FAMILY COURT OF AUSTRALIA

ENTEZAM & DEVI ***[2021] FamCA 25***

FAMILY LAW – NATIONAL ARBITRATION LIST – Regulation 67Q(3) – 15 reasons advanced by respondent for not registering arbitral award – examination of phrase "*any reason*" – relationship with grounds under s 13K(2) for setting aside an arbitral award – held, award registered – no reason for not registering award made out.

Evidence Act 1995 (Cth), s 140
Family Law Act 1975 (Cth), ss 4AA, 13E, 13H(1), 13J, 13K, 79, 90SM
Family Law Regulations 1984 (Cth), regs 67B, 67P(4)(b), 67Q, 67O
Family Law Rules 2004 (Cth), r 26B.32
UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006)

AJH Lawyers Pty Ltd v Careri (2011) 34 VR 236
Braddon v Braddon (2018) 59 Fam LR 234
Briginshaw v Briginshaw (1938) 60 CLR 336
Dougherty v Dougherty (1987) 163 CLR 278
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Gronow v Gronow (1979) 144 CLR 513
House v The King (1936) 55 CLR 499
Isbester v Knox City Council (2015) 255 CLR 135
Johnson v Johnson (2000) 201 CLR 488
Kan & Aamer [2020] FamCA 1014
Loomis v Pattison (2020) 61 Fam LR 415
Mallet v Mallet (1984) 156 CLR 605
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427
Norbis v Norbis (1986) 161 CLR 513
Pavic & Pavic [2018] FCCA 3386
Re JRL; Ex parte CJL (1986) 161 CLR 342
Stanford v Stanford (2012) 247 CLR 108

Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019)
Daniel Centner & Megan Ford, *A Brief History of Arbitration* (2019) 48(4) The Brief 58
Frank D. Emerson, *History of Arbitration Practice and Law* (1970) 19(1) Cleveland State Law Review 155

William G. Horton, *A Brief History of Arbitration* (2017) 47(1) Advocates' Quarterly 12
Professor Patrick Parkinson, *Family Property Arbitration: Exploring the New Potential* (Paper presented at ESFLPG Weekend, Katoomba, June 2016) 9
Maria Lucia Passador, *Challenging Arbitration: How Can Its History Inform Its Current (E-)Practice* (2017) 24(2) Willamette Journal of International Law and Dispute Resolution 233
Derek Roebuck, *Sources for the History of Arbitration: A Bibliographical Introduction* (1998) 14(3) Arbitration International 237
Dr Josh Wilson QC, *Adequate Arbitral Reasons After Westport – Has the Tension Been Resolved to Any Real Degree?* (2015) Resolution Institute 9

APPLICANT:	Mr Entezam
RESPONDENT:	Ms Devi
FILE NUMBER:	SYC 2844 of 2018
DATE DELIVERED:	12 February 2021
PLACE DELIVERED:	Melbourne
PLACE HEARD:	Melbourne
JUDGMENT OF:	Wilson J
HEARING DATE:	29 January 2021
DATE OF FINAL SUBMISSION:	5 February 2021

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr A. Singh
SOLICITOR FOR THE APPLICANT:	Opal Legal
COUNSEL FOR THE RESPONDENT:	Mr A. Strik
SOLICITOR FOR THE RESPONDENT:	Jack Rigg Solicitors

ORDERS

(1) Pursuant to reg 67Q(5) of the *Family Law Regulations* and s 13H of the *Family Law Act* the arbitral award of Heinrich Moser made on 28 October 2020 be and is hereby registered.

(2) The arbitral award that has by paragraph 1 of these orders been registered has, pursuant to s 13H(2) of the Family Law Act, effect as if it is a decree made by this Honourable Court.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Entezam & Devi* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: SYC 2844 of 2018

Mr Entezam
Applicant

And

Ms Devi
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 20 March 2019, well prior to the inauguration of the National Arbitration List, Benjamin J of this court made orders pursuant to s 13E of the *Family Law Act* referring to arbitration the totality of this proceeding.

