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## JUDICIAL EARLY NEUTRAL EVALUATION

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### Abstract

In the light of the recent judgment in *Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* (2020) the author provides a brief overview of some of the history and principles behind early neutral evaluation (ENE) and in particular ‘judicial’ ENE as understood in the *Telecom* judgment (reproduced in this edition).

**Keywords:** judicial early neutral evaluation, legal costs, litigation, alternative dispute resolution, mediation

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### [A] WHY EARLY NEUTRAL EVALUATION?

Any lawyer who has practised in the courts of a jurisdiction such as any of those within the UK will probably have experienced the type of dispute where, in the end, whatever the outcome of the case on its merits, the reality is that the dispute is driven by the legal costs of the litigation. In a system where in general the ‘loser pays’, there can be a tipping point where the parties have become so committed to the litigation in terms of what they have paid—or owe—their lawyers that they simply must proceed and hope to win and obtain an order for costs against a (hopefully solvent) opponent. Of course, if the opponent itself becomes insolvent due to its own legal bills then that may be a forlorn hope.

One can, as happened in the (only slightly) fictional *Jarndyce v Jarndyce* dispute in Dickens’ *Bleak House*, also see the unjust situation where quite simply the money runs out in mid-dispute, and nothing good ever comes of it at least from the parties’ perspective. Without funding, the lawyers stop; without assets sufficient to meet costs and judgment, the justice of a case can simply slip away. The ghost of Dickens’ *Bleak House* and his fictional Chancery case clanks its chains even today in the

UK's jurisdictions as if Dickens had merged the spirit of Christmas Past with the Lord Chancellor's foggy courtroom. Along the way during any case—as in *Jarndyce* itself—there may be rulings, judgments, all contributing in their own ways to the corpus of the Common Law but, as Mr Kenge himself says in that novel, that benefit to the public has to be paid for in money or money's worth, by someone:

that on the numerous difficulties, contingencies, masterly fictions, and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect, Mr. Woodcourt, high intellect. For many years, the ... flower of the bar, and ... the matured autumnal fruits of the woollack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great grasp, it must be paid for in money or money's worth, sir. (Charles Dickens, *Bleak House* (1853: chapter 65)).

## [B] COSTS INCUR COSTS: A FURTHER INCENTIVE TO RESOLVE DISPUTES

Even if the fuel for the engines of the case does not run out—in other words even if matters come to their conclusion with a judgment and an order for costs payable to one side or the other—one then sees the usual order that the loser shall pay the costs of the case 'to be assessed if not agreed' (Civil Procedure Rules 44-47), which triggers a whole new process.

If the loser does not agree the amount then yet further litigation takes place, this time commenced in the Costs Court—typically the Senior Courts Costs Office where specialist judges hear cases (with advocates, solicitors, bundles and all the common accoutrements of litigation) in which the subject of the new dispute is 'how much the loser pays' and where the evidence in the claim is the detritus of the court files, the advices, the attendances and conferences within the concluded case: in short the paper and digital pile of material spanning perhaps several years, pertaining to each and every detail of the case as it progressed and the time and work put in by the lawyers acting for the ultimate winner. The author has from time to time acted as a judge in just such cases and in earlier days as advocate in them.

Such costs cases themselves can span days or weeks, can involve witnesses and cross-examination, and judgments and appeals.

Then there is the question of who pays *the costs of the costs* of the dispute and sometimes also a need for an evaluation of the amount of costs of that.

One is reminded of the rhyme by Jonathan Swift (1733) in *On Poetry: A Rhapsody*:

So, naturalists observe, a flea  
Hath smaller fleas that on him prey;  
And these have smaller still to bite 'em;  
And so proceed *ad infinitum*.

It is no wonder then that for all the value which decided court cases and judgments may add to our Common Law, given that cases must be paid for, the courts have long since begun to stress that every effort must be made to control legal costs, and a part of that is to encourage early settlement.

We have seen the introduction of costs budgeting (a subject outside the scope of this paper but worthy of consideration in itself by legal scholars) whereby costs are to some extent predetermined and more predictable, perhaps with the risk of 'crystal-ball gazing' given that the course of a case is never certain at the start. We also see, and this is where the point of this paper comes in, a succession of cases in which courts have stressed time and time again that parties must try to resolve disputes without going to court, or if they must go to court they should seek to resolve matters before the claim has gone too far and, potentially, the level of legal expense has become the core driver of what takes place.

In *Egan v Motor Services (Bath) Ltd* (2007: paragraph 53), Ward LJ said:

'This case cries out for mediation', should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations that, I accept, may well have taken place in this case, though, for obvious reasons, we have not sought to enquire further into that at this stage. Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent.

