CIVIL PROCEDURE NEWS

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SWEET & MAXWELL

In Brief

Cases

- **Bruce v Wychavon District Council** [2023] EWCA Civ 1389, 24 November 2023, unrep. (Newey, Coulson and Snowden LJJ)

Set aside order made in the absence of a party – medical evidence required for an adjournment

CPR r.39.3. The appellant was found to be in contempt of court in his absence. He was, however, given permission to apply to set aside or vary that order. Full medical evidence was required by the judge to evidence his incapability of attending court or instructing counsel in respect of the hearing. The judge rejected the application to set aside, doing so on the basis that further evidence provided did not justify granting the application. **Held**, an appeal to the Court of Appeal was dismissed. In dismissing the appeal, Coulson LJ, with whom Newey and Snowden LJJ agreed, noted that the leading authority on the evidence required to make an application for an adjournment on medical grounds was ***Levy v Ellis-Carr*** (2012) at [36], which had been expressly approved by the Court of Appeal in ***Forrester Ketley v Brent*** (2012) at [26]. As Coulson LJ noted,

> *"[36] There is a good deal of authority concerned with what may constitute adequate medical evidence, in circumstances where that is proffered as the good reason for the non-attendance. The most useful guidance is set out by Norris J in Levy v Ellis-Carr [2012] EWHC 63 (Ch) at [36], where he said:*
>
> > *'...Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations),* should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, *should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case).' ([Coulson LJ] emphasis)"*

It was important in such cases that the evidence set out in clear terms that the appellant cannot attend the hearing in question,

> *"[40] . . . Judges are not doctors. If a party wishes to set aside an order because he or she had a medical condition which prevented them from attending court, then they are obliged to provide medical evidence which says that in unambiguous terms. It is not appropriate or fair to expect a judge to draw inferences from evidence which – whether deliberately or otherwise – fails to address that critical point."*

Moreover, it was not sufficient for a party seeking an adjournment on medical grounds to rely on a pro forma sick note provided by a doctor,

> *"[41] I should add one further observation. Although these cases will always turn on their facts, I am aware that, all too often, parties seek to justify their non-attendance at court by reference to the sort of 'tick box' sick note used here. The first difficulty with such documents is that they do not indicate whether the party seeking to rely on them was even seen by a doctor. If they were not seen, they are simply the doctor's record of the party's self-reported condition, and therefore add little. And although, in the present case, Mr Bruce was seen by a GP, the sick note simply said that he was not fit for work (it made no mention of attendance at court) and explained that that meant that he 'may not be able to work', which also does not advance matters very far.*
>
> *[42] Furthermore, particularly post-pandemic, the potential difference between being unfit for work and being unfit to attend court, is of some significance, given the wide use of live streaming and CVP in most court centres. It is now much easier for parties to attend court remotely, and for their evidence to be given, or their submissions heard, over a live link. In this way, even a party with a medical condition may, depending on the symptoms, be expected to participate remotely in a court hearing.*
>
> *[43] For those reasons, therefore, a party in the position of Mr Bruce must appreciate that a pro-forma sick note of this type does not generally comply with the Ellis-Carr guidance."*

In the present case, the appellant had failed to forward evidence that satisfied the test in ***Levy v Ellis-Carr***. Moreover, the appellant had been provided with guidance by the judge on the nature of evidence that was required to meet that test.

As such it did not make a difference that the appellant was a litigant-in-person, who might otherwise have been unaware of the need for particularity (at [38]–[39]). ***Levy v Ellis-Carr*** [2012] EWHC 63 (Ch); [2012] B.P.I.R. 347, ChD, ***Forrester Ketley v Brent*** [2012] EWCA Civ 324, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.39.3.7.2.)

■ **Griffiths v TUI UK Ltd** [2023] UKSC 48; [2023] 3 W.L.R. 1204, 29 November 2023 (Lord Hodge DPSC, Lords Lloyd-Jones, Briggs, Burrows and Stephens JJSC)

Expert evidence, cross-examination when seeking to challenge

CPR Pt 35. A claim for damages was pursued on the basis that the claimants were alleged to have suffered damage due to illness arising on a package holiday. The claimant gave uncontested evidence at trial as to the facts concerning the holiday and his illness. The defendant did not cross-examine the claimant's expert, nor did it set out any expert evidence of its own. Defendant's counsel did, however, make closing submissions that impugned the claimant's expert's evidence. The judge, in the light of those submissions, dismissed the claim on the basis that the claimant had failed to discharge the burden of proof (at [1]). The issue before the Supreme Court was

> *"[2] . . . whether the trial judge was entitled to find that the claimant had not proved his case when the claimant's expert had given uncontroverted evidence as to the cause of the illness, which was not illogical, incoherent or inconsistent, based on any misunderstanding of the facts, or based on unrealistic assumptions, but was criticised as being incomplete in its explanations and for its failure expressly to discount on the balance of probabilities other possible causes of Mr Griffiths' illness."*

Held, the claimant's appeal was allowed. The claimant had not received a fair trial in the light of the approach adopted by the trial judge and upheld by the Court of Appeal. The claimant had, given the controverted evidence of their expert, discharged the burden of proof and made out the claim (at [78]). In reaching its decision, the Supreme Court confirmed the validity of the general rule in ***Browne v Dunn*** (1893), i.e., that generally a party must challenge, by way of cross-examination, witness evidence when they wish to submit to the court that it should not be accepted. This rule was one of various rules that exist to enable a judge to ensure that parties are afforded a fair, adversarial trial (at [42]–[43] and [70]). That being said, several exceptions to the general rule, which should not be applied inflexibly, were noted,