2. Pursuant to paragraph 8 of his Honour's orders, the arbitration was limited to two issues, namely, whether a de facto relationship existed between the parties and if so, the duration of that relationship including its commencement and conclusion dates.

3. Heinrich Moser, an accredited AIFLAM arbitrator conducted the arbitration ordered by Benjamin J, declaring on 28 October 2020 that a de facto relationship existed between the applicant and the respondent between 1 July 1991 and 31 August 2016.

4. On 29 October 2020 the applicant in whose favour the declaration of the existence and duration of the de facto relationship was made filed an application to register the arbitral award.

5. On 5 November 2020 the respondent filed an application for orders setting aside the arbitral award.

6. On 6 November 2020 Henderson J of this court made orders transferring this application to the National Arbitration List under my control. I fixed 19 November 2020 for directions in relation to –

    a) the applicant's application to register the arbitral award; and

    b) the respondent's application to set aside the arbitral award.

7. On 19 November 2020 I made orders requiring the parties to file and serve evidence and submissions in relation to both issues and I fixed 29 January 2021 for the hearing of a contested interim hearing on both issues mentioned in paragraph 6 above.

8. Before any question of setting aside the arbitral award fell for determination, it was first necessary to embark upon a consideration of whether to make an order pursuant to Regulation 67Q(5) for the registration of the arbitral award. That was for the simple reason that s 13K(1) of the *Family Law Act* provides that the court may affirm, reverse or vary the arbitral award if that award is registered. An anterior factual scenario presented itself here because the award had not yet been registered so it was not amenable to the making of a decree affirming, reversing or varying the award.

9. With the agreement of both parties I decided to first determine the application under Regulation 67Q(5) about whether to register the award.

10. The respondent opposed the registration of the award on the same grounds on which she relied to set aside the award, namely arbitral bias and lack of procedural fairness.

SYNOPSIS

11. For the reasons that follow I was not persuaded that the arbitral award should not be registered. It follows that pursuant to Regulation 67Q(5) of the *Family Law Regulations* and s 13H of the *Family Law Act* I order that the arbitral award of Heinrich Moser made on 28 October 2020 is hereby registered and takes effect as a decree of this court.

SOME RELEVANT BACKGROUND

12. For the purposes of narrating the setting of this challenge to the registration of the arbitral award, certain matters have been extracted from the award itself whereas other matters have emerged from the affidavit material filed on behalf of the respondent.

13. Let me first take the more important matters that emerged from the arbitral award. They were as follows –

    a) the parties and the arbitrator executed an arbitration agreement pursuant to which they agreed, consistent with Regulation 67O of the *Family Law Regulations* that the rules of evidence would not apply to the arbitration;

    b) on 5 November 2018 the parties consented to the arbitrator making an order pursuant to which the arbitrator was empowered to inform himself on any matter in any way the arbitrator considered appropriate;

c) following a preliminary conference conducted on 1 July 2020 directions for the conduct of the arbitration were made, with which all directions the parties complied;

d) the arbitration was conducted by video conference between 28 September and 2 October 2020, five days in all; and

e) the respondent's written submissions were delivered as directed on 9 October 2020 to which the applicant chose not to reply.

14. The arbitral award recorded the affidavits on which the respondent relied, nine in total, five of which were of the respondent, one made by her daughter, one made by her sister and two of her friends.

15. It must be recalled that the focus of the arbitration was the existence and duration of any de facto relationship between the parties. Addressing himself to the elements of the definition of a "*de facto relationship*", the arbitrator set out s 4AA of the *Family Law Act* and then analysed the evidence against that definition. The respondent in this application argued that the arbitrator's conclusion about the existence and duration of a de facto relationship between the parties should not be accepted and hence the arbitral award should not be registered by reason of the arbitrator's bias and by reason of the arbitrator not applying procedural fairness in the conduct of the arbitration.

THE ISSUE IN THIS CASE – IN OVERVIEW

16. The *Family Law Act* makes provision for the registration of the arbitral award but it contains no criteria for registration. It assumes registration is at large, except for a stipulation as to timing, and postpones a challenge to the integrity of the award until after registration of the award in court. Once registered, the provisions of s 13K(2)(a) – (d) are enlivened.

