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National Arbitration List – A Practical Look At The Last Two Years

The Hon Justice Josh Wilson*

Introduction

In late 2020 the Chief Justice of the (then) Family Court of Australia inaugurated the National Arbitration List (“NAL”).

Arbitration has appeared in the *Family Law Act 1975* (Cth) (“*Family Law Act*”) since Division 4 of Part II of the Act was inserted in 2006.¹ Yet attempts prior to 2020 to invigorate a vibrant and viable arbitration regime under the *Family Law Act* were mostly unsuccessful.

Prior to the commencement of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), at a time when the Family Court of Australia still existed as did the Federal Circuit Court of Australia (“FCCA”), Alstergren CJ² conceived of a proposal for the NAL to be administrated by a judge of the Family Court in respect of NAL cases originally commenced in that court, as well as by a judge of the FCCA in respect of NAL cases originally commenced in the FCCA.

Since the inauguration of the NAL, only one appeal has been heard in an appeal court.³ Further, since the resignation of his Honour Judge Harman, all NAL cases are now controlled by me in Division 1 of the Federal Circuit and Family Court of Australia, sometimes pursuant to an order made under s 149(1) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) in Division 2 transferring the proceeding to Division 1.

Judicial registrars do not deal with cases in the NAL. Since 2021, all NAL applications have been dealt with in Division 1 by me.

* The Honourable Justice Wilson KC, LL.M., PhD, Professor of Law Deakin University, Justice of the Federal Circuit and Family Court of Australia (Division 1). Speech delivered to the Resolution Institute Event on 28 September 2022. The author gratefully acknowledges the assistance given researching and preparing this paper by Deanna Ficatas and Jonathan Heard.

¹ No 46 of 2006, Schedule 4 Part 3 inserted Division 4 of Part II of the *Family Law Act 1975* (Cth).

² Then in his Honour’s dual capacity as Chief Justice of the Family Court of Australia and as Chief Judge of the Federal Circuit Court of Australia.

³ *Lasso & Malaka* [2022] FedCFamC1A 130.

Family Law Arbitration is a Code

The provisions of the *Family Law Act* relating to arbitration were at one time thought to import into family law jurisprudence the whole gamut of the general law relating to arbitration, including aspects of international commercial arbitration.⁴ That concept was despatched in *Griffiths & Griffiths*,⁵ overruling *Braddon v Braddon*.⁶

Arbitration under the *Family Law Act* proceeds under statutory provisions that are to be taken to be a codification of all relevant principles. I canvassed that in *Goh v Ren*.⁷

An abundance of authority speaks in highly supportive terms in relation to arbitration as a method of dispute resolution pursuant to which parties are held to their bargain of referring their disputes to a person appointed by them to hear and determine their disputes outside the framework of a curial determination. This concept was addressed by me in some little detail in *Goh v Ren*,⁸ calling in aid the decision of the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.⁹ It has been said that the approach of Australian courts towards arbitration reflects a balancing act between minimum intervention in arbitration and appropriate curial support for arbitration.¹⁰

While it is true that Australian courts generally support arbitration, in the specific context of family law arbitration, mechanisms exist in s 13F to ensure parties to arbitration retain prompt access to the court to enable the NAL judge to provide directions to ensure the efficient conduct of arbitrations.¹¹

Consonant with general law principles relating to arbitration, parties' agreement to submit their dispute to arbitration retains paramount importance. Even if both parties earlier consented to an order being made under s 13E referring their dispute to the determination of an arbitrator,¹² the withdrawal of that consent at any later time jeopardises the ongoing arbitration itself.¹³ The rationale for that is self-evident, including –

⁴ *Braddon v Braddon* (2018) 59 FamLR 234.

⁵ [2022] FedCFamC1F 219 (6 May 2022).

⁶ (2018) 59 FamLR 234.

⁷ (2020) 61 Fam LR 508.

⁸ *Ibid*.

⁹ (2013) 251 CLR 533.

¹⁰ Chief Justice James Allsop AO and Justice Clyde Croft, 'The Role of the Courts in Australia's Arbitration Regime' [2015] FedJSchol 25.

¹¹ *Family Law Act 1975* s 13F.

¹² *Ibid* s13E.

¹³ *Olsen & Rich* [2022] FedCFamC1F 324 see also Frank D Emerson, 'History of Arbitration Practice and Law' (1970) 19 *Cleveland State Law Review* 155, Derek Roebuck, 'Sources for the History of Arbitration: A Bibliographical Introduction' (1998) 14 *Arbitration International* 237, William G Horton, 'A Brief History of Arbitration' (2017) 47 *Advocates' Quarterly* 12, Maria Lucia Passador, 'Challenging Arbitration: How Can its History Inform its Current (E-) Practice' (2017) 24 *Willamette Journal of International Law and Dispute Resolution* 233 and Daniel Centner and Megan Ford, 'A Brief History of Arbitration' (2019) 48 *The Brief* 58.

- (a) absent ongoing consent, parties will not participate in the arbitral hearing or in its antecedent procedures;
- (b) the award, unless delivered consensually, is unlikely to have the parties' support in terms of its enforceability; and
- (c) without ongoing consent of the parties, the award may be challenged even to the point of successfully opposing registration.¹⁴

Withdrawal of consent to arbitration is a serious issue because it destabilises the consent underpinning the whole arbitration regime. A party might withdraw consent if that party senses that the arbitral hearing is not going well. A party's on-again-off-again consent to arbitration has the capacity to throw the arbitration into complete chaos. It is highly debatable whether a party may be amenable to an order for specific performance of the arbitration agreement in circumstances where that party once consented then withdraws his, her or its consent to the arbitration. It is equally debatable whether a party may be estopped from denying a representation that it was earlier amenable to arbitration once that party's consent is subsequently withdrawn. Those propositions have yet to be tested or determined by me.

Sanctions for vacillating on issues of consent probably are best grounded in costs orders made under s 117(2A)(c).¹⁵

The Philosophy of Arbitration

Arbitration as an alternative to curial dispute resolution is of thousands of years' longevity, early examples being rabbinical arbitrations. Others include –

- (a) the seventeenth-century arbitrations conducted throughout Europe;
- (b) more recently, domestic arbitrations;
- (c) for several hundreds of years, commercial arbitrations;
- (d) international commercial arbitrations;
- (e) investment treaty arbitrations; and
- (f) energy charter arbitrations.

In each of those arbitrations, the underlying philosophy is the taking of the parties' dispute out of the control of the court to the control of the parties' chosen arbitrator for determination.

In the context of family law, this is not an agreement to oust the jurisdiction of the court. The advantages of family law arbitration include –

- (a) speed;
- (b) cost efficiencies;

¹⁴ *Entezam & Devi* (2021) 62 Fam LR 637.

¹⁵ *Family Law Act 1975* s 117(2A)(c).

- (c) privacy;
- (d) relative informality; and
- (e) obtaining an enforceable award much faster than a judgment from a court.

What Can Be Arbitrated

Arbitration recognised under the *Family Law Act* falls into two broad categories. In the first is an arbitration ordered by consent in pursuance of s 13E of the Act. In the second is what has come to be described by the term “financial arbitration” or “private arbitration”. Parenting cases are not amenable to arbitration under the *Family Law Act* nor are child assessment cases. All aspects of applications for orders altering parties’ property interests can be the subject of arbitration, including matters relating to superannuation splitting as well as costs.

Conceptually, an order made under s 13E of the *Family Law Act* is more readily comprehensible than is an order under s 10L in terms of precisely what is the subject of arbitration.¹⁶ Mostly, an order made under s 13E has the entirety of the proceeding, including costs, referred to arbitration for the adjudication of the arbitrator.¹⁷ By the time such an order is made an extensive array of affidavit material has been generally prepared by the parties by which the metes and bounds of the controversy between them can be ascertained. That controversy, as defined by the parties’ affidavits including any formal initiating application and response, becomes the subject matter of the arbitration.

