Neutral Citation Number: [2019] EWHC 1267 (Fam)

Case No: LS18P00657

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Sitting at Leeds Family Court on 22 June 2018 and at Manchester Civil Justice Centre on 17 and 19 July 2018

Date: 20/05/2019

Before:

THE HONOURABLE MRS JUSTICE PARKER

- -

Between:

PAULINE MAVIS PATRICIA LOMAX	**Claimant**
- and -	
STUART ANDREW LOMAX	**Defendant**

- -
- -

Mr Ian Mayes QC and Mr Christopher Buckingham (of counsel**)** (instructed by **KBL Solicitors**) for the **Claimant**
Mr Thomas Entwistle (of counsel) (instructed by **Raworths Solicitors**) for the **Defendant**

Hearing dates: 22 June 2018 (Leeds), and 17 July 2018 and 19 July 2018 (Manchester) by telephone

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE PARKER DBE

This judgment is being handed down in open court. It consists of 127 paragraphs and has been signed and dated by the judge

The Judge hereby gives leave for it to be reported.

Mrs Justice Parker:

1. The Claimant, Mrs Pauline Lomax, 'C', a widow, has commenced proceedings for provision out of the estate of her late husband pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ('the Inheritance Act'), issued in the Family Division of the High Court. The Defendant, Mr Stuart Lomax, 'D', her stepson, co-executor, and beneficiary, resists her application.

2. C seeks an Early Neutral Evaluation hearing ('ENE') or Financial Dispute Resolution hearing ('FDR'). D does not agree. Can I order that there be such a hearing (and by extension give directions for it) in the absence of consent pursuant to amended Civil Procedure Rule (CPR) 3.1 (2) (m)? This stark decision has proved more difficult than it may seem.

The proceedings

3. C was married to the deceased for 34 years. C and D are joint executors of the deceased's will, dated 23 December 2013. A suggestion that C would challenge his capacity and/or assert undue influence is not presently pursued. D says that substantial and sufficient provision has already been made for her by will.

4. The estate is worth about £5.5 M and held on trust with income to be paid to the laimant during her lifetime and thereafter the capital and income on a discretionary trust for a class of discretionary beneficiaries including D, his sister, the Deceased's grandchildren, and remoter issue.

5. Shares in a family company are held in three settlements, of which C contends two are family settlements. After distribution of the proceeds of sale of the personal shareholdings of inter alia C and D, a balance of approximately £50 M was paid into the three settlements, D and his wife being the only Trustees of two of these. It is asserted that they have distributed large amounts of funds to themselves. C asserts but D denies that there was delay in disclosing relevant documents until issue of these proceedings.

6. C seeks variation of those trusts as postnuptial settlements, asserting that this provides reasonable provision, since the Inheritance Act permits the court to make an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.

7. D's case is that C's claim has no possible merit - presumably on the basis that adequate provision has been made for her - and appears to be an abuse of legal process, and that 90% of the evidence so far filed is almost certainly irrelevant.

The directions appointment

8. A directions application came before me on 22 June 2015 whilst sitting at Leeds. C was represented by Mr Ian Mayes QC and Mr Buckingham and D by Mr Entwistle.

9. Inheritance Act proceedings have much in common with financial remedy proceedings. There are similarities in the relief that can be ordered: there is an element of discretion in the award; they usually concern family assets; there is often a family or domestic relationship; and they can give rise to deep emotions.

10. Mr Mayes counsel stresses that spousal claims in Inheritance Act claims are to be approached similarly to applications for financial provision in divorce (this may be tempered by the position of other beneficiaries under a will or intestacy; or conversely enhanced as there is no other spouse for whom to provide).

11. However, Inheritance Act proceedings are governed by the Civil Procedure Rules ('CPR') and not by the Family Procedure Rules 2010 (FPR). CPR rules 57.14 to 16 apply, pursuant to which the claim form has been issued in accordance with Part 8.

12. Mr Mayes told me that there is little authority on variation of settlements in Inheritance Act cases and none of comparable value. He raised the possibility of an ENE or FDR hearing.

13. The bulk of the hearing on 22 June was taken up by argument/ discussion as to what was an appropriate form of ADR, and FDR was referred to as well as ENE. It was common ground that since the Family Procedure Rules 2010 ('the FPR') do not apply to Inheritance Act proceedings the FDR process prescribed in the FPR only applies in Financial Remedy applications.

14. Mr Mayes explained in court that ENE is now provided for in the amended Civil Procedure Rules CPR Rule 3.1. (2) (m), and that provision for an FDR process is contained in the Chancery Guide, but volunteered and accepted that there was no power for the court to order an ENE or FDR. He told me that D's legal team had been informed of C's proposal for ENE by a High Court Judge on 10 May 2018.

15. Although I am told that a Note prepared on behalf of C, dated 20 June 2018, had been provided to the court (as well as a case summary). I have been provided with both Note and skeleton argument since the circulation of this judgment in draft. The contents do not add to the information which I had already considered in oral argument and do not cause me to change my conclusions.

