Neutral Citation Number: [2019] EWFC 7

Case No: BV16D32309

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2019

Before:

Ms Clare Ambrose
Sitting as a Deputy High Court Judge

- -

Between:

BC — **Applicant**

- and –

BG — **Respondent**

- -
- -

Alexander Chandler (instructed on direct access) for **the Applicant**
Christian Kenny (instructed on direct access) for **the Respondent**

Hearing date: 17 January 2019

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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

Ms Clare Ambrose:

1. This is the hearing of the application by BC ("W") that the final arbitral award of Mr Gavin Smith dated 2 August 2018 ("the Award") should not be made an order of the court. The Award is a decision on the parties' distribution of finances following their divorce in 2017. I refer to the parties as W and H respectively as this was the abbreviation their representatives used.

2. The application raises a number of factual issues but also a more general (and novel) question as to the effect that should be given to an arbitration award made when parties agree to arbitrate disputes arising in proceedings for financial remedies following a divorce. The question arises specifically in relation to an award made under the Family Law Arbitration Financial Scheme. This scheme was started by the Institute of Family Law Arbitrators ("ILFA") and I refer to it as the ILFA Financial Scheme as this is a common abbreviation. ILFA has a separate scheme for disputes involving children and this judgment does not touch upon that scheme.

3. W sought that the Award not be made an order of the court, and also a direction that the dispute be remitted back to the Family Court for reconsideration or back to the arbitrator, Mr Gavin Smith, if the parties agreed this.

4. H's position was that I should decline the application and make an order giving effect to the Award.

Factual background

5. W is aged 56. BG ("H") is aged 61. They started cohabiting in 1998, had two children in 2000 and 2001 and married in 2006. They separated in 2016 and the children still live with W although spend time with H. One child (now over 18 years) is on a gap year, the other is starting sixth form. H is a senior professor. W had a senior business role and was the principal earner in the family prior to leaving that job when she had the children. She completed professional re-qualification in 2010 and has worked in a self-employed practice.

6. The most substantial assets under consideration were the family home and H's pensions (valued by W at around £670,000 and £506,025 respectively, the largest pension being a civil service pension valued at £292,615). W's position statement for the arbitration put the total assets including pensions at around £1,096,542, and liquid assets at around £497,287. The parties' incomes were not large. W's position at the arbitration hearing was that H's salary and bonus was around £63,384 net plus a pension contribution of £7,464. At the time of the hearing in July 2018 she estimated her gross earnings at £6,500 per year. There were substantial further disputes relating to non-matrimonial contributions and as to whether some contributions from family had been gifts or loans.

7. The factual background is a common one where the tribunal, whether a court or arbitrator, is faced with distributing a relatively small pool of assets and where the former home will have to be sold and both parties (and their children) are making a change downwards in their standards of housing. W is not currently working and clearly found the financial relief proceedings extremely stressful. To their credit the children

seem to be doing well but the proceedings are likely to have caused upheaval for them at a vulnerable age.

8. The need for procedures that enable the parties' dispute to be resolved fairly and efficiently without undue delay is particularly acute in this type of litigation. This case, like most disputes on financial relief, also requires the tribunal to take a view as to future earning capacity and future needs, in particular regarding housing. The predictions cannot reasonably be expected to achieve meticulous accuracy for every eventuality.

Procedural background

9. The procedural background is more unusual but the court was assisted by an agreed chronology and an agreed statement of issues

10. H applied for financial relief on 18 November 2016. Decree nisi was granted on 4 April 2017 and decree absolute on 9 June 2018. The ancillary relief application proceeded in the Family Court through from submission of Form E disclosure by both parties, to a First Appointment and an FDR. For the most part the parties were represented by counsel and solicitors although they undertook some work themselves. The parties served detailed s25 statements. The court had granted permission for the instruction of a single joint expert to report on mortgage capacity. Mr Piers Gooderham was instructed as single joint expert and he had given estimates of mortgage capacity based on the receipt of between £1500 and £2250pm as ongoing maintenance payments, and assuming that W was earning £5840 pa gross and had child tax credit for £2050 pa.

11. A 3 day hearing was listed for February 2018 which was ineffective because the case could not be accommodated by the court. The 3 day hearing was re- fixed for 10-12 July 2018.

12. In advance of the July 2018 hearing the parties had served position statements and H had made an open offer to make maintenance payments to be stepped down from £764 to £382 to £191 until 2020, together with child maintenance for the younger child until June 2020.

13. The July 2018 hearing was ineffective because the judge was unavailable due to sickness. The parties understandably felt let down by the court service and were reluctant to wait several months for a fresh date. On 10/11 July 2018 the parties signed an arbitration application form on the ARB1 FS form agreeing on arbitration under the Family Law Arbitration Financial Scheme. For both court hearings the parties had instructed counsel. The parties agreed to appoint Mr Gavin Smith who is a very experienced and respected family arbitrator. The form described the dispute to be resolved as *"The distribution of matrimonial finances on divorce"*.

14. The ARB1 FS form expressly provide that those signing agree the following:

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

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

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

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

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

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

15. This wording is directly reflected in the ILFA Financial Scheme rules. Those rules make clear that

"1.3 Disputes referred to the Scheme will be arbitrated in accordance with:

(a) the provisions of the Arbitration Act 1996 ('the Act'), both mandatory and non-mandatory;

(b) these Rules, to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and

(c) the agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or these Rules; except that the parties may not agree to exclude, replace or modify Art.3 (Applicable Law).

1.4 The parties may not amend or modify these Rules or any procedure under them after the appointment of an arbitrator unless the arbitrator agrees to such amendment or modification; and may not amend or modify Art.3 (Applicable Law) in any event."

16. A two day hearing took place in the arbitration on 11 and 12 July 2018 before Mr Smith. Both parties were represented by counsel and gave oral evidence. The arbitrator made his final arbitration award on 2 August 2018. It runs to 26 pages. It is clearly reasoned with full and balanced explanation of his approach to the parties' disputes.

17. The main conclusions made in the Award were as follows:

a) The net capital should be divided £315,000 to W and £213,988 to H, i.e. 60:40 in W's favour, i.e. after both parties' liabilities were taken into account. Such division to be achieved by the net proceeds of sale of the family home being divided 54.42% to W and 45.58% to H.

b) This departure from equality was taken because the parties had unequal mortgage capacities. The capital division would enable both to rehouse in broadly similar accommodation with W having the slight edge (with housing needs of £375,000 compared to H's needs assessed at £350,000 or under) by reason of having main care of the children for some years yet. It also reflected the parties unequal non - matrimonial capital contributions and the fact that H had the ability to generate further pension provision in future years.
c) H should pay W global maintenance, initially at £1,600 pm, reducing in steps to £1,050 (on 23 July 2019) and £650 (on 25 March 2022 when W could draw from the civil service pension or equivalent), and such payments terminating upon H's retirement.
d) In terms of pensions, he gave effect to the parties' agreement that there should be a pension sharing order in W's favour in relation to 76% of H's civil service pension.