Financial arbitrations constituted pursuant to s 10L are different.¹⁸ That section permits parties to arbitrate even in circumstances where no proceeding in the court has been commenced. In those arbitrations, the need for precision identifying what is being referred to arbitration is all the more acute because at the point of agreeing to arbitrate usually no documents defining the scope of the arbitration have been prepared *vis-à-vis* the parties. At all events, while comparatively few in number, financial arbitrations do feature (albeit in modest proportions) in cases dealt with in the NAL.

The Arbitrator

In family law arbitration, only persons certified by the Australian Institute of Family Law

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid s 10L.

Arbitrators and Mediators (“AIFLAM”) are eligible for appointment as arbitrators.¹⁹ So, even a former High Court Justice who may be an international commercial arbitrator but who is not certified as an arbitrator by AIFLAM is not eligible to be an arbitrator under the *Family Law Act*. Those AIFLAM certified arbitrators are of varying levels of seniority and expense, ranging from highly experienced King’s Counsel and Senior Counsel, from experienced senior solicitors to junior solicitors and from experienced junior counsel to relatively new junior counsel. As with other aspects of the law, the more talented the arbitrator, the more he or she is in high demand.

That brings me to what I expect of arbitrators.

As I held in *Seldon & Seldon*,²⁰ while not an immutable rule, in the efficient conduct of cases in the NAL, I require cases to be determined by the arbitrator within between four and six months of the case’s entry into the NAL. In very few (but sadly some) arbitrations, the arbitrator has expressed unhappiness at being required to conduct his or her task with such expedition and dispatch. In practical terms, cases usually reach me for first return in the NAL within a week of the making of the orders referring the case to arbitration under s 13E.²¹ On the first return of the case in the NAL I enquire when the parties have locked in their arbitral hearing date. Recognising that my practice is to require the publication of the award and its registration in no longer than six months, the hearing date is usually within four months of the order made under s 13E.²² If a case is before me in, say, February, I expect that any debate about registration of the award will be held in, say, June or July. For cases entered into the NAL after, say, August in any calendar year that presents complications because court closures and summer vacations usually mean the case does not return for my consideration until February or March of the following year. For cases that enter the NAL in and after September, the length between entry into the list and registration of the award is necessarily longer than four months.

The requirement that the award be published within four to six months of entry into the NAL presents something of a conundrum that calls for the performance of a balancing act. One consideration relates to the convenience of the arbitrator. Usually retired judges and senior

¹⁹ That is yet a further feature differentiating family law arbitrations from commercial arbitrations, whether domestic or international, in which trade arbitrators are routinely appointed by reason of the arbitrator’s specialist knowledge of the subject matter of the arbitration.

²⁰ [2020] FamCA 762.

²¹ *Family Law Act* s 13E.

²² *Ibid.*

practitioners are selected to be arbitrators and they are in high demand. Frequently they offer parties hearing dates that do not even have the arbitration commencing inside of six months, let alone concluding in the usual four to six months. In the running of the NAL I discourage that. Sometimes I flatly reject a proposal for the arbitration to be conducted in such a leisurely manner. Instead I require the parties to select a more available arbitrator. While I recognise that parties should be free to appoint their chosen arbitrator, who may even be a busy highly credentialed arbitrator, the litigants' interests are not well served if they are required to wait for lengthy periods just to get before a particular arbitrator. That is antithetical to the philosophy of expedition underpinning the NAL. When confronted with parties informing me on the first return of the proceeding after its entry into the NAL that they have chosen, say, some former judge who only has availability seven months from that day, I usually refuse to make the order appointing their busy arbitrator and I direct instead that the parties choose someone else whose availability is more aligned with the imperatives underpinning the highly successful workings of the NAL.

In days gone by, it often happened that I fixed the case to return before me for the purpose of registering the award on a certain date yet privately, and uncommunicated to me, the parties and the arbitrator adjourned their arbitral hearing well into the future, way beyond the expected four to six months. Then, when the case should have been before me for registration of the award, the parties informed me that the case had not yet begun and the arbitrator had taken it upon himself or herself to recalibrate all timing with the consequence that the case was not determined by the arbitrator until much later than is consistent with the philosophy of the NAL. When it became apparent that certain arbitrators engaged in that conduct, I took steps to arrest it.

To avoid a repeat of that outcome, I now fix the return of the case after arbitration but I have my associates contact the parties a few days before the hearing date as indicated to me. That ensures the hearing will go ahead as foreshadowed. If the parties tell me, for whatever reason, the arbitration will not go ahead, then I require the parties to appear before me on the date otherwise fixed for the hearing to explain the problem. In one case in which I adopted that stance the arbitrator became so indignant that he wrote to me privately threatening to apply to the court about my requiring him to hear the case more expeditiously. Aside from the fact that any such application would have been to me, precisely how he had standing as the arbitrator to make the approach he foreshadowed was not well considered. In the end he recalibrated

the resumption date of the arbitration and a repeat of that episode has not since occurred.

The NAL is a tightly judge-controlled list. History shows in undeniable terms that success is achieved by that approach. One need only look to the incredible results achieved by that approach when adopted by Rogers J as the Commercial List Judge in the New South Wales Supreme Court in the 1980s and his Victorian counterpart, Marks J, in the same epoch. Nowadays Hammerschlag J adopts the same approach. The Federal Court judges do likewise. I read every award and reasons. Sometimes, if a logjam in an arbitration's orderly running emerges, it can be relieved by directions under s 13F.²³ Occasionally it becomes apparent that one party has withdrawn consent to arbitrate in which case I consider terminating the arbitration, removing the case from the NAL and referring the case for fixing for trial before some other judge.²⁴ That is a bad outcome for the parties as the benefit of speed conferred by the NAL is thereby lost. Promptitude in handing down arbitral reasons is required. Only then can the award be registered.

The regulations provide for the precise mechanisms for making an award. One award only is prescribed by the regulations. Three versions of the same award is impermissible.²⁵

Conduct of the Parties' Representatives

In the recent case of *Wright & Rebane*,²⁶ I addressed the need for public confidence in the integrity of the system of arbitration embedded in the *Family Law Act*, to the following effect

—

... family law arbitrations have in recent times assumed mainstream acceptance as a cost effective and time efficient method of resolving family law property disputes and to do so in a manner that takes the litigation out of the overburdened lists of cases awaiting trial before judges.²⁷

While recognising that arbitration is adversarial, in the lead up to the arbitral hearing parties and their legal representatives are nevertheless required to behave co-operatively in getting the case to the arbitral hearing. That means parties and their legal representatives must comply with directions given by the arbitrator, especially in relation to disclosure.²⁸ In *Paviello &*

²³ *Family Law Act 1975*.

²⁴ *Olsen & Rich* [2022] FedCFamC1F 324.

²⁵ *Wright v Rebane* (2021) 64 Fam LR 287.

²⁶ *Ibid*.

²⁷ *Ibid* 9.

²⁸ The duties imposed by disclosure as surveyed in *Bacall & Zagar* [2020] FamCA 350 apply with full force and effect to arbitrations.

Paviello I held as follows²⁹ –

At its core, ground 1 was concerned with the consequences of the arbitrator's conclusion about material non-disclosure. The review applicant argued that material non-disclosure “should have been as to the ultimate just and equitable adjustment pursuant to s 79(2) of the Act”. The review applicant contended that rather than doing that, the arbitrator considered that non-disclosure enlivened s 75(2)(o) of the Act. The wife argued that authorities such as *Black v Kellner*,³⁰ *In the Marriage of Briese*,³¹ *Oriolo v Oriolo*,³² *In the Marriage of Weir*,³³ and others contain stipulations about the correct approach to be adopted when one party has been derelict in his or her compliance with the duty of disclosure. In *Bacall & Zagar*,³⁴ I surveyed the learning in those authorities between the years 1985 and 2020. It is useful to record some of the conclusions set out in that decision –

- (a) rule 13.04 of the *Family Law Rules*, in operation in the lead up to the commencement of the arbitration in this case, imposed a duty of disclosure;
- (b) that duty can be traced back to 19th century equitable principles;³⁵
- (c) the duty is owed to the court as well as to the parties to the proceeding;³⁶
- (d) full and frank disclosure of all material facts is a fundamental requirement in financial matters;³⁷
- (e) a party to a financial proceeding has a duty to make full disclosure of his or her financial affairs;³⁸
- (f) the duty to disclosure is absolute;³⁹
- (g) the duty is crucial to the functioning of courts administering the *Family Law Act*;⁴⁰
- (h) full and frank disclosure of financial matters between the parties is basic to the process of the court and is one of the elements of the *Family Law Act*;⁴¹
- (i) parties are expected to cooperate in the conduct of the proceeding in order to bring about an early and prompt conclusion with a minimum of expense;⁴²

²⁹ [2022] FedCFamC1F 592, 7.