The theme continued in *Halsey v Milton Keynes General NHS Trust* (2004: paragraph 11) where Dyson LJ said:

the value and importance of ADR have been established within a remarkably short time. All litigators should now routinely consider with their clients whether their disputes are suitable for ADR.

Since then, numerous decisions have stressed—and nowadays frequently court orders state—that an unreasonable refusal to engage in alternative dispute resolution can result in the court making adverse costs orders against the party at fault. Application of such penalties has varied but the message at least has been clear, often underpinned by orders whereby if a party refuses to engage in dispute resolution it must provide a witness statement explaining why.

## [C] SOME HISTORY AND PRINCIPLES OF EARLY NEUTRAL EVALUATION

‘Financial dispute resolution’ appointments have for many years (since 1996 on a pilot basis and formally incorporated in family court rules currently in their 2010 edition) been available and a key component in divorce cases, under rule 9.17 of the Family Procedure Rules which specify that: ‘The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation.’

Those rules provide that the judge hearing the FDR must thereafter have no further involvement in the case and will have access to copies of all offers and proposals made by both sides in the case (which would otherwise be confidential and which are returned to the parties at the end if requested).

The UK civil courts were rather slower to take on board any official form of robust evaluative process by judges outside trial (albeit that judges nonetheless would sometimes express a view—asked or unasked—if they were not going to have any further involvement in trying the case, a role which historically was fulfilled by the frank and straightforward approach for which the masters of the High Court were known).

Much of the case law thus refers more or less expressly to *mediation* for dispute resolution. There is not a great volume of academic scholarship in this jurisdiction on ENE let alone more specifically ENE where it is undertaken by a Judge (judicial ENE). It is, however, notable that in his *Civil Courts Structure Review: Final Report* (2016) Lord Justice Briggs recommended the creation of an online court (a subject about which I wrote in ‘Suing in Cyberspace’: McCloud 2017).

A key stage in that anticipated new court is *conciliation* at which a court officer—not a judge—considers the case and makes recommendations as to how it might best be resolved in terms of what type(s) of alternative dispute resolution may be useful for the parties to consider. (In daily court life, judges or at least this judge often does much the same if it appears likely to help.) Briggs LJ's stance was that if the method adopted is to be ENE then at least within his conception of the Online Court that should be a matter done by a judge, though clearly, in this jurisdiction it is always, quite separately, open to parties to agree to some form of evaluation by an external third party such as an expert and to agree to be bound by that decision.

There has been consideration in reported case decisions relating to judicial ENE. In *Seals and Another v Williams* (2015) the court said that:

it is highly commendable that the legal representatives for the parties have proposed as a way forward, and the court has been invited to undertake, an Early Neutral Evaluation of the case. The advantage of such a process 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.

Not long thereafter, the Civil Procedure Rules applicable to cases in England and Wales were amended so that the function of the court in engaging in the expression of provisional opinions about the merits of a case was placed on a more formal footing by way of an amendment to rule 3.1(2)(m) which in its current form says that the court may:<sup>1</sup>

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.

In *Lomax v Lomax* (2019: 29) (per Moylan J) the court held that the court may make an order for ENE whether or not the parties request it. It also approved what was said by Norris J in *Bradley v Heslin* (2014: 24):

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<sup>1</sup> ENE had in fact by then already found its way into court guides by specific courts, but its basis was uncertain, per Norris J in *Seals* (2015): 'The FDR process is familiar in the Family Courts. Although the process endorsed in the Chancery Modernisation Review as a valuable tool (see paragraphs 5.23 to 5.30) and features in the Guides both of the Commercial Court (see paragraph G.2.1 – G.2.5 of the Commercial Court Guide) and the Technology and Construction Court (see paragraph 7.5 of the TCC Guide) its precise foundation is unclear.'

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.

It is against the backdrop of the amended CPR rule and the above decisions which we see the judgment in *Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* (2020) which is reproduced at the end of this Note. It is a decision of the present author but plainly with cooperation from the parties (not a case where ENE had to be imposed albeit it was raised by the court as a suggestion), and it sets out some views as to how one may progress ENE in the particular Division in which I sit as a judge.

It has drawn some attention but is little more than a restatement of some basic principles, albeit in something of a procedural vacuum in formal terms for the court in which I sit.

It is self-explanatory in terms of suggestions as to how to go about arranging judicial ENE such as the one envisaged in that case. The brevity of the relevant court rule is a blessing inasmuch as the parties and the judge may shape the process as necessary for the specifics of the case, the resources available and the likelihood that ENE may help to resolve 'logjam' issues in a claim.

