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Lomax v Lomax

[2019] EWCA Civ 1467

Court of Appeal, Civil Division

McCombe, Moylan and Rose LJJ

6 August 2019

Practice – Early neutral evaluation – Absence of consent

Abstract

Contrary to the defendant's submissions, there was no reason to imply into subparagraph (m) of CPR r 3.1(2), any limitation on the court's power to order an Early Neutral Evaluation (ENE) hearing to the effect that the agreement or consent of the parties was required. Consequently, the Court of Appeal, Civil Division, allowed the claimant's appeal against the judge's decision not to order an ENE where the defendant had refused to consent to such a hearing.

Digest

The judgment is available at: [2019] EWCA Civ 1467

Background

The substantive proceedings concerned an application by the deceased's widow (the claimant) pursuant to the Inheritance (Provision for Family & Dependants) Act 1975. In the course of those proceedings, the applicant had sought an Early Neutral Evaluation (ENE) hearing. Rule 3.1 of the Civil Procedure Rules (the CPR) contained the court's general powers of management' and set out a 'list of powers' which were in addition to any other powers the court might have. The list, in paragraph (2), included at (m) that the court could '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'. Reference to an ENE hearing had been incorporated into r 3.1(2)(m) by the Civil Procedure (Amendment No. 4) Rules 2015, SI 2015/1569, which came into effect on 1 October 2015.

The defendant opposed an ENE hearing. The judge declined to order the hearing, deciding that she did not

have the power to do so when one party had refused to consent to such a hearing. The claimant appealed, submitting that the judge had been entitled to order and should have ordered the ENE hearing to take place despite the defendant's opposition.

Issues and decisions

The effect of CPR r 3.1(2)(m) when it referred to the court's powers as including 'hearing An Early Neutral Evaluation'.

The claimant submitted, among other things, that the rule did not expressly provide that the parties had to consent to an ENE hearing being ordered and that there was nothing which suggested that the need for such consent should be implied into the rule. She further relied on the overriding objective as supporting the rule being interpreted as not requiring consent.

There were no express words either in r 3.1 generally or specifically in subparagraph (m) to the effect that an ENE hearing could only be ordered if all the parties consented. Looking at the matter more generally, the great value of a judge providing parties with an early neutral evaluation in a case had been very well demonstrated in financial remedy cases. Further, the benefits had been demonstrated not only in cases where the parties were willing to seek to resolve their dispute by agreement and were, therefore, willing to engage in financial dispute resolution (FDR). The benefits had also been demonstrated frequently in cases in which the parties were resistant or even hostile to the suggestion that their dispute might be resolved by agreement and equally resistant to the listing of an FDR (see [7], [29] of the judgment).

Further, there was 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 was required. 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 CPR r 1.2(b). The present case would benefit from an ENE hearing. Accordingly, it would be proposed that one be held as soon as possible (see [32] of the judgment).

Christopher Buckingham (instructed by KBL Solicitors LLP) for the claimant.

Thomas Entwhistle (instructed by Raworths LLP Solicitors) for the defendant.

Neneh Munu Barrister.