Neutral Citation Number: [2019] EWHC 1897 (Fam)

Case No: SO15D08858 / F00LU343

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before:

Ms Clare Ambrose
(sitting as a Deputy High Court Judge)

- -

Between:

H	**Applicant**
- and -	
W	**Respondent**

- -
- -

The Applicant in person
Kirsten Allan (instructed by Manor Law Family Solicitors) for the Respondent

Hearing date: 25 June 2019

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Approved Judgment

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

....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the 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.

Ms Clare Ambrose:

1. This is the Court's decision on two applications arising out of an arbitration of financial disputes between the parties following the end of their marriage. The arbitration proceeded to an award dated 26 November 2018 ("the original award") and this was amended by the arbitrator's decision made by an email dated 3 February 2019 ("the amended award").

2. This case is about the limits on when an arbitrator can amend an award under section 57 of the Arbitration Act 1996 ("the 1996 Act") and how parties can challenge such an amendment. H's application is essentially seeking to vary the amended award so as to remove the award of spousal maintenance whereas W's application is to show cause why the original award or the amended award should not be given effect by being made an order of the court.

3. The central issue is whether the amended award should be given effect or whether it should be remitted, set aside or varied under s68 and/or s69 of the 1996 Act.

4. I refer to the parties as W and H respectively as they also used this terminology.

The factual background

5. The parties married in 1988 and have two grown up children in their twenties. They separated in October 2014 and sold their former matrimonial home in November 2015. They divided the proceeds of sale equally and purchased their own properties with mortgages. The parties' daughter sometimes stays with the father and he receives money from her for this. W keeps two lodgers. The lodgers pay rent which is not wholly subject to income tax under the Rent a Room scheme. W's property is valued at around £30,000 more than H's property.

6. The parties' dispute related to the division of pensions, what maintenance (if any) should be paid and the division of assets including shares and also a redundancy payment.

The procedural background

7. Divorce proceedings were commenced by H and decree nisi pronounced on 3 October 2016. Neither party made an application to court for financial relief and instead on 27 September 2017 the parties signed an arbitration application form on the ARB1 FS form agreeing on arbitration under the Family Law Arbitration Financial Scheme. Their named chosen arbitrator was Mr A ("the arbitrator"). This form listed the following issues to be resolved, 1) pension division, 2) spousal maintenance, 3) division of assets pertaining to shares and a redundancy. The form carried the following notice "*Parties should be aware that: arbitration is a process whose outcome is generally final. There are very limited bases for raising a challenge or appeal, and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award"*.

8. An initial hearing took place on 22 February 2018 and a final oral hearing took place on 31 October 2018. The parties represented themselves at both hearings and throughout but have also been assisted from time to time with legal representation or advice.

9. The arbitrator made his final award on 26 November 2018. It ran to 31 pages, with 168 paragraphs.

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

    a) There should be no further capital provision for either party except for an equal division of the BAE shares.
    b) There should be a pension sharing order in W's favour in relation to 78.3% of H's T-Mobile DB pension.
    c) H should pay W spousal periodical payments at the rate of £500 per month for a three year period.

11. The arbitrator paid careful attention to the arrangements for income received from lodgers or the adult daughter concluding as follows:

"30. I have seen the wife's tax returns for the years 2013/14 to 2017/18. These documents provided details of the wife's combined income from her business as well as the rental income that she receives…the income fluctuated over the years, but on average the wife received c£24,800 net over the course of those years.

31. The Wife has prepared a document in order to try and predict what her income this year may be. That document suggested an anticipated income of £21,403.

…

79. As I have already mentioned, the wife currently has an income/earning capacity of between £21,000-£25,000 pa (net) from her employment and from the rental income she receives.

…

96. The husband receives payment from K while she stays with him but I do not find it appropriate that any order I make should effectively force the husband to have to rent out rooms in his house. That is not to say that in coming to the conclusions that I have I am in any way "forcing" the wife to rent out rooms in her house. I have already commented that she has historically done this voluntarily rather than out of necessity, and as such I cannot disregard any income, she receives from this. Presumably if she had not wanted to do so then she would have sought to purchase a smaller, cheaper property to reduce the amount she would have then needed to secure by way of mortgage.

