsory mediation for all new monetary claims under £10,000 on the small claims track. Claims issued after 22 May 2024 are now subject to compulsory mediation. The aim is to resolve cases early and free up Court time. With small claims taking over a year to reach trial, this move is expected to also help reduce waiting times for those matters that do go to a hearing.

In the wake of the *Churchill* decision, the Civil Procedure Rules Committee launched a consultation on proposed amendments to the Civil Procedure Rules (CPR) to address the Court's authority to compel parties to engage in ADR. The amendments to the CPR came into effect on 1

October 2024, and so it is important for clients and their lawyers to understand how this decision will affect litigation strategies and the conduct of cases moving forward. ADR, particularly mediation, will become even more central to resolving disputes efficiently. Although the *Churchill* decision talks about ADR, the writer's experience is that mediation is the method preferred by courts especially given the compulsory mediation in small claims.

***Churchill v Merthyr Tydfil Borough Council* [2023]**

In *Churchill*, the claimant brought a case against Merthyr Tydfil Borough Council, which centred around property damage. The key issue was whether the Court had the authority to compel both parties to engage in mediation as part of the dispute resolution process. Historically, in *Halsey v Milton Keynes General NHS Trust* [2004], the Court had ruled that it could not order or compel parties to engage in ADR.

However, in *Churchill*, the Court of Appeal held that under certain circumstances, courts could order a stay in proceedings to allow ADR to take place. This decision effectively overruled the long-standing precedent in *Halsey*, opening the door to a more assertive role for Courts in encouraging or even mandating mediation/ ADR where appropriate. In *DKH Retail Ltd v City Football Group Ltd*, the High Court noted that mediation would offer the parties options for settlement that may not be available through the Court.

What does this mean for litigants and their lawyers?

For clients and solicitors, the decision in *Churchill* and its subsequent application in *DKH Retail Ltd v City Football Group Ltd* means that there is now a greater emphasis on resolving disputes through mediation and other forms of ADR. In practical terms, it means that:

1. **Court-mandated mediation**: Litigants can no longer rely on avoiding ADR or mediation simply because they prefer to proceed to trial. If the Court believes mediation could assist in resolving the dispute, it may now order it.

2. **Cost implications**: Failure to engage in mediation or ADR, when ordered by the Court, could result in adverse cost orders. For example, even if a litigant wins their case, they could be penalised on costs if the Court finds they unreasonably refused to engage in mediation/ADR.

3. **Litigation strategies**: Lawyers need to be proactive in advising clients on the benefits of mediation/ADR early in the process. It is no longer enough to dismiss mediation/ADR if it appears unsuitable; a detailed explanation of why mediation/ADR is not appropriate will now need to be provided.

This shift makes it critical for parties to approach litigation with an open mind toward ADR from the outset, as Courts will likely be more willing to impose mediation in an effort to save Court time and reduce legal costs.

What are the changes to the Civil Procedure Rules?

Previously, the Court's overriding objective required it to encourage parties to use ADR. This has now been strengthened to "*ordering and encouraging*" parties to engage in ADR. In reality, this will mean mediation more often than not.

The Court's case management powers have been updated to include new rules allowing it to "*order the parties to engage in alternative dispute resolution*".

Amendments to the CPR affecting both fast-track and multi-track cases now require the Court to consider ordering or encouraging mediation/ADR when issuing directions. For fast-track cases, the Court must specifically assess whether mediation/ADR should be mandated or encouraged. Similarly, in multi-track cases, the new rules oblige the Court to evaluate the need for mediation/ADR when setting directions.

The rules now include specific provisions on costs, granting the Court broad discretion to issue cost orders. When deciding costs, the Court will consider the parties' conduct. If a party has failed to comply with or unreasonably refused to engage in mediation/ADR, they must provide strong evidence justifying their decision. They will need to explain why their case was unsuitable for mediation/ADR or why they rejected an ADR offer from their opponent. Failure to convince the Court may result in cost penalties, even if the party succeeds in their claim.

The new amendments to the CPR, effective from October 2024, reflect the Ministry of Justice's ongoing commitment to promoting ADR. Forms of ADR, like mediation, often boast high success rates and are typically faster and more cost-effective than going to trial. However, they require both parties to actively engage and be open to settlement. If either party is firmly entrenched in their position, ADR may prove ineffective, potentially leading to wasted time and costs.

What parties should bear in mind in terms of mediation or other forms of ADR when litigating

In light of the changes introduced by the *Churchill* decision and the amendments to the CPR, parties should keep several key points in mind.

- First, ADR has become a core component of litigation, and engaging in it early can save both time and costs; it is not merely a formality but a genuine opportunity to resolve disputes.

- Additionally, mediation or some other form of ADR is likely to be mandated by the Court, so parties who refuse this must provide compelling reasons for their stance; otherwise, they risk incurring adverse cost consequences.

- Early discussions between parties and their lawyers about ADR options are crucial, as settling matters promptly can help avoid lengthy and costly court proceedings. Finally, parties should be prepared for the possibility that the Court may order mediation/ADR, as resistance to ADR is unlikely to be viewed favourably, particularly under the new CPR provisions.

Why this is a welcome move

The decisions in *Churchill* and *DKH Retail Ltd v City Football Group Ltd* and the changes to the CPR are a positive development for litigants and the legal system alike. Mediation has long been recognised for its efficiency in resolving disputes, for its potential for cost-saving, faster resolution, flexibility and control, and maintaining relationships.

The updates to the CPR primarily serve to reinforce existing practices rather than introduce fundamental changes. Courts already possess the discretion to implement what these updates propose. For instance, it is common for Courts to pause proceedings to allow parties to consider mediation, requiring them to report back after this period. Even when a stay is not ordered, Courts typically take into account the need for parties to have adequate time to engage in mediation when establishing the procedural timetable for a case. However, the new rules provide additional impetus for judges to actively encourage or mandate mediation or another form of ADR, offering a clear basis for such decisions.

In conclusion, the decisions in *Churchill* and *DKH Retail Ltd v City Football Group Ltd* and the changes to the CPR represent a cultural shift towards encouraging early resolution of disputes. This will benefit parties by saving time, costs, and the stress associated with protracted Court proceedings. Generally, the success of ADR is closely linked to the level of genuine commitment from the parties involved. There is a risk that a party may treat the process superficially, using mediation merely as a fact-finding exercise rather than with a genuine intent to settle. Fostering a culture where parties carefully consider mediation for their specific dispute would represent a positive shift.

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