Neutral Citation Number: [2020] EWCA Civ 1369

Case No: B6/2020/0587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
(FAMILY DIVISION)
Deputy High Court Judge Ambrose
BV18D11995

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2020

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE POPPLEWELL

- -

Between:

Russell Haley	**Appellant**
- and -	
Kelly Haley	**Respondent**

- -
- -

James Ewins QC and William Tyzack (instructed by **Levison Meltzer Pigott Solicitors**) for the **Appellant**
David Walden-Smith (instructed by **Nockolds Solicitors**) for the **Respondent**

Hearing dates: 22 July 2020

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Approved Judgment

Lady Justice King:

1. The issues in this appeal arise from an arbitral award made on 23 October 2019 by Mr Howard Shaw QC. The underlying litigation concerned applications for financial remedies in the Family Court sitting at Chelmsford, between Kelly Haley ("the wife") and Russell Haley ("the husband"). The husband believed that the award made by Mr Shaw was unfair. He therefore made an application to the High Court seeking either to appeal the arbitral award or, alternatively, for an order to be made by which the court would decline to make an order under the Matrimonial Causes Act 1973 ("MCA 1973") in the terms of the award and would instead exercise its discretion anew.

2. On 27 February 2020, Deputy High Court Judge Ambrose ("the judge") dismissed the appeal and refused the application to interfere with the award. The judge accordingly made an order in the terms of the arbitral award.

3. It is against this order that the husband now appeals. In giving permission to appeal in this case, Moylan LJ identified an important point of principle as to "the proper approach which the family court should take to arbitral awards when making a financial remedy order."

Arbitration in Family Cases

4. Unlike commercial arbitration, the availability of arbitration in financial remedy cases is relatively recent. The Family Law Arbitration Financial Scheme operates under the Institute of Family Law Arbitrators ("the IFLA Scheme"). The scheme was launched in February 2012 as a collaboration between Resolution, the Family Law Bar Association, the Chartered Institute of Arbitrators and the Centre for Child and Family Law Reform. The ILFA Scheme's authority derives from the Arbitration Act 1996.

5. There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of "lockdown".

6. It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service; either, on the one hand, because the outcome is not seen as sufficiently certain or, on the other, because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome.

7. In the present case, the wife's application for financial relief following the breakdown of the marriage went through the normal court process, including an unsuccessful financial dispute resolution hearing. The parties were unable to settle the case and the matter was set down for trial to be heard in front of a District Judge for two days and to commence on 19 September 2019. Only a week before the trial, on 12 September 2019, the parties were told that there would be no judge available to hear the case and that the matter would have to be listed for an unspecified date in the future. It was in those unhappy circumstances that, on 13 September 2019, the parties - anxious to have the

case heard, and it being ready for trial - signed an arbitration agreement on the ARB1 FS form provided under rules governing the IFLA Scheme. Mr Howard Shaw QC was named as the arbitrator.

8. The arbitration hearing took place on the same days as those which had been already set aside by the parties and their legal teams for the trial, the 19 and 20 September 2019. In due course a draft award was circulated to counsel. Counsel for the husband sought clarification as to certain matters, but this request was declined by Mr Shaw. On 23 October 2019, Mr Shaw produced his final award in substantially the same terms as the draft award, save that he had increased the figure which he awarded by way of periodical payments for the wife.

9. The husband subsequently made the following applications to the court:

   i) An order setting aside the award for serious irregularity under s68 Arbitration Act 1996 ("AA 1996") (Challenging the award: serious irregularity);

   ii) Permission to appeal under s69 AA 1996 (Appeal on a point of law);

   iii) An order that the award should not be made into a final order by the court under the MCA 1973.

10. The judge dismissed the applications under s68 and s69 AA 1996. No further appeal was made in relation to s68 AA 1996, and it is common ground that, after the judge refused the application under s69 AA 1996, the Court of Appeal had no jurisdiction to grant permission to appeal from that refusal (see *The Northern Pioneer* [2003] 1 Lloyd's Rep 212).

11. The judge held that the test to be applied in determining whether to refuse, in the exercise of her discretion, to make an order in the terms of the arbitral award, was akin to the test under s68 and s69 AA 1996. Further, she held that if she was wrong as to the correct test to be applied, the award made by the arbitrator was "not wrong."

12. This appeal is limited, therefore, to a consideration as to the test to be applied where one party declines to consent to or challenges the making of an order under the MCA 1973 in the terms of the arbitral award following family arbitration under the IFLA Scheme. The questions to be determined are as follows:

   i) Did the judge apply the wrong test, namely one which was akin to that applied under the AA 1996?

   ii) If so, is the correct test that which was characterised by Counsel as the 'appeals test' applicable under the MCA 1973?

   iii) If the appeals test is the appropriate test, then if properly applied is there a real prospect that the first instance court would have concluded that the arbitral award was wrong;

   iv) If so, should the matter be remitted to a first instance court or is this court able to substitute its own order?

13. It is useful before examining the IFLA Scheme and the appeals process under the MCA 1973, to identify in broad terms the differing approach and philosophy that apply to a challenge to an arbitral award under the AA 1996 on the one hand, and an appeal under the MCA 1973 on the other.

