Neutral Citation Number: [2024] EWHC 778 (Fam)

Case No: FA-2023-000281 / FA-2023-000332

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF SCHEDULE 1 CHILDREN ACT 1989
ON APPEAL FROM THE CENTRAL FAMILY COURT
HHJ EVANS-GORDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/04/2024

Before :

THE HONOURABLE MR JUSTICE COBB

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Between :

ZU		**Appellant**
- and -		
LT		**Respondent**

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Re A and B (Schedule 1: Arbitral Award: Appeal)

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Tim Amos KC and **Samantha Singer** (instructed by **Keystone Law**) for the **Appellant (mother)**
Michael Glaser KC and **Sophia Gonella** (instructed by **Mishcon de Reya LLP**) for the **Respondent (father)**

Hearing dates: 14 & 15 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.
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 children 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.
A reporting restriction order has been made.

The Honourable Mr Justice Cobb :

Summary

1. This judgment sets out my reasoned conclusions for allowing an appeal against an order of Her Honour Judge Evans-Gordon ('the Judge'), sitting in the Central Family Court, dated 6 October 2023[1]. By her order, the Judge had declined to convert an arbitral award into a substantive court order. The arbitral award had been made by Duncan Brooks KC in August 2022 within financial remedy proceedings brought by the Appellant ('the mother') under Schedule 1 of the Children Act 1989 ('CA 1989').

2. The judgment under review in this appeal is reported as *LT v ZU* [2023] EWFC 179; an earlier judgment dealing with an interlocutory case management issue in the same case was reported as *LT v ZU* [2022] EWFC 206[2]. I have used the same anonymisation where relevant[3]. The mother invites this court, in allowing the appeal, to confirm the arbitral award as a final court order. The Respondent ('the father') opposes the appeal, and the outcome proposed by the mother.

3. The mother is represented on this appeal by Tim Amos KC and Samantha Singer. They, together with their solicitors Keystone Law (Ms Charlotte Cuevas), appear *pro bono*; I am grateful to them for taking on the instructions from the mother in this way. The father is represented by Michael Glaser KC and Sophia Gonella; neither counsel, nor their instructing solicitor, represented the father in the arbitration.

4. Within this appeal, a cross-application was issued by the father on 14 December 2023. By this application he sought the dismissal of the appeal, "without the need for a hearing", on the basis that he had lost his employment since the hearing before the Judge:

> "… Given the financial reality of the Respondent's position, he is completely unable to obtain a mortgage as he has no employment or income. As such, whatever the position as to the correctness of the decision in the Court below, it is impossible to implement the arbitral award".

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[1] The order under appeal was in fact not sealed until 7 December 2023.

[2] One point of clarification. These judgments currently erroneously appear in the EWFC (High Court Judges) section of Bailii; it is clear from [16] of [2022] EWFC 206 (the case management judgment) that the cross-applications were heard by the Judge sitting as a Circuit Judge; she was not sitting as a section 9 Deputy High Court Judge. The case had been allocated to her by HHJ Hess (Order: 27.10.22) and not by Peel J (as she asserts). Had the application been dealt with her as a DHCJ, the appeal would not of course properly have been before me.

[3] For the title of this appeal, the parties' identities have been inverted as it is the mother (ZU) who is the appellant.

5. The father's application was presented to the court with a request that it be determined 'without a hearing', and initially without notice to the mother. I nonetheless gave directions on the father's application on the papers, permitting the father (pursuant to rule 30.12(2)(b) Family Procedure Rules 2010: 'FPR 2010') to file evidence to support this application, and gave a direction permitting the mother to reply if so advised. The mother replied, by a statement from her solicitor.

6. For the purposes of the appeal, I received detailed oral and written representations of counsel, including further written submissions (5 April 2024) on disposal of the appeal following circulation of the draft judgment. I was provided with two substantial bundles of documents (an appeal bundle, and the bundle of documents which had been before the Judge), and an extensive authorities bundle. I was taken to a number of key documents within all of these bundles. Following the hearing, while the judgment was in preparation, the father's solicitors drew my attention to a judgment of HHJ Hess in *SP v QR* [2024] EWFC 57(B); in that case, HHJ Hess had relied on the Judge's substantive decision in this case ([2023] EWFC 179). I invited brief written submissions on this recently reported decision, and in light of those submissions I am satisfied that *SP v QR* provides no material assistance to me. I do not need to rehearse the highly persuasive substantive arguments of Ms Singer in this regard, for it is effectively conceded by Mr Glaser that this is not a decision on which I can or should place reliance (Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, and Practice Direction (Citation of Authorities) [2012] 1 WLR 780).

Relevant background facts

7. The background facts can be shortly stated.

8. The mother and father, both now in their early forties, met in or around 2007, and formed a relationship which lasted a few (on the material before me somewhere between three and five) years. Their relationship resumed again in 2015, and they separated for the final time in 2019. Within this second phase of their relationship, two children were born to the couple, A (a boy) who is 7 (born in 2016), and B (a girl) who is 5 (born in 2018). Post-separation litigation concerning the welfare of the children began in 2019.

9. The mother and two children currently live in a two-bedroom apartment in London ("Thames House"[4]); this property is owned by the father and was said to be worth c.£935k at the time of the arbitration. The father lives in a 4-bedroom property nearby, which he purchased for £1.28m in 2021, and had a similar value at the time of the arbitration. The Thames House apartment had been the parties' home during the second phase of their relationship. Both properties are heavily mortgaged; the mortgage repayments are made by the father. These post-separation arrangements were made by agreement between the parties some time ago.

10. At the time of the arbitration in June 2022, and at the time of the hearing before the Judge in June 2023, both parties were working. The father was a founding (albeit minority) partner and an executional trader of a hedge fund. His remuneration package comprised regular (albeit not guaranteed) monthly drawings (£100,000 gross p.a.), a 5% share of management fees and a 5% share of performance fees. The mother, a

[4] Not its real name

former professional tennis player, has worked part-time for some years for a charity (of which she is the CEO); she also undertakes some additional freelance work.

11. Within the last few months, since the hearing before the Judge, the father's hedge fund has been wound up, and since October 2023 he has, he says (see §4 above), been out of work.

12. Following the separation of the parties, the mother made an application for child arrangements orders, including a specific issue order under section 8 of the CA 1989, requesting permission to relocate the children to Kent, so that she and the children could live closer to her own family. Within those welfare proceedings, independent reports (social work and psychiatric) were prepared; the authors of these reports did not support the application for relocation, and the mother resolved not to pursue it. In January 2022, HHJ Roberts made child arrangements orders in relation to A and B, providing for the children to spend exactly equal time with both parents.

13. Given the equal split of the children's time pursuant to HHJ Roberts' order, the Child Maintenance Service made a nil assessment of the father (pursuant to regulation 50(1)/(2) of the Child Support Maintenance Calculation Regulation 2012); this was made on 23 November 2022 and was backdated to 17 January 2022.

14. It is relevant to note, for the purposes of this appeal, that within the section 8 proceedings, leading counsel for the father had produced a document in September 2021 setting out a proposed property budget for the mother and children in the event that they were to remain living in London (i.e., not relocating to Kent); the budget was accompanied by the comment: "he [i.e., the father] provides his assurance that the housing fund is protected from any financial liabilities he holds". This led HHJ Roberts to observe in her judgment in January 2022 (on the evidence before her):

> "I am not able to factor in, as [the mother] wishes me to, the housing arrangements which are yet to be finalised. Schedule 1 proceedings are underway. <u>[The father] told me that he remains confident that it could be managed that [the mother] and the children can be rehoused within a reasonable distance of his home and the school and nursery</u>. I accept that that is his intention. I also note that the extensive litigation, much of it unnecessary, has reduced this family's pot of money considerably. It may well be that [the mother] needs to increase her earnings <u>to assist in the future and look to her own capital</u> but at this stage, <u>I am not able to conclude, as [the mother] wishes me to, that the plan is not going to happen</u>." [Emphasis by underlining added]

15. At the conclusion of the section 8 proceedings, HHJ Roberts made a costs order (described by the Judge as 'swingeing') against the mother. Within this order, the mother was to repay part of a Legal Services Payment Order ('LSPO') from the father of £41,000 within 28 days; payment of the balance of the costs order was to await the Schedule 1 process. The mother sought permission to appeal this order, unsuccessfully. On or about Christmas Eve 2022, the mother was served with County Court proceedings brought by the father for the recovery of £1,870.36, namely the shortfall

of the LSPO element of the costs order which by then remained unpaid. This, perhaps, illustrates the depth of the antipathy which had by then developed between these parties.

16. On 21 May 2021, during the section 8 proceedings, the mother had issued her application under Schedule 1 CA 1989. In early 2022, the parties agreed to refer the Schedule 1 claim to arbitration, and Duncan Brooks ("the Arbitrator") was chosen; he is a barrister specialising in complex matrimonial finance proceedings, and has considerable experience in family finance arbitrations.

17. By the time of the arbitration, the parties had already spent approximately £1m on legal fees; the father's expenditure was said to be "significantly greater" than the mother's. I was told at the hearing before me that since the arbitration the father has spent a further £260,000 in legal fees. Had these sums (or even a fraction of them) been applied to housing provision for the mother and children (which is at the heart of this financial dispute), the Schedule 1 proceedings would have been considerably less complex; indeed, they may well not have been required at all.

18. The case has a somewhat complex litigation history. Rather than rehearse it within the body of this judgment, I have prepared an outline chronology of the key steps in the litigation, which is attached as **Appendix 1** to this judgment.

The Arbitral Award

19. In preparation for the arbitration on Schedule 1 matters, the parties exchanged statements of evidence. Significantly, they instructed a single joint expert ('SJE') (Oliver Fare of Fox Davidson) to advise on the mortgage capacity of the parties applying various different scenarios. Both parties completed the 'mortgage fact-find' document for the SJE, setting out their relevant financial situations so that he could advise.

20. The parties prepared a joint statement of issues for the arbitration. For present purposes it is relevant to note that it was agreed, inter alia, that:

    i) The mother and children would be permitted to make their home at the Thames House apartment;

    ii) The mother and children would be permitted to move to a replacement property in substitution for the Thames House apartment;

    iii) Subject to provisos sought by the mother, the father could extend the mortgage on Thames House for the purpose of extracting up to £70,000 specifically to meet tax due July 2022;

    iv) The father would be responsible for <u>meeting the mortgage payments, whether interest-only or repayment, on the mother's and children's home at Thames House or its replacement</u> (emphasis by underlining added).