…

107 I confine myself to saying that in my view any adult child should be contributing to their upkeep while they are at home with one parent, but it is unlikely that they can do more than cover their costs. I approach the matter on the basis that each party will have the outgoings of a single person, although accept that for so long as the wife has lodgers/ tenants her household expenses will consequently increase to some extent."

12. Between 26 November 2018 and 15 February 2019 there were a series of exchanges by email between the parties and the arbitrator as follows. These exchanges were on first name terms.

13. On 13 December 2018 H made a formal application to the arbitrator under section 57 of the Arbitration Act 1996. This was an 8 page document. H's position was that the arbitrator had made a clerical error in excluding the rental income from lodgers when considering forecast income. H also included new material from a Government web site going to what costs were deductible for tax purposes. Overall, H suggested that the arbitrator should recalculate the monthly net income and suggested that "*the omission of a large part of the wife's income impacts the whole direction and consideration of the award"*. He requested that the error and the consequences of it be corrected.

14. On 17 December 2018 the arbitrator responded indicating that the complaint raised was not a clerical mistake or error arising from an accidental slip or omission within s57 of the 1996 Act, stating "*[H]'s complaint is, as I read it, more fundamental than that and suggests that I have miscalculated [W]'s income which is then said to affect the overall fairness of the Award. With respect I do not think that I am therefore being asked to merely correct a clerical mistake. In reaching my award I had to consider all the evidence I heard and read, and I had to exercise my discretion in determining what I considered to be a fair award in light of the totality of that evidence. I am afraid that I am not now in a position to hear submissions or evidence on issues which should have been explored during the hearing. In the circumstances I decline to amend the award".*

15. On 18 December 2018 H responded indicating that he was not merely asking the arbitrator to correct a clerical mistake, he was also asking the arbitrator to correct the consequence of that error. The next day H indicated he would make a revised request under s57 within the 28 day time limit.

16. On 24 December 2018 (just before the 28 day time limit expired) H sent the arbitrator a revised formal application to the arbitrator under section 57 of the Arbitration Act 1996 on grounds of accidental omissions. This was an 11page document and contained a detailed analysis of the annual income figures for the wife, focusing on the 3 tax years between 2015 and 2018. Again he alleged that the arbitrator had erroneously and accidentally omitted any rental income from the wife's predicted income and also from the historical income leading to a material understatement of the wife's income/earning capacity. This time he indicated that he introduced no new evidence, although he again asked the arbitrator to refer to the Government website on what items were deductible, and noted that rental costs are not deductible.

17. On 6 January 2019 W submitted comments. At the outset she said, *"Unless you are likely to consider making a substantial change to the award, I do not wish to take detailed legal advice because I simply do not have the funds. However, if a large change is likely, please would you let me know as I may need to consider preparing a more detailed response*." She went on to make comments which ran to 4 pages. She made detailed comments about lodger income streams, and asked the arbitrator not to take into account such income streams, "*Lodger income should either be considered as an emergency option for us both or not taken into account for either party. Tim's house, despite what he has written, is every bit as able to house lodgers as my own."*

18. On 8 January 2019 H responded indicating that W had acknowledged the error and been afforded a reasonable opportunity to make representations.

19. On the same day W commented and stated *"I will make a representation to [the arbitrator] if he suggests it would be a good use of my time but if he is unlikely to make a change, I would be better spending time trying to support my teachers…I am eager to hear back from [the arbitrator] as soon as possible."*

20. On 9 January 2019 the arbitrator acknowledged their correspondence and asked for the parties to give him a few more days to consider.

