Neutral Citation Number: [2023] EWCA Civ 1416

Appeal No: CA-2022-001778
Case No: H42YJ543

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MERTHYR TYDFIL
Deputy District Judge Kempton Rees

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2023

Before:

LADY CARR OF WALTON-ON-THE-HILL, LADY CHIEF JUSTICE OF ENGLAND AND WALES
SIR GEOFFREY VOS, MASTER OF THE ROLLS
and
LORD JUSTICE BIRSS

BETWEEN:

JAMES CHURCHILL

Claimant/Respondent

and

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

Defendant/Appellant

and

(1) THE LAW SOCIETY
(2) THE BAR COUNCIL
(3) THE CIVIL MEDIATION COUNCIL
(4) THE CENTRE FOR EFFECTIVE DISPUTE RESOLUTION
(5) THE CHARTERED INSTITUTE OF ARBITRATORS
(6) HOUSING LAW PRACTITIONERS' ASSOCIATION
(7) THE SOCIAL HOUSING LAW ASSOCIATION

Interveners

Michel Kallipetis KC, Iain Wightwick and **Maya Chilaeva** (instructed by **Simon Jones** of **Merthyr Tydfil County Borough Council**) for the **appellant/defendant** (the Council)

Robert Weir KC and **Tom Carter** (instructed by **McDermott Smith Law Ltd**) for the **respondent/claimant** (Mr Churchill)

Rupert Cohen (instructed by **Law Society Legal Services Team**) for the **Law Society of England and Wales** (the Law Society)

Nicholas Vineall KC and **Amy Rogers** for the **Bar Council** (the Bar Council)

Edwin Glasgow KC and **Kelly Stricklin-Coutinho** (instructed by **Stewarts**) for the **Civil Mediation Council**, **Centre for Effective Dispute Resolution**, and the **Chartered Institute of Arbitrators**

Justin Bates and **Tom Morris** (instructed by **Anthony Gold Solicitors LLP**) for the **Housing Law Practitioners Association**

Elizabeth England (instructed by **Capsticks LLP**) for the **Social Housing Law Association**

Hearing dates: 8-10 November 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 29 November 2023.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. The headline questions in this case are whether a court can lawfully order the parties to court proceedings to engage in a non-court-based dispute resolution process, and, if so, in what circumstances it should do so. The kind of non-court-based dispute resolution in issue is an internal complaints procedure operated by a local authority, to which the claimant was not contractually bound. A question has also arisen as to whether, and in what way, the nature of the non-court-based dispute resolution process should be taken into account by the court.

2. The relevant circumstances are simple. Mr Churchill bought a property at 9 Gellifaelog Terrace, Penydarren, Merthyr Tydfil, CF47 9HL (the property) in 2015. The Council owns adjoining land (the land) to the east of the property. Mr Churchill claims that, since 2016, Japanese knotweed has encroached from the land onto the property causing damage to it, a reduction in its value and loss of enjoyment. Mr Churchill's solicitors sent the Council a letter of claim on 29 October 2020, to which the Council responded on 20 January 2021. The Council's response queried why Mr Churchill had not made use of its Corporate Complaints Procedure.[1] It said that, if Mr Churchill were to issue proceedings without having done so, the Council would apply to the court for a stay and for costs. Despite that warning, Mr Churchill issued proceedings in nuisance

[1] Apparently referring to a Corporate Complaints, Representations and Compliments Policy version 1.0 dated September 2014.

against the Council in July 2021. On 15 February 2022, the Council duly issued the stay application, as it had threatened.

3. Deputy District Judge Kempton Rees (the judge) dismissed the stay application on 12 May 2022, having delivered a reserved judgment. He held that he was bound to follow Dyson LJ's statement in *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 (*Halsey*) 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". The judge also held that Mr Churchill and his lawyers had acted unreasonably by failing to engage with the Council's complaints procedure. That conduct was contrary to the spirit and the letter of the relevant pre-action protocol. On 4 August 2022, HH Judge Harrison granted the Council permission to appeal. He referred the matter to this court on the grounds that it raised an important point of principle and practice and that there were many other similar cases.

