Neutral Citation Number: [2019] EWCA Civ 1467

Case No: B6/2019/1369

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MRS JUSTICE PARKER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 6 August 2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LADY JUSTICE ROSE

Between:

LOMAX

Appellant

- and -
LOMAX as Executor of the Estate of
Alan Joseph Lomax (Deceased)

Respondent

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Mr C Buckingham (instructed by **KBL Solicitors LLP**) appeared on behalf of the **Appellant**

Mr T Entwistle (instructed by **Raworths LLP Solicitors**) appeared on behalf of the **Respondent**

Judgment

(As Approved)

LORD JUSTICE MOYLAN:

Introduction

1. The issue in this appeal is the effect of rule 3.1(2)(m) of the Civil Procedure Rules 1998 ("the CPR") when it refers to the court's powers as including "hearing an Early Neutral Evaluation".

2. Rule 3.1 contains the court's "general powers of management" and sets out a "list of powers" which are in addition to any other powers the court might have. The list, in subparagraph (2), includes at (m) that the court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case".

3. Does this provision mean that the court can only order that an Early Neutral Evaluation ("ENE") hearing takes place if all the parties agree? Or, does it mean that the court can order that such a hearing takes place whether or not the parties agree?

Background

4. The substantive proceedings comprise an application by a widow under the Inheritance (Provision for Family & Dependants) Act 1975. By her order dated 20 May 2019, Parker J declined to order an ENE hearing. She decided that the court did not have power to do so when, as in this case, one party refused to consent to such a hearing.

5. The party who opposed an ENE hearing is the defendant (the respondent to this appeal). The claimant (the appellant) seeks such a hearing and submits that the judge was entitled to order and should have ordered it to take place despite the defendant's opposition. It is clear from Parker J's judgment that, if she had concluded she had power to order an ENE hearing, she would have done so. The issue on this appeal is, therefore, largely one of principle, as summarised above.

Legal Framework

6. Reference to an ENE hearing was incorporated into rule 3.1(2)(m) by the Civil Procedure (Amendment No. 4) Rules 2015. It came into effect on 1 October 2015.

7. Paragraph (m), as I have said, appears in a list of other powers available to the court. It provides that, among the steps the court can take and among the orders it can make, is to hear an ENE. There are no express words either in rule 3.1 generally or specifically in subparagraph (m) to the effect that an ENE hearing can only be ordered if all the parties consent.

8. We were also referred during the course of the parties' submissions to the overriding objective, which I do not propose to set out; to rule 1.4(2)(e), which states that active case management includes "encouraging the parties to use an alternative dispute resolution

procedure if the court considers that appropriate and facilitating the use of such procedure"; and to rule 3.3(1), which provides, "Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative".

9. Until recently the commentary on rule 3.1(2)(m) in the *White Book* 2019, at 3.1.13, stated that:

> "The court's decision whether or not to conduct ENE is not dependent in any way on the consent of the parties. It is simply part of the court's inherent jurisdiction to control proceedings."

This has been changed in the Second Cumulative Supplement dated 7 June 2019. The reference to consent not being required is removed. It is noted that ENE is mentioned in "many Court Guides and, [that] in all of those Guides, it is still said to depend upon the consent of all parties". Parker J's decision in this case is also noted as is the earlier decision of *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.

10. We have been referred specifically to the Chancery Guide, paragraphs 18.7, 18.8 and 18.9; the Commercial Court Guide, paragraph G2.3; and the Technology and Construction Court Guide, paragraph 7.5. Additionally, we were referred to Civil Procedure News, C.P.N. 2015, 8(Sep), 7-8, which was to the same effect as the previous commentary in the *White Book*, namely that the power to order an ENE "is not constrained by the need to secure party consent".

11. The authorities to which we have been referred include, in particular, *Halsey v Milton Keynes General NHS Trust* and *Seals and Seals v Williams* [2015] EWHC 1829 (Ch). In the former decision, Dyson LJ (as he then was), giving the judgment of the court, said at paragraph 9:

> "We heard argument on the question whether the court has power to order parties to submit their disputes 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 disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."

The judgment then refers to Article 6 of the European Convention on Human Rights, adding that:

> "… 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."

