Neutral Citation Number: [2020] EWHC 841 (Fam).

Case No: FD19F00106

IN THE HIGH COURT
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2020

Before:

Ms Clare Ambrose sitting as a Deputy High Court Judge

- -

Between:

R **Applicant**

- and –

K **Respondent**

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- -

Mr James Ewins QC and Mr William Tyzack (instructed by Levison Meltzer Pigott) for the Applicant
Mr David Walden Smith (instructed by Nockolds) for the Respondent

Hearing date: 28 January 2020

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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.

.....

MS CLARE AMBROSE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Deputy High Court Judge Ambrose:

1. This is the court's decision on a claim made by the applicant to challenge an arbitration award relating to disputes over financial arrangements between him and the respondent following their divorce. For convenience I refer to them as H and W.

2. H seeks an order that an arbitration award ("the Award") dated 23 October 2019 made by Mr Howard Shaw QC be set aside under s68 or s69 of the Arbitration Act 1996 ("the 1996 Act"), and that a hearing be listed for 2 days in the Family Court in Chelmsford for determination of W's financial remedy claim. H also asks the Court to exercise its discretion under s25 of the Matrimonial Causes Act 1973 ("the 1973 Act") not to approve a consent order in the terms of the Award.

3. W is asking that these applications be dismissed and that an order be made reflecting the terms of the Award.

4. The case raises some questions of general principle as to the grounds upon which parties can challenge an arbitration award dealing with financial disputes following divorce, and upon which a court can refuse to make an order in terms of the Award. Issues also arise relating to the correct procedure to adopt and whether parties must raise their complaints first with the arbitrator. The specific issues relate to whether:
   I permission to appeal is to be given under s69 of the 1996 Act?
   II the Award should be set aside for serious irregularity under s68 of the 1996 Act?
   III an order under s25 of the 1973 Act should be made in the terms of the Award?

Factual background

5. The following facts are based on the findings in the Award. These basic findings were not challenged.

6. The parties started cohabiting in 2003 and married in 2005. They have one son who is now 11 years old. In June 2018 W petitioned for divorce and in August 2018 they agreed to share care of their son equally. He goes to a prep school and it is planned that he will go to the attached secondary school which is also fee paying.

7. H was born in 1968 and is 51, he has always worked in the financial industry and has been very successful. He is now CFO and partner of a well-known city brokerage business. It is a challenging job involving 55-70 hours work per

week. He commutes into the city by road. His remuneration agreements are relatively complex, including both a salary and a company draw and also benefits such as a loan and deferred bonus. His current net income was found to be £175k per annum.

8. W was born in 1974 and is 45. Her career is in marketing. She stopped working for 4 years after their son was born, went back part time and then built up to full time, with her highest income at £40k gross per annum. Her last full-time job came to an end in 2018. Since then she has freelanced but that work also came to an end. At the time of the hearing she was out of work. The arbitrator placed her earning capacity at £35k gross per annum within 2 to 3 months. There was an issue as to whether he assessed her future earning capacity.

9. H had owned properties prior to the marriage, and one of these was the parties' first home. The parties sold the former matrimonial home in 2018 and the net proceeds of sale were £319,000. Beyond that lump sum, the main assets were the parties' pensions, with H having much greater pensions. H also has units from his employer (or partnership), some of which will vest over two years and certain (the largest portion being around US$70,000 worth) will be monetised when he leaves his job as "a good leaver".

Procedural background

10. W sought a court order for financial relief and the matter went through the court process (including an FDR). A two-day final hearing was listed to commence on 19 September 2019 but the parties were informed on around 12 September 2019 that the hearing was adjourned due to judicial unavailability.

11. Accordingly, it was at very short notice that the parties signed an arbitration agreement dated 13 September 2019 on the ARB1 FS form provided under the Family Law Arbitration Financial Scheme ("the IFLA Scheme") naming Howard Shaw QC as arbitrator.

12. The ARB1 FS form has a notice stating in bold that:

"IMPORTANT
Parties should be aware that:
…
- *Arbitration is a process whose outcome is generally final. There are very limited bases for raising a challenge or appeal and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award."*

13. It also provides that those signing confirm the following:

"6.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:

(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

(b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require;

(c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;

(d) insofar as the award provides for continuing payments to be made by one party to or for the benefit of a child or children, a subsequent assessment by the Child Maintenance Service (or its successor) in relation to the same child or children.

6.5 If and so far as the subject matter of the award makes it necessary, we will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award. (In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.) We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made.

6.6 We understand and agree that although the Rules provide for each party generally, to bear an equal share of the arbitrator's fees and expenses (see Art 14.4(a)), if any party fails to pay their share, then the arbitrator may initially require payment of the full amount from any other party, leaving it to them to recover from the defaulting party."

14. The arbitration agreement identified the following issues: "*financial remedy issues, namely (1) division of net proceeds of FMH (2) term and quantum of maintenance (3) pension sharing orders (4) whether arbitrators fees should be shared"*.

15. In the arbitration the parties had put their respective open positions on these main substantive issues as follows:
    (1) Lump sum:
        H suggested 50/50 split of the lump sum, less a deduction of £10,000 for W.

W asked for 100%.

(2) Maintenance:
H suggested stepped spousal maintenance, initially £1147 pcm until 2023, then £574pcm until the son finishes school.
W asked for £4k per month for life or until the end of their son's tertiary education.

(3) Pensions:
H proposed sharing contributions made during the marriage.
W asked to equalise current values, with a sharing order for 33.75% of H's largest fund.

16. A final oral hearing took place before the arbitrator on 19 and 20 September 2019. Both parties were represented by counsel and gave evidence. Skeleton arguments were served in advance. Following the hearing the arbitrator circulated a draft award to counsel, and it was requested that it could be passed also to instructing solicitors. H's counsel made a two-page Request for Clarification/ Explanation ("the Request for Clarification") of 14 substantial items dealt with in the Award. The matters upon which clarification/ explanation were sought were largely the same as the complaints raised in the application made to this court, although they did not overlap entirely. An example of the 14 items is as follows:

"*At paragraph 52 it is suggested that H can build up his pension. Please could further explanation or calculations be provided as to how this could happen, in light of (a) the maintenance obligations; (b) the school fee obligations; (c) the need to re-build capital in light of the division of capital".*

17. On 23 October 2019 the arbitrator declined to provide clarification on grounds that "*The request for clarification of certain aspects of the Award goes far beyond what is permissible and therefore I decline to do so".* He then produced his award in the same terms as the draft on 23 October 2019 except it had slightly higher figures for W's income needs and the periodical payments.

