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Neutral Citation Number: [2022] EWFC 151

Case No: GL22P70084

**IN THE FAMILY COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/12/2022

**Before :**

**MR JUSTICE PEEL**

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**Between :**

**G  
- and -  
G**

**Applicant**

**Respondent**

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**Hannah Markham KC and Christopher Hames KC** (instructed by **BloomBudd LLP**) for the **Applicant**

**Gemma Borkowski** (instructed by **Harrison Clark Rickerbys Solicitors**) for the **Respondent**

Hearing date: 9 November 2022

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**Approved Judgment**

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MR JUSTICE PEEL

Mr Justice Peel :

**Introduction**

1. In the context of a financial remedies dispute, the Court of Appeal in **Haley v Haley [2020] EWCA Civ 1369** determined that:
  - i) A challenge to an arbitration award is not confined to the limited grounds set out in the **Arbitration Act 1996** which (other than a challenge to jurisdiction under s67) are; (a) an application to set the award aside on the ground of serious irregularity (s68); and/or (b) an appeal on a point of law of law (s69).
  - ii) The court has an independent, statutory duty to survey the fairness of any financial remedies order which is sought to implement the arbitral award.
  - iii) Per King LJ:

“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" (para 73).
2. Thus, the approach to be taken by the court on a challenge to an arbitral award in financial remedies, howsoever the challenge is made, is the appellate test i.e whether the determination was “wrong” or “unjust because of a serious procedural or other irregularity...” (FPR 30.12(3)).
3. Where a party challenges the award, the court should conduct a triage exercise on paper. The test at this filter stage is the same as on an application for permission to appeal, namely whether “the court considers that the appeal would have a real prospect of success” or “there is some other compelling reason why the appeal should be heard” (FPR 30.3(7)). If the court is satisfied that the hurdle is passed, then it should list the application for a full inter partes hearing of the challenge, akin to a hearing of an appeal against a court order which operates by way of a review of the lower court’s decision (FPR 30.12(1)). If it is not so satisfied, then the court can “make an order in the terms of the arbitral award without more ado” (para 96 of **Haley v Haley**).

4. In **A v A [2021] EWHC 1889**, Mostyn J, in the light of **Haley v Haley**, and with the approval of the President, gave guidance as to the appropriate procedure to be followed when there is a challenge to an arbitration award. In summary:
  - i) The challenge to an award should be made by issue of Form D11.
  - ii) The party challenging the award should submit a skeleton argument not exceeding 20 pages, and the party seeking to uphold the award “may file a short skeleton in response”.
  - iii) The papers shall be placed before a circuit judge to conduct a “triage/paper” exercise and decide whether the permission to appeal test has been passed. If it has, direction will be given for an inter partes hearing. If not, an order will be drawn in the terms of the arbitration award.
5. The issue before me is whether the same legal test set out in **Haley v Haley** applies to a challenge to an arbitration determination made in a dispute about children as in a challenge to an arbitration award made in a financial remedies dispute, and, if so, whether the **A v A** guidance applies, save as necessarily adapted for children’s cases.
6. I note that, although this particular case falls squarely within the arbitration scheme, a number of specific types of children’s disputes are expressly excluded from arbitration by Rule 2.2 of the **Family Law Arbitration Children Scheme Arbitration Rules 2021**. These include, principally, cross border international cases such as under the 1980 Hague Convention, although relocation applications from this jurisdiction to another jurisdiction fall within the class of cases capable of being arbitrated.

