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Avoiding compulsory mediation after Churchill

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Why might a client want to resist mediation?

- Fraudulent claim/defence (Halsey at [17]).
- Perceived strength of their position (Halsey at [18]).
- Concern about delay (Halsey at [22]).
- Animosity toward the other side/belief that they are not in good faith.
- Concern about lack of disclosure.
- Concern about inequality of resources/bargaining power/sophistication.
- Lack of faith in prospects of settlement (Halsey at [25]).
- Other mediation failed/settlement agreement breached (Kelly v Kelly).

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But resisting mediation may not be a good idea

- Even parties with very strong cases face costs sanctions for unreasonably failing to engage in mediation proposals (Stoney-Andersen v Abbas though cf Gore v Naheed).
- Perceived strength/ability to prove fraud might be overestimated.
- Delay can be avoided if built into directions timetable.
- Lack of disclosure potentially goes to timing/need for earlier disclosure.
- Concern about inequality of resources will also affect trial.
- Many would-be unsettle-able cases settle at mediation.
- Costs of trial will be higher.

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Churchill – the background

- Council sought a stay on the basis that Mr Churchill should have used their in-house complaints procedure.
- District Judge refused on the basis that he was bound by the *dicta* in **Halsey** that compulsory mediation was an unacceptable obstruction on their right of access to a court.
- Leapfrog appeal to the Court of Appeal, with multiple intervenors.
- The council's position on appeal was that there should be a 1-month stay. Their grounds of appeal were that the judge was *not* bound by **Halsey**, and that the CPR permitted the court to stay 'premature' claims for ADR and to stay or strike out claims if a party unreasonably refused ADR.

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Churchill – the decision

- Lord Dyson MR's statement in **Halsey** was *dicta.*
- ECHR and ECJ cases did not preclude compulsory ADR if the order did not impair the very essence of the claimant's right to a fair trial, was made in pursuit of a legitimate aim, and was proportionate to achieving that aim.
- The principle in *UNISON* (that an impediment or hindrance to access to a court required primary legislation) did not preclude compulsory ADR orders.
- The court had the power to stay claims for ADR and order the parties to engage in it.
- Absent a respondent's notice, Mr Churchill could not challenge the judge's view that his refusal was unreasonable.
- Things had 'moved on' since the District Judge's decision. Mr Churchill had refused to allow the council to treat his knotweed, the internal complaints procedure was designed for pre-action matters, was not designed for private-law matters, and might not be appropriate for an entrenched dispute. No stay was therefore imposed.
- Query if the analysis in **Churchill** is itself *dicta*, but in practice it will be followed.

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Churchill – the outstanding questions

- **How will the discretion be exercised?**
  - Subject to Art 6 (ie not impair the essence of the right to access a court, or be disproportionate).
  - Halsey considerations were said to be 'likely to have some relevance'. But query eg if this includes a party's reasonable belief in the strength of their case.
  - Bar Council's proposed factors were also said to be 'likely to have some relevance':
    - the format of ADR proposed
    - whether the parties were professionally advised/represented, and whether ADR was likely to be effective/appropriate absent professional advice/representation
    - if it was clear to the parties that if they did not settle they could pursue their claim/ defence
    - urgency and the reasonableness of delay, and whether delay would vitiate the claim or cause/exacerbate a limitation issue;
    - the costs of the proposed ADR both absolutely and relative to the parties' resources
    - whether there is a reasonable prospect of the ADR process succeeding
    - any significant imbalance in the parties' resources, bargaining power, or sophistication
    - the reasons for refusal
    - the reasonableness and proportionality of the proposed sanction

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Churchill – the outstanding questions

- **What sanctions will be imposed?**
  - one of the grounds for distinguishing *UNISON* was that it did not concern *delaying* access to a court.
  - but the court also referred to *UNISON* not preventing the court adopting sanctions which 'delay *or prevent*' the resolution of proceedings and drew an analogy with security for costs.
  - the grounds of appeal referred to strike out sanctions and the court did not criticise this.
  - would a strike-out or debarring sanction impair the essence of the right to access a court and/or be proportionate?
  - will defendants be treated differently?
  - might specific types of claim raise more specific ECHR concerns (eg a claim to sell X's home)?
- **How prescriptive will the court be?**
  - eg what will happen if the parties cannot agree a mediator/venue?
  - ECJ cases concerned free or very cheap ADR schemes – would the court require a party to commit to more considerable expenditure?

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Avoiding a compulsory mediation

- **Propose something else – the court is concerned with ADR, not mediation.**
  - ENE or FDR – cheaper, preparation overlaps with trial preparation. But might improve the other side's case. Likely lower prospects of settlement.
  - Courts may favour mediation as less of a burden on court resources.
- **Apply for strike out/summary judgment**
  - Potentially functions as an ENE even if unsuccessful. Potentially entirely obviates the need for expense. But can be very hard to win, potentially improves the other side's case, and risks adverse costs orders.
- **Deferring mediation**
  - Feet-dragging can amount to an unreasonable refusal.
  - But there may be legitimate reasons to delay, and proximity to trial/incurred costs may be a reason to decline a compulsory order.

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Avoiding a compulsory mediation

- **Secure an acceptable sanction**
  - If your client is willing to take the risk of retrospective costs sanctions, they may be willing to accept prospective costs sanctions. But is it realistic to expect a court to make a prospective order?
  - But more draconian sanctions are potentially available. Query if/when they will be used (eg would a court debar a party from proving a will?)
  - Scope for argument that the question of sanctions should be left until after trial (once findings of fact are known and WPSATC correspondence is available).
- **Attend the mediation without taking steps to maximise prospects**
  - The conduct of the mediation itself is privileged and the court has said it will not get involved (**Halsey** at [14]). But advising a full bad faith mediation is unlikely to be in your client's best interests.
  - No obligation to ensure that tax advice is available.
  - No obligation to stay late.
  - No obligation to settle.
  - No obligation to use expensive personnel (query if this applies to the mediator).

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Avoiding a compulsory mediation order

- Openly resist ADR
  - High risk – the court may well think that the reasons you give for resisting a mediation are misconceived (see earlier slides). Visible intransigence might also point in favour of more draconian sanctions.
  - Judicial climate generally very pro-ADR.
  - Costs risk of losing an application (though might be limited if the point is dealt with at the CCMC).
  - Arguments based on merits will be harder *ex ante* (and are even being rejected *ex post* – eg **Stoney-Andersen v Abbas**).
  - But extreme cases might be suitable (eg breach of a previous settlement agreement - **Kelly v Kelly**).

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