Key points of note which arise from the above judgment applicable to this jurisdiction are that:

- ◇ judicial ENE is confidential unless the parties agree otherwise;
- ◇ it is non-binding unless agreed otherwise;
- ◇ the judge hearing the ENE will not hear the ultimate trial;
- ◇ the ENE may cover some or all issues in the case;
- ◇ the procedure is as formal or informal as the judge directs, taking into account the parties' views; and
- ◇ the case papers lodged for the ENE will be returned to the parties at the conclusion of the ENE process so as to avoid the private process from being accessible publicly.

According to Norman Chow and Kamal Halili (2014: 138), court-based ENE was (as at the end of 2014) available in 22 US states in civil claims. Judge Wayne Brazil, an (perhaps *the*) acknowledged US pioneer of ENE as a judge in California in his useful piece in 2007 (Brazil 2007: 10; and see also Brazil 2013), discusses situations where (in his jurisdiction in the USA but of much relevance to the UK) ENE may be preferable to other methods such as mediation. He proposes several questions to help parties to form

a view (and I suggest that such questions may also be of use to any judge—I have added some comments of my own to the questions he proposes):

- 1** *How important to achieving your goals at this juncture is a credible evaluation of the merits of the case from an impartial and knowledgeable source?*—This speaks for itself: evaluation by a judge can be a weighty indication as to how some other judge may decide issues if the matter goes to trial.
- 2** *How important at this stage is focusing and expediting the case development process?*—This perhaps translates in terms of the UK into the extent to which resolving parts of a case may have structural effects useful to saving money and court resources.
- 3** *How important to achieving your objectives at this juncture is face-to-face interaction with the other side?*—The fact that ENE can take place with all parties present can be a very useful way to help the lawyers advise clients credibly, especially where clients may be reluctant to take bad news from them rather than the judge. It can also give rise to surprising opportunities for parties to talk via lawyers outside the door of the court and find helpful ways forward.
- 4** *How important is it for your client (or an opposing litigant) to feel he or she has had something like his or her day in court?*—This is perhaps especially relevant in personal litigation where one must never forget the role which psychology and pride can play. Sometimes people are prepared to change position if they can do so without loss of face, and that can be assisted by a tactful and fair evaluation by a neutral party, and not ‘because the other side dictated it’.

Similarly, the valuable review by Chow and Halili (2014) offers the following as examples of ‘distinctive features’ of ENE: that it is confidential; that it encourages settlement discussions even if the ENE itself does not resolve the case; that it is specifically ‘evaluative’ as to the merits; and typically, that it happens early in the case. To Chow and Halili also there may be a sense of ‘empowerment’ of the litigants (similar to Brazil’s observation about the sense of ‘having one’s day in court’) and a clarification of the issues in dispute.

## [D] CYBER-ENE?

Briggs LJ envisaged ENE being done by judges exclusively in his Online Court proposals. But what if one considers the future and the rapid rate of development of legal technology?

In a world with increasing focus on online dispute resolution, if one pauses for a moment to consider relatively circumscribed specialist fields,

such as the adjudication of disputes relating to dissolution of partnerships or relatively technical commercial disputes over contracts which have boilerplate clauses, one may foresee that technology may be capable of providing a form of ‘dispute resolution co-pilot’ for neutral evaluation purposes so as to assist with consistency of resolution.

Following the important case of *Cape Intermediate Holdings v Dring* (2019), where the UK Supreme Court approved certain principles relating to open justice from the first instance decision, the court has jurisdiction to allow public access to court documents subject to certain constraints and burdens of proof, beyond the categories spelled out in court rules.

This opens up the potential for a greater use of the detail of legal disputes for the purposes of informing digital systems seeking to model judicial reasoning and forecast case outcomes based on real, fine-grained data and not simply the rarefied language of judgments themselves. If deep learning systems could be trained in specialist areas of work to provide assistance to dispute resolution specialists, and perhaps judges too, and to propose solutions and weigh up prospects given the detail of known prior decisions and crucially the facts and evidence which underlay them, it may become possible for judicial or non-judicial ENE to be facilitated by systems which provide processed digital insight into the case law based on real and not sparse detail seen through the lens only of a judgment.

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Family Procedure Rules 2010

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*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

*Lomax v Lomax* [2019] EWCA Civ 1467

*Seals and Another v Williams* [2015] EWHC 1829 (Ch)

*Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* [2020]  
EWHC 368 (QB)

[2020] EWHC 368 (QB)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION

MASTER VICTORIA MCCLOUD

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 [...]

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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 in 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.