14. The principal routes of challenge to an arbitral award are that the arbitrator "lacked substantive jurisdiction" (s67 AA 1996); or there was "serious irregularity affecting the tribunal, the proceedings or the award" (s68 AA 1996); or that the award was wrong on a question of law (s69 AA1996). As set out at [22] – [26] below, the test under section 69 (which is the route most commonly used in an attempt to challenge an award) is applied on the basis of the facts as found by the arbitrator. The party challenging the award requires leave and must show that the decision on the question of law was "obviously wrong", unless the question is one of general public importance, in which case it must be shown to be at least open to serious doubt. Fairness as a concept has no place in a challenge to an arbitral award; arbitration being a procedure designed to provide certainty across the international commercial world.

15. By contrast, where there has been a contested financial remedy trial heard in court (which would have been the preferred option of the parties) then leave, as with a challenge under s69 AA 1996, will be required. However, permission will be given if the judge concludes that there is a real prospect that the proposed appellant can satisfy the appeal court that the order made was: (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Fairness will be central to the court's determination.

16. The judge in the present case held that the proper test, where the challenge is in respect of a family arbitration under the terms of the IFLA Scheme, is "closely aligned" to that provided under the stringent terms of the AA 1996, save where there has been a supervening event or mistake.

The Arbitration Agreement

17. As noted in the judgment at [13], the parties each signed the ARB1 FS form. By paragraph 6.4 of the form, the parties confirm that they:

> "…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."

18. At the end of the form, immediately above the signatures of the parties or their legal representatives, appears the following:

IMPORTANT

Parties should be aware that:

- **By signing this form they are entering into a binding agreement to arbitrate (within the meaning of s.6 of the Arbitration Act 1996).**
- **After signing, neither party may avoid arbitration (unless they both agree to do so). Either party may rely on the arbitration agreement to seek a stay of court proceedings commenced by the other.**
- **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.**

Challenges under the Arbitration Act 1996

19. As referred to above, an arbitral award can be challenged only on the grounds that: (i) the tribunal lacked substantive jurisdiction (s67 AA 1996); (ii) that there was a "serious irregularity affecting the tribunal, the proceedings or the award" (s68 AA 1996); or (iii) "there is a question of law" arising from the award (s69 AA 1996).

20. There is, within s57 AA 1996, a corrective jurisdiction which allows the tribunal to "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" (section 57(3)(a)); or to "make an additional award in respect of any claim […] which was presented to the tribunal but was not dealt with in the award" (Section 57(3)(b)). By s70 AA 1996, no application or appeal may be brought until any available recourse under s57 AA 1996 has been exhausted.

21. As was properly recognised by the judge at [60], s68 AA 1996 relates to process and is not designed to address the issue as to whether the tribunal reached the right result. This was emphasised by Flaux J (as he then was) in *Sonatrach v Statoil* [2014] 2 Lloyd's Rep 242 at [11], where he said:

> "…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."

22. Section 69 AA 1996 deals with challenging an award on a point of law arising out of the award. Such a challenge involves an initial requirement for leave to appeal, followed by a substantive hearing on the merits of the appeal. Leave is ordinarily dealt with on paper by way of a triage type process, and:

> "(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."

23. The Commercial Court is constantly alert to attempts to present challenges to findings of fact as points of law under section 69.

24. In his judgment in *J v B (Family Law Arbitration: Award)* [2016] EWHC 324 (Fam), [2016] 1 WLR 3319 (also known as *DB v DLJ)* (herein *J v B*), Mostyn J quoted with approbation a passage from a lecture by Sir Bernard Eder:

> "6. In his excellent paper *'Challenges to Arbitral Awards at the Seat'* given to the Mauritius International Arbitration

> Conference on 15 December 2014 Sir Bernard Eder explains at [6] that:
>
> > '…the general approach of the Court is one which strongly supports the arbitral process. By way of anecdote, it is perhaps interesting to recall what I was once told many years ago by Michael Kerr, a former judge in the Court of Appeal and one of the leading figures in the recent development of the law of arbitration in England, when I was complaining about an arbitration that I had just lost and the difficulties in the way of challenging the award. I told him that the award was wrong and unjust. He looked baffled and said: *"Remember, when parties agree arbitration they buy the right to get the wrong answer"*. So, the mere fact that an award is "wrong" or even "unjust" does not, of itself, provide any basis for challenging the award or intervention by the Court. Any challenge or appeal must bring itself under one or more of the three heads which I have identified.'"

25. This robust approach simply mirrors the approach of the Commercial Court to the various ingenious efforts on the part of disgruntled parties to dress up what they regard as perverse findings of fact, as points of law. The case of *Geogas S.A v Trammo Gas Ltd.* [1993] 1 Lloyds Rep 215, on appeal from [1991] 1 WLR. 776 *(The Baleares),* was a case decided under the earlier Arbitration Act 1979, but is still regarded as a classic statement of the proper approach to appeals on a point of law under the statutory arbitration regime. In this case, Lord Justice Steyn said:

> "This is an appeal under section 1 of the Arbitration Act 1979 on […] a question of law arising from an arbitration award[…] For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.
>
> From time to time attempts are made to circumvent the rule that the arbitrators' findings of fact are conclusive. Such attempts did not cease with the enactment of the Arbitration Act 1979. Subsequently, attempts were made to argue that an obvious

> mistake of fact by arbitrators may constitute misconduct. It is clear that such a challenge is misconceived. […] This catalogue of challenges to arbitrators' findings of fact points to the need for the court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."

