Neutral Citation: [2023] EWFC 179 (B)

Case No: ZC21P04034

IN THE CENTRAL FAMILY COURT

IN THE MATTER OF SCHEDULE 1 OF THE CHILDREN ACT 1989

AND IN THE MATTER OF A AND B (CHILDREN)

Date: 6 October 2023

Before :

Her Honour Judge Evans-Gordon

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Between :

LT — **Applicant**

- and –

ZU — **Respondents**

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- -

Michael Glaser KC (instructed by **Mischon de Reya**) for the **Applicant**
Samantha Singer (instructed by **Keystone Law**) for the **Respondent**

Hearing dates: 22 & 23 June 2023

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This judgment was handed down on 6th October 2023 by circulation to the parties by email

JUDGMENT

1. This judgment follows the substantive hearing of the applicant father's challenge to the arbitral award made by a jointly appointed arbitrator ("the arbitrator") on 12 August 2022 ("the award"). The award was made pursuant to Schedule 1 ("Schedule 1") of the Children Act 1989 ("the Act"). The challenge is on two general bases, firstly (Ground 1), that the arbitrator had no power to require the applicant to borrow monies for the purposes of making a settlement of property under paragraph 1(2)(d) of Schedule 1; and, secondly (Grounds 2 – 12), that the award more generally, was wrong and/or unfair in that it failed to take into account the applicant's own needs and his ability to pay. Further, the applicant says that there has been such a significant change of circumstances that it would now be wrong to make the award an order of the court. The change of circumstances comprises of a continued fall in the applicant's net income and a significant increase in interest rates which were unforeseen at the date of the award. Both matters are attributable to the economic events of September and October 2022.

Parties and representation

2. The applicant father is LT ("the applicant") while the respondent mother is ZU ("the respondent"). The award was made in respect of the parties' two children who are 7 and 4 years old. The applicant was represented by Michael Glaser KC (who did not appear in the arbitration) while the respondent was represented by Samantha Singer. For the purpose only of written submissions made after the hearing in relation to an authority introduced by Mr Glaser on day 2 of the hearing, Ms Singer was led by Tim Amos KC. I am grateful to them all for their assistance particularly as Ms Singer, Mr Amos and their instructing solicitors were all acting *pro bono*.

The Award

3. Essentially, the award requires the applicant, together with the respondent, to purchase a three-bedroom home for the respondent and the children during the latter's minority with a housing fund of £1,100,000 or £1,130,000, depending on whether additional stamp duty land tax ("SDLT") is payable at 3%. This requires the applicant to enter into a joint mortgage with the respondent in the sum of c.£870,500. The applicant would contribute £240,000 in cash towards the deposit and the costs of purchase. The Respondent would contribute between £3,000 and £20,000 to the purchase. The applicant will be solely responsible for

paying the mortgage instalments. The property would revert to the parties in proportion to their contributions upon a triggering event. In addition, the applicant was directed to pay the children's school fees, any service charges on the acquired property and £10,000 per annum per child in general maintenance, inclusive of any sums assessed by the CMS.

4. I say at the outset that the applicant's position in the arbitration was that he would enter into a mortgage to purchase a bigger home for the respondent and the children albeit at a lower borrowing level than that determined by the arbitrator. Given the applicant's position it is hardly surprising that the arbitrator felt able to make the award he did. As far as I can tell, it was never suggested to him that he, or the court, had no power to make an award requiring the applicant to borrow money for the purposes of housing the children. There is no reference to this in the award and, I have no doubt, there would have been had the issue been raised.

The Positions

5. The applicant states that neither the arbitrator nor the court has power to require a parent to settle property under paragraph (2)(d) of Schedule 1 unless the relevant parent is entitled to that property either in possession or in reversion. This means that an order cannot be made requiring a parent to borrow money by way of mortgage or otherwise in order to settle it for the benefit of the child. The applicant also challenges the award on the basis that there has been such a significant change in the applicant's circumstances since the arbitration hearing that it would be unfair to make the award an order of the court. The relevant change in circumstances is the loss of investment monies in the hedge fund for which the applicant works resulting in his annual income being reduced to between £65,000 and £86,000 odd net.