17. Curiously, and this is the issue highlighted by this case, subordinate legislation provides for a dissatisfied party to object to registration of the award. The act of registration is an administrative act. A challenge to registration may be brought by a party to the award raising "*any reason*" why the award should not be registered. This case raises the breadth of the phrase "*any reason*" as appearing in Regulation 67Q(3).

18. This case raises an important point concerning the interaction between the *Family Law Act* and the *Family Law Regulations* in relation to the bases for challenging an arbitral award. It calls in issue the overall operation of the legislative scheme for family law arbitrations. No authority exists in this court on the point raised in this case.

19. In the course of these reasons I have examined each of the 15 grounds on which the respondent relied in order to assess whether they constituted a "*reason*" why the arbitral award should not be registered as is contemplated by

Regulation 67Q(3). But before going to the individual grounds on which the respondent relied in opposing the registration of the arbitral award, one preliminary observation is essential. The respondent did not put into evidence on this application a transcript or sound recording of the conduct of the arbitration. It was not possible for me to verify the truth or otherwise of many of the assertions made by the respondent (and denied by the applicant) about the arbitrator's conduct of the arbitration. It fell to the respondent to make good her contentions about the want of procedural fairness and bias. She had to prove the existence of "*any reason*" of which Regulation 67Q spoke.

20. The words of Regulation 67Q do not link any particular reason to any one of the reasons set out in s 13K, such as bias or want of procedural fairness. It seems to me that the "*reason*" to which Regulation 67Q(3) is directed is a reason connected to the validity of the process, the consensus of the parties, or the integrity of the arbitral process. The mere fact that one party may be dissatisfied with the upshot of the arbitration or with the orders pronounced as part of the arbitral award will not be a sufficient "*reason*" for the purposes of Regulation 67Q to refuse to register the award.

THE LEGISLATIVE STRUCTURE

21. Each of the *Family Law Act*, the *Family Law Regulations* and the *Family Law Rules* contain provisions in relation to aspects of arbitration. Registration of the arbitral award is canvassed in s 13H(1) of the *Family Law Act* and in Regulation 67Q of the *Family Law Regulations*. The party applying for registration of the award must apply by filing a form 8 under the regulations. Ordinarily, by the time a party seeks an order for the registration of the arbitral award, the arbitrator has notified the court under Rule 26B.32 of the matters set out in Regulation 67P(4)(b), namely, that the arbitration has ended and that an award has been made in relation to all or part of the proceeding to which the arbitration relates.

22. Regulation 67Q(3) enables the party upon whom an application to register the award is served to bring to the court's attention "*any reason why the award should not be registered*". That regulation is silent about the nature of the reason a party may wish to bring to the court's attention.

23. The reference in Regulation 67Q(3) to "*any reason*" introduces a discretion entitling the court to decline to register the award. But that discretion is not unfettered or unguided. The discretion must be exercised judicially, consonant with authorities such as *House v The King*,[1] *Gronow v Gronow*,[2] *Mallet v Mallet*,[3] *Norbis v Norbis*,[4] *Dougherty v Dougherty*[5] and *Stanford v Stanford*.[6] It would

[1] (1936) 55 CLR 499.
[2] (1979) 144 CLR 513.
[3] (1984) 156 CLR 605.
[4] (1986) 161 CLR 513.
[5] (1987) 163 CLR 278.
[6] (2012) 247 CLR 108.

not be competent for a judge to refuse to register the arbitral award on the basis that the arbitrator had green eyes, for example.

24. Counsel referred me to a trilogy of decisions[7] between 2018 and 2020 in which his Honour Judge Harman examined the interrelationship in the learning in international commercial arbitrations, especially under the *Model Law*, and in arbitrations under the *Family Law Act*. No parameters are given in Regulation 67Q(3) about the metes and bounds of the phrase "*any reason*". His Honour Judge Harman has taken the view in that trilogy of cases that the "*reason*" to which that phrase is directed is the same as those set out in ss 13J and 13K of the *Family Law Act*. I discussed the general operation of family law arbitrations in *Kan & Aamer*.[8]

25. Had parliament intended to equate the expression "*any reason*" in Regulation 67Q(3) to the grounds stated in s 13K(2) it would have been simple enough for parliament to have so provided. But it did not. The essential question in this case is the meaning in Regulation 67Q of the phrase "*any reason*" where no criteria are specified.