> *"[61] . . . There are also circumstances in which the rule may not apply. Several come to mind. First, the matter to which the challenge is directed is collateral or insignificant and fairness to the witness does not require there to be an opportunity to answer or explain. A challenge to a collateral issue will not result in unfairness to a party or interfere with the judge's role in the just resolution of a case; and a witness in such a circumstance needs no opportunity to respond if the challenge is not an attack on the witness's character or competence.*
>
> *[62] Secondly, the evidence of fact may be manifestly incredible, and an opportunity to explain on cross-examination would make no difference. For example, there may be no need for a trial and cross-examination of a witness in a bankruptcy application where the contemporaneous documents properly understood render the evidence asserted in the affidavits simply incredible: Long v Farrer & Co [2004] EWHC 1774 (Ch); [2004] BPIR 1218, para 60 , in which Rimer J quotes from the judgment of Chadwick J in In re Company (No 006685 of 1996) [1997] 1 BCLC 639, 648 .*
>
> *[63] Thirdly, there may be a bold assertion of opinion in an expert's report without any reasoning to support it, what the Lord President (Cooper) in Davie v Magistrates of Edinburgh described as a bare ipse dixit. But reasoning which appears inadequate and is open to criticism for that reason is not the same as a bare ipse dixit.*
>
> *[64] Fourthly, there may be an obvious mistake on the face of an expert report. Bean LJ referred to this possibility in para 94 of his judgment and cited Woolley v Essex County Council [2006] EWCA Civ 753 as a useful example. In Hull v Thompson [2001] NSWCA 359, ('Hull v Thompson') Rolfe AJA at para 21 expressed the view that such a circumstance would be where the report was ex facie illogical or inherently inconsistent. See also A/S Tallinna Laevauhisus v Estonian State Steamship Line (1946) 80 Ll L Rep 99, 108 ('Tallinna') where Scott LJ spoke of the court rejecting an expert's evidence if 'he says something patently absurd, or something inconsistent with the rest of his evidence.'*
>
> *[65] I would add that what is said about the evaluation of expert evidence of foreign law in Tallinna and the other cases cited by the parties in argument in this appeal may now need to be read in the light of the recent guidance of this court in Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45, [2022] AC 995 and of the Board in Perry v Lopag Trust Reg [2023] UKPC 16; [2023] 1 WLR 3494 .*
>
> *[66] Fifthly, the witnesses' evidence of the facts may be contrary to the basis on which the expert expressed his or her view in the expert report. Rolfe AJA in Hull v Thompson , para 21, spoke of the report being 'based on an incorrect or incomplete history, or where the assumptions on which it is founded are not established.'*
>
> *[67] Sixthly, as occurred in Edwards Lifesciences, an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify his or her report. For example, if an expert faces focused questions in the written CPR*

Pt 35.6 questions of the opposing party and fails to answer them satisfactorily, a court may conclude that the expert has been given a sufficient opportunity to explain the report which negates the need for further challenge on cross-examination.

[68] Seventhly, a failure to comply with the requirements of CPR PD 35 may be a further exception, but a party seeking to rely on such a failure would be wise to seek the directions of the trial judge before doing so, as much will depend upon the seriousness of the failure.

[69] Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge when considering what weight to attach to the evidence of the latter witness to bear in mind that the former witness had not been given the opportunity to comment on that evidence. The failure to cross-examine on a matter in such circumstances does not put the trial judge 'into a straitjacket, dictating what evidence must be accepted and what must be rejected': MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB), para 90 per Nicklin J. This is not because the rule does not apply to a trial judge when making findings of fact, but because, as a rule of fairness, it is not an inflexible one and a more nuanced judgment is called for. In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination."

Lord Hodge, with whom the other Justices agreed, summarised the position as follows,

"[70] In conclusion, the status and application of the rule in Browne v Dunn and the other cases which I have discussed can be summarised in the following propositions:

(i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in Chen v Ng, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances."

Browne v Dunn (1893) 6 R 67, HL (Scot), ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.35.0.3.)

■ **Wolverhampton City Council v London Gypsies and Travellers** [2023] UKSC 47, 29 November 2023, unrep. (Lord Reed PSC, Lord Hodge DPSC, Lords Lloyd-Jones, Briggs and Kitchin JJSC)

Power to grant final injunctions against unknown and unidentified – "newcomer injunctions"

Senior Courts Act 1981 s.37. Various proceedings were brought by local authorities in which they sought injunctions against gypsies and travellers (at [1]). When injunctions were granted few, if any, defendants were identified, hence they enjoined persons unknown. The question on the appeal to the Supreme Court was,

> *"[2] . . . whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date: 'newcomers', as they have been described in these proceedings."*

Held, newcomer injunctions are a wholly new form of injunction (at [144]). Their distinguishing features are:

> *"[143] . . . as follows:*
>
> *(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in Cameron) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.*
>
> *(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.*
>
> *(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.*
>
> *(iv) Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.*
>
> *(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.*
>
> *(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.*
>
> *(vii) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.*
>
> *(viii) Nor is the injunction designed (like a freezing injunction, search order, Norwich Pharmacal or Bankers Trust order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities."*

Equitable principle justified the development of this new form of injunction (at [149]–[153] and [186]). In drawing this conclusion, the Supreme Court also affirmed the approach taken in ***Broad Idea International Ltd v Convoy Collateral Ltd*** (2021) to the jurisdiction to grant interim injunctions. Guidance on the exercise of the jurisdiction to grant interim and final newcomer injunctions was also given by Lords Reed, Briggs and Kitchin, with whom Lords Hodge and Lloyd-Jones agreed:

> *"[167] . . . there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle.*

But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226-231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries."

See further [186]–[238]. At [238] the court provided a summary of its conclusions, which ought to usefully guide the exercise and development of this jurisdiction. ***Broad Idea International Ltd v Convoy Collateral Ltd*** [2021] UKPC 24; [2023] A.C. 389, PC, ref'd to. (See ***Civil Procedure 2023*** Vol.2, para.15-53.1.1.)