6. The respondent's position initially, appeared to be that the court does have power to order the applicant to borrow monies for the purpose of a settlement although, for practical purposes, the order would be framed in two stages, providing the lump sum and then creating the settlement (see the draft order proposed to implement the award which it was said, was mere drafting and not a matter of substance). During the hearing Ms Singer posited that the court can order the applicant to pay a lump sum pursuant to paragraph 1(2)(c) of Schedule 1 for the purpose of providing housing, which monies would subsequently be settled and revert to the

applicant upon a triggering event and this would not infringe any prohibition against settlements of property not already in the settlor's possession in paragraph 1((2)(d) of Schedule 1 to the Act, at least, that was my understanding of her oral submissions. I apologise if I misunderstood. In any event, the net effect of the submission was that the court could order a lump sum for housing There is no statutory restriction on a lump sum payment limiting it to property in possession or reversion therefore the court could direct the applicant to borrow monies for the purpose. The further written submissions, as I understand them, state that the court can order the payment of a lump sum for the purpose of property provision and, having done so, can then direct the settlement of that sum. This, it is submitted, is different to ordering the settlement of property. Further, it is not necessary for the property that is to be the subject of the settlement to have been identified in advance. The applicant's objections, it is said, are mere pedantic quibbling about the drafting of the order and the court always retains jurisdiction to give effect to its orders even if this means altering the mechanism originally envisaged or directed.

7. As far as the second ground of objection is concerned, the respondent says that the arbitrator took into account potential variations in the applicant's income and determined that he would be able to meet any shortfall in times of lower income. This was open to him on the evidence. As to the alleged change in circumstances, the court should reject the applicant's evidence as to his means on the basis that he has omitted key information, fails to clarify his tax position, does not adequately address his debt position, his non-disclosure in the arbitration proceedings and his lack of full and frank disclosure of his disposition of 'locked' illiquid shares and his withdrawal of equity from the home occupied by the respondent.

Background

8. I set out only brief facts, the full history appears in the award from paragraph 9 onwards. The parties initially had a relationship for 3 – 5 years leading up to 2012. They met again in 2015 and rekindled their relationship. Their eldest child was born on 23 June 2016 and the younger on 23 November 2018. The parties separated in 2019. Both children are being privately educated. The respondent occupies a two-bedroom flat owned by the applicant. It is subject to a significant mortgage. The applicant lives in a 4-bedroom house near the

respondent's home. This, also, is subject to a significant mortgage. The housing arrangements had been the subject of agreement, not a court order, as had the payment of school fees and child maintenance by the applicant. The applicant works for a hedge fund while the respondent is CEO of a tennis charity; she is a former professional tennis player.

9. The first set of litigation involved private law proceedings in which the respondent sought permission to relocate to Kent and consequent child arrangements orders. Following reports from a Dr A and an independent social worker, the respondent later withdrew her relocation application and, at a final hearing of the remaining child arrangements issues on 17 January 2022, HHJ Roberts made an order that the children spend equal time with each parent and made, for the family courts, swingeing costs orders against the respondent. While the s.8 proceedings were ongoing, the respondent commenced her Schedule 1 application seeking lump sums, a settlement or transfer of property and periodical payments. There is a CMS calculation in place, which the applicant challenged although it appears that his payments have been assessed at £0, perhaps on the basis of shared care.

10. Between them, the parties had spent approximately £1,000,000 in total on legal fees by the time of the arbitration although the applicant's expenditure was significantly greater than the respondent's. This sum would have housed the respondent and children in larger accommodation without the need for any borrowing.

11. The arbitration took place on 30 June 2022. The award is dated 12 August 2022. The applicant issued his challenge to the award on 2 September 2022 and the respondent applied for an order upholding it on 15 September 2022. Following the respondent lodging a 'triage' skeleton argument, on 27 October 2022, His Honour Judge Hess granted the applicant permission to pursue his challenge. The matter was listed for directions before me on 29 November 2022. One of the matters before me was the applicant's application to adduce evidence of a significant change of circumstances which rendered upholding the award wrong. As the hearing was listed for only 1 hour, I had to reserve judgment on the issue of fresh evidence. I handed down judgment on 28 December 2022 granting permission for the fresh evidence. As has become depressingly regular in the family courts, the parties were unable to agree the terms of an order and there had to be another hearing to settle its terms. That took

place on 11 March 2023. The substantive hearing took place on 22 and 23 June 2023.