21. As the date for the arbitration approached, both parties made open written offers to settle their dispute. The father's offer is dated 22 June 2022. It is material to note that he predicated his offer on the basis that he would continue to pay the mortgage on the

Thames House apartment and/or an equivalent mortgage on another property. Specifically he proposed (referencing the point agreed at §20(iii) above) that:

> "The Mother shall permit one or more valuers access to the property for the purposes of facilitating a re-mortgage of the property of up to 90% of the equity (sic.) (and if possible, a switch to interest only) within 2 months of the date of this order, and thereafter biennially". (Emphasis by underlining added).

22. The mother's revised open offer (28 June 2022) reflected advice received from the SJE; in her offer, she made clear that she:

> "… would also be willing to contribute her own mortgage capacity, to the extent that the repayments are affordable".

23. Thus, it was absolutely clear, and indeed agreed between the parties, that the settlement of property for the mother and children going forward would be dependent upon a financial contribution from a lender by way of mortgage which would be serviced by the father. Given the way in which the father was presenting his case (i.e., with mention of a 90% mortgage), it was at least possible, if not likely, that the loan would be a significant one.

24. At the arbitration on 30 June 2022, both parties gave oral evidence under affirmation. Extensive documentary evidence was presented to the Arbitrator too.

25. The arbitral award is a detailed and lengthy document running to thirty-six pages (ninety-nine paragraphs). I have extracted from the award a number of key findings or records of fact/evidence which are relevant to the issues before me on the appeal. I have placed them into **Appendix 2** to this judgment for reference.

26. The award makes clear that the parties had by then agreed that the Thames House apartment should be sold; the father agreed to place the gross value of the Thames House apartment towards a new property, including the mortgage capacity which he had previously utilised. The mother had expressed herself willing to put her own resources additionally towards the new property. It was held that the mother's housing need for herself and the children in London during their minority was c.£1.1m to c.£1.13m inclusive of costs of purchase, removal and redecoration. A joint mortgage of £870,000 was to be raised to achieve this. A fund (comprising capital from both and the joint mortgage) would be used to purchase a property in the parties' joint names on a trust for sale. The choice of property was to be agreed by both parties; the choice of mortgage product was also to be agreed. The father was to meet all instalments due in respect of the mortgage as and when they fall due. The Arbitrator reflected his challenge in this case in delivering an outcome which was "effectively to juggle debt and mortgage capacities. My decision would have been far easier if the parties had not spent so much money on legal fees".

27. The award was buttressed by a number of undertakings and agreements offered by the parties.

28. Neither party argued before the Arbitrator that he did not have the statutory or other power (and/or that the court would not have the statutory or other power) to make an award/order which was predicated on one or other or both parties borrowing money by way of mortgage in order to settle property under Schedule 1 CA 1989 for the purposes of housing the children in substitution for the Thames House apartment.

29. The Arbitrator's draft written award was circulated to the parties on 11 July. Both parties submitted comments on the draft. In his comments, the father notified the arbitrator of a recent significant redemption from the hedge fund for which he worked, thereby reducing its value. Of this, the Arbitrator said:

> "I note that redemption, but will not revisit my conclusions, because it occurred after the arbitration hearing and I am not going to direct a new round of updating disclosure generally. Losses need to be recouped before there is any prospect of a performance fee. The fund has managed to weather storms before…".

The Arbitrator further noted that:

> "This has clearly been a very bad year for markets generally, and [the father's hedge fund] has not been an exception to that. However, no-one can accurately predict the future. Just as markets can fall very quickly, so they can rise".

He added,:

> "Some of the amendments requested by [the father] [to the draft award] related to changes that had occurred since the date of the arbitration hearing. My decision was made on the basis of the evidence available to me at the hearing, except where I specifically requested further evidence. I have therefore decided not to consider other updating matters in isolation and on a piecemeal basis. I consider several of the adjustments sought by [the father] to be re-argument".

30. The final award was issued on 12 August 2022.

31. On 11 October 2022, the Arbitrator issued a costs award. In this award he made a number of findings critical of the father's conduct of the arbitration. He found that the father's disclosure in relation to his tax liabilities had been "unclear". He further found that the father had not been "full, frank and clear" in relation to a family company and its relevance as a potential resource. He found that the father's stance in relation to the payment of child maintenance (namely an opposition to paying any child maintenance at all) was "unreasonable". He ordered the father to pay 25% of the mother's costs of the arbitration.

Challenge to the arbitral award

32. By notice of challenge dated 2 September, the father objected to the arbitral award, and to a number of the Arbitrator's key findings. He raised altogether twelve grounds of challenge.

33. The first challenge was articulated thus:

> "There was no power for the Arbitrator to make an award requiring the father to borrow money by way a mortgage on a joint purchase with the mother. Fundamentally, this was not money which he had. There is no power under the Act to require the father to borrow money in order to satisfy the award, in excess of that which he conceded". (Emphasis by underlining added).

Materially, when the Judge later reproduced this ground of challenge in her judgment [2023] EWFC 179 at [1], she omitted the words underlined above. She described it thus:

> "… the Arbitrator had no power to require the applicant to borrow monies for the purposes of making a settlement of property under paragraph 1(2)(d) of Schedule 1".[5]

The father now argues before me that the Judge was right to characterise the issue (i.e., borrowing for the purposes of achieving property settlement) in the unqualified way set out above.

34. By his further grounds of challenge (Grounds 2-12), the father disputed a range of findings of fact made by the Arbitrator; he underpinned his complaints by contending that the award was wrong and/or unfair in that it failed to take properly into account the father's own financial needs, liabilities, and his ability to pay.

35. The father's final challenge to the award (i.e., not included in the twelve grounds referenced in §33 and §34 above) was that his financial circumstances had deteriorated significantly since the arbitration, indeed to such an extent that it would be unfair to convert the arbitral award into an order.

36. On 15 September 2022, the mother issued a cross-application to the court, requiring the father to show cause why a court order should not be made in the terms of the arbitral award.

37. Following representations from the parties, on 27 October 2022 HHJ Hess granted the father permission to pursue his challenge.

38. On 10 March 2023, the Judge gave leave for the father to adduce fresh evidence of his allegedly changed circumstances since the arbitration; the statement setting out those changes is dated 24 October 2022 supported by a statement from the Chief Financial Officer ('CFO') of the hedge fund dated 3 October 2022. The father asserted that there

[5] In her [2022] EWFC 206 judgment, the Judge defined the issue slightly differently still: "…the Arbitrator (and the court) had/has no power to make an award requiring the applicant to borrow money by way of a mortgage on a joint purchase with the respondent mother".

had been such a significant change of circumstances since June 2022 that it would now be wrong to make the award an order of the court. Specifically, he deposed to:

i) A reduced income (£89,000 to £66,000);

ii) Further significant redemptions from the hedge fund, which meant that it was (materially) no longer 'breaking even';

iii) That he did not expect to receive management or performance fees "for several years";

iv) The possibility of the winding up of the hedge fund;

v) His sale of shares in the hedge fund to pay the tax liabilities (HMRC);

vi) Significant additional liabilities.

39. The mother challenged the father's fresh evidence (in her own witness statement dated 31 March 2023). She pointed out the various overly pessimistic predictions of the hedge fund's performance provided by its CFO in the past, and the incongruity between his previous gloomy prognoses and the father's liberal spending, including his purchase of an expensive home with large (£880,000) mortgage and the significant outlay to his lawyers on this and related litigation.

40. The parties exchanged open offers. The mother offered to vary the arbitral award by pushing back the date on which the capital award would increase by CPI (January 2024), effectively giving the father more time to raise funds for the settlement of property. It was in the father's open offer in May 2023 that it became clear for the first time that he was withdrawing his agreement to take out a mortgage in order to settle a property for the mother and children; instead, he proposed that upon the sale of the Thames House apartment, the mother should move into her own modest[6] investment property with the children.

41. The substantive hearing of the cross-applications took place before the Judge on 22 and 23 June 2023. Further submissions were delivered in writing on 28 June 2023. Judgment was delivered on 6 October 2023.

Arbitration: Award and Challenge

42. Before looking at the judgment under review, it is convenient to summarise here the established legal principles relevant to the status of the arbitration award, and the procedure for challenge.

43. I can take this shortly, because the essential point of reference in this regard is the judgment of King LJ in *Haley v Haley* [2020] EWCA Civ 1369[7] (*Haley*). In her judgment, King LJ usefully encapsulated the key principles applicable to an appeal at

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[6] Said by her to be one-bedroom only

[7] In her judgment, King LJ usefully rehearses at some length the views of Sir James Munby P, and Mostyn J, in (respectively) *S v S (Arbitral Award: Approval)* [2014] EWHC 7 (Fam), [2014] 1 WLR 2299 and *J v B (Family Law Arbitration: Award)* [2016] EWHC 324 (Fam), [2016] 1 WLR 3319; she rejects in some part their judgments on the legal test to be applied where the court is considering a challenge to an arbitral award.

[49] (I shall not reproduce those here, but have had regard to them), before observing that:

> "… the approach taken by the courts to a review of what may have been an unjust outcome following a court hearing, is significantly less restrictive than that following an arbitration" ([50]).

44. At [69] King LJ said this:

> "A court can decline to make an order in the terms of an agreement negotiated by, or on their behalf, in circumstances where (to borrow the words of Lord Philips in *Radmacher*) there are "good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement"; or where "it would not be fair to hold them to their agreement". It must, in my view, equally follow that where the agreement, albeit contractual, is for a third party to decide the terms that are in dispute, the court can decline to make the order where there are good and substantial grounds for concluding that an injustice will be done if an order is made in the terms of the arbitral award" [69] (Emphasis by underlining added).

45. She continued:

> "…parties must go into arbitration with their eyes open with the understanding that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order" [72].

And then at [73]-[74]

> "… the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and the approach found in the FPR 2010. In other words, when presented with a refusal on the part of one party to agree to the conversion of an arbitral award into a consent order, the court should, at an initial stage, 'triage' the case with the reluctant party having to 'show cause' on paper why an order should not be made in the terms of the arbitral award. Such approach would be similar to the permission to appeal filter found at FPR rule 30(7) where the trial has taken place under the MCA 1973. If the judge is of the view that there is a real prospect of the objecting party succeeding in demonstrating that the arbitral award is wrong, then the matter can be set down for a hearing. That hearing will, as with an appeal, be confined to a review and will not be a rehearing, subject to any case management directions which the judge may make in relation to updating or other evidence and subject to, as

> under FPR 30.12(1)(b), the court considering that "it would be in the interests of justice to hold a re-hearing".
>
> [74] The court will, thereafter, only substitute its own order if the judge decides that the arbitrator's award was wrong; not seriously, or obviously wrong, or so wrong that it leaps off the page, but just wrong" (Emphasis by underlining added).