4. The relevant pre-action protocol was the Practice Direction on Pre-Action Conduct and Protocols which came into force in 1999. It was substantially amended to its current form on 6 April 2015, and was updated in August 2021 (the PD). The PD applied to this case, because there was no specific pre-action protocol applicable to Mr Churchill's nuisance claim. It may be obvious, but it is worth stating expressly, that the PD applies to pre-action conduct, whilst this case concerns the powers of the court once proceedings have been issued. I will return to that point.

5. The PD provides at [3] that, before commencing proceedings, the court will "expect the parties to have exchanged sufficient information to – … (c) try to

settle the issues without proceedings; (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement; … and (f) reduce the costs of resolving the dispute". At [8], the PD provides that "[l]itigation should be a last resort. … the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings". At [11], the PD provides that, if proceedings are issued, "the parties may be required to provide evidence that ADR has been considered", and that a party's refusal to participate in ADR might be considered unreasonable and lead to an order to pay additional costs. [13]–[16] of the PD deal with compliance with it. Notably, [14] provides that the court may decide that a party has not complied with the PD if they have "unreasonably refused to use a form of ADR, or failed to respond at all to an invitation to do so". [15] of the PD says that, where there has been non-compliance with it, the court may order that sanctions (mainly costs sanctions specified in [16]) are to be applied or that the "proceedings are stayed while particular steps are taken to comply" with the PD.

6. Against that background, the main issues that this court has to resolve are as follows:-

   i) Was the judge right to think that *Halsey* bound him to dismiss the Council's application? This involves a consideration of whether the passages in *Halsey* relied upon by the judge were part of the main reasoning of that decision.

   ii) If not, can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

iii) If so, how should the court decide whether to stay the proceedings for, or order, the parties to engage in a non-court-based dispute resolution process? This involves a consideration of the relevance of the kind of non-court-based dispute resolution process being considered.

iv) Should the judge have acceded to the Council's application to stay these proceedings to allow Mr Churchill to pursue a complaint under the Council's internal complaints procedure?

7. I shall proceed then to deal with the four issues that I have just identified.

Issue 1: Was the judge right to think that *Halsey* bound him to dismiss the Council's application for a stay of the proceedings?

8. The simple question under this heading is whether the passage from *Halsey* upon which the judge relied was a necessary part of the reasoning that led to the decision in that case. In Latin, one would ask whether the passage was "*obiter*". I prefer to avoid the use of Latin in order to make the court's judgment as accessible as possible.

9. It is necessary first to understand what was in issue in the two cases decided in *Halsey*. *Halsey* itself was a claim under the Fatal Accidents Act 1976, which had been dismissed with costs. The claimant appealed the costs order on the ground that the defendant had refused invitations to mediate the claim. The second claim, *Steel v. Joy*, concerned consolidated personal injury claims by the same claimant against two separate defendants who had, admittedly, caused the claimant injury in incidents 2 years apart. The substantive issue concerned the failed contribution claim brought by the first defendant against the second defendant. The first defendant contended that the second defendant had failed

to respond to their offer to mediate, so that the first defendant should not have been ordered to pay the costs of the contribution claim.

10. In *Halsey*, Dyson LJ described at [2] the costs question in the cases as being "of some general importance" and as being "should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution". The Court of Appeal's decisions were: (a) in the first case that the claimant had "come nowhere near showing that [the defendant] acted unreasonably in refusing to agree to a mediation" ([50]), and (b) in the second case that "the first defendant has not proved that the second defendant acted unreasonably in refusing to agree to mediation" ([81]).

11. At [3], the Court of Appeal said it would begin by "giving some guidance as to the general approach that should be adopted when dealing with the costs issue raised by these two appeals". The heading that follows is "General encouragement of the use of ADR". At [4], the court dealt with the relevant provisions of the CPR, including CPR 26.4(1) (now CPR 26.5(1)) which provided that "a party may, when filing a completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means".

12. At [5], Dyson LJ recited that the term "alternative dispute resolution" was defined in the glossary to the CPR as a "[c]ollective description of methods of resolving disputes otherwise than through the normal trial process".[2] He

[2] The Glossary itself says that it "is a guide to the meaning of certain legal expressions as used in these Rules, but it does not give the expressions any meaning in the Rules which they do not otherwise have in the law".

referred at [6]-[8] to external materials, government reports, recent cases and court guides extolling the virtues of mediation.