26. *Demco Investments and Commercial S.A. and Others v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm), [2005] 2 Lloyd's Rep 650 *(Demco)* was an important case concerned with the alleged mis-selling of pensions to individuals who had either failed to join, or opted out of occupational pension schemes, which had otherwise been available to them. Mr Justice Cooke considered the proper test to be applied in an application for permission to appeal under s69 AA 1996. Cooke J applied the "obviously wrong" test at s69 (3)(c)(i) emphasising the opening words of s69(3)(c), that leave will only be given *"on the basis of the findings of fact in the Award"*. After considering some seemingly conflicting dicta at [43] that are not of relevance here, Cooke J concluded that Steyn LJ's dictum in *The Baleares* set out above "takes full force and effect."

Financial Provision upon divorce

27. It is common ground that in the family context arbitration cannot oust the jurisdiction of the court, as is properly recognised at para 6.5 of ARB1 FS, which says that the court "has a discretion as to whether, and in what terms, to make an order."

28. In my judgment, it is helpful briefly to consider the nature of that discretion, and how it is framed when an application for financial remedy has been made through the courts, when considering whether - as the judge and as Mostyn J effectively suggest (see below at [59]-[60]) - that discretion should be limited almost to vanishing point where a party seeks to challenge an arbitral award. This is so, given the stringency of the test under s68 and s69 AA 1996 and the rarity of cases that succeed where mistake or supervening event are pleaded.

29. At the end of a marriage, amidst potential distress and recriminations, two important matters have to be resolved, namely the arrangements for any minor children, and the separation of the finances of the parties. Rightly, the welfare of any children is the court's "first consideration" when it exercises its jurisdiction in deciding how to utilise its powers in relation to financial provision (section 25(1) MCA 1973).

30. The making of financial provision orders upon divorce (or dissolution of a civil partnership) are governed by the MCA 1973 which imposes a statutory duty upon the court to have regard to all the circumstances of the case (s25(1) MCA 1973). In broad terms, section 23 MCA 1973 provides for the making of periodical payments and lump sum orders; section 24 for property adjustment orders; section 24A for orders for the sale of property; and section 24B- section 24F for pension sharing orders.

31. These orders, or a combination of them, provide an enforceable route for the division of a couple's matrimonial assets, regardless of whether they are of modest means or, at

the other end of the spectrum, wealthy with complex financial affairs involving trusts, companies and international assets. Without the appropriate orders being made, under the MCA 1973 following an arbitral award, the parties' rights will remain legally undetermined and they cannot take advantage of the bespoke provisions available under the MCA 1973, and crucially, their enforceability.

32. The couple with whom this court is concerned fall into the former category. The husband, by virtue of a demanding commute and by working long hours, has a substantial income, but the parties' capital assets amount to less than £400,000.

33. Where a couple are unable to reach agreement, one or other of them has to make an application for financial remedy to the court. The judge will then have regard to the mandatory criteria found in section 25(1) and (2) of the MCA 1973, when making orders under sections 23(1)(*a*), (*b*) or (*c*), 24, 24A, 24B or 24E.

34. Regardless of where a couple's assets fall on the spectrum of wealth, section 25 MCA 1973 sets out: "Matters to which the court is to have regard in deciding how to exercise its powers under ss23, 24, 24A, 24B and 24E."

35. Although familiar to all practitioners, it is worth for the purposes of this judgment rehearsing the mandatory criteria found in section 25(2) of the MCA 1973 as they apply whenever a court makes an order for financial provision, whether by consent or otherwise:

> "(2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters—
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
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> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the

> family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

Agreements

36. Where, however, the parties have been able to reach agreement, the Family Procedure Rules 2010 ("FPR") set out, at r 9.26, the requirements for obtaining a consent order with agreed terms. One of the requirements is for the filing of a statement of information.

37. By FPR PD 9A, paras 7.1 – 7.3, the statement of information must be in the prescribed form, setting out personal and financial information so that the court can undertake its inquisitorial jurisdiction when considering whether to approve an agreement.

38. Section 33A of the MCA 1973, as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984, provides that:

> "the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application."

39. The court, therefore, scrutinises the statement of information, with the list of factors from s25 MCA 1973 at the forefront of its judicial mind. The proper exercise of the court's inquisitorial jurisdiction, in relation to the making of consent orders, was graphically described in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26 at [73], as being not "a rubber stamp" but that, whilst the court must always exercise a discretion, it should not be to the extent of acting as "a bloodhound or a ferret."

40. In *Sharland v Sharland* [2015] UKSC 60, [2015] 2 FLR 1367, the Supreme Court considered the relationship between the court and parties who wish to resolve their financial dispute following divorce by way of a consent order. Baroness Hale said:

> "18. It has long been possible for a married couple to make a binding agreement about the financial consequences of their present separation. However, it is not possible for such an agreement to oust the jurisdiction of the court to make orders about their financial arrangements. This was a rule of public policy, because of the public interest in ensuring that proper provision is made for dependent family members: see *Hyman v Hyman [1929] AC 601*. ……

> 19. Thus it is impossible for the parties to oust the jurisdiction of the court, but the court also possesses powers to achieve finality (a "clean break") in the parties' financial arrangements which the parties cannot achieve for themselves. For those reasons, it is now much more common for separating or divorcing spouses to negotiate with a view to embodying their agreed arrangements in a court order than to make a formal separation agreement. If they do this, the fundamental principle is that 'an agreement to compromise an ancillary relief application does not give rise to a contract enforceable in law'. Furthermore, 'the court does not either automatically or invariably grant the application to give the bargain [the] force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act 1973 as amended': see *Xydhias v Xydhias* [1999] 2 All ER 386, per Thorpe LJ at 394.
>
> 20. Although the court still has to exercise its statutory role, it will, of course, be heavily influenced by what the parties themselves have agreed. …"