18. On 3 September 2018 W contacted the arbitrator raising three of the four main issues she raised in this court application (see the list of issues below) but not raising her objection regarding the declaration of trust of the former matrimonial home. She contacted him again on 14 September 2018 and he responded on 17 September 2018 indicating that any involvement would require the joint instruction of both parties.

19. On 1 October 2018 W contacted H to indicate that the Award was untenable in its current form for the same reasons and indicated that she had no option but to appeal stating "*This will be a costly process and will inevitably cause a long delay to the resolution of the matter".* She asked H to agree to engage the arbitrator in resolving the issues and indicated that she would otherwise lodge an appeal. H declined to go back to the arbitrator.

20. On 5 October 2018 W issued "A Letter to the Court and Judge at the High Court" with a personal note, she also enclosed the Award, a form on D11 or N8 including grounds for appeal out of time and a request for transfer to the High Court and an annotated copy of the Award raising her objections. I have not seen the forms filed at this stage. The application was effectively put forward as an appeal from the Award, her letter started in terms that "*I would like to point out that I do not undertake this Appeal lightly".*

21. The matter was passed to the High Court and on 12 October 2018 Mr Justice Mostyn gave directions that W may issue her application and *"it will be treated as an application that the award is not made an order of the court pursuant to DB v DLJ [2016] EWHC 324 (Fam). Once issued the application is to be listed for directions"*. Her application contained several pages of grounds of relief, she claims the right to appeal under s69 of the Arbitration Act 1996 ("the 1996 Act"), and also raises s68 of that Act. She also requests that an appeal out of time be considered. The application was usefully summarised in the agreed chronology as containing the following points:

"1. Asserts "fundamental and material errors" in Arbitrator's application of law;
2. Law applied unfairly "…in such a manner as to render the Award in pragmatic terms unworkable
3. Supervening event = (1) inability to obtain mortgage due to change in maintenance, (2) H contributions to pension not mandatory, (3) Award failed to take

account of debts, (4) Arbitrator failed to give proper account of W superior financial contribution into marriage (91.6%)
4. Arbitrator's refusal to take further info from mortgage advisor might be failure to deal with issues?
5. Award fails to meet W needs – doesn't meet needs of children – obviously wrong
6. H deliberately misled court
7. H cavalier approach to disclosure. Should have challenged credibility
8. Economical with truth re family trust not referred to in Form E
9. Not stated legal justification for varying terms of declaration of trust / Radmacher
10. Should have taken account of fact that Hs debt was post-acquired."

22. The application does not contain any dispute as to the arbitrator's findings on W's future earning capacity. There is also no allegation that the arbitrator was biased or that W had not validly agreed to arbitrate. In her letter of 5 October W had raised the point that Mr Smith was in the same chambers as H's barrister and also that she had been stressed when she signed the arbitration form and sometimes was stopped from speaking in the arbitration. W expressed her own concerns about this but these were not points she relied on in making this application. For the avoidance of doubt I do not consider that these points would have justified a challenge to the Award.

23. The matter was listed for directions before Mr Justice Mostyn on 26 October 2018 and W appeared at that hearing in person, H was represented by counsel. The matter was listed for a one day hearing and W was given permission to serve a statement summarising her case as to non-disclosure and H was allowed to serve evidence in reply.

24. W served evidence on non-disclosure on 8 November 2018 and H served his evidence on 23 November 2018.

25. In an open offer dated 10 January 2019 W put forward her position as to what allocation of assets should be made seeking a relatively small adjustment to increase her share of the capital assets by 3.58% and increased maintenance at £1750pm until H reaches 67 (or starts retirement if later).

26. Both parties were litigants in person but instructed counsel to appear at the hearing on a direct access basis. The main documents before me were the parties' position statements in the arbitration, their position statements at the directions hearing on 26 October 2018, skeleton arguments for this hearing, the Award and witness statements served in accordance with the directions of 26 October 2018. There were various other documents including some correspondence with the arbitrator following the Award and the opinion of Mr Piers Gooderham on the parties' mortgage capacity served in the arbitration and his note provided following the Award. Both parties attended but it was agreed that oral evidence was not required.

27. Both parties' overall costs up to the conclusion of the arbitration were around £145,000 and at least £21,000 has been incurred since.

The grounds for W's application and the issues in dispute

28. I have carefully considered the document put forward by W on 5 October and also on 12 October 2018, her statement and the skeleton argument served on her behalf. At the hearing W's counsel helpfully outlined the four main aspects to W's application and these four points were incorporated into the agreed list of issues as follows.
    Has the applicant satisfied the court that it should not convert the final award of Mr Gavin Smith into an order of the court? Specifically:
    a) Does W's assertion in this application that she has no mortgage capacity amount to a supervening event?
    b) Does H's alleged non-disclosure that his pension contributions are voluntary, and not obligatory provide a further reason not to convert the Award into an order?
    c) Did the arbitrator fall into error in his application of the law by failing to attach proper weight to the express declaration of trust relating to the family home dated 12 September 2001?
    d) Did the arbitrator fall into error by failing to take into account the excessive spending and debts incurred by the respondent, as alleged by the applicant?

29. A further issue was raised as to what directions should be made if the application was successful.

The applicable law

30. There was considerable common ground between the parties on the law and it is not necessary for me to set out both parties' account, although there were some aspects of W's submissions that I did not accept (as explained below). I take into account that the applicant was expressly given permission to make an application that would be treated as an application that the Award is not made an order of the court pursuant to *DB v DLJ* [2016] EWHC 324 (Fam).

The ILFA Scheme's introduction in 2012

31. Modern arbitration of family disputes has taken effect principally through the rules of ILFA. Originally a single ILFA scheme was launched in 2012. The current rules for the ILFA Financial scheme are dated 1 January 2018. Parties agree to arbitrate in accordance with the rules by means of signing the ARBFS1 form. A primary purpose of the scheme is for the parties to achieve finality in their dispute. As Sir Peter Singer wrote in an article following the scheme's launch (reported at [2012] Fam Law 1496), its purpose is to meet the needs of people experiencing relationship breakdown who "*wish their financial dispute to be dealt with as swiftly, cheaply, privately and with as little acrimony as is possible*".

32. The scheme is expressly stated to be governed by the Arbitration Act 1996 ("the 1996 Act"). The purpose of the 1996 Act was to lay down a comprehensive code for all arbitrations with a seat in England and Wales. Many provisions are mandatory (see Schedule 1) and the Act is based on the express principle that in matters governed by it, *"the court shall not intervene except as provided by this Part"*. As Mostyn J explained in *DB v DLJ*, the methods for resiling from an award are strictly limited. There are specific rules governing challenge of an arbitration award. One notable rule is that any challenge to an award must be made within 28 days of the date of the award unless the party seeking to challenge took no part in the arbitration (s70(3) and s72 of

the 1996 Act). In addition, the leave of the court is required for any challenge to the award on grounds of error of law (s69(5)).