46. The seminal decision in *Haley* has been followed by Mostyn J in *A v A (Arbitration Guidance)* [2021] EWHC 1889 (Fam), and by Peel J in *G v G* [2022] EWFC 151 (which followed an arbitration on children's welfare issues).

The Judgment

47. In accordance with the procedure and legal principles outlined above, the hearing before the Judge took the form of a quasi-appeal; the Judge was invited (following *Haley*) to approach the issue of challenge to the arbitral award broadly 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; the Judge herself accepted this describing it ([14]) thus: "the process following a challenged award is akin to an appeal rather than a true appeal".

48. The Judge articulated the primary issue before her as to whether:

> "…the arbitrator [or] the court has power to require a parent to settle property under paragraph (2)(d) [(sic.)] of Schedule 1 unless the relevant parent is entitled to that property either in possession or in reversion. This means that an order cannot be made requiring a parent to borrow money by way of mortgage or otherwise in order to settle it for the benefit of the child" ([5]).

49. In her judgment, the Judge fairly summarised the essential background facts, and the parties' positions; in a section headed 'the law', she appropriately referenced *Haley*. In this section, she went on to direct herself as to the test to be applied on the application before her as follows:

> "I must be satisfied that the arbitral award is not wrong. The [father] must persuade me that it is. A decision that is 'wrong' may be based on an error of law or its impact may be unfair on one or other of the parties. Although I accept, for these purposes, that the children's welfare is a weighty factor… that does not, it seems to me, lead to a result that the court must, or should, make orders that would leave one parent unable to meet their own needs or the needs of the children while in their care. I must, after all, take into account both parents' needs as well as their resources (Schedule 1, para 4(1)(a) & (b))." ([16])

While the opening two sentences of the paragraph set out above could possibly have expressed the test more clearly, I do not regard the Judge's phraseology as particularly troubling given her overall approach to determining the application.

50. The Judge outlined the essential ingredients of Schedule 1 sub-paragraph 1(1) which permits the court to make any or all of the orders set out in sub-paragraph 1(2); in this regard, she extracted the statutory prohibition on the court making more than one order requiring a parent to make a settlement or to transfer property for the benefit of a child (sub-paragraph 1(5)(b)). She turned then to the proposals of the parties. Specifically, she addressed the mother's argument that the settlement of property would in this case take place in stages: the payment of a lump sum, the provision of borrowed funds, then the settlement of the property. In this regard, and at Mr Glaser's invitation, the Judge considered Singer J's judgment in *Phillips v Peace* [2005] 2 FLR 1212 ('*Phillips v Peace*'). In *Phillips v Peace*, Singer J had considered whether sub-paragraph 1(5)(b) of Schedule 1 was conjunctive or disjunctive. Having isolated the issue, the Judge observed:

> "[Singer J] determined that the sub-paragraph permitted <u>the court to make only one of the orders providing for a transfer or settlement of property</u> and, having previously made an order for settlement of property (as was the case in *Phillips v Peace*) it could <u>not make a subsequent order for a transfer of property</u>. Both are property adjustment orders and the legislative intention was that transfers of property and settlements "are to be regarded as different methods of dealing with the same, one-off, need for property adjustment in an appropriate case." This is in contrast to periodical payments and lump sums which are to meet interim needs which needs are susceptible to change over time" [21]. (Emphasis by underlining added).

The Judge went on to acknowledge the written arguments later delivered from Mr Amos and Ms Singer that *Phillips v Peace* was not concerned with the settlement of property which was reliant in part on mortgage borrowing.

51. Crucially, at [25] of the judgment she said that:

> "… an order requiring a parent to borrow money for the purposes of a settlement (or transfer) cannot be made, as a settlement (or transfer) may only be ordered of property "to which either parent is entitled in possession or reversion"…".

She continued:

> "Without specified property, there is no settlement" ([25]).

Then in the following paragraph ([26]) she added:

> "It seems to be said [on behalf of the mother] that, absent an existing property, the court starts with an order for the provision of a lump sum and then orders the settlement of the

> property eventually purchased with that lump sum albeit that those steps are often rolled up. That cannot be right as a matter of construction. If the [mother] is saying that the settlement does not arise until a particular property is acquired, as opposed to a settlement of the money for such a property, then I disagree".

Before concluding this section with the following comment:

> "… it is difficult to see how a parent who did not have the necessary funds could borrow sufficient to acquire a home for the child's benefit without giving some sort of security to the lender over the relevant property. In such a case the settlement could not be of the entire value of the property, only of the equity held by the relevant parent" ([27]).

52. At [34] of the judgment, drawing on her comments from [25]-[27] (above) she set out her key conclusion:

> "I am satisfied that the court does not have power to order a parent to borrow monies or provide property they do not have for the purposes of a settlement. The court does not adopt a two-stage approach to a settlement by directing the provision of a lump sum for the purposes of purchasing a property which is then settled on the child, it orders the settlement of a sum of money for the purposes of acquiring a suitable property unless there is already a suitable property in the paying parent's hands in which case it might direct a settlement of that specific property. It would be a misuse of the court's powers, to borrow Singer J's phrase, for the court to utilise the power to award a lump sum to circumvent the restriction on a settlement to property to which the paying parent is already entitled. That plainly means property to which they are entitled at the time the order is made and not to property to which they might become entitled in the future as a result of a loan agreement." [34] (Emphasis by underlining added)

She added (also in [34]):

> "… it does not seem right to order a parent to borrow money when whether or not anyone will lend money is not in that parent's control. An unidentified mortgagee cannot, in my view, be compared to a *Thomas*[8] resource such as an existing trust fund or generous family member."

[8] *Thomas v Thomas* [1995] 2 FLR 668: i.e., a resource to which a party to the marriage has no strict legal or beneficial nexus but has nonetheless formed part of the picture of the parties' financial life.

53. The Judge was clear that she did not regard it as relevant that the father had "offered to borrow monies" by way of mortgage ([35]) to purchase a new home for the mother and children. Her essential view was that it would not be:

> "…. right to order a parent to borrow money when whether or not anyone will lend money is not in that parent's control." ([34]).

54. On this basis, Ground 1 of the challenge succeeded. She added:

> "The award was premised on the provision of new housing funded through borrowing. Arguably, therefore, if the central plank of the award falls away, the whole award must fail". ([37]).

55. The Judge took the remaining eleven grounds of challenge collectively and relatively shortly ([37]-[45]). After an outline review of the Arbitrators' findings as to the parties' respective finances, the Judge said at [43]:

> "Without going into the detail of the various matters raised in the grounds of appeal [(sic.)], it seems to me that the award was wrong on its face in that it is almost certainly unaffordable for the [father]… the arbitral award is too high in the light of the [father's] hard liabilities".

And:

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

56. The Judge then turned to the father's alleged 'change of circumstances' between June 2022 (the date of the arbitration) and June 2023 (the date of the hearing). The Judge had, in the opening paragraph of her judgment, identified the alleged change of circumstances ("… a continued fall in the [father's] net income and a significant increase in interest rates which were unforeseen at the date of the award": [1]). At [16] of her judgment she had addressed the approach on the law:

> "Further, a significant change of circumstances following the award may render it unjust or unfair to make the arbitral award an order of the court in that it may impact on the children's welfare by impacting disproportionately on one or other of the parents." ([16]) (Emphasis by underlining added).

57. The Judge made clear that, in light of her finding on Ground 1, it was "not necessary" to address the father's alleged change of circumstances ([46]). Nonetheless, she went on to say that:

    i) "the very significant increases in borrowing interest rates since September/October 2022 are sufficient to render an order in the terms of the August 2022 award wrong" ([46]);

    ii) "[t]he evidence shows that the hedge fund's fortunes have continued to decline" ([46]);

    And that:

    iii) the father's application "succeeds on this basis also" ([47]).

58. The Judge concluded her judgment as follows:

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

59. The effect of the judgment was that the parties were back to 'square one' with the mother's Schedule 1 claim.

The Notice of appeal

60. By the Notice of Appeal dated 27 October 2023, the mother seeks "an order upholding the arbitral award, with adjustments if necessary if the Court sees fit." Mr Amos clarified that he sought an order on this appeal which replaced the Judge's order, and embodied the arbitral award in its entirety. The possible 'adjustments' referred to in his Notice of Appeal would be (he argued) no more than alternative/updated undertakings, or minor corrections of that nature.

61. There are four Grounds of Appeal, as follows (I have adapted the wording a little):

    i) The Judge was wrong to hold that there is no power in the court to settle property for the benefit of a child of unmarried parents pursuant to Schedule 1 which requires (in part) mortgage borrowing for its funding; it is relevant to that question that the parties here agreed in principle to purchase property for the mother and children which relied on borrowing by way of mortgage;

ii) The Judge was wrong to ignore the fact that the father had expressly confirmed, before two 'tribunals' (i.e., in the section 8 CA 1989 proceedings before HHJ Roberts and in the Schedule 1 arbitration), that he would be financially responsible for housing the children in London while they are in the care of the mother, partly through mortgage borrowing by him;

iii) The Judge was wrong to substitute her own conclusions of fact on the affordability for the father of the Arbitrator's award, given the range of factual findings which the Arbitrator had made after hearing oral evidence from both parties;

iv) The Judge was wrong to conclude that a foreseeable 'change of circumstances' is a ground for overturning a property adjustment order. She was further wrong to find that there had been a qualifying change of circumstances.

62. On 20 November 2023, the mother set out in open correspondence an offer to resolve the appeal (and the Schedule 1 claim) on the basis that she would accept the gross sale proceeds of the Thames House apartment, including the existing mortgage, for the purposes of her housing fund (with no further top up payment from the father), with a reduction to that fund in the event that the family were to live in a less expensive area. This proposal was rejected; the parties discussed non-court dispute resolution albeit to no avail.

Arguments on appeal

63. Mr Amos and Ms Singer launched a root and branch assault on the judgment; they pointed to only one of the Judge's conclusions with which they agree, namely that by setting aside the arbitral award, "…this is the worst of all possible outcomes for both parties" (see §58 above).

64. They argued that the Judge was wrong to conclude that there was no power in the court to make a property adjustment or settlement order under Schedule 1 sub-paragraph 1(2)(d) by reference to an obligation on one or both parties to raise a mortgage. They cited a number of relevant authorities to support this contention, some of which I have discussed below.

65. They contended that the Judge was wrong to allow the father to resile from his 'agreement', freely given, that he would provide suitable accommodation for the mother and children in London; this 'agreement', they contend, had been recorded in HHJ Roberts' judgment in the earlier section 8 proceedings (see §14 above) and in the 'open' documents prepared in advance of the arbitration (see §20(iii)/(iv) above).