41. *Sharland* makes it abundantly clear that the fact of an agreement cannot oust the jurisdiction of the court and that, although the court is heavily influenced by an agreement (a matter reflected in the words of section 7 of the Matrimonial and Family Proceedings Act 1984), the court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 MCA 1973. Baroness Hale continued:

> "27. Family proceedings are different from ordinary civil proceedings in two respects. First, in family proceedings it has been clear, at least since the House of Lords' decision in *de Lasala v de Lasala [1980] AC 546*, that a consent order derives its authority from the court and not from the consent of the parties, whereas in ordinary civil proceedings, a consent order derives its authority from the contract made between the parties: see, eg, *Purcell v FC Trigell Ltd [1971] 1 QB 358* , CA. Second, in family proceedings there is always a duty of full and frank disclosure, whereas in civil proceedings this is not universal.
>
> 29. It follows that the majority in the Court of Appeal in this case were correct to say that matrimonial cases were different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court's order and not from the prior agreement of the parties. It does not, however, follow that the parties' agreement is not a sine qua non of a consent order. Quite the reverse: the court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be good reason to set aside the consent order. The only question is whether the court has any choice in the matter."

42. So much for agreements which the parties wish to be incorporated into a court order. What of those agreements which have been entered into either in contemplation of marriage or at the end of the marriage?

43. The Supreme Court considered agreements made in contemplation of marriage in *Radmacher v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, quoted in both *S v S* and *Sharland* above. The Supreme Court said at [75]:

> "*White v White* and *Miller v Miller* establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod:*
>
> > 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'"

44. Lord Philips, between [77] and [84], moved on to consider the circumstances in which it would not be fair to hold parties to their agreement. These included the welfare of the children [78] and the parties' needs. At [81], the court said:

> "The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

45. In relation to agreements reached between parties upon divorce, the principles have long been established in the *Edgar v Edgar* [1980] 1 WLR 1410, (1981) 2 FLR 19 ("*Edgar")* line of cases, where Ormrod LJ said at [25]:

> "To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; *all* the circumstances as they affect each of two human beings must be

> considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."

46. The legal position in relation to agreements is, therefore, crystal clear. Regardless of whether the parties apply to the court to make an order by consent, having reached an agreement, or whether the court is faced with a party who wishes to renege on an agreement made in contemplation of marriage or upon divorce. In each case:

    i) The family proceedings with which the court is concerned are different from ordinary civil proceedings as the order made under the MCA 1973 derives its authority from the court and not from the consent of the parties. This is in contrast to ordinary civil proceedings where the consent order derives its authority from the contract made between the parties;

    ii) Although the court still has to exercise its statutory role, it will be heavily influenced by what the parties themselves have agreed.

Appeals

47. If the matter is not resolved by agreement the matter will go to trial. In the event that either party is dissatisfied with the outcome, that party can make an application for permission to appeal (save for an appeal from the magistrates to the district judge where no permission is required). Whilst the rules governing the procedure differ, depending upon whether the appeal is to a circuit or high court judge on the one hand (FPR r 30.3 and FPR PD 30A), or the Court of Appeal on the other (CPR 1998 r52), the approach and principles that apply are the same (see *CR v SR (Financial Remedies: Permission to Appeal* [2013] EWHC 1155 (Fam), [2014] 1 FLR 186 at [6]). Permission to appeal will only be granted if there is a "real prospect of success"- that is to say, the applicant must show a realistic, rather than fanciful, prospect of success (*CR v SR* at [8]).

48. For the purposes of this appeal, I refer only to the FPR, given that Mr Ewins QC, on behalf of the husband, submits that the approach of a court where a party is dissatisfied with the outcome of an arbitration should mirror that where a litigant is dissatisfied following a financial remedy hearing before a court.

49. Where permission to appeal has been granted, the appeal hearing is not an opportunity for a "second bite of the cherry." It should be borne in mind that:

i) The appeal is limited to a review of the lower court's decision unless a rehearing is permitted for a particular class of appeal, or the court considers it to be in the interests of justice to hold a rehearing (FPR 30.12(1)(a) and (b));

ii) An appeal will only be allowed where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court (FPR 30.12);

iii) The test to be applied on appeal is whether the decision of the lower court is "wrong" as opposed to "plainly wrong" (*Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at [46]; see also *Prescott v Potamianos* (also known as *Re Sprintroom Ltd*) [2019] EWCA Civ 932 at [72] – [78]);

iv) The approach to appeals, as elucidated by Lord Hoffman in *Piglowska v Piglowski* [1999] 1 WLR 1360, [1999] 2 FLR 763, has withstood the test of time, and continues to be the authoritative statement as to the proper approach to an appeal. At [1372] Lord Hoffman said:

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc [1997] RPC 1* , 45:
>
> > 'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'"

50. It can be seen, therefore, that whilst a rigorous approach is taken to both the granting of permission and the conduct of appeals, the approach taken by the courts to a review of what may have been an unjust outcome following a court hearing, is significantly less restrictive than that following an arbitration.

The Conundrum

51. The question, therefore, is what is the test to be applied by the court in those cases where the parties have agreed to arbitration but are dissatisfied with the award?

i) Is it limited to those matters in the AA 1996, save where there has been a supervening event or mistake (per Mostyn J in *J v B*, see below*)*; or,

ii) Is it the appeals test under the MCA 1973?

52. If the appeals test is the proper approach, where does the fact that the parties signed a contractual agreement fit in?