16. The Note expanded on the reason for seeking an ENE or FDR, reproduced Rule 3.1 (2) (m), and referred to the decision of Norris J in **Seals and Seals v Williams [2015] EWHC 1829 (Chancery), [2015] 4 Costs LO 423.** I am certain, and so is my clerk, that I did not see it before the hearing commenced. I recall struggling to read into the case without a reading list (which the skeleton argument contained) and remarking on this. I cannot now recall, and neither counsel can tell me, whether I was referred to the Note or its attachments in court. I have recorded nothing to that effect in my notebook. Having been recently provided with the Note after circulation of this judgment in draft its contents were unfamiliar. I would certainly have remembered being referred to Ilott v Mitson (No 2) [2017] 2 WLR 979 (having heard one of the appeals at High Court Level), and probably also P v G [2006) 1 FLR 431- and I do not. Also, I recall that I did not see in court the Rule itself, either a copy, or in a document. (I cannot remember whether Seals was referred to at the hearing).

17. So, I am inclined to think that I did not see the Note on behalf of C or the other material with which it was sent. I may or may not have seen Mr Entwistle's skeleton argument. It may be in the light the of the concession on behalf of C that it was not considered relevant for me consider **Seals** nor the amended CPR Rule 3. (2) 1. (m).

18. Counsel agree however that I was not provided with the commentary on the amended Rule in the White Book (there was no White Book in the court room at Leeds Family Court, and no request was made that one be provided); now relied on by C. I was not told that there was any relevant commentary in any publication either in favour of or against the proposition that an ENE might be ordered without the consent of both parties.

19. I cannot recall whether a draft directions order had been produced. I am certain that no draft was provided which referred to ENE or specified the terms of reference of any ENE; and counsel do not dissent from this. The remainder of the directions were essentially agreed but their timing depended on what steps were to be taken as to ADR.

20. Mr Mayes asked me to give an indication as to whether I considered that an ENE would be beneficial or not. Mr Entwistle had not addressed in his skeleton argument C's case that the case was best suited to a form of ENE. This may or may not have been because he thought there was no point, in view of the concession therein that there was no power to order it. In oral submissions he asked me not to interfere by expressing a view; he argued that no transaction was impugned, and that ENE/FDR would lead to a substantial increase in costs because of the extent of the disclosure required. He told me that D was prepared to submit to mediation and proposed that it should take place over summer/ autumn 2018.

21. I ruled that I should give an indication as part of my case management powers and in general conformity with the overriding objective.

22. I said that this was a case which cried out for a judge-led, legally-focussed, authoritative process; but that I could not order such in the light of Mr Mayes's concession. I also said words to the effect that a form of mediation focussed on conciliating the relationship and finding common ground was unlikely to be helpful concentrating on the contested issues. I have not seen a transcript of what I said, and do not need to for the purposes of the current evaluation.

23. The resulting draft order thus provided for: -

    a. Case management and trial by a High Court Judge

    b. Permission to C to amend her details of claim and re-serve including on other discretionary beneficiaries

    c. Disclosure and inspection and filing of evidence, listing for PTR, and trial, bundling, filing of counsels' documents etc.

    d. Stay of the proceedings over the summer vacation to seek mediation.

Further developments

24. On 29 June 2018 whilst I was sitting in London my clerk received a letter by email from Mr Mayes and Mr Buckingham stating that they had not appreciated that the note in the White Book to the amended Rule CPR R3. 1 (2) (m) stated in terms that ENE could be ordered without party consent and thus provided strong support for the view that a judge could make an order compelling the parties to submit to a judge-led ENE. Mr Entwistle, also in writing transmitted electronically, (i) resisted my revisiting my original decision and (ii) maintained his original position.

25. I was referred to the Rules, the White Book and other commentaries, and to *Seals*. Both counsel submitted that these materials supported their respective cases.

26. I directed that the matter come before me whilst I was sitting in Manchester. The parties attended by telephone on 17 July 2018. The first conference call slot booked was too short and was terminated abruptly by the provider; the telephone hearing needed to be re-fixed when submissions were concluded. There was no time for judgment, on which in any event I wanted to reflect.

27. At first a question arose as to whether the order that I had made on 22 June 2018; whilst approved by me, had been sealed. It became clear that it most probably had not, and that remains the case. Whether it had or not is not decisive.

28. I need to consider, in the following order:

    a. whether I can revisit my decision

    b. if so, whether I should in principle prefer the White Book commentary which states that an ENE process can be ordered non-consensually or the Chancery Guide which states that it cannot; and if so, do I agree with it.

    c. whether a consensual mediation process is preferable to a judge-led intervention for other reasons.

29. Before turning to the important question of whether I can (i) revisit my decision at all and (ii) whether I should do so, it is necessary to set out the background to the amendment to CPR R 3. 1 (2) (m).

30. The Rules were amended to reflect the decision of Norris J in **Seals.**

31. Seals also concerned Inheritance Act proceedings. The parties agreed and proposed that there be an order for an Early Neutral Evaluation; for which the CPR did not then provide.

