KNOT A GOOD IDEA

Failing to engage in ADR could leave you tied up in knots

Written by **SAM DORNE**

A seismic shift to the English legal system has been handed down by the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, in which the Court held that the lower County Court was wrong to decide that it did not have the powers to order the parties to engage in non-court-based dispute resolution.

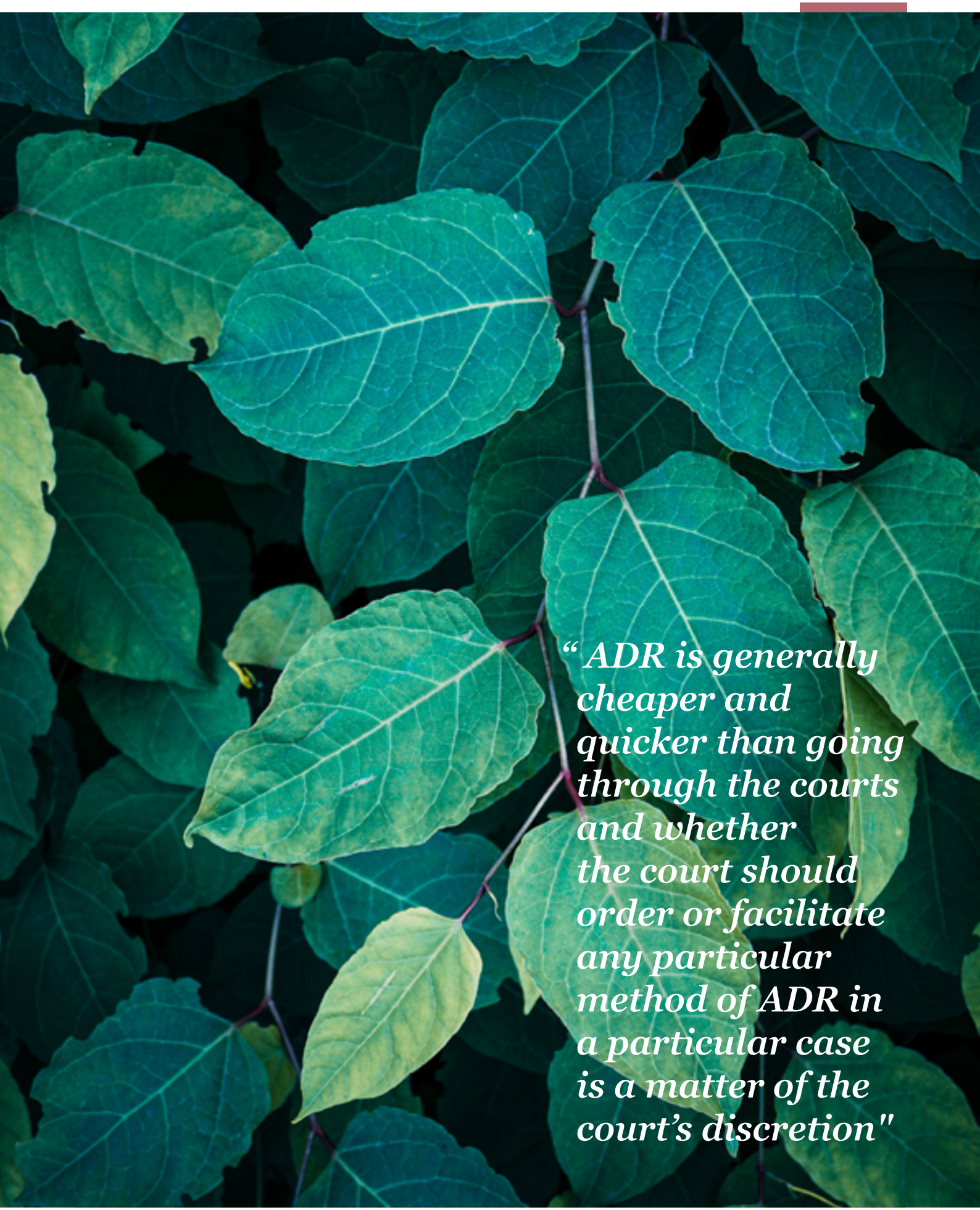
The root cause of the issue

Japanese knotweed is an invasive species of plant which is a well-known problem for properties in the UK. When selling homes owners must even disclose if their property is affected with the nuisance plant, and lawsuits over this issue are not uncommon.

Mr Churchill bought a property in the small Welsh town of Merthyr Tydfil. The Council owns part of the adjoining land and since 2016 Japanese knotweed has been spreading from the Council land onto Mr Churchill's.

Mr Churchill's solicitors sent a formal letter of claim which would have put the Council on notice of their intention to commence court proceedings if they did not receive a satisfactory response.