13. These passages were then followed by [9]-[10] which I set out in full on the basis that they have been specifically called into question before us. Dyson LJ said this:

> 9. We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us 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. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see *Deweer v Belgium* (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:
>
> > "The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate."
>
> 10. If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

14. The Court of Appeal proceeded, after these passages, to decide the costs questions under CPR 44 (general rules about costs). CPR 44.3(2) (now 44.2(2)(a)) provided for the general rule that the unsuccessful party will be ordered to pay the costs. CPR 44.3(4) (now 44.2(4)) provided that "in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including - (a) the conduct of the parties". CPR 44.3(5) (now 44.2(5)) provided that the conduct of the parties included "… the extent to which the parties followed any relevant pre-action protocol".

15. At [13], Dyson LJ explained what he was doing as follows:

> In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable.

16. At [14]-[35], Dyson LJ went through a number of the factors that the court could or should take into account in deciding whether it was unreasonable, in the context of the costs order sought, to refuse to mediate. He then dealt with the facts of the cases concluding in the way that I have already mentioned.

17. In *R (Youngsam) v. The Parole Board* [2019] EWCA Civ 229, Leggatt LJ delivered an incisive concurring judgment (with which Nicola Davies and Haddon-Cave LJJ did not expressly agree) concerned with the proper meaning of the Latin terms "*ratio decidendi*" and "*obiter dicta*". The analysis at [48]-[59] is worth reading in full. At [48] Leggatt LJ cited the classic definition of

the necessary reasoning of a decision (leaving the Latin aside) as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him". The proviso that he added that is relevant for our purposes was in [51] as follows:

> It therefore seems to me that, when the *ratio decidendi* is described as a ruling or reason which is treated as "necessary" for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, 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 [emphasis added].

18. There are four indications in Dyson LJ's judgment in *Halsey* that [9]-[10] are not to be regarded as "part of the best or preferred justification for the conclusion he reached" (assuming for the sake of argument that that is to be regarded as the appropriate test). First, Dyson LJ's own statement of the issue at [3] makes clear that the decision was about costs sanctions, and not whether to order parties to participate in mediation. Secondly, [9]-[10] are in a section of the judgment entitled "[g]eneral encouragement of the use of ADR". Thirdly, the court said expressly that they had heard argument on whether the court had power to order parties to submit their dispute to mediation against their will. That was something, as the parties and interveners to this case agreed, which had only been raised for the first time in oral argument.[3] Fourthly, both [3] and [13] set out what Dyson LJ thought he was doing on his route to deciding the specific cases. He was providing guidance as to the general approach in dealing with the costs issues raised by the appeals and the factors that should be

[3] See the formal statement agreed by all the parties and interveners on the second day of the hearing before this court: "The question of whether compulsory mediation is lawful was not in issue at first instance in *Halsey*. In the Court of Appeal proceedings, the issue was not raised in the Appellant's Notice and none of the written skeleton arguments addressed that issue."

considered in deciding whether a refusal to agree to ADR was unreasonable. The question of whether the court had power to mandate ADR was no part of the best or preferred justification for these conclusions.

19. In my view, in considering Dyson LJ's full reasoning, 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.

Issue 2: Can the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

22. Neither the parties nor the interveners submitted that the applicable legal principles depend on the nature of the dispute resolution process being considered. Instead, Mr Churchill made three rather different submissions. First, he submitted that his right to bring and progress proceedings could not be impeded by a requirement to pursue an internal complaints procedure that was not designed to address his cause of action. Secondly, he said that any impediment to his right of access to the courts required a "secure statutory

footing", which impliedly was not present here. Thirdly, he submitted that, even if there were such a statutory footing, "it [was to be] interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question" (see *R (UNISON) v. Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [80] (*UNISON*)).

23. Conversely, the Council and the interveners submitted 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) did not impair the very essence of the claimant's right to a fair trial, (b) was made in pursuit of a legitimate aim, and (c) was proportionate to achieving that legitimate aim.

24. These submissions can only properly be evaluated against the backdrop of applicable authority. There are three relevant streams of authority: domestic cases, European Court of Human Rights (ECtHR) cases, and pre-Brexit cases from the Court of Justice of the European Union (CJEU). It appears from *UNISON* that the three streams, although based on different foundations, largely coincide.

