IN THE COURT OF APPEAL, CIVIL DIVISION
ON APPEAL FROM THE COUNTY COURT SITTING AT CARDIFF

Case No H42YJ543

Appeal Ref: CA-2022-001778

B E T W E E N:

MR JAMES CHURCHILL

Respondent

AND

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

Appellant

AND

(1) CIVIL MEDIATION COUNCIL
(2) CENTRE FOR EFFECTIVE DISPUTE RESOULTION
(3) CHARTERED INSTITUTE OF ARBITRATORS

Interveners

SKELETON ARGUMENT FILED ON BEHALF OF THE INTERVENERS:

CMC, CEDR and CIARB

This Skeleton Argument adopts defined terms in the Interveners' Written Submissions.

A: Introduction

1. The Civil Mediation Council, the Centre for Effective Dispute Resolution, and the Chartered Institute of Arbitrators (collectively referred to as "**The Interveners**") have filed Written Submissions dated 22 September 2023, in accordance with the invitation to do so in the Order of Andrews LJ dated 16 June 2023. This skeleton and the Application for it to be admitted, have been prepared in the light of the discussion with the Bar Council as directed by Andrews LJ, and are intended to supplement (not replace) the Interveners' Written Submissions.

2. Since the Interveners were granted permission to intervene in these proceedings, but only by way of written submissions, they have been provided with copies of submissions made by some other interveners. In addition, part one of the Civil Justice Council's Final Report on Review of the Pre-Action Protocols (the '**CJC PAP Report**') was published in August 2023.

3. The Interveners have also liaised with the Bar Council, as they were directed to do by Order of Andrews LJ dated 4 July 2023. Although there is substantial overlap between the thrust of the arguments made by the Interveners and the Bar Council in respect of *Halsey* and Article 6 ECHR, some points of disagreement remain, which the Interveners consider to be important. Some examples are:

    a. At [33] of the Bar Council's submission it is stated that "*a Court-ordered private ADR process which caused substantial unjustified delay or was disproportionately costly would be far more problematic*." While the Interveners accept that this observation may be theoretically right, in practice the Interveners find it difficult to envisage circumstances in which any court would make an order, the effect of which would be to cause "substantial unjustified delay", and their professional experience of practice is that, insofar as that comment is intended to apply to mediation, most mediations are arranged promptly and do not cause significant, let alone unjustified, delay in the context of the proper and sensible timeframe for proceedings, and the costs are usually proportionate to resolution of the dispute. (we refer to the Witness Statement of Ian Gatt KC dated 23 May 2023 at [20] to [23] and [24] to [27].)

    b. At [39] the Bar Council submits that "*It is generally recognised that mediation is successful in part because it is a consensual process*." And that where mediation is proposed to be mandatory "*the Court will wish to consider carefully whether mediation still has a realistic prospect of success*". The Interveners agree that the Court is often (but not always) well placed to assess whether it is appropriate to order mediation. The Interveners disagree, however, with the implication that the success of mediation is dependent on it having commenced as a consensual process. The agreement of the parties is fundamental to the outcome; not to the reasons for having engaged in the process. The practical experience of the Interveners is that processes or systems

in other jurisdictions which either compel or place real encouragement on the parties to mediate, regardless of the parties' willingness to do so, do nonetheless frequently result in successful outcomes.

c. At [40(1)] the Bar Council submits that "*A court will always ensure, as best it can, both that an unrepresented party is not taken advantage of and that he or she obtains a just outcome. Mediators are generally not under any sort of duty to do either of those things. They will generally have no duty to prevent parties taking advantage of each other….*" The Interveners firmly disagree with the negative part of that observation which they respectfully consider to be fundamentally misconceived. The principle that unrepresented parties may <u>not</u> be taken advantage of, and that the mediator uses a fair process that produces a just outcome from the perspective of the parties who are the decision-makers on the terms of their settlement, is fundamental to, and at the forefront of, all mediations conducted by competent mediators. The European Code of Conduct for Mediators (the '**European Code'**), which the CMC requires to be used as a minimum standard applied to those regulated by it, makes various provisions to this end.

   i. It provides at article 3.1 that "*The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, <u>including possible imbalances of power</u> and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute.*" (emphasis added).

   ii. The European Code also requires impartiality, and commitment to serve all parties equally: "*2.2 Impartiality. Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation*."

   iii. The European Code makes provision for the fairness of the process at 3.2: "*The mediator must ensure that all parties have adequate opportunities to be involved in the process. The mediator must inform the parties, and may terminate the mediation, if:*

   – a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or

– the mediator considers that continuing the mediation is unlikely to result in a settlement."