33. The introduction of this modern form of family arbitration by ILFA has been successful and endorsed by the courts (as explained below). There has always been recognition that issues arise as to the interface between family arbitration, court proceedings and the Arbitration Act 1996.

34. A key issue is the nature and scope of the court's jurisdiction to uphold or reject an award. When a court grants a decree of divorce it has power to order ancillary relief and "*the parties [to divorce proceedings] cannot, by agreement, oust the jurisdiction of the court*" (see *Granatino v Radmacher* [2010] UKSC 42, [3]). There has also been recognition that a court order will usually be required by the parties to a financial dispute, typically to bind a third party such as a pension provider or to achieve a clean break (see *DB v DLJ* [20]).

35. It is well established that in making an order for financial relief the court will give weight to the parties' agreement on the allocation of assets, whether that agreement was concluded before the marriage, after the marriage or during the divorce proceedings or after a decree absolute has been granted. The agreement is regarded as a "*magnetic factor"* and the courts encourage parties to settle their disputes. The use of alternative dispute resolution is also facilitated by Part 3 of the Family Procedure Rules 2010 and the courts (see Sir James Munby P in *S v S* [2014] 1 EWHC 7 (Fam), [12]).

Judicial guidance on family arbitration

36. The courts have encouraged arbitration as a means to resolve family disputes. Firm guidance was given in 2014 by Sir James Munby J, then President of the Family Division, in *S v S (Arbitral Award: Approval) (Practice Note)*. He commented on the ILFA Scheme as follows:

"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 [2008] FLR 1467". I agree. This, after all, reflects the approach spelt out by the Supreme Court in Granatino's case [2011] 1 AC 534 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. Sir Peter had earlier suggested, at p 1502:

"The scope for backsliding, resiling and indeed any space for repentance should … be just as narrowly confined"—as it was in L v L [2008] 1 FLR 26 —"where what is in question is an attempt to wriggle out of the binding effect of an arbitral award."

Again, I agree. 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."

37. *S v S* is significant in that it makes clear that disputes about distributing finances after a divorce are arbitrable and there is nothing contrary to public policy about an agreement to arbitrate such disputes. Sir James Munby's comment that there was no conceptual difference between an arbitration agreement and a pre-nuptial agreement (or a settlement agreement as was in issue in *L v L*) perhaps requires further consideration. To equate the legal effect of an arbitration agreement with that of a pre-nuptial agreement probably fails sufficiently to recognise that the 1996 Act has given very specific consequences to an arbitration agreement, the commencement of arbitration pursuant to an arbitration agreement and the arbitration award made in the arbitration. The parties are not merely concluding an agreement between themselves, they are agreeing that a neutral third party (who is subject to specific court supervision) will adopt a fair procedure and apply the law in order to reach an independent and final decision.

38. *S v S* was a case where the parties were asking the court to approve a consent order giving effect to an arbitration award. The matter was decided on papers. Sir James Munby P considered the situation of deciding whether to approve a consent order and said:

"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."

39. He also dealt with the situation where a party seeks to resile from the arbitral award and stated that:

"[25] Where a party seeks to resile from the arbitral award, the other party's remedy is to apply to the court using the "notice to show cause" procedure. The court will no doubt adopt an appropriately robust approach, both to the procedure it adopts in dealing with such a challenge and to the test it applies in deciding the outcome. In accordance with the reasoning in cases such as Xydhias v Xydhias [1999] 2 All ER 386, the parties will almost invariably forfeit the right to anything other than a most abbreviated hearing; only in highly exceptional circumstances is the court likely to permit anything more than a very abbreviated hearing.

[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 cannot, then it may well be that the court will again feel able to proceed without more to make an order reflecting the award and, if needs be, providing for its enforcement."

40. On 23 November 2015 Sir James Munby P also provided specific guidance regarding arbitration in financial cases *Practice Guidance (Family Court: Interface with Arbitration) [2016] 1 WLR 59.* At the outset he explained as follows:

> *"4 In order to be effective, elements of some arbitral awards (by comprehensive dismissal of claims to create a clean break, or so as to bind the provider to a pension split, for example) will require their terms to be reflected in a Family Court order. If enforcement of the award becomes necessary, doing so via Family Court processes will be available only if orders reflecting the award are obtained. (Para 30 below describes an alternative route which may be available via section 66 of the AA96 in the County Court or in the Family Division of the High Court.)*
>
> *5 But it should be borne in mind that not every award need be brought before the Family Court for a financial order to be made, and that it may be more appropriate for some to be brought (if necessary) before a court which does not exercise family jurisdiction. Thus, for instance, where an arbitrator has decided upon the title to or possession of property under the Married Women's Property Act 1882 (45 & 46 Vict c 75), or has determined the respective beneficial interests of the disputants in a property or fund, the parties may simply choose to operate in accordance with the award and thus have no need for a court order to reflect it."*

41. The Practice Guidance deals with applications for a stay of proceedings under s9 of the 1996 Act, unopposed and opposed applications for a consent order. It also goes on to deal with arbitration claims, including applications to challenge an award under sections 67-68 of the 1996 Act, and to enforce under s66 of that Act. It plainly envisages that arbitration claims could be made in relation to arbitrations under the ILFA Scheme, although it recognizes that ordinarily arbitration claims are issued in the Commercial Court and will have to be transferred to the Family Division.

42. This guidance is significant in that it makes clear that an award on the allocation of assets following divorce is not to be treated as a different species of decision outside the scope of the 1996 Act and necessarily subject to a separate Family Court regime requiring investigation and endorsement. To the contrary, the Family Court procedures are applicable where appropriate and necessary, and specific legislation on arbitration takes effect if parties arbitrate family law disputes. The guidance makes clear that not every award need be brought before the Family Court for a financial order to be made. In addition, s66 may be an alternative route for obtaining an order.

43. I consider that W's counsel went too far in suggesting that s66 would never be used in the family context and that it would be inconceivable that a family award would not be made into an order. For the same reason I reject the submission that "*every award made in a family law arbitration needs to be incorporated into a court order, which requires the approval of the court".* In my view a court order under s25 of the Matrimonial Causes Act 1973 ("MCA 1973") is not a pre-condition for the binding effect of an award as between the parties to that arbitration.