18. The basic thrust of the arbitrator's conclusions in the Award can be summarised as follows:

a) It was common ground that this was a needs case.
b) As the son is spending exactly 50% of his time with each parent it is important that he does not notice a significant disparity in the standard of the two homes and the style of living enjoyed by each parent. It would be wrong for him to feel comfortable taking his friends to his father's house but embarrassed to take them to his mother's house.
c) He determined the parties' assets, liabilities, income, pensions, expenditure and housing needs under separate headings.

d) He concluded that both parties' housing needs would be met by a house costing around £350,000.
e) He decided that *"in order to meet W's liabilities of £47,623 and her housing need she will need to receive a disproportionate amount of the net sale proceeds".* W was to take £298,000 of the proceeds of £319,000 from the former matrimonial home.
f) Although W was out of work, she had an earning capacity of £35,000 gross and would within a short period of time be able to find a mortgage of £100,000. With this and the lump sum she would be able to cover her debts of £48,000 and meet her housing needs.
g) In view of H's net income, he would have no trouble whatsoever in obtaining a substantial mortgage, even assuming his gross income was only £200,000. If only his gross basic draw was utilised he would still be able to achieve a mortgage far in excess of the £350,000 that he would need to buy a house.
h) H was to pay periodical payments of £3,500 per month until the son leaves tertiary education. "*This is because I have found that W could earn £35,000 gross in a relatively short period of time".* The periodical payments order would mean that she is able to meet her expenditure which he found to be £60,000 per annum, leaving her with £10,000 per annum to purchase capital items.
i) The arbitrator concluded that *"Based upon H's net income there will be ample funds for him to meet his outstanding liabilities, school fees, pay a substantial mortgage and pay into his pension. I have taken into account his obligation to pay maintenance."*
j) On pensions he concluded that as this was "*very much a needs case*", there should be no separate treatment of that part of H's pension that was accrued prior to the marriage. He adopted the view of the single joint expert report, namely that the simplest way to implement a sharing order for equal income is to share 35.94% of H's large Aegon UK pension with W.
k) H was ordered to pay the arbitrator's fees but no other order was made as to costs.

19. H issued his application on 22 November 2019. The matter was listed before me for a directions hearing on 27 January 2020 and I made directions for the substantive hearing to be heard the following day on 28 January 2020.

20. In the bundle I was provided with the award, the parties' s25 statements and also some correspondence with the arbitrator as well as some of the Form E material. I allowed some further evidence to be admitted in the substantive hearing, including the skeleton arguments from the arbitration and the evidence from mortgage brokers. At the directions hearing H's counsel proposed that I deal with the application for permission to appeal under s69 and I did so but indicated that detailed reasons would be given in a single judgment.

I Should permission to appeal be given under s69 of the 1996 Act?

21. Section 69 of the 1996 Act deals with challenging an award on a point of law arising out of the award. Such challenge involves an initial requirement for leave (also termed permission) to appeal followed by a substantive hearing on the merits of the appeal. Section 69 provides as follows:

"*(3) Leave to appeal shall be given only if the court is satisfied-*

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award-

i) the decision of the tribunal on the question is obviously wrong, or

ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required."

22. In seeking permission to appeal H had set out a lengthy list of where the arbitrator had erred in law, in particular it was alleged that the arbitrator had:

- Failed to compute the parties' resources;
- Failed to identify the percentage division of the net effect of capital and pension award, and failed to apply a proper cross-check of the fairness of the Award;
- Failed to give effect to statutory considerations set out in s25 of the 1973 Act;
    - W's income and earning capacity in the foreseeable future including any increase in that capacity which it would be reasonable to expect her to take to acquire and any consequent step-down in maintenance;
    - the nature of H's income and division between basic salary, bonus, loan and distribution;
    - H's age, nature of employment and the length of time he may be able to continue working at this level;

  - the extent to which H would be able to recover his capital position through income before retirement;
  - H's housing needs, as to the specific location needs and the by virtue of his shared care commitments towards the son coupled with his commitments requiring him to commute;
- Failed to give adequate consideration to H's contribution of his non-matrimonial property;
- Failed to give reasons to explain;
  - how he had taken into account non-matrimonial assets and pension;
  - why H was ordered to pay the arbitrator's fees.
- Failed in his obligation to achieve a fair outcome and made an award outside the wide discretion conferred upon the decision maker and one that no reasonable observer would consider fair.

23. Section 69(4) of the 1996 Act requires a party to identify the question of law raised (and this is also required in the practice direction). In his claim form H had failed to identify the question of law upon which permission was sought. I allowed H's counsel to formulate the questions raised and a single question was put forward (offered in two slightly different formulations):
    a) How and in what quantum should the tribunal make financial provision consequent to the divorce?
    b) Did the arbitrator conduct the discretionary exercise under the 1973 Act so as to achieve a fair outcome in accordance with case law?

24. H argued that the tribunal's decision was obviously wrong and its unfairness "*leaps off the page*". Mr Ewins QC's primary submission was that the appeal raised a pure question of law, although he accepted that the authorities looked at the matter as a mixed question of fact and law, where the test is whether the award was one which no reasonable arbitrator could reach when applying the law properly.

25. Further, H submitted that the appeal raised a matter of general public importance and the decision was open to serious doubt. Either way H suggested that permission should be granted.

26. Mr Ewins QC argued that the question was a matter of general public importance because there is uncertainty as to the test to be applied for permission to appeal in the context of IFLA Scheme arbitrations. Further, it was submitted that the test for granting permission to appeal in an IFLA Scheme arbitration should be the same as the test applying to an appeal from a judge's decision under Part 30 of the Family Procedure Rules. There were said to be strong public policy reasons why the tests should be aligned for arbitrations under the IFLA Scheme.
    a) IFLA arbitration is often used by litigants as an alternative dispute resolution mechanism to relieve the burden from the public justice system and this is

to be encouraged. It will be less attractive if the test for challenge is more demanding than that applying to a judgment of the court under FPR Part 30. A higher threshold would create a "private justice system" where parties contract into a substantively different regime.

b) Different considerations apply in family cases to those developed in the sphere of commercial arbitration where parties deliberately contract into a decision-making process which is faster, cheaper and more certain than litigation. This is of an entirely different nature to financial determinations under the 1973 Act.

c) The approach adopted in commercial cases is less well-suited to a dispute whose statutory footing is predicated on a quasi-inquisitorial jurisdiction involving the exercise of a broad discretionary evaluation of fairness as the overall objective.

W's case

27. W's position was that this was a needs case and the Award fairly reflected the parties' needs. There was no error that would have justified an appeal, even if the decision had been that of a district judge. There was certainly no error that "*leaped off the page"* or could be treated as a "*major intellectual aberration"* so as to justify refusing to make an order under s25 or giving permission to appeal (see e.g. *Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd* [2019] EWHC 704 (Ch)). The arbitrator had correctly exercised his discretion and if the decision had been made by a district judge then there would have been no right of appeal so that even if the test was the same as FPR Part 30 the appeal should be dismissed.

28. W also argued that H was barred from challenging the Award because he had not made an application for a correction under s57 of the 1996 Act.