32. Norris J commented on the acrimony engendered by the proceedings, that the parties were in danger of becoming entrenched; and that mediation had largely stalled because of differing perceptions of the issues in dispute and the strength of the respective arguments. (I comment that the same features were apparent here - although of course mediation had not been attempted).

33. In Seals the parties had agreed that the case would be furthered by ENE and asked the judge to endorse that by court order.

34. Norris J said that "*The advantage …over mediation is that a judge will evaluate the parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of this case and an experienced evaluation of the strength of the evidence available to deploy in addressing these legal issues. The process is particularly useful where the parties have very differing views of the prospects of success and perhaps an inadequate understanding of the risks of litigation itself*."

35. He commented that although FDR is familiar in the family court and is endorsed in the Chancery Modernisation review as a valuable tool, "*its precise foundation is unclear*". He said "*The FPR provide an answer in the context of family proceedings, CPR 3.1 (2) (m) provides an answer in…civil proceedings, since it empowers the court to 'take any 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'".*

36. He continued

"6. *… the Rules themselves could not supply any jurisdiction otherwise lacking. However… the expression of provisional views - with a view to assisting the parties - reduces the areas and the general scope of the argument, and is an inherent part of the judicial function both in civil litigation and criminal proceedings.*

"7. *The expression of provisional views in the course of a hearing is not dependent in any way on the consent of the parties. It is simply part of the judge's inherent jurisdiction to control proceedings… The expression of views about the ultimate outcome of a case at a hearing especially convened for that purpose is slightly different…. If the parties ask the judge to express provisional views in particular under the Inheritance (Provision for Family and Dependants) Act 1975 ('the Inheritance Act'), issued in the Family Division of the High Court, or upon the judge's overall impression of the case so far, then it is part of the judicial function for the judge to accede to doing so - though plainly the judge is not bound to do so whenever the parties request."*

"9. *The proposed directions have been carefully crafted so as to afford the settlement judge the opportunity to make non-binding recommendations as to the outcome and to state short reasons … without in any sense attempting a provisional judgment. Indeed the settlement judge will not be further involved … the directions also provide that, in the light of the recommendations, the parties may agree a consent order.*

"10. *What will bind them is their consent to the making of the order - not the outcome of the neutral evaluation process itself. Both in the Birmingham District Registry and in the District Registry such neutral evaluations are being adopted and the move is warmly to be welcomed*."

37. In consequence the words which I have highlighted in Rule 3.1 (2) (m) were inserted by the Civil Procedure (Amendment No 4) Rules and came into force on October 1, 2015.

38. Rule 3.1 (2) (m) now reads:

> 'The court (under its general powers of case management) 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. *(Emphasis added)'.*

Can a judge revisit a decision?

39. The first question I must decide is whether I am entitled to set aside my decision.

40. It may be easier to succeed in such an application if an order has not been perfected by being sealed. Enquiries made during one of the telephone hearings established that it had not. I assume that is correct but that may be wrong. For the reasons set out below I do not consider that it makes any difference.

41. CPR 3.1. (7) provides that

> 'A power of the court under these rules includes the power to vary or revoke an order.'

42. Mr Entwistle relies upon: -

- **In Re L and another (Children) Preliminary Finding: Power to Reverse)** [2013] UKSC 8 ('**Re L**')
- **Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)** [2012] EWCA 518 ('**Tibbles**')
- Gosvenor London limited v Aygun Aluminium UK Limited [2018] EWHC 277 (TCC) ('**Gosvenor**').

43. In **Re L** CPR 3.1(7) was not engaged. No order had been made, but a finding of fact pursuant to s 31 Children Act 1989 had been made in public law Care Proceedings, but the judge then changed her mind as to her conclusions. The decision –one way or the other- did not lead to a final order, but it was a final determination on the facts. In my view, it was therefore a decision more conclusive than a case management decision- certainly compared with an application of this type which must be capable of being renewed.

44. In **Re L** the Supreme Court ruled that the power for a judge to revisit a decision before the order was drawn up and perfected by being sealed was not limited to exceptional circumstances and the overriding consideration was to deal with cases justly. Relevant factors would include the extent to which parties had acted on the decision to their detriment, and on the other a mistake by the court or failure to draw to the attention of the court to a plainly relevant fact or point of law, or new facts.

45. Baroness Hale said at [37] '…there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is appropriate to vary the order.' and at [38] 'Clearly that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised 'judicially and not capriciously' and in accordance with the overriding objective."

46. On the assumption that the order had been sealed, and in any event, Mr Entwistle relied on the decision of the Court of Appeal in **Tibbles**.

47. In **Tibbles** the Court of Appeal held that that considerations of finality, the undesirability of allowing a 'second bite at the cherry', and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion pursuant to CPR R 3.1.(7) only where there was (i) material change in circumstances (ii) facts had been innocently or otherwise misstated (iii) manifest mistake by the judge and altogether required something out of the ordinary to lead to reconsideration of an order. However, that an exhaustive definition of what might constitute circumstances might arise should be avoided: including misstatement as well as omission (page 2602, B-D).