26. It is utile to record what Professor Parkinson wrote.[9]

> Because the legislation only provides for an arbitration award to be challenged *after* it has been registered in court, and the regulations do not indicate the basis for objection, it is necessary to go back to some basic principles to understand what this right to "bring to the attention of the court any reason why the award should not be registered" might mean.
>
> The first point to observe is that the Regulations are subject to the head legislation. If any regulation is inconsistent with the terms of the legislation it will be invalid to the extent of that inconsistency. Section 13H does not give any party to an arbitration a right to object to registration, and it only gives the Court power to review the arbitration award (on the various grounds given) after it has been registered. So whatever the right to "bring to the attention of the court any reason why the award should not be registered" its meaning ought to be consistent with the legislation's provision that powers of review be exercised in relation to *registered* awards.
>
> Secondly, as a matter of general principle, Australian courts will only deal with orders of another court if the orders are registered (see e.g. s.111CT). It is the registration that gives the Court jurisdiction to deal with it by enforcement or otherwise.
>
> Thirdly, before any legal document can create rights and obligations, the conditions precedent for legal validity must be satisfied. Unless and until the

[7] *Braddon v Braddon* (2018) 59 Fam LR 234, *Pavic & Pavic* [2018] FCCA 3386 and *Loomis v Pattison* (2020) 61 Fam LR 415.
[8] [2020] FamCA 1014.
[9] Professor Patrick Parkinson, *Family Property Arbitration: Exploring the New Potential* (Paper presented at ESFLPG Weekend, Katoomba, June 2016) 9.

> conditions precedent for a valid contract are satisfied, there is no contract to interpret or enforce. Unless a court, other than a superior court of record, has jurisdiction to make an order, any orders it purports to make are a nullity (see Enid Campbell, 'Inferior and Superior Courts of Record' (1997) 6 *Journal of Judicial Administration* 249.)
>
> It follows that the most sensible interpretation of the right to "bring to the attention of the court any reason why the award should not be registered" is that a person may argue that an award should not be registered because one of the conditions precedent for legal validity have not been met. Examples might be:
>
> a) the objecting party did not consent to the arbitration;
>
> b) the 'arbitrator' is not qualified in accordance with the Regulations;
>
> c) the arbitration purports to deal with matters that are outside of the scope of matters that may legally be arbitrated.
>
> If such matters were made out, then there would be no legally valid arbitration award to register, review or set aside. If the arbitration award is valid on its face – that is, the conditions precedent for it to be described as an arbitration award under the *Family Law Act* are met – then it should be registered, and objections to its enforcement be dealt with in accordance with sections 13J and 13K – the power to review awards or set them aside.

27. With respect, I agree with Professor Parkinson. Having regard to the lengths to which Parliament has gone to limit the grounds for setting aside an award once registered, it would be antithetical to the legislative scheme in family law arbitrations to permit at registration phase "*any reason*" to have a literal meaning.

28. What then are the *discrimina*?

29. In my judgment, having regard to the overall scheme of family law arbitrations, which critically limit the circumstances in which awards can be challenged, "*any reason*" in Regulation 67Q must be one by which a judge can conclude that the arbitral award is void *ab initio*. This would include the three reasons described by Professor Parkinson as "*conditions precedent*".

30. In 2019 the Arbitration Law Reform Commission[10] made certain observations concerning the process of opposing the registration of arbitral awards. In paragraph 9.28 of the report, the following passage appeared –

> 9.28 Some possible valid grounds for objection to registration have been canvassed in case law and commentary. They note that many situations which might lead a court to decline registration of an award are likely in any event to enable a party to have the award set aside

[10] Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019).

under s 13K of the *Family Law Act*, primarily on grounds of lack of due process or procedural fairness. Alternatively, the same circumstances may enable a party to have the award reviewed on a question of law under s 13J of the Act. It is not likely that there would be occasion to decline registration of an award for reasons which would not fall within the set aside or review provisions, noting also the qualifications required for arbitrators. It has also been noted that there is a lack of guidance as to the status of an unregistered award, and the appropriate course of action in the event that registration of an award is declined.