DB v DLJ [2016] EWHC 324

44. The question of how a party can challenge a family arbitration award came before Mostyn J in *DB v DLJ* where the husband was seeking to obtain a consent order and gave notice for the wife to show cause why the award should not be made an order of the court. The grounds for the application were supervening circumstances and a mistake. Mostyn J concluded that it would be impossible to raise these grounds of challenge in an ordinary arbitration (see paragraph 15). Mostyn J gave a masterful and useful account of arbitration which is a helpful resource for all family practitioners. His starting point was the Arbitration Act 1996 and the limited means of recourse under that Act, commenting as follows:

> *"7. The grounds or heads of challenge are very circumscribed indeed. In addition to the three heads mentioned by Sir Bernard (to which I will turn below) there is the facility under section 57 to ask the arbitrator to correct his award. It is noteworthy that by virtue of section 57(1) the parties are free to agree on the powers of the tribunal to correct an award or make an additional award. As will be seen, in this case the parties agreed that certain matters could and should be corrected and clarified by the Tribunal. In the absence of agreement then by virtue of section 57(3) and (4) a party may apply to the arbitrator within 28 days of the award either (a) 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 in the award; or (b) to make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.*
>
> *8. This power is very limited.*
>
> *...*
>
> *10 Aside from this limited corrective jurisdiction the only ways of contesting an award are by:*
>
> *i) challenging an award of the arbitral tribunal as to its "substantive jurisdiction" under s 67 of the 1996 Act; or*
>
> *ii) challenging an award on the ground of "serious irregularity" under s 68 of the 1996 Act; or*
>
> *ii) an appeal to the Court on a "question of law" arising out of an award made in the proceedings under s 69 of the 1996 Act.*

45. Mostyn J also commented that it is open to a party to apply for enforcement of a civil award under section 66 of the Arbitration Act 1996 and went on to draw a distinction between such civil awards and family cases.

> *"20 In contrast it is to be expected that in most family arbitration cases the parties will want an incorporating order. For example, the arbitrator may have awarded a clean break – that can only be achieved conclusively with a court order. The arbitrator may have awarded a pension share – again, that can only be achieved by a court order. It is trite law that where such an order is sought the court exercises an independent inquisitorial discretion. It is no rubber stamp: see Jenkins v Livesey [1985] AC 424.*
>
> *21 In this case the terms of the form ARB1 signed by the parties stated:*

"5.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:
(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the [1996] Act;
(b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below (sic , recto 5.5)), any changes which the court making that order may require; …
5.5 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 all the relevant part of the award. … 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."

22 It can therefore be seen that the parties have agreed in writing that challenges to an arbitral award would not be confined only to those available under the 1996 Act. In addition they specifically agreed that the court would retain an overriding discretion, and inferentially the parties agreed that they would each be enabled to argue that the court should not exercise its discretion to incorporate the award for reasons outwith those stated in the 1996 Act. In so doing they were agreeing, pursuant to section 58(1) , an exception to the award being final and binding. In making such an agreement the parties were of course, doing no more than recognising what the general law already provided."

46. He set out the remarks of Sir James Munby P (in paragraph 26 of *S v S)* and went on to comment:

"[27] This would appear to suggest that the Family Court could only refuse to make the order if a challenge or appeal under the 1996 Act could be made out. I would not go that far, as this would appear to rule out a challenge on the ground of a vitiating mistake or a supervening event. 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. I agree with Mr Chamberlayne QC in this regard. However I do agree with Mr Pointer QC that 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.

[28] 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."

47. As regards the proper approach of the courts to supervening events, both parties relied on the approach of Mostyn J in *DB v DLJ:*

"In Barder v Barder (Caluori intervening) [1988] AC 20 , the House of Lords stipulated the test that must be met before a set-aside could be granted. It has four conditions:

i) New events have occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made.

ii) The new events should have occurred within a relatively short time of the order having been made. It is extremely unlikely that could be as much as a year, and in most cases it will be no more than a few months.

iii) The application to set aside should be made reasonably promptly in the circumstances of the case.

iv) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order.

32 In Cornick v Cornick [1994] 2 FLR 530 at 537 Hale J explained that "for the Barder principle to apply, it is a sine qua non that the event was unforeseen and unforeseeable." Obviously, if the parties had actually foreseen a later event then it would not be unforeseeable. So, the question is usually confined to an analysis of (un)foreseeability. I agree with Hale J that the new or later event must have been unforeseeable. If relief were granted on the basis of the arrival of a foreseeable event then that would amount to exercising a disguised power of variation on proof of a mere change of circumstances, where Parliament has specifically declined to enact such a power.

33 In Richardson v Richardson [2011] EWCA 79 [2011] 2 FLR 244 Thorpe LJ emphasised that the jurisdiction is highly exceptional. At [86] he stated "cases in which a Barder event … can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar." Earlier in Walkden v Walkden [2010] 1 FLR 174 Elias LJ had stated at [80]: "given the importance attached to finality in settlements of this nature, the circumstances must be truly exceptional before a capital settlement can be re-opened."

34 Even where the four conditions have been met it lies within the discretion of the court whether to grant the set-aside. A set-aside would be unlikely to be granted if alternative mainstream relief could be granted which broadly remedied the unfairness caused by the later event."

48. As regards intervention regarding mistake, the parties again accepted Mostyn J's approach in *DB v DLJ:*

"57 Therefore I think that applicable principles in relation to the mistake ground can be formulated as follows:

(i) The court may set aside an order on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made.

(ii) The claimant must show that the true facts would have led the court to have made a materially different order from the one it in fact made.

(iii) The absence of the true facts must not have been the fault of the claimant.

(iv) The claimant must show, on the balance of probabilities, that he could not with due diligence have established the true facts at the time the order was made.

(v) The application to set aside should be made reasonably promptly in the circumstances of the case.

(vi) The claimant must show that he cannot obtain alternative mainstream relief which has the effect of broadly remedying the injustice caused by the absence of the true facts.

(vii) The application if granted should not prejudice third parties who have, in good faith and for valuable consideration, acquired interests in property which is the subject matter of the relevant order."

What is the scope of an application that an order should not be made pursuant to DB v DLJ?

49. W's counsel correctly recognised that some of W's complaints involved a criticism of the arbitrator. He raised a preliminary issue as to whether leave under s69(2) of the Arbitration Act 1996 was required for the point to be made. W's counsel maintained that this aspect of the application was within the 1996 Act but if necessary he would put forward the points as arising under the principles established in *DB v DLJ.*

50. W contended that leave should not be required because of the directions of Mostyn J and because the arguments should be conceived more generally on the basis that there was an error "*so blatant and extreme that it leaps off the page"* as explained in *DB v DLJ.* Alternatively, W suggested that the requirement for leave was met on the basis of satisfying the *Chablis* test of an arbitrator getting something obviously wrong as proposed by Colman J (extra-judicially) and cited by *Coulson J in Amec Group Ltd v SS Defence [2013] EWHC 110 (TCC) at [23]*.

"…'*What is obviously wrong?' Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."*

51. H's counsel rightly took a pragmatic and cooperative approach on this point. He did not suggest that leave was required. I considered that in the specific circumstances where W had been directed that her application would be treated as being an application for no award to be made under *DB v DLJ* it would be unfair to impose the leave restrictions imposed on an appeal under s69(2) of the 1996 Act. I allowed the points to proceed without the requirement of obtaining leave. I also took into account that W had issued her application promptly after receiving a response from the arbitrator so that she was not responsible for delay.