66. They further maintained that the Judge was wrong to interfere with the Arbitrator's findings of fact, which had been underpinned to some extent by a finding that the father had not been "full, frank and clear" in his disclosure. They observed that the Judge had failed to consider that the father had spent £230,000 in costs between the arbitration and the appeal, notwithstanding his protestations of relative poverty. It cannot be said, they suggested, that the minor adjustments which the Judge made to the figures which the father himself had proposed in the arbitration (see the table at §115 below), could justify an interference with the award in this quasi-appeal. They cited the judgment of Lewison LJ in *FAGE UK Limited, FAGE Dairy Industry S.A. v Chobani UK Limited,*

Chobani, Inc. [2014] EWCA Civ 5, suggesting that the father had treated the arbitration as a 'dress rehearsal', whereas of course (per *FAGE* [114](ii)), that should really have been regarded as "… the first and last night of the show". They suggested that the Judge had indulged in unwarranted 'island hopping' of the evidence whereas the arbitrator "will have regard to the whole of the sea of evidence presented to him" (*FAGE* at [114](iv)).

67. They further suggested that the Judge was approaching the property division as if it were a matrimonial case, seeking to achieve a 'fair division'. In this regard they pointed to [15] of her judgment in which she had said:

> "… when approving a financial remedies order arising out of an agreement the court must discharge its statutory function under the Matrimonial Causes Act 1973 ("the 1973 Act") or Schedule 1 of the Children Act 1989, as appropriate and ensure that the proposed order is fair in the light of the criteria set out in section 25 of the 1973 Act or paragraph 4 of Schedule 1".

They pointed out, as Baron J had made clear in *DE v AB* (citation see below) at [42], that the capital sum to be provided by the father towards a settlement of property in a Schedule 1 case (in contrast to an MCA 1973 case) "is, in reality, a long-term loan which will be recovered in due time".

68. They denounced the father's habit of 'drip-feeding' new information to the Judge, not previously before the Arbitrator, much (they argued) as he had tried to do before me.

69. In answering Mr Glaser's reliance on *Phillips v Peace*, they argued that *Phillips v Peace* does not address the point raised by Ground 1 of this appeal (i.e., that there is no jurisdiction to make a housing award under Schedule 1 which relies on mortgage borrowing beyond any amount conceded by the payer). That the mother had proposed the payment of a lump sum, followed by the settlement, was merely a practical, stepped, way of achieving a single outcome, it was not her attempt to achieve two different forms of relief.

70. They referred to the arbitral award as an 'exemplary account' of a financial remedy process, in which the Arbitrator had conscientiously balanced debt and income in a low capital case. By contrast, the Judge appeared to set herself the wrong test ([16] "I must be satisfied that the arbitral award is not wrong. The applicant must persuade me that it is"), and had undertaken nothing like the same level of care in the analysis of the figures.

71. Mr Amos argued that the Judge was wrong (at [12], [21], [27] and [32] of the judgment) to declare that a 'settlement' under Schedule 1 has to take place, as a matter of form, in a single transaction. In this submission he relied on the judgment of Francis J in *A v V* [2022] EWHC 3501 (Fam) at [56] and [57], wherein the Judge plainly contemplated a two-stage process to achieve a Schedule 1 settlement: namely, of funds being provided to the mother for the purchase of the property, and then separately the creation of the settlement of trust and the transfer of the property to the trustees.

72. I was taken to the standard template orders (May 2023 edition), which have been drafted (and signed off by the President of the Family Division) on the basis that mortgages

may well be involved in the settlement of property: see for instance Order 2.2 ([58](h)(iii)):

> "… the new home shall be held upon the same trusts, terms and conditions as the property and the trustees shall have full power as if they were beneficial owners thereof to execute such mortgage deed as may be necessary to enable the purchase thereof to be completed".

73. Finally, Mr Amos argued that if it is not possible for paying parties, generally fathers, to raise funds by way of mortgage to achieve settlements of property, the Schedule 1 jurisdiction would be, or would become, 'heavily discriminatory' against payees (mothers) for whom suitable property may not otherwise be achievable.

74. For the father, Mr Glaser and Ms Gonella disputed the power in the court to include a mortgage requirement in any award under Schedule 1 paragraph 1(2)(d). Mr Glaser argued that the Arbitrator did not have the power to order a 'joint mortgage'; he submitted that while Baron J (in *DE v AB*) may have contemplated that the mother may take out a mortgage to top up a capital payment by the father, this was not a precondition of the order.

75. Mr Glaser told me that it is the father's view that the Thames House apartment and the father's own home should now be sold. The parties should move (separately) into rental accommodation. Mr Glaser added that the mother could, should she wish to do so, move into her own investment property.

76. The father's case was that he had only ever intended to "port" the existing mortgage on Thames House to any new property; he asserts (without evidence from his mortgagee) that this would not have involved any increased borrowing, nor any new mortgage deal. Mr Glaser pointed out that the father's offer in the section 8 proceedings to ensure "that the housing fund is protected from any financial liabilities he holds" (9 September 2021: see again §14 above) was conditional upon the section 8 proceedings concluding without significant additional cost. They did not conclude until January 2022, with material additional cost.

77. Mr Glaser highlighted the ways in which the Arbitrator had obviously fallen into error. Included among these errors were: (a) having identified the tax liabilities, he failed to explain how they could be satisfied; (b) in predicting with optimism not realism the father's likely income; and (c) failing to acknowledge the extent of the father's indebtedness. He supported strongly the Judge's conclusion that the arbitral award was or had become "unaffordable" for the father (judgment: [45]).

78. Mr Glaser relied again on *Phillips v Peace*, as the Judge had done, in attempting to demonstrate that the Arbitrator's approach had offended against the prohibition against more than one payment under Schedule 1 sub-paragraph 1(2)(d).

79. Mr Glaser argued that before an arbitral award could be converted into an order, the court has to be satisfied that it is 'fair'. In this regard, he pointed to the alleged change of circumstances of the father before the hearing in June 2023, and the yet further change of circumstances since that hearing. He submitted that the appeal is 'pointless', a 'waste of time and money' given the father's changed situation, and the fact of the nil

assessment by the CMS (see above and §80 below). He submitted that the arbitral award needs to be 'consigned to history' and the mother's application for a Schedule 1 order now needs to be considered on its merits in the light of current information. He pointed to the Judge's comment (in her e-mail of the 7 December 2023 which accompanied the sealed order of 6 October 2023) that the mother "simply does not accept the reality of [the father]'s [financial] position". Mr Glaser used the phrase 'busted flush' to describe the father's current situation – a formerly successful executional trader at a hedge fund who is now unemployed. In these circumstances, he argued that it is wholly unrealistic to seek to adhere to the arbitral award, and have it imposed at this stage, as Mr Amos proposes.

80. Mr Glaser emphasised that the nil assessment of the father by the Child Maintenance Service had denied the court the power to make any 'top up' award of maintenance to take account of mortgage repayments: see section 8(6) Child Support Act 1991. Therefore, in the absence of agreement as to child support, there was no mechanism for facilitating the mortgage payments by the parties, or either of them, or at all.

Schedule 1; settlement of property: the law

81. It is necessary for me now to turn to the substantive law. Paragraph 1 of Schedule 1 CA 1989 provides that on an application by a parent of a child (and other potential applicants, though not relevant here), the court "may make one or more of the orders mentioned in sub-paragraph (2)".

82. Sub-paragraph 1(2) of Schedule 1 reads as follows:

> "(2) The orders referred to in sub-paragraph (1) are—
>
> (a) an order requiring either or both parents of a child—
>
> (i) to make to the applicant for the benefit of the child; or
>
> (ii) to make to the child himself,
>
> such periodical payments, for such term, as may be specified in the order;
>
> (b) an order requiring either or both parents of a child—
>
> (i) to secure to the applicant for the benefit of the child; or
>
> (ii) to secure to the child himself,
>
> such periodical payments, for such term, as may be so specified;
>
> (c) an order requiring either or both parents of a child—

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

(ii) to pay to the child himself,

such lump sum as may be so specified;

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

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

(ii) which is specified in the order;

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

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

(ii) to transfer to the child himself,

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

83. Further provisions within Schedule 1 make clear that the periodical payments orders under sub-paragraph 1(2)(a) and (b) can be "varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made" (Schedule 1 sub-paragraph 1(4)). While more than one order under Schedule 1 sub-paragraph 1(2)(a)-(c) is contemplated by the CA 1989, it is clear that a court "may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child" (Schedule 1, sub-paragraph 1(5)).

84. Schedule 1, paragraph 4 sets out the matters to which the court must have regard when deciding whether to exercise its powers under paragraph 1, and if so in what manner, as follows:

"… the court shall have regard to all the circumstances including—

(a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

> (b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4)[9] has or is likely to have in the foreseeable future;
>
> (c) the financial needs of the child;
>
> (d) the income, earning capacity (if any), property and other financial resources of the child;
>
> (e) any physical or mental disability of the child;
>
> (f) the manner in which the child was being, or was expected to be, educated or trained" (Emphasis by underlining added).

85. There is no definition in the CA 1989 of the term 'property' nor of the term 'settlement'; Schedule 1 paragraph 16 (the interpretation paragraph of Schedule 1) is, in both respects, silent.

86. Section 24 of the Matrimonial Causes Act 1973 ('MCA 1973') contains similar provisions to achieve the settlement of property by way of court order following divorce, nullity, or judicial separation:

> "(1) [On making a divorce, nullity of marriage or judicial separation order or at any time after making such an order (whether, in the case of a divorce or nullity of marriage order, before or after the order is made final),] the court may make any one or more of the following orders, that is to say—
>
> > (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
> >
> > (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them…".

Property adjustment orders under the MCA 1973 are defined as "the orders <u>dealing with property rights</u> available… for the purpose of adjusting the financial position of the parties to a marriage and any children of the family" (Section 21(2) MCA 1973[10]: emphasis added). Notably, 'settlements of property' are also included in the definition

[9] For present purposes, this is "any parent of the child"
[10] Which is specifically referenced by the 'interpretation' section: section 52 MCA 1973 in this regard.

of 'property adjustment orders' which deal with 'property rights' (section 21(2)(b) MCA 1973).

87. Assistance in defining the term 'property' can be found in quasi-matrimonial legislation (not specifically in focus in this appeal), namely the Matrimonial Causes (Property and Maintenance) Act 1958 ('MC(PM)A 1958'). As it happens, there are only very limited provisions of the MC(PM)A 1958 still in force, but by section 7, the Act extends the court's powers under section 17 of the Married Women's Property Act 1882. Section 8(1) (the definition section), also still in force, gives the term 'property' a wide definition in these circumstances as:

> "… any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, any other right or interest whether in possession or not."

