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What is the impact for mediation of *Churchill v Merthyr Tydfil CBC* and the new amendments to the CPR, and how will client advice change?

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27 November 2024

- How many have participated in a mediation in the last 12 months?
- If so, would you broadly consider it successful?

- How many have turned down an invitation to mediate in the last 12 months?
- If so, would you consider that broadly successful?

- How many have been ordered in the last 12 months to mediate or engage in other forms of ADR despite one party not consenting?
- If so, would you broadly consider it successful?

What does experience tell us?

- Mediation may achieve a successful outcome – may not will.
- It takes consent on both sides to achieve a mediated settlement – may not must.
- Post *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 ADR may be ordered not just encouraged – may not must.

1. What did *Churchill* decide?
2. What are the changes to the Civil Procedure Rules?
3. How do we advise clients as a result?

1. What did *Churchill* decide?

Background:

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

Lomax v Lomax [2019] EWCA Civ 1467

McParland v Whitehead [2020] EWHC 298 (Ch)

Civil Justice Council Report 12 July 2021

Ministry of Justice consultation July 2022

1. What did *Churchill* decide? Contd.

The Decision (MR with which LCJ and Deputy Head of Civil Justice agreed):

- Issue of court's power to order ADR had not been before the CoA in *Halsey*. Any comments were therefore not binding.
- Court of Appeal in *Churchill* was free to consider the issue afresh.
- Court has power to order ADR: existence of that power is not contrary to constitutional law or ECHR Article 6.
- ADR not limited to mediation but includes '*any other process that has a prospect of allowing the parties to resolve their dispute*' [64].

1. What did *Churchill* decide? Contd.

Decision (contd)

- The power should be exercised bearing in mind ECHR Article 6, the overriding objective and the individual circumstances of the case:

No checklist or fixed principles [66].

Important objective of *'bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective'* [66].

2. What are the changes to the Civil Procedure Rules?

SI 2024 No 839: The Civil Procedure (Amendment no3) Rules 2024

In force 1 October 2024. See 'www.justice.gov.uk'.

- Express power to order and not simply encourage ADR: rules 1.1(f), 1.4(2)(e), and 3.1(2)(o).
- Additional specific provision that a court may order and not simply encourage in county court claims: rules 28.7(1)(d) and 28.14(f) and 29.2(1A)
- Non-compliance with an order to be dealt with by general court powers AND may be reflected in costs: rule 44.2(5) (and for fixed costs regimes, Parts 45 and 46).

3. How do we advise clients as a result?

TCC Guide (NB dated 2022):

‘Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.’ 7.1.3

‘ADR may be appropriate before the proceedings have begun or at any subsequent stage.’
‘... the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. The timing of ADR needs careful consideration.’ 7.2.1

‘At any stage after the first CMC and prior to the commencement of the trial, the court, will, either on its own initiative or if requested to do so by one or both of the parties, consider afresh the likely efficacy of ADR’ 7.2.4

3. How do we advise clients as a result? Contd.

Three issues:

- Is ADR appropriate?
- When would ADR be appropriate?
- What form of ADR would be appropriate?

Get ahead of the court and your opponent. Shape the debate!



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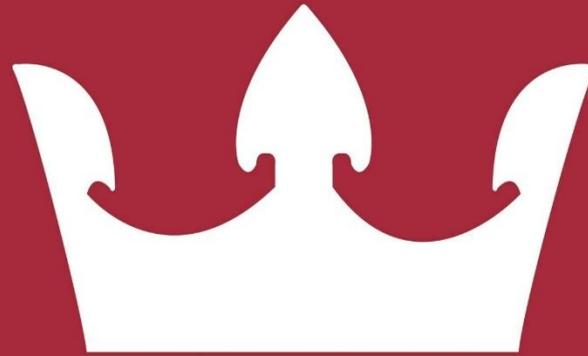
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