

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2021

Before :

MR JUSTICE MOSTYN

Between :

A

Applicant

- v -

A

Respondent

Joseph Rainer (instructed by **Charles Russell Speechlys**) for the **Applicant**
Sally Harrison QC (instructed by **Jones Myers**) for the **Respondent**

Hearing dates: 23-24 June 2021

Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. This version of the judgment has been anonymised and redacted and should be referred to as *A v A (Arbitration: Guidance)*. In no publication of the judgment may the identities of the parties or the contents of the redactions be revealed. Breach of this direction will amount to a contempt of court.

Mr Justice Mostyn:

1. The applications before me concern an arbitral award (“the award”) made by Christopher Pocock QC (“the arbitrator”) on 21 December 2020.
2. The wife has issued an application for the husband to show cause as to why he should not be held to the terms of the award. I also have before me an application made by the husband to challenge the award pursuant to s.68 of the Arbitration Act 1996 (“the 1996 Act”), as well as an application for leave to appeal on a point of law under s.69. Those applications have been transferred to the Family Division from the Money and Business Court in Leeds. The husband also in his counsel’s skeleton argument of 16 February 2021 invited the Family Court to decline to make an order in the terms of the award. So there were four separate applications bringing issues about the award before the court. The Family Court does not have jurisdiction to hear the 1996 Act applications. Therefore it has been necessary to transfer the Family Court applications to the High Court.
3. These disordered procedural steps, together with my knowledge of similar procedural chaos in other cases, has led me to formulate guidance about the correct

procedure to be adopted where one party wishes to challenge an arbitral award, or where a party wishes to implement an arbitral award in the face of opposition from the other party. The guidance, together with a proposed *pro forma* order, is set out in the Appendix to this judgment and is issued with the authority and approval of the President.

[4. Redacted]

5. The parties are both aged 63. They married in September 1979, and separated in 2018, making this a 39 year marriage. On 8 February 2019, they both signed the ARB1 form, agreeing to go to arbitration to resolve their financial situations following separation and divorce. Specifically, they agreed in writing:

“The parties are applying for a determination as to how their assets should be divided between them.”

6. Financial remedy proceedings were not commenced in the FRC at that stage. Both parties issued petitions for divorce in July 2019, and following the wife’s petition being withdrawn by consent, decree nisi was pronounced in March 2020 and decree absolute in November 2020.
7. An initial directions hearing took place via telephone before the arbitrator on 1 November 2019. The final arbitration hearing had been due to commence on 11 May 2020, but at another hearing before the arbitrator on 8 April 2020, at which the husband successfully applied for an adjournment, it was relisted to begin on 14 December 2020.
8. On 1 September 2020, however, the parties reached a broad overall agreement in correspondence, but there remained several ancillary issues on which they were at odds. For the purposes of this judgment it is not necessary for me to set out in full the details of that agreement, save to note that under its terms the husband received 52% of the circa £17 million matrimonial asset base, and the wife 48%.
9. Consequently, the parties requested that the arbitrator determine only the outstanding matters in dispute at the final arbitration hearing. A working draft order was placed before the arbitrator containing the provisions that had been agreed at that point. The final arbitration hearing took place on 14 December 2020.
10. The arbitrator then handed down his written award on 21 December 2020. This was a 32 page document much like a court judgment, which set out the reasons for the arbitrator’s decisions, and it contained a section at the end entitled ‘Award’ summarising and declaring what had been awarded (“the declaration”).
11. Following receipt of the award, the wife amended the working draft order to include the arbitrator’s decisions on the matters in dispute, and invited the husband to agree it. On 18 January 2021, however, the husband made an application under s.57 of the 1996 Act for clarification and correction of the award. The arbitrator dismissed that application on 19 January 2021. The husband subsequently did not agree for the amended draft order to be converted into a consent order.

12. As a result, on 21 January 2021 the wife filed both a Form A and an accompanying Form D11 at court, in which she made her notice to show cause application against the husband. On 16 February 2021, the husband made his application under the 1996 Act to the Business and Property Court in Leeds (which had to be transferred to the Family Division), under which he presented effectively four grounds of challenge, each of which is discussed in turn below. On 1 June 2021, the husband made his Part 18 application in relation to the sale of X.
13. The final hearing of the various applications took place remotely before me on 23 and 24 June 2021.

