Neutral Citation: [2022] EWFC 206 (B)

Case No: ZC21P04034

IN THE CENTRAL FAMILY COURT

IN THE MATTER OF SCHEDULE 1 OF THE CHILDREN ACT 1989 (ARBITRAL AWARD DIRECTIONS)

BEFORE : HER HONOUR JUDGE EVANS-GORDON

DATE : 28 DECEMBER 2022

BETWEEN:

LT

Applicant

- and -

ZU

Respondent

JUDGMENT

This judgment was handed down by circulation to the parties by email on 28 December 2022

1. This matter concerns the applicant father's application challenging an arbitral award made on 12 August 2022 ("the award") ("the first application"). The award concerned provision for the parties' two young children pursuant to Schedule 1 of the Children Act 1989. The grounds of challenge are, broadly, that the arbitrator (and the court) had/has no power to make an award requiring the applicant to borrow money by way of a mortgage on a joint purchase with the respondent mother and that the award was wrong and unfair in that it failed, in various ways, to take into account the applicant's own needs, his reducing income and his ability to meet the award.

2. However, I am not concerned today with the substance of the first application but with the directions necessary to get to a substantive hearing. The applicant has made a second application seeking permission to adduce further evidence which, he says, establishes both that the arbitrator was wrong in the award he made but also that, in the light of subsequent events, to make the award an order of the court would be unfair. Further, says the applicant, having admitted the additional evidence, I should deal with both the applications together. This would require directions permitting the respondent to lodge evidence in reply and require a hearing of 3 days.

3. The respondent says that I should not admit the further evidence as it is not truly fresh evidence, but concerns evidence placed before and submissions made to the arbitrator before they made their award. Alternatively, says the respondent, I should deal with the first application first, which would take a day, and only go on to consider the

question of fairness in light of subsequent events thereafter, if necessary. The respondent also seeks, again, for the matter to be allocated to a full High Court Judge.

4. The applicant was represented by Ell Calnan, instructed by Mischon de Reya and the respondent by Samantha Singer, instructed by Keystone Law. Ms Singer and her instructing solicitors are acting *pro bono*. I am grateful to them both for their assistance both written and oral.

5. 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"
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> 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.
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> 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".
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> 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.
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> 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".”

6. 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] EWHC7 (Fam)). When approving a financial remedies order arising out of an agreement the court must discharge its statutory function under the Matrimonial Causes Act 1973 and ensure that the proposed order is fair in the light of the criteria set out in section 25 of that Act 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*. The court must be satisfied that the arbitral award is not wrong or unfair.

7. In undertaking this exercise the question sometimes arises as to whether, and on what basis, additional evidence should be allowed. It appears to me that there are at least two basis on which further evidence might be permitted. The first is on the *Ladd v Marshall* [1954] 1 WLR 1489 principles, however, the applicant expressly disavows such reliance. Instead, he relies on the court’s overarching duty to ensure any order is fair: this will involve admitting evidence of any change of circumstances since the arbitration. Such a basis is also consistent with the admission of additional evidence on a true appeal, as set out in *G v G (Minors:Custody Appeal)* [1985] 1 WLR 647 at 654B-C where Lord Fraser of Tullybelton said:

> “The Court of Appeal itself must be entitled to decide, in the exercise of its discretion, whether to look at additional evidence or not. 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. But it must be a matter for the discretion of the court in each case to decide whether the additional evidence which it is asked to look at is likely to be useful or not and to reject it if it considers it unlikely to be so.”

8. Indeed, it seems to me that whether one is applying *Haley, Xydhias*, or *G v G*, the principle is the same: is the proposed order fair and just, bearing in mind the breadth

of the arbitrator's discretion? A very significant change of circumstances may render it unjust or unfair to make the arbitral award an order of the court. If a change of circumstances is relied upon, that could only be established by admitting evidence of the change. I would put the test as being is the further evidence necessary to deal with the case justly? Plainly, the additional evidence will be neither useful nor necessary if it does not, on its face, establish a relevant, significant change of circumstances which is likely to be long lasting and is likely to have an effect on the award. A small, short term blip in a party's finances is unlikely to be sufficient.

9. In this case the applicant states that his income from AB Capital LLP, a hedge fund, has reduced to £66,000 a year net, his basic monthly drawings. This is because the funds under AB's management have reduced to $242 million, below the break-even level of $290 million, which means no management or performance fees are payable to him. This compares with net earnings of £438,000 in y/e 2019, £220,000 net in y/e 2020, £367,000 net in y/e 2021 and £448,000 net in y/e 2022.