12. On the first day of the hearing, it became clear that the respondent's case was that the court had power to order the applicant to borrow monies to provide a lump sum pursuant to paragraph 1(2)(c) of Schedule 1. In consequence, Mr Glaser produced the case of *Philips v Peace* [2004] EWHC 3180 (Fam) as authority that where a court has already made an order for the settlement of property pursuant to paragraph 1(2)(d) of the Schedule 1 it cannot subsequently order the transfer of property pursuant to that sub-paragraph. Further, while the court has power to order multiple lump sums, it cannot use that power in order to circumvent the prohibition on more than one settlement of property. Ms Singer required time to consider this authority and formulate her response therefore I reserved judgment. Her response, written together with Mr Amos, was lodged on 28 June 2023. As I have found myself writing with increasing frequency, there has been a delay in producing this judgment due to commitments in another court and the inability in this court to provide me with judgment writing time in light of the case load and the absence of judges during August. I apologise to the parties for the delay.

The Law

13. As far as my role is concerned, the starting point on the law is the decision of the Court of Appeal in *Haley v Haley [2020]* EWCA Civ 1369. King LJ set out the nature and scope of the application following an arbitral award when she said:

> "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".”

14. An arbitral award is not, of course, an order of the court (*A v A (Arbitration Guidance)* [2021] EWHC 1889) therefore the process following a challenged award is akin to an appeal rather than a true appeal. An arbitral award is based on the agreement of the parties to be bound by the decision of an arbitrator (*S v S (Arbitral Award: Approval* [2014] EWHC 7 (Fam)). In *S v S* Munby P said 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. Indeed, an arbitral award is surely of its nature even stronger that a simple agreement between the parties."

15. However, when approving a financial remedies order arising out of an agreement the court must discharge its statutory function under the Matrimonial Causes Act 1973 ("the 1973 Act") or Schedule 1 of the Children Act 1989, as appropriate and ensure that the proposed order is fair in the light of the criteria set out in section 25 of the 1973 Act or paragraph 4 of Schedule 1 and not merely act as a 'rubber stamp' (*Xydhias v Xydhias* [1998] EWCA Civ 1966). That, it seems to me, is the effect also of the decision in *Haley*. Those decisions apply as much to decisions under Schedule 1 as to those under the Matrimonial Causes Act 1973 although in Schedule 1 decisions the children's welfare is not the court's paramount consideration it is a very relevant matter. While the factors set out in s.1(3) of the Children act 1989 do not directly apply to Schedule 1, it seems to me that I should have those factors in mind, insofar as they are relevant.

16. I must be satisfied that the arbitral award is not wrong. The applicant must persuade me that it is. A decision that is 'wrong' may be based on an error of law or its impact may be unfair on one or other of the parties. Although I accept, for these purposes, that the children's welfare is a weighty factor, as Ms Singer and Mr Amos submit, that does not, it seems to me, lead to a result that the court must, or should, make orders that would leave one parent unable to meet their own needs or the needs of the children while in their care. I must, after all, take into account both - parents' needs as well as their resources (Schedule 1, para 4(1)(a) & (b)). Further, a significant change of circumstances following the award may render it unjust or unfair to make the arbitral award an order of the court in that it may impact on the children's welfare by impacting disproportionately on one or other of the parents. This is the sense in

which I use the word ‘unfair’ not in the sense that the ultimate test is fairness as between the parents. Indeed, even in matrimonial finance cases, the welfare of minor children is the court’s first concern and that can affect the fairness of the outcome as between the adults.

17. Again, by way of analogy with an appeal, this is clear from the decision of Lord Fraser of Tullybelton in *G v G (Minors:Custody Appeal)* [1985] 1 WLR 647 at 654B-C where he said:

> “Additional evidence dealing with events that have occurred since the hearing in the court below is readily admitted, especially in custody cases where the relevant circumstances may change dramatically in a short period of time.”

While this is not a custody case, it is plain the principle applies in other family cases too.

Evidence

18. I have read the application notices, grounds of appeal/objection, the award, the witness statements of each party and the other documents included in the bundle and supplemental bundle provided to me. I have also read the parties’ additional position statements and/or skeleton arguments. I have not read arbitration bundle.

19. I propose to deal with Ground 1 and Grounds 2-12 separately as they are very different, finally turning to the change of circumstances.

Ground 1 – power to compel a parent to borrow

20. Schedule 1, in so far as is relevant reads as follows:

> 1 **Orders for financial relief against parents**
>
> (1) On an application made by a parent, guardian or special guardian of a child, or by any person who is named in a child arrangements order as a person with whom a child is to live, the court may make one or more of the orders mentioned in sub-paragraph (2).
>
> (2) The orders referred to in sub-paragraph (1) are—

(a) an order requiring either or both parents of a child—

(i) to make to the applicant for the benefit of the child; or

(ii) to make to the child himself,

such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both parents of a child—

(i) to secure to the applicant for the benefit of the child; or

(ii) to secure to the child himself,

such periodical payments, for such term, as may be so specified;

(c) an order requiring either or both parents of a child—

(i) to pay to the applicant for the benefit of the child; or

(ii) to pay to the child himself,

such lump sum as may be so specified;

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property—

(i) to which either parent is entitled (either in possession or in reversion); and

(ii) which is specified in the order;

(e) an order requiring either or both parents of a child—

(i) to transfer to the applicant, for the benefit of the child; or

(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order.