48. At p. 2603 Rix LJ stated that many cases whether there was a need to revisit an order arise without dispute: for instance, where there is a 'liberty to apply', and there may be a need to revisit an order where there is an 'ongoing situation'; and there 'might be room' for prompt recourse to the court to 'deal with a matter' 'overlooked in genuine error', and this would not be a second consideration but to consider something for the first time. At page 2601 G-H Rix LJ expressed the view that failure to draw attention to a point would not necessarily be an insuperable burden.

49. D also relies on the general statement of principle set out by Fraser J in Gosvenor at para 52 that: 'very careful consideration must be given to all such applications, and litigants should not be given the opportunity to have a second bite of the cherry'. I accept that formulation - but it all depends on the context.

50. Since I heard the argument in this case I have been referred in another case to the decision of Mr Justice McDonald in **N v J and G v H** [2017] EWHC 2752 (Fam). The decision sought to be set aside was a final return order of children internationally under the inherent jurisdiction. MacDonald J was referred to and surveyed the relevant jurisprudence, which included Tibbles and Re L, but extended to other relevant authority in civil proceedings to which I had not been referred, considered also by Mostyn J in **Re F** [2015] 1 WLR 4375.

51. In **Roult v North-West Strategic Health Authority** [2010] 1 WLR 487 the Court of Appeal considered an application to set aside a final order and observed that CPR Rule 3.1 (7) is not expressly confined to procedural orders. Hughes LJ (as he then was) observed at [15] and [16] that in case management decisions the grounds for setting aside would generally be on the basis of (i) erroneous information or (ii) subsequent events, but if either were established it did not necessarily follow that this justified an application to set aside an order; especially a final determination.

52. MacDonald J's summary of the principles at [66] with which I respectfully agree, was that: -

"*…the authorities all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise… (but) normally only (a) where there has been a material change of circumstances…, or (b) where the facts on which the original decision were made were (innocently or otherwise) misstated. The Court of Appeal in Tibbles further noted that it would be dangerous to treat the statement of these primary circumstances as though it were a statute, and that is room for debate in any particular case as to whether and to what extent a misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts.*"

53. I do not have an open-ended discretion to set aside my decision even if there is no perfected order; and in my view, there is an overlap between the two types of case. It may depend on the type of decision that has been made and in what circumstances.

54. The decision here is in an importantly different context from the judge's factual/evaluative determination in Re L. I had made a decision with direct consequences which had been intended to be drawn up in an order. But it is also significant that this was a case management decision. I do not read the Rules as confining the approach to the court to a one-off application for some form of ADR-circumstances may arise to change the landscape. Furthermore, if following my decision, the Rule had been clarified to establish that consent was immaterial it seems obvious that C would have been able to renew her application. Such a clarification would be arguably a relevant change in circumstances, and arguably merely a statement of existing fact (since opinion can be a relevant fact) and not a change in circumstances.

55. I regard many of the factors outlined in as relevant here to the overriding question of justice. Promptitude is of particular relevance. Promptitude bears on the extent to which the parties have altered their positions, as may also the lack of perfection of the order, (not as a matter of black letter law but as a matter of fact upon which the parties can normally rely); and the prejudice to one or other party and the extent to which the decision has been relied on, and the consequences, financial or otherwise. An asserted manifest mistake by the judge – and it should not matter whether the mistake is that of the judge or of counsel leading the judge into error; misstatement or omission; or where something has been overlooked in genuine error- opens the door to injustice. The reasons for advancing a different case which the judge is asked to consider for the first time must also be important and justify setting aside the order.

56. Both parties had a duty to refer me to the White Book commentary, and to the contrary view expressed in the Chancery Guide and Commercial and other Guides, of which I assume both were unaware. The guidance conflicts. The consequence is that there was a mutual failure to draw my attention to important statements of principle from high-quality sources which bore directly on my adjudication, and which although not binding are of considerable persuasive weight, and which I am now considering for the first time. To that extent this is not a 'second bite at the cherry'. At the application stage it cannot be necessary for the argument to be overwhelming and conclusive; the question is whether the material should be put before the judge to decide. Its absence leads to a potentially flawed decision which requires to be reconsidered.

57. The application fulfils the 'promptitude' test.

58. In this case neither party has acted to their detriment in what is a case management decision, and although to make an order for ENE might disturb the timetable the court has power to do this in any event. Costs consequences can be dealt with separately.

59. It is no answer for Mr Entwistle to state that this was not a case of simple error, because this is a question of principle and there are finely balanced arguments to be decided.

60. I see no reason why a frank error which can be corrected without revisiting any other of the other components of the decision cannot be revisited particularly in respect of the actual case management decision here.

61. The only material difference in formulation between the approaches in **Re** L and **Tibbles** is that the Supreme Court said that a setting aside was not limited to 'exceptional circumstances' where the order had not been sealed, whereas the Court of Appeal in Tibbles stated that to set aside required 'something out of the ordinary' if it had. The two formulations are not identical and seem to be illustrative value judgments rather than a principle to be applied, or fact to be established.

62. I conclude that whatever the status of the order my original decision was flawed by the failure to draw my attention to a point of importance, and it is just, as well as expedient, to consider this question afresh.