88. Long-established case law supports the broad interpretation of the term 'property' set out in the legislation to which I have just referred (§87), without apparently implying any restrictions from the words 'whether in possession or reversion' which sometimes follow it. For a historic perspective, I was taken to *Jones v Skinner* (1835) 5 LJ 87, in which Lord Langdale MR said that:

> "… it is well known that the word 'property' is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have."

89. More recent discussion of this topic is to be found in the judgments of the Supreme Court in *Prest v Petrodel Resources* [2013] UKSC 34; [2013] AC 415. This was a matrimonial dispute decided under the MCA 1973; although the case on appeal focused on altogether different property issues from those arising here, the common theme between that appeal and this is what is meant by property 'ownership' for the purposes of making orders for financial relief. In his judgment at [37], Lord Sumption JC described the provisions of section 24 MCA 1973 as follows:

> "The language of this provision is clear. It empowers the court to order one party to the marriage to transfer to the other "property to which the first-mentioned party is entitled, either in possession or reversion". An <u>"entitlement" is a legal right in respect of the property in question. The words "in possession or reversion" show that the right in question is a proprietary right, legal or equitable.</u> This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law." (Emphasis by underlining added).

Lady Hale made clear her support for this proposition in her judgment at [84], wherein she said that if a party is "beneficially entitled" to property, then it falls within the scope of the court's power to make transfer of property orders under section 24(1)(a) of the MCA 1973. She went on to say:

> "[86] Section 24(1)(a) does not give the court power to order a spouse to transfer property to which he is not in law entitled. The words "entitled, either in possession or reversion" refer to a right recognised by the law of property".

90. To illustrate further the breadth of judicial interpretation of the term 'property' in post-separation legislation, Mr Amos took me to the decision of the Court of Appeal in *K v K (Minors: Property Transfer)* [1992] 1 WLR 530; in this case, the court considered the transfer of a council tenancy under section 11B of the Guardianship of Minors Act 1971 ('GoMA 1971'). Section 11B GoMA 1971 contained provision for the making of an order requiring either parent to transfer to the other parent for the benefit of the child, or to the child, "such property" as may be so specified, being "property" to which the first-mentioned parent is entitled, either in possession or reversion. Nourse LJ observed that section 11B(2)(d) is in broadly similar terms to the terms of section 24(1)(a) of the MCA 1973. It was held that the joint tenancy of the formerly co-shared home is "property" for the purposes of section 11B(2)(d).

91. The power of the court to 'settle' property is, as I have referenced above, a common feature of Schedule 1 sub-paragraph 1(2)(d) CA 1989 and section 24(1)(b) MCA 1973. In its interpretation under the MCA 1973, a consistently broad meaning has been given by the courts to the term 'settlement'. In this regard, reliance was placed by Mr Amos on *Brooks v Brooks* [1996] AC 375, in which the issue was whether a pension fund scheme could be regarded as a post-nuptial 'settlement'. The judgment of Lord Nicholls contains this useful commentary at p.391:

> "In English law 'settlement' is not a term of art, with one specific and precise meaning. <u>Its meaning depends on the context in which it is being used</u>. … In the Matrimonial Causes Act 1973 settlement is not defined, but the context of section 24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement 'made on the parties to the marriage.' So, broadly stated, <u>the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children</u>. Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property." (Emphasis by underlining added).

Grounds of Appeal: Discussion

92. I turn to the primary ground of appeal (see §61(i) above): namely, that the Judge was wrong to hold that there is no power in the court to settle property for the benefit of a child of unmarried parents pursuant to Schedule 1 which requires (in part) mortgage borrowing for its funding. It is surprising that this point has apparently never arisen for determination before now.

93. Borrowing capacity by way of mortgage is, in my judgment, plainly a 'resource' of one or both of the parties under Schedule 1 paragraph 4, just as it would be under section

25(2)(a) of the MCA 1973. In this regard, I regret that this experienced Judge misdirected herself when she said that "it did not seem right" to "order" a parent to borrow money "when whether or not anyone will lend money is not in that parent's control" ([34]: see §52 above). In this regard she appeared wrongly to be contemplating that the financial 'resources' of the parties are only those to which the parties have a clear and inalienable right. This is not so. In the assessment of 'resources' for the purposes of Schedule 1 paragraph 4, the court is considering not just the existing resources of the party but also the likelihood of the party acquiring such resources ("the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or <u>is likely to have</u> in the foreseeable future"). This is made clear from the judgments of the Court of Appeal in the matrimonial finance case of *Whaley v Whaley* [2012] 1 FLR 735, in which Lewison J (as he then was) at [113] said:

> "… The resource must be one that is "likely" to be available. This is the origin of the "likelihood" test. No judge can make a positive finding about the future: the best that can be done is to assess likelihood."

Black LJ (as she then was) made the same point in her judgment in the same case at [40], citing Wilson LJ in *Charman v Charman* [2005] EWCA Civ 1606 at [12] and [13].

94. In this case, the Arbitrator was equipped with a detailed SJE report on mortgage borrowing, to which both parties had contributed their financial information, which was relevant to assist in the quantification of mortgage capacity. This expert opinion represented reliable evidence of the parties' 'likely' resources.

95. As I have illustrated above, 'property' is broadly defined in both statute and caselaw. It can be mere 'property rights' (section 24 MCA 1973), or the interest in property to which a mortgage can attach (see the MC(PM)A 1958). It can include 'proprietary rights' both legal and equitable (*Prest*, at §89 above) and/or beneficial interests (ibid.). Beneficial entitlement to property extends beyond the equity and, most pertinently here, includes occupation of the whole. In this regard it is relevant to note the provisions of Family Law Act 1996, section 54 which specifically considers that the 'estate or interest' of the person entitled to occupy exists irrespective of the mortgagee's rights. The expectation that the settlement is made "to the satisfaction of the court" introduces the court's powers to give effect to its intention. It seems to me that the Judge's interpretation of the statutory language wrongly required entitlement to the relevant property to be absolute and unencumbered; this does not in my judgment accord with the statutory wording, or the authorities which have considered similar provisions. Just as a settlement of property in the matrimonial context can be made even if it is mortgaged as per *Mesher v Mesher* (see §96 below), so can property in the Schedule 1 context in these circumstances.

96. I turn next to consider whether settlements of property under Schedule 1 CA 1989 can be made subject to mortgage. Settlements under Schedule 1 are a form of property adjustment order, and in relation to children of unmarried parents the court is exercising a similar power to the parallel property adjustment power in matrimonial proceedings (see section 24 of the MCA 1973 set out at §86 above). A good example of a settlement in the matrimonial jurisdiction is the *Mesher* order (*Mesher v Mesher and Hall* [1980]

1 All ER 126); under such an order, property (often the family home) is settled on trust for one party's occupation with the children until the happening of a certain trigger event. It is clear from case law that *Mesher* orders may settle property subject to mortgages, and MCA 1973 property adjustment orders are generally drafted to be 'subject' to any mortgage borrowing.

97. *Birch v Birch* [2017] UKSC 53 is another example of a settlement of property under the matrimonial jurisdiction. The central issue on that appeal was whether a wife who wished to cease to be bound by her undertaking (in this case to use her best endeavours to secure the husband's release from the mortgage on the former matrimonial home where she lived with the two children of the family) could apply for a release from it, or for discharge of it. It is clear from the opening paragraph of Lord Wilson's judgment that the settlement of the property was properly and indisputably undertaken "subject to the mortgage".

98. The Family Court has power, in a financial remedy dispute, also to release parties from a mortgage and/or to indemnify the other against liability. This was considered, and confirmed, in *CH v WH* [2017] EWHC 2379 (Fam). Mostyn J (in a judgment explicitly approved by the President of the Family Division: see para.[11])) drew specific attention to the fact that in any proceedings in the Family Court, the court may make any order which could be made by the High Court if the proceedings were in the High Court (per section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984). He authenticated (at [5] and [9] of his judgment) the view of the Financial Remedies Working Group that:

> "As to mortgage and other outgoings in my view the power to order A to make payment to B plainly includes the power to order A to make payments on behalf of B. The greater includes the lesser".

99. While acknowledging (*CH v WH* at [8]) that the court cannot make orders outside its powers, he continued:

> "It is certainly true that the literal words of section 23 and section 24 [MCA 1973] do not provide for the court to be able to make consequential or supplementary provisions of this nature, in contrast to the terms of section 24A(2), which explicitly grants such a power when making an order for the sale of property. However, section 30 gives the court power when making a property adjustment order to direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties. While this provision is now virtually obsolete it cannot be disputed that the instrument in question could contain terms which furnish all necessary indemnities and the obligations to pay instalments in relation to a mortgage secured on the property. So I do not agree that the provision in question is outside the "parameters" of the Matrimonial Causes Act".

100. Furthermore, he observed that the powers of the court are not "confined to the four corners of the Matrimonial Causes Act" ([9]), and continued:

> "… The Family Court has all the powers of the High Court. The High Court unquestionably has the power, as part of its equitable jurisdiction, to order an indemnity. If awarded, that represents a legal right in favour of the person so indemnified. The court can award an injunction in support of a legal right. To order someone who has been ordered to indemnify the other party in respect of a mortgage to use his or her best endeavours to keep up the payments on that mortgage is of the nature of an injunction in support of a legal right. In my opinion, this provision is squarely within the power of the High Court to order, and is therefore within the power of the Family Court". ([9]) (Emphasis by underlining added).

101. Picking up Mostyn J's remarks about the statutory powers of conveyancing counsel under section 30 of the MCA 1973 to settle a proper instrument to be executed by all necessary parties, it is to be noted that equivalent powers are available to the Family Court in a Schedule 1 case: see Schedule 1 sub-paragraph (13), which reads:

> "Where the High Court or the family court decides to make an order under this Act for the securing of periodical payments or for the transfer or settlement of property, it may direct that the matter be referred to one of the conveyancing counsel of the court to settle a proper instrument to be executed by all necessary parties."