Challenge to an arbitral award: principles

14. In *Haley v Haley* [2020] EWCA Civ 1369 King LJ ruled at [73] and [96] that, substantively, a challenge to a financial remedy arbitral award should be dealt with in broadly the same way, and subject to the same principles, as a financial remedy appeal in the Family Court from a district judge to a circuit judge.
15. The effect of the judgment of King LJ is to make a challenge to a financial remedy arbitral award under s.68 of the 1996 Act, or an appeal against such an award under s.69, entirely redundant.
16. I have to decide if the arbitral award is “wrong”. King LJ at [74] emphasised that the test is “not seriously or obviously wrong, or so wrong that it leaps off the page, but just wrong”. If I am so satisfied then I will make different provision to that within the arbitral award.
17. It is important that I approach the husband’s challenge as if I were hearing an appeal by him from a judgment of a district or circuit judge. If this were an appeal I would have wide powers. I would have all the powers of the lower court (FPR 30.11(1)). I could affirm, set aside or vary any order or judgment of the lower court; refer any application or issue for determination by the lower court; order a new hearing; make orders for the payment of interest; and/or make a costs order (FPR 30.11(2)).
18. If this were an appeal and I reached the decision that the judge below fell into error in relation to part of his order, then I would have power to vary other parts of the order without a respondent needing to seek and obtain permission to appeal. That power is wide enough to encompass those matters which are consequential to a successful appeal and which are necessary in order for the court to do justice in the appeal which is before it: see *Phillimore v Hewson* [2020] EWHC 499 (QB), [2020] 1 WLR 2175. In that case, notwithstanding the lack of a cross-appeal, the appeal court varied (for the benefit of the respondent to the appeal) the order of the judge below so as to give effect to the judge’s intention, there being no resulting prejudice to the appellant.
19. I myself have recently dismissed an appeal but have gone on to make consequential corrections to mathematical errors in order to give effect to the first instance judge’s intentions: see *AZ v FM* [2021] EWFC 2.

20. In this case I propose to exercise my powers analogously to those I would have available to me if this were an actual appeal.

The first ground of challenge

21. The husband first seeks to challenge the award by arguing that there was uncertainty or ambiguity as to the effect of the award in relation to what was intended or meant by ‘capital costs’.
22. The issue of these ‘capital costs’ arises because the wife currently remains in occupation at X. In the overall agreement reached on 1 September 2020, the husband agreed to pay £4,500 per month for ongoing running costs of the property for a period of six months while the wife remained in occupation (with the wife to be solely responsible for all running costs after that six month period while she remained in occupation, and with the parties to bear the running costs equally once the wife vacated the property). The husband also agreed to pay £12,000 towards capital costs that needed to be paid in relation to the property.
23. However, a dispute then arose about who should pay for any additional capital costs that might come to light after the agreement was reached on 1 September 2020, but while the wife remained living in the property.
24. It is the wife’s occupation of X that appears to be the sticking point for the husband, for he has openly accepted that he will pay 50% of any capital costs that arise once the wife has left X. Incidentally, I am told that the husband has not paid any of the £4,500 monthly instalments to the wife for the running costs since the agreement was reached.
25. I have to express my surprise and disappointment that an issue as banal as this should not have been the subject of agreement.
26. The arbitrator was therefore asked to determine the issue of who should pay for additional capital costs that arose after 1 September 2020 whilst the wife remained in occupation of X.
27. The arbitrator agreed that a term of the overall agreement was that the husband’s contribution to the capital costs that were known as at 1 September 2020 was to be £12,000. He determined that over and above that figure, the parties should meet capital costs in equal shares. Specifically, he ruled that (a) any capital costs that became apparent or necessary after 1 September 2020, but before the wife vacated the property, would be met equally, and (b) in the event that capital costs which were known as at 1 September 2020 transpired to be more expensive than budgeted for, any surplus would be met equally.
28. Ms Harrison QC, on behalf of the husband, submitted that the terms of the award in relation to capital costs are ambiguous and uncertain, since the arbitrator failed to define what ‘saleable or lettable’ condition meant, and failed to define the meaning of ‘capital costs’. Ms Harrison QC said that this uncertainty will cause significant injustice to the husband, who is bound to pay an uncertain amount for an indefinite period of time in relation to a property from which he is excluded for as long as the wife chooses to live there.

29. Mr Rainer submitted that no such uncertainty or ambiguity exists. He stated that the parties had already virtually entirely agreed how ‘capital costs’ should be defined in the working draft order. Indeed, the agreed part of the relevant paragraph in the draft order says:

‘The ‘long term capital costs’ shall mean the capital expenditure required to maintain X in a lettable and saleable condition as advised and evidenced by the property managing agent.’

Mr Rainer said that neither the husband nor the wife invited the arbitrator to go into further detail in defining ‘capital costs’, save that the arbitrator added to the definition, at the wife’s request (opposed by the husband), the words ‘this shall include any ongoing costs of maintenance and decoration’. Mr Rainer noted an irony: it was the wife who at the final arbitration hearing invited the arbitrator to give more detail in the definition, while the husband resisted that further particularity. Mr Rainer further argued that the arbitrator had rightly put in place a mechanism to minimise the potential for debate over what would constitute a ‘capital cost’.