(3) The powers conferred by this paragraph may be exercised at any time.

(4) An order under sub-paragraph (2)(a) or (b) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(5) Where a court makes an order under this paragraph—

> (a) it may at any time make a further such order under sub-paragraph (2)(a), (b) or (c) with respect to the child concerned if he has not reached the age of eighteen;
> (b) it may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child.

21. It is clear that paragraph 1 of Schedule 1 permits the court to make any or all of the orders set out in subparagraph 1(2) (paragraph 1(1)) Further, it may make multiple orders relating to periodical payments, secured periodical payments and lump sums (paragraph 1((5)(a)). However, it may make only one order requiring a parent to make a settlement or to transfer property for the benefit of a child (paragraph 1(5)(b)). In *Phillips v Peace* [2005] 2 FLR 1212, Singer J considered whether the word 'or' in sub-paragraph 1(5)(b) is conjunctive or disjunctive. He determined that the sub-paragraph permitted the court to make only one of the orders providing for a transfer or settlement of property and, having previously made an order for settlement of property (as was the case in *Phillips v Peace*) it could not make a subsequent order for a transfer of property [22]. Both are property adjustment orders and the legislative intention was that transfers of property and settlements "are to be regarded as different methods of dealing with the same, one-off, need for property adjustment in an appropriate case." (at [20]). This is in contrast to periodical payments and lump sums which are to meet interim needs which needs are susceptible to change over time.

22. The mother in *Phillips v Peace* then argued that the court could award a further lump sum subject to a condition that it be used towards housing which would, in due course, revert to the father in accordance with the terms of the original settlement. Singer J held that lump sums are not designed to revert to the payer but are paid "once and for all and are used to reimburse past expenditure or are spent on current or future needs. To the extent that whatever was purchased with the lump sum is not consumed it will be retained for or by the child" (at [27]). He then reviewed the authorities and determined that one could not use the lump sum provisions to circumvent the prohibition against ordering a second settlement (at [30]-[32]): this would be a mis-use of the court's power.

23. Mr Amos and Ms Singer put forward the following arguments in support of a contrary construction or conclusion:

i) *Phillips v Peace* does not address the issue of whether there is jurisdiction to make a housing award that relies on mortgage borrowing;

ii) What the court does in these cases is to order a lump sum as a stepping-stone towards the settlement of a property once it has been purchased with the lump sum. If this were not the case, it is said, the court would have to identify the particular housing to be subject to a settlement which housing must already be in the possession of the paying parent. This is rarely done in advance of an order;

iii) Despite there being no express power in Schedule 1 to order a sale of property to produce the required lump sum or to direct that a new property be purchased on trust, this is what the courts do. Accordingly, it is only after the relevant housing is purchased with the lump sum, that is made subject to the settlement because that is the point at which the settlor is entitled to the specific property in possession. The applicant's quibbles are ones of drafting not jurisdiction;

24. In seeking to make good these points, reliance is placed on a number of authorities: *MB v KB* [2007] Fam Law 801; *MT v OT* [2019] 1 FLR 93; *G v A (financial remedy : enforcement (No 1)* [2011] EWHC 2380 (Fam); *G v A (financial remedy : enforcement (No 2)* [2011] EWHC 968 (Fam); *G v A (financial remedy : enforcement (No 3)* [2011] EWHC 2377 (Fam); *G v A (financial remedy : enforcement (No 4)* [2012] 1 FLR 427; *G v S (Children Act 1989: Schedule 1)* [2017 EWHC 365 (Fam).