102. It is undeniable that there is no express power within Schedule 1(1) to order a sale of property (i.e., to assemble the sum to settle); nor is there express power to direct that a new property be purchased on trust. But that is overwhelmingly the way in which Schedule 1 housing provision is interpreted and routinely carried into effect – that is to say, a sum of money is paid over from one party to the other (usually in one tranche) to purchase a property on trust terms; after the property is purchased – at the point when the payer is then "entitled" to the property "in possession or reversion" – it is settled on Schedule 1 terms. The statutory power (Schedule 1 sub-paragraph 1(2)(d)) is phrased as "requiring a settlement to be made…to the satisfaction of the court"; the statute addresses what is to happen going forward. This supports the practice, illustrated by *MT v OT* [2019] 1 FLR 93 (to which the Arbitrator referred in his award at [24e]), for a settlement to include provision for a replacement (substitute) property to be acquired for the benefit of the child without offending against the one-settlement only/*Phillips v Peace* limitation (see Cohen J at [18-19]: "The replacement of one property by another does not amount to a new settlement of property. It is simply the substitution of one property for another"). In this case, the Judge appeared to accept (at [32] of her judgment) that the 'settlement' could provide for a future replacement property (as originally agreed between these parties and accepted also by the Arbitrator); the acquisition of a future property would on these facts very possibly (indeed probably) involve new mortgage borrowing rather than the 'continuing' mortgage borrowing. The Judge seemed to reject the former, but accept the latter. Furthermore, it should be borne in mind that while 'porting' (suggested by Mr Glaser in this case as a straightforward solution: see §76 above) is a flexible feature of some mortgages, there

are no guarantees that a lender will permit it; almost always the mortgagor has to reapply for the same or a similar mortgage deal creating a new contract.

103. As the authors of Rayden & Jackson (Relationship Breakdown Finances and Children: current edition) at [17.65] make clear, the mechanism of a trust is merely "a device" for the performance of the court's objective under Schedule 1 CA 1989. Referencing the pedantic ingenuity which characterised the litigation in *G v A (financial remedy: enforcement) (No 1)* [2011] EWHC 2380 (Fam), [2012] 1 FLR 389 (and its three sequels), the authors go on at [17.65]:

> "… the purpose of the legislation is to provide a secure home for the child during his youth. That purpose is not satisfied until a secure home had been provided and the family court's jurisdiction does not end when the trust deed was executed; any other view of the law would be impracticable and unjust, particularly to the weaker party in Sch 1 proceedings….
>
> …the family court has not only the jurisdiction but also the <u>duty to consider any proper applications relating to the fulfilment of its order and to give whatever directions appeared appropriate to give effect to it</u>; such directions can override the trust deed, which exists as an expression of the court's will and not as an obstruction to it." (Emphasis by underlining added).

104. In some Schedule 1 CA 1989 cases, the paying parent has extraordinary wealth, and outright settlements of unencumbered property are perfectly achievable; two recent examples of such cases are *Re Z (No.4)* [2023] EWFC 25 and *Y v Z* [2024] EWFC 4. However, a great many more cases come before the court under Schedule 1, like this one, where the financial resources of the parties are more limited. Parties of young children are likely to need to borrow funds by way of mortgage in order to help them to acquire and/or settle domestic property. In those cases, it is likely in my judgment that either or both parties will be expected to use their own funds and/or use their mortgage capacity/ies in supplementing the housing fund. Albeit now more than a decade old, a good illustration of this is found in *DE v AB* [2011] EWHC 3792 (Fam), [2012] 2 FLR 1396, a Schedule 1 case to which I have already referred. The parties in that case had been in a short relationship producing one child; Baron J made an order based on the father providing £250,000 towards a housing fund, with the mother being expected to raise the same amount by way of mortgage:

> "[42] … this sum [from the father] is, in reality, a long-term loan which will be recovered in due time and will provide this child with a secure house from which to reach his full potential as he grows towards adulthood. This sum will be invested in a property which will be purchased. <u>The mother can, if she wishes, make a contribution through a mortgage, but such mortgage must never exceed the amount which the father is investing (i.e. £250,000)</u>, so as to ensure that:
>
> (i) the mortgage payments are affordable; and

> (ii) the father is not placed at undue risk of losing his part of the equity through non payment of a mortgage.
>
> I have already given an indication of the prudent level of mortgage in this case. The mother is at liberty to choose the property which the father shall approve, his approval not to be unreasonably withheld. This will allow for the fact that the mother may wish to purchase a smaller flat with two bedrooms in a better area, or to move to another part of this country, for example into the commutable suburbs, to secure better housing for C and herself. If the parties cannot agree then the court will have to determine the proper home and mortgage level. …" (Emphasis by underlining added).

105. In my judgment, the Judge in the instant case wrongly limited her evaluation to the 'four corners' of Schedule 1, and ignored the essential purpose of Schedule 1, and the ancillary steps which can be taken to give effect to an order made under its provisions. As Mr Amos argued, and I agree, in proceedings of this kind a parent can be compelled into a joint property purchase, into an insurance contract and to discharge or indemnify for debt for which they are not contractually responsible. These are essential ancillary powers for carrying property adjustment into effect, though none are expressly set out within the statute.

106. Thus, for the reasons set out above, I am of the view that the Judge was wrong in her interpretation of Schedule 1 sub-paragraph 1(2)(d) CA 1989 and its application to the facts of this case. Given that this was what she herself described as the 'central plank' on which her decision was based, I am left with no alternative but to allow the appeal.

107. Importantly, I must add that while the Judge was, in my judgment, wrong in her approach to Schedule 1 sub-paragraph 1(2)(d) CA 1989 as a matter of jurisdiction, I consider that the arbitral award in relation to the settlement of property for the mother and children looked, by June 2023 (on the father's *asserted* change of income position), ambitious, and perhaps the more so now. I wish to make clear that I am not saying that the Arbitrator was wrong on the facts as they were presented to him, but I consider that his objective took the parties close to the limits of their likely resources. The Arbitrator himself recognised that he was juggling debt and borrowing (see §26 above); such cases are undoubtedly the hardest financial remedy cases. But the extent of the proposed borrowing under the arbitral award was to be colossal by many standards, and would have required an extremely high level of financial servicing, which on the evidence before the Judge in June 2023 looked somewhat more uncertain.

108. I turn to the further grounds of appeal, which I can address more briefly.

109. The second ground of appeal (§61(ii) above) is that the Judge was wrong to ignore the fact that the father had expressly confirmed that he would be financially responsible for housing the children while they are in the care of the mother, partly through mortgage borrowing by him. On this point, the Judge had said:

> 'Absent a voluntary agreement or undertaking the court has no power to compel the [Father] to give an undertaking or force him into an agreement to borrow monies…' (see [35]).

110. While the father had indeed offered, albeit in a qualified way in some contexts, to fund borrowing by way of mortgage to settle property for the mother and children, this 'agreement' (if ever there was one) was never confirmed by way of court order or undertaking[11] and the Judge was powerless, as she confirms, to hold him to such a deal.

111. While I accept that courts should, and indeed will, give significant weight to agreements reached between autonomous adults in financial remedy disputes even if the agreement is one which may not, when seen through a different lens, seem entirely fair (see *Granatino v Radmacher* [2010] 1 AC 534 at [75]), the father had never signed on the dotted line in relation to his proposal. I was unpersuaded by Mr Amos that the mother had acted to her detriment in withdrawing her relocation application on the assurance of secure housing financed by the father in London; it seems more likely that she was discouraged from pursuing that application once she had seen the very strongly worded reports from the independent experts opposing the children's move from London. The father's earlier agreement to fund mortgaged property for the mother and children could be considered as one of the general "circumstances" of the case, and possibly as a reflection of the father's greater confidence in his likely available resources (Schedule 1 paragraph 4(1)), but in no more specific way than that. Overall, I was unpersuaded by this ground of appeal.

112. By her third ground of appeal (§61(iii) above), the mother contends that the Judge was wrong to substitute her own conclusions of fact on the affordability for the father of the Arbitrator's award, given the range of factual findings which the Arbitrator had made after hearing oral evidence from both parties. While my comments on the third ground of appeal make no impact on the overall result, I must record my grave misgivings about the Judge's substitution of her own findings of fact on the affordability for the father of the Arbitrator's award for the factual findings which the Arbitrator had made after hearing oral evidence of the parties.

113. In this regard, any judge considering a challenge to an arbitral award must remember that "arbitrators are the masters of the facts" (*Geogas S.A v Trammo Gas Ltd.* [1993] 1 Lloyds Rep 215). An appellate court should be correspondingly slow to interfere with the findings, particularly if the judge applies the guidance set out by Lewison LJ in *Volpi & Delta v Volpi* [2022] EWCA Civ 464 at [2]. For present purposes I draw attention to what he said at [2](ii)/(v):

> "What matters is whether the decision under appeal is one that no reasonable judge could have reached … An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was <u>rationally insupportable</u>."

And at [65]/[66] he added:

> "I re-emphasise the point that it is not for an appeal court to come to <u>an independent conclusion as a result of its own consideration of the evidence. Whether we would have</u>

[11] The father had offered the Arbitrator an undertaking as part of a composite offer which was not accepted by the mother.

> reached the same conclusion as the judge is not the point" (Emphasis by underlining added).

114. The Judge identified little, if any, fault with the Arbitrator's computation of resources or other findings. She did not, for example, tabulate her assessment of affordability compared with the Arbitrator's. There is, therefore, no clear and obvious basis for the Judge to have substituted her finding of 'unaffordability' for the Arbitrator's own finding of 'affordability'. That the Arbitrator had formed the view that the father would be able to afford a larger mortgage was likely to have been informed by the SJE report, augmented by his finding that in some respects the father's evidence had been "unclear" (reference his tax liabilities), that the father had not been "full, frank and clear" in relation to the family company, and had taken an "unreasonable" stance in relation to the payment of child maintenance. It was not, in my judgment, open to the Judge to reach contrary findings of fact following her quasi-appellate review. She had not heard any evidence.

115. As it happens, the Arbitrator's award was not significantly different from the father's open proposal; this strongly suggests that the Arbitrator's award was not materially 'wrong'. I reproduce the table usefully set out in Mr Amos' submissions:

	Father's position	Arbitrator award	Difference
Deposit for M's property purchase	227,795	240,000	12,205
Mortgage for M's property purchase	679,000	686,000	7,000
F's current monthly payments	(9,286)	(9,792)	(506)

116. Finally, and by her fourth ground (§61(iv) above), the mother complains that the Judge was wrong to conclude that a foreseeable 'change of circumstances' is a ground for overturning a property adjustment order. She was further wrong to find that there had in fact been a qualifying change of circumstances.

