A case of *libre recherche scientifique*

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Recently the Master of the Rolls gave the judgement with the concurrence of Lord Justice Birss and Lady Carr, Lady Chief Justice of England and Wales in an appeal[2] concerning the extent to which the courts can order parties to engage in non-court based dispute resolution. The judgement relates to an internal local government complaints procedure which may have implications for retail and commercial businesses where consumer complaints are frequent.

In this case the Mr Churchill (Claimant/Respondent) purchased property in Merthyr Tydfil in 2015. The Merthyr Tydfil Borough Council (Defendant/Appellant) owned adjoining land. The Claimant complained that since 2016 Japanese knotweed had encroached upon his property causing damage with consequential diminution in value and loss of enjoyment. His solicitors sent the Defendant a letter of claim on 29th October 2020 and they replied on 20th January 2021 inquiring why the Claimant had not used its Corporate Complaints Procedure.

The Claimant ignored this and issued proceedings in July 2021. Despite the council warning him that they would apply for a stay which they did on 15th February 2022. On the application the Deputy District Judge dismissed the stay application having delivered a reserved judgement following the dictum of Dyson LJ in *Halsey v Milton Keynes General NHS Trust* [3] although here the Deputy District judge held that Claimant acted unreasonably in ignoring the council's procedure contrary to the Pre-Action Protocol. On 4th August 2022 the Defendant was granted permission to appeal and the matter was referred to the Court of Appeal on a point of principle and practice.

The Practice Direction on Pre Action Conduct and Protocols which came into force in 1999 and updated in August 2021 applied there being no specific Pre-Action Protocol for nuisance subject to the question of the powers of the court once action had been commenced. The key questions for the court in summary were: whether the District Judge was right to dismiss the council's stay application, if not, whether the court could lawfully stay proceedings or order the parties to engage in a non-court dispute resolution process.

The Master of the Rolls, Sir Geoffrey Vos, considered whether the remarks of Dyson, LJ in context were *obiter*. In *Halsey* Dyson, LJ was concerned with costs and conduct as to whether the Claimant acted unreasonably in refusing mediation. What Dyson, LJ

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[2] *James Churchill v, the Merthyr Tydfil County Borough Council with Interventions from The Law Society, The Bar Council, The Civil Mediation Council, The Centre for Effective Dispute Resolution, The Chartered Institute of Arbitrators, The Housing Law Practitioners Association and The Social Housing Association* [2023] EWCA Civ 1416.

[3] [2004] EWCA Civ 576.

did was give some guidance to parties making requests to stay pending alternative dispute resolution. Sir Geoffrey went on to analyse Dyson, LJ 's judgement as relevant to this appeal: as to paragraphs 9 and 10 of Dyson, LJ's judgement warning of the impropriety of ordering parties to mediate when the process was voluntary, not mandatory. Paragraph 13 of Dyson, LJ's judgement, explained his reasons why in such cases of unreasonable refusal to mediate the unwilling parties should pay the costs as an exception to the general rule on costs.

Sir Geoffrey referred to *R (Youngsam) v The Parole Board* [4] where Leggatt, LJ delivered an incisive judgement as to the meaning of *ratio decidendi* and *obiter dicta.* In that judgement the *ratio* was defined as "part of the best or preferred justification for the conclusion reached." The Master of the Rolls identified Dyson, LJ's decision as focused on certain sanctions not whether compulsory mediation was lawful. Dyson, LJ's expressed views in the context of his paragraphs 9 and 10 were *obiter dicta* not part of the *ratio decidendi*.

In this appeal the Respondent (Mr Churchill) argued that his right of action could not be impeded by an internal complaints procedure which could not address his cause of action. Secondly, any impediment to such legal right would require statutory authorisation. In any event statutory provision would have limited effect in his view. *R(Unison) v Lord Chancellor.*[5] On the other hand the council contended that the court could stay provided the order did not impair the right to a fair trial; it was made in pursuance of a legitimate claim and was proportionate to achieving that claim.

Sir Geoffrey then applied the relevant principles from European Court of Human Rights cases, pre-Brexit CJEU cases and CJEU cases which largely coincided. In doing so he referred to Article 6 of the ECHR and to the courts duties outlined in CPR 1.4(1), CPR 3.1, and CPR 26.5(1) concerning case management encouraging ADR as well as compliance with practise directions and pre action protocols. In particular he pointed to CPR 26.5(3) which expressly gave the court power to stay even if not requested by the parties. As to European Court of Human Rights cases Dyson, LJ had relied on *Deweer v Belgium* [6] that…" compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court."[7] The CJEU cases cited included *Alassini v. Telecom Italia SpA* [8] where member states were obliged to ensure judicial protection of an individual's rights under EU law and…

> that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.