³⁰ (1992) 15 Fam LR 343.

³¹ (1985) 10 Fam LR 642.

³² (1985) 10 Fam LR 665.

³³ (1992) 16 Fam LR 154.

³⁴ [2020] FamCA 350.

³⁵ *Flight v Robinson* (1844) 50 ER 9.

³⁶ *Waterman v Waterman* [2017] FamCAFC 23.

³⁷ *Black v Kellner* (1992) 15 Fam LR 343, *In the Marriage of Giunti* (1986) 11 Fam LR 160 and *In the Marriage of Mezzacappa* (1987) 11 Fam LR 957.

³⁸ *In the Marriage of Weir* (1992) 16 Fam LR 154.

³⁹ *Kannis v Kannis* (2002) 30 Fam LR 83.

⁴⁰ *In the Marriage of Morrison* (1994) 18 Fam LR 519.

⁴¹ *In the Marriage of Suiker* (1993) 17 Fam LR 236.

⁴² *In the Marriage of Marinko* (1983) 8 Fam LR 849.

- (j) the duty involves full and frank disclosure in a timely manner;⁴³
- (k) if a party breaches the duty of full and frank disclosure as outlined above, the uppermost limit of what can be ordered to be transferred to one party in a s 79 application is the whole of the ascertained property of the parties;⁴⁴
- (l) it is not open to a party who has failed to fulfil the duty of full and frank disclosure to rely on that failure so as to prevent the making of orders against the party in default;⁴⁵
- (m) any failure to disclose relevant financial information may lead a court to draw inferences against the person who failed to disclose the relevant financial information;⁴⁶
- (n) where there is clear evidence of non-disclosure the court should not be unduly cautious about making findings in favour of the innocent party;⁴⁷
- (o) once there is sufficient evidence to support a finding that a party has not made full and frank disclosure, the court has jurisdiction to make orders in relation to unidentified and undisclosed property;⁴⁸
- (p) the duty to disclose is absolute and it is beside the point whether the non-disclosure was wilful, accidental, the result of misfeasance or nonfeasance;⁴⁹ and
- (q) in the case of deliberate non-disclosure, the court is entitled to draw inferences against the non-disclosing party.⁵⁰

Even without prescriptive directions concerning disclosure the duty to give proper disclosure is exhaustive. Parties and their legal practitioners should not take unmeritorious points or behave less courteously or efficiently merely because the case is not being heard before a judge. The arbitrator's fees should be paid in strict conformity with directions or otherwise in accordance with the arbitration agreement. The arbitrator should be given the benefit of diligent submissions, carefully researched as to fact and law.

Nevertheless, the adversarial nature of arbitration equates to that between parties in a curial

⁴³ *In the Marriage of Briesse* (1985) 10 Fam LR 642, *Waterman & Waterman* [2017] FamCAFC 23, *In the Marriage of Morrison* (1994) 18 Fam LR 519 and *In the Marriage of Suiker* (1993) 17 Fam LR 236.

⁴⁴ *Monte & Monte* [1986] FamCA 1.

⁴⁵ *In the Marriage of Giunti* (1986) 11 Fam LR 160, *Black v Kellner* (1992) 15 Fam LR 343 and *Oriolo v Oriolo* (1985) 10 Fam LR 665.

⁴⁶ *In the Marriage of Stein* (1986) 11 Fam LR 353.

⁴⁷ *In the Marriage of Weir* (1992) 16 Fam LR 154 and *Monte & Monte* [1986] FamCA 1.

⁴⁸ *Ibid.*

⁴⁹ *Chang v Su* (2002) 29 Fam LR 406, *In the Marriage of Weir* (1992) 16 Fam LR 154 and *Kannis v Kannis* (2002) 30 Fam LR 83.

⁵⁰ *In the Marriage of Stein* (1986) 11 Fam LR 353, *In the Marriage of Mezzacappa* (1987) 11 Fam LR 957, *In the Marriage of Giunti* (1986) 11 Fam LR 160, *In the Marriage of Morrison* (1994) 18 Fam LR 519 and *Barker v Barker* (2007) 36 Fam LR 650.

dispute and an arbitrator's duty to fairly dispose of a case is no different to that of a judge. As Lord Wilberforce held in *Air Canada v Secretary of State for Trade* –

In a contest purely between one litigant and another ... the task of the court is to do, and be seen to be doing, justice between the parties ... There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.⁵¹

Once parties recognise that their case will be determined to finality through the arbitration process then they should approach the arbitration, not as a dummy run to some later court hearing, but as the true trial of their property dispute.

Registration of the Award

Unless and until the award is registered in accordance with s 13H of the *Family Law Act*, the court knows nothing about the arbitration, it being a private process immune from principles of open justice.⁵² Unless and until the award is registered, it is not enforceable. It is very much in the parties' interests to apply for the registration of the award with promptitude and in accordance with the time frame set out in the regulations. Only upon registration can the procedure, prescribed by s 13J and separately by s 13K be set in train.⁵³ There are very limited grounds to oppose the registration of the award. The leading authority on this point is *Entezam v Devi*.⁵⁴ Those practising in the field must be aware in very real detail of the prescriptions of that case.

Section 13H speaks of the award, once registered, taking effect as a decree of the court. The word "decree" is a defined term. The significance of the award being converted to a decree of the court upon registration cannot be understated. Not only is enforceability thereby enlivened but the award's status as a decree may bear upon the process in s 13J,⁵⁵ especially as to timing, although the issue has yet to be authoritatively determined.

A decree may be appealed (not reviewed) in accordance with the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) and a time limit applies to the

⁵¹ [1983] 2 AC 394, 438.

⁵² *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

⁵³ *Family Law Act* 1975 ss 13J and 13K.

⁵⁴ (2021) 62 Fam LR 637.

⁵⁵ *Family Law Act* 1975 s 13J.

commencement of any such appeal.⁵⁶ The relevant rule is 13.01(b).⁵⁷ Yet that rule does not include a review from a decision of an arbitrator under s 13J.⁵⁸ For that matter, the rule expressly provides that the rule does not apply to an appeal from an application to a judge for the review of a decision of a judicial registrar under chapter 14. So the argument goes, rule 13.03 provides that an appeal must be brought within 28 days after the order being appealed against was made. At first blush that would suggest a 28 day limitation period (from the date of registration of the award) may apply in any review application under s 13J.⁵⁹ Of course, the validity of that argument can only be made good if the 28 day period is actually applicable which in turn depends on whether rule 13.01 applies at all to an order under s 13H registering the award.⁶⁰ It is arguable that rule 13.01 does not apply to such an order.

Let it be assumed for the moment that rule 13.01 does not apply so as to prescribe a 28 day limitation period for the bringing of any review application.⁶¹ The result would be that no time limit applies within which a review applicant must bring the s 13J application.⁶² Whether that argument is correct has not yet been determined. Having regard to the prevalence of s 13J review applications, the debate will undoubtedly unfold soon enough.

Registration is relevant, among other things, mainly in respect of enforcement, as regulation 67S provides.⁶³

If no time limit applies to the commencement of a review application under s 13J and the time for doing so is at large, it may be arguable that a review applicant must bring the application within a reasonable time of registration.⁶⁴ By definition, a fact intensive examination is invoked in any such examination.

Challenging the Award

The remedies provided in s 13J on the one hand and s 13K on the other hand are quite different.⁶⁵ The family law arbitration regime does not make provision for appeal for error of law, as is found in appeals to the Full Court. To that end I have very real misgivings about the

⁵⁶ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

⁵⁷ *Ibid* r 13.01(b).

