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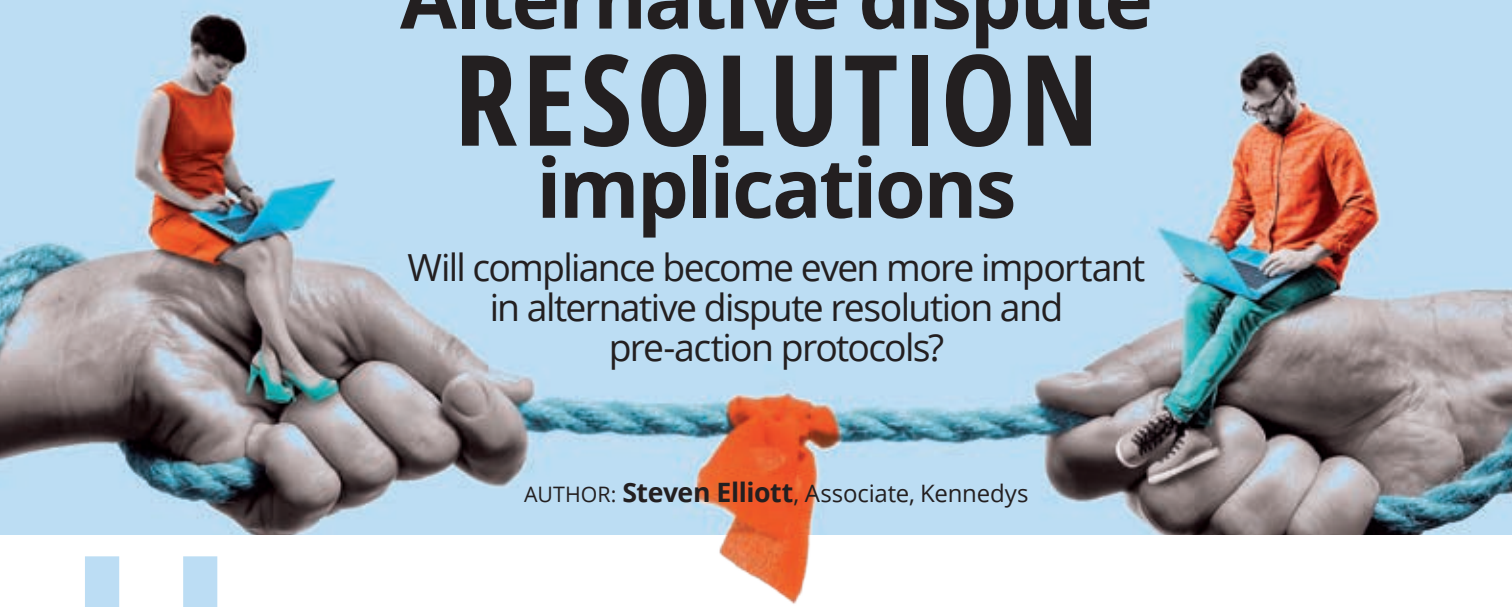
Alternative dispute RESOLUTION implications

Will compliance become even more important in alternative dispute resolution and pre-action protocols?



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Halsey v Milton Keynes *General NHS Trust 2004 (Halsey)*, along with the Civil Justice Council's report on compulsory alternative dispute resolution (ADR) endorsed by Sir Vos, were both analysed by the court when deciding whether to grant permission to appeal in the case of *Churchill v Merthyr Tydfil County Borough Council 2022* (*Churchill*).

Sir Geoffrey Vos, Master of the Rolls, previously made clear the direction of travel regarding ADR, stating that: "ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on resolution rather than dispute."[1]

Against this background, in June 2023, the Court of Appeal is set to consider an important issue relating to access to justice and ADR in the case of *Churchill*. The Court will decide whether a claimant who unreasonably refuses to engage in ADR can be prevented from bringing or advancing a claim in court.

The nuisance case of *Churchill* relates to the alleged incursion of Japanese Knotweed onto the Claimant's land. The Council intends to argue that a claimant should be required to exhaust internal complaints procedures, including following any relevant pre-action protocol, prior to issuing a claim at court.

The Civil Justice Council (CJC) published a report which concluded that compulsory ADR is compatible with the *European Convention on Human Rights*, and is, therefore, lawful.

Paragraph 15 of the *Practice Direction* (*Pre-action Conduct and Protocols*) states: 'where there has been non-compliance with a pre-action protocol or this practice direction, the court may order that:

- The parties are relieved of the obligation to comply or further comply with the pre-action protocol or this *Practice Direction*
- That proceedings are stayed while particular steps are taken to comply with the pre-action protocol or this *Practice Direction*
- Sanctions are to be applied.'