**This case: the arbitration determination and subsequent proceedings**
7. The parties have two children. I shall refer to their mother as M and their father as F. Currently the parties and the children live in the same property in the west of England, and the children attend a local school. There are ongoing financial remedy proceedings which, regrettably, have not yet resulted in settlement.
8. On 23 March 2022, M issued a Form C100 seeking (i) permission to relocate with the children to the London area and (ii) a defined child arrangements order. The parties agreed to attend arbitration, and accordingly the court proceedings were stayed by order made in the local family court on 11 July 2022. On 27 and 28 July 2022, Andrew Norton KC (the appointed arbitrator) conducted the arbitration, during the course of which he heard evidence from both parents and an Independent Social Worker. On 12 August 2022, he delivered his determination. He refused M’s relocation application, and provided for an equal shared care arrangement.
9. The matter was listed on 5 September 2022 before the local Lay Justices to incorporate the arbitration determination in a court order. During the hearing, M’s counsel indicated that M intended to apply to set aside the determination. The lay bench recorded the agreement of the parties that “this matter shall be listed before a circuit judge for directions on the application following the guidance of Mr Justice Mostyn in **A v A [2021] EWHC 1889**”. They allocated the matter to circuit judge level. The stay on the C100 was lifted.

10. On 8 September 2022, M formally applied in Form C2 for an order setting aside the determination, and a rehearing. F opposes the application.
11. On 26 September 2022, the circuit judge further allocated the matter, this time to High Court level, noting that there is no direct authority on the legal test and/or procedure to be applied when a challenge is brought against an arbitration determination relating to a children's dispute.
12. The matter came before me in the Urgent Applications list on 28 October 2022. I directed that there should be a specific hearing to address the issues of (i) the applicable legal test and (ii) the applicable procedure where there is an application to set aside, or challenge, an arbitral determination in children's proceedings. That hearing took place before me on 9 November 2022. It was emphatically not a hearing on the merits of the challenge. It was designed to give a clear legal and procedural foundation for the progression of the challenge. I make no comment about the merits of the case.

**The legal test to apply upon a challenge to an arbitral determination in a children's welfare dispute**

13. The essence of the ratio in **Haley v Haley** is that a financial remedies order derives its authority from the court, which has a discretion whether, and if so in what terms, to make the order. The order is made pursuant to the Matrimonial Causes Act 1973, not the Arbitration Act 1996; the arbitration award is not enforceable until such time as an order in like terms is made. The court is entitled to refuse to convert an award into an order if it considers that the arbitration award was wrong.
14. In my judgment, the same principles apply to a children's dispute determined by arbitration. A judge being invited to make any welfare order under the Children Act 1989 must be independently satisfied that it is a proper order to make, the paramount consideration being the welfare of the child under s1(1) thereof. Upon making an order after a contested hearing, or endorsing an order made by consent, the judge has a duty to have in mind the welfare checklist and to ensure that the order is compatible with the paramountcy principle. The same, in my view, applies to the making of an order which one party (if the determination is challenged by the other party) or both parties (if there is no challenge by either party) invite the court to make after an arbitration determination. Of course, if there is no challenge to the determination, it is highly likely (albeit not inevitable) that the court will make the order sought. But the parties cannot oust the jurisdiction of the court and, whether the order sought is agreed or opposed by one or other party after the arbitration determination, the court's overarching duty to consider whether the order is consistent with the best interests of the children remains the same. The mere fact that the parties have submitted to an arbitration does not prevent the court from scrutinising the subsequent order and, if appropriate, refusing to endorse some or all of its provisions.
15. Accordingly, in my judgment, as with a financial remedies arbitration award, the test to apply is whether the children's arbitration determination was "wrong", nothing more and nothing less.
16. I am fortified in this conclusion by para 27 of **Haley v Haley**, where King LJ said:

“It is common ground that **in the family context** arbitration cannot oust the jurisdiction of the court”. [emphasis added]

It seems to me implicit in her comments that King LJ envisaged the same principles on challenge would apply to family cases generally, not just financial remedies cases.

17. Further, in submitting to the Family Law Arbitration Scheme, the parties in this case (as, I assume, will apply in every case where the parties enter into the children’s arbitration scheme) signed the ARB1-CS form. By 8.49 thereof (which replicates r13.3 of the Family Law Arbitration Children Scheme Arbitration Rules 2021) they acknowledged that:

“this dispute will be final and binding on us, subject to any of the following:

- (a) any challenge to the determination 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 determination requires it to be embodied in a court order (see 8.5 below), any changes which the court making that order may require, or the refusal by the court, where it has jurisdiction to do so, to embody the determination or any part of it in a court order
- (c) any subsequent determination superseding the determination; or any changes to the determination or subsequent order superseding the determination which the Family Court considers ought to be made in the exercise of its statutory and/or inherent jurisdiction whether under the Children Act, 1989 or otherwise.”