117. The father raised two relevant 'changes of circumstances' in his statement for the hearing before the Judge, namely (a) the proposed reduction in his income and (b) post-arbitration mortgage interest rate rises. It is clear from authority (including *Birch v Birch*, citation above, at [11] and [15]) that a "significant" change in circumstances needs to be demonstrated before a party can be released from an undertaking or agreement, or an order varied or discharged. In *Tibbles v SIG Plc (Trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518 it was suggested that the change of circumstances needs to be "material"; at [39(vii)] in *Tibbles*, Rix LJ added:

> "…the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation." (Emphasis added)

118. At the time of the hearing before the Judge in June 2023 the father's asserted change in income position was not a fact, it was a prediction. It was a possibility to which the Arbitrator was himself alive :

> "This has clearly been a very bad year for markets generally, and [the father's hedge fund] has not been an exception to that. However, no-one can accurately predict the future. Just as markets can fall very quickly, so they can rise. [The father's] income fluctuates dramatically. I am not solely concerned with his income, but rather his earning capacity" (Arbitral award: [58]).

While changes in income position can represent a material change in circumstances, this was not (yet) established on these facts. Mortgage interest rate rises are not in my judgment "something out of the ordinary", and in my assessment the Judge was wrong to focus on the potential impact of interest rate change on the father's ability to meet the arbitral award.

Conclusion

119. There are many benefits of arbitration in the resolution of post-separation financial and child welfare disputes; speed of decision, reduced conflict, and lower cost are among them. Moreover, the parties to the dispute are able to exercise choice in the identity of the decision-maker. Arbitration is a procedure designed to provide certainty. These potential benefits of arbitration have been entirely forfeited in this case by what has turned out to be intense, combative, legally complex and protracted post-arbitration litigation before the courts.

120. As I have indicated above, this experienced Judge erred, I find, in her application of Schedule 1 sub-paragraph 1(2)(d) on the facts of this case. Mr Amos makes good his case that to treat the provisions of Schedule 1 sub-paragraph 1(2)(d) CA 1989 materially differently from the provisions of section 24 MCA 1973 (where for example a *Mesher* order would be available to achieve a settlement) and where fresh borrowing to achieve property adjustment is not unconventional, is not only wrong but is also potentially discriminatory against the children of unmarried parents. It will be remembered (§54 above) that the Judge had taken the view that the property settlement based on obtaining a mortgage was the "central plank" of the arbitral award, and that once it had fallen away (i.e., namely the facility for the parties to raise money from a mortgagee to achieve a settlement of property) "the whole award must fail".

121. It is possible that the Judge had misunderstood the mother's argument in relation to how the funds were to be raised for the property to be settled on trust (see [6]/[26] at §51 above); the mother's case is that it was not necessary for there to be two settlements (which she rightly identified would be prohibited by statute) to achieve this. The Judge did not appear to have the benefit of focused legal argument on the construction of the statute, but, for the reasons which I have discussed at §85 – 91 above, and contrary to the view expressed by the Judge, I am satisfied that the terms 'property' and 'settlement' are sufficiently widely defined as to include the sort of arrangement contemplated here.

122. Drawing the threads together of the points discussed above:

i) The parties' respective mortgage capacities were a "likely" 'resource' available to them to be considered by the court (Schedule 1 sub-paragraph 1(4)); they had indeed accepted this before the Arbitrator (see §23 and §28 above);

ii) 'Property' can include beneficial interest in property which is subject to mortgage; it could in certain circumstances, as I have illustrated above, even include a council tenancy. Baron J in *DE v AB* made clear that property settled by one party can be burdened by mortgage borrowing, including by another. If the Judge was suggesting at [27] of her judgment (see §51 above) that a settlement cannot be of the 'equity' in the property, she was, in my judgment, wrong;

iii) The terms 'in possession or reversion' do not necessarily contemplate that there is an existing property to 'settle', nor do the terms contraindicate a prospective property purchased with the assistance of a newly obtained mortgage; a reversionary interest is just that: a non-current, future form of interest;

iv) It is possible to settle pre-existing mortgaged property on trust pursuant to Schedule 1 (i.e., the conventional *Mesher* order: §96 above). It is also permissible (as the Judge acknowledged in this case) to provide for a future replacement property within the same settlement of property; though where I differ from the judge is my view that this may well involve *new* mortgage borrowing;

v) As the mother's counsel had proposed at the hearing before the Judge, a two-step[12] process to achieve the settlement of property (payment of the lump sum, then identification of the property and settlement of the trust) does not offend against the prohibition on a second payment (Schedule 1 sub-paragraph 1(5)(b)) and does not cut across what Singer J had said in *Phillips v Peace*; the steps taken to achieve the settlement is a matter of form not substance; the statutory language contemplates a future settlement: "settlement to be made";

vi) Schedule 1 paragraph 13 can come to the aid of the court if there is any difficulty in executing relevant documents to secure the mortgage (as per *CH v WH* at §98 above);

vii) The Family Court, like the High Court, has wide powers to make orders to give effect to its decision (orders must be made "to the satisfaction of the court");

viii) The fact that there is no specific statutory power in Schedule 1 for a party to raise funds by way of mortgage in order to make one of the defined forms of financial provision for the benefit of children does not exclude this approach; it is to be noted that other essential ancillary powers for carrying property adjustment into effect are routinely exercised by the court (i.e., the taking out of insurance, or discharging a debt for which the party is not contractually liable), even though these are not expressly set out within the statute;

[12] The Judge characterised the submission thus at [23](ii): "What the court does in these cases is to order a lump sum as a stepping-stone towards the settlement of a property once it has been purchased with the lump sum".

ix) The payment of the instalments of capital/interest to the mortgagee in this case was founded on the father's undertakings/agreement; the contract of borrowing (mortgagor/mortgagee) is and would always have been between the father (or father and mother) and the lender; the standard template orders (Order 2.2 and see §122(x) below) plainly contemplate that the court can make orders to regulate this;

x) The Standard Orders template (Order 2.2), approved by the President of the Family Division, contains the appropriate form of wording for the settlement of property subject to mortgage; it specifically includes the formula for direction for one or other party to make all payments of capital and interest on the mortgage. In short, there is an extensive menu of suggested formulae from which the parties may draw, in particular undertakings (paragraphs 31-32) and orders (paragraphs 55-63, note especially §57(c)/(g)(ii)/(iii) and §58(c)/(h)(iii)).

123. As I have indicated above, the Judge granted the father's application (i.e., his challenge to the arbitral award) on the basis of his Ground 1 challenge alone; accordingly, she provided only abbreviated discussion and analysis of Grounds 2-12, and of the alleged change of the father's circumstances. She limited herself in this way quite deliberately and explicitly, and in so doing, she did not address in any particular detail the arguments of the mother on those points. Notable among the mother's arguments, which remained largely unaddressed, were (a) that information produced in the hearing before the Judge demonstrated that the father's financial circumstances were in some respects rather better than the Arbitrator had understood; and (b) that the Arbitrator had made adverse findings (in the costs judgment) about the father's litigation conduct and specifically his less than frank disclosure. In the latter respect, it appears from the extract of the transcript which I have seen that during the hearing in June 2023 the Judge raised with Mr Glaser a significant question mark about at least one other alleged "deception" by the father of the Arbitrator, though no finding or conclusion was reached about this; it did not find its way into the judgment, and I have therefore ignored it.

124. It is difficult to discern from the Judge's judgment whether she had gone as far as holding that some or all of the Arbitrator's findings were "rationally insupportable" (per *Volpi* above); indeed, in some respects she appears to have relied on the Arbitrator's findings, and in other respects wrongly relied on evidence which the mother had not had the chance materially to challenge (i.e., the CFO evidence). The Judge referenced the eye-watering sums which the father had spent on the costs of litigation, but failed to consider this expenditure in the context of the father's claims of relative penury. It is not clear that the Judge had addressed herself adequately to the need to find (particularly in the context of mortgage interest rate rises) that any alleged change of circumstances needed to be 'something out of the ordinary' (*Tibbles*: see §117 above).

125. The Judge's approach on these supplementary points (discussed in §123-124 above) would not in itself have been objectionable but for the fact that she went on explicitly to hold that the father succeeded in his challenge to the arbitral award on every one of them (i.e., Grounds 2-12, and separately on his alleged change of circumstances). This approach was in my judgment, and for the reasons outlined above, unsound.

Order on appeal

126. For the reasons set out above, I allow the appeal.

127. I am however unable to accede to the submission of Mr Amos (see §60 above) that I should simply substitute the Arbitrator's award in place of the Judge's order (per rule 30.11(1) FPR 2010); I am equally unpersuaded (per his most recent submission: 5 April 2024) that it would be right to substitute the Arbitrator's award and then 'suspend' the order for a limited period pending any variation application by either party. Nearly two years have passed since the arbitration; I have already found that the arbitral award looked 'ambitious' in its terms (§107) by the time of the hearing before the Judge in June 2023. From the information available to me now, it appears that the father's financial situation may well have significantly and materially further deteriorated in the last nine months. I make clear that I have not been able to make any determination of the alleged change in the father's circumstances, nor its alleged impact on the arbitral award; however, I note his recent statement which includes the following passages:

> "… the Fund ceased operating on 30 September 2023 and … I have not received any income, capital payment or any other benefit from the Fund since 31 October 2023. … I have been de-registered from the Financial Conduct Authority as of 6 October 2023… I have not found a new role and I have no income at all. Without a job or any income, I am unable to obtain a mortgage or rent a property to live in with the children. I am already liable for three mortgages (two secured against my home and one secured against the property I own and [the mother] lives in) with outstanding balances totalling more than £1.6m. … I have no job or income."

Even the mother's solicitor appears realistically to acknowledge the difficulty in implementation of the 2022 arbitral award now (statement: 2 February 2024):

> "… even if [the father's] current circumstances make implementation impossible now (as opposed to in due course), this does not affect the primary issue under appeal which is one of jurisdiction".

128. In my judgment the appropriate course is therefore for me to remit the parties' cross-applications (i.e., those referenced at §32 and §36 above) for re-hearing.

129. Having liaised with Peel J (the National Lead for the Financial Remedies Court) and HHJ Hess (the lead judge at the London Financial Remedies Court) I propose to determine the substantive cross-applications myself, sitting as a judge of the Family Court; I will list the applications for an urgent case management hearing once the parties have considered this judgment, and had the chance to discuss the directions they seek.

130. In the meantime, Mr Amos further proposes that I should settle Thames House on the mother "on Schedule 1 terms" at least to protect her position there. I am not prepared, on the information available to me at this stage, to make this or any substantive order.

131. I can only express my despair, which I suspect is shared by all those in this case, that the remittance of the cross-applications for re-hearing will inevitably lead to further cost and delay in the resolution of these already long-drawn-out proceedings. Within the time now available to the parties, and before any further step is taken, they may like

once again to consider non-court dispute resolution[13] in a final effort to resolve this painful and destructive dispute.