■ **Gordiy v Dorofejeva** [2023] EWHC 3036 (Comm), 29 November 2023, unrep. (Foxton J)

Commercial Court – guidance on commencing claims of less than £1 million

CPR Pt 58. In proceedings that arose from a shareholder dispute, Foxton J provided guidance to claimants and defendants concerning the issuing of proceedings in the Commercial Court. The judge stressed that all parties were required to ensure that claims were brought in that court only where appropriate, and that generally claims seeking amounts of less than £1 million would not be suitable for the Commercial Court, i.e., such claims ought to be commenced in the Circuit Commercial Court. Claims improperly brought in the Commercial Court would be transferred out. As the judge put it,

"[2] The claim was issued by Ms Gordiy, who is acting in person, in the Commercial Court, even though the value of the claim is between £650,000 and £900,000. A claim in this amount should not have been commenced in the Commercial Court (as Mr Justice Andrew Baker J recently had cause to note in Bailey Ahmad Holdings Limited v Bells Holdings Limited [2023] EWHC 2829 (Comm), [31]-[32], another dispute worth less than £1m which was issued and the subject of a contested application in the Commercial Court). However, neither Defendant – both of whom do have legal representation – raised that issue with the court. Instead, they have issued applications in the Commercial Court which I heard over two half day hearings on consecutive Fridays, with time spent after the hearings preparing this judgment, and a further hearing to deal with (possibly substantial) consequential issues to come.

[3] The Commercial Court faces formidable pressures on its time. It is important that its finite resources are deployed determining cases which have appropriately been commenced here, having regard to their subject-matter and value. It is as much the responsibility of defendants, as it is of those commencing proceedings, to ensure that the proceedings have been commenced in an appropriate court and, if they have not, to raise the issue of transfer with the court promptly. While there are some cases of lower value which it will nonetheless be appropriate to bring in the Commercial Court (e.g. because they raise an issue whose importance extends beyond the particular dispute), the decision that a case of that kind should remain in the Commercial Court should be a judicial one.

[4] If this is not done, and instead hearings are listed in the Commercial Court in cases which should never have been commenced here, then in the future those cases will be transferred out, however close to the hearing the case might

be, once the proceedings come to the attention of a judge. Parties who are keen to avoid the delay which might follow from having to re-fix a hearing in the court to which the claim has been transferred will only have themselves to blame, by failing to raise the issue of transfer at an appropriately early stage."

Bailey Ahmad Holdings Ltd v Bells Holdings Ltd [2023] EWHC 2829 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.2, para.2A-02.)

■ **Chedington Events Ltd v Brake** [2023] EWHC 3094 (Ch), 1 December 2023, unrep. (HHJ Matthews sitting as a judge of the High Court)

Directions concerning extensions of time to file an appellant's notice

CPR r.52.12(2)(a). Following the hand down of a judgment on quantum, the question arose whether the court had jurisdiction to grant an extension of time to file an appellant's notice. HHJ Matthews was referred to three decisions, all of which predated the current wording of CPR r.52.12(2)(a), which governed the application. Those decisions were ***Aujla v Sanghera*** (2004), ***Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd*** (2004), and ***Dalkia Utilities Services Plc v Celtech International Ltd*** (2006). Given the change in wording to the rule, effected in October 2021, those decisions could no longer be said to explain the rule. The current wording specifies that the court from which a decision is to be appealed can only give directions concerning the filing of an appellant's notice "*at the hearing at which the decision to be appealed was made or any adjournment of that hearing*". That the pre-2021 decisions suggested that the court had power to grant an extension of time to file an appellant's notice once time had run out to do so did not survive the change in wording. It was clear that the current wording of the rule required a party to either request an extension of time at the hearing at which the decision to be appealed was made or at any adjournment of that hearing. If no such application was made, only the Court of Appeal had jurisdiction to consider and, if necessary, grant an extension of time (at [23]–[24]). Guidance set out in ***McDonald v Rose*** (2019) concerning the approach to making applications for directions, albeit provided before the rule change, was noted. ***Aujla v Sanghera*** [2004] EWCA Civ 121, unrep., CA, ***Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd*** [2004] B.L.R. 409, TCC, ***Dalkia Utilities Services Plc v Celtech International Ltd (No. 2)***, 2 February 2006, unrep.; [2006] 2 W.L.U.K. 67, Comm., ***McDonald v Rose*** [2019] EWCA Civ 4; [2019] 1 W.L.R. 2828, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.52.12.3.)

■ **Green v CT Group Holdings Ltd** [2023] EWHC 3168 (Comm), 11 December 2023, unrep. (Charles Hollander KC, sitting as a deputy judge of the High Court)

Norwich Pharmacal relief – inapplicability to foreign proceedings

CPR r.31.18. The claimant sought Norwich Pharmacal relief against the defendant. She did so concerning the source of documents that were said to be required for the purpose of proceedings that were being pursued in the Channel Islands. The deputy High Court judge noted that Saini J in ***Collier v Bennett*** (2020) had summarised the conditions that were to be satisfied for the grant of Norwich Pharmacal relief and that that summary had been approved by the Privy Council in ***Stanford Asset Holdings Ltd v AfrAsia Bank Ltd*** (Mauritius) (2023) at [36]. As the deputy High Court Judge put it,

"[18] In Collier v. Bennett [2020] EWHC 1884 (QB), [2020] 4 WLR 116 at [35], Saini J identified and defined the following four conditions for the grant of such relief:

a. The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ('the Arguable Wrong Condition');

b. The respondent to the application must be mixed up in, so as to have facilitated, the wrongdoing ('the Mixed Up In Condition');

c. The respondent to the application must be able, or likely able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ('the Possession Condition'); and

d. Requiring disclosure from the respondent must be an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ('the Overall Justice Condition')."