The substantive arguments as to interpretation

63. It is necessary for me to set out the whole of rule 3.1 (2) (m) to do justice to Mr Entwistle's argument as to the way in which it is formulated. It is headed "**The court's general powers of management**". It reads:

> (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
>
> (2) Except where these Rules provide otherwise, the court may –
>
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
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> (b) adjourn or bring forward a hearing;
>
> (bb) require that any proceedings in the High Court be heard by a Divisional Court of the High Court;
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> (c) require a party or a party's legal representative to attend the court;
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> (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;

(f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(g) consolidate proceedings;

(h) try two or more claims on the same occasion;

(i) direct a separate trial of any issue;

(j) decide the order in which issues are to be tried;

(k) exclude an issue from consideration;

(l) dismiss or give judgment on a claim after a decision on a preliminary issue;

(ll) order any party to file and exchange a costs budget;

(m) 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. *(emphasis added).*

The commentary

64. The commentary on CPR 3.1 (2) (m) Rule in the White Book upon which Mr Mayes relies reads:

"*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. However, if all parties seek ENE, the court will usually give directions for it unless it decides that ENE would not be appropriate in that case (see, for instance, the guidance given in the Chancery Guide 2016*…)" (emphasis added).

65. Mr Entwistle correctly observes that what Norris J in fact said was (and I apologise for this repetition)

"[7.] *The expression of provisional views in the course of the hearing 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… The expression of views about the ultimate outcome of a case at a hearing specially convened for that purpose is slightly different. …if the parties ask a judge to express provisional views on a hypothesis or upon the judge's overall impression of the case so far, then it is part of the judicial function for the judge to accede to doing so- although the judge is not bound to do so whenever the parties request.*

And "[8.] *In the instant case, the parties accept that if there is Early Neutral Evaluation by a High Court Judge…than it would be part of the judge's judicial*

function in enabling the parties to resolve the dispute and in discharge of the obligation to abide by the overriding objective."

66. Mr Entwistle is right that the White Book commentary elides two concepts and does not reproduce the words of the judgment. (I note that it does not purport to be a direct quotation). He is also right that Norris J was considering the power of the court to hold an ENE where there was agreement to it. The court plainly had a duty to consider whether it should do so: it involved the use of court resources and the overriding objective was engaged.

67. Norris J's view that the court has power to give a provisional view in circumstances where it must be axiomatic that one party or perhaps both (or more in a multi-party case) may not have been asked for or have given consent may support the view that there can be a non-consensual referral to ENE, but that is not determinative. It is also arguable, as Mr Entwistle submits, that by stating this was 'slightly different' from a case where the parties jointly requested the parties to express provisional views on a particular hypothesis, where it would be part of the judicial function to accede to assist the parties in dispute resolution complying with the overriding objective, Norris J can only have meant that consent is essential to such a process. But I am not clear that that is what Norris J meant, and nor can I see a compelling reason for this to be so. After all the overriding objective and the desirability of resolution apply across the board.

68. The question of consent was not relevant to the decision. It decision was predicated on the fact of agreement; but it is going too far to say that the language and approach of Seals makes it clear that ENE (where there was no rule then in existence) is predicated on consent. More importantly it is a different question from what the rule makers intended.

69. Upon submitting their suggested corrections in response to this draft judgment, Mr Mayes and Mr Buckingham also sent me a copy of the judgment of Norris J at [2018] EWHC 3228 (Ch) delivered after the argument before me had concluded. Some Members of Lloyds of London, and LIC, a Belgian company to whom Lloyds intended to transfer business (a 'ring fenced transfer scheme') in the event of the UK leaving the EU, had issued a claim form under Part VII of the Financial Services and Markets Act 2000 for the court to sanction such a scheme.

70. In the context of discussion of his jurisdiction to make an order approving the scheme when the memorandum of understanding reached recorded that the order would not subsequently bind the court, Norris J said: -

'[29] The Court plainly has an inherent jurisdiction to express non- binding views…' (and he then referred to **Seals** and CPR 3.1. (2) (m)). 'The Court can also, for the purposes of case management, express provisional views to assist in case preparation, without restricting the scope or nature of any final order…'.

71. Mr Mayes and Mr Buckingham suggest that 'The court may find the statement above to be of some assistance' with reference to my conclusion that Norris J did not expressly state that reference to ENE could only be by consent.

72. I agree with Mr Entwistle however that nothing said by Norris J in the Lloyds/ Financial Services Act application of 2018 touches on consent. Furthermore, the context is a mandatory referral of an agreed transfer scheme to the Court for approval, so this authority does not assist me.

73. The Chancery Guide (dated 2017, postdating the amendment to the CPR) at 18.8 states that an "essential feature, apart from being consensual, is that unless the parties agree otherwise, the opinion is non-binding and the process is without prejudice (it being treated as part of a negotiation between the parties)."

74. At 18.16 it describes the Chancery FDR process which it describes as 'a form of ADR' – not, I note, as a form of ENE. 18.17 states at bullet point 1 'The Court will not direct Chancery FDR unless all the parties agree to it.' At G.2 3. it states that ENE may be provided by third parties but that "…in appropriate cases and with the agreement of all parties the Court will itself provide an ENE".