What approach applies in deciding an application for permission under s69 in a family case?

29. I reject H's submission that the test for permission to appeal in an IFLA case should depart from the usual statutory test and instead be that applied to a judge's decision under FPR Part 30. It had little support in the authorities or the wording of the parties' arbitration agreement or the broader public policy arguments put forward by H.

a) The ARB 1FS form makes clear that the 1996 Act applies and that parties must be aware that challenge will only be allowed in exceptional cases. If the IFLA or parties wanted to depart from the usual requirement for permission to appeal then they could have dispensed with it under s69(2(a) (this is a feature in some standard form contracts).

b) The fact that the choice to arbitrate may have been made at short notice to avoid an adjournment due to judicial unavailability does not change the nature of the agreement. To the contrary it is consistent with the

parties' positive choice to refer the matter to their chosen arbitrator, bring the dispute to an efficient conclusion and avoid more court hearings. There is no obvious reason to suggest that in family disputes finality should be a lesser priority and the parties should be placed in the same position as if they had litigated.

c) There is a public policy interest in the fair division of assets following the end of a marriage. However, that is reflected in the court's overriding jurisdiction under s25 of the 1973 Act (discussed below) which provides a safeguard. The test under the 1996 Act does not need to be adjusted.

d) The discretionary and public policy nature of decisions under s25 of the 1973 Act does not justify adjusting the test for challenge. An award can be set aside under the 1996 Act if it is contrary to public policy. Arbitrators are required to apply the law (including the priority given to the welfare of children of the family) and principles of natural justice, and can adopt an inquisitorial approach.

e) Parties who have chosen to arbitrate have not simply contracted out the hearing to an arbitrator. They are contracting into a different regime although the same substantive law applies to the allocation of assets. The ARB 1FS form highlights the broad consequences regarding finality. Whether more guidance would be helpful or encourage IFLA users is a matter for IFLA. Consumers commonly enter arbitration agreements without advice as to the distinctions between the appeal processes.

f) The statutory framework under the 1996 Act reflects the consensual nature of the process (for example the parties control who decides the case) and a preference for finality. I doubt it would be attractive to IFLA users (or their lawyers) if a separate or "mix and match" approach was adopted in family cases drawing from both the 1996 regime and that applying to appeals under FPR Part 30. Even if it might reassure some it would create substantial uncertainty.

g) The existing test is not designed or suited solely for commercial cases. Arbitration is used also in the context of consumer, partnership and employment disputes where broad evaluations of fairness and reasonableness are critical to the outcome.

Was the question of law one of general public importance?

30. The decision that the arbitrator had to make on the question raised was a very common one: namely the fair distribution of finances under s25 of the 1973 Act where the parties' needs exceed their assets. This involves a very important principle of law but the complaints raised by H were not novel or complex issues that could be of wider importance (to the contrary H's case was that the correct approach was well established). For the purpose of permission to appeal, the correct application of s25 to these parties' specific circumstances was a "one-off" case as opposed to a question of general public importance that would

provide guidance in other cases. Most questions of mixed fact and law will be one-off in this sense.

31. The question of general public importance that H relied on was a separate one (set out above) as to how a judge should approach an application for permission to appeal where the award is a decision on finances following a divorce made under the ILFA scheme.

32. Accordingly, I do not accept that the Award raised a question of law of general public importance. Under s69(3) permission is only available if H can show that the arbitrator was obviously wrong on the question raised.

Was the arbitrator obviously wrong on the question of law raised?

33. H correctly accepted that a decision under s25 is discretionary and there will be a range of right answers. Outside that range there will be wrong answers. Where a decision is within the range of right answers it is not for an appeal court to substitute its own discretion. This would be the approach to an appeal under FPR Part 30.

34. For a judge deciding whether to grant permission to appeal under section 69 on a question requiring an exercise of discretion the test is essentially the same. H accepted that a first instance tribunal has a wide discretion in accordance with *Piglowska v Piglowski* [1999] 2 FLR 763 where Lord Hoffmann laid down the firm rule for an appellate court, namely that:

"reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

35. The test is similar under section 69 of the 1996 Act. In accordance with *The Nema* [1982] AC 724, 744 the court will not intervene in a mixed question of fact and law unless it can be shown that *"the arbitrator misdirected himself in point of law, or (ii) the decision was such that no reasonable arbitrator could reach".*

36. Similarly, in approaching an appeal under s69 (and s68) it is trite law that the court should read the award as a whole in a fair and reasonable way rather than engaging in minute textual analysis in order to find fault with it. The same approach applies to a judgment by a district judge. Here at the outset the arbitrator had correctly identified the principles of law to be applied stating:

"*I have to apply s25 of the Matrimonial Causes Act 1973. I must have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of the child. I must have regard to the factors set out in the Act at Section 25(2). I must also consider the matters set out in section 25A. Following White v White [200] 2 FLR 918 the statutory objective in all cases is fairness. Insofar as there is to be a departure from equality, there has to be a good reason for doing so."*

37. Having stated what he considered to be the applicable law, the arbitrator had gone on to deal with the relevant considerations under clearly laid out headings in a 16-page award. The building blocks for the award were obvious. The award was easy to navigate and he had kept his reasons on the issues concise. Neither party could have had any real difficulty in understanding the reasoning. It is doubtful that parties want or expect a lengthy investigation of every legal point, or each aspect of the evidence. This is not required from a judge (see *Piglowska v Piglowski,* and *F (Children), Re* [2016] EWCA Civ 546 [22-23]) and an arbitrator is not expected to do better.

38. I can understand that H may have wanted to know more as to why his evidence and submissions had not been accepted. However, an arbitrator, like a judge, does not have to set out every piece of evidence, argument and legal authority that he takes into account. On most points of criticism, the answer was obvious and implicit, and the real criticism was as to the factual conclusion.

39. The arbitrator was criticised for not giving sufficient consideration to various aspects of s25. However, it was not necessary for the arbitrator to set out every sub-paragraph or the "statutory steer" in s25A, and address it separately. It was similarly not necessary, as a matter of law, for the arbitrator to provide a balance sheet or calculate the percentage split of the capital assets or do a cross-check of fairness. Emphasis was placed on the fact that the main capital asset had been split 98% to W and 2% to H (since W had been given £298,000 of the net proceeds of around £319,000). It was said that this "*leaped off the page".* However, this was a needs case where there was a very limited pool of available assets and a marked disparity in income. The arbitrator had expressly stated that W would need a disproportionate share of the equity. He also stated that in a needs case it would be necessary to depart from equality (this was in the context of the pension but the point did not need to be made repeatedly).