25. It is, of course, absolutely correct to say that *Phillips v Peace* did not address the issue of a housing award that relies on mortgage borrowing. The father in that case was wealthy and could meet any sum he was ordered to provide; no borrowing of any sort was necessary. I cannot see how that helps the respondent here. In my judgment, an order requiring a parent to borrow money for the purposes of a settlement (or transfer)

cannot be made as a settlement (or transfer) may only be ordered of property "to which either parent is entitled in possession or in reversion" (paragraph 1(4)(i)). Making a settlement is either constituting oneself as a trustee of existing property or giving existing property to trustees to hold for particular purposes. Without specified property, there is no settlement. What *Phillips v Peace* does hold is that a court cannot use the lump sum provisions to circumvent provisions relating to the exercise of the discretion in relation to settlements. That is exactly what the respondent is seeking to do albeit that the provision she is seeking to circumvent is that restricting settlements to property to which the relevant parent is entitled rather than that prohibiting a second property adjustment order.

26. The respondent's argument seems to be that the court is not usually directing the settlement of monies but of the property that is eventually bought with a lump sum. It seems to be said that, absent an existing property, the court starts with an order for the provision of a lump sum and then orders the settlement of the property eventually purchased with that lump sum albeit that those steps are often rolled up. That cannot be right as a matter of construction. If the respondent is saying that the settlement does not arise until a particular property is acquired, as opposed to a settlement of the money for such a property, then I disagree. If the paying parent provides the recipient with a lump sum within the meaning of sub-paragraph 1(2)(c), the applicant is not required to use it for a settlement or other particular purpose but only for the benefit of the child or, if not used, retained for or by the child (see *Phillips v Peace* at [27]). If a lump sum is provided to a receiving parent who may use it only to fund the purchase of a property held under a settlement, the receiving parent would hold the money on trust for that purpose: by definition, there would be a settlement of those monies. The order would have directed a settlement of the monies for a particular purpose not specific real property. Indeed, that is what Baron J said in terms in *MB v KB* when she said in the passage cited by the respondent, "The father, who was wealthy, was ordered to settle monies on trust to purchase a home for the child which ultimately reverted to him." (my emphasis).

27. I cannot see how *MB v KB* is of any other assistance to the respondent. In that case the first settlement was made pursuant to the Matrimonial Causes Act 1973. Schedule 1, as Baron J observed, only prohibits two settlements made pursuant to Schedule 1 as the words used are "it may

not make more than one order under sub-paragraph 2(d) or (e) …" (my emphasis): only one settlement was being made under sub-paragraph 2(d) or (e) in *MB v KB.* Schedule 1 does not prohibit a Schedule 1 settlement following another settlement made pursuant to some other statute or, for that matter, by agreement between the parties; although any such previous settlement is likely to be relevant to the exercise of the discretion. Further, the requirement that a settlement may be made only out of property to which the relevant parent is entitled would be meaningless as a parent could always be directed to borrow money and then directed to settle such property having become entitled to it. On a practical note, it is difficult to see how a parent who did not have the necessary funds could borrow sufficient to acquire a home for the child's benefit without giving some sort of security to the lender over the relevant property. In such a case the settlement could not be of the entire value of the property, only of the equity held by the relevant parent.

28. The court does not need the power to order a parent to sell property to produce a lump sum. If the paying parent has the means, the court simply sets the sum that is to be subject to the settlement – it is for the parent to decide how they wish to assemble the monies. They may sell a property, they may raise monies through a mortgage on an existing property, they may sell shares or other investments. Once the monies are settled, it is for the trustees to make decisions about which property will be purchased. Indeed, it seems to me that that was Peter Jackson J's approach in the various *G v A* cases. The settlement had been ordered: the difficulties arose in executing the settlement (purchasing a property) due to unmeritorious objections and unreasonable obstacles raised by the father and his nominated trustee to properties identified by the mother. Peter Jackson J, whose understandable frustration became more and more evident as the number of applications increased, was merely enforcing the court's direction of a settlement and/or exercising the High Court's jurisdiction to control and direct trustees. His references to "inexhaustible pedantic ingenuity" and "excessive lack of common sense" related to the execution of the settlement not its establishment or creation.

29. While a robust and purposive approach to construing Schedule 1 may well be appropriate, in my judgment, such an approach does not extend to ignoring clear statutory provisions.

30. *MT v OT* is of little assistance for largely the same reasons. In that case the settlement was created in 2007 pursuant to an order of Charles J. The dispute before Cohen J was about the substitution of one trust property for another. It seems that the father in that case was also the trustee of the original home. Cohen J was doing no more than giving a trustee directions as to the execution of the trust. Trustees have a duty to exercise their powers to give effect to the trust for the benefit of the beneficiaries. Cohen J was not altering the value of the fund or directing the father to borrow monies. He permitted the father to buy out the trust's interest in the home and the funds generated thereby would be used to purchase a more suitable property. Nothing left or was added to the settlement. If the father wished to buy the trust property, it was a matter for him how he raised the money and, if he chose to borrow it, so be it. The court was not compelling the trustee or the father to borrow monies. It did not need to do so as the trustee of the settlement already had the power to sell the trust property and use the funds to purchase a new property (Trusts of Land and Appointment of Trustees Act 1996, section 6), the trustee just refused to exercise it.