30. The mechanism the arbitrator had put in place for future disputes was as follows. The starting point for any dispute was to be the definition provided by the parties in the draft order, set out above. To this the arbitrator added at paragraph 99 of the award, under the title ‘Definitions’, that:

‘a) On the face of the comparison document, there is a dispute as to whether ongoing “maintenance and decoration” should be specified as a potential cost.

b) It should not matter. If the agent advises (and it is for the agent, as provided here) that some maintenance and redecoration be undertaken, it should be undertaken.

c) For clarity, it should be recorded here.’ (original emphasis)

31. The definition in the amended draft order which the wife invited the husband to agree therefore reads:

‘The ‘long term capital costs’ shall mean such capital expenditure required to maintain X in a lettable and saleable condition as advised and evidenced by the property managing agent excluding the costs listed as ‘Immediate Capital Costs’ above. Insofar as any of the ‘Immediate Capital Costs’ are estimated figures and the actual cost of the work/item is higher, the difference between the actual cost and the estimated cost above shall fall within the definition of ‘long term capital costs’. For the avoidance of doubt, and subject to the above caveats, this shall include any ongoing costs of maintenance and decoration.’

32. Mr Rainer next pointed to the arbitrator’s examples of the sort of costs that might fall within the definition at paragraph 87 of his award. Mr Rainer stated that the

point of this guidance was to assist the parties in agreeing between themselves what should fall within the definition, and to aid the court in determining any future dispute. At paragraph 87 the arbitrator said:

‘These are not ordinary, regular (i.e. recurring) running costs (water and electricity bills, running maintenance/servicing contracts, alarm or “brain” maintenance contracts, pool maintenance). Those are “running costs” within the agreed definition (order paragraph 1.j)). These are capital costs required to “enable the property to be let”. They would include the repair of damage to the property, maintenance of the structure of the property, and replacement of its fixtures and fittings (a refrigerator has been mentioned, as has an air conditioning unit), so as to keep the property (and its fixtures and fittings, which are part and parcel of what may well, in the case of this property, be let or sold with it) in a lettable/saleable condition...’ (original emphasis)

33. Mr Rainer next referred to paragraph 89 where notwithstanding this guidance the arbitrator stated:

‘If there is any dispute as to whether something is necessary to keep the property in a saleable or lettable condition, the parties should be led by the property agent who, after all, will be marketing the property from now on...’

34. And finally, Mr Rainer submitted that the arbitrator ruled at paragraph 90 that as a backstop there should be a specific liberty to apply clause ‘in relation to both the necessity and level of such costs in the event that even with the agent’s advice, the parties are unable to agree’.

35. In fact, in his s.57 application, the husband asked the arbitrator to ‘clarify and provide a more limited definition of what would be deemed to be capital expenses to keep the property in a ‘saleable and lettable condition,’ as it currently is, whilst the Wife is in occupation’. After pointing out that it seemed to him that what the husband was doing was actually requesting that he change his mind, the arbitrator responded that there was set out in the award ‘as much clarity as can be achieved for the purposes of my award in those agreed definitions and conclusions’. He stressed that if there were to be a dispute about what a relevant capital cost was, the court would determine the dispute either if a party made an application for the making of an order reflecting the award, or on a later application pursuant to the liberty to apply clause.

36. Mr Rainer argued that the arbitrator had been correct in his response, and that there was as much clarity as there could be in the award given the lengthy guidance and detailed mechanism he had set out. Consequently, Mr Rainer submitted that the award cannot possibly be said to be so uncertain or unambiguous such as to make it appealably wrong.

37. In my judgment, there is no relevant uncertainty or ambiguity in this regard, and the first ground of challenge thus fails on the basis that the award was not wrong. These are my reasons.
38. First, if one reads the arbitrator's award in full, it is plain that at paragraph 87 the arbitrator went into some considerable detail about what he considered should be classed as a necessary capital cost. I accept Mr Rainer's submission that it would not have been possible for the arbitrator to specify every single item that could possibly constitute a capital cost, and in circumstances where specific examples were given by the arbitrator I unhesitatingly reject Ms Harrison QC's submission that there was no attempt to define or limit 'capital costs' such that the award was uncertain or ambiguous.
39. Secondly, I agree with Mr Rainer that the mechanism the arbitrator put in place was designed to reduce any uncertainty or disagreement as to what might constitute a capital cost, in that the parties would be guided first by the award, second by their marketing agent, and only if they could not reach an agreement following that guidance would they have to go to court. The arbitrator therefore did everything he could to reduce the uncertainty and ambiguity over what might constitute a 'capital cost' for the parties.

The second ground of challenge

40. The second ground of challenge advanced by Ms Harrison QC is that the arbitrator failed adequately to provide for a mechanism for the resolution of any dispute over future capital costs and for the determination of any liability on the part of the husband. Specifically, she submitted that the arbitrator was wrong not to direct that quotes be obtained for any work said to constitute necessary capital costs, along with a letter from the marketing agent dealing with the issue of necessity. It was said that this will cause significant injustice to the husband because there will be uncertainty as to the method by which any expenses are to be determined.
41. Mr Rainer argued in response that the husband did not argue at the final arbitration hearing that the arbitrator should direct that quotes should be obtained. He submitted that in any event, a failure on the part of the arbitrator to direct that quotes should be obtained for any work in advance cannot conceivably render the award wrong.
42. I agree with Mr Rainer. It was perfectly legitimate for the award to state that the parties should pay for capital costs without having to procure quotes beforehand, and the fact that the arbitrator did not direct the parties to obtain quotes in advance cannot be said in any way to be wrong.
43. Furthermore, for the reasons I have set out above, I do not agree that the arbitrator failed to put in place an appropriate mechanism to resolve future disputes, and I do not agree that the mechanism was uncertain or ambiguous. The arbitrator set out a comprehensive mechanism in the award, giving the parties a clear path to follow to resolve any future disputes over capital costs. This ground of challenge therefore fails. I have come close to describing it as hopeless.

