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Case Note

OF CHANGING WINDS: AMICABLE RESOLUTION TO LITIGATION DISPUTES IN SINGAPORE

James Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

Can a court lawfully order a stay of proceedings for parties to engage in alternative dispute resolution ("ADR"), such as mediation, during a court proceeding? This was the central issue the Court of Appeal of England and Wales (the "English Court of Appeal") was tasked to answer in the recent case of *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416. In answering the question in the affirmative, the English Court of Appeal held that a court has the power to order a stay of proceedings even if one party refused to resolve the dispute through ADR. This case note examines the decision and argues that like the UK, Singapore's commitment to facilitate dispute resolution through ADR remains ironclad.

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I. Introduction

1 How, and to what extent can a court lawfully order a stay of proceedings for parties to engage in an alternative dispute resolution ("ADR") process, such as mediation, to resolve their dispute? This was the

1 All views expressed in this article are the authors' alone and are not those of Temasek Polytechnic or TSMP Law Corporation. This author thanks Ilona Tan and Jazelle Chua for their assistance.

central issue that confronted the Court of Appeal of England and Wales (the "English Court of Appeal") in the recent case of *James Churchill v Merthyr Tydfil County Borough Council*[2] ("*James Churchill*").

2 The facts of the case are straightforward. Mr James Churchill ("Mr Churchill") owned a property at 9 Gellifaelog Terrace, Penydarren, Merthyr Tydfill, Wales (the "Property"). The local council, the defendant-appellant in this case (the "Council"), owned the adjoining land. According to Mr Churchill, since 2016, Japanese knotweed from the Council's land started encroaching onto the Property, causing damage and a loss of value and enjoyment of his land.[3]

3 Mr Churchill commenced legal proceedings – specifically, a claim for nuisance against the Council. While the Council's defence to Mr Churchill's claim was not immediately apparent from the decision of the English Court of Appeal, the court noted that the Council had argued before the judge of first instance (the "Judge") that the proceedings should be stayed as Mr Churchill ought to have sought recourse from the Council using the Council's Corporate Complaints Procedure first, before commencing the lawsuit.[4]

4 Although the Judge had also found that Mr Churchill and his lawyer's refusal to engage the Council using their Corporate Complaints Procedure was unreasonable, the Judge nonetheless dismissed the Council's application to stay the proceedings. In arriving at this decision, the Judge held that he was bound by Dyson LJ's remarks in *Halsey v Milton Keynes General NHS Trust*[5] ("*Halsey*") that "to oblige truly unwilling parties to refer their dispute to mediation would be to impose an unacceptable obstruction on their right of access to the court".[6]

5 The Council's permission to appeal was granted by HH Judge Harrison and the matter was referred to the English Court of Appeal for its guidance on whether a court has the power to stay proceedings against

2 [2023] EWCA Civ 1416.
3 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [2].
4 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [2].
5 [2004] 1 WLR 3002.
6 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [3].

a claimant who unreasonably refuses to engage in ADR in breach of the UK Practice Directions (Pre-Action Conduct and Protocols).[7]

II. Decision of the English Court of Appeal

6 The English Court of Appeal ruled that a court has the power to lawfully stay proceedings for the parties to engage in ADR provided that stay: (a) does not impair the parties' right to proceed to a hearing; (b) is granted for the parties to resolve their dispute through ADR; and (c) is proportionate to settling the dispute expeditiously.[8] The court's reasoning is briefly summarised below.

7 First, the English Court of Appeal disagreed with the Judge's reliance on remarks made by Dyson LJ in *Halsey*. After a careful analysis, the court unanimously concluded that the remarks by Dyson LJ were not *ratio decendi* but rather, *obiter dicta*. In reaching this conclusion, the court relied on *R (Youngsam) v Parole Board*[9] where Leggatt LJ stated that "*ratio* is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached".[10] The English Court of Appeal considered Dyson LJ's remarks and concluded that they were not "part of the best or preferred justification for the conclusion he reached".[11] Thus, the court concluded that Dyson LJ's statement was not *ratio decendi* but *obiter dicta* and the Judge was not bound by the remarks.