25. I will deal first with the European Convention on Human Rights (ECHR) and the legislative backdrop, before moving to the European cases.

The ECHR, legislation and rules

26. Article 6 of the ECHR provides as follows under the heading "Right to a fair trial":

> 1. In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

27. The Civil Procedure Act 1997 (the 1997 Act) established the new Civil Procedure Rules, which were stated in section 1(1) to govern "the practice and procedure to be followed" in the County Court, the High Court and the Civil Division of the Court of Appeal. Section 1(3) provided that the power to make Civil Procedure Rules was to be exercised "with a view to securing that the civil justice system is accessible, fair and efficient". Practice Directions are provided for by section 5 and Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

28. The CPR generally provides for what is to happen when civil proceedings have been issued, but our attention was drawn to some provisions that relate in whole or in part to pre-action conduct and to ADR.

29. First, CPR 1.4(1) provides that the court must "further the overriding objective by actively managing cases". CPR 1.4(2)(e) explains that active case management includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

30. Secondly, CPR 3.1 relates to the court's general powers of management. It says expressly at CPR 3.1(4) that, when giving directions, the court "will take into account whether or not a party has complied with [the PD] and any relevant pre-action protocol". CPR 3.1(5) provides that the court may order a party to pay money into court if it has "without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol".

31. Thirdly, CPR 26.5(1) allows a party, when filing a completed directions questionnaire to "make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means".

CPR 26.5(3) also allows the court to stay the proceedings, even without the parties requesting it, "[i]f the court otherwise considers that such a stay would be appropriate".

ECtHR cases

Deweer v. Belgium (1980) 2 EHRR 439 (*Deweer*)

32. *Deweer* was, of course, the case expressly relied on by Dyson LJ in *Halsey* at [9] (see [13] above). It concerned a Belgian butcher who had allegedly committed an offence of selling meat at an illegal profit. The public prosecutor ordered the butcher to close his shop until either his prosecution was completed or he paid a fine of 10,000 Belgian Francs. He paid the fine under protest, but brought successful proceedings before the ECtHR for breach of article 6(1). The ECtHR held at [48]-[54] that the fine had been paid, and the butcher's right to a hearing had been waived, under the constraint of the threat to close the shop and destroy the business. It may be noted at once that Dyson LJ's reference to *Deweer* concluded by saying that: "[if] that is the approach of [the ECtHR] to an *agreement* to arbitrate, it seems to us likely that the *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court". The reference to agreements to arbitrate was to *Deweer* at [49], where the ECtHR had explained that Mr Deweer had waived his right to go to court, and said that a waiver of that kind was frequently encountered in "the shape of arbitration clauses in contracts". The ECtHR said that "[t]he waiver [meaning such waivers], which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the [ECHR]". The ECtHR continued at [49] as follows:

> Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' … for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review … .

33. The ECtHR made clear at [50] and [51] that the pressure brought to bear on Mr Deweer by the threat to close his shop if he did not pay the fine was a constraint that was incompatible with article 6.

Ashingdane v. United Kingdom (1985) 7 EHRR 528 (*Ashingdane*)

34. *Ashingdane* concerned the allegedly unlawful detention of a patient in a secure mental hospital contrary to article 5(4) of the ECHR. Article 5(4) allows a detained person to take proceedings so as to obtain a speedy court determination of the lawfulness of their detention. At [51]-[60], the ECtHR decided that there had not been a breach of article 6(1). It did, however, summarise the applicable principles at [57] as follows:

> Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals' …
>
> Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Tolstoy Miloslavsky v. United Kingdom (1995) 20 EHRR 442 (*Miloslavsky*)

35. In *Miloslavsky*, the ECtHR decided at [56]-[67] that a requirement to provide security for the costs of an appeal was not a breach of article 6. At [67], the

ECtHR said that the English authorities had not "overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal". Those conditions did not impair "the essence of the applicant's right of access to court" nor were they "disproportionate for the purposes" of article 6(1).

Z and others v. United Kingdom (2002) 34 EHRR 3 (*Z and others*)

36. In *Z and others*, the ECtHR rejected a claim that there had been a breach of article 6 where some children's claims against a local authority for negligently failing to protect them from abuse by their parents had been rejected by the House of Lords. At [93], the ECtHR explained the legitimate restrictions on article 6 rights. It said that legitimate restrictions included statutory limitation periods and security for costs orders: "[w]here the individual's access is limited **either by operation of law or in fact**, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (emphasis added).