21. On 28 January 2019 H replied to the arbitrator asking, "*please could you give an indication of how many days you need*" and added further substantive comments. On 28 January 2019, W also responded, again pointing out that she did not acknowledge any error pertaining to the award. She indicated "*I am reluctant to fight something unless I need to prepare a defence. I do not have the time, money, health or energy unless there is a need to defend"*. She reminded the arbitrator that she was awaiting a response to her email of 6 January 2019 as to "*whether he was considering whether a change was needed and therefore whether it was worth me spending money seeking legal advice to defend my position. I have not yet received a response but look forward to hearing shortly."*

22. On 3 February 2019 the Arbitrator wrote to the parties responding to H's revised request for correction.

> "*H invites me to reconsider the amount of W's income, and invites me to determine W's income for the years 2015/2018 to be £30,800 net. He invites me to do so on the basis that in assessing H's income I failed to take into account the "rent a room" tax exempt allowance.*
> …
> He then said he had reconsidered the documents and the schedules put forward on income. He gave a new breakdown of figures for each of the 5 tax years from 2013/2014 through to 2017/2018. He used this new method of presenting the figures to come to a conclusion that the breakdown of her income for those years gave an average net income of £29,505.82 pa. He then gave a renewed explanation of his assessment of the figures put forward on outgoings and how he had assessed the parties' budgets and personal expenses, and went on to state:
>
> *In my initial award I suggested that W had an income shortfall of between £417 - £750pcm. That figure now has to be reconsidered.*
>
> *However, having been asked to look afresh at this matter, in light of the issue of the rental income, and in re-reading the bundles I have had regard to the fact that W, if she is expected to continue to derive an income from lodgers, will also have consequential expenses associated with that, and which were not referred to on the schedule of personal expenses which I have referred to above [in assessing outgoings]. At pages S921-922 of the bundle there appears a document headed "Lodger Capital and repair". This document schedules the expenses that W says have been incurred as a consequence of renting out the rooms…an average of £230 pm. Having re-read the notes of the evidence given at the hearing that schedule was not challenged by H. Therefore, if I am invited to reconsider this issue to deal with any "errors" concerning income, I consider that it is also open to me to deal with any "errors" concerning expenditure. I am therefore of the opinion that W's reasonable*

> *expenses are more in the region of £2,750 (than the £2,500 to which I referred in my Award).*
>
> *…*
>
> ***In summary, my Award stands in all respects, except that I have now determined that the amount of maintenance which is payable to W should be £300 per month."***

23. On 4 February 2019 W responded indicating that she "*would appreciate some time to check through your references in more detail, refer to the court bundle already presented and respond properly"*. She referred to recent ill-health and concluded, *"May I request that you hold off from formally adjusting the award until 3 March to allow time for everything to settle medically and for me to check through and respond properly to the submissions and comments written by H and yourself."*

24. On 12 February 2019 H submitted a further (third) formal application to the arbitrator under section 57 of the Arbitration Act 1996. This time he was seeking a correction to the amended award. He suggested that the arbitrator's recalculation of W's income in his email of 3 February 2019 was inadmissible. He indicated that the revised award should be corrected so as to order that "*The award will be a clean break. There shall be no spousal periodical payments made to either party. There will be no capitalised payments. There will be no possibility to request an application for variance in the future."*

25. W sent in a document of the same date raising concern at how the matter was being conducted and raising a discussion about what might be appropriate given the concerns raised, and asking for an indication so that she could plan a timetable of work and know whether she must continue to trawl through the documents. She put forward a possible solution of having another hearing day, pointing out that *"there are errors in the award, not only the ones spotted by H"*.

26. On 15 February 2019 the arbitrator responded indicating,

    "*Having considered matters further I do not intend to amend the Award (as already amended) any further. I am of the view that H's request for me to reconsider matters in light of W's rental income has been dealt with. If either party remains dissatisfied with the decision/ Award (as amended) then I must leave it to you to decide what other routes, if any, you wish to explore, but I will not be reconsidering the amended Award any further, and will decline any subsequent requests that I do so. I consider my role in this Arbitration to now be at an end, having delivered my final Award."*

27. By an application dated 8 March 2019 in the form of an arbitration claim form issued in the Luton County Court, H applied for an order to set aside the part of the Award relating to spousal maintenance.

28. The arbitrator was named as party in H's application, as required under any application under s68(1) and s69(1) of the Arbitration Act 1996.

