Neutral Citation Number: [2023] EWHC 654 (Ch)

Case No: PT-2022-LDS-000053

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

The Court House
Oxford Row
Leeds LS1 3BG

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

- -

Between :

MILLS & REEVE TRUST CORPORATION LIMITED
(In its capacity as Trustee of the Peter Kevin Martin Will Trust and the Red Land Trust)

Claimant

- and -

(1) BRIAN VINCENT MARTIN
(2) MICHAEL MARTIN
(3) THE ESTATE OF ANNE LINDLEY
(4) GERALD MARTIN
(5) PETER JOHN MARTIN
(6) DERMOT JOHN MARTIN

Defendants

Mr James Fryer-Spedding (instructed by **Mills & Reeve LLP**) for the **Claimant**
Mr Alfred Weiss (instructed by **Schofield Sweeney**) for the **First, Second, Third and Sixth Defendants**
Mr Christopher Buckingham (instructed by **LCF Law Limited**) for the **Fourth and Fifth Defendants**

Hearing date: 12 August and 13 September 2022
Date of Redacted Judgment: 24 May 2023

APPROVED
REDACTED JUDGMENT

The unredacted version of this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email on Friday 31 March 2023. The redacted judgment was release to The National Archives and time for hand-down is deemed to be 2.00pm on 24 May 2023

Her Honour Judge Kelly

1. This judgment follows the hearing of a number of applications made by the Fourth and Fifth Defendants in their application notice dated 14 April 2022. The Claimant is the trustee of the Peter Kevin Martin Will Trust ("the Will Trust") and the Red Land Trust ("the Red Land Trust"). The Claimant commenced proceedings by Part 8 Claim Form issued out of the Rolls Building, London on 10 March 2022. The Claimant seeks the blessing of the Court for decisions made which the trustee intends to action in respect of some of the land held in the Red Land Trust.

2. After service of the Claim Form and before replying to it, the Fourth and Fifth Defendants issued an application seeking a number of orders:
   (1) transfer of the proceedings to the business and property courts in Leeds pursuant to CPR 30.2 (4) and/or PD57AA;
   (2) a stay of proceedings to facilitate mediation (and/or compelling the parties to mediate) pursuant to CPR 3.1 (2) (f) and/or CPR 3.1 (2)(m) and/or the court's inherent jurisdiction;
   (3) an extension of time to respond to the Claimant until 28 days after any stay, alternatively, until 28 days after determination of this application; and
   (4) that the First, Second, Third and Sixth Defendants pay the cost of this application.

3. By order dated 19 April 2022, Deputy Master Henderson transferred the proceedings to Leeds for consideration of the remainder of the application and reserved the issue of costs. The hearing was originally listed on 12 August 2022 with an inadequate time estimate. It was relisted on 13 September 2022. The hearing concerned only the application of the Fourth and Fifth Defendants and not the Claimant's claim.

4. The parties were all represented by Counsel. The Claimant was represented by Mr James Fryer-Spedding. The First, Second, Third and Sixth Defendants were represented by Mr Alfred Weiss and the Fourth and Fifth Defendants were represented by Mr Christopher Buckingham. Counsel had all provided very helpful skeleton arguments before the hearing.

5. This judgment is concerned in the main with whether I should order mediation or, if not, some other form of Alternative Dispute Resolution ("ADR"). On the morning of

the hearing, the Claimant applied orally for the hearing to be conducted in private on the basis that there were matters relating to the Red Land Trust which were commercially sensitive. The issue had been raised in the Claimant's skeleton argument so the Defendants were aware that an oral application would be made at the hearing. The Claimant's application for privacy was supported by Mr Weiss for the First, Second, Third and Sixth Defendants and opposed by Mr Buckingham for the Fourth and Fifth Defendants.

6. After hearing arguments on that issue, I adjourned ruling on it until the written judgment on the applications was given to ensure there was sufficient time to hear the other applications. Although the court was never closed to the public, in fact, throughout the hearing no-one except the parties and their lawyers were in court. I ordered that no transcript of the hearing may be obtained and no documents obtained from the court file until judgment was handed down and any consequential orders following the applications were dealt with.