⁵⁸ *Family Law Act 1975* s 13J.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* s 13H.

⁶¹ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 13.01.

⁶² *Family Law Act 1975* s 13J.

⁶³ *Family Law Act 1975* regulation 67S.

⁶⁴ *Family Law Act 1975*.

⁶⁵ *Family Law Act 1975*.

validity of the reasons of Judge Harman in *Blanco v Blanco (No. 2)*.⁶⁶ In any event, that is a decision of what was then the Federal Circuit Court of Australia, which does not bind a Division 1 Judge.⁶⁷

In s 13J, provision is made for “review” of the award on “questions of law”. A “question of law” is not defined. The word “review” is well understood in the context of *de novo* review.⁶⁸ It will not have been overlooked that s 13J uses the word “review” rather than “appeal”. One would be entitled to think that such wording was reflective of a deliberate legislative intendment to introduce into s 13J a mechanism by which the NAL judge examines the arbitrator’s award against one or more “questions of law” posed by the review applicant. A creditable argument can be mounted that the proper construction of the “questions of law” in s 13J is akin to cases in the Supreme Court of Victoria to which an appeal from VCAT lies only on a question of law.⁶⁹ A survey of the authorities in relation to the phrase “question of law” in the Supreme Court of Victoria in appeals from VCAT reveals that the “question” is ordinarily expressed in an inquisitive manner such as “*did the tribunal err*” or “*is the tribunal’s decision attended by error*” or “*did the tribunal err in law by ...*”.⁷⁰ The authorities emphasise the distinction between error of law, question of law and question of fact. The distinction is important in statutory construction as well as in appeals for error of law.⁷¹ The distinction between a question of fact and question of law has been described by the High Court as a “vital distinction in many fields of law”.⁷² Context often influences, and in some instances determines, the distinction.⁷³ Writing extra-curricularly in 2013, the Hon. Justice Margaret Beazley AO posed the rhetorical question whether the distinction between a question of law and of fact was a question without an answer.⁷⁴

In *HIA Insurance Services Pty Ltd v Kostas*,⁷⁵ the New South Wales Court of Appeal held that whenever a process is called “appeal” it is important to identify the character of the appeal

⁶⁶ (2019) 60 Fam LR 80.

⁶⁷ *Hill v Zuda Pty Ltd* (2022) 96 ALJR 540.

⁶⁸ *Entezam & Devi (No 3)* [2021] FamCA 549, *Bakalov & Bakalov* [2021] FedCFamC1F 161 and *Beirne & Beirne (No 2)* [2022] FedCFamC1F 54.

⁶⁹ *Osland v Secretary, Department of Justice* (2010) 241 CLR 320 and *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2001) 207 CLR 72.

⁷⁰ *Osland v Secretary, Department of Justice* (2010) 241 CLR 320 and *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria* (2001) 207 CLR 72.

⁷¹ Justice Stephen Gageler, ‘What is a Question of Law’ (2014) 43 *Australian Taxation Review* 68.

⁷² *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394.

⁷³ *Da Costa v R* (1968) 118 CLR 186, 194 and *Attorney-General (NSW) v X* (2000) 49 NSWLR 653, [28].

⁷⁴ Justice Margaret Beazley AO, ‘The Distinction Between Questions of Fact and Law: A Question Without Answer?’ (Conference Paper, Land & Environment Court Conference, 24 May 2013).

⁷⁵ [2009] NSWCA 292.

and the powers of the court conducting it. That observation was not upset on appeal.

SECTION 13J

As already observed, the arbitration regime under the *Family Law Act* makes no provision for an appeal against an award of an arbitrator appointed by the court under s 13E or a private arbitration constituted under s 10L.

Instead, the arbitration provisions set out a judicial review procedure under s 13J on questions of law.

Judicial review takes many forms and is ordinarily acknowledged as being different from an appeal, as was held in *Kemper Reinsurance Co v Minister of Finance (Bermuda)*,⁷⁶ as was addressed by the plurality of the High Court in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria*.⁷⁷ There, the High Court held that the “relevant statutory provisions must govern.” Yet judicial review for the purposes of administrative law incorporates an enormous body of learning directed towards charting the metes and bounds of administrative decision making, wholly different to decision making in which an arbitrator appointed under the *Family Law Act* engages.

The use of the word “review” in s 13J is capable of misleading a reader into the belief that it equates to “review” used elsewhere in the *Family Law Act*, such as in the provisions referable to the review of a decision of a registrar. In that context, such a review has been held to mean a hearing *de novo*.⁷⁸ Having regard to the need to construe a statute in context, the context of a registrar dealing with a parenting issue, for example, is quite different to an arbitrator dealing with a s 79 application referred to the arbitrator by a judicial officer pursuant to s 13E.

The word “review” has been considered in a variety of contexts.⁷⁹ It is an altogether erroneous process of reasoning to employ the learning in relation to a particular word used in the context of one statutory provision in a wholly different statutory context.⁸⁰

⁷⁶ [1998] UKPC 22.

⁷⁷ (2002) 207 CLR 72s, [19].

⁷⁸ *Harris v Caladine* (1991) 172 CLR 84.

⁷⁹ For example, under the *Arbitration Act 1902* (NSW) in *Buckley v Bennell Design and Construction Pty Ltd* (1978) 140 CLR 1, under the Supreme Court of New South Wales Rules in *Super Pty Ltd v SJP Formwork Pty Ltd* (1992) 29 NSWLR 549 and *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631, under different rules of the Supreme Court of New South Wales governing referees appointed by the court in *Najjar v Haines* (1991) 25 NSWLR 224 and under the *Federal Court of Australia Act 1976* (Cth) in *CPB Contractors Pty Ltd v Celsus Pty Ltd (Formerly known as SA Health Partnership Nominees Pty Ltd)* (No 2) (2018) 268 FCR 590.

⁸⁰ *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, *McNamara (McGrath) v Consumer, Trader and Tenancy Tribunal*

Context must govern.

Given that the word “review” in s 13J must be examined in context, that invites an appreciation of Part IIIB Division 4 of the *Family Law Act*, entitled “Court’s role in relation to arbitration of disputes” in which s 13J is found.

The second reading speech⁸¹ offers very little insight into the operation of s 13J. The relevant provisions were as follows –

Section 13J Family Court or Federal Magistrates Court can review registered awards

254. Section 13J provides that a party to an award that has been registered in a court under section 13H may apply for a review of the award, on questions of law, by a judge of the Family Court or the Family Court of Western Australia, or by the Federal Magistrates Court.

255. On conducting such a review, the judge or the Federal Magistrates Court may determine all questions of law arising in relation to the arbitration and make any decrees that are considered appropriate.

256. Section 13J consolidates current sections 19F and 19FA of the Act (with relevant changes to terminology).

257. No substantive changes have been made to the arbitration provisions.

In context, arbitration in the family law justice system must be seen as being an alternative dispute resolution process by which parties’ s 79 applications may be determined. But it must not be overlooked that in the same way that the court may make orders under s 79 only if persuaded that it is just and equitable to do so, likewise in an arbitration under Part IIIB of the *Family Law Act* the arbitrator may only make orders under s 79 (or in the de facto equivalent) if persuaded that it is just and equitable to do so. In other words, even though the parties may have agreed that their property dispute is to be determined by an arbitrator rather than by a judge, the legal principles guiding the arbitrator are the same as those that guide a judge.

In those circumstances, the parties who appoint an arbitrator to determine their property proceeding cannot be taken to have agreed to applying anything but the very same legal principles that bind a judge in a proceeding in which parties seek orders for the alteration of

(2005) 221 CLR 646, *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 and *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259.

⁸¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2005 (Philip Ruddock, Attorney-General).

interests in property.

Accordingly, when the arbitrator publishes his or her award, a party dissatisfied with the result is entitled to seek curial intervention “on questions of law”, as s 13J prescribes.