The third ground of challenge

44. The husband's third ground of challenge relates to documentation the husband believes the wife has at X and which he will require in order to prove to HMRC that on sale and remittance of his share of the proceeds no capital gains tax liability arises. During the parties' negotiations leading up to the overall agreement, the husband had proposed that the wife undertake to provide any and all records confirming the acquisition and construction costs referable to X to him. The wife said she could not give that undertaking because she had already delivered up these materials, so that they were no longer in her possession or control, and that as far as she was aware, there were no more documents at X.
45. The arbitrator determined that the wife should simply confirm (through Mr Rainer) that she had provided all such documents, and in the event that she did discover further documents, should provide copies to the husband. The wife agreed to that.
46. That decision of the arbitrator is said by Ms Harrison QC to be a failure to deal with the issue which is so gross as to render the award not only wrong, but also a serious irregularity under s.68(2)(d) of the 1996 Act. She says that this failure to deal with the issue has resulted in an award that will not ensure compliance by the wife and will cause significant injustice to the husband, who as explained above will not have the necessary documentation required to eliminate a potential capital gains tax liability in respect of X when he repatriates his share of the net proceeds of sale to the UK.
47. Mr Rainer submitted that this ground is demonstrably unarguable on the basis that no mechanism for the return of the documents over and above that suggested by the arbitrator was pursued by the husband at the hearing, and that the husband did not invite the arbitrator to make a finding that the wife's contention that she had already sent the documents she had and no longer had any in her possession was false.
48. I agree with Mr Rainer. There was no failure to deal with the issue, since the arbitrator specifically put in place a mechanism to deal with the husband's concerns about the documents by inviting the wife to confirm she did not have any documents in her possession, but that if she found any, she would deliver them up. The arbitrator's decision was therefore neither wrong, nor was there a serious irregularity. This ground of challenge fails.
49. When analysed the husband's complaint is no more than that he would prefer the wife to be subjected to the fiercer language of Ms Harrison QC when her obligation came to be expressed. I do not agree that his preference for fiercer language constitutes a valid ground of challenge. However, the order as drafted merely recorded an agreement by the wife, without any element of compulsion. In my judgment the wife's obligation should be incorporated in an undertaking. If she were to refuse to give an undertaking, her obligation should be made the subject of a mandatory injunction.

The fourth ground of challenge

50. The fourth ground of challenge put forward by the husband is that the arbitrator was obviously wrong to decide that the husband should be liable for 50% of the

capital costs that became manifest and necessary after 1 September 2020, and that he should contribute equally to any expenditure in excess of the budget for the capital costs known as at 1 September 2020.

51. Ms Harrison QC submitted that this decision was wrong because it was ‘outwith the amount he agreed to pay in respect of capital costs’. That sum was £12,000, and it was in respect of the known costs as at 1 September 2020 while the wife was in occupation of X. Ms Harrison QC said that rather than seeking to fill the gap created by the parties’ inability to agree who should pay capital costs in excess of that sum of £12,000 whilst the wife remained in occupation of the property, the arbitrator should have directed simply that the parties would litigate any future dispute, since that is what they had agreed to do, and he should not have imposed any obligation on the husband in respect of those extra costs. She said that the husband had consented only to the terms of the agreement, and that in the agreement there was no suggestion that the husband would be fixed with an open-ended and unquantified liability for capital costs of X throughout the wife’s occupation there, which was the situation he was left in as a result of the award. She also argued that the arbitrator wrongly applied *S v S (Ancillary Relief)* [2009] 1 FLR 254 as authority for the proposition that he was able to make an award outwith the parties’ agreement.
52. Mr Rainer submitted in response that it was never agreed that the husband’s contribution to capital costs known as at 1 September 2020 would be limited to £12,000 while the wife remained in occupation, since the wife’s solicitors had sent an email on 1 September 2020 making clear that the wife did not agree to meet any and all further capital costs arising alone. Mr Rainer said that Ms Harrison QC conceded this point at the final arbitration hearing, which he said was evidenced by the fact that at paragraph 81 of the award, it was recorded that Ms Harrison QC submitted that the wife’s solicitors’ email left the door open to an argument that the husband should contribute to capital expenses that came to light after that date. Furthermore, Mr Rainer submitted that *S v S* is part of a long line of authorities which says that the court is not bound by the terms of a deal struck between parties.
53. The question I must answer is therefore whether the arbitrator had the power to do more than the parties had agreed. It is clear that he did. An arbitrator is given, by the agreement of the parties in Form ARB1, all the powers of a judge, and the authorities are clear that a judge, when presented with an agreement reached between parties, is not confined to a binary choice of either accepting that agreement in its entirety, or jettisoning the agreement in its entirety. On the contrary, the court not only has the power to approve those parts of an agreement it considers to be fair and just, but also to make changes to any parts of an agreement which it thinks ought to be amended in the interests of fairness. It is entirely appropriate for a court, when considering an agreement, to go beyond the terms of that agreement. It is also entirely legitimate for a judge to fill in gaps which are left open in an agreement and to correct numerical errors.
54. In this case, the gap was the issue of what to do about capital costs while the wife remained in occupation of X. The parties had agreed no more than the principle that there would be liberty to apply about any disagreement. There was therefore no substantive agreement on the issue; all the parties had done was to agree to