Halsey v Milton Keynes General NHS Trust 2004

The Court of Appeal will consider how its decision in *Halsey* is affected by *Paragraph 15* of the *Practice Direction,* which came into force in 2015.

The case of *Halsey* related to a medical negligence claim brought by Mrs Halsey following the death of her husband at the Milton Keynes General Hospital (the Trust). The Claimant was unsuccessful at trial and as such, was ordered to pay the Trust's costs in accordance with the general rule that costs should follow the event. The Claimant argued that the conduct of the Trust, in failing to agree to mediation despite being invited to do so on ❯

multiple occasions, meant that the Court should depart from the general rule.

Dyson LJ handed down the judgment in the case finding that parties could not be compelled to engage in ADR and the burden was on the unsuccessful party to show that the successful party had acted unreasonably in refusing to agree to ADR. He considered that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction of their right to access to the Court".

In forming his decision, Dyson LJ referred to *Article 6* of the *Convention for the Protection of Human Rights and Fundamental Freedoms* which includes the right and access to a court, and the case of *Deweer v Belgium 1980* which held that "access to the court may be waived but this should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint'".

It was concluded that *Article 6* did not prevent parties from being compelled to partake in ADR, if the ADR was proportionate.

Civil Justice Council report on compulsory ADR

Taking a different stance to the Court of Appeal in *Halsey*, in June 2021 the Civil Justice Council (CJC) published a report which concluded that compulsory ADR is compatible with the *European Convention on Human Rights*, and is, therefore, lawful.

The report considers two key questions:

1 Can the parties to a civil dispute be compelled to participate in an ADR process?

2 If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed?

In order to answer these questions, the way in which case law in England and Wales, and Europe has developed since the *Halsey* decision was considered.

Can the parties to a civil dispute be compelled to participate in an ADR process?

Rosalba Alassini 2010

The report delves into the legality of compulsory ADR post-*Halsey* by analysing European decisions including the judgment in *Rosalba Alassini 2010.* In this case, a telephone company contended that the legal actions of customers were inadmissible as the customers had not first attempted mediation in accordance with the Italian legislation. The Court concluded that the Italian legislation was a proportionate restriction on the right to a fair trial. Other aspects of Italian and Greek law which compels parties to participate in ADR, and have not been subject to challenge, were also considered in the CJC's report.

These examples of ADR were cited as existing procedural rules that establish some form of compulsion to engage in ADR in England and Wales:

- Early neutral evaluation hearings
- Financial dispute resolution appointments
- The new RTA small claims protocol
- The Advisory, Conciliation and Arbitration Service (ACAS) early conciliation
- Mediation information and assessment meetings
- Localised small claim dispute resolution hearings
- West Midlands Employment Tribunal Pilot
- Compulsory dispute resolution hearing in the Court of Protection.

Considering the advancement of caselaw and the examples outlined above, the CJC considered that it 'would be helpful if the issue on whether parties can be compelled to participate in ADR were addressed afresh by an appellate court and/or the legislature as soon as possible so that procedural reform can proceed with some certainty'. However, it was concluded that *Article 6* did not prevent parties from being compelled to partake in ADR, if the ADR was proportionate.

How, in what circumstances, in what kind of case and at what stage should such a requirement be imposed?

The report notes that: 'as long as all of these techniques leave the parties free to return to the court if they wish to seek adjudicative justice then we think that

Alternative Dispute Resolution (ADR) refers to processes and/or techniques that parties can use to resolve disputes out of court. **There are many types of ADR, including, but not limited to:**

- Mediation
- Conciliation
- Ombudsmen
- Arbitration
- Complaints boards.

the greater use of compulsion is justified and should be considered'. In terms of the consequences for non-compliance with ADR, ultimately the authors endorsed the use of sanctions to enforce ADR including striking out the claim or defence.

The forthcoming appeal in the case of *Churchill* raises interesting issues in respect of access to justice, the steps to be taken before court proceedings are issued (for example, exhausting internal complaints procedures and adhering to the relevant pre-action protocol), as well as the role of ADR in the civil justice system generally, which could impact public service organisations involved in civil litigation.

The CJC, Local Government Association, the Law Society and the Bar Council were suggested as integrated organisations who may wish to intervene and make submissions which highlights the importance and impact the Court of Appeal's decision will have, especially in terms of those who fail to comply with pre-action protocols and requests for ADR.

While it remains to be seen whether the Court of Appeal will agree with the conclusions reached in the CJC's report, this is a case to watch closely.

References

[1]Mandatory (alternative) dispute resolution is lawful and should be encouraged, Courts and Tribunals Judiciary

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