40. H raised a number of other areas where it was said that the arbitrator had erred in law in failing to give consideration to relevant matters. For example, it was suggested that he had erred in law in not considering H's age (51) and the nature of H's income and the precariousness of his employment. This was unfair since the arbitrator had looked carefully at H's career history and had highlighted how demanding and onerous his job was. It was not H's case that he could not find

another job. To the contrary, it was his positive case that, in light of the challenges he faced in his current job, if he changed job his gross earning capacity would be around £200,000pa. It was not necessary for the arbitrator to state that he had taken into account that H may not be able or willing to keep a city job until 67 (not least since the maintenance obligations would end when H was 61, and school fees when he was 58).

41. It was suggested that the arbitrator had made an error of law in treating H's income as plain salary. Quite apart from whether this was an error of law, it was an unfair criticism. The arbitrator assessed in detail how H's income was made up of different constituent parts depending on different considerations, and he assessed how H would obtain a mortgage on his base draw. This also took account of H's case as to his income if he lost his current job. Further, the criticism disclosed no error of law since the assessment of earning capacity and income is essentially a question of fact: there is no legal rule requiring city jobs to be regarded differently to others, or that a bonus is to be excluded from consideration or treated in a specific way.

42. On the oral application for permission H's counsel went into each of the various complaints at length and effectively re-opened the argument and even re-opened the evidence, asking me to look at the skeleton arguments in the arbitration, the mortgage advisors' opinions and factual matters that had not been expressly addressed in the award. I was even asked to recompute the parties' competing income needs, by taking into account their various outgoings. The advocacy would have been attractive if I were re-hearing the matter. However, such argument is not appropriate or helpful in the context of an application for permission to appeal (which should ordinarily be decided without a hearing under s69(5)). First, the question of law must arise from the award itself. Secondly, any attempt to re-open factual findings or persuade the court to substitute its views for that of the arbitrator on the facts, or otherwise to go behind the award, is impermissible and suggests the application must fail.

43. It is not necessary for me to address these arguments in any detail because that is not the nature of the exercise on a decision to give permission to appeal. (Most points were also raised in the s68 application. It was for this reason that I allowed the argument.)

44. It was said that the arbitrator had erred in law by failing to give adequate consideration to W's future earning capacity. However, it was clear on the face of the award that he had the s25 factors and s25A in mind and assessed W's earning capacity for that purpose. He referred to the evidence as to her qualifications, CV, experience, past job opportunities, past income and efforts to find a job (paragraphs 16, 42, 43 of the award) and concluded that a reasonable income for her to receive would be £35,000 gross although it would

take her a while to find a job. He later assessed maintenance on the basis that she could earn that amount in a relatively short period of time (paragraph 68).

45. It was unnecessary for the arbitrator to explain that his assessment of her earning capacity related not only to when she would find a job in the near future but also to the future more generally. On the facts found it was also unnecessary for him to explain that the term of maintenance was only such as was sufficient to enable her to adjust to financial independence, or to give an explanation as to why a step-down in maintenance was not required. The issues and the authorities relating to the length of maintenance may have been argued at length but the arbitrator did not have to rehearse those points. His approach would have been obvious to anyone reading the award. His findings of fact made clear that W was experienced in her field, and had an established track record in the workplace, but her progress was relatively flat and she had not been able to keep a long-term job. There was no basis to suggest that he had ignored some obvious step or career progression that would raise her earning capacity. H's arguments on her ability to earn at a substantially higher level appeared speculative whereas the arbitrator had fairly based his conclusion on actual experience. The arbitrator's conclusion on her flat future earning capacity was unsurprising and easy to understand.

46. Similarly, his conclusions in not incorporating a step-down were also wholly consistent with his unchallenged starting point that it was important for the parties' son that there should not be a significant disparity in the parents' style of living.

47. As regards H's housing needs: the arbitrator had accepted H's case that he required a house worth around £350,000 (H had put forward a range of £350-375,000) so it was, at first sight, difficult to see how his case on housing needs had not been properly taken account of. H had made a positive case that the parties had equal housing needs. Again, at first sight, it was difficult to fault the arbitrator's conclusion that their housing needs were equal. Further, the arbitrator's conclusion that there should not be a disparity in housing in the interests of their son was not challenged. The point appeared to be that the arbitrator had not correctly assessed the relative housing budgets because H needed to live within reach of the M11 (and the school) in order to enable him both to drop his son at school and also to travel to work in central London by road. Accordingly, he would necessarily have to spend more to meet his housing need than W, who could live in the same sort of house but within a 20-mile radius of the school. Accordingly, the submission was effectively that her housing budget should be £50,000 less than his because she did not have to commute to London.

48. Before me, it was submitted (more than once) that the logistics of H's commute were a significant consideration. The same point was also made to the arbitrator. There was no substantial basis for concluding that he must have overlooked or ignored the evidence. The arbitrator had the benefit of assessing

the particulars of houses that were put forward by both parties and the competing locations. It was not wholly surprising that the arbitrator did not comment on the logistics of H's commute or the various properties or make a finding that W and their son should live up to 20 miles away from the school. It was not necessary for the arbitrator to address these points and explain his approach.

49. The arbitrator was criticised on grounds that he had failed to evaluate what was required as a deposit and how H would find a deposit, and had accordingly failed to make an award that enabled H to house himself – this was relied on as an error of law under s69 and also as a serious irregularity under s68.

50. The criticism was largely based on an assertion that H could not obtain a mortgage for £350,000 notwithstanding his net income of £175,000pa because he could not find a deposit for £35,000. The assertion had an air of unreality and did not appear to have featured clearly in the arbitration. There was no factual finding to support the assertion and instead I was asked to assess the evidence from mortgage advisors. This was certainly inappropriate for the purpose of the application under s69 (and suggested that the application was being used to re-open the facts). Given that the point was not in the grounds of appeal or clearly put forward in the arbitration this was further reason to reject it.

51. In any event, the argument lacked merit. The arbitrator concluded that H had around £18,000 in his bank account and investments, and was entitled to £20,000 from the proceeds of sale. He also identified H's debts (mainly outstanding legal fees and hire purchase payments on his sofa, motorbike and cars). In H's skeleton argument before me his debts including legal fees were put at £16.3k and in argument it was suggested that they were nearer £20k. Even on H's own figures (which had not clearly accounted for any prior saving from income, perhaps because some parts of his remuneration were not yet paid) he could have saved £35,000 towards a deposit within a matter of months.

52. The arbitrator was aware that W was not working and might not secure work for another few months. It was implicit that she would not be able to secure a mortgage until she had an income and so could not buy a house until then. Similarly, the arbitrator had expressly recognised that H would have to find all of the £350,000 needed to purchase a house. He was entitled to take the view that this would not be a difficulty. This was a fair conclusion and he did not need to spell out that H might have to wait a few months for parts of his remuneration package to come in if he needed a deposit of £35,000 (and then would need to borrow less). For both parties, it was entirely fair to conclude that they could find a mortgage and purchase a property though that could take a few months. The arbitrator did not need to spell out the logistics. It was unfair (and unrealistic) to suggest that the award left H unable to house himself

and his son, or that his finding amounted to an error of law or a serious irregularity.

