The importance of Alternative Dispute Resolution – Churchill v Merthyr Tydfil CBC

Parties to any litigation are likely to be familiar with the importance of considering alternative dispute resolution (ADR), (as opposed to pursuing a court trial and judgment) or face the possibility of cost sanctions for failure to do so. Examples of ADR might include (and are not limited to): arbitration, expert appraisal, expert determination, early neutral evaluation and mediation (which is the most recognised form of ADR).

The 2004 case of *Halsey -v- Milton Keynes General Trust* set a presumed precedent that forcing unwilling parties to refer their disputes to mediation could impede their right of access to the court, and violate Article 6 of the European Convention on Human Rights (the right to a fair trial). *Halsey* for many years has led courts to stop short of ordering parties to engage in ADR.

The recent court of appeal case of *Churchill v Merthyr Tydfil CBC* has redefined the original interpretation of *Halsey v Milton Keynes General NHS* and is a very important procedural case. The Law Society was in fact one of seven interveners to the appeal case, on the basis that *Churchill* was considered by the society, to be such a significant procedural case for determination.

The particular facts of the case of *Churchill* were procedurally of little relevance. It was in essence, a claim of nuisance brought by a landowner against the local authority in respect of the council's failure to prevent the spread of Japanese Knotweed. At first instance, the defendant issued a stay application, on the basis that the claimant had not made use of the defendant's corporate complaints procedure prior to serving a Letter Before Action on the defendant and issuing proceedings. The application was dismissed at first instance on the basis that the judge considered that the principle in *Halsey* applied.

At appeal, the reasoning behind the decision of *Halsey* was examined. *Halsey* was a case primarily concerned with the costs sanctions and consequences of failing to consider another party's offer to mediate, rather than whether the court had the power to order parties to engage in ADR. In considering whether the court can lawfully stay proceedings for or order parties to engage in ADR, the appeal judge carefully examined ECHR legislation and Rules and domestic cases and considered that the power did in fact exist – so long as in exercising that power, the court does not impede the essence of the parties Article 6 rights; is in pursuit of a legitimate aim and is exercised in such a way that it is proportionate to achieving that legitimate aim.

When considering the issue of how the court should decide whether to stay the proceedings or order the parties to engage in ADR, it was identified by the appeal judge, that experience had shown that it is very beneficial for the parties to disputes to be able to settle their discrepancies cheaply, quickly and even with initially unwilling parties, mediation can be successful. Whether any particular method of ADR should be facilitated is for the court to decide, exercising their discretion. The judge concluded that it was not appropriate for there to be fixed principles as to what will be relevant for the court to consider when exercising their discretion and a checklist or score sheet of some kind for the court would be undesirable.

The case of Churchill highlights the importance parties should place on giving careful consideration to all suitable forms of ADR from the outset of a dispute. We are already seeing the effects of *Churchill* as mandatory mediation sessions are being listed by some county courts.

How we can help

The fact specific nature of decisions in this area means that it is important to get advice from solicitors with genuine expertise. Cripps' **property dispute team** is recognised for delivering expert advice to companies and their directors.

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