Momcilovic v. Croatia (2019) 69 EHRR 14 (*Momcilovic*)

37. *Momcilovic* was a case about restricting access to court remedies. The legislation in question required a would-be claimant against the state first to submit a request for settlement to the State Attorney's Office. The claimants wanted to claim damages for the unlawful killing of a relative, but they failed to submit the necessary request. The court denied their claim, and the ECtHR refused their claim that there had been a breach of article 6(1).

38. The ECtHR restated the principles deriving from *Ashingdane* at [42]-[43], making clear that the right of access to the court might be subject to legitimate restrictions. It said that "[w]here the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

39. At [44]-[56], the ECtHR applied the principles to the facts of *Momcilovic*. It commented at [52]-[53] that the settlement procedure did not prejudice the applicants' claim for damages against the state. The process paused the limitation period, and the three-month delay did not cause actual prejudice.

CJEU cases

Alassini v. Telecom Italia SpA (Joined Cases C-317/08, C-301/08, C-319/08 and C-320/08) [2010] 3 CMLR 17 (*Alassini*)

40. In *Alassini*, the CJEU had to consider whether an Italian domestic provision that meant that court proceedings could not be brought until a mandatory attempt to settle the dispute had been made, infringed the European law principles of effective judicial protection, equivalence and effectiveness. The CJEU decided that it did not. The question was for the domestic legal system. The detailed procedural rules governing actions to safeguard an individual's rights under EU law had to be no less favourable than those governing similar domestic actions (principle of equivalence) and should not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) ([47]-[48]). Those principles embodied the general obligation on

EU Member States to ensure judicial protection of an individual's rights under EU law.

41. The court said at [53]-[59] that various factors showed that the mandatory settlement procedure in question did not make it in practice impossible or excessively difficult to exercise the rights granted by the directive, because (a) the outcome was not binding on the parties and did not prejudice the right to sue, (b) the procedure did not result in substantial delay, (c) limitation was suspended, (d) there were no fees for the procedure, and (e) non-electronic means were available. At [61]-[63], the CJEU explained that:

> 61. … the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in [articles] 6 and 13 of the ECHR …
>
> 62. In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.
>
> 63. Nevertheless, it is settled case law 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.

Menini v. Banco Popolare Società Cooperativa [2018] CMLR 15 (*Menini*)

42. *Menini* applied *Alassini* in the context of Directive 2013/11/EU of 21 May 2013 on 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:

> 51. Accordingly, what is important is not whether the mediation system is mandatory or optional, but the fact that the parties' right of access to the judicial system is maintained. …
>
> 56. … Member States are free to choose the means they deem appropriate for the purposes of ensuring that access to the judicial system is not hindered. The fact, first, that the outcome of the ADR procedure is not binding on the parties and, secondly, the fact that the limitation periods do not expire during such a procedure are two means which, amongst others, would be appropriate for the purposes of achieving that objective. …
>
> 59. … Article 12 of [the mediation directive] provides that Member States are to ensure that parties who have recourse to an ADR procedure in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings as a result of the expiry of the limitation period during that procedure. …
>
> 61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires. …

Domestic cases

UNISON

43. *UNISON* is the leading modern authority on the constitutional right of access to the court as an essential element of the rule of law. The Supreme Court held that the right of access to the courts could only be curtailed by express primary legislation. In that case, the statutory instrument increasing fees for the commencement of Employment Tribunal cases (the fees order) was held to be unlawful since it prevented access to justice. European law principles led to the

same outcome. [66]-[89] of Lord Reed's judgment should be read in their entirety, but the following short extract perhaps encapsulates the essential elements:

> 78. Most of the cases so far mentioned were concerned with barriers to the bringing of proceedings. But impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament. Examples include *Raymond v Honey* [1983] 1 AC 1, where prison rules requiring a prison governor to delay forwarding a prisoner's application to the courts, until the matter complained of had been the subject of an internal investigation, were held to be ultra vires; and *R v Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778, where rules which prevented a prisoner from obtaining legal advice in connection with proceedings that he wished to undertake, until he had raised his complaint internally, were also held to be ultra vires.
>
> 79. The court's approach in these cases was to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation. …
>
> 80. Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. …

44. It will be noted, however, that *UNISON* was concerned with an impediment that prevented access to a judicial determination, not with the circumstances in which it might be considered proportionate to delay such access for a legitimate objective such as achieving resolution of the dispute by other means. 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. There are essentially five reasons for that conclusion.