53. Overall, the various criticisms of the arbitrator were unfounded as errors of law arising out of the award and the points raised were inappropriate attempts to re-open the facts.

Failure to give reasons

54. H's argument that the arbitrator had failed to give reasons and ignored and overlooked particular facts was unlikely to justify permission under section 69(3) since any question of law must arise "*on the basis of the findings of fact in the award"*. If a party considers that the arbitrator has failed to make the necessary findings of fact or law then it can apply under s70(4) for an order for further reasons (although such relief is given sparingly). A judge will be reluctant to find there is an error of law because additional findings could have been made since the question would not "*arise out of the award"* for the purpose of s69.

Overall conclusions

55. I decline permission to appeal. The short answer to the application was that the questions (and errors) of law raised by H were all questions of mixed fact and law as to how the discretionary exercise of sharing assets under the 1973 Act should be made as between these parties. In such a case the ordinary test under s69 applies. Permission is only available if the decision was one which no reasonable arbitrator could reach when applying the law properly. On the facts found (and even taking into account H's submissions as to the facts not found) the arbitrator's exercise of his discretion under s25 was within the range of that which a reasonable (sometimes called rational) arbitrator could make. The arbitrator had identified the right legal test and his exercise of discretion was not obviously wrong, and indeed not even open to serious doubt. Even applying the simple test of "wrong" under Part 30 of FPR permission to appeal would have been refused.

56. I would not have rejected H's application on grounds of failure to make an application under s57 but deal with this below.

II Should the Award be set aside for serious irregularity under s68 of the 1996 Act?

57. Section 68 of the 1996 Act provides as follows:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

..

(d) failure by the tribunal to deal with all the issues that were put to it;

(f) uncertainty or ambiguity as to the effect of the award"

58. H's complaint here was that:
    a) the arbitrator had failed to comply with its core duty to act fairly by failing to give consideration to various matters set out in s25 of the 1973 Act, and to take into account key aspects of the evidence;
    b) the arbitrator had decided the pension sharing in a manner which neither party sought, awarding W 35.9% when she had only contended for 33.75% of the Aegon pension, and had failed to give the parties an opportunity to make representations in respect of that decision.
    c) the tribunal failed in its duty to give reasons regarding the above matters but also
        a) in relation to how non-matrimonial assets had been taken into account;
        b) why H had been ordered to pay the costs of the arbitration.

59. A significant criticism of the arbitrator was that he had overlooked or ignored evidence. H referred to authorities including *Arduina v Celtic* [2006] EWHC 3155 and *Sonatrach v Statoil* [2014] 2 Lloyd's Rep 242 to suggest that if an arbitrator overlooked evidence that would justify a challenge under section 68. H argued that the arbitrator had failed to give consideration to the evidence relating to:
    a) W's earning capacity;
    b) H's housing needs;
    c) The nature of H's employment, his age and the length of time he may be able to continue working;
    d) The nature of H's income and its division between salary and non-guaranteed bonus and benefits.

Failure to give consideration to matters under s25

60. These criticisms were closely linked to the arbitrator's alleged errors of law and the same reasoning applies. The complaints were largely going to the arbitrator's findings of fact (namely how he evaluated the evidence, what findings he should have found on the evidence, and what conclusions he should have drawn as to a fair allocation). Two important and linked points are worth keeping in mind. First, section 68 relates to the process, it is not designed to address whether the tribunal reached the right result. Secondly, powers under section 68 are only to be exercised as a longstop where "*the tribunal has gone*

so wrong in its conduct that justice calls out for it to be corrected". This test is similar to the "*leap off the page"* test that H relied upon in the context of discretion under s25 of the 1973 Act. These two aspects are well covered by Flaux J in *Statoil* at paragraph 11:

"In order to succeed under section 68 an applicant needs to show three things. First of all, a serious irregularity. Secondly, a serious irregularity which falls within the closed list of categories in section 68(2) . Thirdly, that one or more of the irregularities identified caused or will cause the party substantial injustice. The focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision: see per Hamblen J in Abuja International Hotels v Meridian SAS [2012] EWHC 87 (Comm) at [48] to [49]. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. This point, that section 68 is about whether there has been due process, not whether the tribunal 'got it right', is of particular importance in the present case, where, upon close analysis, the claimants' real complaint is that they consider that the tribunal reached the wrong result, which is not a matter in relation to which an arbitration award is susceptible to challenge under section 68 ."

61. There is a debate in the case law as to whether an arbitrator's failure to take account of evidence could give rise to challenge under section 68 since it will generally be regarded as an illegitimate attempt to re-open the findings of fact. The high water mark that H relied upon comes from the following dictum of Toulson J in *Arduina Holdings BV v Celtic Resources Holdings Plc* [2006] EWHC 3155 (Comm) where it is accepted that it would be exceptional:

"The assertion that the arbitrator failed to take any or proper consider of the evidence could, in an exceptional case, give rise to a challenge under section 68, based on the general duty of an arbitrator under section 33 if, for example, an arbitrator genuinely overlooked evidence that really mattered, or got the wrong end of the stick in misunderstanding it. But there is all the difference in the world between such cases and in arbitrator evaluating evidence but reaching factual conclusions on it (as will happen in most arbitrations) which one party does not like. That cannot be the basis of a complaint under section 68."

62. The existence of such an exceptional jurisdiction has been questioned in subsequent cases, as explained by Flaux J in *Statoil v Sonatrach* [2014] EWHC 875 (Comm) where he stated that:

"*The passage in the judgment of Toulson J is clearly obiter since his conclusion (and thus the ratio of the decision) was that the applicant was engaged in an impermissible attack on the tribunal's findings of fact, so that the application*

under section 68 failed. Toulson J does not specify what sort of exceptional case he had in mind. I can quite see that in a case, for example, of an agreed or admitted piece of evidence which was ignored or overlooked, it might be possible to say that the tribunal was in breach of its duty under section 33 , so that section 68(2)(a) was engaged. However, beyond that, it seems to me that, as the present case demonstrates, the contention that the tribunal has overlooked or misunderstood particular evidence necessarily involves interference with the evaluation of the evidence by the tribunal. Whilst the applicant may contend, as in the present case, that the tribunal has overlooked a critical piece of evidence, the tribunal may not have regarded it as critical and thus may have decided that it was not worth referring to in an award which necessarily cannot set out every piece of evidence in the case. I do not see how the court can determine whether the tribunal has overlooked evidence without an analysis of the tribunal's evaluation of the evidence, which is not a permissible exercise under section 68.