Nearly three months later the Council did respond and questioned why there had been a failure by Mr Churchill to not use its Corporate Complaints Procedure. It put Mr Churchill on notice that if he commenced court proceeding without first using its prescribed procedure then the Council would seek a stay and an order for costs against Mr Churchill. Mr


“ADR is generally cheaper and quicker than going through the courts and whether the court should order or facilitate any particular method of ADR in a particular case is a matter of the court’s discretion"

Seismic shift

→ Advantages of ADR prompt English Court of Appeal to issue pivotal judgment.

Churchill issued court proceedings and the Council applied for a stay. The matter went for hearing before Deputy District Judge (**DDJ**) Kempton Rees.

County Court dismisses the application to stay

In deciding the issue over whether to grant a stay or not the DDJ held that he was bound to follow Dyson LJ's statement in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. The relevant paragraph of the Halsey judgment stated: *to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court*. As such, the DDJ held that he did not have the power to order the parties to try and settle the case outside of the Court. The DDJ did however find that Mr Churchill had acted unreasonably by failing to engage with the Council's internal complaints procedure and that his conduct was contrary to the spirit and the letter of the relevant pre-action protocol, but this was secondary to the issue over whether the DDJ had the power to compel the parties to attempt to settle outside of the Court.

The Council appealed the decision to the Court of Appeal, which had to decide whether a court could lawfully order parties to engage in a non-court-based dispute resolution process, and, if so, in what circumstances it should do so (the type of dispute resolution in issue being an internal complaints procedure to which the claimant was not contractually bound). Before looking at the Court of Appeal decision it is worth taking a look at the elements of the civil procedural rules (**CPR**) in England and Wales.

The CPR

The CPR governs how all civil claims are to operate in England and Wales. As already mentioned by the DDJ in the first hearing, there are certain pre-action protocols that must be engaged with; and there is incorporated into these rules the concept of the "overriding objective", which is supposed to, in theory, govern how the rules are to be applied broadly. It is the lens through which a court should be managing the proceedings in every case. The overriding objective is *enabling the court to deal with cases justly and at proportionate cost*, and there is a list of rules and some guidance as to how this should be achieved.

Broadly the rules relevant to this dispute provide that:

- Parties are expected to try to settle the issues without proceedings (litigation should be a last resort).

- Parties are expected to consider a form of Alternative Dispute Resolution (**ADR**) to assist with settlement. Evidence may need to be provided to show that ADR has been considered.
- Parties should look to reduce the costs of resolving the dispute.
- Any party refusing to participate in ADR might be considered unreasonable and could be ordered to pay additional costs.

It is against this backdrop that the Court of Appeal looked at Mr Churchill's case.

ADR is not something to be glossed over

The first issue the Court of Appeal had to consider was whether the DDJ was bound by the *Halsey* judgment or whether the comment in *Halsey* was considered obiter (in other words, a comment made in passing, and therefore not something that was a necessary part of the reasoning for the decision) which did not need to be followed. The Court of Appeal found, for a myriad of reasons which are not worth getting into, that the comment was obiter and therefore the DDJ was wrong to consider that he was bound to it.

The Court then had to consider whether the rules allowed for a court to order parties to ADR and in what context. The Court easily found that the CPR and its case management powers gave it the power to do so. It held: *At one extreme, courts regularly adjourn hearings and trials to allow the parties to discuss settlement. It would be absurd if they could not do so simply because one of several parties, for example, resisted the adjournment*. Therefore the Court concluded that as a matter of law, *the court can lawfully stay existing proceedings for, or order, the parties to engage in a non-court-based dispute resolution process*.

Finding that the Court *could* order a stay and the parties to ADR, the Court went on to consider whether it *should*. The Court argued that *Experience has shown that it is extremely beneficial for the parties to disputes to be able to settle their differences cheaply and quickly. Even with initially unwilling parties, mediation can often be successful*. The Court went on to say that *ADR is generally cheaper and quicker than going through the courts and whether the court should order or facilitate any particular method of ADR in a particular case is a matter of the court's discretion*.

The Court stopped short of laying down what it called *fixed principles* as to what would be relevant considerations in whether a court should exercise its discretion or not. It held that it would be undesirable to provide a *checklist or a score sheet for judges to operate*, as *They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective*. The Court however insisted that any order to stay or order ADR should not *impair the very essence of the claimant's right to proceed to a juridical hearing*.

Conclusion

This decision is a sizeable shift and a clear indication from the higher courts that ADR should not be glossed over. There was no statutory or contractual obligation forcing the parties to go to ADR in this case. Yet the Court has given a clear indication that failing to engage in any kind of ADR prior to commencing court proceedings could end up with one party seeking an order that those proceedings be stayed, with clear costs consequences for any trigger-happy litigant jumping straight into court action.

About the author

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.