Browne Jacobson

New amendments to the Civil Procedure Rules and their impact

29 October 2024 Eleri Griffiths

The Civil Procedure Rules ("CPR") were amended on 1 October 2024 to include a rule to encourage the parties to engage in Alternative Dispute Resolution ("ADR"). This comes following a consultation by the Civil Procedure Rules Committee ("CPRC") and to reflect the Court of Appeal decision in Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416.

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

In 2015, Mr Churchill purchased a property adjacent to land owned by the Council. He claimed that, since 2016, Japanese knotweed encroached from the land onto the property causing damage to it, a reduction in its value, and loss of enjoyment. The parties engaged in pre-action correspondence. The Council queried why Mr Churchill did not use the Council's complaints procedure. It took the position that, if Mr Churchill were to issue proceedings without engaging in the complaint's procedure, the Council would apply to the court for a stay and for costs. Mr Churchill then issued proceedings in nuisance against the Council in 2021.

The Council duly issued a stay application, which was considered by Deputy District Judge Kempton Rees. The Judge dismissed the application on the basis 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 2002 ("Halsey").

The Court of Appeal held that it was possible to lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process, provided that 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.

CPR 1.4(2)

Following the decision in Churchill and the consultation ofthe CPRC, the overriding objective in Part 1 of the CPR now includes "*promoting or using Alternative Dispute Resolution*" and the Court's duty of active case management is extended to include "*ordering or encouraging the parties to use, and facilitating the use of, Alternative Dispute Resolution*". In respect of costs, Part 44 has been amended to include: "*whether a party has failed to comply with an Order for ADR, or unreasonably failed to engage in ADR*".

Procurement litigation

During any litigation process, the parties must have regard to the overriding objective as set out in Part 1 of the CPR. The court's general duty is to further the overriding objective of dealing with cases: i) justly and at proportionate cost; ii) within a reasonable time; and iii) by proportionate use of Court and parties' resources.

The Practice Direction on Pre-Action Conduct and Protocols at paragraph 3 confirms that the Court will expect the parties to have exchanged sufficient information to:

1. Understand each other's position.

2. Make decisions about how to proceed.
3. Try to settle the issues without proceedings.
4. Consider a form of Alternative Dispute Resolution to assist.
5. Support the efficient management of those proceedings.
6. Reduce the costs of resolving the dispute.

The pre-action process for Procurement Litigation challenges is often very short for the following reasons:

1. The mandatory standstill period is for 10 days, and a potential Claimant may need to issue proceedings to obtain an automatic suspension of the award of contract (although this can be extended, this does not extend the 30-day period in which to bring a claim.
2. A claim must be started within 30 days of the date that the economic operator first knew, or ought to have known, that grounds for starting the proceedings had arisen (Regulation 92(2) of the Public Contracts Regulations 2015).

Whilst parties should try and engage co-operatively to resolve the dispute, a Claimant often has no choice but to issue proceedings in order to protect its position.

The Technology and Construction Court Guide 2022, already confirms that at all stages the parties must consider settling litigation by any means of Alternative Dispute Resolution; any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the Trial Judge until questions of costs arise. The amendment to the CPR now confirms that the Court may provide Directions and Order the parties to engage in ADR.

Summary

Although the amendments to the CPR are to be welcomed generally as a means of resolving costly disputes before Trial, our view is that this will have little impact on the way in which Procurement Litigation is conducted. First, the nature of the remedies sought in Procurement Litigation, as is the case with Judicial Review proceedings, means that ADR is rarely an effective dispute mechanism – particularly when an unsuccessful bidder is only (or primarily) seeking to set aside an award. Secondly, as a matter of practice, most public authorities already very carefully consider settlement-type options, such as re-evaluation or abandoning the procurement, before proceedings are commenced, given the substantial costs involved in defending procurement challenges.

That said, public authorities should not overlook the option of staying proceedings to pursue ADR – particularly if further time is needed to (re)consider settlement options before further significant costs are incurred by way of either: (a) filing a Defence; (b) attending a CMC; or (c) providing Standard Disclosure.

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