18. Sub para (a) governs a challenge under the limited grounds in “Part 1 of the Act” which is defined in the form as the Arbitration Act 1996. But the rights of challenge do not stop there. Sub-paras (b) and (c) to my mind expressly envisage that that the court may depart from the arbitration determination as it thinks fit, including at sub-para (c) in the exercise of its jurisdiction under the Children Act 1989. In other words, parties to a children’s arbitration enter into the process explicitly accepting that the court, applying the foundational principles of the Children Act 1989, may make an order which differs from the determination. The IFLA clearly considers the rules, and ARB1-CS form, to state the law correctly, and in my opinion, they are right to do so. The parties are equally right to understand that the court retains its welfare jurisdiction in the manner explained in the ARB1-CS form.

19. It would be curious if a different test were to apply as between financial remedy and children’s disputes when the issue before the court in each case is whether, in the exercise of its supervisory and inquisitorial jurisdiction, to endorse the arbitration award/determination by formalised order. It is obviously desirable to have, where possible and consistent with the interests of justice, coherent and coordinate principles applicable to challenges to arbitration awards and determinations. In the court setting, the appellate test is the same for financial and children’s cases, and in my judgment, the same should apply when an arbitration award or determination is challenged.

20. Although there has been no authority since **Haley v Haley** directly on the point, the Family Court Practice 2022 procedural guide at 1.276 says this in a section headed

**“Arbitrations: Obtaining Arbitral Decisions; Enforcing or Challenging Arbitral Decisions (Finances and Children)”:**

“An arbitral determination or award can be challenged through the court in a process analogous to an appeal from a district judge to a circuit judge. The test for a challenge to succeed is the appellate test under FPR 30.12: is the decision wrong or unjust because of a serious procedural or other irregularity (Haley, para [73])”.

Implicitly, given that this section refers to both financial and children’s arbitrations, the editors take the view that the legal test and procedure are, or should be, the same for both classes of arbitration.

21. Practitioners familiar with (indeed expert in) family arbitration, have expressed a similar view. In **“Family Arbitration: the outlook after Haley” [2021] Fam Law 233**, Jonathan Tecks and Suzanne Kingston wrote:

“It seems likely that the conclusions in Haley would apply to the IFLA Children Scheme (whose scope engages for the most part with matters which could be the subject of applications to the court under s 8 of the Children Act 1989)...however, we await further guidance”.

And in **“Arbitration after Haley – if not now, when?” [2021] Fam Law 811**, Nicholas Allen KC wrote:

“Although Haley was an appeal arising from a financial arbitration, the same principles readily apply to the children scheme.”

22. I agree with these various comments, and I record that the parties’ counsel in this case were also broadly in agreement with the applicable legal test and procedure.
23. I make one further observation. It is clearly intended that all challenges to the arbitration determination, should be brought under one single umbrella, namely whether the determination was wrong. As Mostyn J put it at para 4 of **A v A**:

“The effect of the judgment of King LJ is to make a challenge to a financial remedy arbitral determination under section 68 of the Arbitration Act 1996, or an appeal against such a determination under section 69, entirely redundant”.

24. I agree with those words. In my judgment it is hard to conceive of a situation where a challenge to an arbitration award in a financial case, or an arbitration determination in a children’s case, procedurally needs any more than one application. That application will, of course, contain in the supporting skeleton argument the grounds upon which the challenge is pursued. Those grounds can include the matters mentioned at s68 and s69 of the **Arbitration Act 1996**, but these should not be separate free standing applications. The test will be the same, namely whether the award or determination was wrong; within that test, procedural irregularity or error of law may form part of the grounds of challenge.