29. By an application notice dated 14 March 2019, issued in the Family Court in Southampton, W applied for "*a notice to show cause why the arbitration award determined on 26 November 2019 should not be made into an order of the court pursuant*

to DB v DLJ [2016]; *or in the alternative, to show cause why the amended arbitration award as amended on 3 February should not be made into an order for the court".* Her application was transferred to Luton and then to the Family Division of the High Court.

30. On 14 March 2019 HHJ Waller transferred H's claim form from Luton County Court to the Commercial Court (where arbitration claim forms are usually allocated).

31. On 15 May 2019 Teare J ordered that H's claim be transferred from the Commercial Court to the Family Division of the High Court.

32. On 7 June 2019 both matters were listed for a direction hearing before me. H represented himself. W was represented by counsel. Both parties agreed that the merits of the matter could be dealt with immediately and that they did not seek to serve further evidence on their applications and wanted to avoid a further day in court. On that basis the parties had a half day before me to make their oral submissions on the merits of their applications.

33. The material that was before me included the award dated 26 November 2018 and all the correspondence between the parties and the arbitrator following the issue of that award, up to 15 February 2019. Both parties served detailed position statements.

H's position

34. H made lengthy submissions of which I have taken full account. He had an impressive grasp of the Arbitration Act 1996 ("the 1996 Act") although I allowed him to withdraw a concession that his application be considered solely under section 69 of the 1996 Act.

35. To summarise, H challenged the amended award under section 68 for serious irregularity and also under section 69 for error of law.

Section 69

36. H made a challenge to the amended award by seeking permission to appeal under section 69 of the Arbitration Act 1996, alleging that the arbitrator's decision on spousal maintenance was obviously wrong, and one that would substantially affect his rights, affecting his regular income by 12%. He also alleged that the recalculation of the wife's needs was an inadmissible second thought. He argued that the issues raised questions of general public importance.

Section 68

37. Under section 68 he argued that the arbitrator had failed to comply with his duty under s33 of the Arbitration Act 1996. His application contained several grounds of alleged bias, including the arbitrator having second thoughts in favour of the wife, averaging the wife's income on a biased range, failing to control the wife's submissions and refusing an adjournment to the husband, despite excessive submissions by the wife. In his submissions he did not put bias at the forefront of his case.

Serious irregularity in relation to amending the award

38. H's main complaint was regarding the arbitrator's conduct of the amendment of the award. Here there were a number of objections, including that the arbitrator had exceeded his powers, had failed to deal with the issues, had taken the wrong matters into account and also had unfairly failed to give him an opportunity to put his case.

39. H argued that the arbitrator had exceeded his powers by having an inadmissible "second thought", in that having dealt with rental costs in the original award the arbitrator in his amendment then found an additional supposed "error" to inflate those costs, where such "error" was outside the scope of s57 . A further complaint was that he had done this without giving either party an opportunity to respond, as required by s57.

40. A further challenge by H was based on the arbitrator's alleged failure to deal with all the issues that were put to him, including a failure to fully address errors, in particular relating to the wife's forecast income and also a failure to process his final request for correction dated 12 February 2019.

41. H argued that the arbitrator had taken the wrong periods of income into account, for instance he had erred in his revised award in looking only at past income and in looking at the period 2013-2018 which included two years when W was living in the former matrimonial home and did not have the same tax free allowance, and that he had not taken proper account of all the income from lodgers. He said the arbitrator had erred in his revised award in not assessing future income so that his figures on W's income were lower than they should have been.

42. He also considered that the arbitrator was wrong to have taken into account W's past capital costs in assessing her future needs when there was no indication that these costs would continue or recur in the future. It was not reasonable to include these costs as part of her continuing needs, especially where the "rent a room" tax free allowance allowed for reasonable wear and tear. H submitted that he had not challenged the arbitrator's assessment of W's needs and was still not challenging that. The arbitrator had already assessed her needs and formed a conscious decision so he should not have reopened that in light of his "second thoughts".

43. H emphasised that the arbitrator had wrongly adjusted the award to take account of his "second thoughts". He submitted that this meant something had gone seriously wrong which required the court's intervention.