8 Second, the English Court of Appeal also considered the decision of the Supreme Court of the United Kingdom (the "UK Supreme Court") in *R (UNISON) v Lord Chancellor*[12] ("*UNISON*"). In *UNISON*, the UK Supreme Court considered whether court fees imposed before the employment claims tribunal (the "Tribunal") by the Lord Chancellor were unlawful as imposing fees before claimants could have their cases heard before the Tribunal had the effect of restricting their right of access to the courts. The UK Supreme Court ruled that imposing fees were indeed unlawful as it had the effect of impeding the right to access justice.[13]

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7 "Practice Direction – Pre-Action Conduct and Protocols" *Justice* <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#1.1> (accessed 11 October 2024) at para 1.

8 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [50].

9 [2019] 3 WLR 33.

10 *R (Youngsam) v Parole Board* [2019] 3 WLR 33 at [48].

11 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [18].

12 [2017] 3 WLR 409.

13 *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 at [98].

9 However, in the English Court of Appeal's view, *UNISON* can be distinguished on the facts. This is so as the issue the UK Supreme Court had to grapple was whether the impediment (*ie*, the imposition of fees before a claim can be filed at the Tribunal) prevented access to justice[14] and not the circumstances where it is just to order a stay for a legitimate reason to achieve dispute resolution through other means.[15]

10 Third, the English Court of Appeal ruled that the court has the power to stay proceedings for the parties to engage in ADR. This power, however, should not impair the parties' right to proceed for a hearing and that the stay should not be exercised if it is not proportionate in resolving the dispute expeditiously. As the court also reasoned, it is not unusual for courts to regularly adjourn matters for the parties to discuss settlement options.[16]

11 Fourth, the English Court of Appeal considered authorities in both the European Court of Human Rights and Court of Justice of the European Union. The authorities clearly support the position that a court can stay proceedings in favour of ADR provided that the order to stay proceedings:[17]

> (a) does not impede the 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 of trying to resolve the dispute via ADR.

12 Finally, although the English Court of Appeal was invited to formulate a checklist to decide the circumstances under which a stay ought to be granted in favour of ADR, the court declined to do so. The court commented that judges are best placed to and ought to be given the discretion to consider all the circumstances and decide whether the particular ADR process will bring about a speedy resolution to the dispute.[18] Nonetheless, the court found the following factors submitted

14 *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 at [1].
15 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [44].
16 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [51].
17 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [54].
18 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [66].

by the Bar Council (the interveners) to be relevant and helpful to the court in determining whether to order a stay:[19]

(a) the form of ADR being considered by the parties;

(b) whether the parties are legally advised or represented;

(c) whether the ADR was likely to be effective or appropriate without legal advice or representation;

(d) whether it was made clear to the parties that, if they did not settle, they would be free to pursue their claim or defence;

(e) the urgency of the case and the reasonableness of any delay that might be caused by the ADR;

(f) whether any delay caused by the ADR would vitiate the claim or give rise to or exacerbate any limitation issue;

(g) the costs of the ADR, both in absolute terms, and relative to the parties' resources and the value of the claim;

(h) whether there was any realistic prospect of the claim being resolved through ADR;

(i) whether there was a significant imbalance in the parties' level of resources, bargaining power, or sophistication;

(j) the reasons given by a party for not wishing to participate in the ADR; and

(k) the reasonableness and proportionality of the sanction that will apply if a party declines ADR in the face of a court order.

13 After considering the above factors, the English Court of Appeal ruled that the court has the power to stay proceedings for the parties to engage in ADR provided that: (a) the stay does not impair the party's right to proceed to a hearing; and (b) the stay is proportionate to resolving the dispute expeditiously.

III. Singapore's position on whether courts have power to order parties to attempt amicable resolution

14 The Singapore courts have the power to order the parties to engage in amicable resolution. This is clear from the text of O 5 r 3 of the Rules of Court 2021 ("ROC 2021"). This note first makes two observations on O 5 of the ROC 2021 which concerns amicable resolution.

19 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [61].

15 First, the onus is placed on the parties to satisfy the court that they have attempted amicable resolution before the commencement of the suit or during the course of any action or appeal.[20] By extension, a party who informs the court of his refusal to attempt amicable resolution may be required by the court to submit a sealed document setting out his reasons for refusal. The sealed document will only be opened by the court upon the conclusion of the case.[21] Notwithstanding that a party has refused to attempt amicable resolution and has submitted his reasons in a sealed document to the court, the authors' view is that a judge may still encourage the parties to engage in amicable resolution, whenever appropriate, as there is nothing in statute that prevents the judge from doing so. Support for this proposition is found in the text of O 5 r 3(5) of the ROC 2021 which allows the court to "suggest solutions for the amicable resolution of the dispute at *any time* as the court thinks fit" [emphasis added].