53. These issues have been considered, to a limited degree, in several first instance cases. First in time was *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299 *(S v S).* This was a case where parties were coming before the court seeking a consent order following arbitration. Sir James Munby P made, what he described as, some "provisional comments" that might be "helpful and not out of place", in cases where one party wishes to resile from an arbitrator's award, rather than seeking the court's approval of a consent order in the same terms as the arbitral award. Sir James said at [19]:

> "19. …Where the parties have bound themselves, as by signing a Form ARB1, to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance. As Sir Peter Singer said ([2012] Fam Law 1496, 1503):
>
> > 'The autonomous decision of the parties to submit to arbitration should be seen as a 'magnetic factor' akin to the pre-nuptial agreement in *Crossley v Crossley'*.
>
> I agree. This, after all, reflects the approach spelt out by the Supreme Court in *Radmacher* in the passages I have already quoted. In the absence of some very compelling countervailing factor(s), the arbitral award should be determinative of the order the court makes."

54. In relation to the fact that the parties have made an agreement to arbitrate, Sir James went on:

> "There is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them. Indeed, an arbitral award is surely of its nature even stronger than a simple agreement between the parties."

55. It is within those parts of his judgment where Sir James deals specifically with consent orders, that one finds the origin of the phrase "leaps off the page", a phrase which has become almost a term of art in this context:

> "20. It is worth remembering what the function of the judge is when invited to make a consent order in a financial remedy case. It is a topic I considered at some length in *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26. I concluded (para 73) that: 'the judge is not a rubber stamp. He is entitled but is not obliged to

> play the detective. He is a watchdog, but he is not a bloodhound or a ferret.'
>
> 21. Where the consent order which the judge is being asked to approve is founded on an arbitral award under the 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. With a process as sophisticated as that embodied in the IFLA Scheme it is difficult to contemplate such a case." (my emphasis)

56. Sir James went on to make his obiter observations about those cases where one party opposes the making of an order in the terms of the arbitral award. Having first said at [25] that the proper procedural route is via the "notice to show cause route", Sir James said:

> "26. Where the attempt to resile is plainly lacking in merit the court may take the view that the appropriate remedy is to proceed without more ado summarily to make an order reflecting the award and, if needs be, providing for its enforcement. Even if there is a need for a somewhat more elaborate hearing, the court will be appropriately robust in defining the issues which are properly in dispute and confining the parties to a hearing which is short and focused. 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 can not, 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."

57. This was followed up in *Practice Guidance (Family Court: Interface with Arbitration)* [2016] 1 WLR 59, issued by Sir James, where he stated at [12]:

> "Attention is drawn to my observations in *S v S (Arbitral Award: Approval) (Practice Note) [2014] 1 WLR 2299*, para 21 about the attitude likely to be adopted by the court in such cases: '[where] the parties are putting the matter before the court by consent … it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order.'"

58. The Practice Note makes no reference to cases where one party opposes the making of an order in the terms of the arbitral award.

59. In *J v B* (reference at [24] above), Mostyn J considered the issue of whether a mistake or supervening event should have an impact on an arbitrator's award. For his part, Mostyn J, at [27], in considering Sir James' observations set out at [56] above, said that he would not go so far as Sir James did in *S v S*, which would, he believed, have resulted in the court necessarily ruling out any challenge on the ground of a vitiating mistake or supervening event. Mostyn J said: "If a challenge were to be made out on one or other such ground it would in my judgment be a plainly wrong exercise of discretion for the court to incorporate an award nonetheless." He went on:

> "….when exercising its discretion following an arbitral award the court should adopt an approach of great stringency, even more so than it would in an agreement case. In opting for arbitration the parties have agreed a specific form of alternative dispute resolution and it is important that they understand that in the overwhelming majority of cases the dispute will end with the arbitral award. 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."

60. Mostyn J went on to extend the application of the 'leap off the page' yardstick to those cases where one party wished to challenge the award as wrong rather than limiting it, as Sir James did, to those circumstances where a judge should refuse to make a consent order in the same terms as an arbitral award. More broadly Mostyn J said:

> "My conclusion is this. If following an arbitral award evidence emerges which would, if the award had been in an order of the court entitle the court to set aside its order on the grounds of mistake or supervening event, then the court is entitled to refuse to incorporate the arbitral award in its order and instead to make a different order reflecting the new evidence. Outside the heads of correction, challenge or appeal within the 1996 Act these are, in my judgment, the only realistically available grounds of resistance to an incorporating order. *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.*" (My emphasis).

61. Where an order has been made after 3 October 2016, a party may, pursuant to FPR 2010 r.9.9A(2) and FPR PD9A 13.1 – 13.9, apply to set aside a financial remedy order, where no error of the court is alleged. This is the case regardless of whether the order in question was made following a contested hearing or by consent. By PD9A 13.5, guidance is given as to the likely grounds on which an application for the setting aside of a financial remedy order will be made:

> "An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial

> remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made."

62. It can be seen, therefore, that the exclusions which Mostyn J had in mind, that might lead a court to decline to make an order in the terms of an arbitral award, relate to matters extraneous to the judicial function as they arise in circumstances where no error of the court is alleged, whether in relation to the evaluation by the judge of the evidence before him or the exercise of the wide discretion afforded to him by s25 MCA 1973.

63. For completeness, I should note that Deputy High Court Judge Ambrose in *BC v BG (Financial Remedies)* [2019] EWFC 7, [2019] 2 FLR 337, again sat in a case where there was before her an application that an arbitral award should not be made into an order. DHJ Ambrose held, at [54], that the grounds of challenge are limited to supervening event, mistake, or those found within the Arbitration Act 1996.