44. H's position was that s57(3)(a) was not limited to clerical mistakes. He pointed out in correspondence that the slip rule should be "*applied quite pragmatically, importantly often including arithmetical recalculation"*. He submitted that the arbitrator's recalculation of the wife's needs was an inadmissible "second thought" and attempt at self-exculpation since the matter had already been expressly addressed in the arbitrator's "conscious judgment". He relied on the commentary in Mustill & Boyd on Commercial Arbitration:

> "*This [the Arbitration Act 1996] enables the arbitrator to make an award on a claim which he has inadvertently overlooked such as an award of interest or to correct errors of accounting or arithmetic such as attributing a credit item to the wrong party but the section does not give the arbitrator licence to give effect to second thoughts on a matter on which he has made a conscious judgment."*

45. In this respect he relied on the following analysis of Donaldson MR in *The Montan* [1985] 1 Lloyd's Reports 189 (referring to his earlier judgment in *R v Cripps ex parte Muldoon* [1984] QB 686):

    "*It is a distinction between having second thought and intentions and correcting an award to give effect to first thoughts or intentions which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assess the evidence wrongly or misapreciates the law the resulting award or judgment will be erroneous but it cannot be corrected under [what is now s57] or [the slip rule] or [akin to what is now s68]. The remedy is to appeal if the right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip but it is a natural form of self-exculpation.*"

46. H further alleged that if the arbitrator was going to revisit W's needs, he should at the very least have given all the parties the opportunity to make representations, and he failed to do so. He pointed out that s57 allowed both parties an opportunity to make representations where an arbitrator is exercising powers to correct of his own initiative.

47. H's application was that the court vary the award so as to award a clean break. Alternatively he suggested that the matter be sent back to the arbitrator so that the serious irregularity could be corrected.

H's position on W's cross-application

48. As regards W's cross-application, H considered that it was premature and unexpected. He considered that such an application would only be appropriate once the arbitral process (including any challenge under the 1996 Act) had been completed. He had no objection to making the award into an order of the court following conclusion of the legal process for appeal.

49. He disputed W's complaint of unfairness. He pointed out that the arbitrator had made clear at the outset that his role was not to give legal advice so he could not be expected to respond to her questions as to what she should do.

W's position

50. W's position was that the award of 26 November 2018 was made after a full hearing with written and oral evidence and submissions. The award was expressed to be a final award and this was the intention of the parties when they agreed to arbitrate. The issues raised by H about W's stated income were not raised by H during the arbitration. H had sought a clean break in the arbitration and this application was essentially an attempt to have the award revisited. H's s57 requests did not fall within the scope of section 57 and were, as the arbitrator correctly identified, aimed at a far more fundamental mistake, not a clerical error or an incorrect calculation. The issues raised in these requests (in particular tax reliefs claimed by W and whether there was an element of double accounting in W's figures) were matters that should have been raised during the hearing.

51. W contended that the arbitrator erred in revising his award in February 2019 by failing to allow her to make reasonable representations as required by s57(3). She submitted that

this amounted to a serious irregularity under section 68 justifying the revised award being set aside. Her case was that the arbitrator should, having indicated in December 2018 that he was not minded to re-open the matter, have informed W that he had changed his mind and would do so. This was particularly important where she was a litigant in person and had asked him whether he would reconsider, and where there were tight time frames over Christmas. W contended that she suffered unfairness by reason of the reduction of her payments and the revised award should be set aside and the original award should be reinstated.

52. W's counsel submitted that the court should not grant H leave to appeal or allow the application under s68 since the application was without merit. A court should only intervene under s68 where something really serious has gone wrong. There was no real basis for the allegations of bias, for example the arbitrator responded to both parties at all times and he had reduced her payments by 40%. W also argued that s57 of the 1996 Act did not confer a right on H (as the party seeking a correction) to make representations so his complaint lacked sound statutory basis. Her counsel submitted that the arbitrator had heard full submissions and evidence on W's income and needs. The arbitrator was entitled to take into account the evidence of costs related to renting out the house and H had an opportunity to challenge that evidence at the hearing. The arbitrator was quite correct to refuse to hear new evidence following his original award.

53. Similarly there was no grounds to suggest that there was an error of law or that the award was obviously wrong for the purpose of s69. The arbitrator had made a careful and reasonable assessment of income and needs.