31. Before leaving the issue of Regulation 67Q(3), I wish to record certain observations about Professor Parkinson's three illustrations of conditions precedent to the existence of a valid arbitral award under the *Family Law Act*.

Consent

32. Parties' consent underpins arbitration.[11] Section 13E is expressed to be predicated upon the provision of parties' consent.

The arbitrator's qualifications

33. In family law arbitrations, the arbitrator is qualified and accredited by AIFLAM. A basic tenet of accreditation is knowledge of and training in the need for parties' consent at all times to the arbitral process. It may transpire that the arbitrator is not qualified under Regulation 67B. That regulation provides as follows –

> For the definition of *arbitrator* in section 10M of the Act, a person meets the requirements for an arbitrator if:
>
> (a) the person is a legal practitioner; and
>
> (b) either:
>
> (i) the person is accredited as a family law specialist by a State or Territory legal professional body; or
>
> (ii) the person has practised as a legal practitioner for at least 5 years and at least 25% of the work done by the person in that time was in relation to family law matters; and
>
> (c) the person has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators; and

[11] Frank D. Emerson, *History of Arbitration Practice and Law* (1970) 19(1) Cleveland State Law Review 155, Derek Roebuck, *Sources for the History of Arbitration: A Bibliographical Introduction* (1998) 14(3) Arbitration International 237, William G. Horton, *A Brief History of Arbitration* (2017) 47(1) Advocates' Quarterly 12, Maria Lucia Passador, *Challenging Arbitration: How Can Its History Inform Its Current (E-)Practice* (2017) 24(2) Willamette Journal of International Law and Dispute Resolution 233 and Daniel Centner & Megan Ford, *A Brief History of Arbitration* (2019) 48(4) The Brief 58.

(d) the person's name is included in a list, kept by the Law Council of Australia or by a body nominated by the Law Council of Australia, of legal practitioners who are prepared to provide arbitration services under the Act.

Going beyond the initial reference to arbitration thereby invalidating the arbitral process

34. Section 13E provides in effect that a proceeding under Part VIII or one under Part VIIIAB (but not a Part VIIIAB financial agreement proceeding) may be referred to arbitration, in whole or in part. Parenting cases or cases about child support are not amenable to arbitration.

35. In the ongoing management of the National Arbitration List, whenever an order is made (whether by a judge or a registrar) for the entry of a proceeding into the National Arbitration List, it is the practice of the list to list the proceeding for directions before me within a week or thereabouts. At the first return, a discussion is undertaken about –

a) the nature of the proceeding;

b) whether the whole or part only of the proceeding is to be arbitrated;

c) the identity of the arbitrator and therefore his or her status as a qualified arbitrator under Regulation 67B;

d) whether the parties have executed, and if so the details of, the arbitration agreement;

e) the date on which the first preliminary conference in the arbitration will take place; and

f) the date for the hearing of the arbitration, it being my requirement that the arbitration must be concluded and the award published between four and six months from the date of entry of the proceeding into the National Arbitration List.

36. A reading of the provisions of the *Family Law Act* governing arbitration reveals the intention of Parliament to encourage arbitration as a private means of dispute resolution in a prescribed category of case. Once enlivened, the arbitration provisions prescribe that the parties will conduct the arbitration of their defined dispute in private and confidentially. In the running of the arbitration, the court will only learn of the details of the arbitration if one party seeks directions under s 13F. If the parties resolve their dispute while in arbitration, the court will only learn of the upshot of their resolution when the parties bring in minutes for approval under s 79 or under s 90SM.