45. First, *UNISON* was not concerned with either staying existing proceedings for other dispute resolution processes to take place, or with mandating the parties

to participate in them. It was not even concerned with the situation once proceedings had been issued.

46. Secondly, *UNISON* says nothing to gainsay the proposition that the court has a long-established right to control its own process. That right is entrenched in the 1997 Act which established the CPR to govern the practices and procedures of the court, and provided that rule-making should make the civil justice system accessible, fair and efficient. The settling of cases as quickly as can fairly be achieved and at a proportionate cost to the parties supports those aims.

47. Thirdly, none of the authorities referred to in *UNISON* goes so far as suggesting that the court cannot make orders that delay or prevent the resolution of existing proceedings in aid of making the court system accessible, fair and efficient. Examples include orders staying proceedings whilst security for costs is provided (see *Miloslavsky* at [35] above) and striking out proceedings for non-compliance with rules or court orders.

48. Fourthly, whilst the CPR itself is not primary legislation, nothing in *UNISON* suggests that one of the fundamental premises of the overriding objective and even the CPR itself, namely the promotion of out of court dispute resolution by various means, could be unlawful without primary legislation authorising it expressly. The overriding objective requires the court to manage cases actively and to encourage and facilitate ADR, and expressly contemplates stays for such processes to be undertaken (see [29] above). The PD has supporting provisions (see [5] above).

49. Fifthly, a number of authorities that were not cited to the Supreme Court in *UNISON* support the proposition that the court can, and indeed should, in an

appropriate situation, stay cases whilst out of court attempts to resolve the disputes take place (see, in various contexts, and by way of example only, Arden J in *Guinle v. Kirreh* [2000] CP Rep 62 under the heading "ADR", Woolf LCJ in *R. (Cowl) v. Plymouth CC* [2002] 1 WLR 803 at [14], Blackburne J in *Shirayama Shokusan Co Ltd v. Danovo Ltd (No 2)* [2004] 1 WLR 2985 at [12]-[20], Smith LJ in *Uren v. Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66 at [73], Mostyn J in *Mann v. Mann* [2014] EWHC 537 (Fam) at [16]-[17] and [36]), Norris J in *Bradley v. Heslin* [2014] EWHC 3267 (Ch) at [24], and Moylan LJ in *Lomax v. Lomax* [2019] EWCA Civ 1467, [2019] 1 WLR 6527 at [24]-[32]).

Discussion of issue 2

50. It is against that background that this issue needs to be determined. Can, despite what Dyson LJ said in *Halsey*, the court lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process? In my judgment, that power does indeed exist. It is not disputed that, if the power exists, it must 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. Mr Churchill, though, submits that no such power can exist, because of the nature of the internal complaints procedure in this case, without an express statutory footing. I do not agree.

51. First, the question of the nature of the process for which a stay may be ordered falls to be considered at the next stage of the enquiry. At this first stage, the court is just considering, as a matter of law, whether there is power to order such

a stay or to order the parties to participate in a non-court process. 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. Logically, therefore, the nature of the process, in respect of which an order is sought, falls to be considered once one knows whether there is a power in the first place. Mr Churchill's submission seeks to confuse the two questions, because he submits the internal complaints procedure itself is unsatisfactory. That may be a good reason to support the argument that no stay should ultimately be ordered, but it does not affect the question of whether the power exists in the first place.

52. Secondly, Mr Churchill's submission again confuses the question of the existence of the power with its exercise, by arguing that no stay can be granted for any resolution process that: (i) does not allow the parties to be represented by lawyers, (ii) does not allow for the payment of the claimant's legal costs, and (iii) is not independent of the defendant's management. These are, no doubt, three of many factors that could affect the court's discretion in exercising its power (if it exists). But they do not go to the existence of the power itself. As I have already said, in controlling its own process, the court can obviously delay resolution of a claim to allow the parties to negotiate, whether they all want to or not. Likewise, the court can, in my judgment, control its own process, by staying or delaying any existing proceedings whilst any other settlement process is undertaken. Access to lawyers, payments of costs and the status of any mediator or decision-maker in such processes all go to the exercise of the discretion as to whether to grant such a stay, not to the power itself.