52. However, questions remained as to the scope of relief available in reliance on *DB v DLJ* and as to whether the more substantive requirements under the 1996 Act were applicable in an application for an order not to be made in reliance on *DB v DLJ.* For example is a party allowed to raise a mistaken evaluation of facts by the arbitrator in such an application? W's position was that her application should not fail by reason of the 1996 Act. H's counsel submitted that *DB v DLJ* did not justify W's application but he did not take points based on the 1996 Act (probably because the application had been framed as arising under *DB v DLJ*). A question also arises as to the consequences of a successful application for an order not to be made. Does the court then vary the Award or set it aside, does it simply refuse to

make an order or does it give directions remitting the matter back to the Family Court? If so, what matters get remitted and what is the status of the Award?

53. These questions raise broad issues as to the interface between arbitration of financial disputes and the court's powers. I draw from the existing law and summarise my views as follows.

    a) Finality is an agreed priority for parties using the ILFA Financial Scheme and this agreement will be respected.
    b) It is clear from *S v S* and *DB v DLJ* that financial disputes are arbitrable and the 1996 Act applies to arbitration under the ILFA Financial Scheme and awards produced under that scheme.
    c) In principle an ILFA Financial Scheme arbitration award is effective and binding as between the parties without further court order. An order of the court is not a pre-condition for the binding effect of an award on the parties.
    d) However, in the context of financial disputes it will usually be appropriate for the parties to ask the original family court in which the proceedings were started to incorporate the award into a consent order. This will ordinarily be more convenient than enforcing an award under s66 of the 1996 Act but that procedure is also available. Obtaining an order is necessary for the award to be relied upon against third parties (such as pension providers) and for achieving a clean break.
    e) The making of an arbitration agreement (or an award) does not oust the court's jurisdiction under Part II of the MCA 1973 to make an order, and does not exclude its duty to investigate the parties' circumstances. However, the exercise of the court's discretion must take account of the award, the agreement to arbitrate, and the scope of the court's grounds for setting aside, varying or declaring an award to be of no effect under the 1996 Act.
    f) For the reasons set out in *DB v DLJ* it would be exceptional for a court to refuse to approve a consent order containing an award.
    g) As laid down in *DB v DLJ*, the court can refuse to make an order giving effect to an award where there are supervening circumstances within the principles laid down in *Barder v Barder* [1988] AC 20. These have always been regarded as exceptional cases and the bar is set high. The emergence of fundamental new circumstances justifies re-opening the case because it gives rise to a new dispute upon which there are no findings, and which is not covered by the arbitration agreement, and accordingly the parties are not precluded from asking the court to deal with it.
    h) The ground of mistake justifying a re-opening of facts in *DB v DLJ* is narrowly defined in that case. It will only exceptionally justify an award not being upheld. Again, the emergence of new evidence only triggers relief if it gives rise to a new and materially different dispute.
    i) To allow an application that the award is not made an order under *DB v DLJ* (or an application to show cause) to confer a broader jurisdiction to re-open findings in an award, for example because the arbitrator has made an error of law falling outside s69 or a mistaken evaluation of the facts, or a party has a new argument or some useful new evidence has emerged would run directly counter to the 1996 Act and the parties' intentions in agreeing to arbitrate. I am not satisfied that the wording of ARB1FS supports such wide powers to vary the effect of an award.

54. In conclusion, the grounds for exercising a discretion to refuse to make an order giving effect to an award under *DB v DLJ* are limited to those stated therein. As Mostyn J

explained, these grounds are not available under the 1996 Act. *DB v DLJ* does not create an open-ended discretion for re-opening an award without regard to the restrictions and safeguards imposed by the 1996 Act. An application under *DB v DLJ* does not enable a party to circumvent or avoid the statutory requirements (and safeguards) of the 1996 Act. An order refusing to give effect to an award pursuant to *DB v DLJ* will usually only be granted where the parties have failed to agree on a consent order and the complaint falls outside the scope of the 1996 Act (supervening circumstances being one such situation). On this basis the substantive and procedural requirements of the 1996 Act will not apply to an application under *DB v DLJ*. If the court refuses to give effect to the award, it can direct that the matter in question will be reconsidered, usually by the Family Court (unless the parties agree to remit the matter back to the arbitrator), and the court order will preclude enforcement of the award in the English courts.

The special nature of s25 of the MCA 1973 and the wording of ARB FS1

55. In drawing these conclusions I recognise that the court retains discretion over any order made and the parties cannot by agreement oust the court's jurisdiction under Part II of the MCA 1925. This is expressly recognised in the wording of ARB1FS. However, it is not necessary or appropriate to imply from these words an agreement that the 1996 Act restrictions do not apply generally, or that the court's jurisdiction shall be extended in two limited respects, namely to allow intervention for supervening events and mistake. Much clearer wording would be needed to achieve this, especially where the parties expressly agreed that the arbitration would be governed by the 1996 Act. In this respect I do not share Mostyn J's view of the construction of ARBFS1 in *DB v DLJ*. In any event, it is doubtful that an agreement would be effective to enlarge the court's jurisdiction where there are mandatory statutory provisions limiting the court's jurisdiction (for example section 68 of the 1996 Act).

56. The wording of ARBFS1 recognises the fact that ordinarily parties will seek to obtain a consent order when they have obtained an award. It requires the parties to apply to court "*if and so far as the subject matter of the award makes it necessary".* This does not make a court application necessary in every case and Sir James Munby P's Practice Guidance also supports this view. The wording is directed at situations where a family court order is necessary, typically for the purpose of a pension sharing order or achieving a clean break. It is difficult to infer from the ARBFS1 wording that the parties have agreed that an arbitration award will have no binding effect unless and until a court order was granted. This would also run contrary to the guidance given by Sir James Munby P and mean that an award is merely a precursor to a judicial investigation. This would undermine the purpose of ILFA financial arbitration in achieving a final resolution of disputes. Section 25 of the MCA 1973 does not require such a conclusion. Section 25 imposes a duty on the court to investigate matters if asked to make an order. It does not mean that parties are obliged to seek an order.

57. Overall I consider that the terms of the ARB1FS and the ILFA Financial Scheme are not sufficiently clear to suggest that parties have contracted out of the 1996 Act including the safeguards laid down under that Act. In any event, the parties cannot contract out of mandatory provisions such as section 68.

Practice for parties with an arbitration award

58. In the interests of procedural fairness I waived any requirement of leave that would apply if the application was within section 69 of the 1996 Act. H did not object. However, there is doubt as to whether other mandatory statutory provisions of the 1996 Act can properly be waived. The other side in a future application may not be as cooperative and pragmatic as H was on this point. A party may understandably seek to rely on its statutory rights (for example time limits and the requirement of leave). Given the parties' uncertainty as to what rules applied I make the following points to explain how objections to an award can be made.

59. Any application to resile from an arbitration award should be unusual. Applications using the "notice to show cause" procedure or an application for no order to be made (as adopted in this case) should be exceptional for the reasons given in *S v S* and *DB v DLJ*.