37. Once an arbitral award is published, the court learns for the first time about the upshot of the arbitration upon a party seeking registration of the award. At that time, the court is invited to stamp its imprimatur upon the arbitral award. Until

that time, the court knows only that arbitration is underway, the arbitration otherwise being private and confidential. In order for the court to exercise any jurisdiction over the arbitral award, the award must first be recognised by the court upon registration. Only upon registration, may the court proceed to address challenges to the award as are prescribed by s 13K(2)(a) – (d).

38. Once the award is registered, debates can unfold about setting aside the award. But unless and until the award is registered no debate can be entertained about the award.

The standard of proof to be discharged on the objection to registration

39. During debate I raised the standard of proof against which I was to assess whether the "*reason*" advanced for refusing to register the award had been made out. It was argued that the relevant standard was commensurate to that in *Briginshaw v Briginshaw*.[12] To my way of thinking whether or not to register an arbitral award did not call for persuasion of the sort canvassed in *Briginshaw*. The ordinary civil standard applies, namely balance of probabilities.

40. There is nothing in the legislation or in the subordinate legislation governing arbitrations under the *Family Law Act* concerning the standard of proof that the applicant for registration must discharge nor is there anything concerning the standard of proof that the party opposing registration of the arbitral award must discharge.

OBJECTIONS TO REGISTRATION IN THIS CASE

First reason alleged by the respondent

41. The first reason given was as follows –

> *The arbitrator allowed for improper questioning by the applicant's counsel over extensive periods. Applicants* (sic) *counsel was allowed to belittle witnesses.*

42. In support of this reason, counsel for the respondent contended that on several occasions during the respondent's cross-examination counsel for the applicant behaved aggressively towards one of the respondent's witnesses yet the arbitrator did not intervene. The respondent's counsel in written submissions characterised the conduct of the applicant's counsel when cross-examining the respondent's witness as "*attacking the witness in a rude fashion*" and "*counsel was yelling at the witness*". Counsel for the respondent submitted that the arbitrator should have, but failed to, intervene, inferentially to prevent the respondent from being subjected to aggressive behaviour.

[12] (1938) 60 CLR 336.

43. On behalf of the applicant several contentions were raised in response. They were –

a) no objection was raised at the time by the respondent's legal representative;

b) a cross-examiner is entitled to pursue a witness who provides a non-responsive answer to a question put in cross-examination;

c) the respondent did not identify any prejudice that the respondent suffered; and

d) no evidence was adduced that the arbitrator failed to control the proceeding.

44. This reason addressed matters pertinent to a post-registration challenge. If valid, they can be argued once the award is registered. They do not represent a valid reason why the award should not be registered.

Second reason

45. The respondent alleged that the arbitrator was unnecessarily silent during the whole of the arbitration and that the arbitrator made no attempt to constrain counsel for the applicant, relying on a decision of the Supreme Court of Victoria in *AJH Lawyers Pty Ltd v Careri*[13] to support the proposition that judicial officers are entitled to manage the hearing and require a party to move on to another point.

46. As with the first reason, the purported second reason addressed matters pertinent to a post-registration challenge to the award. This reason did not raise a matter addressing whether the arbitration was void *ab initio*. If valid, this ground can be debated in relation to an application under s 13K(2).

Third reason

47. The respondent asserted as her third reason why the arbitral award should not be registered that "*the arbitrator gave the applicant effectively unlimited time*."

48. At its core this third reason seemed to amount to the respondent's contention that the entire arbitration spanned three days and that almost the entirety of that three day period was consumed by the applicant's counsel cross-examining the respondent. The respondent's counsel contended in his written submissions before me that the arbitrator made no attempt to control time limits.

49. This alleged reason did not go to an issue that might have the effect of rendering the arbitration void *ab initio*. Instead, it addressed matters subsequent to registration as it sought to agitate a ground to set aside the award under s 13K(2).

[13] (2011) 34 VR 236 (at [25]).

Fourth reason

50. The respondent complained that the arbitrator allowed into evidence information about the incarceration of her son. She submitted the arbitrator failed to control the arbitration by allowing that evidence into the hearing.