…

45. The reality is that this is yet another case, of which there are already far too many (Primera Maritime being the most recent) where a party is seeking to use section 68 to challenge findings of fact made by the tribunal. As I said at [50] of my judgment in that case:

'It is clearly not appropriate to use an application under section 68 to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the Reasons or not given the weight it feels it should have been. That is precisely the situation in which the court should not intervene. Matters of fact and evaluation of the evidence are for the arbitrators.'

63. Flaux J's approach is probably to be preferred but I need not decide this point since there was nothing exceptional about the arbitrator's approach to the evidence in this case. Accordingly, even if failure to take proper consideration of evidence engages s68, the arbitrator's approach did not rise to a serious irregularity. I have dealt above with the allegation that the arbitrator failed to give proper consideration to W's future earning capacity, H's age and the nature of his income and employment, and that he failed to give proper account to evidence regarding H's housing needs. It was not shown that the arbitrator ignored or overlooked the evidence or failed to give it proper consideration as alleged. The same conclusions apply here and there was no serious irregularity.

Deciding the pension sharing percentage on a basis other than that put forward by either side

64. Here H's complaint was that the arbitrator made an order for 35.94% of the large pension based on the joint expert's opinion as to the simplest means to achieve equality, whereas W had only asked for 33.75% of that pension.

65. The applicable principle is one of basic fairness. Irregularities can arise where an arbitrator goes off on a new point without giving the parties a chance to address it. However, the arbitrator is not bound by a technical rule that he must always ask both parties before he accepts evidence that is not precisely within one party's case. This would be entirely artificial since the arbitrator is expected to assess the evidence, and there is an inquisitorial aspect in a s25 evaluation. As Thorpe LJ commented in *Parra v Parra* [2002] EWCA Civ 886, [[22], "*the quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to outcome even if not advanced by either party. Equally he is not bound to adopt a conclusion upon which the parties have agreed."* There will also be an element of proportionality: a relatively small new point may not require further submissions. The overall principle is well explained in a dictum quoted in *Cameroon Airlines v Transnet Limited* [2004] EWHC 1829. It is from Zermalt *Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 and Bingham LJ stated:

'If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

66. Here W had asked for an order to achieve equality. The arbitrator's conclusion in giving her 35.94% was based on the key evidence on quantifying the pension share and the expert's view as to what would best achieve equality. H (and his advisors) knew it was the central evidence and they had a full opportunity to explore it. They cannot complain that they never had a chance to deal with it or were unfairly taken by surprise if the arbitrator accepted it. The amount at stake was around £13,000 so I did not consider that there was any serious irregularity in the arbitrator not having sought a further round of submissions before adopting the joint expert's preferred assessment.

Failure to give reasons

67. Complaints about lack of reasons can be best voiced by an application to the tribunal under s57, or to the court under s70(4) or s68 (for example s68(2(d) failure to address issues; and s68(2)(f) uncertainty or ambiguity as to the effect of the award). H's complaints were made under s69 but I was willing to consider them in the slightly more promising context of s68 as they had been put forward as largely straddling both applications. Further, if they had merit then I could have made an order under s70(4).

68. It was alleged that the arbitrator failed to give adequate consideration to H's non-matrimonial property, and that he had failed to give reasons as to his treatment of such property. I reject this since the arbitrator had expressly explained that given the parties' case was "*very much a needs case"* there should be no separate treatment of H's pension that had accrued prior to the marriage.

69. It was also said that the arbitrator was under a duty to consider the non-matrimonial contribution to real property and explain his reasoning. The arbitrator had made clear findings that H had contributed to the purchase of the former matrimonial home with pre-marital property interests. It cannot be said that he ignored the evidence or that his discretion in dealing with that contribution was outside the reasonable range of a decision maker correctly applying the law. It is well established in *Miller v Miller* [2006] 2 AC 618 that the general principle is that the former matrimonial home is regarded as matrimonial property even if it was acquired using pre-marital assets. Given that it was common ground that this was a needs case, the general principle was properly applicable. It was not necessary for the arbitrator to make further findings or to set out the case law as to how and when the general principle can be departed from and explain why he had applied the general principle.

70. H had a fair criticism of the arbitrator regarding his failure to give reasons for ordering that H pay all the costs of the Award. The ARB 1FS provides that under the Scheme rules, each party will generally bear an equal share of the arbitrator's fees. Here there was a dispute as to whether fees were to be shared and the arbitrator should have given reasons for departing from the general rule. The arbitrator may have concluded that as H had lost on most issues he should pay the fees but this was not implicit or obvious. There was a gap which could be regarded as a failure properly to deal with an issue within s68(2)(d). However, given that the amount at stake was £2,500 (I was told the total fees amounted to £5,000), this was not a serious irregularity that justified the court intervening (or refusing to give effect to the award). In any event, the matter would have been remitted to the arbitrator (see below under remedies).

Was the arbitrator biased?

71. At the hearing H suggested that the arbitrator was biased. The grounds for this were not made clear although he relied on the alleged unfairness of the decision. He questioned whether an arbitrator should sit where one of the parties is represented by counsel from his chambers. Whatever its ground, the point was not part of his application and I considered that it was inappropriate for it to be raised at the hearing, without any clear notice. It would, for example, have been a matter that the arbitrator should have been given notice of. I did not consider that the point had any merit, not least since H was well advised at all stages and his experienced advisors would have been well aware of the connection and should have raised the point immediately if there was any concern.

Were the applications under ss68 and 69 barred because H had failed to ask for corrections under s57?

72. W argued that H failed to comply with s70(2) of the 1996 Act by failing to make an application under s57. H's answer to this was that his counsel had made a Request for Clarification and that this was within section 57. This had given the arbitrator an opportunity to self-correct and thereby avoid a challenge under ss68 and 69. H argued that it would have been "ridiculous" to have submitted this request again after the arbitrator made his award as it was "whimsical" to suggest that the arbitrator would have changed his mind. H submitted that it was standard practice for IFLA arbitrators to circulate a draft and this was the opportunity for him to rectify on a plain application of s57.

73. If W's argument was a good answer then the application under the 1996 Act could have been dismissed on that ground alone. I deal with it at the end because the point is a somewhat difficult one and the significance of H's Request for Clarification can be most easily understood against an understanding of the arguments on the appeal.

74. Under the 1996 Act an arbitrator has a carefully defined power to correct an award. The power arises under section 57, sometimes described as the slip rule, as follows:

57 Correction of award or additional award.

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award."

75. A party is expected to use this power (or any agreed appeal procedure) in order to avoid a court challenge and section 70 of the 1996 Act provides that:

"(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award)."

76. The majority of the Request for Clarification sought explanations (and clarifications) for the arbitrator's exercise of discretion, asking for details as to how weight was given to the evidence, and the basis for conclusions drawn from

the evidence. The Request did not expressly refer to any ambiguity or uncertainty or accidental omission on the part of the arbitrator, and there was no reference to section 57.