60. As explained, an award is binding on the parties without need for a court order. Where a party who has taken part in the arbitration wishes to challenge an award under the ILFA scheme the onus lies on that party to seek an order varying the award, setting it aside, remitting it or declaring it has no effect. The primary remedies are laid down in the 1996 Act. The 28 day time limit under the 1996 Act requires a party to act quickly in challenging an arbitration award. The notice to show cause procedure (or an application that the award not be made an order of the court under *DB v DLJ*) does not enable a party to avoid or circumvent the 1996 Act. The 28 day time limit means that any attempt to resile from an arbitration award should ordinarily first be made in an arbitration claim. The court deciding that application may be asked to decide any separate point (for instance supervening circumstances) and the proceedings will result in a court order, typically confirming the award, varying it, remitting it back to the arbitrator or setting it aside. The arbitration claim will be transferred to the Family Division of the High Court (not the Family Court) and the court will take full account of the matters set out in s25 of the MCA 1973.

61. I realise that the previous guidance may be read as suggesting that the "notice to show cause" procedure would be the primary method used for resiling from family arbitration awards. However, Sir James Munby P recognised the availability of arbitration claims under Part 62 of the Civil Procedure Rules. To regard the "notice to show cause" procedure as the primary means of challenging an award runs counter to this. It also runs counter to the purpose of the 1996 Act as a comprehensive code. It risks giving inadequate effect to the statutory rights and mandatory safeguards applying under the 1996 Act. In practice, any challenge of an award will be unusual and the notice to show cause procedure would be an even more unusual means to challenge findings in an award.

62. Quite apart from the mandatory statutory application of the 1996 Act there are good practical reasons why powers under the 1996 Act should be the primary means for challenging an arbitration award. The procedure adopted here for an application under *DB v DLJ* has entailed a directions hearing plus a full day's hearing in the High Court. Even though W had the benefit of very experienced counsel (and solicitors' assisting her in part) there was confusion as to what regime applied and what rules she needed to comply with. She had to obtain an allocation within the Family Court to High Court Judge level and tailored directions were required. The process cannot be regarded as an easier or more efficient alternative to an arbitration claim. The procedures applicable to arbitration claims under the 1996 Act were not drawn up solely for dealing with civil and commercial claims. Arbitration is used in much wider fields including employment, partnership and consumer

claims. The rules are not designed solely for high value commercial claims since many arbitration claims concern relatively small amounts and the procedures are aimed at resolving applications efficiently, often without need for an oral hearing.

63. The procedure used here for challenging an award also fails to give the certainty and safeguards that the 1996 Act confers. For example, under the Arbitration Act the arbitrator is given notice of any challenge so there is an opportunity to answer allegations of misconduct, irregularity or mistake. In addition, challenge under the 1996 Act confers a right of re-hearing in disputes as to whether the tribunal has jurisdiction under section 67. This statutory right to challenge the award confers a firmer and more predictable framework than the *ad hoc* and abbreviated "notice to show cause" procedure applicable in this case. The 1996 Act enables challenges based on irregularities in the procedure (e.g. bias and unfair procedures) to be dealt with before an award is made as well as afterwards. Family Court procedures do not appear to provide effective safeguards to remedy such irregularities until an award is made. A further point is that the 1996 Act enables the court to order that the matter be immediately remitted back to the arbitrator. The "notice to show cause" procedure means that if W's case had merit the parties would be faced with going back to an unknown judge in the Family Court and losing much of the benefit of having their chosen arbitrator who had investigated their case fully and acted promptly throughout. In addition, the "notice to show cause" procedure does not entail the variation of an award or it being set aside (since such orders are governed by the 1996 Act) so it leaves uncertainty as to the status of an award.

Findings on the issues raised

(1) Does W's case that she has no mortgage capacity amount to a supervening event justifying the award not being made into an order?

64. W's case was that in light of the Award she cannot obtain a mortgage and therefore cannot purchase a property for herself and the children in line with the arbitrator's findings as to her needs for re-housing. W submitted that the fact that she is unable to obtain a mortgage (as evidenced by advice from Mr Piers Gooderham dated 30 August 2018) was a supervening event in that it was not reasonably foreseeable at the date of the arbitration, it being a fundamental objective of the Award and also the court's discretion under s25 of the MCA to rehouse both parties.

65. Following the Award W immediately contacted the single joint expert, Mr Piers Gooderham, who responded four weeks later on 30 August 2018. He indicated that:

"In my original Report, all my calculations of your mortgage capacity were based on you receiving maintenance of a fixed monthly amount. We now find an award for maintenance on a reducing scale. Unfortunately, this has a fundamental impact on the amount that you can borrow… As a result, and for matters of policy with most lenders, the maintenance you receive will either be excluded or taken at the lowest level. Therefore, given the low level of your earned income, I find that you do not have any mortgage capacity based on the award"

66. She took immediate steps to raise this advice (namely her inability to obtain a mortgage) with the arbitrator who responded that he could only act upon the joint instruction of both parties as his role as an arbitrator had come to an end (effectively he was *functus officio*).

67. W also relied on the fact that her counsel had contacted the arbitrator shortly before the Award was issued (when he had circulated the Award for correction of typographical errors) to request that fresh expert evidence on mortgage capacity be obtained. This request was dealt with in the Award as follows at [92(e)]:

"*finally Mr Watson [W's counsel] floated the idea of obtaining further evidence as to W's ability to obtain a mortgage of £66,000 given that the existing evidence was predicated on ongoing maintenance of £1,500 pm without a stepdown. However, the mortgage evidence is based on a large number of variables, for both parties. I note in particular that it did not factor in W's receipt of the PCSPS pension lump sum and income at age 60 thus resulting in substantially lower mortgage payments prior to then and a substantial reduction in the mortgage principal at that point. I also note that the report is predicated on W's receiving half of the net equity in the FMH. She will in fact be receiving substantially more than half (58%). In all the circumstances, it would in my judgment be disproportionate for there to be further delay leading to further costs and I shall therefore proceed to finalise my Award."*

68. W's counsel submitted that Mr Gooderham's advice was "a revelation" and would preclude any mortgage capacity at all. W contended that it was unforeseeable that her stepped down maintenance payments would deprive her of the ability to obtain a mortgage in the marketplace. Her counsel submitted that this inability to obtain a mortgage was not realistically in anticipation in the arbitration and had a fatal effect on her need to rehouse herself and the children immediately. The arbitrator had correctly concluded that her rehousing was a priority and that her housing needs were around £375,000. The Award has effectively "killed off" her mortgage capacity which was a fundamental element in the fair distribution of assets. Counsel contended that meeting her housing needs was the "lodestar" of the distribution of assets and this would be frustrated by the Award.