So what, then, are the proper parameters of a “review” under s 13J on “questions of law”? It must be acknowledged that a distinction exists in the reported cases between “questions of law”, “questions of fact” and “mixed questions of fact and law”.

It seems to me that the “review” to which s 13J is directed must equate to a review of fact and law so as to determine whether the decision under review was correct on the material before the relevant body. Such a construction of “review” was postulated by Gavan Duffy CJ and Starke J in *Victorian Stevedoring & General Contracting Co. Pty Ltd v Dignan*.⁸² In the subsequent case of *Avon Downs Pty Ltd v Federal Commissioner of Taxation*⁸³ the process to be engaged in on a “review” was explained by Dixon J in the following terms –

13. But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.⁸⁴

In *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria*,⁸⁵ the plurality held that the legislation under consideration that spoke of appeal by leave was to be read as providing for the institution of a mechanism “in which the correctness of what the Tribunal has done can be challenged”.⁸⁶

⁸² (1931) 46 CLR 73, 85 and also Dixon J at 107 et seq.

⁸³ (1949) 78 CLR 353.

⁸⁴ Ibid 360.

⁸⁵ (2001) 207 CLR 72.

⁸⁶ Ibid [15], per Gaudron, Gummow, Hayne and Callinan JJ.

Stepping back from the minutiae of the word “review” and its proper construction in context, it seems to be that an absurd result would follow if parties to an arbitration of a s 79 application did not enjoy the same avenues for redress of the arbitrator’s decision as litigants to a curial proceeding enjoy from a decision of a trial judge concerning a s 79 application. It would be unthinkable that parliament intended to offer litigants the opportunity of the speedy determination of their disputes by arbitration yet at the same time curtail their remedies on review by reason of selecting arbitration as their chosen method of dispute resolution.

It seems entirely arguable that the “review” to which s 13J is directed equates to that canvassed above in *Dignan’s Case* and in *Avon Downs*. It must be kept in mind that the “review” postulated by s 13J is upon “questions of law”. A long line of cases has highlighted the distinction between “questions of law”, “questions of fact” and “questions of mixed fact and law”, as has already been observed. Other cases have held that exquisite precision is called for when formulating the question of law to be determined by the court.⁸⁷

The five-member Full Court of the Federal Court of Australia in *Haritos* held that a question expressed with such imprecise terms as “whether the Tribunal erred in law” will never be sufficient to transform what is in reality a question of fact into a question of law.⁸⁸

Interesting points have arisen several times of late involving questions concerning –

- (a) disclosure deficiencies;
- (b) percentage findings in s 79 determinations; and
- (c) whether the percentage finding was open in view of deficiencies in disclosure.

Substance, not form, will likely determine whether the review raises a question of law because the issue of whether or not a question of law is raised cannot be determined by the form of the questions themselves.⁸⁹ Legal matters for determination can nonetheless be distilled from the particulars supporting a ground of appeal, or relevantly here, of review.⁹⁰ In his Honour’s learned article, Justice Duncan Kerr wrote –

⁸⁷ See *Haritos v Commissioner of Taxation* (2015) 233 FCR 315, 341-342 (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

⁸⁸ Ibid.

⁸⁹ *Berry v Commissioner of Taxation* [2015] FCA 1244.

⁹⁰ Ibid.

It is not always easy to identify a question of law, yet the Court has repeatedly stressed the importance of stating the question or questions of law with precision, most recently in *Haritos*. The existence of a question of law is not just "a qualifying condition to ground the appeal", it is the very subject matter of the appeal (*TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*). An appeal "on a question of law" is an appeal limited to a question of law...⁹¹

In *Collector of Customs v Agfa-Gevaert Ltd*,⁹² the High Court examined the distinction between questions of fact and questions of law. The reasons of the plurality repay close examination. In *Kostas v HIA Insurance Services Pty Ltd*⁹³ the High Court dismissed an appeal from the New South Wales Court of Appeal in *HIA Insurance Services Pty Ltd v Kostas*⁹⁴ making no serious inroads into the reasoning of Spigelman CJ, Allsop P and Basten JA with the consequence that the Court of Appeal's reasons are to be taken as being definitive statements of principle. In that case, the relevant wording of the relevant legislative provision was "appeal ... against the decision" ... or "a question ... with respect to a matter of law." Self-evidently, that wording differs to that in s 13J. However, the court's treatment of the phrase "matter of law" is instructive and may very well be useful in the construction of the phrase "questions of law" as appears in s 13J. Yet unless and until parties to a s 13J review raise those issues and debate their parameters, thereby providing a foundation for a carefully reasoned judgment on point, the learning will remain undetermined.

Frequently, review applicants do not raise a proper question of law and instead express their disagreement with the outcome. Those review applications are easily detected for their deficiencies.

Adequacy of Reasons

In *Griffiths & Griffiths*⁹⁵ I examined the content of the requirement of adequacy of reasons. It is utile to recite the relevant passages –

- 53 But what is the test for adequate reasons in family law arbitrations?
- 54 To my way of thinking, the principles as set out below apply to arbitrations under the *Family Law Act*.
- 55 Australian family law arbitrators are required by the *Family Law*

⁹¹ Justice Duncan Kerr, 'What is a Question of Law Following *Haritos v Federal Commissioner of Taxation*' [2016] FedJSchol 18, [41].

⁹² (1996) 186 CLR 389, 394.

⁹³ (2010) 241 CLR 390.

⁹⁴ [2009] NSWCA 292.

⁹⁵ [2022] FedCFamC1F 219.

Regulations to be certified by the Australian Institute of Family Law Arbitrators and Mediators. Unlike in domestic commercial or international commercial arbitrations, trade arbitrators are not eligible for appointment pursuant to s 13E of the *Family Law Act*. In order to be certified as a family law arbitrator, the relevant person must demonstrate a high degree of competence in family law cases and a specified percentage of that person's annual practice must be in family law. Family law arbitrators hold themselves out for selection as arbitrator, at least in part, by reason of their expertise in family law. Put differently, it would be unthinkable that a person having no experience, training or practice in family law could be appointed as a family law arbitrator. The appointed arbitrator must comply with duties imposed on arbitrators under the *Family Law Regulations*. It must not be overlooked that in this case the arbitrator was an extremely experienced former judge of the Federal Circuit Court of Australia whose expertise in family law could not be doubted.

56 As for the principles concerning the adequacy of reasons, some important observations must be made. They include the following –

- (a) as was recently held by the Full Court in *Cantoni & Cantoni*,⁹⁶ the adequacy of the reasons vary with the circumstances of the case;⁹⁷
- (b) a failure to provide adequate reasons will itself constitute an error of law;⁹⁸
- (c) not every point raised in argument needs to be the subject of the reasons;⁹⁹ and
- (d) it is not necessary for a determination to be made on each and every item of disputed evidence so long as it is appropriately clear by inference, what facts are found.¹⁰⁰

57 In *Hunter Transport Accident Commission*,¹⁰¹ Nettle JA (as his Honour then was) provided a non-exhaustive list of indicators of valid reasons. They were –

- (a) the extent of the reasons will depend on the circumstances of the case;
- (b) the reasons should deal with the substantial points raised;
- (c) ordinarily that will include findings on material questions of fact and the evidence on which those findings are based;
- (d) reasons should provide an intelligent explanation of the

⁹⁶ [2022] FedCFamC1A 11.

⁹⁷ *Police Federation of Australia v Nixon* (2011) 198 FCR 267, [67].

⁹⁸ *Fleming v R* (1998) 197 CLR 250 and *Pettitt v Dunkley* [1971] NSWLR 376.

⁹⁹ *Shah & Akbarali v Barnet London Borough Council* [1983] 2 AC 309, 350 and *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378.

¹⁰⁰ *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386.

¹⁰¹ [2005] VSCA 1.

process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusions; and

- (e) if the judge has rejected evidence or material, the judge should refer to that evidence or material and explain why that evidence or material was rejected.

