The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

# Litigation Committee response to the Civil Procedure Rule Committee consultation on proposed rule changes in light of Churchill v Merthyr Tydfil

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1. The City of London Law Society (the "CLLS") represents approximately 21,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

2. The CLLS responds to a variety of consultations on issues of importance to its members through its 21 specialist committees. This response has been prepared by the CLLS Litigation Committee.

3. The Committee notes:

   (1) the decision in James Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 at §74(ii) that a court can "*lawfully stay proceedings for, or order, the parties [to litigation] 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*";

   (2) that the purpose of the proposed CPR rule changes the subject of this consultation is to make it clear that the court has the *power* to order a "*non-court-based dispute resolution process*";

   (3) that the proposed rule changes are not intended to deal with the separate issue of how that power falls to be *exercised* by the court.

4. The Committee agrees that it is sensible to amend the CPR for the purpose set out in paragraph 3(2) above and provides its comments on the proposed rule changes below.

5. First, for completeness, we note two issues of terminology:

   (1) Churchill refers to a "*non-court-based dispute resolution process*" whereas the proposed rule changes refer to "*alternative dispute resolution*". We regard these terms as materially interchangeable for present purposes, in circumstances where the online glossary to the CPRs defines "*alternative dispute resolution*" as the "*collective description of methods of resolving disputes otherwise than through the normal trial process*".

   (2) Churchill refers to parties being ordered to "*engage in*" ADR whereas the proposed rule changes generally refer to "*participate in*". On balance we regard these terms as materially interchangeable.

6. Second, we see the sense of including a reference to ADR within the overriding objective. However, we note that the effect of the change at r.1.1(2)(f) is to state that dealing with a case justly and at proportionate cost includes "*so far as is practicable*" using and promoting ADR. "*So far as is practicable*" might be said to differ from the concept in r.1.4(2)(e) that active case management includes encouraging or ordering that parties to use ADR "*if the court considers that appropriate*" (emphasis added). It is respectfully suggested that appropriateness may be a more suitable touchstone than practicability.

7. Third, in respect of 28.7(1)(d), we query whether it is appropriate for the directions made by the court to include *encouraging* the parties to participate in ADR, as opposed to in appropriate circumstances *ordering* the parties so to participate. It appears to be more suitable for any encouragement of ADR that the court chooses to provide not to be enshrined in a formal court order. The same point arises in relation to r.28.14(1)(f) and r.29.2(1A).

8. Fourth, to the extent that the eventual rule changes refer to the court encouraging or ordering ADR, we respectfully suggest that "*encouraging or ordering*", as set out in the proposed change to r.1.4(2)(e), is a more natural sequence than the reverse formulation (that is currently suggested in r.28.7(1)(d), r.28.14(1)(f) and r.29.2(1A) ("*order or encourage*")), also because it reinforces the notion that an order for ADR should not be made lightly by the court.

9. It is right that the proposed rule changes do not address the issue of whether and, if so, how, the court's power to order ADR should be exercised. In any given situation there will be a range of factors that are potentially relevant to these issues, and the court will have to consider the relevance and application of all factors in play, including having regard to different forms of ADR process. We note that in higher-value and more complex commercial cases, of which members of the Committee have most experience, the parties tend to be sophisticated users of legal services, who

are well aware of the options open to them to resolve their disputes, and also that there may be circumstances in which either (1) a dispute is not appropriate for resolution through ADR at all; or (2) at the relevant time it is not yet ripe for resolution through ADR. Where ADR is appropriate, it is preferable that it is undertaken so far as possible in optimal conditions, including, importantly, at the right time, and in a way that minimises the potential for wasted costs. As a general matter, we note that in the context of a competitive global marketplace for the resolution of international business disputes, it is important carefully to consider any aspect of civil procedure that unnecessarily introduces costs and therefore potentially reduces the attractiveness of the English courts for the resolution of disputes. High costs, particularly at the start of a dispute, can drive businesses to courts with less expensive procedures, or to arbitration.

Please address any questions on this consultation response to the Chair of the Litigation Committee, Lois Horne (lois.horne@macfarlanes.com).

Date: 28 May 2024

**THE CITY OF LONDON LAW SOCIETY**
**LITIGATION COMMITTEE**

Individuals and firms represented on this Committee are as follows:

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| Jan-Jaap Baer | Travers Smith LLP |
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