**Procedure upon challenging a children’s arbitration**

25. I further take the view (and, again, the parties agree), that the procedure to be followed in a challenge to an arbitration determination in a children's case should, in principle, be as close as possible to that provided for by Mostyn J in **A v A** in respect of a challenge to an arbitration award in a financial case. In both categories of cases, there should be a triage stage to determine whether the challenge has a real prospect of success. If that gateway test is passed, the application will proceed to a full inter partes hearing for a review hearing. If not, the order incorporating the award or determination will be made.
26. I have taken the liberty of attaching, by way of appendix, suggested practice guidance for children's cases, together with a draft order for the gatekeeping judge. These are issued with the authority and approval of the President.

**Setting aside/appealing against (i) the triage/paper decision and/or (ii) the inter partes hearing decision**

27. Interesting procedural questions arise, which are not specifically referred to in either *Haley* or **A v A**:
- i) If the court determines the triage/paper exercise on paper (as is envisaged), does either party have the right to apply to set aside the triage/paper order if dissatisfied with the decision?
  - ii) Alternatively, does either party have the right to pursue an appeal against the triage/paper decision?
  - iii) If the gateway test is passed, and the application proceeds to an inter partes hearing, does either party have the right to pursue an appeal against the order made at that inter partes hearing?
28. My observations on these questions are strictly tentative. The parties are largely in agreement on the proper procedural pathways and understandably did not undertake a great deal of research into these particular matters. The particular questions identified at para 27 above do not directly arise. I am conscious, also, that it is not for me to tell an appellate court how it should approach a particular case. I am not offering guidance on these three issues. My intention is to offer a view of what appears to me to be the way in which parties are, or may be, entitled to pursue the formal appeal route once firmly back in the fold of court proceedings.
29. The test, and procedures, set out in **Haley v Haley** and **A v A** are judge led law. The intention clearly is to align a challenge to an arbitration award/determination as closely as possible with the appellate route. But there are no statutory provisions, rules or practice direction which expressly govern challenges to arbitrations, save under the Arbitration Act 1996 which, for reasons set out above, are largely redundant. It seems to me that, whilst following as closely as possible the appellate route, the court must be careful not to dispense with rights which are procedurally available to the parties under the FPR 2010.

*Right to apply to set aside the triage/paper order*

30. By FPR 4.3, headed "**Court's power to make order of its own initiative**":

“(1) Except where an enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(Part 18 sets out the procedure for making an application.)

(2) Subject to rule 29.17, where the court proposes to make an order of its own initiative –

(a) it may give any person likely to be affected by the order an opportunity to make representations; and

(b) where it does so it must specify the time by and the manner in which the representations must be made.

(3) Where the court proposes –

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to make the order,

it must give each party likely to be affected by the order at least 5 days' notice of the hearing.

(4) The court may make an order of its own initiative without hearing the parties or giving them an opportunity to make representations.

(5) Where the court has made an order under paragraph (4) –

(a) a party affected by the order may apply to have it set aside, varied or stayed; and

(b) the order must contain a statement of the right to make such an application.

(6) An application under paragraph (5)(a) must be made –

(a) within such period as may be specified by the court; or

(b) if the court does not specify a period, within 7 days beginning with the date on which the order was served on the party making the application.

(7) If the court of its own initiative strikes out a statement of case or dismisses an application (including an application for permission to appeal) and it considers that the application is totally without merit –

(a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order”.

31. It follows that, in my view:

i) The court is entitled to make a triage/paper order without holding an oral hearing.

ii) Invariably, a challenge to an arbitration will consist of an application and a skeleton argument in support. The party seeking to uphold the award/determination has an opportunity to provide their own skeleton in opposition. It follows that each party will have been given “an opportunity to make representations”.

iii) On the assumption that the parties have had such an opportunity to make representations, there is no automatic right to either party to apply to set aside the triage/paper order under 4.3(5).

32. However, another route is available to a party dissatisfied with the triage/paper order. By its general powers of case management, under FPR 2010 4.1(6):



“A power of the court under these rules to make an order includes a power to vary or revoke the order”.