The deputy High Court judge went on, however, to conclude that that formulation was not sufficient where proceedings were not wholly domestic (at [19]). Except in respect of the overall justice condition, Saini J's formulation did not take account of a line of authorities that followed ***R (Omar) v Secretary of State for Foreign and Commonwealth Affairs*** (2013). It was, however, clear from that line of authorities that the court has no jurisdiction to grant Norwich Pharmacal relief to assist the prosecution or defence of claims pursued in foreign proceedings. This was because of the existence of the statutory scheme, which is set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975 for civil proceedings and in the Crime (International Co-operation) Act 2003 for criminal proceedings, on which see ***Ramilos Trading Ltd v Buyanovsky*** [2016] at [119]–[123]. As the deputy High Court judge explained,

> *"[44] the effect of Omar and the cases which follow it is that where the purpose of the Norwich Pharmacal application is to obtain evidence for use in foreign civil proceedings, or in connection with criminal proceedings or a criminal investigation being carried on outside the United Kingdom, the court has no jurisdiction to make a Norwich Pharmacal order because the exclusive remedy is under the respective statutory scheme.*
>
> *[45] This point does not seem to have occurred to anyone in the first fifty years since Norwich Pharmacal was decided. It seems to mean that cases such as R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2009] 1 WLR 2579 were decided per incuriam. It has not gained universal acceptance abroad: thus in Essar Global Fund Ltd v Arcellormittal USA LLC 3 May 2021 the Cayman Court of Appeal (Goldring P, Rix and Martin JA) held, in relation to a Cayman statute in the same terms as the 1975 Act that there was no conflict between the 1975 Act and a Norwich Pharmacal order.*
>
> *[46] However, its consequences in this jurisdiction are more significant than are perhaps often appreciated. It means that some of the earlier Norwich Pharmacal cases have to be reconsidered in the light of this principle. It also means that Norwich Pharmacal cannot be used for any purpose which would be at odds with the statutory regime."*

In the light of this, it was essential to identify, in multi-jurisdictional cases, the purpose for which evidence was being sought under a Norwich Pharmacal order (at [47]–[54]). Consequently, the deputy High Court judge properly suggested that a fifth condition be added to the four conditions identified by Saini J in ***Collier v Bennett*** (2020):

> *"[54] I would therefore propose that in addition to the four preconditions in Collier there should be a further condition:*
>
> *'Is the application made for a legitimate purpose' (the 'Proper Purpose' test).*
>
> *Such a formulation reflects the importance of the Omar line of authority in non-domestic cases and is in accordance with the analysis of Andrew Baker J in Burford."*

If the information is sought for an illegitimate purpose, the court cannot make such an order: see ***Burford Capital Ltd v London Stock Exchange Group Plc*** (2020) at [25] and [147] (at [47]–[48]). Finally, it was also noted that,

> *"[52] . . . non-domestic Norwich Pharmacal cases it may often be necessary to consider the effect of the decision of the Court of Appeal in Gorbachev v Gouriev [2023] KB 1. This was a case on non-party disclosure where the Court of Appeal held that in any normal case sovereignty issues prevented it from making an order against a non-party for disclosure of documents located outside the jurisdiction. This was not a point on which I was addressed in the present case, but in other non-domestic Norwich Pharmacal cases it may well be significant."*

R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118; [2014] Q.B. 112, CA, ***Ramilos Trading Ltd v Buyanovsky*** [2016] EWHC 3175 (Comm); [2016] 2 C.L.C. 896, Comm., ***Collier v Bennett*** [2020] EWHC 1884 (QB); [2020] 4 W.L.R. 116, QBD, ***Burford Capital Ltd v London Stock Exchange Group Plc*** [2020] EWHC 1183 (Comm); [2021] 1 All ER (Comm) 1231, Comm, ***Gorbachev v Gouriev*** [2022] EWCA Civ 1270; [2023] K.B. 1, CA, ***Stanford Asset Holdings Ltd v AfrAsia Bank Ltd*** (Mauritius) [2023] UKPC 35, unrep., PC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.31.18.2.)

Practice Updates

STATUTORY INSTRUMENTS

Civil Procedure (Amendment No. 4) Rules 2023 (SI 2023/1397). The latest statutory instrument effecting amendments to the CPR came into force on **20 December 2023**. It amended CPR Pt 80 so as to extend its application to proceedings brought under Part 2 of the National Security Act 2023.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 162nd Update. This Practice Direction Update introduced a new pilot scheme under CPR Pt 51. It specifically introduced a costs capping pilot, via PD51ZD – Pilot Scheme for Capping Costs in Patent Cases in the Shorter Trial Scheme. The pilot scheme is operative in patent cases in the Patents Court that are allocated to the shorter trial scheme. The scheme is operative from 1 January 2024 to 31 December 2026. In addition to providing for capped costs, the scheme also varies the application of CPR Pt 36 to claims that come within its scope.

CPR PRACTICE DIRECTION – 161st Update. This Practice Direction Update effected amendments to PD51R – Online Civil Money Claims Pilot. The amendments came into effect at 11 am on 29 November 2023. They revised the scheme to enable claimants who are legally represented to bring and continue claims up to £25,000 within the scheme where the defendant is a litigant-in-person. They also effected amendments to enable defendants to use the Welsh language. Further amendments were made to clarify when a claim was to exit the pilot scheme and how information submitted by parties under the scheme was to be treated once a claim had exited the scheme.

CPR PRACTICE DIRECTION – 160th Update. This Practice Direction Update effected amendments to PD51ZB – The Damages Claims Pilot. The amendments came into effect at 8 pm on 16 November 2023. The amendments made provision for the generation of trial bundles within the scheme. They also amended the scheme in respect of provision for transferring claims out of the scheme.