51. The applicant submitted that evidence of the incarceration of the respondent's son was in fact relevant. The applicant further submitted –

    a) such evidence was adduced without objection;

    b) the respondent herself introduced evidence of the incarceration of her son; and

    c) the respondent addressed the issue in her own final address.

52. It must not be forgotten that the parties agreed that the arbitrator was empowered to inform himself of such matters as the arbitrator considered appropriate.

53. In my view, the alleged fourth reason did not involve agitating a matter that bore upon whether the arbitration was void *ab initio*. Instead, the issue raised in the alleged fourth reason might, if valid, support a challenge to the award under s 13K(2).

Fifth reason

54. The respondent asserted that the arbitrator made a finding at paragraph 166 of the arbitral award to the effect that the respondent aided in certain illegal conduct, namely, the applicant's obtaining of Centrelink benefits to which he was not entitled.

55. In paragraph 152 of the award the arbitrator explained the significance of the Centrelink evidence. The arbitrator took the view that the evidence concerning the receipt and application of the Centrelink payments was further evidence of the existence and duration of the de facto relationship. Paragraphs 165 and 166 were in the following terms –

> 165. In other words, at the time the application was completed I accept that the parties were in a relationship different from the one represented in the application and both parties were involved in the completion of the application.
>
> 166. Whilst the Applicant signed the application any illegality was perpetrated by both of them or with respect to the Respondent she at least aided in the illegal conduct.

56. Again, this so-called reason does not address a fact by which the agreement may be declared void *ab initio*. If this so-called reason is valid, it could be prayed in aid of a challenge to the award under s 13K(2).

Sixth reason

57. The sixth reason urged by the respondent for not registering the arbitral award was a submission. It was as follows –

> 6. *Arbitrator did not give appropriate weight to the litigious attitudes of the Applicant.*
>
> It is clear that the applicant has an appetite for free or easy money. His appetite started with his application for government funds through Centrelink, it continued through his car crash claim, and continues into this proceeding.

58. This reason, as alleged, does not raise a matter capable of rendering the arbitration void *ab initio*. If valid, it may be relevant to an application under s 13K(2).

Seventh reason – using the words "*former matrimonial home*" in the award

59. The same comments apply in relation to the seventh reason as apply to the sixth.

Eighth reason – the arbitrator's use of the phrase "*by and large*"

60. I make the same comments in relation to the eighth reason as have been made in relation to the sixth and seventh reasons.

Ninth reason

61. At its core, the respondent seemed to be asserting that the arbitrator mentioned the respondent's affidavits being replete with vituperative and ill-considered conclusions whereas the arbitrator made no similar comments about the applicant's affidavit material.

62. The applicant submitted that the arbitrator was required to make findings of fact covering 26 years where those facts were in large measure contested.

63. Once again, if any validity attended this so-called reason, it may be called in aid to support a challenge to the award by the respondent under s 13K(2). However, it does not raise a matter pursuant to which the award could be declared void *ab initio*.

Tenth reason – colourful language

64. The respondent was critical of the arbitrator describing the respondent as having a manipulative nature who would say anything that suited her purposes.

65. The applicant submitted that those findings as expressed by the arbitrator were open. Counsel for the applicant embraced the reasoning in certain writings on arbitral awards.[14]

66. I make the same observation here as I made in relation to the ninth reason.

Eleventh reason – "*smart and resourceful people*"

67. The arbitrator observed that the respondent was a "*smart and resourceful person*" whose brother was a professional and whose sister worked for a Government Department and that it would have been easy for the respondent to have obtained the assistance she had in 1992. The respondent challenged that. That is not a reason for refusing to register the award as that reason does not enliven a consideration of whether the arbitration is void *ab initio*. If valid, the respondent could rely on the so-called eleventh reason in any challenge under s 13K(2).

Twelfth reason – "*I would not put it past her*"

68. The respondent impugned paragraph 47 of the award. It was as follows –

> 47. Although I am unable to make findings to this extent, I would not put it past her to have sought to enlist or at least influenced her witnesses to be sparse with the truth and indeed to bend it to her ends.