75. I note that the specimen forms of order attached to the Chancery Guide in respect of Chancery FDR have several similarities to the standard FDR order under the FPR and I suspect was modelled on it; including that the parties can be ordered to attend court and provide written material – all of which can be ordered under other CPR Rules. This is an interesting but not determinative inclusion in an order which the authors consider can only be made by consent. The authors may well have taken the view was that consent to the referral entails consent to the making of court orders to facilitate it.

76. Civil Procedure News 2015 notes that Briggs LJ (as he then was) in the Chancery Modernisation Review: Final Report (2015) recommended the development of judge-led ENE as an 'option' in Chancery proceedings.

77. Civil Procedure News 2015 comments that "There is a general assumption that its use depends on party consent" and that there is a "lack of clarity regarding the basis on which a court could, either with or without party consent, direct an ENE …". It noted that the Technology and Construction Court and the Admiralty and Commercial Court Guides state that ENE "may be carried out by the court with the consent of the parties."

78. The authors of Civil Procedure News comment also that the amended rule is not restricted to the Chancery Division. The authors stated that in **Seals** Norris J had rightly concluded that the wide jurisdiction provided by R 3.1 (2) (m) … 'to manage cases and further the overriding objective' provided such power. They comment that under the inherent jurisdiction "the power to order ENE and for the judge to conduct it was part of the judicial function and did not depend on party consent." They conclude that the amendment to Rule 3.1 (2) (m) "codifies Norris J's statement from Seal… to make specific reference to the power to order an ENE. The power to do so is not constrained by the need to secure party consent". They stated that "in appropriate cases and with the agreement of all parties (*emphasis added***)** the court will provide a non-binding …ENE of a dispute or of particular issues (see CPR rule 3 1. (2) (m))." Civil Procedure News comments that the amended Rule is not limited to Chancery proceedings, and that a clear and common approach to ENE could be "facilitated ... through an ENE Practice Direction. Until that occurs, guidance as to

the proper approach to directing an ENE … save as to the requirement for party consent, could usefully be drawn from the TCC and Admiralty and Commercial Court Guides". It is not clear to me why it is stated that consent is required and the commentary is not consistent.

79. I bear in mind also as submitted by Mr Mayes, that Part 2 of the White Book at 12-44 (p2934) states that Court Guides are not sources of law, although they may assist in interpreting ambiguity.

80. Although I should pay this material close attention, it is not binding on me. With the greatest respect to the authors and originators of all this important guidance, it is obvious that there are strongly held and arguable views both ways.

81. Although Norris J did not say in **Seals** that he could not make an order for ENE in the absence of consent, he did not say that consent was a pre-requisite either.

82. The reference to Norris J's reasoning in both the White Book commentary and Civil Procedure news does not address this point, and I accept Mr Entwistle's submission to the extent that it is unclear whether the framers of the amended rule considered, assuming that they did indeed 'codify' his decision, that it was intended to give the court power to override the parties' lack of consent.

83. I must form my own view on the construction of the rules. I observe also that no specific arguments are advanced in any of the material as to why the authors take the view that the procedure must be consensually adopted, or otherwise.

84. I note there is no reference in the Rules to the procedure under the FPR/ FDR - and that is understandable if, as I conclude, ENE and FPR are not necessarily the same creatures. As the commentaries observe, ENE governs a whole range of assistance with dispute resolution, whereas the Financial Remedy FDR has the specific purpose of advising the parties as to a settlement figure or range of figures, although the court may also express its opinion as to legal analysis, or evidence, as steps within that advice.

85. Mr Mayes relies on the absence of any reference in the Rule to the necessity for consent, Mr Entwistle points to the language of CPR 3. 1. (2) (m) which he submits must lead to the conclusion that the parties' consent is required: for example, the court is empowered to 'hear' an ENE, but not to direct it: and that this is to be done for 'helping the parties settle the case'.

86. Mr Entwistle is however wrong that an FDR can only take place with consent, as examination of the FPR demonstrates (see below). So, a ruling that there can be a non-consensual order for an ENE process in non-family proceedings would not create an anomaly between the CPR and FPR/FDR regimes. On occasion I have been urged by a party to bypass the Family Division FDR process and list the case for trial. There is no doubt that I have power to do so (I believe that I have always declined) but it has never been suggested that a party is entitled to opt out of the FDR process.

87. On the other hand, although I have heard of the use of an ENE procedure anecdotally I have never been asked to make an order for an ENE and have never encountered such an order in family proceedings. I understand that in the Family Division children's cases are a fertile source of ENE. I know of no compulsive orders for ENE in such a context, and am certain that such would be resisted.

88. I note that the Red Book records that an FDR style hearing has been recommended to assist in the determination of a preliminary issue (Shield v Shield [2014] EWHC 23 (Fam) 2014 2 FLR 1422 FD but that the judge commented that it could not be ordered (Mr Nicholas Francis QC, as he then was). The intervention proposed there seems to have been more akin to ENE than FDR. That approach supports the view that the court does not have free-for-all powers to order ENE/FDR.