PRACTICE GUIDANCE

Artificial Intelligence (AI) – Guidance to Judicial Office Holders. On 12 December 2023, the Lady Chief Justice, Master of the Rolls, Senior President of Tribunals and deputy Head of Civil Justice issued guidance to the courts and tribunals judiciary concerning the use of artificial intelligence by the judiciary. The guidance provides practical information concerning the uses and potential problems that may arise through the use of AI, and particularly generative AI, in proceedings. Advice is given on how to minimise any risks that are inherent in the use of such technology. It particularly focuses on minimising risks to privacy and confidentiality, data security, and potential bias. It stresses the need to ensure accuracy, i.e., to be aware that generative AI can and does generate fictitious case law; a point particularly pertinent in the light of the nine fictitious cases provided to a litigant-in-person through the use of generative AI in ***Harber v The Commissioners for HMRC*** [2023] UKFTT 1007 (TC). The guidance is available at: *https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf.*

Practice Note – London Circuit Commercial Court. On 7 December 2023, the judge in charge of the London Circuit Commercial Court, with the concurrence of the judge in charge of the Commercial Court, issued practice guidance concerning the transfer of claims from the London Circuit Commercial Court where their value is less than £500,000 (or the equivalent in a foreign currency) to an appropriate County Court hearing centre, where those claims had been improperly issued in the London Circuit Commercial Court. The guidance makes clear that the practice identified by the Commercial Court in ***Gordiy v Dorofejeva*** [2023] EWHC 3036 (Comm), in respect of similar such cases issued in that court, will be adopted rigorously in the London Circuit Commercial Court. The guidance is reprinted below.

Practice Note – London Circuit Commercial Court

1. *In Section B.7(b) of the current edition of the Circuit Commercial Court Guide, practitioners were informed that the current practice of the LCCC is to transfer claims with a financial value of less than £500,000 or the foreign currency equivalent (exclusive of interest and costs) to an appropriate County Court unless retention is justified by reason of the factors set out in CPR r. 30.3(2). Notwithstanding that indication, practitioners have continued to attempt to issue claims in the LCCC with a value of less than £500,000 even though none of the factors set out in CPR r. 30.3(2) justify either issue in or retention of the case by the LCCC, and defendants to such actions have not themselves raised the issue of transfer with the court, but often issued their own applications.*

2. *In Gordiy v. Dorofejeva and another [2023] EWHC 3036 (Comm), Foxton J addressed a similar problem faced by the Commercial Court. Foxton J indicated that in future cases that should not have been commenced in the Commercial Court would be transferred out, however close to a hearing the case might be (whether on the application of a claimant or a defendant), once the proceedings come to the attention of a judge. He added that Parties " ... who are keen to avoid the delay which might follow from having to re-fix a hearing in the court to which the claim has been transferred will only have themselves to blame, by failing to raise the issue of transfer at an appropriately early stage."*

3. *Whilst cases commenced in the LCCC should all be triaged on issue, there may be cases where this step has not been taken as a result of administrative oversight or because an application is made without notice before the Claim can be triaged. The practice identified by Foxton J in Gordiy v. Dorofejeva and another (ibid.) will be firmly applied in the LCCC with immediate effect to any case with a value of less than the figure identified in Paragraph 1 above unless retention is justified by reason of the factors set out in CPR r. 30.3(2).*

4. *This Practice Note has been issued with the concurrence of the Judge in Charge of the Commercial Court.*

Mark Pelling
His Honour Judge Pelling KC,
Judge in Charge of the London Circuit Commercial Court

Guideline Hourly Rates. On 1 December 2023, Sir Geoffrey Vos MR announced his approval of recommendations made by the Civil Justice Council concerning uplifts to the Guideline Hourly Rates. Consequently, new Guideline Hourly Rates came into effect on 1 January 2024. The Master of The Rolls also confirmed that the Rates will now be increased annually by reference to the Services Producer Price Index. The new Guideline Hour Rates are as follows.

Grade	Fee earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and legal executives with over 8 years' experience	£546 (£512)	£398 (£373)	£301 (£282)	£278 (£261)	£272 (£255)
B	Solicitors and legal executives with over 4 years' experience	£371 (£348)	£308 (£289)	£247 (£232)	£233 (£218)	£233 (£218)
C	Other solicitors or legal executives and fee earners of equivalent experience	£288 (£270)	£260 (£244)	£197 (£185)	£190 (£178)	£189 (£177)
D	Trainee solicitors, paralegals and other fee earners	£198 (£186)	£148 (£139)	£138 (£129)	£134 (£126)	£134 (£126)

In Detail

MANDATORY ADR - CHURCHILL v MERTHYR TYDFIL COUNTY BOROUGH COUNCIL (2023)

In ***Churchill v Merthyr Tydfil County Borough Council*** [2023] EWCA Civ 1416, the Court of Appeal (Lady Carr LCJ, Sir Geoffrey Vos MR, Birss LJ) reconsidered its approach to the question whether civil courts could mandate the use of alternative dispute resolution. In so doing it reconsidered its much-contested decision in ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] W.L.R. 3002. That earlier decision concluded that mandatory ADR orders were contrary to art.6 of the European Convention on Human Rights. It did so notwithstanding and without engaging with the High Court's decision in ***Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*** [2004] 1 W.L.R. 2985, which took the opposite view and, moreover, considered that the power to make such an order was implicit in CPR r.1.1. In ***Churchill*** the Court of Appeal laid ***Halsey*** to rest and confirmed that the civil courts could direct parties to engage in ADR or, as it described it, non-court-based dispute resolution. Vos MR, with whom Lady Carr LCJ and Birss LJ agreed, gave the reasoned judgment.