31. If the original property sold for less than £1.35 million that was a loss to the trust caused by the father/trustee's default in not maintaining the property and he had to make good the loss to the trust or settlement. While Cohen J did not express his decision in those precise terms, it seems to me that is the effect of what he said in paragraphs [24] and [26] of his judgment. This is usual where a trust suffers a loss as a result of a trustee's neglect or breach of his duties. Cohen J made it clear that the costs of sale and purchase, including SDLT, had to come out of the £1.35 million of the existing trust property. As to the additional £50,000 ordered by Cohen J, that was clearly a permissible exercise of the power to award multiple lump sums under sub-paragraph 1(2)(c) of Schedule 1. The money was not subject to a settlement in that it was to be used for the benefit of the children and did not revert to the father upon termination of the settlement. If £25,000 was spent on works to the new property the father would or might, depending on the nature of the works, eventually, receive the benefit of that but, if the works were not carried out, the money would pass to the children per *Phillips v Peace*.

32. *G v S* is not different in substance to *G v A* and *MT v OT*. Hayden J was settling the terms of an order following a *Xydhias* agreement. He

determined that the order creating or directing the settlement of £2.1 million as a housing fund should include provisions permitting the mother to require the sale of a property and the purchase of another on more than one occasion. While Hayden J stated that the court retained the jurisdiction to 'vary' the housing provision [19], it seems to me that he meant only that the court retained jurisdiction to give directions to the trustees in relation to the settlement in the future, specifically in relation to the acquisition of appropriate housing. He is unlikely to have meant that the court could vary the settlement pursuant to its powers under Schedule 1 because sub-paragraph 1(4) only permits the variation of periodical payments (see also paragraphs 6, 6A and 7). Of course, trusts may be varied by the High Court, as opposed to the Family Court, pursuant to the Variation of Trusts Act 1958 and it may be that is what he had in mind. However, even in those cases, the court has no power to require the trustees, or anyone else, to add to the trust fund.

33. As far as the costs of sale and purchase of substitute properties are concerned, it seems to me that Hayden J determined that these should be met by way of additional lump sum payments. While this approach is different to that in *MT v OT*, it is not inconsistent with it. The costs of sale and purchase of future properties are not monies that will be returned to the paying parent at any time; in that sense, they are more akin to a lump sum than a settlement. Whether such sums should be paid out of a settlement or by way of a lump sum is a matter of discretion for the judge who will consider the fairness of a particular order in light of the circumstances of the particular case. Hayden J plainly was of the view that the scale of the father's wealth meant that fairness required costs to be paid by way of lump sum so the value of the child's housing was not diminished just because needs dictated a move.

34. In none of the above cases was it suggested or implied that a court can order a parent to borrow monies for the purpose of a settlement in circumstances where that parent is not already entitled to property in the required sum. It is difficult to see how that could be fair even if the court did have such jurisdiction. Having considered the case law cited to me, I am satisfied that the court does not have power to order a parent to borrow monies or provide property they do not have for the purposes of a settlement. The court does not adopt a two-stage approach to a settlement by directing the provision of a lump sum for the purposes of

purchasing a property which is then settled on the child, it orders the settlement of a sum of money for the purposes of acquiring a suitable property unless there is already a suitable property in the paying parent's hands in which case it might direct a settlement of that specific property. It would be a misuse of the court's powers, to borrow Singer J's phrase, for the court to utilise the power to award a lump sum to circumvent the restriction on a settlement to property to which the paying parent is already entitled. That plainly means property to which they are entitled at the time the order is made and not to property to which they might become entitled in the future as a result of a loan agreement. Further, it does not seem right to order a parent to borrow money when whether or not anyone will lend money is not in that parent's control. An unidentified mortgagee cannot, in my view, be compared to a *Thomas* resource such as an existing trust fund or generous family member.

35. The fact that the applicant offered to borrow monies to purchase a new home for the mother and children does not, it seems to me, make any difference. Such an agreement would have to be reflected in any order as a recital of an agreement or an undertaking. Absent a voluntary agreement or undertaking the court has no power to compel the applicant to give an undertaking or force him into an agreement to borrow monies to meet a property adjustment order. Nor can it, for the reasons given above, order him to do so.