10. At the time of the arbitration, the funds under management were $394 million, down from a high of $851 million in 2019 and at its lowest level since 2017. The arbitrator was subsequently informed of a further withdrawal of $44 million prior to the date of the award, but decided that he would not take that into account and determined that, on the basis of other financial storms weathered by AB in earlier years, it was likely that the fund would recover and he was more concerned with the applicant's earning capacity than with his actual current earnings. He set the applicant's earning capacity at £410,000 per annum gross and £223,000 net, while finding that his actual gross income would be £273,000 for the current financial year and £150,000 net for 2023/2024 on current performance of the fund. Management/performance fees are paid in the financial year following that in which they are earned. This equates to £152,000 and £89,000 net for each year respectively. The additional evidence suggests that the arbitrator's expectations were wrong and that the fund is considering winding itself up. A further change in circumstances is the change in mortgage interest rates which have nearly doubled in the interval since the award.

11. The respondent submitted that the additional evidence was not truly new in that the issue of a reduction in the fund was argued before the arbitrator and the $44 million reduction in the fund brought to his attention. This is correct, as far as it goes. However, the additional evidence suggests that, far from recovering, AB's fund dropped significantly below its break-even level. If the arbitrator had been aware of that, there is a real prospect that his award would have been very different. On 12 August 2022, no-one could have foretold the effects on the financial markets and borrowing rates of the events of September 2022. These two factors alone might render the award unfair. I note what is said about the applicant's poor disclosure and his lack of frankness about CD being a resource available to him; however, neither of those matters goes to the level of his income from AB or mortgage interest rates. Nor

does the award suggest that this resource would sufficiently offset the change in income from AB. I agree that the amount spent on costs is eyewatering. Unfortunately, there is nothing the court can do to restore the funds spent on lawyers: that money is gone.

12. The additional evidence put forward by the applicant appears to be credible. It is consistent with the reduction in the capital fund managed by AB as at the arbitration and with the further reduction of $44 million, before the date of the award. The arbitrator accepted that the applicant's income from AB on a fund of $290 million would be limited to monthly drawings and even that would be at risk. If the additional evidence comes up to proof, it seems to me that to make the arbitral award an order of the court could be unjust and unfair. The unfairness would be amplified by the sharp increase in interest rates, which were largely, if not entirely, unforeseeable at the time of the award, which would render the proposed new mortgage unaffordable and, possibly, unachievable. For these reasons, in my judgment, the additional evidence should be admitted.

13. This has an inevitable impact on the length of the hearing. In my view both the appeal and the question of the fairness of the award in the light of the additional evidence should be considered at the same hearing. Any other approach would cause excessive delay and would not be proportionate. Whatever the merits of the other grounds of appeal, there is a very real issue over an order compelling the applicant to borrow money by way of a mortgage in order to house the children and the respondent. If that ground is successful, a review of the whole award will be necessary. The parties need an end to this litigation and the best way of achieving that is to ensure that all matters are dealt with at the same time. However, it does not seem to me that a time estimate of 3 days is necessary. The matters on which the applicant seeks to rely in relation to a change of circumstances do not seem to me to require oral evidence. The state of the AB fund and its prospects can be established by documentation from its Chief Operating Officer, as before the arbitrator. Mortgage interest rates may also be reasonably established by documentary evidence. The appeal itself does not require oral evidence. If the parties comply with the practice direction on bundles, and I require them to do so, a time estimate of 2 days should be sufficient.

14. This approach means that directions on evidence are required. Each party has lodged a different draft order due to their different approaches to the way this case should proceed. I trust that they will now be able to agree the necessary directions and lodge an agreed order.

15. As far as the additional matters raised by the respondent are concerned, it seems to me that the home in which the mother lives should not be sold prior to the determination of these proceedings, except with the consent of the respondent or the approval of the

court. If the applicant does not agree to this, I do not see why I cannot make an order against him. I also see no reason why the applicant should not be required to set out what order it is that he wants this court to make so that the issues may be narrowed. Other matters such as payment of the costs awarded by the arbitrator against the applicant (£1,500), arrears of child maintenance, albeit voluntary (£7,500) and on-going child maintenance were not addressed before me because there was inadequate time in light of the applicant's second application. I would be prepared to deal with them, and the issue of whether the appeal should be heard in public, on paper or, if it would be more cost effective for the parties, at a short hearing. I should note however, that the issue of child maintenance and its enforcement is a matter for the CMS. Any challenges must be made to the appropriate tribunal and not this court.

16. The respondent renewed her request for this matter to be allocated to a puisne judge. The issue of allocation was raised with and decided by Peel J. His decision was that the case should be heard in the Family Court by a circuit judge, specifically, by me.