- 58 Those propositions apply to arbitrators.
- 59 The decision of Gray J in *Sun Alliance Insurance Ltd v Massoud*¹⁰² is cited frequently in this Court for the statement of principle about the adequacy of reasons. There, Gray J held that reasons will be inadequate if an appeal court is unable to ascertain the reasoning on which the decision is based or if justice is not seen to be done. That said, the reasons as a whole must be examined in order to determine whether the minimum content of sufficiency for reasons has been met.¹⁰³
- 60 Various iterations have been given of the need for the path of reasoning to be exposed.¹⁰⁴
- 61 Any submission worthy of serious consideration should ordinarily receive attention in reasons.¹⁰⁵
- 62 Drawing together those threads, I take the view that the arbitrator in this case considered all submissions worthy of consideration in his award. I also take the view that the arbitrator's path of reasoning was sufficiently exposed leading the arbitrator from the evidence to the findings and from the findings to the ultimate conclusion. It must not be forgotten that an arbitrator is not required to consider each and every item of disputed fact. However, it is necessary for the arbitrator's path of reasoning to be ascertained. In my view, the reasons in this arbitration did that.

In addition to the authorities there cited, observation of immense utility on point may be found in cases such as *Pettitt v Dunkley*,¹⁰⁶ *Public Service Board of New South Wales v Osmond*¹⁰⁷ and *Fleming v R*.¹⁰⁸

Whereas it might be said, for example, that in a trade arbitration the reasons given by the arbitrator would not be expected to equate with those given by a retired High Court Justice in

¹⁰² [1989] VR 8, 17.

¹⁰³ *Francis v Todd* [2011] WASC 185, [18].

¹⁰⁴ *Transport Accident Commission v Kamel* [2011] VSCA 110, *Resi Corporation v Munzer* [2016] SASCFC 15, [91], *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72, [26], *AK v Western Australia* (2008) 232 CLR 438, 453, [45], *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186, 191, [28] and *Cantwell v Beitzel* (2014) 87 NSWLR 103, 111, [31].

¹⁰⁵ *Sydney West Corporations Ltd v Aqua Clear Technology Pty Ltd* [1996] NSWSC 640.

¹⁰⁶ (1971) NSWLR 376, 388.

¹⁰⁷ (1986) 159 CLR 656, 666.

¹⁰⁸ (1998) 197 CLR 250, 260, [22].

a complex international commercial arbitration,¹⁰⁹ in a family law arbitration the test for the adequacy of reasons is likely to be high. That is for two reasons. The first is by reason of the fact that the arbitrator is certified by AIFLAM, and is therefore well trained, tested and accredited. The second is that the arbitration of the s 79 application is different only to a judicial determination by reason of the identity of the decision maker.

Reversing or Varying the Award for Fraud

Section 13K provides, in substance, that an arbitral award may be (relevantly) reversed or varied by decree but only if the court is satisfied that one of the many elements set out in subsection 13K(2)(a) to (e) has been made out.

Section 13K(2)(a) speaks of the award or arbitration agreement having been obtained by fraud. The aphorism that “fraud unravels everything” is of very long standing.¹¹⁰ The High Court held in 1946, ten years prior to Lord Justice Denning’s immortal pronouncement, that fraud is conduct which vitiates every transaction known to law.¹¹¹ Fraud takes many forms and is “infinite in variety”.¹¹² Fraud may be equitable in nature¹¹³ or it may take a common law form.¹¹⁴ In *SZFDE v Minister for Immigration*¹¹⁵ the High Court addressed fraud in public law. Yet where the relevant fraud is said to be reposed in a witness’s perjury or by witnesses acting in concert, the judgment will usually not be set aside¹¹⁶ having regard to the benefits of the finality of litigation.¹¹⁷ In public law, fraud encompasses the notion of bad faith. All very interesting, perhaps, but the wording of s 13K(2)(a) is the critical factor.

Assessing whether the arbitration agreement was obtained by fraud will be a fact intensive exercise. Similarly, it will be an intense factual examination to ascertain whether the award was obtained by fraud (of any description).

One would be forgiven for thinking that the notion of fraud unravelling everything may prevail over concepts of finality of litigation, especially where s 13K(2)(a) makes an express provision about fraud. Further, based on *Entezam & Devi*, one reason for objecting to

¹⁰⁹ *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239.

¹¹⁰ *Lazarus Estates Ltd v Beazley* [1956] 1QB 702, 712.

¹¹¹ *Farley (Aust) Pty Ltd v J.R. Alexander & Sons (Queensland) Pty Ltd* (1946) 75 CLR 487.

¹¹² *Reddaway v Banham* [1896] AC 199, 121.

¹¹³ *Nocton v Lord Ashburton* [1914] AC 932.

¹¹⁴ *Derry v Peek* [1889] AC 337.

¹¹⁵ (2007) 232 CLR 189.

¹¹⁶ *McDonald v McDonald* (1965) 113 CLR 529, 544 and *Cabassi v Vila* (1940) 64 CLR 130, 147-148.

¹¹⁷ *Owens Bank Ltd v Bracco* [1992] AC 443 and *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [43].

registration is defects in the arbitration agreement, fraud being among them.

While not in the context of an arbitration but rather in the context of a s 79A application, I delved in some little detail into fraud as concepts known in equity and at common law in *Jess & Jess (No 4)*.¹¹⁸ Having regard to the importance of context in statutory construction it may be arguable that the proper construction of the word “fraud” in s 79A is not the same as “fraud” in the context of s 13K, even though the same word is used in the same legislation, albeit in different parts.¹¹⁹

It must be recognised that fraud is a very serious allegation. To assert that the award or the arbitration agreement was obtained by fraud is likely to enliven a very searching examination of all relevant circumstances. In *Goodridge v Beadle*¹²⁰ as well as *Kan & Amer*¹²¹ I examined the authorities concerning the need to set out in real detail all particulars constituting the fraud. The relevant passage was as follows –

46. At all events, the respondent relies on fraud. Fraud is a very serious allegation to make. In recent cases I have examined the requirements in law a person must discharge when alleging fraud. I canvassed them when sitting as a judge of the Federal Circuit Court of Australia in *Goodridge & Beadle*¹²² –

112. In most types of ligation [sic], including family law, allegations of fraud require special care. In courts regulated by pleadings, fraud must be specifically pleaded supported by full particulars as was held by the High Court in *Krakowski v Eurolynx Properties Pty Ltd*.¹²³ That requirement for full particularisation of an allegation of fraud is underpinned by the court’s insistence that a claim of fraud is sufficiently clear so that the party against whom the allegations made may answer it. A recent observation to that effect was made by

Forrest J in *Perpetual Trustees Victoria Ltd v Dunlop*.¹²⁴ But even in a proceeding not governed by pleadings as was this case, nonetheless allegations of fraud must be specifically put to the alleged fraudster at the trial of the proceeding as the High Court of Australia held in *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liquidation)*¹²⁵ (McHugh, Kirby and Callinan

¹¹⁸ [2022] FedCFamC1F 530.

¹¹⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹²⁰ (2017) 57 Fam LR 425.

¹²¹ [2020] FamCA 1014.

¹²² (2017) 57 Fam LR 425.

¹²³ (1995) 183 CLR 563, 573.

¹²⁴ [2009] VSC 331.

¹²⁵ (2003) 214 CLR 514, [38].

JJ).

113. Historically, Anglo Australian jurisprudence has so deeply held the view that fraud must be specifically identified with detailed particularity that it has imposed ethical obligations and consequences upon legal practitioners who make allegations of fraud against a party in the absence of specific instructions and evidence to support those allegations. The authorities on that point are extensive but for present purposes it is sufficient to identify the English authorities to include *Ex parte James*,¹²⁶ *Davy v Garrett*,¹²⁷ *Wallingford v Mutual Society*,¹²⁸ *Reddaway v Banham*,¹²⁹ *Associated Leisure Ltd (Phonographic Equipment Co) Ltd v Associated Newspapers Ltd*¹³⁰ and *Medcalf v Mardell*.¹³¹
114. The Australian cases are plentiful also. They include *Angelides v James Stedman Henderson's Sweets Ltd*,¹³² *Protean (Holdings) Ltd v American Home Assurance Co*,¹³³ *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd*¹³⁴ ("Akhil"), *White Industries (Queensland) Pty Ltd v Flower & Hart (a firm)*¹³⁵ and *Ghazal v Government Insurance Office of New South Wales*¹³⁶ ("Ghazal").
115. In cases such as this where the material facts are recorded in affidavit form, the word "fraud" need not be used. However, the person making the allegation must clearly set out all the matters upon which the accuser proposes to rely to establish the alleged fraud. That point was established by the decision of the Supreme Court of Queensland in *Retailers Association of Queensland Ltd v Queensland Retail Traders' Association of Grocers, Drapers and General Stores*.¹³⁷ Further, in *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liquidation)*¹³⁸ ("Downs") Latham CJ held that before fraud is found the issue must be clearly raised and the evidence must be convincing.