Background

The proceedings arose out of a dispute between the claimant and defendant concerning Japanese knotweed. The claimant alleged that since 2016 the knotweed, an invasive plant, had encroached on his property from neighbouring land owned by the defendant. It was alleged that the knotweed had caused damage to the claimant's property, which had consequently caused a reduction in its value and in the claimant's enjoyment of it. Following receipt of a letter before claim, the defendant queried why the claimant had not initially engaged with its Corporate Complaints Policy. It further indicated that if proceedings were issued without the claimant taking steps under that Policy, it would apply for a stay of proceedings and costs. Proceedings were issued. The defendant duly issued an application for a stay. That application was dismissed by a Deputy District Judge on the basis that he was bound by the Court of Appeal's decision in ***Halsey***, i.e., there was no power to require unwilling parties to engage in a mediation process as to do so would amount to an impermissible fetter on the right to fair trial. Permission to appeal was granted and the appeal was transferred to the Court of Appeal.

There were three issues of principle before the court: was ***Halsey*** binding, as the DDJ had concluded; if it was not binding can a court lawfully stay proceedings to require parties to engage in ADR (or non-court-based dispute resolution processes); if it can do so, what factors should a court take into account in considering a stay application? A further

issue arose, if the court had such power: whether to grant the stay application in this case. The Court of Appeal held at [74] that: (i) ***Halsey's*** statements concerning mandatory ADR were not part of its necessary reasoning and were thus not binding; (ii) courts had the power to mandate the use of ADR as long as the mandated process did not impair the essential essence of the right to fair trial and the process was a proportionate means to achieve the legitimate aim of promoting a fair settlement, speedily and at reasonable cost; (iii) it would not specify fixed principles governing the exercise of the court's discretion to mandate ADR, but did set out various factors that could be taken into account; and (iv) given the circumstances of the case, it declined to stay proceedings.

Terminology

Throughout his judgment Vos MR refers to ADR as non-court-based dispute resolution. He does so despite the CPR referring to ADR both in specific rules, e.g., CPR r.1.4(2)(e), and its Glossary. It is apparent that what the Master of the Rolls was referring to is what is generally known as ADR, i.e., processes through which parties resolve their disputes consensually rather than via court adjudication. The defendant's Policy is one specific instance of such a process. Mediation and ENE are others. Referring to these, and other such processes, collectively as non-court-based dispute resolution is slightly problematic. ENE is, for instance, both non-court based and court-based; the latter in the sense that a judge can act as the third party evaluator. Negotiation can be facilitated by a judge. There is no reason, in principle, why a judge cannot act as a mediator, as is apparent from Judicial Mediation in the Employment Tribunals. Each of these processes could be understood to be court-based, albeit they do not involve a judge exercising the judicial power of the State to determine a dispute adjudicatively. It would also be odd to suggest that the court has no power to mandate parties to engage in such processes, not least as it has explicit power to do so through CPR r.3.1(2)(m) where ENE is concerned; a power that led to the Court of Appeal's decision in this very case. By choosing to deploy this neologism, Vos MR could be said to have slightly muddied the waters by appearing to draw an apparent distinction between court-based and non-court based forms of ADR. It would have been far better to either maintain use of the CPR's terminology or to introduce a new term that was not potentially problematic. If new terminology was required, and it may be that this is something the Civil Procedure Rule Committee will need to consider, consensual dispute resolution (CDC) would have been a more appropriate one to adopt. ADR will be used herein to refer to what Vos MR described as non-court-based dispute resolution.

Issue One – Was *Halsey* binding?

It was suggested as long ago as 2008 that what ***Halsey*** had to say about mandatory ADR was not binding. Sir Anthony Clarke MR made that very point extra-judicially, noting that

> *"The substantive issue in Halsey had nothing to do with compulsory mediation. The issue before the court then was 'when should a court impose cost sanctions against a successful litigant on the ground that he has refused to take part in an alternative dispute resolution . . ?' Whatever the Court of Appeal held in Halsey in answer to that question its comments regarding compulsory ADR were surely what we used to call obiter dicta. . ."*[1]

Even Lord Dyson MR expressed the view, again extra-judicially, that it was not binding. As he noted 10 years after ***Halsey*** was decided,

> *". . . [Masood] Ahmed of Leicester University, . . . in 2012 suggested that what Halsey had to say about compulsory mediation was obiter (which in my view it was) . . ."*[2]

Nearly 20 years after ***Halsey***, the Court of Appeal finally turned its attention to the issue. The court first noted the matters that were in issue in ***Halsey***. They were whether the court should impose cost sanctions on a party that had refused to take part in ADR. The question whether or not the court had power to mandate ADR was not in issue. Notwithstanding that, the court in ***Halsey*** went on to accept and hear argument from intervenors on whether it had power to mandate mediation where parties did not wish to take part in such a process. Having set out its views on this point, it then went on to decide the questions concerning costs that had been raised by the appellants. On that point it held that a party should not be deprived of their entitlement to costs unless it can be shown that they had unreasonably refused to agree to ADR. It then went on to provide guidance concerning the factors relevant to determining that question.