77. I was told that it is normal (or even universal) practice for an IFLA arbitrator to circulate a draft award to the parties' counsel. The practice would appear similar to that used when judges circulate a draft judgment to counsel. The draft is not circulated for the purpose of re-opening the decision-making process or for re-writing the judgment. A request for clarification should be limited to exceptional cases where a specific material omission or ambiguity is identified (*I (Children)* [2019] EWCA Civ 898). The Request for Clarification in this case was very courteous, but had the tone of a request for further information from an opposing party. It was not what a judge would have expected (or welcomed) if a draft judgment were circulated. It appeared to ask the arbitrator to re-open his decision-making and start re-drafting. As with a judgment, any attempt to use this process (or s57) for that purpose with an arbitration award is inappropriate and can be declined. The Request would certainly not have been understood as a request to correct clerical errors or accidental omissions, and made no mention of specific ambiguity or uncertainty. It was unsurprising that the arbitrator declined to provide the explanations and clarifications sought.

78. A party is not expected to make a s57 application if the errors it complains of are not within s57 (indeed the application would be inappropriate). In light of s70(2) it is prudent to consider whether a ground for challenge could be addressed by a correction under s57. The complaints raised in H's claim form were largely about the arbitrator's exercise of discretion and his evaluation of the evidence. A few of the points (mainly the complaint regarding lack of reasons, and particularly the omission on reasons on costs) could possibly have been called an accidental omission. The grounds of appeal made no mention of specific ambiguity or uncertainty in the Award.

79. Overall, I considered that the complaints raised in this application do not clearly fall within s57 and it was not necessary for H to seek a correction under s57. Accordingly, I reject W's argument that the application was barred for having failed to make such an application. In any event, I would have been reluctant to reject H's argument that the Request should be treated as a s57 request for the purpose of s70(2). First, to the extent that any of the complaints did fall within s57 the arbitrator had been given an opportunity to correct the errors. Secondly, it was not clear that H himself had been aware of the Request and its implications (although that equally should not have disadvantaged W). Thirdly, there was very limited evidence before me as to practice in IFLA arbitrations (for example as to whether the circulation of the draft is regarded as the only opportunity for requesting corrections).

80. As a general rule, however, if corrections to a draft award are not made as requested, and a party considers an award still requires correction, it is safer to make a further request after the award has been made. The request should usually be kept within section 57, not least as this is most likely to elicit a correction. A request does not need expressly to refer to section 57 but the arbitrator should know what is being asked of him and it is preferable to make clear that the corrections are within s57, and an explanation should be given as to why a broader correction is sought.

81. Overall, for reasons set out above, the section 68 application failed.

III The application that the award not be made an order of the court

82. H's position was that the party's arbitration agreement did not oust the court's jurisdiction under Part II of the 1973 Act and the court retains a duty to consider the parties' circumstances. He drew on all the alleged shortcomings to submit that by reason of the overall unfairness of the Award, it is not one which the court can approve within a consent order pursuant to its duty under s25. It was said that the test to be applied is that used by a judge in deciding whether to give effect to a settlement agreement, and that indeed a settlement agreement (or pre-nuptial agreement) had more weight as to the parties' wishes than an arbitration award. On this basis it was submitted that the court could look at new evidence and make a new assessment of what would be a fair allocation – by reference to cases such as *Luckwell v Limata* [2014] EWHC 523 (Fam) and *MB v EB* [2019] EWHC 1649 (Fam). It was also argued that it would discourage IFLA arbitration if the test was more strict and that clarity was required.

Conclusions

83. Much of the law was uncontroversial save for the analogy with the treatment of settlement agreements and the approach to new evidence. It is useful to draw together a number of threads relevant to the court's discretion to make an order reflecting the award.

84. First and foremost, the court retains its overriding discretion to make (or decline to make) orders under s25 of the 1973 Act even where parties have agreed to arbitrate financial disputes. The court's discretion is not governed by the 1996 Act. For example, an order may be declined on grounds of vitiating mistake or a supervening event (*DB v DLJ* [2016] 2 FLR 1308).

85. Secondly, as stated in *BC v BG* [2019] 2 FLR 337, the exercise of the court's discretion must take account of the award, the parties' agreement to arbitrate and the scope of the court's grounds for setting aside under the 1996 Act. The court's discretion is not intended to be invoked as a means to circumvent the statutory restrictions which the parties have contracted into. In most cases the discretion will be applied consistently with the statutory framework in the 1996

Act. As the President described in *S v S (Arbitral Award: Approval) (Practice Note)* [2014] 1 WLR 2299, [26].

"In most such cases the focus is likely to be on whether the party seeking to resile is able to make good one of the limited grounds of challenge or appeal permitted by the Arbitration Act 1996 If they can, then so be it. If on the other hand they cannot, then it may well be that the court will again feel able to proceed without more to make an order reflecting the award and, if needs be, providing for its enforcement."

86. Thirdly, the test for not making an order giving effect to the award has been set high. It has been repeatedly emphasised that the court would only intervene in rare and extreme cases where something has gone so seriously wrong that it "*leaps off the page*". Mostyn J explained in *DB v DJ* at [28:

"*An assertion that the award was "wrong" or "unjust" will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page."*

87. The President also explained in *S v S at* [21]:

"Where the consent order which the judge is being asked to approve is founded on an arbitral award under the [Institute of Family Law Arbitrators ('IFLA') Scheme] or something similar (and the judge will, of course, need to check that the order does indeed give effect to the arbitral award and is workable) the judge's role will be simple. ***The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award.*** *Although recognising that the judge is not a rubber stamp, the combination of (a) the fact that the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of course be able to study) and (c) the fact that the parties are putting the matter before the court by consent, means that* ***it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order."*** [Bold emphasis added]

88. Fourthly, there is some analogy with the court's exercise of discretion in giving effect to a settlement agreement or a pre-nuptial agreement (this is apparent from *S v S* and also *DB v DJ*). However, the same test does not apply since in assessing an award the court must take account of the fact that the parties have agreed to refer their dispute to a neutral and independent arbitrator, with detailed statutory safeguards including the right to challenge any award on clearly defined grounds. An award is given binding effect not only by consent but also by statute and international treaty. It would be incorrect to equate its binding effect with that of a settlement agreement or pre-nuptial agreement. Further, the discretion to decline to make the award into an order is a blunt form of relief leaving uncertainty as to the status of the arbitration – the court cannot set aside the award, remove the arbitrator, declare the award to be of no effect, vary it or remit it back to the arbitrator. Such relief is only available under the 1996 Act.