In paragraph 10 the judgment states:

> "… 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."

And in paragraph 11 it states:

> "… we reiterate that the court's role is to encourage, not to compel."

12. In *Seals and Seals v Williams*, which was decided before the rules changed expressly to incorporate ENE, Norris J said at paragraph 3:

> "The advantage of such a process [ENE] over mediation itself is that a judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself."

13. I would also refer to the equivalent hearing in financial remedy cases in the Family Court and the Family Division, the Financial Dispute Resolution appointment. This was initially introduced on a trial basis in 1996. Its success meant that it was incorporated into the then rules in 2000, and it has been a standard part of the process since then. It is now in the Family Procedure Rules 2010, Part 9.

14. The benefits of the FDR appointment for the parties, by promoting the early settlement of the case, and for the court, by saving time, have been amply demonstrated in the thousands, I would estimate, of cases in which it has taken place since 2000. In her judgment in this case, Parker J rightly referred to the FDR appointment as having been proved to be "outstandingly successful".

Judgment

15. Parker J concluded that this case "cries … out for a robust judge-led process" by which the case might be resolved by agreement. However, as I have said, she felt constrained to decide that she did not have power to order an ENE having regard to the defendant's refusal to agree to this taking place.

16. Initially, at the hearing before her, it had been conceded on behalf of the claimant that the judge was indeed so constrained. This had been based significantly upon what was stated

in the Chancery Guide and led to a draft case management order which did not provide for an ENE hearing. After the hearing before Parker J had concluded, counsel for the claimant sought to withdraw their concession on the basis of what was then said in the commentary in the *White Book*. The judge fixed a further hearing and agreed to revisit her draft order, principally because she had not been referred to the passage in the *White Book* as set out above. After considering that passage, the Court Guides and other matters including *Seals and Seals v Williams*, she decided, as I have said, that she could only order an ENE hearing if the parties consented.

Submissions

17. I am grateful to both counsel for their elegant submissions.

18. Mr Buckingham on behalf of the claimant submits, simply, that the rule does not expressly provide that the parties have to consent to an ENE hearing being ordered and that there is nothing which suggests that the need for such consent should be implied into the rule. He submits that it could not be right that one party should be able to exercise, what he described as, a veto over one of the court's case management powers. He further relies on the overriding objective as supporting the rule being interpreted as not requiring consent.

19. Mr Entwistle on behalf of the defendant made clear that his client is not opposed to any form of ADR. The defendant is opposed only to ENE because he considers that mediation is more appropriate in this case.

20. Mr Entwistle summarised his submissions in three parts. First, he submits that the court has no power to order parties to submit their dispute to ADR which, in his submission, includes ENE. He relies in support of this submission on, in particular, *Halsey v Milton Keynes*. Secondly, the relevant provisions of the CPR reinforce the principles set out in *Halsey v Milton Keynes*. Thirdly, the fact that the authors of the Court Guides consider consent is required support the conclusion that it is.

21. In support of his submission that ADR includes ENE, he took us to the definition of ADR in the Glossary in the *White Book*. He also referred to the Court Guides as supporting the conclusion that ENE is a form of ADR. Based on *Halsey v Milton Keynes*, he submits that the court does not have power to order parties to submit their dispute to ENE against their will, absent an express provision to the contrary. This is because: (i) to oblige unwilling parties to engage in this, as a form of ADR, would be an unacceptable obstruction of their right of access to the court; and (ii) to compel unwilling parties to have an ENE hearing would achieve nothing except to add to costs. He submits that what was said in *Halsey v Milton Keynes* applies to all forms of ADR and is still good law.

22. In support of his second submission, Mr Entwistle relies on the use of the words "encouraging" and "facilitating" in rule 1.4(2)(e). He submits that these words support the conclusion that ENE can only be ordered with the parties' consent. He also relies on the use of the words "helping the parties settle the case" in subparagraph (m). Additionally, he pointed to the use, in other subparagraphs of rule 3.1(2), of mandatory words such as

"require", "direct" and "hold" in contrast to the words that appear in subparagraph (m). He submits that forcing the parties to have an ENE hearing would be a strange way of helping them to settle the case.