53. Thirdly, I do not agree that *Deweer* compels the conclusion that directing the parties to engage in a non-court-based dispute resolution process would, in itself, be regarded by the ECtHR as an unacceptable restraint on the right of access to the court (see [9] in *Halsey*). *Deweer* did not decide that. As explained at [32]-[33] above, *Deweer* decided that the threat to close Mr Deweer's shop if he did not pay the fine, which itself prevented him in practice from defending the prosecution if he wished to remain in business, was a constraint that was incompatible with article 6.

54. Fourthly, 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.

55. Fifthly, Mr Churchill's suggestion that these cases only applied to statutory non-court-based processes is, in my judgment, wrong. It is true that statutory processes were in issue in *Momcilovic*, *Alassini* and *Menini*. But the principles were established and enunciated in *Ashingdane*, *Z and others*, and *Miloslavsky*, where different kinds of impediments to the conclusion of legal proceedings were in issue.

56. Sixthly, Mr Churchill relied on *Peters v. East Midlands Strategic Health Authority* [2009] EWCA Civ 145, [2010] QB 48 (*Peters*) at [41] as demonstrating that a party could not be required to engage with a dispute

resolution procedure if that process was designed to address something different from that party's specific claim. In fact, *Peters* simply decided that claimants can decide whom they wish to sue for compensation, where they have claims against more than one party. The case says nothing about whether or not parties can or should be required, in the context of existing legal proceedings, to engage with any specific kind of non-court-based dispute resolution process.

57. This approach is supported by the Civil Justice Council's June 2021 Report on Compulsory ADR which expressed the view at [58] and [60] that "any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights", and "we think the balance of the argument favours the view that it is compatible with Article 6 for a court or a set of procedural rules to require ADR".

58. Accordingly, I would conclude 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.

Issue 3: How should the court decide whether to stay the proceedings for, or order, the parties to engage in a non-court-based dispute resolution process?

59. In *Halsey*, the Court of Appeal said at [9] that, even if the court had jurisdiction to order unwilling parties to refer their disputes to mediation, they found "it difficult to conceive of circumstances in which it would be appropriate to exercise [that jurisdiction]". That comment was undoubtedly not part of the essential reasoning of the decision for the reasons given above. Moreover, I would not go so far. 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. 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.

60. As is already clear, Mr Churchill argued that different legal principles applied when different methods of non-court-based dispute resolution were being considered. I have rejected that argument in deciding issue 2 above. 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.

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.

62. I note that these factors mirror, to some extent at least, the factors discussed by the Court of Appeal in *Halsey* at [16]-[35] as being relevant to the costs question of whether a party had behaved unreasonably in refusing ADR.

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.

64. These submissions illustrate the point I have already made as to the relevance of the particular process being considered. In this context, I should mention that we heard some argument about whether an internal complaints procedure of the kind offered by the Council is properly to be regarded as a species of ADR at

all. That definitional issue seems to me to be academic. The court can stay proceedings for negotiation between the parties, mediation, early neutral evaluation or any other process that has a prospect of allowing the parties to resolve their dispute. The merits and demerits of the process suggested will need to be considered by the court in each case.

65. Based on what I have said under issue 2 above, the principles can be applied to the situation where an order is sought to facilitate non-court-based dispute resolution in the context of ongoing legal proceedings. The court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

66. I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions. The matters mentioned by the Bar Council and Mr Churchill, and by the Court of Appeal in *Halsey* are likely to have some relevance. But other factors too may be relevant depending on all the circumstances. It would be undesirable to provide a checklist or a score sheet for judges to operate. 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.

Issue 4: Should the judge have granted the Council's application to stay these proceedings to allow Mr Churchill to pursue a complaint under the Council's internal complaints procedure?