33. What circumstances justify an application by an aggrieved party who seeks to set aside the triage/paper order under this rule? Consideration was given to the circumstances in which that power might be used by Patten J in **Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen [2003] EWHC 1740 (Ch)**, when considering analogous provisions under the CPR. He said at paragraph 7:

"The Deputy Judge exercised a discretion under CPR Part 13.3. It is not open to me as a judge exercising a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order. If the Defendant wished to challenge whether the order made by Mr Berry was disproportionate and wrong in principle, then he should have applied for permission to appeal to the Court of Appeal. I have been given no real reasons why this was not done. That course remains open to him even today, although he will have to persuade the Court of Appeal of the reasons why he should have what, on any view, is a very considerable extension of time. It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly, it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ. It is therefore clear that I am not entitled to entertain this application on the basis of the Defendant's first main submission, that Mr Berry's order was in any event disproportionate and wrong in principle, although I am bound to say that I have some reservations as to whether he was right to impose a condition of this kind without in terms enquiring whether the Defendant had any realistic prospects of being able to comply with the condition."

34. That formulation was approved by the Court of Appeal in **Collier v Williams 2006 [EWCA] Civ 20** (para 40), and the Court of Appeal in **R (on the application of Vincent Nolson) v Stevenage Borough Council [2020] EWCA Civ 379** endorsed this procedural route.
35. I note also that at FPR 30.14:

“(1) The High Court will not reopen a final determination of any appeal unless –  
(a) it is necessary to do so in order to avoid real injustice;

- (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
  - (c) there is no alternative effective remedy.
- (2) In paragraphs (1), (3), (4) and (6), ‘appeal’ includes an application for permission to appeal”.

If this is the test for applying to set aside an order made on an application for permission to appeal in the High Court, I suggest it is also the applicable test if an application is made to set aside a triage/paper decision which is analogous to a decision on an application for permission to appeal.

36. I conclude that a party who seeks to set aside or vary a triage/paper decision made in respect of an arbitration award/determination is entitled to apply under FPR 2010 4.1(6), but the application is only likely to be allowed if it demonstrates exceptionality justifying a reversal of the triage/paper decision. I also take the view, for reasons which I will attempt to explain, that in any event a route of appeal (where the ultimate test is whether the order was wrong, a lower threshold than exceptionality on a set aside application) lies against the triage/paper decision and, accordingly, there is little or no practical benefit in applying to set aside the order under FPR 2010 4.1(6).

*Right to appeal against the triage/paper decision*

37. I am of the view that the triage/paper decision is susceptible to the appellate route in accordance with FPR Part 30. I do not consider that it is permissible to circumvent, or ignore, the established right to appeal under Part 30. Thus, the party aggrieved by the triage/paper decision requires permission to appeal. Assuming the decision has been made by a circuit judge, the route of appeal is to the High Court, and the usual test will apply i.e whether the appellant can demonstrate that the triage/paper decision was “wrong”. In a sense, the appeal from the triage/paper decision would be tantamount to a second appeal. Accordingly, in my view (but this will ultimately be a matter for the appeal court) it may be that the permission to appeal application should be informed by not only whether there is a “real prospect of success” but also whether the appeal would “raise an important point of principle or practice” (CPR 52.7). I acknowledge that this applies to appeals to the Court of Appeal, and is not replicated in the rules for appeals to the High Court, but in my judgment such an approach might be a logical way for an appellate court to consider an appeal against a triage/paper order which in itself procedurally is treated as an appeal against the arbitration award/determination.