54. Initially W's primary case was that an order should be made in the terms of the original award but at the hearing W correctly accepted that she had not made any application challenging the revised award. In a sensible and pragmatic way she was willing to accept that the arbitrator's amended award should apply so as to bring matters to an end. On that basis, she put forward a primary case that the revised award be made into a final order.

Conclusions on the applications

Appeal under section 69 of the 1996 Act

55. Section 69 of the 1996 Act is about appeal for error of law. H's complaints here were about the arbitrator's conduct of the arbitration and his assessment of the income and needs. There was no question of law that would have justified granting permission to appeal under section 69. There was no basis for suggesting that the arbitrator's application of law was obviously wrong or that it raised a legal question of general public importance. I dismiss this aspect of the application.

Application under section 68 of the 1996 Act

56. Section 68 of the 1996 Act provides as follows:

"68 Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

57. Section 68 provides a closed list of grounds of intervention. The grounds of challenge are very circumscribed indeed (see *DB v DLJ* [2016] EWHC 324, paragraph 7). Intervention is not justified merely because something has happened that falls within one of the grounds. It is necessary also to show that the irregularity has caused or will cause substantial injustice to the applicant. Substantial injustice is not established merely by showing that the outcome would have been different in a material way if there had been no irregularity. It has long been held that the test of substantial injustice will only be met in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. It must be shown that what happened is so far removed from what could reasonably be expected of the arbitral process that the court must take action.

58. In addition, a court only has power to remit or set aside an award under section 68, it is not empowered to vary the award. In practice, this meant that even if successful, any application under section 68 would have resulted in the award being remitted back to the arbitrator rather than the court varying it.

59. It was common ground that the threshold for intervention under s68 is a high one requiring that something really serious has gone wrong. In entering arbitration the parties signed the ARBF1S on the express basis that challenge to court was limited and a variation would only be justified in an exceptional case. The reason why intervention is exceptional is because the parties have chosen to use arbitration in order to bring an end to their dispute in a fair and efficient manner. Parties do not agree for an arbitrator to resolve their disputes in an award in order for this to be a precursor to further rounds of extended submissions on possible errors and then a set of court proceedings before the matter is remitted back to the arbitrator for further submissions and perhaps a further hearing. This must be the last outcome the parties would intend and the court would not allow it unless the high statutory threshold is clearly met.

Bias generally

60. H did not press his more general case on bias. This was sensible and I consider that the points relied upon raised no irregularity.

Serious irregularity in relation to amending the award

61. The starting point is that a published arbitration award is final and binding (s58 of the 1996 Act). Once an arbitrator has made a final award, he has discharged his duty (he is *functus officio*) and no longer has power to make decisions in respect of matters decided.

62. Section 57 provides an exception to this in conferring limited powers to correct an award (or make an additional award for the same purpose). It provides as follows:

"57 Correction of award or additional award.

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.

(4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.

(5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its

own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.

(6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.

(7) Any correction of an award shall form part of the award."

63. The husband was correct in submitting that section 57 does not allow an arbitrator to give effect to second thoughts (see also *Ases Havacilik v Delkor* [2012] EWHC 3518 (Comm) referred to in *DB v DLJ* [2016] EWHC 324). Section 57 does not allow an arbitrator to improve or revisit his decision or correct a mistaken assessment of the facts or the law. The husband was also correct in submitting that if an arbitrator "*assesses the evidence wrongly or misappreciates the law"* this error does not come within section 57 (as per *The Montan* and *R v Cripps ex p Muldoon*).

64. Whether an error comes within section 57 is an objective matter, it is not simply a matter of the arbitrator's discretion under what is often termed the slip rule. If an arbitrator admits there is an error in an award there are usually only three ways to correct it: by the parties' agreement, by a correction if it falls under s57 or by an order of the court under s68(2)(i) for an admitted error.