7. There are thus 2 main issues for me to decide:
   (1) Whether to hear the matter in private; and
   (2) Whether to order mandatory mediation or some other form of ADR.

Background and Evidence

8. I have had the benefit of reading the following witness statements:
   (1) Catherine Scholfield, solicitor for the Fourth and Fifth Defendants, dated 14 April 2022 and 28 July 2022;
   (2) Brian Vincent Martin, First Defendant, on behalf of the First, Second, Third and Sixth Defendants, dated 21 April 2022 and two statements dated 26 April 2022.
   (3) Mr Andrew Playle, solicitor and director of the Claimant, dated 10 March 2022.

   In addition, I had the benefit of reading the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments.

9. I do not propose to set out all of the evidence which I read and heard, nor the contents of all of the witness statements. It is not necessary to do so. Nor do I propose to rehearse all of the arguments raised in the skeleton arguments or during the course of the hearing. However, I record that I read and considered the evidence as a whole, as

well as various documents within the hearing bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

10. This matter has a long and convoluted history, which is set out in detail in the witness statement of Mr Andrew Playle. The statement was attached to the Part 8 Claim Form. Happily, for the purpose of these applications, it is not necessary to set out the entirety of the history.

11. The Defendants in this matter are the living children and the estate of one child of Peter Kevin Martin ("the Deceased"), who died on 21 April 1995, and his widow Evelyn. Evelyn later died on 19 May 2004. The Defendants and Evelyn were the beneficiaries to the Deceased's estate. In his will dated 11 January 1995, the Deceased appointed the Fourth, Fifth and Sixth Defendants as executors and trustees of his estate ("the original executors and trustees").

12. In the Will Trust, the Deceased left Royds Hall Farm (which farm comprises just over 117 acres) to be held on trust subject to a number of conditions. It is not necessary to set out the details of the trust for the purposes of this judgment. Subsequently, on 12 January 1996, a fresh trust was declared in respect of some of the land held in the Will Trust. That land was referred to as the Red Land and the new trust called the Red Land Trust. The Red Land Trust is a bare trust in favour of the Defendants as beneficiaries. Again, it is not necessary to go into detail about how and why the Red Land Trust was declared. The original executors and trustees were appointed as trustees of the Red Land Trust.

13. Parts of the land held in the Red Land Trust have development value. That land is land at Summer Hall Ing ("the Summer Hall Ing Land") and Fenwick Drive ("the Fenwick Drive Land") (together referred to as "the development land"). However, it is important to note that none of the development land enjoys a main road frontage. It can only sensibly be accessed for the purposes of any development via what I will call the ransom strip land which is owned by Bradford Metropolitan District Council ("BMDC"). In addition, Royds Community Association ("Royds CA") also are involved as a result of an interest they have in the ransom strip.

14. The Claimant seeks the court's blessing to:
    (1) Execute a collaboration agreement with BMDC and Royds CA in respect of the development land;
    (2) Market the development land for sale with a view to the Claimant accepting the best offer; and
    (3) Accepting an offer to purchase the development land if that course of action is approved by the majority of the Defendants as beneficiaries.

15. The reason the Claimant has commenced proceedings and seeks the blessing of the court is that the Defendants disagree as to how the development land should be dealt with by the Claimant. The Defendants have been in dispute about how to deal with both the Will Trust and the Red Land Trust since each Trust was created. Unfortunately, the Claimant was unable to break the deadlock between the Defendants.

16. It is necessary to go into some of the background concerning the disputes between the Defendants in order to consider the mediation issue.

17. [***Redacted***].

18. [***Redacted***].

19. Planning permission was obtained in respect of some of the development land during this period. By 2012, various planning permissions had expired and offers or potential offers in respect of the purchase or development of the development land had fallen away. A claim was issued then by the First, Second and Third Defendants against the original executors and trustees. The claim sought replacement of the original executors and trustees on the basis that little information had been provided to the First, Second and Third Defendants as beneficiaries and various allegations were made about mismanagement of the trusts.

20. By order of District Judge Jordan (as he then was) dated 6 December 2012, the Claimant was appointed as substitute trustee of the Trusts in place of the original executors and trustees. The Claimant then began to engage with the Defendants to discuss the Trusts and the potential development and sale of the development land.

21. [***Redacted***].