It is further submitted that in the context of mediation, a just outcome can often be a "holistic" one, in which the mediator presides over a process which takes into account the parties' personal and commercial interests, in addition to the legal position, and not infrequently includes solutions which could not be ordered by a court.

d. At [40(1)] of the Bar Council's submissions it is asserted, without any supporting evidence, that "*The practical reality, moreover, is that unrepresented litigants may misconstrue observations made as being advice or guidance of some sort, and as carrying particular authority or force when the mediator was court-ordered."* The Interveners also disagree with this assertion. Ensuring that the parties understand the role of the mediator, is integral to any mediator's role, and a fundamental part of all proper mediation training. See, for example, article 3.1 of the European Code, which provides that *"The mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it."* Further, mediators are trained to ensure that the parties understand that the mediator acts as process manager, and that the outcome of the mediation is entirely in the parties' hands. That is reflected, for example, in CEDR's Model Mediation Agreement which provides at [6] that "*The parties understand that the Mediator and CEDR do not give legal advice…*".

e. At [40(5)], it is suggested that caution is required where ADR is only likely to be effective, or is more likely to be effective, at a particular stage of proceedings. The Interveners do not disagree with the proposition that the time when mediation is required to take place must be chosen with care. However, they respectfully submit that a Judge is usually well placed to make that decision.

f. At [40(6)], the submission identifies an example of claims involving public bodies which may be constrained in their ability to reach a commercial settlement. The example provided is of HMRC in certain tax disputes where it may be constrained by law and/or equity between taxpayers. The Interveners of course accept that. It is, however, important (and fair to HMRC) to note that,

while there are certain matters[1] that are justifiably excluded from its ADR process, HMRC itself nonetheless runs a robust ADR service. In 2022-23, 86.7% of cases referred to HMRC for ADR were resolved, and only 73 cases from 1013 applications proceeded to litigation[2].

g. The Interveners accept that there may be cases in which a decision by a Court is required, or where there may be a wider public interest in litigation proceeding to a judgment. However, even in those exceptional cases, there may be a place for dispute resolution in managing the dispute because it may be appropriate to use an order for dispute resolution to narrow the issues between the parties. The ability of dispute resolution processes to narrow the dispute, so that any subsequent litigation is limited to resolving those issues that need to be determined by the court, is recognised in the CJC PAP Report, at [1.26], [3.12] and in the proposed General PAP itself at [4.15].

h. Throughout their submission the Bar Council uses the word "mandatory" in relation to mediation. The Interveners strongly believe that use of the phrase "mandatory mediation" is unhelpful and should not be adopted as common parlance. Courts direct litigating parties throughout the civil justice process to take steps which are mandatory, but none of these directions is described as mandatory, despite being compulsory. It should be noted that the Government in its Consultation outcome "Increasing the use of mediation in the civil justice system" updated 1 September 2023[3], deliberately replaced the term "mandatory mediation" with "integrated mediation", to reflect this point.

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[1] Complaints about HMRC delays in using information or giving a taxpayer misleading advice, cases where HMRC's criminal investigators are involved, 'paper' or 'basic' cases before the FTT (which are cases with a value of less than £500 or which are appeals against penalties for procedural matters, or their mitigation, and certain applications), debt recovery or payment issues, disputes about tax credits, default surcharges, automatic late payment or filing penalties, PAYE coding notices, Extra-Statutory Concessions, pension liberation schemes, High Income Child Benefit Charges, disputes about the National Minimum Wage, accelerated payments or follower notices, civil evasion penalties or forfeiture. See https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr

[2] See Table 14: Alternative dispute referrals at https://www.gov.uk/government/publications/hmrc-annual-report-and-accounts-2022-to-2023/hmrcs-annual-report-and-accounts-2022-to-2023-tax-assurance-commissioners-report

[3] https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system/outcome/increasing-the-use-of-mediation-in-the-civil-justice-system-government-response-to-consultation

4. The Interveners' intention in offering these Supplemental Submissions, is simply to record what their position is in relation to the points which are now before the Court.

5. The Interveners hope that these written submissions may be helpful to the Court and they remain willing to assist in any way that they can or to respond to any questions the Court may have.