litigate in the future. Plainly, an arbitrator should not have his hands tied by a so-called agreement that the parties will have to go to court. Plainly, it is clearly lawful, proportionate and just for the arbitrator, exercising the powers of a judge, both to fill in the gap and make his own decision about who should pay the capital costs. It was equally lawful and proportionate for him to set down a framework of indicative non-binding principles which might enable the parties to reach a compromise rather than going to court. In those circumstances, the arbitrator's decision and mechanism were wholly legitimate and in line with the authorities.

55. They were also consistent with the overriding objective, which requires the court to allot to an individual case an appropriate share of the court's resources. This must apply equally to an arbitrator. He has to consider, when faced with an impasse such as that in the present case which the parties, or at least one of them, was maintaining could only be resolved by future litigation, whether it is an appropriate use of the court's resources to allow such litigation. In my judgment it would have been wrong for the arbitrator, faced with such intransigence and folly, not to have done his utmost to devise a scheme to avoid future litigation.
56. It is trite law that the court can fill in the gaps of an agreement where it is presented with only a framework, and can change the terms of an agreement if it thinks it is necessary. As Thorpe LJ said in *Xydhias v Xydhias* [1999] 1 FLR 683 at 692:

'In consequence, it is clear that the award to an applicant for ancillary relief is always fixed by the court. The payer's liability cannot be ultimately fixed by compromise as can be done in the settlement of claims in other divisions. Therefore the purpose of negotiation is not to finally determine the liability (that can only be done by the court) but to reduce the length and expense of the process by which the court carries out its function...Finally in every case the court must exercise its independent discretionary review applying the section 25 criteria to the circumstances of the case and to the terms of the accord.'

57. He had stated earlier at 691:

'An even more singular feature of the transition from compromise to order in ancillary relief proceedings is that the court does not either automatically or invariably grant the application to give the bargain in the force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act as amended.'

58. He went on to cite the well-known dictum of Butler-Sloss LJ in *Kelley v Corston* [1998] 1 FLR 986 at 1013:

'The court retains the duty laid upon it under section 25 in respect of consent orders as well as contested proceedings. It has to scrutinise the draft order and to check, within the limited

information made available, whether there are other matters which require the court to make enquiries. The court has the power to refuse to make the order although the parties have agreed it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp.’

59. Given the long-established principle that the court (or arbitral tribunal) is not bound by parties’ agreements, but must consider the s.25 factors in determining whether or not an agreement is fair, and can fill in gaps which are left open in an agreement, it was not wrong for the arbitrator to hold that the husband should contribute over and above the £12,000 he had agreed to pay towards capital costs. Such a decision was wholly within the arbitrator’s power to make, and squarely within the bounds of discretion open to him. His hands were not tied. In my judgment the arbitrator’s decision in this regard was not wrong but was right.
60. This ground therefore also fails.

The fifth ground of challenge

61. Although this did not form a separate ground in the grounds of challenge document initially prepared on behalf of the husband, Ms Harrison QC at the hearing before me further criticised the award for containing internal inconsistencies, which I treat now as a discrete fifth ground.
62. She submitted the first inconsistency is that paragraph 89 of the award says that until the wife vacates X, she will meet the ongoing running costs of the property. However, the declaration says at paragraph 133 that pending the wife’s vacation of X, she would meet the ongoing running costs of the property, but that the husband would pay £4,500 per month for six months from 1 October 2020, after which he would pay half the running costs. Ms Harrison QC therefore argued that the two paragraphs are inconsistent.
63. In relation to this alleged inconsistency, Mr Rainer pointed out firstly that the husband did not actually raise the issue as a point of clarification in his s.57 application to the arbitrator. He said that the reason is that it was understood by the parties that part of the overall agreement they had reached was that the husband would pay £4,500 towards the running costs for six months, and that after that period, if the wife remained in the property, she would bear the running costs on her own. However, it was agreed that once the wife left the property, the running costs would be split equally again. Mr Rainer pointed out that the agreement that the husband would contribute £4,500 per month for six months to the running costs was first recorded at paragraph 72(d) of the award. Thus its absence at paragraph 89 and its reappearance at paragraph 133 is not an inconsistency when the award is read as a whole, as was intended.
64. I agree with Mr Rainer. As he put it, Ms Harrison QC’s “island-hopping” approach of looking at individual paragraphs in the judgment ignores the fact that the award was written to be read in full from start to finish. Although it is true that the award could perhaps have been clearer in respect of whose obligation the running costs