16 Second, the court will only dispense with the need for the parties to engage in amicable resolution if the parties have reasonable grounds not to do so.[22] Although what constitutes "reasonable grounds" is not stated in the ROC 2021, the authors suggest that situations where the parties do not attempt any amicable resolution ought to be rare. This is because the definition of making an offer of amicable resolution in O 5 r 1(3) of the ROC 2021 is wide enough to cover any form of communication that enables the parties to discuss the possibility of settlement.[23]

17 The case of *James Churchill* arose despite the clear pre-action protocol for the parties to try and resolve their dispute via amicable resolution. Until the English Court of Appeal's decision in *James Churchill*, there was limited clarity on the application of the pre-action protocol. There was also doubt within the English legal community as to whether the English court had the power to order the parties to undergo amicable resolution in the light of the decision of *Halsey*.[24] In contrast, there is legal certainty in Singapore in respect of this issue. The Singapore courts have the power to order the parties to attend amicable resolution at any time before or during the course of proceedings, including when the matter is on appeal. This power, as mentioned, can be found in O 5 r 3(1) of the

20 Rules of Court 2021 O 5 r 1(2).
21 Rules of Court 2021 O 5 rr 3(4)–3(5).
22 Rules of Court 2021 O 5 r 1(2).
23 See the definition of making an offer of amicable resolution at O 5 r 3 of the Rules of Court 2021.
24 "Why We Intervened in *Churchill v Merthyr Tydfil*" *The Law Society* (11 December 2023) <https://www.lawsociety.org.uk/topics/civil-litigation/why-we-intervened-in-churchill-v-merthyr-tydfil> (accessed 11 October 2024).

ROC 2021 which states that "the Court *may order* the parties to attempt to resolve the dispute by amicable resolution" [emphasis added].

18 Although one might argue that the use of the words "may order" in O 5 r 3 of the ROC 2021 suggests that the court cannot compel the parties to participate in an amicable resolution if they are unwilling, the authors' view is that such an argument is misconceived. In the recent case of *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*[25] ("*Maxx Engineering*"), the General Division of the High Court (the "General Division") granted an order of specific performance for the parties to refer their dispute to mediation.[26] In so ordering, the General Division held that the values of promoting *consensus* and *conciliation* in place of litigation is found under the newly-enacted O 5 r 1 of the ROC 2021 which mandates the parties to consider amicable resolution before the commencement and during the course of any action or appeal.[27] *Maxx Engineering* demonstrates that the Singapore courts have the power to order the parties to attempt amicable resolution despite a party's unwillingness. Indeed, the Singapore courts have the power to order a stay of proceedings under the newly-enacted ROC 2021. Such a power is also found within the inherent jurisdiction of the court; Sundaresh Menon JC held:[28]

> The Rules of Court (Cap 322, R 5, 2006 Rev Ed) spell out many of the powers of our courts to manage and regulate civil cases. *The powers contained there are complemented by the court's inherent jurisdiction, an amorphous source of power to do that which is deemed appropriate in the circumstances to secure the ends of justice* … [emphasis added]

IV. How readily will Singapore courts stay proceedings in favour of amicable resolution?

19 Given the clear legal position that the Singapore courts have the power to order a stay of proceedings to allow the parties to attempt amicable resolution, the anterior question is: How readily will the Singapore courts stay proceedings in favour of amicable resolution? The authors' answer that this is more often than not, and offer three reasons in support.

20 First, the Ideals under O 3 r 1 of the ROC 2021 require the court to consider ADR in its orders and directions.[29] These Ideals are

25 [2024] 3 SLR 715.
26 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [31].
27 *Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd* [2024] 3 SLR 715 at [30].
28 *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR(R) 95 at [1].
29 Rules of Court 2021 O 3 r 1(2)(*c*).

the stated objectives that the court should seek to achieve in its conduct of civil proceedings. Crucially, one such Ideal is for the court to ensure that proceedings are conducted expeditiously.[30] As the English Court of Appeal noted in *James Churchill*, there are studies and evidence which show that the parties who attend ADR are often able to resolve their disputes faster compared to the traditional litigation process.[31] In Singapore, it is also commonplace that mediation resolves disputes faster compared to litigation.[32]

21 Second, it is in the interest of justice for the court to order a stay of proceedings to allow the parties to engage in amicable resolution, if such step is necessary in the circumstances. In Singapore, parties who opt for mediation have a higher success rate of resolving disputes compared to those who opt for litigation.[33] Irrespective of whether there is an applicable provision in the ROC 2021, the courts are always expected to consider what the interests of justice in the case require and do their utmost to ensure that the interests of justice are met. Indeed, O 3 r 2(2) of the ROC 2021 confirms that notwithstanding that there is "no express provision in these Rules or any other written law on any matter, the court may do whatever the court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the court, so long as it is not prohibited by law and is consistent with the Ideals".