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[4] [2019] EWCA Civ 229

[5] [2017] UKSC 51 [2020]AC 869 at 80.

[6] (1980) 2 EHRR 439.

[7] See also: *Ashingdane v. United Kingdom* (1985) 7 EHRR 528; *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 EHRR 442; *Z and others v. United Kingdom* (2002) 34 EHRR 3; and *Momcilovic v. Croatia* (2019) 69 EHRR 14.

[8] (Joined Cases C-317/08, C-301/08, C-319/08 and C-320/08) [2010] 3 CMLR 17.

In *Menini v. Banco Popolare Società Cooperativa* [9] Directive 2013/11/EU of 21 May 2013 was applied. This dealt with alternative dispute resolution for consumer disputes (the mediation directive). It reiterated the principles and explained some further principles including the lack of significance of compulsion, and the fact that the requirement for a suspension of the limitation period came from the mediation directive itself. Protection is maintained in such cases provided the result is not binding on the parties, does not cause a substantial delay for the purposes of bringing legal proceedings, and that it suspends the period for time-barring claims and does not give rise to costs.

So far as domestic cases were concerned reference was made to *UNISON* where the Supreme Court held that's the constitutional right of access to the court was an essential element of the rule of law which could only be curtailed by primary legislation. That case was distinguished as Sir Geoffrey said:

> The essential question is whether UNISON mandates the conclusion that existing proceedings may not be stayed or delayed to allow such steps to occur without primary legislation allowing it. In my judgment, it does not.

He also considered that in *Halsey* the court had power to stay proceedings to enable ADR if it did not impair Article 6 rights and was proportionate. But the question was whether there was such a power as a matter of law for this process. The Respondents claim confused the question of existence of a power with its exercise. No doubt that power existed in this case but what about its exercise which must be discretionary? Sir Geoffrey concluded as a matter of law that the court can lawfully stay proceedings for, or order, the parties to engage in non-court based dispute resolution process. He further opined that mediation, early neutral evaluation and other means of non-court-based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. Whether the court should order or facilitate any particular method of non-court-based dispute resolution in a particular case is a matter of the court's discretion, to which many factors will be relevant. He was careful not to give a list of such factors but acknowledge those submitted by the parties which may not be exclusive. It was a matter for the court to decide on the facts of each case.

So questions remained as to whether the court should have granted the council I stay. The judge had decided to that theme claimants at first instance had acted unreasonably and contrary to the spirit of the practise direction. A Claimant denied that but the court held that he was unreasonable. The judge felt he was bound by *Halsey* and consequently had to refuse the stay. Mr Churchill had refused to allow the council to treat the knotweed. There were very high number of knotweed claims pending for which the process may not have been appropriate.

In conclusion Sir Geoffrey held that paragraphs [9]-[10] of the Halsey judgment were not part of the essential reasoning in that case and did not bind the Deputy District Judge to dismiss the Council's application for the stay of these proceedings.

He found that the court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made did not impair the very essence of the claimant's right to proceed to a judicial hearing

[9] [2018] CMLR 15.

and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. He declined to lay down fixed principles as to what would be relevant to determining the questions of a stay of proceedings or an order that the parties engage in a non-court-based dispute resolution process. Many of the factors mentioned in his judgment[10] and the nature of the process contemplated would be relevant, as would other circumstances. He also declined to make any order for a stay of the current proceedings at this stage. He decided to allow the appeal in part as indicated and expressed his provisional view that: (i) there should be no order as to costs of the appeal as between the parties to the proceedings, and (ii) the parties ought to consider whether they can agree to a temporary stay for mediation or some other form of non-court-based adjudication.

It seems that whilst the Court is not laying down any fixed guidance on the particular grounds for a stay it is underpinning the flexibility of the civil justice system to accommodate informal dispute resolution processes as appropriate. However the submissions of The Law Society and Bar Council are such that practitioners and others may find them useful indicators although not by any means exclusive as each case must be determined on its merits some of which are difficult to predict.

[10] At paragraphs [61]-[63].