65. There may sometimes be a fine distinction between an accidental slip or omission (correctable under s57) and an error or gap in the reasoning or a mistaken assessment of the facts (outside section 57). The arbitrator's powers under section 57 should not be construed broadly for this purpose. Section 1 of the 1996 Act makes clear that its provisions are founded on the object of achieving a fair resolution without undue delay or expense. This is also the parties' intended priority in agreeing to the FLAS scheme. Section 57 is not intended to allow parties "another bite of the cherry" and it should not be construed broadly so as to permit costly and time-consuming attempts to re-open the arguments or the evidence. Section 57 does not allow for the introduction of fresh evidence for the purpose of identifying or correcting errors.

66. I turn back to the specific question as to whether the arbitrator's conduct gave rise to a serious irregularity within section 68 which has caused or is likely to cause substantial injustice justifying remission or setting aside.

Serious irregularity in failing to deal with the issues

67. I reject the complaint based on the arbitrator failing to deal with all the issues. This allegation was made on the basis that the arbitrator had not properly considered future income in his amendment. However, even if correct, this was not a failure to deal with the issue. At highest it was an incorrect assessment of the facts. Complaints regarding the merits of the arbitrator's assessment of fact do not fall within section 68. H also argued that the arbitrator had failed to process his final request for correction dated 12 February 2019 and failed to give reasons. This complaint also lacks merit. The arbitrator had given reasons in declining to make an amendment to an award, and he was correct to do so (as explained below).

Serious irregularity in exceeding powers

68. H insisted that the arbitrator's original assessment of W's income contained an accidental omission which required recalculation under s57, and indeed the appropriate correction

was to recalculate so as to give a clean break. At the same time H contended that the arbitrator was not entitled to conclude that he had also made an accidental omission in his original assessment of W's needs. H submitted that the arbitrator exceeded his powers by recalculating needs because this was an impermissible "second thought" and it was "*a very long way"* outside of the permitted 28 day time limit for corrections.

69. I do not accept this approach. As a preliminary point, where an arbitrator is entitled to correct an error under section 57 he is then entitled to make changes to other parts of the award in order to reflect the correction. The corrections may be made after 28 days and he can make them without having to go back to allow further representations since this is merely the necessary consequence of the error. Indeed, it was H's own case in requesting the amendment that the arbitrator should recalculate his figures as a necessary consequence of the alleged error.

70. More importantly, there was no error arising out of an accidental omission in the arbitrator's original assessment of W's income and needs. His original award involved exercising his discretion to draw conclusions from a broad range of information. If the arbitrator had incorrectly failed to give proper account to income received from lodgers and the tax status of such income (or even ignored it) then he made a mistaken assessment of the evidence (whether by his own error or because the evidence was not clearly presented). If his award was inconsistent in saying at one point that he would take into account rental income but then at another stage not taking full account of that income then that is also a fault or gap in reasoning. Similarly, if the arbitrator incorrectly or inaccurately assessed W's needs then this was a mistaken assessment of the evidence rather than an accidental omission or slip. H was wrong to suggest that any error in assessing income must be corrected in his favour under s57 whereas any error in assessing needs could not be corrected as this would be an impermissible "second thought".

71. The arbitrator was placed in a difficult position. He was dealing with two litigants in person in circumstances where an award had been made and ordinarily his work would be complete. The informality of the exchanges suited the parties but it may have led them to believe that submissions could continue as if there had been no award. The arbitrator decided to allow an application under section 57 to address what he perceived as a shortcoming in his original award that should be corrected. He took the view that both income and needs needed recalculation such that the overall correction should not be as large as H requested. It was understandable that he wanted to improve his decision so as to correct it. However, attempts by parties or a tribunal to perfect, correct or improve an award (except for the narrow powers under section 57) are not allowed under the 1996 Act where finality is valued more than meticulous accuracy.

72. The arbitrator had initially been correct on 17 December 2018 in considering that the request went beyond the scope of section 57. When the arbitrator later changed course and re-opened the assessment of income on 3 February 2019 he expressly acknowledged that he was being asked "*to look at the matter afresh"*. He accepted that he had gone back to reconsider the documents afresh. This was not a situation where he had accidentally left something out or accidentally omitted his "first thoughts". Instead, he re-opened his reasoning and reconsidered his method of assessment. He presented the figures in a different way and gave two pages of additional reasons for adjusting his previous

reasoning. In my view the errors he sought to correct were not within section 57 of the 1996 Act.