Having set out this background, Vos MR at [17] recalled Leggatt LJ's judgment in ***R (Youngsam) v The Parole Board*** [2019] EWCA Civ 229; [2020] QB 387, particularly at its [48]–[59], concerning the proper interpretation of *ratio decidendi* and *obiter dicta*; the latter being statements in a judgment that are not necessary for the court's decision. Necessary in this context does not mean logically or causally necessary, but as Leggatt LJ put it at [51], it refers to statements that

> *". . . must, . . . be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted."*

Vos MR identified at [18] four reasons that were indicative that the statements concerning mandatory mediation in ***Halsey*** were not necessary for its decision in the sense articulated by Leggatt LJ, and hence were not binding. First, the

court stated that the decision was about costs sanctions and not whether the court had power to order parties to engage in mediation. No doubt this underpinned Lord Dyson MR's comment from 2014 that what the decision said about the latter point was *obiter*. Secondly, the passages in ***Halsey*** that dealt with mandatory mediation were headed up as "General encouragement of the use of ADR". Thirdly, while the court stated it had heard argument on the question of its power to mandate mediation, the parties and intervenors were agreed that this was first raised in oral argument before the Court of Appeal. It was thus not something that the parties had been concerned with at first instance, and thus it was not something that formed one of the grounds of appeal (see Vos MR judgment, footnote 3). Fourthly, it was apparent from the judgment that the court in ***Halsey*** were providing general guidance on how to deal with the costs issues before it, the question of whether to mandate mediation *"was no part of the best or preferred justification for [those] considerations"*. Given this, and the nature of the full judgment in ***Halsey***, it was readily apparent that the statements concerning mandatory ADR were not necessary to dispose of the appeal. As Vos MR put it, in agreement with his two predecessors' extra-judicial statements,

> *"[19] In my view, in considering Dyson LJ's full reasoning [giving the judgment of the court in Halsey], it is even clearer that his ruling on whether the court had power to order the parties to mediate was not expressly or impliedly a necessary step in reaching the conclusions on the costs questions decided in the two cases. The costs questions were, as I have said, as to how the court decided whether a refusal to mediate was unreasonable. The factors identified by the court as relevant to that question were relevant whether or not the court had power to require the parties to mediate.*
>
> *[20 Accordingly, I have reached the clear conclusion that [9]-[10] of the judgment in Halsey was not a necessary part of the reasoning that led to the decision in that case (so was not part of the ratio decidendi and was an obiter dictum).*
>
> *[21] As a matter of law, therefore, the judge was not bound by what Dyson LJ had said in those paragraphs."*

As a consequence the Deputy District Judge was not bound by ***Hasley***, and neither was the Court of Appeal.

Issue Two - can a court lawfully stay proceedings to require parties to engage in ADR (or non-court-based dispute resolution processes)?

Halsey may not have been binding, but the question remained: had it reached the correct conclusion on the substantive question concerning mandatory ADR? Vos MR next turned to consider this question. He did so by reviewing the issues taken into account by the court in ***Halsey*** and by more recent developments. Vos MR was clear that the court had the power to order parties to take part in an ADR process. It was not in dispute that such a power had to be exercised so that "*it does not impair the very essence of the claimant's article 6 rights, in pursuit of a legitimate aim, and in such a way that it is proportionate to achieving that legitimate aim.*" (at [50]). Several reasons led to this conclusion:

- ***R (UNISON) v Lord Chancellor*** [2017] UKSC 51; [2020] A.C. 869 was not authority for the proposition that a statutory basis was required for the court to be able to mandate ADR. It was clear from that judgment that the court had power to control its own processes, and that it could for legitimate reasons to place fetters on the right of access. Whatever it may have said in respect of access to justice it did so, in any event, without reference to or consideration of a number of domestic decisions, such as ***Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*** [2004] 1 W.L.R. 2985, which supported the proposition the courts can and should, in appropriate cases, stay proceedings pending settlement processes, not least as doing so furthered the CPR's overriding objective (at [22] and [43]–[49]).
- The court had the power to take many steps that postpone parties' access to a trial. It could, for instance, adjourn proceedings. There was no basis to argue that the power to adjourn should be subject to party consent. This power formed part of the court's general power to control its own process. While there may be good reason not to adjourn or good reason, comparably, not to mandate participation in an ADR process, such reasons were relevant to the exercise of the power not to the existence of the power itself (at [51]–[52]).
- The European Court of Human Rights' decision in ***Deweer v Belgium*** (1980) 2 E.H.R.R. 439 did not, contrary to the conclusion in ***Halsey***, conclude that mandatory ADR breached art.6 of the ECHR. ***Deweer*** concerned coercion into arbitration and the fact that that breached the right to fair trial (at [32]–[32] and [53]).
- It was clear from both the case law of the European Court of Human Rights and the European Court of Justice that court-mandated ADR was compatible with the art.6 right to fair trial, see ***Alassini v Telecom Italia SpA*** [2010] 3 C.M.L.R. 17; ***Menini v Banco Popolare Società Cooperativa*** [2018] 1 C.M.L.R. 15; and, ***Momcilovic v Croatia*** (2019) 69 E.H.R.R. 14 (at [37]–[42] and [54]–[55]); and see more generally concerning limitations on the right of access to justice, ***Ashingdane v United Kingdom*** (1985) 7 E.H.R.R. 528; and ***Z v United Kingdom*** (2002) 34 E.H.R.R. 3 (at [34]–[37]). It was, in fact, clear that

  > *"[54] . . . the more recent cases in both the ECtHR and the CJEU that I have cited above support the propositions that I have already enunciated, namely 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: (a) does not impair the very essence of the claimant's right to a fair trial, (b) is made in pursuit of a legitimate aim, and (c) is proportionate to achieving that legitimate aim".

- There was nothing in ***Peters v East Midlands Strategic Health Authority*** [2009] EWCA Civ 145; [2010] Q.B. 48 to suggest the court could not mandate mediation. It was not concerned with such a question (at [56]).
- The Civil Justice Council's recent report on Compulsory ADR (2021) supported the general view that mandatory ADR was compatible with art.6. It therefore supported the general position reached in Vos MR's judgment (at [57]).

In the premises, the court had the power to mandate the use of an ADR process.