89. Based on the Chancery Guide, the ENE and FDR processes there described are not identical, although they may overlap. It would be possible to extend Norris J's argument in Seals to say that FDR is available as part of the court's case management powers, but the rules do not say so - indeed Rule 3 is silent as to FDR, which seems to have been adopted as a matter of practice, as it was originally in the family courts. This all strengthens my perception that the ENE is different from an FDR. Does this matter? Should I place any reliance on the absence of any reference to FDR in the amended Rule 3? Should I take the view that the inherent jurisdiction can be used to order an FDR in furtherance of the overriding objective? If so, and any intervention can be justified on that ground, it is pertinent to ask why the framers of the Rules thought it necessary to provide an amendment to 'codify' Norris J's decision.

90. Mr Entwistle submitted to me that in civil litigation the parties must have the choice as to whether they attempt to resolve their differences or not; that no party can be compelled to mediate, and that any inroad can only be by statute and not by rule. He cited no authority for that proposition, which is not referred to in the commentaries.

91. I have read further into the White Book commentary on ADR during the lengthy process of reflection on what I find to be a difficult point.

92. My research establishes that in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 the Court of Appeal stated that a court could not order unwilling parties to refer their dispute to mediation. Dyson LJ (as he then was) and Ward LJ stated: "It seems to us that to oblige truly unwilling parties to mediation would be to impose an unacceptable obstruction on their right of access to the court".

93. In *Wright v Wright* [2013] EWCA Civ 576 Ward LJ stated that he may been wrong in Halsey to have been persuaded that to order the parties to mediate would contravene Article 6 of the European Convention on Human Rights; but he did not form a clear conclusion; and the point was not in any event before him.

94. The FPR 2010 provisions require the parties to attend an information session about mediation before progressing children proceedings under the 1989 Act (although the Rules do not compel the parties to engage in mediation); and I do not believe that this provision has ever been considered to breach the rule in Halsey – if it is a Rule.

95. Norris J in *Bradley v Heslin* [2014] EWHC 3267 (Ch) said "*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. The Court cannot oblige truly unwilling parties to submit their disputes to mediation; but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice".

96. But I need not venture into the consideration of whether the parties can be forced into mediation. ENE is not strictly a process of mediation, although FDR comes closer to it. As the Chancery Guide states at 18.7 2 ENE is a simple concept which involves an "independent party, with relevant expertise, expressing an opinion about a dispute or an element of it. It is unlike mediation because a mediator acts primarily as a facilitator. Although the mediator may undertake some 'reality testing', there is no requirement to do so. The person undertaking ENE provides an opinion based on the information provided by the parties and may do so without receiving oral submissions …".

Analogy with the FPR/FDR

97. From the perspective of a Family specialist, with experience of the Financial Dispute Resolution process as practitioner and judge, and knowing how successful it can be even in the most intractable cases, the argument advanced by Mr Entwistle that parties must be free to decide whether to submit to ADR may be open to challenge in the modern world and in pursuance of the overriding objective.

98. The FDR model has proved outstandingly successful overall in financial remedy proceedings in divorce and related financial proceedings, topping an 85 percent success rate; some would say much higher. Even if settlement does not take place at the FDR itself seeds are often sown which lead to an agreed solution later. FDR is appropriate in all types of dispute; from the most complex cases with vast wealth, requiring massive presentation for FDR, to the small value case where the issues are often even more difficult to resolve. FDR judges have no difficulty in assessing the risks and advantages likely to accrue to both or all parties of various litigation approaches, and in advising on appropriate settlement, which may be in specific or more general terms.

99. The FDR process in the Family Division was introduced by way of a pilot programme in 1996 and incorporated in the then Family Proceedings Rules by The Family Proceedings Amendment Rules1991 (SI 1999/3491).

100. I have a faint recollection that there was, early in the process, a challenge in the Court of Appeal to the propriety of the Court ordering a Financial Remedy FDR. My researches have failed to identify the decision. Whatever may have been the foundation of the FDR then, the concept of and the procedure for FDR is now firmly established within the FPR.

101. Paragraph (3) of the Practice Direction (Ancillary Relief Procedure) [2000] 1 FLR 997 recorded at para (1) that the procedure was "intended to reduce delay, facilitate

settlements, limit costs incurred by parties and provide the court with greater and more effective control over the proceedings."

102. The Practice Direction specified that anything said in the FDR were not to be admissible save in respect of the trial of an offence allegedly committed at the appointment or in very exceptional circumstances. (3.2).

103. By R 9.15 (4) if the court decides that a referral to a FDR appointment is appropriate it 'must direct' that the case be referred to a FDR appointment.

104. The language of R 9.17 is mandatory: the parties "must file" documents; "must use their best endeavours"; "Both parties must attend the FDR appointment unless the court directs otherwise".

105. The Rules provide that "At any stage:

i) a party may apply for further directions or a FDR appointment;

ii) the court may give further directions or direct that the parties attend a FDR appointment."