22. Mediation had been specifically raised by the Claimant as long ago as 2013. The Claimant has always taken the stance that it will attend and participate in a mediation agreed by all the Defendants. However, it cannot force the Defendants to mediate against their wills. In September 2013, the Claimant proposed that the Defendants mediate. In October 2013, the Fourth and Fifth Defendants said that they would attend mediation. The other Defendants did not agree to this immediately but did agree in March 2014. Almost immediately following that agreement from the other Defendants, the Fourth and Fifth Defendants said that they should be able to settle their differences without mediation and hoped to provide proposals for settlement. Later, the Fourth and Fifth Defendants said they remained amenable to mediation but felt that wider animosity between all the Defendants would prevent any proposals they made from being considered properly. Between 2014 and 2015, the parties engaged in various without prejudice discussions as to the appropriate strategy in respect of the trusts. There was no agreement.

23. In the absence of agreement as to how to proceed, and with there being issues as to the ability of the Red Land Trust to pay for professional advice, the First, Second, Third and Sixth Defendants commissioned David Hill to produce a planning and sales strategy. A report was produced in 2015 which advised entering into a collaboration agreement with BMDC and thereafter jointly promoting or marketing the land with BMDC. The Fourth Defendant did not agree with that approach and preferred a full legal agreement.

24. [***Redacted***].

25. By August 2019, David Hill had provided the Claimant with an update. BMDC had resolved whatever issue it had with Royds CA and David Hill was in a position to instruct solicitors to progress the agreements. In April 2020, the Defendants were sent draft indemnity and collaboration agreements. The Fourth Defendant has not given the indemnity requested. He asserts this is because he has concerns about the proposed terms of the collaboration agreements and the indemnity itself.

26. Before issuing proceedings, the Claimant sought to move matters forward to maximise the value of the land for the Red Land Trust and to deal with cash flow

issues by proposing loans from each of the Defendants. The Claimant provided the draft proceedings for this claim and the draft witness statement of Mr Playle to each of the Defendants. Again, there was no agreement between all of the Defendants as beneficiaries and none of them would themselves apply to the court for directions as to how to proceed. That being the case, the Claimant issued these proceedings. After the issue of proceedings, the Fourth and Fifth Defendants again proposed mediation.

27. Whilst the Claimant remains content to mediate, the proposed mediation was rejected by the other Defendants. Various reasons were given by various of the parties including:
    (1) The Fourth Defendant, whilst acting as original trustee and executor, had sought to control and dominate the inheritance with disastrous consequences. After his removal, he has demonstrated a desire to punish the other Defendants.
    (2) There was no point in mediation because there was no scope for a mediated resolution. Despite asking the Fourth and Fifth Defendants for their proposals as to how to deal with matters, no proposals had been forthcoming.
    (3) In any event, mediation without the involvement of BMDC and Royds CA would be pointless if the Fourth and Fifth Defendants wish to renegotiate the terms of the collaboration agreement. In any event, BMDC and Royds CA would be unlikely to be interested in a mediation which seeks to reopen terms of agreements which are agreed in principle in respect of the Fenwick Drive Land and are in a relatively advanced stage of negotiation for the Summer Hall Ing Land.
    (4) The offer to mediate appears to be a delaying tactic to stop the sale of the sites rather than any real attempt to resolve the dispute.

28. After the proceedings had been issued, BMDC confirmed in May 2022 that it had approved the proposed collaboration agreement in respect of the Fenwick Drive Land and its wish to progress with the agreements.

29. As to whether or not the hearing should be held in private, the Claimant (supported by the First, Second, Third and Sixth Defendants) argued that the claim and this application be held in private. The Fourth and Fifth Defendants argued that the hearing be held in public.