69. I do not accept that the content of Mr Gooderham's advice is a supervening event within the meaning of *Barder v Barder* and justifying intervention. It was not unforeseen or unforeseeable.
    a) The parties and their advisors should have been aware that maintenance could be awarded at different levels to take account of known future changes in income, for example due to H's retirement, pension drawdown and loss of child tax credit. Indeed, H's offer made in advance of the hearing was for staged maintenance payments.
    b) The parties knew prior to the July hearing that the expert evidence on mortgage capacity had not taken account of the impact of staged payments.
    c) W's counsel knew that mortgage capacity could be affected because he had applied to the arbitrator for permission to adduce further evidence from the SJE for this purpose.
    d) The arbitrator addressed the request carefully by balancing the potential variables that would affect mortgage capacity. He assessed whether further evidence on mortgage capacity was necessary and proportionate, and concluded that further advice from Mr Gooderham was not necessary. His conclusion reflected the fact that evidence of mortgage capacity is not an exact or absolute science and that it was unnecessary to re-open the evidence in light of all the variables he identified.

70. I also reject this ground of challenge because the event relied upon does not invalidate the fundamental assumption or basis upon which the Award was made. I accept that the arbitrator did not have evidence as to how borrowers would respond to a staged maintenance payment and that the staged maintenance will make it more difficult for her to obtain a mortgage as she has not yet reached the predicted earning capacity and is self-employed. However, Mr Gooderham's advice does not invalidate the prospects of W obtaining a mortgage as envisaged by the arbitrator. Mr Gooderham's advice did not give account for the fact that W will have a 58% share of the equity in the matrimonial home and that she will have the benefit of a civil service pension (or equivalent) and a lump sum in that pension aged 60. The arbitrator was correct to regard these factors as helpful in obtaining a mortgage. Mr Gooderham also did not give account to W's earning capacity as found by the arbitrator, and which was not challenged. Accordingly, Mr Gooderham's opinion cannot be regarded as an absolute bar to the obtaining of a mortgage as envisaged by the arbitrator.

71. W also alleged in the alternative that the arbitrator fell into error in refusing W's counsel's application to obtain further evidence on mortgage capacity. I do not accept this. For reasons set out above, the arbitrator's decision as set out above cannot be faulted.

The circumstances under which the arbitration agreement was entered

72. In making her case on supervening events and also mistake W contended that the court should take into account the circumstances under which the parties entered into arbitration. In particular, it was said to be relevant that the parties' hands had been forced because they had been let down by the court service. It was submitted that this diluted the "*magnetic factor"* that would be attached to an arbitration agreement. I accept H's argument that the parties had freely entered into arbitration with the benefit of legal advice. I do not consider that the parties' concern regarding delay in court hearings dilutes the significance to be attached to the arbitration agreement. I cannot usefully investigate the parties' subjective motives in arbitrating but I can take into account that a prompt conclusion to the dispute was chosen in favour of waiting several months for a court hearing.

(2) Does H's alleged non-disclosure that his pension contributions are voluntary, and not obligatory provide a further reason not to convert the award into an order?

73. In the Award the arbitrator concluded that:
"*his latest P60 shows a total gross income of £91,855. According to his May 2018 payslip his current gross annual salary is £58,826. He has in addition a supplement of £5,000 gross pa as Head of Department and a market payment of £8,582 gross pa. In 2017 he received a performance related bonus of £3,500 gross. He makes pension contributions to the Universities Superannuation Scheme (USS), his currently active pension scheme of £7,952 pa. He told me that he is contractually obliged to make these contributions. I consider them in more detail below. After deduction of tax NICs and pension contributions his net monthly pay is £5,100."*

74. W contended that H knowingly misled the arbitrator under oath about his pension contributions being obligatory when they were in fact voluntary. W had made requests prior to the July 2018 hearing as to whether his pension payments were obligatory or not

so he know that this was a significant matter. She had tried to obtain information on his contributions from the USS prior to the hearing but they had declined to provide private information. After the hearing she had spoken to someone at USS who had indicated that all pension schemes were optional and directed her to the USS website which made clear that although employees are signed into the pension scheme for the first three months, all employees can opt out of the pension scheme.

75. I do not accept that this is a non-disclosure that would justify refusing an order or reopening the Award.
    a) W had not established that there was a deliberate or dishonest non-disclosure. I am not satisfied that H was lying in stating that the contributions were contractual. He was making the pension contributions as a matter of his employment contract with the university, these were not voluntary payments.
    b) The non-mandatory nature of the pension scheme was not something that vitiated the findings in the Award or amounted to a fundamental mistake. It is common for there to be an opt-out for public service pension schemes and this feature of the USS scheme was in the public domain and could reasonably have been discovered prior to the hearing.
    c) It is also well known that an employee contribution would be contractually required for any employer contribution and that any right to a pension is dependent on contractual payments of contributions.
    d) More significantly, even if the opt-out had been disclosed, it is unlikely that the overall outcome would have been materially different. The arbitrator took careful account of the fact that H (unlike W) had the opportunity to build up his pension and was losing 76% of his civil service pension. He took this factor into account in justifying his departure from equality in the division of capital assets at #82, expressly concluding that "*I also bear in mind that Mr [BG] has the ability for a few more years to generate further pension provision, which I consider will not be available to W"*.
    e) If the USS pension contributions had been regarded as available income then they would have been taxable and it is likely that any consequential adjustment in maintenance payments would have been a small one and balanced by a small adjustment in the division of capital assets.

(3) Did the arbitrator fall into error in his application of the law by failing to attach proper weight to the express declaration of trust relating to the family home dated 12 September 2001?

76. W's case on this point was that:

    a) Prior to the marriage, on 12 September 2001, the parties entered into an express declaration of trust relating to their ownership shares of the family home, which reflected their financial contributions (i.e. 58% W: 42% H).
    b) In the Award, the arbitrator attached insufficient weight to this declaration, concluding at [40(a)] that "*The declaration of trust does not of course fetter the tribunal's discretion in any way".*
    c) The arbitrator dealt with the parties' contributions broadly, *"It is sufficient to record that W's non-matrimonial contributions are substantially greater, and that it is fair that this element be reflected in my Award notwithstanding that there has been some*

mingling and that some of the sums in question have been applied towards the family home." [paragraph 62].

d) He approached the declaration of trust with the wrong test in mind. While, plainly, no agreement can 'fetter' the court's hands, the court has increasingly recognised the autonomy of the parties to enter into private agreements which may amount to magnetic factors within the court's consideration of the Section 25(2) factors.

e) There is no difference in principle between the parties entering into a detailed pre-nuptial express declaration of trust which records their beneficial interests (recognising their contributions) and a pre-nuptial agreement which sets out the level of capital a party will receive upon divorce. Both are formal agreements which should be considered with the *Radmacher* principles in mind, the only factual difference being save that the express declaration of trust was not entered into in expectation of marriage. In particular the arbitrator should have applied the following test laid down in *Radmacher:*

> *"[75] 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.*
>
> *…*
>
> *[81] 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."*

77. I consider that the objection raised cannot amount to a mistake justifying resistance to an award within *DB v DLJ*. Cases of mistake allowed to be raised under *DB v DLJ* are carefully identified by Mostyn J at paragraphs 50 to 57 of that judgment. The starting requirement is that an order may be set aside "*on the ground that the true facts on which it based its disposition were not known by either the parties or the court at the time the order was made".* Here the true facts as to the declaration of trust were always known. Mistake under *DB v DLJ* does not include a mistake of law on the part of the tribunal. The correct remedy for a mistake of law on the part of a judge is an appeal. Similarly, the correct remedy for a mistake of law by an arbitrator is an appeal under section 69 of the 1996 Act. Relief for error of law will only be given under the 1996 Act where the question of law is one that the tribunal was asked to determine (see s69(3)(b)).