73. However, even if the errors were not within section 57, the application to challenge the amended award on grounds of the arbitrator exceeding his powers under section 68 fails for want of substantial injustice. This would apply equally to the complaints of W (who preferred the original award with no corrections) and also H (who was unhappy with the recalculation of needs). The arbitrator decided that a correction was required to give better allowance for income and costs due to lodgers. The parties had agreed that he should decide their financial dispute. Justice does not require me to undo his decision or send it back to him for reconsideration. To the contrary, his decision reflects a fair and careful assessment of the parties' needs. I note that the 1996 Act also makes provision for an arbitrator to admit an error falling outside s57 such that the parties can either agree for the award to be corrected or one party can apply to court for remission under s68(2)(i) of the 1996 Act. This is intended for extreme cases but shows that a court may give effect to an arbitrator's admission of an error.

Serious irregularity in failing to allow the parties to make further representations

74. There was a separate but related objection that the arbitrator should have allowed both sides to make further representations. I do not accept that the arbitrator acted unfairly in making his decision on 3 February 2019 without calling for further representations. H had made two very full sets of submissions regarding the corrections he was seeking on assessment of income and spousal maintenance. The parties had already been given a full opportunity to serve submissions and evidence regarding income and needs at the hearing. The arbitrator correctly concluded that no new evidence should be allowed following the award. W had served detailed comments regarding H's application for a correction. It was not the arbitrator's role to advise her whether she needed to get further legal advice, or to tell her what he was likely to decide before he decided. He would have been open to criticism if he had done this.

75. Given that he had concluded that there was an error within section 57, the arbitrator could have returned to the parties raising the point that the costs of keeping lodgers had also not properly been accounted for. I accept H's submission that where an arbitrator makes a correction of his own initiative he should give both parties an opportunity to comment. With the benefit of hindsight (and assuming, contrary to my earlier conclusions, that the matter was within s57) a further round of submissions may possibly have prevented one ground of complaint. I can also understand W's concern in feeling she might have added a stronger response. However, she had a reasonable opportunity to make representations. She had made her position clear in a 4 page document and overall she had more than a month to respond to the s57 application. Lengthy submissions should not be required on a section 57 application. Another round of submissions would have increased costs and delay, and could have spawned further unnecessary and unmeritorious attempts to re-open the decision or seek further corrections.

76. Neither party could show that a significantly different outcome might well have been reached if there had been further submissions. It was clear that neither party would have been entitled to put in fresh evidence. The arbitrator cannot be criticised for relying on the existing evidence in making an allowance for the costs of keeping lodgers. The husband emphasised that the arbitrator made a mistake in assessing W's future needs at around £200pcm greater by reference to past capital costs rather than looking more broadly at

running costs. He also found fault with the arbitrator's assessment of income. However, these sort of complaints going to the arbitrator's assessment of the facts are not procedural shortcomings justifying court intervention under section 68. In my view the arbitrator's conduct in making a decision on 3 February 2019 without allowing further submissions falls far short of making this an extreme case requiring court intervention under section 68.

77. For these reasons H's application under section 68 fails. I dismiss his application in its entirety.

78. H asked for an order that each party bear its own costs as he wished to ensure that costs were limited. However, on an appeal the ordinary rule is that costs should follow the event and I consider that the costs of these applications should follow the event. W is entitled to an order for her costs of the applications, to be assessed summarily when I hand down judgement (if not already agreed).

79. The legal process for appeal has come to an end. H accepted that he had no objection to the award being made an order of the court in such circumstances. I consider that W's application to show cause was justified because an order would not have automatically been made following the end of the appeal process. It would be necessary for the parties to seek the court's approval of an agreed draft order or for one party to make an application for an order, typically using an application to show cause. Accordingly, in this case the amended award should be made into an order of the court. The draft order is attached to the arbitrator's original award. An order in that form will be made but adjusted to reflect the amended award so that £300 is substituted for £500 in the spousal maintenance, and also to reflect my order for costs.

80. That concludes this judgment.