The Law

30. Happily, counsel largely agree on the legal principles.

31. In relation to the privacy argument, I was referred to:
    (1) CPR 39.2(2) and (3)(c), f) and (g) and CPR 64
    (2) the White book commentary at 39.2.2 on Re Timothy Edward Schuldham
    (3) Lewin on trusts (20th Edition) paragraphs 39-086 to 39-101
    (4) the Chancery Guide 2022 paragraphs 3.31 and 3.32
    (5) Practice Guidance: interim non-disclosure orders [2012] 1 WLR 1003 paragraphs 9 to 12

32. In summary, the general rule is that hearings are to be in public. The hearing may not be held in private, irrespective of the parties' consent unless, and to the extent that, the court decides it must be held in private. The court has to be satisfied that publicity would defeat the object of the hearing, the hearing involves confidential information including information relating to personal finances and publicity would damage that confidentiality or for any other reason the court considers to be necessary to secure the proper administration of justice. The principle of open justice extends to court documents and the default position is that the public should be allowed access not only to the parties submissions and arguments but also to documents which have been placed before the court and referred to during the hearing.

33. Any derogation from the principle of open justice should be the minimum strictly necessary in the interests of justice and for the proper administration of justice. Applications for part or all of the hearing to take place in private must be supported by evidence. In relation to trust proceedings, where the issue is whether a proposed course of action is a proper exercise of the trustees' powers, as in this case, traditionally the application would have been heard in Chambers, in other words, not in public. However, the mere fact that the case falls within one of the classes identified within CPR 39.2 does not suffice to mean the hearing should be held in private. The court has to form a view of the nature of the confidential information, before deciding whether or not to hold a hearing in private. Applications must be held in private only to the extent that the court is satisfied that nothing short of the exclusion of the public will suffice to ensure the administration of justice. The person

seeking to move from the usual rule that hearings are heard in public has the burden of proof.

34. As to the application for a stay of proceedings to facilitate mediation or an order compelling the parties to mediate pursuant to CPR 3.1(2)(f) and/or CPR 3.1(2)(m), I was referred to a number of cases and other materials including:

(1) *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002
(2) *Wright v Michael Wright (Supplies) Limited* [2013] CP Rep 32
(3) *Lomax v Lomax (Practice Note)* [2019] 1 WLR 6527
(4) *McParland & Partners Limited v Whitehead* [2020] Bus LR 699
(5) *The Sky's The Limit Transformations Ltd v Mirza* [2022] EWHC 29 (TCC)
(6) *DSN v Blackpool Football Club Ltd* [2020] Costs LR 359
(7) The Chancery Guide 2022 Chapter 10 paragraphs 10.6 to 10.12
(8) The Civil Justice Council report "Compulsory ADR"
(9) Lewin on Trusts (20th Edition) paragraphs 48-006 to 48-007
(10) New Law Journal 8 October 2021 – Tony Allen "The final demise of *Halsey*?"
(11) Roebuck Lecture (Chartered Institute of Arbitrators) 8 June 2022 – Master of the Rolls Sir Geoffrey Vos "Mandating Mediation: The Digital Solution"
(12) Part 3 of the CPR and White Book Vol 2 Section 14 Alternative Dispute Resolution

35. The parties agree largely on the case law on compulsory mediation and on the development of attitudes in relation to compulsory ADR generally in recent years. Where the parties are not agreed is as to the power of the court to order mandatory mediation (as opposed to other forms of ADR) and, if the court does have such a power, whether it should be exercised in this case. Mr Buckingham for the Fourth and Fifth Defendants asserts that the court does have power to make such an order and should exercise its discretion and order mandatory mediation. Mr Weiss for the First, Second, Third and Sixth Defendants says that the court may have the power to order mandatory mediation. However, even if it does, in this case, such an order should not be made in any event. The Claimant's stance was that it remained willing to attend a mediation in which all Defendants agreed to take part. However, it was not in a position to compel any party to attend a mediation against their will.

36. The starting point for considering compulsory mediation is the case of *Halsey*. Dyson LJ (as he then was) noted that the use of ADR had developed rapidly in recent years and strong support for the use of ADR in general and mediation in particular had been given by the courts in a number of cases. He then said:

"9 We heard arguments on the question whether the court has power to order parties to submit their dispute to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us 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. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the Claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 . Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Civil Procedure 2003 say at vol 1, para 1.4.11:

"The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate."

"10 If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process" …. "But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it."

37. In *Wright*, Sir Alan Ward (who had been a member of the Court of Appeal which decided the *Halsey* case) made a number of observations in relation to compulsory mediation in paragraph 3 of the judgment when he said:

"My second concern is that the case shows it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation… HH Judge Thornton attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002*, for which I am partly responsible, where at [9] in the judgment of the Court (Laws and Dyson LJJ and myself), Dyson L.J. said:

> "It seems to us 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."