36. The application succeeds on this ground.

Grounds 2-12

37. The award was premised on the provision of new housing funded through borrowing. Arguably, therefore, if the central plank of the award falls away, the whole award must fail. Nevertheless, I will address the other grounds of appeal and the change in circumstances, albeit in somewhat shorter form.

38. The arbitrator made various findings which are relevant to the issue of the fairness or affordability of the award. They are:

    i) The net equity in the respondent's current home, owned by the applicant, is £227,000;

ii) The net equity in the applicant's current home is £256,000;

iii) The value of the applicant's interest in a jointly owned family property in X is £21,500 and is liquid;

iv) The value of the applicant's shares in the hedge fund is £129,000 net of capital gains tax which the arbitrator accepted was illiquid;[1]

v) The applicant has hard debts of £76,000 (bank loans, credit cards & legal fees);

vi) The applicant has hard tax liabilities of £248,321 but he would seek to defer payment for an unspecified period and pay any consequent interest, at 4.25%;

vii) Tax liabilities on income to y/e 5 April 2023 (estimated at £108,000 by the applicant) should be excluded as they will be paid out of 2023/2024 income;

viii) Contingent tax liabilities of £232,000, arising out of an HMRC investigation should be ignored, which position the applicant accepted;

ix) A debt of £32,500 owed to the applicant's brother is a soft loan;

x) The applicant's total current net assets amount to £232,000 and his total assets amount to £58,000;

xi) The applicant's brother will make £60,000 available to him if he needs it by way of a soft loan;

xii) The applicant would earn c. £89,000 net in 2022/2023;

xiii) The applicant's earning capacity is £223,000 net p.a.;

xiv) The applicant has an unquantified income resource from a family company;

xv) The respondent needed a housing fund of £1,130,000 requiring a cash sum of £259,500 and borrowing of £870,500.

xvi) Of the required borrowing, the respondent could contribute £184,000 by way of her own mortgage capacity and the applicant the balance, which he could afford;

xvii) Of the cash sum required, the respondent could contribute £3,000 to £20,000, the equity in the

[1] The shares were sold between the date of the arbitration and the date of the award although the arbitrator was not informed of this.

respondent's current home would contribute £227,795 and the applicant would have to contribute the balance of c.£10,000 to £27,000 (the actual figures are £11,705 to £38,705);

xviii) This is affordable for the applicant because he needs to find only a modest amount of further capital, he can manage repayment of his debts and tax, he might obtain a SDLT rebate of £34,000 on the sale of the respondent's current home, he can borrow a further £60,000 against his own home on the basis of an 85% loan to value ratio and his brother will lend him £60,000 (para [71]);

39. Based on the then mortgage instalments on the respondent's current home, the arbitrator's award required the applicant, to pay £98,212 per annum by way of periodical payments, or other financial support as follows:

i) £39,000 for repayment mortgage instalments (at 2.5% interest over 35 years);

ii) £7,212 in service charges;

iii) £32,000 in school fees and extras;

iv) £20,000 in child maintenance (£9,500 by way of CMS assessment and a top up of £10,500);

40. As to his own expenditure, the arbitrator found that the applicant would have to pay £49,500 annually as follows:

i) £13,000 mortgage instalments on his own property;

ii) £6,000 repaying the Selina loan;

iii) £21,000 repaying a Barclay loan;

iv) £4,000 in credit card payments;

v) £3,000 in repaying his brother's loan;

vi) £2,500 in buildings insurance and the children's healthcare.

41. These figures gave a total expenditure of £147,712 per annum. They do not include other outgoings such as council tax and utilities, food and clothing for the applicant and the children while in his care or any other usual expenditure. On the basis of the sums the arbitrator attributed to meet the respondent's needs (net income of £33,000 and £20,000 of child maintenance) the applicant would have further expenditure of £53,000 a

year taking his total expenditure to £200,712 per annum. While that significantly exceeded the anticipated net income for 2022/2023 of £89,000, the arbitrator was of the view that the applicant could weather this by relying on the resources identified at paragraph 71 of the award being, I infer, a potential SDLT rebate of £34,000, a further £60,000 of mortgage borrowing on his own home and a £60,000 loan from his brother: £154,000 in total. I infer that the additional borrowing costs could be repaid out of the additional borrowing.