While no authority on point presently exists in relation to the ambit of s 13K(2)(a) of the *Family Law Act*, it is likely that "fraud" in the obtaining of the award or arbitration agreement will involve a degree of moral obloquy or moral turpitude on the putative fraudster. Whether

¹²⁶ (1874) LR 9 Ch 60.

¹²⁷ (1877) 7 Ch D 473.

¹²⁸ (1880) 5 App Cas 685.

¹²⁹ [1896] AC 199.

¹³⁰ [1970] 2 QB 450, 456.

¹³¹ [2003] 1 AC 120.

¹³² (1927) 40 CLR 43.

¹³³ [1985] VR 187.

¹³⁴ (1990) 169 CLR 279.

¹³⁵ (1998) 29 ACSR 21.

¹³⁶ (1992) 29 NSWLR 336.

¹³⁷ [1955] St R Qd 369.

¹³⁸ (1948) 76 CLR 463.

the famous aphorism coined by Denning LJ in *Lazarus Estates Ltd v Beasley*¹³⁹ is wholly apposite to s 13K(2)(a) is a matter not yet the subject of judicial determination. In *Jess & Jess (No 4)*¹⁴⁰ I observed that his Lordship's aphorism may be qualified by the terms of s 79A itself.

It should be acknowledged that the words in parenthesis in s 13K(2)(a) "including non-disclosure of a material matter" are unlikely to be illustrative of the fraud with which the balance of the subsection is concerned.¹⁴¹ Nor, it seems to me, are the words in parenthesis likely to create some genus of the fraud with which the subsection is concerned.

Subsection 13K(2)(b) relates to the court's satisfaction that the award or arbitration agreement is "void, voidable or unenforceable".¹⁴² The subsection is silent in respect of the circumstances that may render the award or arbitration agreement void, voidable or unenforceable. So far as the arbitration agreement is concerned, one can readily conceive of circumstances where a party's consent to the entry into it is vitiated by one of a collection of factors – duress, undue influence, unconscionable conduct, fraud, mistake or deceit being but a few. As to the award itself, it is not immediately apparent how the award might be void or voidable or somehow otherwise unenforceable. The point has not yet arisen for decision.

A change in circumstances of the sort contemplated by s 13K(2)(c) has been the subject of consideration in *Belding & Belding*.¹⁴³ Of present relevance are two matters in s 13(2)(c). The first is the temporal context, namely, that "in circumstances that have arisen *since the award was made*". Accordingly, a party invoking this subsection can only do so if, after the award was made, the relevant circumstances have arisen. The second element is the relevant circumstances themselves that have arisen since the making of the award. Those relevant circumstances must be such as to render it impracticable for some or all "of it" to be carried out. Reference to "it" being carried out seems to be a reference to the award rather than to the arbitration agreement. That is because the arbitration agreement is likely to be discharged by performance upon concluding the arbitration by the making of the award. The only other noun mentioned in the subsection is the award. Those factors point to s 13K(2)(c) being referable to circumstances having arisen since the making of the award that make the carrying out of

¹³⁹ [1956] 1QB 702.

¹⁴⁰ [2022] FedCFamC1F 530.

¹⁴¹ *Family Law Act* s 13K(2)(a).

¹⁴² *Ibid.*

¹⁴³ [2020] FamCA 1027.

the award impracticable.

Impracticable does not mean impossible.¹⁴⁴ It involves the concept of something that is not able to be done, relevantly here, by reason of circumstances that have arisen since the making of the award.

Subsection 13K(2)(d) incorporates concepts of bias and want of procedural fairness.¹⁴⁵ Taking bias first, the subsection makes no differentiation between actual bias as opposed to apprehended bias. The interrelationship between s 13F and s 13K(2)(d) may well be enlivened.¹⁴⁶ For example, if a party becomes aware of circumstances giving rise to an apprehension of bias, one might rightly think that the party perceiving bias would immediately seek directions from the court pursuant to s 13F in relation to the impugned conduct.¹⁴⁷ Whether any failure to seek directions could be said to constitute a waiver of the entitlement to later complain about bias is not the subject of consideration in the lead authorities on apprehended bias.¹⁴⁸ In *Entezam v Devi (No 3)*¹⁴⁹ I addressed the three stage formulation favoured by Gageler J in *Isbester* for ascertaining the existence of bias. It was as follows –

25. The applicant, Mr Entezam, argued that the respondent bore the burden of establishing a claim that apprehended bias existed. Counsel for the applicant relied on *Ebner v Official Trustee in Bankruptcy*,¹⁵⁰ *Isbester v Knox City Council*¹⁵¹ and *Minister for Immigration and Multicultural Affairs v Jia Legeng*.¹⁵² In *Isbester*, Gageler J held that a three stage process existed for ascertaining the existence of bias, namely –
 - (a) identifying the factor that is hypothetically said to cause the question to be resolved otherwise than as a result of a neutral evaluation of the merits;
 - (b) articulating how the identified factor might cause that deviation from a neutral evaluation of the merits; and
 - (c) considering the reasonableness of the apprehension of that deviation being caused by that factor in that way.¹⁵³

¹⁴⁴ *Guild v Stasiuk* (2020) 63 Fam LR 322.

¹⁴⁵ *Family Law Act* s 13K(2)(d).

¹⁴⁶ *Ibid* s 13F and 13K(2)(d).

¹⁴⁷ *Ibid*.

¹⁴⁸ *Re JRL, ex parte CJL* (1986) 161 CLR 342, *Johnson v Johnson* (2000) 201 CLR 488, *Ebner v Official Trustee in Bankruptcy* (2022) 205 CLR 337, *Michael Wilson & Partners Pty Ltd v Nicholls* (2011) 244 CLR 427, *Isbester v Knox City Council* 255 CLR 135 and *Charisteas v Charisteas* (2020) 60 Fam LR 483.

¹⁴⁹ [2021] FamCA 549.

¹⁵⁰ (2000) 205 CLR 337.

¹⁵¹ (2015) 255 CLR 135.

¹⁵² (2001) 208 CLR 507.

¹⁵³ [2021] FamCA 549, [25].

In the family law arena, the dissenting judgment of Alstergren CJ in *Charisteas v Charisteas*¹⁵⁴ as upheld by the High Court¹⁵⁵ is regarded as the *locus classicus* for apprehended bias. The reasons of Strickland and Ryan JJ were comprehensively dashed as being wrong in law.¹⁵⁶

Section 13K(2)(d) also speaks of the arbitration being affected by there being a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.¹⁵⁷ Interestingly, subsection 13K(2)(d) does not make provision for the arbitration being generally affected by a lack of procedural fairness.¹⁵⁸ Instead, more pointedly, s 13K(2)(d) confines any lack of procedural fairness to that as between the agreed procedure and the manner in which the arbitration itself was conducted.¹⁵⁹ It is therefore important, in an application grounded in an asserted lack of procedural fairness under s 13K(2)(d), to focus in precise terms on the procedure for the conduct of the arbitration on which the parties and the arbitrator agreed. The decision in *Goh v Ren*¹⁶⁰ involved that precise situation.

A breach of the rules of procedural fairness represents an error in law and so if presented as a review application under s 13J (as opposed to an application under s 13K(2)(d)) the question of law may very well be amenable of expression as whether the arbitrator breached the rules of procedural fairness in engaging in a particular step or, conversely, in failing to engage in some particular step.