69. Her counsel submitted that "there never has been a standard of proof of "*I would not put it past her*"".

70. Aside from the use of that phrase, counsel for the applicant referred to *Briginshaw v Briginshaw*[15] and to s 140 of the *Evidence Act*. He submitted further as follows –

> 40. The respondent does not appear to challenge the substance of any of the evidence on which the arbitrator made his findings against the respondent. There was unchallenged documentary evidence before the arbitrator establishing that the respondent had engaged in a course of conduct to mislead the court and the applicant as to her financial circumstances (see for example paragraph 150-162 of the applicant's submissions to the arbitrator – annexure "J" of Ms C's affidavit). It was open to the arbitrator to be "reasonably satisfied" as to the respondent's credibility based on the documentary and oral evidence before him.

71. As has been recorded above, a "*reason*" for the purposes of Regulation 67Q will be one that renders the arbitration void *ab initio*. This was not such a reason.

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[14] Mr Singh referred to my article – Dr Josh Wilson QC, *Adequate Arbitral Reasons After Westport – Has the Tension Been Resolved to Any Real Degree?* (2015) Resolution Institute 9.
[15] (1938) 60 CLR 336.

Thirteenth reason – alleged internal inconsistency in the award

72. The respondent cited three paragraphs of the award she said were inconsistent with one another. In the first the arbitrator took the view the respondent was unreliable. In the second the arbitrator stated he did not make a finding on point but that he would not put it past the respondent to do certain things. In the third the arbitrator stated he accepted the applicant's account.

73. It was argued on behalf of the applicant that there was no inconsistency. To the contrary – each revealed a path of reasoning to the effect that the arbitrator regarded the applicant as a credible witness but not the respondent.

74. To my mind, this reason addressed an issue post-registration and did not raise a matter by which the arbitration could be declared void *ab initio*.

Fourteenth reason – bias against the respondent

75. The respondent seemed to contend that the arbitrator's conclusions in relation to the unreliability in the respondent's version of the evidence revealed a bias against her. The applicant argued that the arbitrator's conclusions about credit cannot amount to bias.

76. In order to make out this reason, a detailed debate would need to unfold concerning High Court authorities such as *Re JRL; Ex parte CJL*,[16] *Johnson v Johnson*,[17] *Ebner v Official Trustee in Bankruptcy*,[18] *Michael Wilson & Partners Ltd v Nicholls*[19] and *Isbester v Knox City Council*.[20]

77. But it seems to me this reason does not postulate a basis for contending the arbitration is void *ab initio*. If anything, it raises s 13K(2) issues.

Fifteenth reason – so-called timeline

78. The respondent sought a rehearing arguing that no time would be lost in adopting that approach. In reply, the applicant submitted as follows –

> 51. This submission is incorrect. The arbitrator has determined all major issues in dispute. All that is left is to determine the adjustment to be made of the property interests of the parties. This could well be done by written submissions given that it will be determined on the same evidence as that that was before the arbitrator.
>
> 52. The respondent's proposed course - that a judge (who did not have the benefit of observing the witnesses) re-determine the entire issue of whether a de facto relationship existed between 1990 and 2016 - is the very thing that the arbitration regime has been set up to avoid.

[16] (1986) 161 CLR 342
[17] (2000) 201 CLR 488.
[18] (2000) 205 CLR 337.
[19] (2011) 244 CLR 427.
[20] (2015) 255 CLR 135.

79. This reason does not seek to impugn the arbitration *ab initio*. It is not therefore within the purview of Regulation 67Q.

CONCLUSION

80. All reasons for not registering the award failed. The orders I make are as follows –

(1) pursuant to reg 67Q(5) of the *Family Law Regulations* and s 13H of the *Family Law Act* the arbitral award of Heinrich Moser made on 28 October 2020 be and is hereby registered; and

(2) the arbitral award that has by paragraph 1 of these orders been registered has, pursuant to s 13H(2) of the *Family Law Act*, effect as if it is a decree made by this Honourable Court.

I certify that the preceding eighty (80) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Wilson delivered on 12 February 2021.

Associate:

Date: 12 February 2021