[End]

Appendix 1: Litigation Chronology

Date	Event
21 May 2021	Mother makes application for Schedule 1 relief
17 January 2022	Final hearing of the section 8 CA 1989 application before HHJ Roberts. She records in her judgment that: “[The father] told me that he remains confident that it could be managed that [the mother] and the children can be rehoused within a reasonable distance of his home and the school and nursery”.
10 March 2022	HHJ Hess. Directions hearing in the Schedule 1 proceedings. The parties agree to refer the Schedule 1 application to arbitration.
15 March 2022	Parties sign the application for Family Arbitration Financial Scheme
18 May 2022	Duncan Brooks KC (DBKC) accepts the appointment to act as arbitrator
19 May 2022	DBKC gives directions
6 June 2022	The parties jointly instruct Oliver Fare from Fox Davidson (financial adviser) “to carry out the mortgage capacity calculations” in advance of the arbitration
21 June 2022	Mother’s revised open written proposal to settle
22 June 2022	Father’s open written proposal to settle
28 June 2022	Mother’s open invitation to narrow issues
30 June 2022	Arbitration before DBKC
11 July 2022	DBKC circulates the draft arbitral award
	Both parties submit comments on the draft

[13] Proposed here in the spirit of the new rule 3.4(1A) FPR 2010, which is scheduled for implementation on 29 April 2024.

Date	Event
12 August 2022	Final arbitral award is circulated to the parties
2 September 2022	Father issues his challenge to the arbitral award
15 September 2022	Mother issues a cross-application seeking confirmation of the award
23 September 2022	HHJ Hess: Order that the case passes the 'triage' test and lists for hearing on 14.10.22. No consideration had been given to the mother's application or representations on her behalf at this stage. Mother's solicitor draws court's attention to this.
4 October 2022	HHJ Hess: Further directions: Mother to file skeleton argument in response to the father's application. Judge will then reconsider his triaging decision. Hearing on 14.10.22 vacated
11 October 2022	DBKC issues a costs award against the father
24 October 2022	Father issues application for permission to file witness statement in relation to recent 'change of circumstances'. Witness statement in support refers to "material changes to my financial circumstances"
27 October 2022	HHJ Hess: the father's Grounds of Challenge pass the 'permission to appeal' test; the challenge has a real prospect of success. Case allocated to HHJ Evans-Gordon
29 November 2022	HHJ Evans-Gordon: Directions hearing
22 December 2022	Father issues County Court proceedings against the mother seeking recovery of c.£1,850 (the balance of his costs award from the section 8 proceedings).
28 December 2022	HHJ Evans-Gordon judgment following the 29.11.22 directions hearing; the Judge grants the father's application for leave to adduce fresh evidence about his financial situation
10 March 2023	Further hearing before HHJ Evans-Gordon: Parties having been unable to agree the wording of the Order to follow the November 2022 hearing and the December 2022 judgment. Order made.
31 March 2023	Mother files statement in response to the father's 24.10.22 statement, pursuant to the 10.3.23 order
21 April 2023	Mother makes an open offer to settle

Date	Event
10 May 2023	Father makes an open offer to settle
10 May 2023	Mother e-mails father seeking a "creative solution" to the current situation
12 May 2023	Mother makes further open offer to settle
22-23 June 2023	Hearing before HHJ Evans-Gordon
22 June 2023	Letter from [CFO, father's hedge fund] confirming cancellation or reduction in partner drawings
28 June 2023	Mother submits further submissions on *Phillips v Peace* prepared by Tim Amos KC and Samantha Singer
26 July 2023	Letter from [CFO, father's hedge fund]: fund will cease operating from 30.9.23
27 July 2023	Mr Glaser KC sends the 26.7.23 letter from [CFO, father's hedge fund] to the Judge by e-mail
6 October 2023	Judgment of HHJ Evans-Gordon circulated
27 October 2023	Mother files Notice of Appeal and Grounds
8 November 2023	Peel J: Permission to Appeal granted, with directions given for the appeal hearing
14 November 2023	Father writes to the mother: "you leave me no choice than to start eviction proceedings"
18 November 2023	Mother replies asking where she and the children should go.
20 November 2023	Mother's solicitors to father: offering to work around the existing resources
30 November 2023	Letter from [CFO, father's hedge fund]: Father received gross drawings @ £83k to October 2023, and nothing further will be paid
6 December 2023	Mother asks for the father's reply in relation to the threatened eviction proceedings
7 December 2023	CFC sends out the sealed order from 6 October 2023. 1. Father's application allowed 2. Mother's application refused

Date	Event
	3. Mother to pay the father's costs, not to be assessed before the conclusion of the Schedule 1 proceedings. Judge e-mails the parties: "[the mother] simply does not accept the reality of [the father's] position".
14 December 2023	Father applies for permission to file further statement of evidence on the appeal: in this he states: "he is no longer employed, has no income and to set out his current financial liabilities all of which are relevant to the Appeal…. he respectfully requests that the Appellant mother's Appeal is dismissed without the need for a hearing", supported by statement of the same date.
15 January 2024	Peel J gives permission to the mother to appeal the costs order; the costs appeal is to be determined at a later date after the main appeal.
23 January 2024	Cobb J: Order: permission to the father to file and serve his 14.12.23 statement. Permission to mother to reply
2 February 2024	Mother's solicitor files statement replying to father's evidence
14 February 2024	Cobb J. Hearing of the mother's appeal against the order of HHJ Evans-Gordon [2 days of oral argument]. Judgment reserved.
19 March 2024	Father's solicitors send to the Judge the decision in *SP v QR*. Cobb J responds by inviting short written representations on the relevance of the case by noon on 20 March 2024
20 March 2024	Both parties submit written representations on *SP v QR*
21 March 2024	Judgment circulated in draft; typographical and other corrections invited by 25 March 2024, with a proposed hand down date of 27 March 2024. Emphasis that the judgment is still <u>in draft</u>
25 March 2024	Both parties submit corrections. Mother's counsel raise question about the disposal of the appeal. Cobb J gives directions for both parties to file further submissions on issue of disposal of appeal by 5 April 2024
2 April 2024	Father's lawyers (unsolicited) submit further proposed corrections to the draft judgment, and comments on the mother's proposed corrections.

Date	Event
5 April 2024	Both parties make short further written submissions addressing issues around the disposal of the appeal.
10 April 2024	Hand down of Judgment,

Appendix 2: Key ingredients of the Arbitral Award

Assets

i) The mother's assets (which included the equity in an investment property which she owned in south London) totalled c.£20,000. After deducting her future liabilities, her total assets (liabilities) amounted to c.-£89,000;

ii) The parties agreed that the Thames House apartment should be sold; it had a net equity of approximately £227,000;

iii) The father's property had a net equity of c.£256,000 (value at the time of the arbitration: c.£1.2m);

iv) The father had benefitted financially indirectly from a family company which owns a property in Spain; the Arbitrator found that the father would be able to derive a benefit (whether directly or indirectly) in the future. No figure could be put on this resource;

Income/earning capacity

v) The mother's net income was c.£27,000; her earning capacity was found to be £33,000 net per year, inclusive of the child benefit she received;

vi) The father's tax returns showed markedly varied gross income from 2019 to 2022: at its peak £861k, and at its lowest £391k;

vii) The father's earning capacity was found to be c.£410,000 gross or £223,000 net. The father's income fluctuated yearly;

Child support

viii) Pursuant to section 8(6) of the Child Support Act 1991 (CSA 1991), the child maintenance figure was fixed at £10,000 per annum per child; the level of maintenance was to vary annually in line with the UK Consumer Prices Index (CPI); at the time of the arbitration there was a maximum assessment ([21] of the arbitral award). This was subsequently revised to a nil assessment;

ix) Pursuant to section 8(7) of the CSA 1991 and by consent, the father was to pay the fees for the schools attended by the children by agreement or order of the court;

Housing need

x) The father offered an undertaking to permit the mother and children to remain in occupation of the Thames House flat;

xi) Importantly it was recorded that:

> "[The father] is willing to put the gross value of [Thames House] towards a new property, including the mortgage capacity that he has previously utilised. [The mother] is willing to put her own resources towards the property, too". (Emphasis by underlining added).

xii) The mother's need for accommodation for herself and the children during their minority was found to be c.£1.1m to c.£1.13m inclusive of costs of purchase, removal and redecoration;

xiii) Having regard to the evidence of the jointly instructed financial adviser, a mortgage of approximately £900,000 was found to be "realistic and affordable"; the Arbitrator found that there should be a joint mortgage of £870,000 of which £184,000 reflected the mother's mortgage capacity (as a reference point, the mortgage on the Thames House apartment was c.£680,000 at the time of the arbitration);

xiv) The provision would require a modestly greater capital commitment on behalf of the father;

xv) The deposit for a new home for the mother and children could be raised by way of £228,000 from Thames House, £20,000 cash contribution from the mother, and £10,000 from the father's other resources. The Arbitrator added: "The provision I am making will only require a modestly greater capital commitment on [the father's] behalf and an increased mortgage"; (Emphasis added);

Nature and structure of the award

xvi) The parties were to enable a housing fund of £1.13m (inclusive of costs of purchase, redecoration and removal costs); both parties were expected to contribute to the capital (see above);

xvii) The fund would be used to purchase a property in the parties' joint names on a trust for sale; the choice of property was to be agreed; it was envisaged that it would be within three miles of the private school which the children then attended;

xviii) Specific arrangements were made for any necessary minor adjustments to the figures (referable to the CPI) in the event that a property had not been identified by 1 January 2024;

xix) £870,000 (linked to the CPI as above) was to be raised "by way of joint mortgage, with both parties to provide all documents required by the mortgagee promptly and to execute all documents required to give effect to the mortgage application within 48 hours of being requested to do so" (Emphasis by underlining added);

xx) The choice of mortgage product was to be agreed by both parties;

xxi) The mortgage may be an interest-only product if achievable. If not, then it may be part-repayment part-interest-only if achievable. If not, then it will be a repayment mortgage over the maximum obtainable term;

xxii) A sale of the property was to be triggered by one of a number of specified events, the last of which being the youngest surviving child attaining the age of eighteen or finishing full-time education to the end of first degree (whichever shall be the later). The Arbitrator set out detailed arrangements for the distribution of the proceeds of sale. The mother was to have the option to buy out the father's interest at any time, provided that he was released from the covenants under the mortgage;

xxiii) The father was to meet all instalments due in respect of the mortgage as and when they fall due.

xxiv) In relation to the mortgage rate, the Arbitrator "took the view that a rate of 2.5% would probably be achievable, and was entitled to do so even though the jointly-instructed mortgage broker had proposed a figure of 3%. Base rates have increased since the hearing and my draft Award. Finances and economic conditions constantly fluctuate".

[End of Appendices]