MC MS Blog

Oh Yes! or Oh No!? - Will "Churchill" have a significant impact on the use of ADR in the construction industry?

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As we hurtle towards the end of another calendar year, the trend towards alternative dispute resolution methods continues to gain popularity, reinforcing the collective demand for resolving disputes expeditiously and cost-effectively, preserving relationships and alleviating the burden on the court system. Indeed, the senior judiciary and government have, for some time, voiced their support for integrating ADR processes into the civil justice system.

A leading candidate for one of the most talked about cases in the "dispute resolution" fraternity over the last 12 months must surely be James Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 handed down by the Court of Appeal on 29th November 2023. The fact that there were seven interveners, including the Law Society, the Bar Council, the Civil Mediation Council, the Centre for Effective Dispute Resolution and the Chartered Institute of Arbitrators, all of whom have a significant interest in mediation, is testimony to the potential importance and impact of the case on the use of "non-court based dispute resolution" and, specifically, a court's power to order parties involved in litigation to engage in such processes.

For the purposes of this blog I don't intend to delve into the detail, but the key point to note is that the Court of Appeal (via the leading judgment of the Master of the Rolls, Sir Geoffrey Vos and supported by the Lady Chief Justice, Lady Sue Carr, and Lord Justice Briggs) unanimously held that a court has the power to stay legal proceedings and/or order parties to engage in a non-court based dispute resolution process provided that it would not impair the essence of a party's right to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at a reasonable cost. The Court of Appeal also held that the part of the Court of Appeal's judgment in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, handed down almost 20 years earlier, to the effect that "*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*", did not form part of its essential reasoning such that it was not binding. For the Latin scholars amongst you, it was deemed to be *obiter dictum* and not part of the *ratio decidendi*.

Since the judgment in *Churchill* was handed down, the Civil Procedure Rules ("CPR") have been revised, and in force with effect from 1st October 2024, to accommodate its impact. Of note is the amendment to CPR 1 which has expanded the overriding objective to include the use and promotion of "ADR", i.e. "alternative dispute resolution" which is described in the glossary as "a collective description of methods of resolving disputes otherwise than through the normal trial process". Thus,

as well as including facilitative processes, such as mediation, it arguably includes more determinative processes, such as expert determination and adjudication.

The effect of *Churchill* on the construction industry

In parts (but not all) of the construction industry, we have adjudication. In property/real estate disputes, there is sometimes expert determination in lieu of arbitration. My experience of litigation in the TCC is that the parties will almost invariably have provided for mediation, either as part of the pre-action protocol process or at some point in the procedural timetable. Thus, to that extent, I do not envisage a great change for the construction industry or property transactions. However, what I do anticipate is that there may be an increase in court prompted ADR for contracts which do not currently provide for adjudication. That does not need to be restricted to construction projects.

Although it does not represent the majority of what we do, both Jonathan and I have seen an increase in the number of times we are appointed to act as mediator over the last 5 to 10 years. Our experience is that the majority of cases going to mediation result in a settlement, either in whole or part. However, in relation to those cases that don't settle, my view is that perhaps one of the reasons for this is that certain disputes or parties (or at least the relevant decision makers) are not suited to a facilitated negotiation and would be more suited to a determinative process.

I understand that the traditional or classical model of mediation prescribes a purely facilitative process and that is a model that both Jonathan and I were trained in by the Centre of Effective Dispute Resolution (CEDR). However, I know the RICS (in response to some construction industry market research) adopt an evaluative model where the mediator may be asked to provide an opinion on either aspects of the dispute or even the whole of the dispute. Likewise, the conciliation model which we see in various contracts, for example, RIAI contracts, used in Ireland adopts a process which involves an initial mediation, but then involves the conciliator proceeding to reach a non-binding recommendation in the event the mediation does not result in a settlement. Anecdotally, I hear that conciliation is still alive and kicking in Ireland even though statutory adjudication has taken a hold. I also hear that parties generally adhere to the recommendation. However, I do wonder whether the reason for this is that the largest employer in Ireland is the Public Sector and also the nature of the market.

When I conduct a conventional mediation, as part of my preparation I will often ask the parties whether they have any strong views on whether I should act in a facilitative or evaluative manner. Almost invariably the response is that they are less interested in the approach adopted than they are in achieving a settlement. This then leads to the question of whether a mixed facilitative and evaluative approach is conducive to achieving settlement. In my view, the danger of incorporating the possibility of an opinion or non-binding recommendation is that the parties will be less open in their private discussions with the mediator as they will be seeking to protect their positions and/or advocate their legal cases as they will have an eye towards influencing the recommendation. For that reason, one school of thought is that any suggestion of a recommendation should be left until a point is reached in the mediation where it becomes clear that a settlement is not going to be achieved.

Concluding thoughts

Circling back to the outset of the blog, my thoughts are that *Churchill* will not have a significant impact on the use of ADR in the construction industry, but that we may see an increase in the use of ADR in relation to disputes arising under or in connection with contracts that are not currently within the definition of construction contracts included in the Construction Act. This may also result in the use of determinative ADR in other industries. As alluded to, in my view some disputes (and/or parties to those disputes) are not suited to mediation. In such situations, my thoughts are that an efficiently managed determinative process may be more appropriate. In that regard, there may be things to learn from the Conflicts Avoidance Process (CAP) Panel rolled out by the RICS and Transport for

London where parties can elect to adopt either a purely facilitative or evaluative procedure at the outset.

Matt

MATTHEW MOLLOY