106. It is implicit that the application may be opposed, and that the opposition may be overridden, in that one party only may apply.

107. The FDR was described in the report produced by the Family Justice Council as "*an innovative development, designed to enable the parties, with the assistance of the judge, to identify and seek to resolve the real issues in the case, at a time and in a manner intended to limit the overall financial cost for the parties, to reduce delay in resolving the case and to lessen the emotional and practical strain on the family of continuing litigation. Over ten years on, the procedure continues to provide a timely and effective means of resolving many financial disputes.*" He commented at P 14, para 52 that "*Practitioners should bear in mind, and lay clients must be made aware, that failure to comply with rules of court/directions/disclosure leading to the FDR being ineffective may well result in applications for wasted costs*". (I have made such an order myself, and was not appealed, where there had been complete failure to engage.)

108. As the report of the Family Justice Council Best practice guidance records, the FDR process was introduced informally on a trial basis in 1996. It was not formally incorporated into the revised rules governing ancillary relief proceedings until 2000.

109. I see no material distinction between the formulation "meeting for discussion and negotiation" (the FPR) and "helping the parties to settle the case" (the CPR).

110. The conditions attaching to an FDR are replicated in the draft ENE/ FDR orders. By CPR Rule 39 (2) hearings may in general be in public, but there are number of exceptions relevant to an ENE/ FDR process including that the court considers this to be necessary, in the interests of justice, or necessary to protect the interests of a party or witness, and a hearing in open court would defeat the purpose of ENE. It is axiomatic, and the Chancery Guidance provides that an ENE/FDR is confidential, and that the judge conducting the intervention must play no further part in the case.

Conclusion

111. I have decided, on the finest of fine balances, that I cannot order an ENE or FDR. I have found this decision extremely difficult. I may well be wrong, and overly cautious.

112. My reasons are as follows:

113. The CPR in totality contains powers enough to compel the parties to participate in a court process by filing documentation and most importantly to attend. But that is not conclusive as to whether the Rule creates a compulsory process. It is not helpful for me to speculate what Norris J would have ordered had there been no consent in the absence of sanction by the Rules. It is necessary for me to look beyond Norris J's judgment at the Rules and what they in totality provide.

114. I cannot be clear that they are intended to provide for a non-consensual evaluation, however attracted I am by that proposition and tempted to impose it.

115. The fact that there is no reference to consent cuts both ways and does not assist me.

116. The commentary on Rule 1.4 (1) (e) (ADR) at 1.4.11 refers to "facilitating" ADR, as opposed to "ordering the use of early neutral evaluation ", which implies but does not specifically state that a compulsory approach is envisaged. But it is not clear nor conclusive and could be restricted to a consensual process.

117. Tempting though it would be to say that this is no different from the FPR/FDR process, the FPR Rules make it quite explicit what the court's powers are and that this is not an elective process. The CPR does not. I accept Mr Entwistle's submission that the language of Rule 3 itself in totality is directed towards facilitation rather than compulsion.

118. Also, the FDR process is extremely specific and focussed on a particular outcome, as opposed to the more diffuse guidance entailed in an ENE where it will probably take a consensual effort by the parties to define what issues need to be resolved. I cannot ignore the lack of reference to the FDR process within the amended Rules. In my view FDR cannot be considered just as a sub-species of ENE.

119. My overall conclusion is that the current Rules are insufficiently precise in their formulation for me either to conclude, or be confident that the Rule makers intended, that the judge is permitted to give directions which lead to a non-consensual ENE; or that the term ENE in the amended Rule is intended to govern FDR as well.

120. I do not consider that I can use the catch-all of the inherent jurisdiction to make an order which is not governed by the Rules.

121. However, I reject Mr Entwistle's submission that D's present unwillingness to participate is a reason for this process not to take place; as the FDR experience demonstrates.

122. It is also not a bar that an ENE process might require disclosure, perhaps even in-depth disclosure, whereas mediation does not; and that this may be a time-consuming and expensive process and involve third parties. Indeed, this may well be

a case where no effective negotiation can take place without disclosure, as the history of the litigation may illustrate.

123. My conclusion does not disturb my view that this is a case which cries, indeed screams out, for a robust judge-led process to focus on the legal and factual issues presented by this case; and perhaps even craft a proposed solution for the parties to consider. Mediation (even by a legally trained mediator, if one could be found to assist where the issues are specialised, is unlikely to approach the issues in an authoritative way, as Norris J said in Seals.

124. I urge the Rules committee (a) to clarify whether ENE is to be considered compulsory and (b) to give consideration to providing a clear route to compulsory FDR in appropriate civil proceedings a prime example in my view being Inheritance Act litigation. The arguments for the court having power to do so are strong and the experience in the Family Division of court-controlled intervention presents a very favourable picture.

125. I observe also a judge will, as Norris J said in Seals, be permitted to express a view as to outcome or guidance at any further hearing without the parties' consent.

126. I approve the order as originally drafted with date amendments.

127. I apologise for the time it has taken for me to arrive at this decision where I have havered between conclusions and reflected lengthily on them.

Judgment ends