22 Finally, the introduction of various initiatives and pronouncements over the years clearly points towards the courts encouraging the parties to attempt amicable resolution. For example, in 2012, the State Courts introduced a "presumption of ADR" for all civil cases. This initiative was aimed at civil cases and parties are automatically opted in unless they deliberately choose to opt out. However, parties who opt out without any valid reasons may find themselves subject to costs implications.[34] This initiative is beneficial because parties now have no reason to claim that they were not told to settle the matter via ADR.

30 Rules of Court 2021 O 3 r 1(2)(*c*).

31 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [59]. See also, Kenneth R Feinberg, "Mediation: A Preferred Method of Dispute Resolution" (1989) 16 Pepp L Rev 5.

32 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "International Mediation and the Role of the Courts", speech to the Indonesian Judiciary (7 November 2023) at para 8.

33 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "International Mediation and the Role of the Courts", speech to the Indonesian Judiciary (7 November 2023) at para 8.

34 Joyce Low & Dorcas Quek Anderson, "Introducing a 'Presumption of ADR' for Civil Matters in the Subordinate Courts" *Singapore Law Gazette* (May 2012) <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?params=/context/sol_research/

The Singapore courts have also been proactive in supporting initiatives for new alternative dispute resolution. In 2014, the Singapore International Arbitration Centre and Singapore International Mediation Centre introduced the "Arb-Med-Arb" protocol, where a dispute is first referred to arbitration and then mediation is attempted. If the parties reach a mediated settlement, the agreement may be recorded as a consent award and this award will be enforceable in various contracting states under the New York Convention.[35] This has been expanded to include a "Litigation-Mediation-Litigation" protocol when the parties commence proceedings at the Singapore International Commercial Centre.[36] More recently, the Singapore Mediation Centre has introduced the Integrated Appropriate Dispute Resolution Framework ("INTEGRAF"). INTEGRAF allows the disputing parties to apply the most appropriate dispute resolution mechanism to each aspect of a dispute. This would facilitate the amicable resolution of at least certain parts of a dispute (if not all parts of it).[37] There are also other alternate dispute resolution forums such as the Financial Industry Dispute Resolution Centre dispute resolution process which requires the parties to resolve matters through mediation first, and then adjudication if they are not settled by mediation.

23 Notwithstanding the above, a related point is the issue of costs that the courts may impose on the parties' failure to make an effort to engage in amicable resolution. This note therefore turns to the recent case of *Zou Xinye v Ang Eileen*[38] where the Magistrate's Court ruled that it would not strike out a claim owing to a party's failure to consider amicable resolution. The authors note that the deputy registrar considered the failure may be a consideration for the court to impose costs and the failure may result in adverse costs consequences.[39] This is consistent with the text of O 21 r 2(*a*) of the ROC 2021 which provides that the court, in determining the quantum of costs, should have regard to efforts by the parties to attempt to resolve their dispute via amicable resolution. Further, O 21 r 4 of the ROC 2021 allows the court to disallow or reduce the winning party's costs or order a party to pay costs if that party has failed to comply with any order of court, any relevant pre-action protocol

article/4324/&path_info=Introducing_a_Presumption_of_ADR_for_Civil_Matters_Law_Gazette_May_2012.pdf> (accessed 11 October 2024).

35 "The Singapore Arb-Med-Arb Clause" *Singapore International Arbitration Centre* <https://siac.org.sg/the-singapore-arb-med-arb-clause> (accessed 11 October 2024).

36 "Lit-Med-Lit" *Singapore International Mediation Centre* <https://simc.com.sg/lit-med-lit> (accessed 11 October 2024).

37 "SICC and INTEGRAF" *SG Courts* <https://www.judiciary.gov.sg/singapore-international-commercial-court/sicc-and-integraf> (accessed 11 October 2024).

38 [2024] SGMC 9.