78. W's counsel correctly conceded that counsel who had acted in the arbitration had not suggested that the *Radmacher* test should be applied to the declaration of trust. Accordingly, it was rather unfair to suggest that the arbitrator made an error of law in failing to apply the *Radmacher* test. Appeals under the 1996 Act (or otherwise) are not intended to allow parties to raise new points that could have been raised in the arbitration.

79. Even if the point had been raised in the arbitration I considered that there had been no mistake (whether of law or fact or both) on the part of the arbitrator and his approach reflected that which would correctly have been taken by any judge. The declaration of trust was plainly not a pre-nuptial agreement purporting to deal with the division of the parties' capital upon the breakdown of their marriage. It pre-dated the marriage by five years and there was no evidence of the safeguards envisaged in *Radmacher* (including the availability of advice to ensure that the full implications were understood). The arbitrator had correctly

considered that the parties' relative contributions to the purchase of the family home (as evidenced by the declaration of trust) were relevant and had not considered that it prevailed in the distribution of assets to meet the parties' needs.

80. If I had considered that leave was required under section 69 then leave would not have been given because the arbitrator was not wrong for the reasons set out above. He approached the parties' dispute with great care, investigating the facts in an even-handed manner and applying the law with expertise, taking the same approach that a judge would have taken if the matter had gone to trial. His conclusions on these points are correct and would not have justified any appeal or re-opening if the findings had been made by a judge in the Family Court. I emphasise this because W's actions suggest she is aggrieved by the arbitral process. I consider that the Award reflects the correct approach under s25 and she would have done no better in a trial or in an appeal from a judgment or an attempt to re-open a court order.

(4) Did the arbitrator fall into error by failing to take into account the excessive spending and debts incurred by the respondent, as alleged by the applicant?

81. W's position here was that:
    a) Post-separation, H had built up significant debts in excess of £100,000, at a time when he was enjoying a regular income significantly in excess of W's own.
    b) Whereas W's legal fees had been paid from her own assets. H's costs were either outstanding or represented by loans to his father such that W in effect was held responsible for (a) H's post-separation spending, and (b) H's costs liability;
    c) The arbitrator erred by failing to consider her 'add back' arguments, i.e. that H's wanton dissipation of assets should be taken into account.
    d) The arbitrator had erred in concluding that H's debts in the amount of around £109,000 be regarded as within the matrimonial assets and in concluding at #40(f) that *"In my judgment these are all debts which need to be repaid and I shall factor them into my overall distribution".*
    e) W contended that these debts must be regarded as wanton and reckless and relied on *Vaughan v Vaughan* [2007] EWCA 1085, "*a spouse cannot be allowed to fritter away the assets by extravagant living of reckless speculation and claim as great a share of what was left as he would have been entitled to if he had behaved reasonably".* W noted that the add back would deplete H's housing capacity but argued that his housing needs were exaggerated since he only needs to house himself.

82. W contended that the arbitrator's error was so blatant and extreme that it leaped off the page, and was to be regarded within the exceptional cases referred to in *DB v DLJ* where an allegation that the Award was "wrong" or "unjust" justified intervention.

83. H contended that the majority of debts were due to legal costs. There was simply no basis for contending wanton and reckless dissipation, and indeed this had not been raised in the arbitration. He also submitted that this was a needs case with modest resources and it was essential that H's debts were discharged and that he was left with the ability to house himself and the children. The way that the arbitrator chose to deal with the debts fell within his wide discretion and could not be regarded as an error.

84. I prefer H's submissions on this point. I also consider that this point cannot amount to a mistake justifying resistance to an award within *DB v DLJ* for the reasons established above. No new material facts have emerged. W had always considered that these debts should come out of H's share of capital rather than being shared and her complaint was as to the arbitrator's exercise of discretion on that point. I consider that the arbitrator correctly took the view that these debts did not represent wanton and reckless dissipation (indeed that point had sensibly not featured in W's case because the debts were mainly legal costs of similar magnitude to W's costs). He was entitled to conclude that where there were limited resources to meet the parties' housing needs, H's debts should not preclude him finding a home that would accommodate the children. I can understand that W feels aggrieved that she paid her legal costs out of her own funds whereas parts of H's costs have been shared. However, as a matter of fairness and recognising the needs of the children, the arbitrator was entitled to place a priority on enabling H to buy a home where the children could stay.

85. The question raised did not amount to an error of law within s69 of the 1996 Act and W's counsel sensibly did not attempt to suggest as such. At very highest it would amount to a mixed question of fact and law as to the correct exercise of discretion in deciding on the allocation of debts under s25 of the MCA 1973 and would not justify re-opening an award under s69. The decision would also not justify an appeal against a judgment of the Family Court so W has been placed in no worse a position by reason of the decision being made in arbitration.

86. Again, if leave under s69 had been required I would have refused it. The issue regarding H's debts was not a question of law and was also not one that the arbitrator was asked to determine. If the application had been made under section 69 then W's complaints on this question (and the third issue covered under the heading above) could have been fully raised in an arbitration claim and considered carefully and promptly by a judge but leave would have been refused on paper without the need for an oral hearing.

Conclusion

87. W has failed to satisfy the court that it should not make an order giving effect to the Award. She has not established her case on the issues put forward. I reject W's application. H is entitled to an order giving effect to the Award and a draft order can be submitted to me for approval.

Costs

88. I heard the parties' positions on costs. W incurred costs of around £21,000 on this application. W sought an order for costs in the event of succeeding and suggested that although the court had a broad discretion the application did not fall within rule 28(3) of the Family Procedure Rules 2010 and that one party winning should weigh heavily in the court's discretion. In this respect I was also asked to take into account the affordability of costs in a case where finances were tight.

89. H's counsel did not submit a Form H at the hearing but objected to any costs order being made in W's favour. He suggested that a costs order should be made in H's favour if the application failed.

90. I consider that this is an application where the general rule laid down in rule 28(3) does not apply. It is analogous to an application to set aside an order (see *Judge v Judge* [2008] EWCA Civ 1458). Overall I consider that costs should follow the event. H is entitled to an order for his costs of the application, to be assessed if not agreed.

91. That concludes this judgment.