

You Must Mediate – A Pathway to Resolve Conflict Without Trial or an Obstruction to Parties’ Rights of Access to the Courts?

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by Joseph Lewin

Following the Court of Appeal decision in *Churchill -v- Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, the Civil Procedure Rules (the “CPR”) were amended with effect from 1 October 2024 to expressly permit the court to order parties to engage in mediation.

This was regarded as a radical change in approach after the generally accepted prohibition on the courts to compel alternative dispute resolution, based on the now 20-year-old case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, where the court stated 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” (at paragraph 9).

In the recent decision of *DKH Retail Ltd and others v City Football Group Ltd* [2024] EWHC 3231 (Ch), the High Court exercised the new power to compel parties to mediate, and granted the claimants’ application for a compulsory mediation before trial.

The claimants submitted that the court’s new powers recognised a “sea-change in the approach of the courts to ADR” (at paragraph 31).

In *DKH Retail*, the claimants contended that:

- The dispute was not a particularly complicated one, and a compromise was possible.
- There had been no mediation, and the parties were about to incur hundreds of thousands of pounds in further costs if they proceeded to trial.
- A “short, sharp, mediation of one day” might well allow the parties to avoid at least some of those costs.
- Engaging in mediation would potentially also save court time and resources.

The defendant resisted the application, arguing that:

- A mediation should only be held where there was a realistic prospect of success, and

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this was not such a case.

- Both parties wanted their case to be judicially determined instead.
- It was very late in the day to seek such an application, and the parties had already spent hundreds of thousands of pounds on the case, with trial imminent.
- The defendant had very limited availability for a mediation.

The judge granted the claimants' application, saying that "*mediation is capable of cracking even the hardest nuts*" (at paragraph 38).

Mr Justice Miles observed that there was some force in the defendant's argument that the application came very late in the day, but that also had an advantage: the parties' positions had been crystallised through pleadings and witness evidence. The judge did not accept that the proposed mediation would have low prospects of success or that adjudication by a court was necessarily required.

The judge was correct: the mediation was ultimately successful, as confirmed in a postscript to the judgment.

This case is demonstrative of the court's willingness to actively exercise its new case management powers. It highlights the importance of considering different ADR strategies throughout the entirety of the court proceedings.

It will be interesting to see how the court will balance the competing interests of parties in future, in circumstances where some may refuse to engage in ADR for good reasons and instead prefer to pursue and obtain judicial determination.