- would be at various points in time, I do not accept that there is an appealable inconsistency.
65. Secondly, Ms Harrison QC argued that the arbitrator wrote at paragraph 90 of his award that the parties would have liberty to apply to the court in the event they could not agree about capital costs in the future, but that in the part of the declaration which refers to the capital costs issue, there is no reference to there being liberty to apply (at paragraphs 132 and 133). Again, Ms Harrison QC said this is an inconsistency.
66. Mr Rainer accepted that the omission in the declaration of the parties having liberty to apply was unhelpful, but submitted that it was not an omission of such moment as to render the award wrong.
67. I agree with Mr Rainer. Although it is unfortunate that liberty to apply was specifically mentioned at paragraph 90 but not in the declaration, if the award is read as a whole as was intended, there can be no doubt that the fact that the parties would have liberty to apply was implicit in the declaration. There is no appealable inconsistency.
68. Thirdly, Ms Harrison QC submitted that at paragraph 82 there is a list of specific capital expenses the wife alone had to bear, along with a recording of the fact that the husband would make a contribution of £12,000. Some of the figures given for the specific costs the wife would bear were estimates. However, at paragraph 132, the declaration says that in fact insofar as the specific expenses the wife would bear are estimates, the husband would meet one half of any cost in excess of the estimate. Ms Harrison QC said that no such stipulation was made at paragraph 82 and thus again there is doubt as to what the award actually intended.
69. Mr Rainer argued in response that once again a reading of the award in full makes it clear what the arbitrator intended.
70. I agree with Mr Rainer. While it is true that at paragraph 82 there is no mention of the husband paying one half of any costs in excess of what was estimated, paragraph 89 says explicitly that the parties would share equally the capital costs which were known as at 1 September 2020, but for which costs were underestimated. Thus, by the time the reader reaches paragraph 132 and the declaration, which says the husband would meet one half of any costs in excess of any estimate, there is no inconsistency at all.
71. Fourthly, Ms Harrison QC criticised the fact that the list of what might constitute a capital cost at paragraph 87 forms no part of paragraphs 132 or 133, the paragraphs of the declaration dealing with capital costs. Again, she said this leads to an internal inconsistency.
72. Mr Rainer submitted that paragraph 87 was not so much part of the substance of the award, but was more of a signpost for a future court should the parties invoke the liberty to apply clause, having been unable to reach an agreement on what constitutes a necessary capital cost. He argued there was therefore no inconsistency in it not being incorporated as part of the final declaration.

73. I agree with Mr Rainer that not including the list of what might constitute a capital cost in the declaration is not an appealable inconsistency. The final declaration is a concise summary of precisely what was being awarded to each of the parties. That is its purpose. It is therefore not in the least surprising that a contemplative list of suggestions as to what might or might not constitute a necessary capital cost was not included in the concise summary of the award.
74. In my judgment Ms Harrison QC's attack on the award under this ground amounts to a narrow textual analysis enabling her to claim that the arbitrator had fallen into error. This approach was criticised by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372. As he said, the exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. There is no doubting in this case what the arbitrator intended. The inconsistencies do not detract from the clear meaning of the arbitrator's reasoning and do not amount to appealable errors.

Conclusion on the challenges to the award

75. The husband's challenges to the award are therefore dismissed.
76. I do not certify any of the challenges as having been totally without merit although some of them have been very close to the line.

[77 – 86 Redacted]

87. I have seen the working composite order agreed by counsel which sets out the few drafting differences between the parties. I am expecting that counsel will be able to agree the necessary wording in the light of this judgment.
88. I will deal with the costs of the proceedings before me separately and without a hearing. Counsel are directed to file written submissions not exceeding five pages concerning costs.
89. That is my judgment.