42. In arriving at these figures, the arbitrator adopted a 2.5% mortgage interest rate when the jointly instructed mortgage broker had indicated a figure of 3% interest. The higher figure would increase repayments by £6,000 per annum. He declined to take into account an increase of £13,000 per annum in mortgage payments on the Applicant's home from July 2023 upon the expiry of the fixed term, on the basis that he did not know what the rates might be then. The arbitrator declined to adjust the credit card repayments by an additional £6,000 per annum to reflect the end of the 0% interest in October 2023, for the same reason. He also declined to include the expected increase in school fees of £12,500 per annum from September 2023. If all this increased expenditure occurred, the applicant's outgoings would be £37,500 higher at £238,212 which exceeds his earning capacity of £223,000. It would exceed his 2022/2023 net income by at least £123,712 (excluding the increases taking effect in or after July 2023). Further, the applicant needs to find between £11,705 and £38,705 to make up the housing fund for the proposed new property for the respondent. If the required figure is the higher one, the sums required in 2022/2023 over and above his net income exceed the additional resources identified and quantified by the arbitrator. To the extent that the applicant may have a further indirect income resource from his mother's company, the arbitrator did not quantify the level of income and it is not possible for me to do so on a *quasi*-appeal. However, it does not seem to me, on the basis of what the arbitrator said in this respect, that it is likely to plug the gap between the applicant's financial obligations and needs and his income/resources.

43. Without going into the detail of the various matters raised in the grounds of appeal, it seems to me that the award was wrong on its face in that it is almost certainly unaffordable for the applicant. It exceeds his income and resources, including additional borrowing, in 2022/2023. It makes no

provision for the payment of £248,000 odd plus interest in existing tax liabilities, even under a repayment plan; it makes no provision for the repayment of legal fees; it makes no provision for payment of the 2022/2023 tax liabilities which the arbitrator found would be paid out of the 2023/2024 net income; it makes no provision for repayment of the additional borrowings needed in order to generate the funds required to meet the shortfall in 2022/2023. Even if one deducts the private school fees of £32,000, as appears to be the position in the parties' open offers for this hearing, the arbitral award is too high in the light of the applicant's hard liabilities.

44. Given the figures, it is unnecessary for me to consider the criticisms of the applicant's evidence set out in paragraph 7 above. I have based my decision on the arbitrator's own findings, not on any matters raised by the applicant.

45. The application succeeds on these grounds. I will not address each and every ground individually in the interests of proportionality. It is sufficient that the award is unaffordable. Indeed, in my judgment the unaffordability means that the whole exercise will have to be conducted afresh and it would not be helpful to give decisions on individual grounds of appeal.

Change of circumstances

46. While it is not necessary to address the change of circumstances relied upon by the applicant, it seems to me that the very significant increases in borrowing interest rates since September/October 2022 are sufficient to render an order in the terms of the August 2022 award wrong. Mortgage rates are double or almost double the 2.5% rate taken by the arbitrator which would increase the applicant's outgoings on mortgage instalments alone by c.£52,000 a year. The evidence shows that the hedge fund's fortunes have continued to decline with the result that the applicant's net income in 2022/2023 was expected to be c.£64,000. The applicant's hedge fund is not alone in this respect. Even if the applicant received a further payment of £57,817 gross in January 2023, that would still produce a net income of little more than £86,000 net. While the applicant can, and will have to, find employment that will pay him more, it is not clear how feasible that is in the current economic climate or what income he is likely to achieve. In any event, even if he reaches the earning capacity determined by the arbitrator, the award is unaffordable for him.

47. The application succeeds on this basis also. It follows that the respondent's application for the making of the award an order of the court fails and must be dismissed.

48. The children spend equal time with each parent. The applicant must be able to meet the children's housing and other needs while they are in his care. It cannot be said that the children's welfare requires that their father be unable to meet those needs in order to ensure that the needs are met when with their mother. These children's welfare requires that they be housed, clothed and fed at a level that is affordable for both parents.

49. I appreciate that this is the worst of all possible outcomes for both parties and it is a result I would have avoided if it had been at all possible. The capital resources, on the findings of the arbitrator are only £272,000 at the highest which includes the equity in both homes and that in the respondent's property. I cannot properly order the applicant to make payments for which he does not have the funds or other resources. Given that the parties have spent c. four times their current joint assets on litigation and come close to rendering themselves and their children homeless, I can only urge them to be realistic and take steps to ensure that their children's needs are met as best they may be in the current circumstances.

50. I have to apologise in a further short delay in handing down of this judgment following circulation of the draft. This is attributable to Covid.