Further Appeal

Once the court decides a s 13J or s 13K challenge, the aggrieved party is entitled to appeal to the Full Court.

Although this is yet to be determined, the s 13J/13K challenge is likely to be an appeal from a decision that finally determines the rights of the parties. The relevant authorities for that proposition include *Carr v Finance Corporation of Australia Ltd (No1)*¹⁶¹ and *Bienstein v*

¹⁵⁴ (2020) 60 Fam LR 483.

¹⁵⁵ (2021) 64 Fam LR 94.

¹⁵⁶ Ibid.

¹⁵⁷ *Family Law Act* s 13K(2)(d).

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ (2020) 61 Fam LR 508.

¹⁶¹ (1981) 147 CLR 246.

Bienstein.¹⁶² Thus, leave to appeal is not likely to be required. This point is not yet decided, however.

Costs

Arbitrators are required to determine costs when, in a s 13E order, the entirety of the proceeding is referred to the arbitrator. Some arbitrators, erroneously, have taken the view that they are not required to determine costs because they were not specifically ordered to do so.

Possibly by reason of that approach, a collection of cases have been determined by me on the specific issue of costs in arbitrations. Seemingly counterintuitively, that has had the effect of requiring me to decide several important cases on costs in arbitrations. One involved indemnity costs¹⁶³ in which I held that the learning about indemnity costs being ordered in exceptional circumstances had been engaged in the particular circumstances of that case. There are others.¹⁶⁴ Bettering offers of compromise is another well-worn avenue for the imposition of indemnity costs.¹⁶⁵

There is authority which I regard as being of dubious legitimacy¹⁶⁶ in which a judge of what was then the FCCA held that an arbitrator has an inherent power to determine the question of costs. In my view that is wrong in law. An arbitrator's power is derived by agreement or order pursuant to s 13E. The arbitrator has no "inherent power". Even the Family Court (as it then was) had inherent power only in the regulation of its own process to prevent abuse.¹⁶⁷

Arbitrators should decide costs issues. To avoid doubt, where a registrar or Division 2 judge makes an order under s 13E referring the proceeding to arbitration but says nothing about the determination of costs by the arbitrator, I now amend orders referring the proceeding to arbitration under s 13E so as to specifically include a stipulation requiring the arbitrator to determine all questions of costs.

¹⁶² (2003) 219 CLR 1.

¹⁶³ See *Yeo & Garston* [2022] FedCFamC1F 235.

¹⁶⁴ See eg *Entezam & Devi (No 2)* (2021) 62 Fam LR 637, *Zheng & Chueng* [2022] FedCFamC1F 249 and *Griffiths & Griffiths (No 2)* [2022] FedCFamC1F 379.

¹⁶⁵ See eg *Haven & Haven* [2020] FamCA 954, *Agosti & Agosti* [2021] FedCFamC1F 72 and *Kyle & Kyle* [2022] FedCFamC1F 251.

¹⁶⁶ *Blanco v Blanco (No 2)* (2019) 60 Fam LR 80.

¹⁶⁷ *Toma & Doyle* [2022] FedCFamC1F 215.

Some Statistics

The NAL has passed through two full financial years of operation. Some very pleasing statistics have been collated to reveal the success of the NAL.

For the financial year 1 July 2020 to 30 June 2021 –

- (a) 165 cases were transferred to NAL;
- (b) of those, 94 were finally disposed of;
- (c) in the course of disposing of those 94 cases, 11 published judgments were delivered by me of which only four bore upon applications under s 13J or 13K (none of which was successful);
- (d) in broad terms, 4% of those 165 cases transferred into the list went beyond the determination of the arbitrator, the other 96% were finally determined by arbitration; and
- (e) there were no appeals from my decisions.

For the financial year 1 July 2021 to 30 June 2022 –

- (a) 288 cases were transferred to the NAL (compared to 165 the year earlier);
- (b) of those, 221 were finally disposed of;
- (c) in the course of disposing of those 221 cases, 19 judgments were delivered by me – one relating to the adequacy of the arbitrator's reasons, one relating to a s 106A application, five relating to directions and four relating to s 13J or 13K applications;
- (d) in broad terms 1.4% of cases went beyond the arbitrator's determination, the rest lay where they fell upon registration of the award; and
- (e) none of my decisions were appealed, whether successfully or otherwise.

For the financial year from 1 July 2022 to present –

- (a) a little over 50 cases have been transferred to the NAL;
- (b) two judgments have been delivered by me; and
- (c) there has been one successful appeal.

So, of the combined number of cases transferred to the NAL, ie. 436 (165 + 288 + 50), only one has been appealed successfully.

One case in 436 cases, when expressed as a percentage, equates to less than a quarter of one

percent. That is a most satisfying statistic.

Areas for Improvement

The main geographic locations that enthusiastically embrace arbitration are Queensland and New South Wales. Next to no take-up has been exhibited in other states and territories, including, surprisingly, Victoria. In states or territories where property values may not be as high as those in New South Wales, it remains a curious phenomenon that arbitration has little attraction, especially in circumstances where the speed and cost efficiency of arbitration favours cases having smaller asset pools and less complex areas of debate including trusts, corporate arrangements or taxation.

Having endeavoured to ascertain the reasons for the poor take-up of arbitration in states other than New South Wales and Queensland, it seems that a probable explanation is professional unfamiliarity with arbitration under the *Family Law Act*. In consequence, practitioners are not well versed in promoting arbitration to their clients. When a judicial officer from either Division 1 or Division 2 recommends arbitration, the solicitor often responds negatively.

The above statistics demonstrate the undeniable success of arbitration. The main reasons, it seems to me, for that success include –

- (a) the very high quality of AIFLAM certified arbitrators;
- (b) the speed with which the case is ordinarily determined upon entry in the NAL;
- (c) there being little scope for mischief orchestrated by a party who may be determined not to cooperate;
- (d) the relative cost efficiencies;
- (e) the fact that the list is tightly judge-controlled with the consequence that cases do not “drift into outer space”;
- (f) practitioners who are regular users know and understand the way arbitration works, they do not “fly kites” nor engage in wasteful activities but rather they cooperatively get the cases before the arbitrators to enable the arbitrators to do their work; and
- (g) it is much easier to explain to a client whose case has been determined in about 6 months of entry into the NAL that she or he can get on with her or his life than it is to explain why a seemingly endless array of personally trying and demoralising issues continue to crop up preventing an end to that party’s litigation.

In the same way parties wish a just and equitable outcome of their property adjustment

application, they also – without exception – want finality to their litigation. Arbitration achieves that.

In months to come I plan to give similar addresses to practitioners in South Australia, Tasmania, Australian Capital Territory and Northern Territory. Education is key.

Practitioner's Notes

Ten Tips for the Mediation of Family Law Property Disputes

The Hon Robert McClelland AO*

Preparation is the Key

There are many routes to achieving a successful mediated outcome in Family Law matters. Each case involves different considerations. Irrespective of what strategy is applied – preparation is the key. These are ten tips that may be useful.

Has a Litigant Been Given Unrealistic Expectations?

The practice of some lawyers in unrealistically talking up client expectations is unprofessional. It creates unrealistic expectations and can backfire against the practitioner when the ultimate outcome is nowhere near what the client expected.

And it makes the job of the mediator all that much more difficult.

It may be necessary for the mediator to engage in reality checking if they consider that the lawyer has given their client the advice that they think the client wants to hear, rather than their honest professional opinion based on objective consideration of all relevant facts and circumstances.

Appreciate the Difference Between Mediation and Court Adjudication

If a client has been properly informed by their lawyer, then they should be aware that if a matter proceeds to hearing, the lawyer's role is to persuade a third person, ie a judge.

Dispute resolution, of course, is aimed at persuading the other party to the dispute.

The bombastic and belligerent style of some advocates is not only inappropriate, but also counter-productive in dispute resolution. If it starts to occur, the mediator may suspend the conference and have a discussion with the practitioners directly, and point out that the legal representative who, at mediation,

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