APPENDIX

1. In this Appendix to my judgment I shall refer to the dissatisfied party who is seeking to challenge the arbitral award as “P” and for convenience I shall use male pronouns for that party. I shall refer to the satisfied party seeking to uphold the arbitral award as “D” and for that party I shall use female pronouns. I shall use female pronouns for the circuit judge who hears the dispute.
2. In *Haley v Haley* [2020] EWCA Civ 1369 King LJ ruled at [73] and [96] that in substance a challenge to a financial remedy arbitral award should be dealt with in the same way, and subject to the same principles, as a financial remedy appeal in the Family Court from a district judge to a circuit judge. Thus, a challenge to an arbitral award by P should be placed before a specialist circuit judge who hears financial remedy appeals. That judge should then conduct a “triage/paper” exercise applying the permission to appeal test. If she takes the view that the objection made by P would not pass that test then she can make an order in the terms of the arbitral award without more ado and penalise P in costs: see [96].
3. If the circuit judge is satisfied at the “triage/paper” stage that the permission to appeal test is passed then she will set the application down for an *inter partes* hearing at which the court will decide whether the arbitral award is wrong. King LJ at [74] emphasised that the test is “not seriously or obviously wrong, or so wrong that it leaps off the page, but just wrong”. If the circuit judge is so satisfied then she will make different provision to that within the arbitral award. The arbitral award will then be reduced to the status of a mere relic, superseded by the court’s order.
4. The effect of the judgment of King LJ is to make a challenge to a financial remedy arbitral award under section 68 of the Arbitration Act 1996, or an appeal against such an award under section 69, entirely redundant. For the future all challenges to a financial remedy arbitral award should be undertaken in accordance with the new procedure.
5. There are certain aspects of the new procedure which need to be clarified.
6. The first end is to determine exactly how the challenge is brought before the court. In the proceedings before me there has been a plethora of applications which betray the confusion into which the procedure has fallen. The husband has applied to challenge the award under section 68 of the Arbitration Act 1996. He has also sought permission to appeal pursuant to section 69. Those applications have been transferred to the Family Division. He has further informally applied for an order that the arbitral award should not be made into an order of the court. The wife has issued a notice for the husband to show cause why the award should not be made an order of the court.
7. This kind of confusion is all too prevalent. For example in *BC v BG* [2019] EWFC 7 the dissatisfied wife issued “A Letter to the Court and Judge at the High Court” with a personal note, and a Form D11 and N8 including grounds for appeal out of time. In that case I directed that her application should be issued and treated as an application that the award is not made an order of the court.

8. In *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299 Sir James Munby P held at [25] that “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”. This procedure finds its origin in agreement cases where it has been used for decades: see *S v S* at [14]. For example in *Dean v Dean* [1978] Fam 161 just such a procedure was used.
9. *Haley v Haley* itself presupposes that this procedure will be used. At [96] King LJ stated:

‘...a party who believes the arbitral award which follows an arbitration hearing is wrong can, through the 'notice to show cause' process put their objections before the court.’
10. A contested application to the court will therefore most commonly be made by P, seeking to challenge an arbitral award. Less commonly the application will be made by D, seeking to implement the award in an order of the court, but not having the consent of P to do so.
11. Very commonly, the parties will be jointly applying for a consent order implementing the award. In such circumstances the application for a consent order will follow the normal path in FPR 9.26 and PD 9A para 7.1.
12. The guidance I give in this judgment is confined to contested cases. Its terms have been approved by the President.
13. An issue with the “notice to show cause” procedure is that it presupposes that D will make the running by applying to the court. This is the opposite of what would happen on an appeal. On an appeal the dissatisfied party, the appellant, applies to the court for permission to appeal, and if permission is granted advances the appeal. The notice to show cause procedure is not literally apt where it is P who wishes to mount a challenge to the award, although I accept that efforts have been made to adapt it so that P can proactively challenge an award.
14. A further issue with a “notice to show cause” application is that no rule or practice direction within the FPR allows a financial remedy claim to be initiated in this way. It is a judicial invention which has not been reproduced in the rules. FPR 9.9B(2) and FPR PD 9A paras 1.2 and 1.2A mandatorily state that an application for a financial remedy must be dealt with under the standard procedure unless it is for periodical payments, variation of periodical payments (but not capitalisation) or for relief under Schedule 1 of the Children Act 1989 (or under the Domestic Proceedings and Magistrates’ Courts Act 1978, or under article 10 of the 2007 Hague Convention), in which case it must be dealt with under the fast-track procedure. Neither track allows a financial remedy claim to be initiated by a “notice to show cause”. FPR 5.1(1) and PD 5A Tables 1 and 2 stipulate that an application for a financial order must be made in Form A.
15. It is therefore axiomatic that a Form A needs to be filed. It may be that a Form A was filed previously and stayed pending arbitral proceedings. But before an application can be made by P challenging an award, or by D seeking to implement an award, there must be a Form A on the file.

16. The filing of a Form A in these circumstances does not give rise to a requirement to attend a MIAM. An arbitral award is of the character of an agreement: see *S v S* at [19] where Sir James Munby P stated:

‘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.’

Therefore, pursuant to FPR PD 3A para 13(2)(b), the proceedings do not fall within FPR PD 3A para 11 to which the MIAM requirement applies: see *Practice Guidance (Family Court: Interface with Arbitration)* [2016] 1 WLR 59 at [18].

17. Once there is a validly issued Form A on the court file the application by P, challenging the award, or by D, seeking to implement the award, should be made in Form D11 - the standard application notice - using the Part 18 procedure.

Application by P

18. Where P challenges the arbitral award and seeks that different provision should be made by the court, he should file in his local FRC zone hub a Form D11 as follows:

- i) Box 3 should contain the statement:

This is a challenge to an arbitral award dated [date] made by [name of arbitrator]. The grounds of challenge are annexed at page 7.

