

HIGH COURT

QUEEN'S BENCH DIVISION

MASTER VICTORIA MCCLLOUD

BETWEEN

TELECOM CENTRE (UK) LIMITED

CLAIMANT

AND

THOMAS SANDERSON LIMITED

DEFENDANT

Mr Alexander Robson, instructed by Messrs Mayfair Rise Solicitors for the Claimant.

Mr Sam Neaman, instructed by Messrs Bingham Mansfield Solicitors for the Defendant.

Keywords: Early Neutral Evaluation – ENE – Queen's Bench Division – Master – order - procedure

JUDGMENT

1. This brief decision concerns the use of Judicial Early Neutral Evaluation, in this case in the Queen's Bench Division before a Master.
2. By CPR rule 3.1(2)(m) in an appropriate case the court may provide an Early Neutral Evaluation (ENE) for the purposes of assisting the parties to settle the case. In this case, the facts of which I need only briefly spell out, the Claimant sues the Defendant on the basis, among other things, of an alleged wrongful termination of a contract for provision of phone based customer services. It claims to be entitled to payment on the basis of alleged (and disputed) terms as to the amount of damages payable in such circumstances and also in relation to rights to compensation under Regulations namely the Commercial Agents (Council Directive) Regulations 1993. The Defendant inter alia alleges the Claimant was in repudiatory breach of contract entitling it to terminate the relationship between the parties.

3. The case was transferred to this Division from the Business and Property Court and assigned to me. I raised with the parties whether they may be assisted by some form of Judicial Early Neutral Evaluation and if so on what aspects of the case. It appeared to me that there were four potential candidates for useful ENE namely (i) whether based on a sample of alleged breaches, there was merit in D's argument as to repudiatory breach, (ii) whether there was merit as to an argument raised as to oral variation of a written contract, (iii) whether there was merit as to an argument as to the existence of a separate oral contract and (iv) a short point as to the applicability of Reg. 8 of the above EU Regulation. The subject of ENE had in fact been canvassed at an earlier stage between the parties before my own suggestion.
4. For the avoidance of doubt nothing in this judgment in any way relates to confidential matters to be dealt with at the ENE appointment, which is listed before me on a future date, but I indicated to the parties that in view of the lack of current specific information in the QB Guide as to use of ENE before QB Masters it may assist if I supply my judgment as to the approach to be taken in this case. It may inform other litigants and I will supply a copy to the current author of the Queen's Bench Guide for her information and consideration.
5. The Chancery Guide, by contrast, contains a section on ENE in that court. In this decision I have set out the process which will be followed in this case and have endeavoured to tailor my approach to the circumstances applicable to litigation before QB Masters. Counsel on both sides were helpful in commenting on the content of the draft order which I have provided as a template annexed to this judgment (the ultimate form of order in this case is still being finalised as to its specific details).
6. Early Neutral Evaluation is a procedure which involves, in this instance, an independent party expressing an opinion about a dispute or parts of it. The evaluative nature of ENE means that positive or negative views as to merits are expressed, perhaps robustly, by the judge. It is therefore different from many forms of 'mediation' where the focus is facilitative. The process to be adopted for Judicial (or any other form) of ENE is not stated in the Civil Procedure Rules and it is intended that the approach can be tailored to the needs of any given case. Thus one may for example proceed wholly on the basis of written evidence and submissions or by way of written evidence and written argument supplemented at an oral hearing.
7. In the QBD, an ENE process may be useful for example where a view on merits is needed on the merits of points of law and construction (such as in this case whether Reg. 8 of the Regulations is likely to have been excluded by the wording of the contract) or whether alleged breaches if proved would likely amount to repudiatory breaches. Consideration may be given to ENE in respect of any or all issues in a case and may also be especially useful where the resolution of some key issues would encourage settlement of others, or where the trial time estimate and use of resources and costs would be significantly reduced if parts of the case are resolved as a result of ENE.
8. ENE is a confidential process. The judge dealing with the ENE will thereafter not (absent agreement) try the case or deal with contentious applications. It will therefore be the case that in this instance once I have dealt with ENE I will release the case to another Master who will not be aware of the views expressed at the ENE appointment. That Master may then try the case if appropriate or release to some other judge or court in the usual way, perhaps on a much reduced trial time estimate if any issues have been resolved as a result of the ENE.

9. In the Chancery Division the Guide indicates that the opinion of the judge will be provided informally and that it may be necessary for a hearing of half a day to take place. In my judgment in the Queen's Bench Division given the vast range of types of case and complexity handled by Masters it is a matter for the judge to decide the form and degree of informality or formality of the opinion given, and to consider an appropriate time estimate which may well be more than half a day depending on complexity and substance in a QB case.
10. The outcome of Judicial ENE is normally 'without prejudice' unless privilege is mutually waived and is normally not binding unless the parties agree. It is possible that agreed terms of ENE may be that the decision is binding only upon the happening of certain events, or binding only for a defined period such as where an issue is dealt with on an interim basis.
11. Papers considered at the ENE will be returned to the parties at the end and not retained in the court file so as to ensure that subsequent judges or the public will not access them.
12. I have set out below in the ANNEX a generic version of the order which I will make in this case (the final form will be determined once the parties have discussed matters) but with additions which may usefully be adapted to suit other cases so as to make this decision more useful to others considering ENE. In this particular case the ENE is to be heard for 1 day on the basis of succinct skeleton arguments and the issue of repudiation shall be dealt with on the basis of a small sample of particulars selected by the Defendant from its statement of case on that issue. The other issues may include those set out above and the parties will discuss the precise range of the ENE whilst remaining within the time estimate. The evidence relied on will be in writing and shall be the witness statements of the relevant witnesses as (by the date of the ENE) by then already served for the purposes of the trial, ie there are not to be specific separate statements produced only for the ENE. I have indicated that if any modest issues of procedure arise before the ENE I will be willing to deal with those on the basis of email submissions.
13. I have given permission for the skeletons in this case to address the substance of what the relevant party would say if given the opportunity to respond to the opponent's statements, rather than permission to file formal statements in response, so as to avoid any risk that the ENE process leads to a tailoring of one side's case by way of achieving sequential exchange where such has not been ordered in the claim itself.

MASTER MCCLLOUD

20/2/20

ANNEX

DRAFT ORDER for ENE – QB Masters

1. The parties shall exchange [skeleton arguments/written submissions] [no longer than Pages] by no later than 4pm on
2. The parties shall [serve upon/indicate to] each other the written evidence upon which they wish to rely for the purposes of ENE by 4pm on [...]
3. The parties shall agree a core bundle of documents for the Master which shall be lodged by 4pm on [...]

4. [The ENE appointment shall take place [in private] at on before Master with a time estimate of]
5. The non-binding opinion of the judge hearing the ENE will be provided in such form as the judge decides and may be given orally, or in writing, and with such degree of formality or informality as s/he decides. The opinion may be given issue by issue or as a whole. The opinion shall be without prejudice to the claim and the opinion shall remain confidential to the parties.
6. After the ENE is concluded the papers relating to it shall be removed by the parties and shall be confidential unless the parties agree otherwise. No non-party shall be entitled to obtain a transcript of the hearing.
7. The judge shall (unless agreed by the parties) thereafter have no further involvement with the case.