64. It can be seen, therefore, that the test has become increasingly strict, and the basis for challenge correspondingly increasingly narrow; Sir James' obiter comments in *S v S* were couched in terms such as "likely" and "in most cases", or "may well be." He said that, where parties sought a consent order, only if an error "leapt off the page" would the court interfere. That has now developed to the extent that the phrase 'leapt off the page' has become some sort of a measure (as applied by the judge in the instant case), of how wrong a decision has to be in order to invoke the jurisdiction of the court; not only in cases where a consent order is sought, but equally when one party submits that the arbitral award is unfair.

The Arbitration Agreement

65. Sir James was of the view that "there is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them". The fact of the agreement he regarded as a "magnetic factor".

66. Mostyn J was of the view that the test for interference in an arbitral award should be even more rigorous than that applied in those cases where a party seeks to go behind the terms of an agreement. An argument that an award was 'wrong' or 'unjust' would, he said, rarely succeed and the error would have to be 'so blatant' that it 'leaps off the page'.

67. Both Sir James and Mostyn J were of the view that an agreement to arbitrate carries even more weight than that given by a court to an agreement reached between the parties themselves. With respect, I would disagree. The agreement to arbitrate is an agreement that a third party will determine the terms. It is not, at the time the agreement is reached, an agreement to any particular terms. An agreement as between the parties themselves is, albeit often reached with the assistance of legal advisors, by contrast an agreement to the actual terms; the parties, therefore, know precisely the outcome and have agreed to it. That is not the case in an arbitration, where the parties have agreed to nominate a third party to determine fair terms intended to be final and binding, but subject to the court's ultimate discretion.

68. Even if I am wrong about that, the fact remains, as highlighted by Baroness Hale in *Sharland*, that family cases are different from civil cases. Court orders embodying the terms of commercial and civil arbitrations awards derive their authority from the arbitration agreement, and the enforcement of that agreement under the mandatory provisions of the AA 1996. The enforceable order following family arbitration ultimately derives its authority from the court and not from the arbitration agreement as is recognised on the face of the ARB1 FS.

69. A court can decline to make an order in the terms of an agreement negotiated by, or on their behalf, in circumstances where (to borrow the words of Lord Philips in *Radmacher*) there are "good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement"; or where "it would not be fair to hold them to their agreement". It must, in my view, equally follow that where the agreement, albeit contractual, is for a third party to decide the terms that are in dispute, the court can decline to make the order where there are good and substantial grounds for concluding that an injustice will be done if an order is made in the terms of the arbitral award.

70. It follows that, with great respect, I do not agree with the approach of either Sir James in *S v S* or Mostyn J in *J v B,* whose respective approaches limit challenges to an arbitral award in family cases to the statutory challenges found under the AA 1996 or mistake or supervening event.

71. Given that the orders determining the enforceable legal rights of the parties following divorce are made under the MCA 1973 and not under the AA 1996, there is no requirement for the discontented party first to make an application under s.57, s.68 or s.69 AA 1996 before asking the Family Court to decline to make an order under the MCA 1973 in the terms of the arbitral award. It follows that in my judgment the judge was in error in saying at [91] that "An assertion of unfairness or extreme error is likely to be rejected summarily if a party has, without justification, failed to invoke the remedies under the 1996 Act".

72. In saying this, I would emphasise that I do not wish it to be thought that I am in any way undermining the arbitration process or the fact that the parties have signed the ARB1 FS. On the contrary, parties must go into arbitration with their eyes open with the understanding that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order.

73. In my view, the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and the approach found in the FPR 2010. In other words, when presented with a refusal on the part of one party to agree to the conversion of an arbitral award into a consent order, the court should, at an initial stage, 'triage' the case with the reluctant party having to 'show cause' on paper why an order should not be made in the terms of the arbitral award. Such approach would be similar to the permission to appeal filter found at FPR rule 30(7) where the trial has taken place under the MCA 1973. If the judge is of the view that there is a real prospect of the objecting party succeeding in demonstrating that the arbitral award is wrong, then the matter can be set down for a hearing. That hearing will, as with an appeal, be confined to a review and will not be a rehearing, subject to any case management directions which the judge may make in

relation to updating or other evidence and subject to, as under FPR 30.12(1)(b), the court considering that "it would be in the interests of justice to hold a re-hearing".

74. The court will, thereafter, only substitute its own order if the judge decides that the arbitrator's award was wrong; not seriously, or obviously wrong, or so wrong that it leaps off the page, but just wrong.

75. It follows that, in my judgment, the wording found in the bold box at the foot of the ARB1 FS is itself wrong and goes too far in saying that "it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award".

The Judgment

76. Turning then to the judgment which led to the making of the order which is the subject of this appeal. The judge, unsurprisingly, concluded that there had been no serious procedural irregularity that could lead to a successful appeal under s68 AA 1996 and, equally unsurprisingly, there is no appeal against that conclusion.

77. The judge dealt with the application under s69 AA 1996 at some length. As was necessary to satisfy the requirements of the section, those representing the husband had to characterise their complaints as errors of law which satisfied the "obviously wrong" test. The reality was that the challenges largely related to submissions that the arbitrator had failed to give adequate consideration to relevant matters, and that he had erred in the discretionary exercise. The judge, by reference to the "obviously wrong" test, considered between [38] – [54] the arguments raised by the husband in support of his application. For example, the arbitrator's treatment of the parties' housing needs [47] and the wife's earning capacity [44].