- ii) If there is already a Form A on the file which is stayed in favour of arbitration the statement in Box 3 should further seek that the stay be lifted.

- iii) At page 7 the grounds of challenge should be annexed.

19. The Form D11 should be filed within 21 days of the date of the arbitral award in its final form.

20. 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 award. 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)).

21. In addition, P should file along with the Form D11:

- i) a skeleton argument not exceeding 20 pages in length (c.f. FPR PD 30A para 5.13 – 5.22 and PD 27A para 5.2A.1);
- ii) the award; and
- iii) a draft of the initial gatekeeper’s order (see below).

22. On the issue of the Form D11 the gatekeeper should immediately issue an order:
- i) disapplying the procedural requirements in FPR 9.12 and 9.14 (including, but not limited to, the requirement for each party to file a Form E and to attend a first appointment) which would otherwise have been triggered by the filing, or un-staying, of the Form A;
 - ii) disapplying the service requirements in FPR 18.8 and providing that on service of the application and accompanying papers on D she may within 14 days of such service file a short skeleton argument in response (c.f. 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 A; 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.
23. Pursuant to the gatekeeper's initial order, but subject to para 30 below, the papers should be placed before a circuit judge authorised to hear financial remedy 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.
24. If the judge decides that the permission to appeal test has not been passed then she will make the order drawing on the draft provided by D, and will likely penalise P in costs. If she decides that the permission to appeal test has been passed then directions will be given by her for the application to be heard *inter partes*.

Application by D

25. Sometimes D has to bring the matter before the court because P, while rejecting the award, 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 3 of the Form D11 should contain the statement:

This is an application for an order implementing an arbitral award dated [date] made by [name of arbitrator]. The grounds in support, and a draft order, are annexed at page 7.

26. In this scenario D should:
- i) annex to the Form D11 a draft order which implements the award;
 - ii) file a skeleton argument;
 - iii) file the award; and
 - iv) file a draft of the initial gatekeeper's order (see below).

27. The gatekeeper's initial order will be in the same terms as para 22 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 award, within 14 days of service.
28. Subject to para 30 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 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*.
29. 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

30. If either P or D considers that the application seeking to challenge or uphold the arbitral award 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 Mostyn J (for a case proceeding in London or on the South-Eastern circuit), or to the relevant FDLJ (for a case proceeding elsewhere), for assignment to a specific High Court judge to conduct the "triage/paper" exercise.

Conclusion

31. If the above procedure is followed, I believe that the intention of King LJ to align as much as possible a challenge to an arbitral award with an appeal in the Family Court is achieved. Obviously, variations demanded by the facts of the individual case can be made to the above process. But the process should be followed as far as possible.
32. On an appeal costs will normally follow the event. The same principle should apply on an application seeking to challenge, or implement, an arbitral award. The general rule of no order as to costs in FPR 28.3(5) will not apply to such an application: see *BC v BG* at [90].
33. I attach a *pro forma* initial gatekeeper's order. It will be added to the Compendium of Standard Orders as Order No. 6.5.



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

No: **[Case number]**

The Matrimonial Causes Act 1973
The Civil Partnership Act 2005
The Children Act 1989, Schedule 1
(ADAPT AS NECESSARY)

The **[Marriage] / [Partnership] / [Relationship]** of **[applicant name]** and **[respondent name]**
(ADAPT AS NECESSARY)

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 A was filed by the **[applicant] [respondent]** on **[date]**.
3. **By an order dated [date] the proceedings initiated by the Form A were stayed in order for the parties to engage in arbitration.**
4. **EITHER**
 - a. The applicant has applied to this court in Form D11 dated **[date]** challenging an arbitral award made by **[name of arbitrator]** on **[date]**.
 - b. Grounds of challenge are annexed to the Form D11.
 - c. A skeleton argument has been filed by the applicant.
 - d. The award dated **[date]** has been filed by the applicant.

OR

 - a. The applicant has applied to this court in Form D11 dated **[date]** for an order implementing an arbitral award made by **[name of arbitrator]** on **[date]**.
 - b. A skeleton argument and a draft proposed order have been filed by the applicant.
 - c. The award dated **[date]** has been filed by the applicant.

IT IS ORDERED THAT:

5. **The aforesaid stay is lifted.**

6. The procedural requirements in FPR 9.12 and 9.14 (including, but not limited to, the requirement for each party to file a Form E and to attend a first appointment) are suspended.
7. The applicant shall serve the application and accompanying papers on the respondent forthwith. The service requirements of FPR 18.8 are disapplied.
8. The respondent may within 14 days of such service file a short skeleton argument in response including grounds of challenge, if applicable, and 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 placed [before Mostyn J] [FOR A CASE PROCEEDING IN LONDON OR ON THE SOUTH-EASTERN CIRCUIT] [before X J] [THE RELEVANT FDLJ FOR A CASE PROCEEDING ELSEWHERE] for allocation.

10. Costs reserved.

Dated *[date]*