39 *Zou Xinye v Ang Eileen* [2024] SGMC 9 at [15].

or any practice directions.[40] While it is possible that a party grudgingly attends mediation without the real intention to settle,[41] the authors' view is that such an occurrence ought to be rare. The parties are likely to act circumspectly and make a genuine attempt at amicable resolution to prevent adverse costs orders from being made against them given the court's wide discretion to consider the parties' conduct, including their efforts in resolving the dispute, when ordering costs.[42] It is also in their commercial interests to do so. In sum, potential costs consequences are likely to disincentivise the parties from avoiding attempting amicable resolution and it will also incentivise the parties to accept the court's order to attempt amicable resolution.

V. Suggested approach

24 In the analysis above, it was established that the Singapore courts can stay proceedings in favour of amicable resolution and should readily exercise its power to order if necessary. However, in scouring the cases, the authors have not found a clear judicial framework endorsed by the superior courts for when the courts should exercise its power to stay proceedings in favour of amicable resolution. Against this backdrop, the authors propose an approach for the courts to take in determining whether to stay proceedings and order the parties to attempt ADR.

25 The court should first consider whether the parties have attempted amicable resolution.[43] If the parties have not done so and have provided an explanation, the court would then consider their explanation and where appropriate, direct the parties to the most appropriate ADR (*eg*, mediation[44] or conciliation[45]). Only when the parties have no reasonable explanation for not engaging in ADR should the court consider the factors under O 5 r 3(2) of the ROC 2021 before directing the parties to attempt amicable resolution. In this regard, the list of factors cited

40 See also *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2022] 5 SLR 525 at [46] where the General Division stated (in a different context) that a "successful party who raised issues or made allegations improperly or unreasonably … may be deprived of all or part of its costs".

41 Robert Angyal, "Court-ordered Mediation: Is It Undesirable?" [2003] NSW Bar Assoc News 12.

42 Rules of Court 2021 O 21 rr 2(*a*) and 2(*f*).

43 Jeffrey Pinsler SC, *Singapore Civil Practice* (Lexis Nexis, 2022) at para 7-12.

44 "Mediation" *SG Courts* <https://www.judiciary.gov.sg/alternatives-to-trial/mediation/what-is-mediation-(from-1-april-2022)> (accessed 11 October 2024).

45 "Conciliation" *SG Courts* <https://www.judiciary.gov.sg/alternatives-to-trial/conciliation/what-is-conciliation-(1-april-2022)> (accessed 11 October 2024).

in *James Churchill* are relevant factors that the Singapore courts could consider before directing the parties to attempt amicable resolution.[46]

26 The authors suggest that the above approach is not dissimilar to the "judicial ADR pluralism" advocated by Masood Ahmed[47] who argued that the Judiciary should be flexible in making ADR orders. In his view, rather than insisting solely on a particular mode of ADR, *eg*, mediation, the Judiciary should be flexible and consider the most appropriate mode of ADR.

27 Under this approach, judges should: (a) have a detailed understanding of the nature of a variety of ADR procedures; (b) actively and constructively engage in an "ADR" dialogue with the parties; and (c) make the appropriate ADR orders based on the parties' views and needs.

28 In the suggested approach, the judge, in considering the parties' explanations, would necessarily be considering the parties' concerns. While the authors would not go so far as to suggest that the court should engage in a *dialogue*, the authors take the view that the judge in considering the parties' concerns would necessarily be assuaging the parties' concerns towards ADR, if any.

VI. Conclusion

29 The benefits of amicable resolution are obvious. The use of mediation to resolve disputes helps to ensure a more amicable resolution. To illustrate, a study found that the use of mediation in the family law context has prevented re-litigation of almost 2,000 divorce cases compared to litigated cases.[48] The promotion of amicable resolution through legislation (in the ROC 2021) and the court's power to order a stay of proceedings to facilitate amicable resolution points to one categorical conclusion – Singapore's commitment to facilitate dispute resolution through amicable resolution remains ironclad.

30 In light of the abundant literature on the benefits of ADR and the espoused Ideal for the courts to strive towards expeditious resolution of

46 *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 at [61].

47 Masood Ahmed, "*James Churchill v Merthyr Tydfil CBC*" (2024) 1 *Journal of Personal Injury Law* 60.

48 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "International Mediation and the Role of the Courts", speech to the Indonesian Judiciary (7 November 2023).

cases, the authors postulate that the Singapore courts will be more inclined to direct the parties to engage in amicable resolution. The authors would even go so far as to suggest, that moving forward, the Singapore courts will actively order the parties to resolve their disputes through amicable resolution. Amicable resolution is likely to become the norm for litigation proceedings in Singapore and not an unusual or extraordinary step.