> Was this observation obiter? Some have argued that it was. Was it wrong for us to have been persuaded by the silky eloquence of the *eminence grise* for the ECHR, Lord Lester of Herne Hill, to place reliance on *Deweer v Belgium (1979-80) 2 E.H.R.R. 439*? See some extra-judicial observations of Sir Anthony Clark, *The Future of Civil Mediations*, (2008) 74 Arbitration 4 which suggests that we were wrong. Does CPR r.26.4(2)(b) allow the courts of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which *Halsey* did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really "an unacceptable obstruction" to the parties right of access to the court if they have to wait a while before being allowed access across the courts threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field."

38. There have been developments in and significant commentary on the field of compulsory ADR. In the *Lomax* case, the Court of Appeal ruled that the court can order an Early Neutral Evaluation ("ENE") hearing under CPR r 3.1(2)(m) whether or not the parties give their consent. Moylan LJ distinguished the *Halsey* case on the basis that *Halsey* only dealt with mediation. He then found that if the parties did not settle the case at all following an ENE hearing, that did not obstruct the parties access to the court. He therefore did not need to answer the question raised by Sir Alan Ward in *Wright*. Sir Geoffrey Vos, when he was Chancellor, commented in the *McParland* case that the decision in *Lomax* inevitably raised the question of whether the courts might also require parties to engage in mediation despite the decision in *Halsey*. In his case, the parties had agreed to a direction that mediation was to take place and so the issue did not arise for decision.

39. Since the *Halsey* case, and the decision of *Deweer* on which reliance is placed by the Court of Appeal, there have been subsequent decisions of the European Court on the issue of mandatory mediation. There are cases where a mandatory mediation scheme has been found to be both proportionate and not preventing effective access by litigants to the court process. It is not necessary for the purposes of this judgment to consider those European cases further.

40. Since the *McParland* case, the Civil Justice Council ("CJC") published its review on compulsory ADR in June 2021. The CJC concluded that parties could lawfully be compelled to participate in ADR and that such compulsion was compatible with Article 6 of the European Convention on Human Rights. A number of factors would need to be considered when compulsory ADR was being considered, including the

cost and time burden to the parties, the stage of proceedings where ADR may be required and whether the process was particularly suitable in some specialist areas of civil justice.

41. It is right to say that in relation to compulsory mediation, whilst the report stated that introducing further compulsory elements of ADR would be both legal and "potentially an extremely positive development", it was felt necessary to make a specific observation about mediation:

"We think that as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats we see no reason for compulsion not to be considered in this context also. The free or low-cost introductory stage seems the least likely to be controversial".

42. The possibility of the court ordering mediation was raised again in the decision of His Honour Judge Stephen Davies sitting as a judge of the High Court in *The Sky's the Limit* case in the context of lower value domestic property renovation building contract disputes. The judge suggested a more cost-effective way of managing such cases and at paragraph 6 of his judgment stated that there should be:

"… a stay for mediation on receipt of the report and questions. If the parties are not willing to mediate and the judge does not consider it appropriate to order mediation, then there should be an order for compulsory early neutral evaluation before another TCC judge."

The Issues

43. The parties broadly agree on the issues to be determined. The first issue is as to whether or not the hearing should be held in private. The Fourth and Fifth Defendants set out the other issues in their application as:

(1) What costs order should be made following the transfer of the proceedings to Leeds?

(2) Does the court have power to make an order compelling the parties to mediate?

  (1) If so, should the court exercise that power in this case?

  (2) If not, should the court:

    (a) give permission to appeal and stay the proceedings pending determination of that appeal?

    (b) order the parties to engage in some other form of ADR such as a Chancery FDR?

    (c) stay the proceedings for a period and encourage the parties to mediate?

(3) Should the court grant an extension of time to the Fourth and Fifth Defendants to respond to the claim?
(4) What costs order should be made in relation to the remainder of the application?
(5) If the court is prepared to give a provisional view, is the Claimant's case in a satisfactory state (as the Claimant contends) or does it require amendments to enable it to be dealt with justly and at proportionate cost?