78. The judge refused permission to appeal on the basis: (i) that the suggested errors of law were in fact "questions of mixed fact and law as to how the discretionary exercise of sharing assets under the 1973 Act should be" applied; and (ii) permission will only be granted under s69 if the award was one which no reasonable (or rational) arbitrator could make (see *The Nema* [1982] AC 724 at 744). The judge concluded at [55]:

> "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."

79. The judge, having dismissed those applications made on behalf of the husband, turned, more briefly, to the husband's application that no order be made in the terms of the arbitral award by reason of its overall unfairness. The judge concluded at [55] that:

> "… Even applying the simple test of 'wrong' under Part 30 FPR permission to appeal would have been refused."

80. The judge set out between [84] – [92] "a number of threads" that she said were relevant to the court's discretion to make an order reflecting the arbitrator's award. These can be summarised as follows:

i) The court retains its overriding discretion to make, or decline to make, orders under s25 MCA 1973. The court's discretion is not governed by the AA 1996;

ii) 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 AA 1996. In most cases, the discretion will be applied consistently with the statutory framework in the 1996 Act (*see S v S*, at [26]);

iii) The test for not making an order giving effect to the award is 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* (see Mostyn J in *J v B* at [28] and *S v S* at [21];

iv) There is some analogy with the court's exercise of discretion in giving effect to a settlement agreement or a pre-nuptial agreement. However, the same test does not apply since the court must take into account that the parties have agreed to refer their dispute to a neutral and independent arbitrator. An arbitration award is given effect not only by consent, but also by statute and international treaty; it would, therefore, be wrong to equate its binding effect with that of a settlement agreement or pre-nuptial agreement;

v) The parties have elected to "have their day in court" before an arbitrator, and the AA 1996 deals with procedural irregularity and errors of law. The court's discretion is not intended to allow them to re-run or improve their case, and to ask the court to be a new tribunal of fact.

81. Putting together these features, the judge concluded at [90] and [91] that the practical effect is that the s25 MCA 1973 discretion will usually be exercised in a similar way to the court's discretion to grant relief under a challenge to an award under the 1996 Act. The test for intervention, the judge said, is "closely aligned and similarly robust". The judge then concluded:

> "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*)." (my emphasis).

82. It is clear that, whilst the judge referred to a test of "wrong", she in fact imbued the word with adverbs which served to heighten the test to "seriously wrong" or "obviously wrong" or as being a decision where the error "leaps off the page". The judge, therefore, identified a similarly high bar before a court should be permitted to exercise its s25 jurisdiction where one party is dissatisfied with an arbitration award, as to that which undoubtedly applies in relation to applications made under s68 or s69 AA 1996. Having set out her test of "seriously" or "obviously wrong" or an error which "leaps off the page", the judge went on to consider whether, in her view, the arbitrator's award would, in fact, be consistent with the court's discretion under s25. The judge said that she "put to one side the 1996 Act", and that she was satisfied that from a pure s25 MCA 1973 perspective, the award made by Mr Shaw was "not wrong". DHJ Ambrose said at [93]:

> "It [the award] 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 […] I am satisfied that I should approve the order attached to the Award."

83. In my judgment, the judge's reference to "not wrong" can only be looked at against the backdrop of the previous paragraph, where she clearly states that she regards the "obviously wrong" test to apply to the discretionary exercise under s25 where there has been a previous arbitration award. This view is reinforced by the fact that her substantive consideration of the case, and its outcome, was considered by the judge as part of her s69 AA 1996 analysis and was effectively adopted by her for the purposes of the husband's submissions, in relation to the use of the judge's residual discretionary jurisdiction under the MCA 1973.

The Parties' submissions

84. Mr Ewins, on behalf of the husband, submits that there is conflicting High Court authority, and confusion within the profession, concerning the proper approach where a party wishes to challenge an arbitral award. In any event, he says, the husband in the present case has not had a fair determination of the wife's claims. As a consequence, by reason of the overall unfairness of the award and measured against the court's duty under s25 MCA 1973, the award's failure properly to meet the husband's needs and to take into account his contributions, means that the award is not one that the court could properly approve, pursuant to its duty under s25 MCA 1973.

85. For the detailed reasons set out in his skeleton argument, and expanded upon orally, Mr Ewins submits that the judge was in error in considering that the award was fair and "not wrong". On a proper reading of the judge's judgment, Mr Ewins submits, the reality is that, notwithstanding her reference to "wrong", the judge in reality imposed a higher test as is clear from her references at [92]. The judge approached the application of "wrong" by reference to the stringent test for the 1996 Act, and by the application of the gloss of "seriously", "obviously" or an error that "leaps off the page".

86. Mr Walden-Smith, on behalf of the wife, submits that the judge was correct in her application of the law and as to the proper test, namely one that is synonymous with s68 and s69 AA 1996. However, even if the judge was in error, and the proper test is as submitted on behalf of the husband, in fact the "appeals test" as it would be applied under the MCA 1973 rather than a higher test aligned to s68 and s69 AA 1996, the first instance (arbitral award) was not open to realistic challenge.

87. The essence of this appeal, Mr Walden-Smith submitted, is the identification of the circumstances in which a judge of the Family Court should decline to make an arbitral award, notwithstanding the failure of any appeal pursuant to ss67, 68 or 69 of the AA 1996. That being so, he submits the effect of the decision of Mostyn J in *J v B*, is that the only circumstances in which a Family Court is justified in refusing to make an order in the terms of the arbitral award, absent a successful challenge under ss67,68 or 69, are in cases where there has been a vitiating mistake or a supervening event.