89. Fifthly, an important consideration (and a further distinction from the settlement agreement cases) is that the parties have chosen an arbitrator to decide their case and have had the opportunity to make their case. The parties have elected to have their "day in court" before their chosen arbitrator and the 1996 Act deals with procedural irregularity and errors of law. The court's discretion under s25 is not intended to allow them to re-run (or improve) their case and ask the court to be a new tribunal of fact. The requirement that the flaw in the award *"leaps off the page"* or be "*so blatant and extreme*" reflects this. Arbitration is not a dress rehearsal enabling a dissatisfied party to re-open and improve his evidence on appeal in the High Court before then going back to argue the case before the Family Court (as was in effect the relief sought by H). To allow the s25 discretion to achieve this purpose would be unfair and contrary to both the 1996 Act and also the 1973 Act. As Mostyn J commented in *DB v DJ,* [27]:

    "*It would be the worst of all worlds if parties thought that the arbitral process was to be no more than a dry run and that a rehearing in court was readily available".*

90. Taking all these threads together the practical impact is that the court's discretion under s25 will usually be exercised in a similar way to the court's discretion to grant relief on a challenge to an award under the 1996 Act. The tests for intervention are closely aligned and similarly robust (as explained above). In signing up to arbitration a party is protected by the framework laid down under the 1996 Act including relief for errors of law and procedural irregularity. Both parties are expected to comply with it, and seek all available relief within the statutory time limits.

91. It would be rare to find a situation where a party who has not succeeded in challenging an award under the 1996 Act can persuade the court to refuse to make that award into an order by reason of its discretion under s25. If a party has failed to challenge the award under the 1996 Act (or been unsuccessful in doing so) then as a matter of statute (s58 of the 1996 Act) the award is final and binding. This is likely to be a very significant consideration and the onus would lie on the party seeking relief to explain why the court should exercise its discretion in not giving effect to that award notwithstanding its binding effect. An assertion of unfairness or extreme error is likely to be rejected summarily if a party has, without justification, failed to invoke remedies under the 1996 Act. Most complaints are properly dealt with by the 1996 Act, especially complaints regarding the procedure of the decision-making since this is not engaged by s25. The court's discretion can operate as a safety net for exceptional cases but it is unlikely to be exercised to deprive an award of binding effect unless the matter is extreme or the complaint is outside the scope of the 1996 Act (for example supervening circumstances, or matters involving third parties - such matters may also fall outside the scope of the arbitration agreement).

92. As explained above, the judge should generally not allow the exercise to be treated as an opportunity for one party to re-open the facts and introduce new evidence. It may be sufficient to start by considering whether the decision is wrong. In most cases this will be enough to determine the matter (and the answer will be consistent to that given under the 1996 Act). Whether a decision is "seriously" or "obviously" wrong or such that the error "leaps off the page" is usually a measure of how confidently and promptly a judge can form a view as to whether it is wrong. The test reflects the nature of the exercise: the court's role is not to re-hear the matter or search out potential errors and it should resist any attempt by the parties to achieve this (c.f. *Piglowska v Piglowski)*.

93. At this stage, having already considered relief available under the 1996 Act, I put to one side the 1996 Act and consider whether the arbitrator's decision would be consistent with the court's discretion under s25, and whether the court should make an order reflecting his decision. Here, I am satisfied that the Award was not wrong. It reflects a fair allocation of assets taking account of the relevant considerations and is firmly within the range of right outcomes. Another tribunal may have been more generous to the husband on some points but it could also have gone in the other direction (for example by taking more account of the benefit of his units). I am satisfied that I should approve the order attached to the Award.

Available remedies

94. H had wanted the matter to be listed for a re-hearing before a judge in the Family Court at Chelmsford. W argued that if the Award were set aside, the matter should be remitted back to the arbitrator so as to ensure continuity. She pointed to s68(3) of the 1996 Act under which the court should not set aside an award unless satisfied that it would be inappropriate to remit.

95. It was not necessary for me to explore these arguments but the application for the matter to be listed in Chelmsford for a new 2-day hearing had very serious difficulties. At a practical level it entailed delay and expense. At a legal level, there is no clear power under the 1996 Act for a matter to be remitted to a Family Court judge. I accept W's argument that under ss68 and 69 the default remedy is that the award be remitted back to the existing tribunal. The fact that a party has lost confidence in an arbitrator will not usually be enough in itself to justify the matter being remitted to another tribunal. The grounds for challenge primarily went to him having not addressed certain issues and evidence, and not having given reasons. This would not have been enough to show that he was unable properly to reconsider the case on remission. Bias was raised at a very late stage, as discussed above, and was not accepted. A party seeking a new tribunal would usually have to make an application that the arbitrator be removed under s24 of the 1996 Act.

96. At a practical level the court's discretion under the original proceedings may be a means for the matter to be re-listed before a Family Court judge if necessary. The court's overriding discretion may enable statutory restrictions in the 1996 Act to be overcome (or by-passed) in exceptional cases. However, the parties' agreement to arbitrate and the statutory framework will remain a central consideration: it would be rare that errors cannot be resolved by remission back to the parties' chosen arbitrator.

Procedure

97. There was some debate as to practical jurisdictional issues arising out of an application for the court to exercise its discretion to make the award into an order. The parties suggested that guidance would be helpful, in particular as to whether it would be necessary to make an application that the award be made into an order where there has been a challenge under the 1996 Act.

98. In most cases the parties will ask the Family Court in which proceedings were begun to approve a consent order incorporating an award and that will be the end of the matter. If the application is opposed the matter is likely to be transferred to the High Court. At that stage the matter can be looked at on paper and a hearing can be fixed if appropriate. As explained above a party seeking to challenge an award will be expected to invoke the 1996 Act.

99. Applications under ss67-69 of the 1996 Act are issued in the High Court and should be issued on an arbitration claim form. In practice the claim form will ordinarily be issued in the Commercial Court (as advised in the Practice Direction) and it will be transferred to the Family Division as a matter of course. CPR Part 62 and PD62 provides guidance and rules that are designed to be user-friendly and save costs – for example the parties can apply for an application under s68 to be decided summarily without a hearing. An application for permission to appeal under s69 should usually be decided without an oral hearing (s69(5) of the 1996 Act). I was willing to allow evidence that had not been introduced in compliance with the practice direction but generally it should be followed.

100. Either party may ask the court in the 1996 Act proceedings to make (or decline to make) an order reflecting the award and should make their position clear as to whether an order under s25 of the 1973 Act is sought or opposed. If the position is made clear it should not be necessary for either party to issue, in addition, a separate application for this relief in the original Family Court proceedings.

101. In his claim form H asked that the original Family Court proceedings be transferred to the High Court. This was a sensible option. Here the parties

helpfully agreed to adjourn a mention hearing listed in the Family Court in Chelmsford. In some cases, the court may need to manage the existence of the two sets of proceedings – typically by an adjournment or transfer to the Family Division and, if necessary, a transfer back to the Family Court for any enforcement issues.

Conclusion

102. I decline permission to appeal under s69 and dismiss the application under s68 of the 1996 Act. W is entitled to an order giving effect to the Award in the terms of the order provided.

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