Browne Jacobson

Alternative dispute resolution: The future of ADR in the UK legal system

24 July 2024

I have recently arranged my first mediation, which will take place remotely. The claim I am defending involves quasi-clinical negligence, discrimination, breach of human rights and data protection - a pretty broad claim.

Three weeks before the mediation, I had a pre-meet; also remote, with the mediator. We discussed how mediation works, who will attend, and what we hope to gain from it. A similar pre-meet will then take place with the Claimant , and with the Claimant's permission, the mediator will tell me in advance what the Claimant is looking for from the mediation.

Within the Insurance and Public Risk Team here at Browne Jacobson LLP, we have seen an increase in the number of mediations we are undertaking. I think this is likely to continue, particularly as there are a number of proposed changes to the Civil Procedure Rules (CPR) regarding mediation.

Currently, the Pre-Action Protocol for personal injury claims states that litigation should be a last resort. The parties should consider whether negotiation or some form of ADR (Alternative dispute resolution) might enable them to settle their dispute without commencing proceedings. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been issued. If proceedings are issued, the parties may be required to provide evidence to the Court that ADR was considered. A party's silence in response to an invitation to participate, or a refusal to participate in ADR, might be considered unreasonable by the Court and could lead to an adverse Costs Order against that party.

In **Churchill v Merthyr Tydfil County Council (2023)** the **Court of Appeal** considered whether a Court can lawfully order the parties to engage in ADR and if so, in what circumstances.

The background to this claim was that Mr Churchill had bought a property in Merthyr Tydfil in 2015. The Council owned land adjoining this property. Mr Churchill claimed that since 2016, Japanese knotweed encroached from this land onto his property, causing damage. As a result of this, Mr Churchill said that his property had reduced in value, and he had lost enjoyment.

A Letter of Claim was sent by Mr Churchill in October 2020. The Council sent a Letter of Response in January 2021. The Letter of Response queried why Mr Churchill had not made use of the Council's corporate complaints procedure and said if proceedings were issued, then the Council would apply for a stay and costs unless this procedure was utilised.

In July 2021, proceedings were issued for nuisance, without using the ADR procedure. In February 2022 the Council issued the stay application.

In the first instance, the Judge dismissed the stay application following **Halsey v Milton Keynes Health Trust (2004),** where it was held that to oblige unwilling parties to mediate would impose an unacceptable obstruction on their right of access to the Court. The Judge did however hold that Mr Churchill had acted unreasonably by failing to engage with ADR; this conduct being contrary to the spirit and the letter of the Pre-Action Protocol. Permission to appeal was granted to the Council on the ground that this raised an important point of principle and practice, and there were many other similar cases.

The first issue which the Court of Appeal considered was whether the Judge was right to follow Halsey. The Court decided that the Judge was wrong to follow it because the comments regarding ADR within Halsey were obiter, and so did not bind the Court.

Secondly, the Court of Appeal looked at whether the Court can lawfully stay proceedings or order the parties to engage in ADR. Mr Churchill said that the Council's process was not suitable for his claim. If his right of access to the Court was to be impeded, then it needed a secure statutory footing, and even if there was such a statutory footing it should only be interpreted as requiring such intrusion as was reasonably necessary in order to fulfil the objective in question. The Council submitted that the Court can lawfully stay proceedings and order the parties to engage in ADR, provided that it did not impair the essence of the Claimant's Right to a Fair Trial, it was in pursuit of a legitimate aim and was proportionate to that legitimate aim.

The Court discussed Article 6 of the ECHR (Right to a Fair Trial) and the CPR. The Civil Justice Council's report from June 2021 was referenced: "*any form of ADR which is not disproportionately onerous and does not foreclose the parties' access to the Court is compatible with the parties' Article 6 rights*". Accordingly, the Court held that as a matter of law, the Court can lawfully stay proceedings or order the parties to engage in ADR.

Mr Churchill submitted that the Council's procedure was not relevant to his case and pointed out that it was dealt with by a manager of the Council's own knotweed department, and so was not a typical ADR where there is a neutral third party involved. The Court held that they should not lay down fixed principles as to what will be relevant when determining how the Court should decide whether to stay proceedings, or to order the parties to engage in ADR. Instead a Judge should consider whether a particular process is, or is not likely or appropriate, for the purpose of achieving a fair, speedy and cost-effective solution to the dispute.

Mr Churchill's complaints about the Council's procedure implied that he believed that he was not unreasonable in refusing to engage with it. In the first instance, the Judge would have ordered a stay if he had not thought that he was bound by Halsey. The basis on which the Judge would have made this Order was not appealed, therefore the criticisms of the Council's procedure were not under challenge. Putting that aside, the Court of Appeal said that they would allow the appeal, with the merits or otherwise of the procedure, to be resolved on another occasion.

Thus, the appeal was allowed with no Order as to Costs of the appeal and the parties were told to consider whether they could agree a temporary stay for some form of mediation.

The 2021 report mentioned above found that uptake of mediation had remained limited, particularly for Small Claims which make up over 60% of claims within the County Court. This means that the vast majority of parties to Small Claims disputes fail to benefit from the free mediation service, and it means judicial time and expertise is utilised on claims where it may not be required.

Proposed changes to the CPR include Part 44, where a factor to be taken into account in deciding the amount of costs could include whether a party has failed to comply with an order for ADR, or unreasonably failed to participate in ADR.

Another proposed change is at CMC stage when it is proposed that the Judge **must** consider whether to order the parties to participate in ADR.

At present much of the CPR refers to 'encouraging' parties to participate. This may change to 'encouraging or ordering'.

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