67. I have already set out some of Mr Churchill's complaints about the nature of the Council's internal complaints procedure at [63] above. These demerits led Mr Churchill to submit that the judge was right not to have ordered the stay that the Council sought. Conversely, the Council submitted that this court ought now to order a stay for one month so as to allow Mr Churchill to consider whether or not to engage in the internal complaints procedure and specifically to consider allowing the Council to do what it had offered to do, namely to treat the knotweed in Mr Churchill's garden.

68. There is, however, a problem with this court resolving these submissions. First, the Council's Notice of Appeal seeks a stay for three months for the parties to engage in the Council's internal complaints procedure. The relevant grounds of that appeal are simply that: (i) the judge was wrong to hold that *Halsey* prevented him from staying the claim for that purpose, and (ii) the CPR, the overriding objective and the principle that litigation should be the last resort, allows the court to stay premature claims for non-court-based dispute resolution and to stay or strike out claims where a party has been found to have unreasonably refused to do so. These points have already been substantively resolved above.

69. The judge, as I have said, decided at [41], in addition to the *Halsey* point, that Mr Churchill and his lawyers had acted unreasonably and contrary to the spirit and the letter of the PD in refusing to use the internal complaints procedure. He said at [42] that he disagreed with Mr Churchill that true ADR had to be a wholly

independent process. He rejected at [43]-[46] Mr Churchill's three other complaints at that stage, namely that (i) it was an inappropriate process, (ii) it did not deal with matters more than 12 months old, and (iii) it did not allow for the recovery of the claimant's costs. At [47]-[48], the judge declined to make any further immediate findings or costs orders, but left the costs orders to the trial judge. None of these findings has been the subject of a Respondent's Notice from Mr Churchill, as implicitly acknowledged in his first skeleton.

70. In these circumstances, resolving issues 1-3 deals with everything that has been properly raised before the court. The question of what should happen now is more complicated. The difficulty is that Mr Churchill's criticisms of the internal complaints procedure carry the implication that he was not unreasonable to refuse to engage in it, when the court has found that he was, and he has not appealed that finding. Had he challenged the finding, it would have been open to us to reach the opposite conclusion on the question of reasonableness, and the arguments before the court would have been different.

71. With those points in mind, I will say briefly what I think about issue 4. First, it is plain that, had the judge not concluded that he was bound by *Halsey* to refuse a stay, he would have granted one; as I have said, the basis on which he would have done so is not appealed. Secondly, in fact, things have now moved on considerably. Mr Churchill has refused to allow the Council to treat the knotweed in his garden, standing on his right to seek compensation and costs from the court. Thirdly, whilst the stay was sought after the issue of legal proceedings, the Council's internal complaints procedure is plainly intended to operate before proceedings have been issued. We are told that it is in a form that

is in widespread use by Councils. Fourthly, the procedure itself seems, predominantly at least, to envisage a complaint about the Council's services to council tax payers as opposed to private law claims against the Council as a neighbour. Finally, whilst the Council submits that its internal complaints procedure is crucial, because the total value of all knotweed claims brought by adjoining owners against the Council is very high indeed, it may not be the most appropriate process for an entrenched dispute of this kind.

72. In these circumstances, whilst it is obvious that the judge would have stayed the claim back in May 2022, had he been able to see this judgment, things have moved on. There is little point in doing so now, since nothing will be gained if a one-month stay were granted as the Council seeks. This court cannot properly grant a mandatory injunction against Mr Churchill requiring him to allow the Council to treat his knotweed. That has been neither formally sought nor argued.

73. It is better in my judgment to allow the appeal to the extent already stated and to allow the merits and demerits of this particular internal complaints procedure to be resolved on another occasion.

Conclusions

74. For the reasons I have given, I have decided that:

i) [9]-[10] of *Halsey* was not part of the essential reasoning in that case and did not bind the judge to dismiss the Council's application for the stay of these proceedings.

ii) 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 does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

iii) I decline to lay down fixed principles as to what will 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 at [61]-[63] above and the nature of the process contemplated will be relevant, as will other circumstances.

iv) I would decline to make any order for a stay of these proceedings at this stage for the reasons given at [67]-[73] above.

75. I would allow the appeal in part as indicated above. I would also indicate that it is my provisional view that: (i) there should be no order as to costs of this 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.

Lord Justice Birss:

76. I agree.

Lady Carr, Lady Chief Justice:

77. I also agree.