B: Proposed Further Submissions

6. In addition to explaining the limited extent to which the Interveners do not agree with the Bar Council, in accordance with the direction of Andrews LJ, we hope it may assist if we briefly add to the submissions that have already been made.

I: "Dispute Resolution" should encompass an integrated system of forms of dispute resolution

7. The Interveners respectfully submit that the time has now come to move away from the use of a definition of Alternative Dispute Resolution in England & Wales. ADR is a term which no longer serves its purpose in this jurisdiction. It erroneously treats those forms of dispute resolution currently described as "alternate" as standing outside of, or separate from, court based outcomes. In the Interveners' view, what is currently described as ADR should now be regarded as an integral part of the dispute resolution process.

8. The use of the term "integrated mediation" is also reflected in the Ministry of Justice ('MoJ') Consultation Outcome updated 1 September 2023, "Increasing the use of mediation in the civil justice system: Government response to consultation"[4].

[4] https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system/outcome/increasing-the-use-of-mediation-in-the-civil-justice-system-government-response-to-consultation

II: Distinction between neutrally managed processes and those which are not

9. The Interveners respectfully but firmly take the position that any form of dispute resolution is to be encouraged.

10. In the Interveners' view, it would be right to draw a distinction between dispute resolution processes which are neutrally managed, and those which are not (one such example of which is Internal Complaints Procedures, or '**ICPs**').

11. That distinction is reflected in the CJC PAP Report. The CJC proposes a General PAP which would replace the PD-PAC (see 3.14 of the Report). As the second step of the PAP, 'Dispute Resolution', it is proposed that the parties to a dispute are "*required to engage in a dispute resolution process*" prior to proceedings being issued. That process "*may involve, but is not limited to*" mediation (defined to be a neutral third party), ENE, any applicable ombudsman scheme, any dispute resolution scheme the parties have joined and a pre-action meeting between the parties[5]. The PAP also identifies that where parties have engaged in "*mediation or any other dispute resolution process involving the assistance of a neutral third party…*" and the dispute does not settle, then the parties will not be required to engage in another mediation if court proceedings are started[6]. However, if a dispute resolution process conducted without a neutral (like a complaints process) is used, this exception does not apply, and if court rules or a judicial order may require mediation or evaluation, there is no exemption from a court-required neutrally run process.

12. In the Interveners' submission, the CJC is right to draw a distinction between neutrally managed processes and those which are not. In the Interveners' view, this is because the court should not be prevented in any circumstances from ordering mediation or some other neutral process at any time that it considers to be appropriate, merely because an ICP has taken place already (and probably before proceedings have even been issued).

[5] See 4.11 of the Proposed General PAP at Annex 2 of the Report
[6] See 4.14 of the Proposed General PAP at Annex 2 of the Report

13. That distinction is also reflected in schemes currently in force. In many regulated sectors (such as energy, communications and aviation), following an ICP companies are mandated to provide neutral facilitated ADR. In others, a two-step process is provided for in legislation. By way of example, in the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, article 19(2) provides for a two-step process which distinguishes an ICP from ADR. It requires a trader, once it has exhausted its ICP, to provide details of ADR, including its obligation or preparedness to engage in ADR:

> *"Where a trader has exhausted its internal complaint handling procedure when considering a complaint from a consumer relating to a sales contract or a service contract, the trader must inform the consumer, on a durable medium –*
>
> *(a) that the trader cannot settle the complaint with the consumer;*
>
> *(b) of the name and website address of an ADR entity which would be competent to deal with the complaint, should the consumer wish to use alternative dispute resolution; and*
>
> *(c) whether the trader is obliged, or prepared to submit to an alternative dispute resolution procedure operated by that ADR entity."*

III: Judges' discretion

14. The Interveners respectfully submit that there is not and never has been anything in Article 6 ECHR which prevents a judge from ordering parties to engage in dispute resolution, whether that involves a neutral or not.

15. The Interveners further submit that, the parties having engaged in one form of dispute resolution (whether neutrally managed or bilateral), should not prevent a judge from ordering the parties to engage in another form of dispute resolution.

16. A judge will, and always does, retain their discretion as to what order they consider it appropriate to make in terms of dispute resolution. They must also retain full discretion as to when, in the course of a dispute, it is appropriate to do so. In doing so, a Judge

will apply the overriding objective and make orders which are proportionate to the case and circumstance. The Interveners respectfully submit that judges are well placed to make case management decisions as to when and what to order in terms of mediation or other form of dispute resolution, having considered the respective parties' positions and taking a fair view.

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