Issue Three – Principles guiding the discretion to mandate ADR

The final of the three issues of principle determined by the court was whether it should provide guidance on how the discretion to mandate ADR should be exercised. It did so against the background that ***Halsey*** had itself deprecated the making of such orders, even if it had concluded that it had the jurisdiction to do so (at [59). ***Halsey's*** reticence can, perhaps, be explained by a more general lack of familiarity with or understanding of the mediation process, and particularly of the utility of mandatory mediation in other jurisdictions, albeit Lord Woolf in 1996 had already noted that mandatory mediation had its benefits following exposure to its operation in Australia.[3]

Vos MR took a different view to that expressed in ***Halsey***. He noted that experience had shown that referral to mediation did confer benefits, i.e., it facilitated settlement, particularly speedy and inexpensive settlement (at [59). This was the case not just for mediation, but for other forms of ADR, e.g., ENE. It was the case, however, that the court's discretion to mandate ADR would need to take account of different considerations depending on the nature of the process. As Vos MR put it,

"[60]. . . As a matter of legal principle, in my judgment, the court can properly regulate its own procedure so as to stay proceedings or order the parties to proceedings to engage in any non-court-based dispute resolution process. I have no doubt, however, that the characteristics of the particular method of non-court-based dispute resolution process being considered will be relevant to the exercise of the court's discretion as to whether to order or facilitate it."

It would, for instance (albeit not noted by Vos MR), be difficult to see how court mandated arbitration, the consequence of which would bind the parties and thus deny them access to trial and judgment, could satisfy the requirement that the order should not impair the essence of the right to a fair trial. Hence it is difficult, given the nature of the arbitration process, to see how the court could lawfully exercise its discretion to mandate such a process. While Vos MR declined to set out any fixed principles, stating that he did not believe the court could or should do so, governing exercise of the court's discretion, he did identify a range of factors that could be relevant to its consideration (at [66]). As he put it, factors identified by the appellant, by the Bar Council and by the Court of Appeal in ***Halsey*** at its [16]–[35] were all *likely* to be of relevance to the question whether the court should exercise its discretion to mandate ADR, as should the overriding objective. The ***Halsey*** factors were noted as mirroring to some extent those identified by the Bar Council. The various factors should not, however, be treated as a checklist. They should not therefore develop into a quasi-legislative list of factors, as has happened in the past when similar such factors have been identified. The factors identified by the appellant and Bar Council were,

"[61] The Bar Council submitted that the following factors were relevant to the exercise of the court's discretion: (i) the form of ADR being considered, (ii) whether the parties were legally advised or represented, (iii) whether ADR was likely to be effective or appropriate without such advice or representation, (iv) whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence, (v) the urgency of the case and the reasonableness of the delay caused by ADR, (vi) whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue, (vii) the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim, (viii) whether there was any realistic prospect of the claim being resolved through ADR, (ix) whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication, (x) the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR, and (xi) the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court.

. . .

[63] Mr Churchill submitted that the internal complaints procedure in this case was, in any event, a disproportionate fetter on the right of access to court because (a) there was no neutral third party involved and the claim was dealt with by the manager of the Council's own knotweed department, (b) no legal advice was available to the claimant, (c) there was no settled written procedure by which it operated, (d) it had no statutory backing, (e) it was a process that had

no fixed timescale and might take an open ended amount of time, (f) the limitation period was not suspended during the process, (g) there was no provision for the payment of a claimant's costs, and (h) there was no express provision allowing for the payment of compensation in addition to eradicating the knotweed."

Comment

The Court of Appeal's judgment in ***Churchill*** will no doubt mark the starting point of further development of the civil courts' approach to ADR. It is a judgment that ought realistically to have taken no one by surprise. Following its decision in ***Lomax v Lomax*** [2019] EWCA Civ 1467; [2019] W.L.R. 6527, maintenance of the position reached in ***Halsey*** was unprincipled and largely indefensible. Fortunately, the Court of Appeal in ***Lomax*** would not be drawn into an *obiter* discussion of ***Halsey's*** status. It is to be hoped that it maintains this careful approach and avoids acceding to interventions that seek to raise general points of principle that are not in issue in proceedings.

Having identified a range of potential relevant factors in ***Churchill***, it is inevitable that the courts will now be called upon to consider how they, and other factors, may apply to different situations and to different forms of ADR process. Given the sheer range of ADR processes, from negotiation, through mediation, Arb-Med, Med-Arb, collaborative law, Executive Tribunals, to ENE and non-binding adjudication, their relevance and application will vary, as it will depending on the substantive issues, the status of the parties and whether they are legally represented, and the effect that the cost and time of any proposed process may have. It may well be the case that parties and the courts will draw on experience from other jurisdictions, where court-mandated ADR is well-established, to develop the approach to such factors, as well as to identify other relevant ones. Useful guidance could, for instance, be drawn from the US Federal Judicial Center's *Guide to Judicial Management of Cases in ADR* (2001), sections II to IV, which provides clear and balanced guidance on a range of relevant matters concerning the selection of cases for ADR and the selection of the optimum ADR process. Such considerations, taken against the background of the integration of mediation into the small claims process and the increasing promotion of digitised pre-action processes aimed at promoting settlement, will no doubt see an increasing emphasis on consensual settlement. The clear guidance the Court of Appeal has given on how mandated ADR can be carried out consistently with the right to fair trial ought, however, to ensure that such increased enthusiasm and promotion of ADR is kept within proper boundaries and cannot be deployed or developed so as to frustrate or deny access to justice.

End Notes

1 Sir Anthony (later Lord) Clarke MR, *The Future of Civil Mediation* (2008) 74 Arbitration 419 at 422.
2 Lord Dyson MR, "Halsey 10 Years On—The Decision Revisited", in *Justice: Continuity and Change* (Oxford; Hart, 2018) at 383.
3 Lord Woolf, "A New Approach to Civil Justice", Law Lectures for Practitioners Vol. 1996 (Hong Kong Law Journal Special Edition) (Sweet & Maxwell, Asia) at 11.

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