44. The cost issues identified at paragraphs 43(1) and 43(4) above will be dealt with after hearing submissions from the parties when this judgment is handed down. It is not appropriate, in my judgment, to give a view at this stage as to the Claimant's case as requested in paragraph 43(5).

45. This judgment will deal with whether the applications should be heard in private and the issues as set out at paragraphs 43(2) and 43(3) above.

Should the hearing be held in private?

46. In my judgment, it was necessary for this hearing to be held in private. I accept and acknowledge that this is not the ordinary rule and that open justice is a fundamental principle which should be departed from only where strictly necessary and in the interests of justice. However, I make it clear that this decision was made only in relation to this particular hearing. An application for any further hearings to be held in private will need to be made to the judge hearing that particular application.

47. Although a formal application had not been made by the Claimant, it was clear on the face of the Claim Form that privacy would be sought for reasons of commercial confidentiality. The parties were all aware that would be sought, both before proceedings were issued when they were given the draft claim form and supporting documents and once those proceedings were issued. No assertion was made by any party after service of the Claim Form and supporting documents.

48. The Claimant's solicitors raised the issue of privacy again shortly before the hearing by email. The solicitors for the Fourth and Fifth Defendants queried why privacy was thought necessary for this hearing as it was not a substantive hearing of the claim. There was some further email correspondence about the issue and the reasons for

seeking privacy. The solicitors for the Fourth and Fifth Defendants then stated that it was a matter for the Court and the parties could not agree the matter between themselves in any event. It was only after the application for privacy was made at the start of the hearing that Mr Buckingham for the Fourth and Fifth Defendants objected and asserted that the hearing should be in public.

49. Whilst much of this hearing related to whether or not the court had power to order the parties to mediate, the application was also for the court to order a stay for the court to encourage mediation or other ADR, or for the court to order an alternative form of ADR to mediation. In order to determine those applications, it was necessary to consider at some length the history of this matter...[***Redacted***]

50. [***Redacted***].

51. In my judgment, it is also telling that these risks to confidentiality were specifically recognised by the Fourth Defendant in particular during the history of these proceedings. For example, in his email dated 1 December 2020, when disclosing professional advice from his niece of Athena Planning, he specifically stated:

> "I urge you to take professional advice on this document – In doing so it is important that the document remains confidential – disclosing our potential strategy to other parties BMDC etc would be financially damaging".

In my judgment, that was a realistic assessment of the risks in this case if professional advice concerning the trust property were made public.

52. For the same reasons as set out above, I am also satisfied that it is necessary and in the interests of justice that there should be no access to the documents produced for the purposes of this hearing to anybody other than the parties. I have considered whether it would be possible to redact various parts of the documents in order to protect the principle of open justice. Having considered the matter carefully, I am not satisfied that redaction would suffice in this case. The reality is that the witness statements, all of the exhibits and indeed the submissions made in skeleton arguments by the parties set out commercially sensitive information and expose in great detail the rifts between the defendants which if made public could endanger the interests of the beneficiaries.

53. I am not satisfied that the application for privacy has been brought by the Claimant at the instigation of the First, Second, Third and Sixth Defendants. I am satisfied that the Claimant has genuine and realistic concerns about protecting and maximising the benefits from trust property if the background to this matter and the details of negotiations and possible agreements relating to the trust property are made public.

54. For all of those reasons, the hearing was held in private and no access to the documents is permitted other than by the parties. I will hear submissions before this judgment is handed down as to whether it is necessary to redact or abridge any public version of this judgment. A copy of the order relating to the hearing of this application in private will be published on the website of the Judiciary of England and Wales.

Does the court have power to make an order compelling the parties to mediate?

55. The first question is whether the dicta in the *Halsey* case concerning mandatory mediation are binding or not. As has been noted in other cases and in academic commentary, the Court of Appeal were not considering an appeal in respect of an order mandating or refusing to mandate the parties to mediate in that case. In addition, there have been questions raised as to the interpretation of the court of and its reliance on the *Deweer* case.

56. In my judgment, although the subject matter of the appeal in the *Halsey* case did not concern an order for mandatory mediation, the dicta of the Court of Appeal in that case are binding on me. Even if the discussion of mandatory mediation is technically obiter, the Court of Appeal expressed a very clear view on the lawfulness of mandatory mediation when given the opportunity to do so.