*Right to appeal against the inter partes challenge hearing*

38. If, at the triage/paper stage, the court is satisfied that the challenge to the arbitration award/determination carries a real prospect of success, it will set the matter down for a full inter partes hearing which will operate, in like manner to an appellate hearing, as a review of the arbitration award/determination.
39. The decision of the court at the inter partes hearing is also, in my judgment, capable of being the subject of an appeal by the party aggrieved with the outcome of that hearing. The same procedure applies as to an appeal against the triage/paper order described above. Thus, permission to appeal against the decision must be sought and it may be that the permission to appeal application should be informed by not only whether there is a “real prospect of success” but also whether the appeal would “raise an important point of principle or practice” (CPR 52.7)

*Answers to the three questions identified at para 27 above*

40. I therefore tentatively conclude that:
- i) A party aggrieved by the triage/paper decision has a right to apply to set aside the order, but must establish exceptionality to justify the application. It is difficult to see why this route would be elected by the aggrieved party ahead of an appeal against the triage/paper order where a lower threshold (that the order was wrong) applies.
  - ii) A party dissatisfied with the triage/paper decision has a right of appeal under Part 30, which must go through the usual appellate procedure including the filter stage of permission to appeal. It may be that the approach to be taken by the appellate court will be informed by the second appeals test at CPR52.7.
  - iii) If the triage/paper order provides for a full inter partes hearing, a party dissatisfied with the order made at that hearing similarly has a right of appeal under Part 30, which must go through the usual appellate procedure including the filter stage of permission to appeal. Again, it may be that the approach to be taken by the appellate court will be informed by the second appeals test at CPR52.7.

**The way forward in this case**

41. I will make directions for skeleton arguments, and arrange for the matter to be placed before a High Court Judge to conduct the triage/paper exercise on paper.

## APPENDIX

42. As in **A v A**, and for convenience. I refer to the person challenging the determination as “P”, using the male pronoun, and the party seeking to uphold the determination as “D”, using the female pronoun.

### **Application by P**

43. Where P challenges the arbitral determination, and seeks that different provision should be made by the court, he should file in his local court a Form C2 as follows:

i) Box 6 should contain the statement:

**This is a challenge to an arbitral determination dated [date] made by [name of arbitrator]. The grounds of challenge are annexed at page 9.**

ii) If there is already a Form C100 on the file which is stayed in favour of arbitration, the statement in Box 6 should further seek that the stay be lifted. Where a Form C100 has not previously been filed, it should be filed along with the Form C2. Section 3(d) of the Form C100 (exemption from MIAMs because of attendance at non-court resolution) should be ticked.

iii) The grounds of challenge should be annexed to the Form C2

44. P should file and serve on D the Form C2 (and, if applicable, the Form C100) within 21 days of the date of the arbitral determination in its final form.

45. The grounds of challenge should set out succinctly, and in the same manner as grounds of appeal would be pleaded, P's complaints about the arbitral determination. They should specify in respect of each ground whether the ground raises a challenge against a point of law or a challenge against a finding of fact, or an allegation of procedural irregularity (c.f. FPR PD 30A para 3.2(b)).

46. In addition, P should file, and serve on the respondent, along with the Form C2 (and, if applicable, the Form C100):

i) a skeleton argument not exceeding 20 pages in length (FPR PD 30A para 5.13 – 5.22 and PD 27A para 5.2A.1);

ii) the determination.

47. On the issue of the Form C2 and (if applicable, the Form C100), the gatekeeper should immediately issue an order:

i) disapplying the procedural requirements in FPR 2010 Part 12, and PD 12A-B;

ii) providing that D may within 14 days of service of the Form C2, Form C100 (if applicable) and accompanying skeleton argument, file a short skeleton argument in response (CPR PD 52C paras 19 and 20(1)) and a draft order which she wishes the court to make in the event that it determines that the permission to appeal test is not passed;

iii) lifting any stay on an existing Form C100; and

iv) directing that the application and the accompanying documents will be considered by a circuit judge without a hearing not sooner than 21 days after issue of the application.

48. Pursuant to the gatekeeper's initial order, but subject to para 51 below, the papers should be placed before a circuit judge authorised to hear appeals not sooner than 21 days after issue (thereby allowing time for D to file a skeleton argument in response). That judge will then conduct the "triage/paper" exercise without a hearing and will decide whether the permission to appeal test has been passed. The judge should give brief written reasons.
49. If the judge decides that the permission to appeal test has not been passed then he/she will make the order drawing on the draft provided by D, and will likely penalise P in costs. If he/she decides that the permission to appeal test has been passed, then directions will be given by him/her for the application to be heard *inter partes*.