23. Mr Entwistle also submits that the previous commentary in the *White Book* and the passage in the CPN were based on a misreading of *Seals and Seals v Williams*. Finally, he relies on what is said more generally in the Court Guides about ENE and the requirement for the parties to consent before the court can order it.

Determination

24. I start by noting, as referred to above, that the wording of subparagraph (m) does not contain an express requirement for the parties to consent before an ENE hearing is ordered. The question therefore is whether such a limitation is to be implied.

25. I do not consider that *Halsey v Milton Keynes* assists with the proper interpretation of subparagraph (m) because it was dealing with a very different situation. It was concerned with whether a court can oblige parties "to submit their disputes to mediation". It does not, therefore, in my view assist with the interpretation of subparagraph (m), which is dealing with an ENE hearing as *part* of the court process.

26. In any event, ENE does not prevent the parties from having their disputes determined by the court if they do not settle their case at or following an ENE hearing. It does not, in any material way, obstruct a party's access to the court. Insofar as it includes an additional step in the process, this is not in any sense an "unacceptable constraint", to use the expression from *Halsey*. In my view, it is a step in the process which can assist with the fair and sensible resolution of cases.

27. This means that I do not need to enter into the question raised in *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234 as to what *Halsey* determined and the extent to which it remains good law. I would only comment that the court's engagement with mediation has progressed significantly since *Halsey* was decided. I also do not consider that *Seals and Seals v Williams* directly assists. It dealt with the position prior to the express introduction of ENE in subparagraph (m).

28. As for the Court Guides relied on by Mr Entwistle, whilst they can assist in particular where there is ambiguity, as stated in the *White Book* at 12-44, p.2898:

> "It is clear that the effect of rules and directions cannot be suspended or disapplied by what may be said in Court Guides."

Equally, the commentary in the *White Book* as to the effect of subparagraph (m) is not determinative.

29. Looking at the issue more generally, as I have already described, the great value of a judge providing parties with an early neutral evaluation in a case has been very well demonstrated in financial remedy cases. Further, the benefits referred to above have been demonstrated not only in cases where the parties are willing to seek to resolve their dispute by agreement and are, therefore, willing to engage in an FDR. In my experience and that, I would suggest, of every other judge who has been involved in financial remedy cases, the benefits have also been demonstrated frequently in cases in which the parties are resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR. As Norris J said in *Bradley v Heslin* [2014] EWHC 3267 (Ch*)*:

> "24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves."

30. Dealing with Mr Entwistle's second submission, I also do not consider that his analysis of the rules supports the conclusion that consent is to be implied in subparagraph (m). If the intention had been to require the parties to consent, it would have been very easy to make this clear by expressly providing for this. In my view, the absence of any such express requirement is a powerful indication that consent is not required. As I have already indicated, in my view an ENE hearing is not an obstruction to or constraint on a party's access to the court.

31. I would also suggest, in response to Mr Entwistle's submission that ordering an ENE is a strange way of helping parties settle a case, that it requires parties to focus on whether a case might be capable of settlement and requires them to hear a judge's neutral evaluation. It requires them to hear this because the parties can be, and would typically be, ordered to attend the hearing as permitted by rule 3.1(2)(c), because one of the key purposes of such a hearing is for the parties to hear directly the judge’s evaluation of the case. Also, contrary to another of his submissions, based on my experience of FDRs, the result of requiring parties to have such a hearing can and often will be to achieve a great deal, including saving rather than adding to costs.

32. In conclusion, I see no reason to imply into subparagraph (m) any limitation on the court's power to order an ENE hearing to the effect that the agreement or consent of the parties is required. Indeed, in my view such an interpretation would be inconsistent with elements of the overriding objective, in particular the saving of expense and allotting to cases an appropriate share of the court's resources, and would, therefore, be contrary to rule 1.2(b). If my Lord and my Lady agree, I propose that the appeal be allowed, and, having regard to Parker J's clear view that this case would benefit from an ENE hearing, I would propose that the court directs that one be held as soon as possible.

LADY JUSTICE ROSE:

33. I agree.

LORD JUSTICE McCOMBE:

34. I also agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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