



**Informing Progress - Shaping the Future**

## FOIL Update – 3<sup>rd</sup> June 2024



### The Churchill Decision and its Impact

The Court of Appeal's landmark ruling in **Churchill v Merthyr Tydfil Borough Council [2023] EWCA Civ 456** overturned the long-standing position that English courts cannot compel parties to engage in alternative dispute resolution (ADR) or Early Dispute Resolution (EDR) processes, such as mediation. This decision has far-reaching implications for civil litigation in England and Wales.

Prior to Churchill, the prevailing view was that while courts could encourage and facilitate ADR, they could not order parties to participate. This stance was based on the principle of party autonomy and the consensual nature of ADR/EDR processes. However, in Churchill, the Court of Appeal held that courts have an inherent jurisdiction to order parties to participate in ADR, **“provided the order 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.”**

The Court of Appeal declined to lay down fixed principles on the issues relevant to determining whether ADR/EDR should be encouraged or ordered but noted a number of factors likely to be relevant, including the form of the ADR being considered; whether parties are represented; urgency and the reasonableness of the delay caused by ADR/EDR; whether there is an imbalance in the parties' resources or sophistication; and the reasons given by the parties for not wishing to participate, for example a recently failed attempt at ADR/EDR.

The court emphasized the importance of ADR/EDR in promoting access to justice and reducing the costs and delays associated with traditional litigation. It recognized that ADR/EDR can often provide a more efficient, cost-effective, and satisfactory resolution of disputes, particularly in cases where the parties' relationship is ongoing or where the issues are not purely legal.

## The CPRC Consultation and Proposed Rule Changes

In response to the Churchill decision, the Civil Procedure Rule Committee (CPRC) has published a consultation on proposed amendments to the Civil Procedure Rules (CPR) to reflect the court's newly confirmed power to order ADR/EDR.

The key proposed changes include:

### Overriding Objective and Case Management

- Amending CPR 1.1 to add "**using and promoting [ADR]**" to the overriding objective of dealing with cases justly and at proportionate cost.
- Modifying CPR 1.4 and 3.1 to confirm the courts' case management duties and powers include ordering parties to participate in ADR where appropriate.

These changes aim to embed the use of ADR/EDR into the core principles and case management processes of civil litigation, reflecting the court's endorsement of ADR as a means of achieving the overriding objective.

### Directions and Costs

- Amending Parts 28 (fast/intermediate tracks) and 29 (multitrack) to require the court to consider ordering or encouraging ADR when making case management directions.
- Adding to CPR 44.2(5)(e) that the court's costs discretion may consider "**whether a party failed to comply with an order for [ADR], or unreasonably failed to participate in [ADR] proposed by another party.**"

These proposed changes take a robust approach in implementing Churchill, imposing an obligation on the judiciary to consider ordering ADR/EDR at the directions stage, rather than merely permitting it. The costs provision aims to incentivise parties to participate in court-ordered or proposed ADR/EDR processes.

### FOIL's Response and Concerns

The Forum of Insurance Lawyers (FOIL) has responded to the consultation. FOIL has long been a supporter of the use of ADR/EDR to resolve civil disputes. It is supportive of the general principle outlined in *Churchill*, that the court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process. It is important to note of course, the requirement that ADR be proportionate to achieving the legitimate aim of settling the dispute "**fairly, quickly and at reasonable cost**" and to note the ultimate right of the parties to proceed to a judicial hearing.

### Potential Impact and Future Developments

The proposed rule changes, if implemented, are likely to have a significant impact on the conduct of civil litigation in England and Wales. Parties and their legal representatives will need to carefully consider their approach to ADR/EDR and be prepared to participate when ordered or encouraged to do so by the court.

Overall, the Churchill decision and the proposed rule changes represent a significant shift in the English legal system's approach to ADR/EDR, reflecting a growing recognition of its potential benefits in resolving disputes efficiently and cost-effectively.

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