### **Application by D**

50. Sometimes D has to bring the matter before the court because P, while rejecting the determination, is refusing to cooperate in the making of a consent order that implements it. In that case the above procedure should be followed save that Box 6 of the Form C2 should contain the statement:

**This is an application for an order implementing an arbitral determination dated [date] made by [name of arbitrator]. The grounds in support, and a draft order, are annexed at page 9.**

51. In this scenario D should:
- i) annex to the Form C2 a draft order which implements the determination;
  - ii) file a skeleton argument;
  - iii) file the determination.
52. The gatekeeper's initial order will be in the same terms as para 50 above save that sub-para (ii) is to be read as providing that P should file any skeleton argument in response, together with any grounds of challenge to the arbitral determination, within 14 days of service.
53. Subject to para 58 below, the papers should then be placed before the circuit judge who will decide whether the objections of P pass the permission to appeal test. If they do not pass that test, he/she will make the order drawing on the draft provided by D. If the objections do pass the permission to appeal test, directions will be given by the circuit judge for the application to be heard *inter partes*. The judge should give brief written reasons.
54. In this scenario there should not be a time limit within which D must make her application to the court. It is easy to imagine negotiations about the terms of an implementing consent order breaking down after weeks of discussion.

### **Allocation to High Court judge level**

55. If either P or D considers that the application seeking to challenge or uphold the arbitral determination should be allocated within the Family Court to High Court Judge level, then a written request to that effect should be made at the time of making the application. This will be considered by the gatekeeper, and if granted the initial order should provide under para 22(iv) above that the papers should be sent to the relevant FDLJ, for assignment to a specific High Court judge to conduct the "triage/paper" exercise.

**DRAFT GATEKEEPING ORDER**

**In the Family Court**  
**sitting at [court]**

**Case No: [insert]**

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**Order**  
**Children Act 1989**

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The full name(s) of the children	Boy or Girl	Date(s) of Birth
[insert]	[insert]	[insert]
[insert]	[insert]	[insert]

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After consideration of the documents lodged by the applicant

**ORDER MADE BY [NAME OF JUDGE] ON [DATE] ON THE PAPERS**

**The Parties**

1. The applicant is *[applicant name]*  
The respondent is *[respondent name]*  
**(SPECIFY IF ANY PARTY ACTS BY A LITIGATION FRIEND)**

**Recital**

2. Form C100 was filed by the [applicant] [respondent] on [date].
3. *By an order dated [date] the proceedings initiated by the Form C100 were stayed in order for the parties to engage in arbitration.*
4. **EITHER**
  - a. *The applicant has applied to this court in Form C2 dated [date] challenging an arbitral determination made by [name of arbitrator] on [date].*
  - b. *Grounds of challenge are annexed to the Form C2.*
  - c. *A skeleton argument has been filed by the applicant.*
  - d. *The determination dated [date] has been filed by the applicant.*

**OR**

- a. The applicant has applied to this court in Form C2 dated [date] for an order implementing an arbitral determination made by [name of arbitrator] on [date].
- b. A skeleton argument and a draft proposed order have been filed by the applicant.
- c. The determination dated [date] has been filed by the applicant.

**IT IS ORDERED THAT:**

5. The aforesaid stay is lifted.
6. The procedural requirements in FPR Part 12 and PD12A-B are suspended.
7. The applicant shall serve the application and accompanying papers on the respondent forthwith (if service has not already been effected). The service requirements of FPR 18.8 are disapplied.
8. The respondent may within 14 days of service file a short skeleton argument in response including a proposed draft order.
9. **EITHER**  
  
The application and the accompanying documents will be considered by a circuit judge without a hearing not sooner than 21 days after issue of the application.  
  
**OR**  
  
The application and the accompanying documents shall be considered by a High Court Judge without a hearing, to be allocated upon consultation with the FDLJ.
10. Costs reserved.

Dated [*date*]