57. I accept, of course, that there have been significant developments in the use of mandatory ADR since *Halsey* was decided. The court has decided in various cases that various forms of ADR can be ordered, such as ENE. There has been detailed consideration by the CJC of mandatory mediation and other forms of ADR. The CJC did not endorse mandatory mediation at this point in time. The Chancery Guide 2022 proceeds on the basis that the court cannot compel unwilling parties to mediate. Whilst there has been academic and other commentary on the pros and cons of mandatory mediation, there has been general recognition that a mediation ordered at

the wrong time not only may be unlikely to succeed but may have the effect of entrenching parties' positions.

58. Various comments have been made by judges in other cases which question whether it is time for the Court of Appeal to review the issue of compulsory mediation and the rule in *Halsey*. It may well be that giving an answer to the question of whether there is now power to order mandatory mediation has been sidestepped because it has not been necessary to answer the question in any particular case. However, given the very clear views of the Court of Appeal in *Halsey*, I do consider myself bound by Court of Appeal's views in that case.

59. In answer to the first question then, I do not accept that I have power to order mediation. It is not therefore necessary to answer issue 2(1) as to whether it is appropriate to mandate mediation in this case.

Should the court give permission to appeal and stay the proceedings pending determination of that appeal?

60. No. Although there has been commentary and criticism of the decision in *Halsey*, I am not presently persuaded that it is necessary or appropriate for me to give permission to appeal and thus refer my decision to the Court of Appeal.

61. I accept that various cases since *Halsey* have questioned whether the time is right for either the legislature and/or an appellate court to consider again the issue of mandatory mediation. I accept further that Mr Weiss accepted that the court may have power to order the parties to mediate. However, mandatory mediation was considered in detail, along with other forms of compulsory ADR, by the CJC who published their report in June 2021. The lead author of that report was Lady Justice Asplin DBE. The report did not recommend mandatory mediation at this time. In those circumstances, I do not accept presently that it is the right thing for me to do to give permission to appeal and thus require the Court of Appeal to consider this issue.

62. In coming to that assessment, I had in mind CPR 52.6 and the test for granting permission to appeal. For the reasons given above, I am not presently satisfied that an appeal on the issue of mandatory mediation would have a real prospect of success.

Nor do I consider that there is some other compelling reason for an appeal on that point to be heard.

63. However, I am conscious that the parties have not been given the opportunity to make submissions on whether permission to appeal on any issue should be granted after this judgment is handed down. They will of course be given the opportunity to seek permission to appeal. As such, the hearing for judgment to be handed down will be adjourned (pursuant to paragraph 4.1(a) of Practice Direction 52A) to a hearing to determine the appropriate form of order after judgment is handed down. The time for making any application for permission to appeal will not start to run until that form of order hearing.

64. If, after submissions, I remain of the view that I will not grant permission to appeal in respect of the mandatory medication issue, the Fourth and Fifth Defendants may of course seek permission to appeal from the Court of Appeal directly. If the Court of Appeal thinks it is the right time and this is the right case to reconsider their decision in *Halsey*, in the light of the significant developments in relation to mandatory ADR generally since that case was decided, no doubt it will give permission to appeal.

Should the court order some other form of mandatory ADR such as a Chancery FDR? Alternatively, should the court simply stay the proceedings and encourage the parties to engage in ADR?

65. After careful consideration, I am not satisfied that I should order a different form of mandatory ADR, nor am I satisfied that it would be in the interests of justice to order a stay in the hope that the parties choose to pursue ADR.

66. This is a matter which has been ongoing for over 27 years. It is apparent from the extensive correspondence over that time that there is significant animosity between the Defendants. The Defendants disagree as to the cause of that animosity. Whilst I accept that ordinarily, simple animosity between parties is no basis to refuse mediation, in my judgment this is not an ordinary case of simple animosity.