88. Mr Walden-Smith submits that, although the making of an arbitration agreement does not oust the jurisdiction of the court, the fact that the parties have agreed to refer the matter to binding arbitration is centrally relevant to the exercise of discretion in deciding whether or not to make an order in the terms of the award.

Discussion

89. With respect, in my judgment, Mostyn J's reliance on Sir Bernard Eder's view (para. [23] above) that, where parties have entered into an arbitration agreement, "the mere fact that an award is "wrong" or even "unjust" does not, of itself, provide any basis for challenging the award or intervention by the Court", cannot be justified in the context of family proceedings.

90. Further, in order for an arbitration award to become enforceable, the parties have to issue an application and obtain orders for financial provision, the authority for those orders coming from the court.

91. In the present case, for example, the wife needs a periodical payments order in her favour, made pursuant to s23 MCA 1973. If the parties submit a consent order that is,

in the mind of the district judge, unjust, having taken into account the section 25 criteria and the fact that the parties had agreed to submit themselves to arbitration, then that district judge will not rubber stamp the order, he will decline to make it. Similarly, where one party says, as here, that the proposed order does not meet his or her needs, how can a judge exercising his or her jurisdiction under the MCA 1973 metaphorically shrug his or her shoulders and say that the disgruntled party has "[bought] the right to get the wrong answer", and that (failing mistake, or a supervening event) the potentially unfair order that fails to meet the needs of one of the parties will nevertheless be made?

92. In my judgment, such an approach cuts across the fundamental tenet of "fairness", which has informed every decision made by the courts since the landmark case of *White v White* [2000] UKHL 54. In his opening remarks, Lord Nicholls said:

> "Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."

93. "Fairness" is the constant reprise of Lord Nicholls; a concept, which he refers to as, "the underlying objective of securing fair financial arrangements". Fairness continues to be the lodestar by which all financial remedy hearings are guided *(see H v T (Judicial Change of Mind)* [2018] EWHC 3962).

94. In my judgment, for the statutory duty found in s25 MCA 1973 to operate effectively, a person has to be able to put before the court the reason(s) why they believe the order is unjust.

95. The practical effect of the submissions made on behalf of the wife can be demonstrated by reference to the facts of this case; had the court found a deputy district judge who was available to hear the case then, in the event that either of them felt the outcome to be unfair, either the wife or the husband would, subject to leave, have an appeal to the circuit judge on the usual terms (see *Piglowska* v *Piglowski* etc). Where, however, no deputy district judge becomes available and the parties turn to arbitration as a last resort, there is no appeal and, in line with the submissions of Mr Walden-Smith and the approach of the judge, whilst the jurisdiction of the Family Court has not been ousted by the making of the arbitration award, the court's inquisitorial jurisdiction is limited to the stringent terms of the AA 1996, designed originally for civil and commercial cases.

96. Rightly, para [6.5] of the ARB1 FS form (quoted at [16] above) highlights that the parties "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". In my judgment, a party who believes the arbitral award which follows an arbitration hearing is wrong can, through the 'notice to show cause' process put their objections before the court. If the court at the triage/paper stage takes the view that the objection made to the award by one of the parties would not pass the permission to

appeal test, it can make an order in the terms of the arbitral award without more ado and penalise the reluctant party in costs.

97. It follows that I do not think it necessary for these rare cases to be put before a High Court judge as a matter of course. It seems to me that they will be allocated to either the specialist circuit judges who hear financial remedy appeals from the district judges sitting in the financial remedies court or to the High Court, whichever is appropriate on the facts of the case.

Outcome of the Appeal

98. In my judgment, notwithstanding her lengthy and careful judgment, the judge applied the wrong test and the proper test is the appeals test. The judge went on specifically to hold that even had the appeals test been the proper approach, there was no basis for the court to interfere with the award.

99. A substantial part of the submissions of Mr Ewins were occupied with his detailed arguments to the effect that on the facts of the case, the arbitrator's award was wrong. Mr Ewins submitted that the judge was in error in assessing in particular: the housing budget for each of the parties and the realistic ability of the husband to rehouse himself to an acceptable standard, the distribution of the parties' pensions and the quantum of periodical payments made to the wife by virtue of the award.

100. Mr Walden-Smith, for his part, adopted the approach of the judge; namely that, whilst another judge may have been more generous to the husband, the award made was within the discretionary bracket and the court should not, therefore, interfere.

101. In my judgment in applying the appeals test, I am satisfied that the husband would have a real prospect of succeeding in an appeal against the award made for the reasons submitted by Mr Ewins. In order to avoid appearing to express any view as to outcome, I do not intend to elaborate further or even to set out the facts and terms of the order, given that, in my judgment, the inevitable consequence of my view is that the matter must now be remitted to a circuit judge.

102. If my Lords agree, I would therefore allow the appeal and remit the matter for a case management hearing (in part because of the lapse of time since the arbitral award) before a circuit judge ticketed to hear financial remedy appeals to determine the form and extent of the hearing required to determine these proceedings.

Postscript

103. Both Moylan LJ at the permission stage, and myself at the conclusion of the appeal hearing, implored the husband and wife to settle this case. I dare not guess how little (if any) of the modest capital which was available to rehouse each of these parties is now left.

104. I can only hope that renewed efforts will be made by the parties to resolve the matter without recourse to the further litigation anticipated by this judgment.

Lord Justice Moylan:

105. I agree.

Lord Justice Popplewell:

106. I also agree