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How the CPR is now going ADR

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Arbitration

John Pugh-Smith explains recent amendments to the Civil Procedure Rules, which took effect from 1st October 2024 and reflect the Court of Appeal's ruling in Churchill v Merthyr Tydfil CBC.

Last November, the case of *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 (Churchill) overruled the earlier *Halsey* decision, allowing courts to mandate that parties explore Alternative Dispute Resolution (ADR). Amendments made to the Civil Procedure Rules (CPR) which took effect from 1 October 2024 ensure that ADR is now an objective of civil justice, allowing courts to direct parties to resolve their disputes efficiently and cost-effectively.

Context

Following the Court of Appeal's judgments in *Churchill* the question then arose as to what would be the practical implications and how they should be woven into the CPR and civil practice generally. Accordingly, the Civil Procedure Rules Committee (CPRC) swiftly decided that rule change was indeed required to create a clear framework for what amounts to a dramatic change in procedural law. By April 2024 it published draft amendments to the CPR for consultation with responses sought by the end of May 2024. Despite the intervening general election, the CPRC approved the draft rules, as slightly amended in response to consultees' comments. They were formally made on 29 July 2024, laid before Parliament the next day and came into force on 1 October 2024. The relevant statutory instrument is the Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839).

The Amendments

The most significant change concerns the scope of CPR 1, where the overriding objective of civil justice is enshrined, and, from which the judiciary usually measure the exercise of their discretions. The objective of *"enabling the court to deal with cases justly and at proportionate cost"* is now expanded to include *"(f) promoting or using alternative dispute resolution"*. Indeed, CPR 1.4(2)(e) dealing with the court's duty of active case management, now includes *"ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution"*.

The second set of amendments address a court's management powers over the ordering of ADR as follows:

CPR 3.1(2)(o) (which form part of the Court's case management powers) now includes:

"(o) order the parties to participate in ADR;

CPR 28 (which deals with matters to be dealt with by directions in fast track and intermediate track cases) now includes *"whether to order or encourage the parties to engage in alternative dispute resolution"*.

CPR 29 (which deals with case management in multitrack cases, so all litigation of significant value and complexity not covered by other Court Guides) requires directions hearing in every case and now provides:

"(1A) When giving directions, the court must consider whether to order or encourage the parties to participate in alternative dispute resolution."

The third amendment relates to the costs provisions of CPR 44 and how the litigation has bene conducted by the parties. Such conduct now includes:

"(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution."

It is noteworthy that the CPRC consciously chose not to define what "alternative dispute resolution" means, leaving it to the parties to decide what is the most suitable form of ADR for the particular dispute.

For example, in the context of judicial review, it will be recalled that the Pre-Action Protocol already advises in the following terms:

10. It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation which may be appropriate, depending on the circumstances—

- *Discussion and negotiation.*
- *Using relevant public authority complaints or review procedures.*
- *Ombudsmen – the Parliamentary and Health Service and the Local Government Ombudsmen have discretion to deal with complaints relating to maladministration. The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies and this is available from their website at www.bioa.org.uk. Parties may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.*
- *Mediation – a form of facilitated negotiation assisted by an independent neutral party*

In addition, following the practices adopted, for example, in the field of compensation, Early Neutral Evaluation ("ENE") whether binding or non-binding, is another option.

Outworkings

These CPR amendments, coupled with the parallel developments over small claims introduced on 22 May 2024, can only have a dramatic effect on the position of ADR, and mediation in particular, in civil justice.

The fundamental change for general litigation will now lie in the fact that the Courts will now be able to mobilise ADR (especially mediation) during the life of any case. This is in contrast with the pressure to mediate merely being generated by the likelihood that a case (or reference in the case of the Lands Chamber) will reach trial, and, that costs sanctions might be imposed by a judge retrospectively for unreasonably refusing to mediate. Nevertheless, the case of *Northamber v Genee World* [2024] EWCA Civ 428 has already seen a sanction imposed for failure to mediate since *Churchill*.

Whether or not the Courts will, in future, need to order mediation will depend upon whether the parties simply agree to use mediation by agreement, to avoid any risk of a costs sanction at a directions hearing or still on a specific application. Certainly, there has, within the last few years (since the Covid Pandemic) been increasing experience of ADR by civil practitioners, leading now to fewer cases going to full trial. Experience in other jurisdictions, such as British Columbia, further suggests that compulsion usually means that parties pre-empt compulsion by consent.

For the public law sector, and, the work of the Administrative Court, there is the added challenge that cases are there because of a claimed error of law. Nevertheless, mediation should be actively considered where:

1. a pragmatic solution or outcome can be found, say, through roundtable discussions;
2. it is important to conserve the relationship between the parties, so for example where they need to work together in the future;
3. negotiations to settle have broken down but where the introduction of an independent neutral third party can help re-start dialogue especially where the parties are in general agreement about the course of action required to resolve a dispute but need help to agree the detail.

Nonetheless, the biggest impact on future litigation culture will come from how Courts now apply the amendments to CPR 1 to their case loads. So, as we move into Autumn 2024 it would be unwise simply to await more judicial announcements and further reported case examples before taking active steps; for ADR is now part of the CPR.

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