67. The Defendants' father died over 27 years ago. Half of the Defendants dealt with the estate as executors and trustees in such a manner that the others applied to remove

them. No admission was made by the original executors and trustees of any misconduct. At the suggestion of the court to avoid protracted litigation and costs, the original executors and trustees agreed that the court would remove them and appoint the Claimant. Despite numerous occasions where the Claimant has attempted to negotiate matters and try to find a middle path that all of the Defendants could agree, the Claimant has failed time after time after time. I do not criticise the Claimant for that. However, that being the position, in my judgment it is highly unlikely that any form of mandated ADR, whether mediation or otherwise will succeed.

68. I accept also that it is not unusual for parties in both civil and family disputes to criticise the behaviour of other parties. Ordinarily, again I would accept that that is not a valid reason to refuse to mediate. However, again the lengthy history and the fact that the Defendants over a 27 year period have not really agreed about anything to do with the estate bodes ill for the prospects of success of any form of ADR. It is an intractable dispute. In my judgment, this is all the more so where there is a proposal for how to deal with:
    (1) the Fenwick Drive Land with a collaboration agreement which has been negotiated and agreed in principle with and approved by BMDC and is effectively ready to go; and
    (2) the Summer Hall Ing Land with a collaboration agreement which is at a relatively advanced state of negotiation with BMDC and Royds CA; and
    both proposals are endorsed by the Claimant as an independent trustee.

69. Given the strongly held and unwavering views given recently by the First, Second, Third and Sixth Defendants that they will not contemplate mediation or other ADR as there is simply nothing to talk about, ordering a stay and encouraging ADR will just delay matters further before there is a resolution.

70. Although the Fourth Defendant asserts that he is concerned with the terms of the proposed collaboration agreements and the indemnities suggested, no other practical solutions or suggestions have been made by the Fourth or Fifth Defendant. Even after the initial listing of this matter in August 2022, a further suggestion of mediation was put forward by the Fourth and Fifth Defendants. However, despite being asked again for credible proposals as to how to deal with the land, no further details were forthcoming from the Fourth and Fifth Defendants.

71. Whilst I accept the proposition that some litigants need saving from themselves and using mediation is a good tool to settle disputes, I do not accept that this by itself means an order for a stay for facilitation of mediation or other ADR will assist here. It may well have been that mediation would have assisted at an earlier stage, before the position reached now where the trustees have decided what they wish to do and seek the blessing of the court for their proposed course of action, a decision having been made upon it.

72. The reality here is that the dispute is between the beneficiaries. The fact that the Claimant may have been trying to get the beneficiaries to agree to mediate in early 2022 does not really assist. At that stage, the trustees were trying to facilitate an agreed position so as to save costs.

73. It may be that mediation would add some degree of delay. That by itself is not a reason not to mediate. The Fourth and Fifth Defendants assert that there is no urgency here. I disagree. This matter has been rumbling on for decades. The Claimant now has a collaboration agreement effectively agreed with BMDC. There is a stalemate between the beneficiaries and no means of moving forward. The beneficiaries as a whole have been kept out of their inheritance. One beneficiary has died before the estate could be dealt with. Another beneficiary wishes to retire and cannot while matters remain unresolved. After 27 years, there is real urgency in this case.

74. Further delays are not justifiable in circumstances where the Fourth and Fifth Defendants had not made any detailed assertions or observations as to what they propose instead. It is notable that throughout the history of these matters, there have been various occasions where the Fourth Defendant has been asked to explain his position when a query has been raised by him and no or no adequate response has been received from him.

75. I accept the submission made on behalf of the other Defendants that realistically, without the involvement of BMDC and Royds CA, amendments to what has been either agreed in principle in respect of the Fenwick Drive Land, or at a relatively advanced state of negotiation for the Summer Hall Ing Land are unlikely. Even if BMDC and Royds CA agreed to take part in mediation, in my judgment, there is a

real risk of BMDC or Royds CA using the differences and arguments between the Defendants as a means of obtaining a better deal. In my judgment, if ADR were ordered, or even stay and encouragement given for ADR, any ADR would be at the wrong time and would just entrench positions even further.

Should the court grant an extension of time to the Fourth and Fifth Defendants to respond to the claim?

76. Obviously, a short period of time is required for the Fourth and Fifth Defendants to respond to the claim. However, I see no reason to give an extended period in circumstances where there is to be no stay. The response to the claim must be provided by 4pm 5 May 2023.

77. I am grateful to counsel for their very able assistance in this matter.