IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (Civil) Appeal No 12 of 2021
(Formerly FAM 66 of 2014)

BETWEEN:

AH

Respondent /Appellant

-AND-

AW

Petitioner/Respondents

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon C Dennis Morrison, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: **Mr Frank Feeham QC (via Zoom) with Mr. Guy Dilliway-Parry of Priestleys for the Respondent/Appellant.**
Mr Nicholas Yates QC (via Zoom) instructed by Ms. Yvonne Mullen of Hampson & Co for the Petitioner/ Respondent

Heard: **8 September 2021**

Draft circulated: **23 September 2021**

Judgment delivered: **13 January 2022**

JUDGMENT

The Rt. Hon Sir John Goldring, President

Introduction

1. On 21 August 2020 this court (JAs Martin, Field and myself) handed down its judgment in the first appeal involving AH and AW. In paragraphs 1 and 2, I summarised the issues in the following way:

> "*AH and AW began their relationship in 2004. They married on 17 February 2012. They had lived together continuously for the two years prior to the marriage, having done so non-continuously for the three years before that. On*

17 February, before they married, they each signed a pre-nuptial agreement. It had been drafted by AH's attorney. It had been through several drafts. Their child ("Y")…, was born on 4 July 2012. They separated on 28 March 2014. On 16 November 2016 AW's divorce petition was proved. However, the marriage still has not been dissolved. Following a two day hearing on 4 and 5 June 2019, and further hearing in respect of costs, the Honourable Justice Cheryl Richards QC, sitting in the Grand Court, among other things, ordered AH:

(1) To make a lump sum of CI$747,878.99 to AW over a period of 3 years;

(2) To pay the deposit of 10% on a house to be purchased in the joint names of the parties, at a cost of between CI$800,000-CI$900,000 and to pay 55% of the monthly mortgage costs; the house to be held on trust for Y, AW to have the right to live there subject to certain conditions;

(3) To pay CI$9,577.00 per month maintenance for the benefit of Y, reducing to CI$7,157.00 on the purchase of the house, all of Y's medical insurance plus uninsured medical expenses and the cost of therapeutic treatments.

(4) Subject to some exceptions, to pay AW's costs.

"2. AH now appeals the Court's order. While accepting that both parties intended to be bound by the pre-nuptial agreement, he firstly submits the judge wrongly construed it. Paragraph 4 of the Agreement did not provide, as the judge found, that property acquired by him after final separation but before dissolution, was joint property, and fell to be shared; nor did paragraph 6(e), again as the judge found, require him to provide all the educational and other expenses for Y. Secondly, he submits that the cost of the house the judge ordered be purchased was excessive. Thirdly, he submits that if the judge did rightly construe the Agreement, it was unfair in all the circumstances for the court to hold him to it. Fourthly, he submits AW should make a contribution to Y's maintenance; that the judge erred in her findings regarding AW's income. Finally, he appeals the order for costs that the judge made."

2. The court set out the parties' financial resources in paragraphs 3-7 of the judgment:

"*3. Since July 2010 AH has been a partner in a Cayman firm (the "Firm"). AW is a certified public accountant and an attorney. Since November*

2016, she has been self-employed in her law firm, while operating a second company providing corporate services…

…4. AH's annual income for 2014 had been []; for 2015 []; for 2016 []; for 2017, [] and for 2018 []. Additionally, he had rental income of some CI$40,320.00…

5. As at the separation on 28 March 2014, AH assessed his assets at some CI$215,225.33. The judge put his net assets at the time of the hearing at some CI$1,816,851.50 (including capital contributions to the Firm). In other words, AH acquired assets in the order of CI$1,601,626.00 after the parties separated (including the capital contributions). Having excluded the capital contributions, the judge took a figure of CI$1,507,581. There was no evidence of the increase of assets year by year following the separation. However, in his affidavit of 22 March 2019, AH gave his net assets as at July 2017 (excluding his interests in the Firm) as CI$1,449,154.10…

…6. As the judge found, AW's annual income for 2014 was [] plus CI$11,131.00 rental income; for 2015, [] plus CI$5,740.00 rental income; for 2016, [] plus CI$6,677.00 rental income; for 2017, [] plus CI$5,700.00 rental income and for 2018 [] plus (as I understand it) [] income from her company. The judge found that the company was on a path of growth.

…7. AW had net assets of CI$287,870.68. It was agreed that AW's assets did not fall to be shared under the Agreement. AW expressly conceded that her assets acquired after separation should be shared."

3. As Mr Yates QC, who has again represented AW, observed, AH only succeeded on one issue in his appeal. The court found that, as from mid-2017, AW had failed diligently and reasonably to pursue her claim; that it would be:

> "*…a manifestly unfair outcome justifying the court's interference to permit a party AW to benefit from the terms of a pre-nuptial agreement to the extent he or she does so as a result of their failure to act diligently. Moreover, that is so whether or not the failure to act diligently is deliberate, and in order to gain a benefit*." (See paragraphs 89 - 92 of the judgment)

4. As I shall shortly set out in detail, the case was remitted to Justice Richards, in broad terms, to consider the implications of the Court of Appeal's judgment. Having done so, Justice Richards, in her second judgment, concluded that AH should pay AW CI$650,000 as a clean break award.

AH appeals that award. However, Mr Feehan QC, who again represented AH, said that he would not have appealed an award of some $350,000-$400,000.

5. The present judgment should be read in conjunction with the earlier judgment of this court.

The events leading to the case being remitted to Justice Richards

6. The draft judgment of the Court of Appeal was distributed in the usual way. What followed is set out in the judgment at paragraphs 93-6:

> "*93…Paragraph 93 of that draft stated that:*
>
> > *'On the assumption that during the period from the middle of 2017 and June 2019 there was an increase in the value of AH's assets, it follows that AW should not benefit from that increase. It would, in my judgment, be manifestly unfair for her to do so. Were that to result in an outcome which fails sufficiently to provide for AW's needs and an element of compensation, they would have to be provided for as set out by the judge in paragraph 247 of her judgment (paragraph 74 above). That said, AH 's affidavit of 22 March 2019 (paragraph 5 above) shows net assets as at July 2017 of CI$1,449,154.10 as compared with the figure of CI$1,507,581.00 ultimately taken by the judge, a difference of some CI$58,426.90. Half that figure would amount to CI$724,577.05 as compared with the sum of CI$747,878.99 awarded by the judge, a difference of CI$23,301.94. I would reduce the sum awarded by the judge by that amount. The terms of her order should otherwise be unchanged.'*
>
> *94. The figures set out in that paragraph reflected my understanding of figures previously submitted to the court by the parties in response to a question asking, 'What the evidence was of the increase in AH 's assets as between the date of the separation and the date of the hearing. Was there any evidence of the increase year by year?' However, in response to the draft, the Appellant stated that the calculation in paragraph 93 was based on a misunderstanding of the figures submitted. Without descending into detail, it was submitted that on a proper understanding there should be a deduction of CI$503,917 from the judge's award. (That sum was subsequently reduced by some CI$50,000). Again, without going into detail, the Respondent disagreed. Such is the nature of the disagreement between the parties, that it is quite plain this court is not in a position to resolve it.*
>
> *95. In further response to the circulation of the draft judgment, the Respondent both sought to re-argue the case and make a number of fresh points. It is*

important to make this plain. The purpose of circulating a draft judgment is not to enable a party to re-argue the case or make fresh submissions. It is in order to correct typographical or plain numerical errors or obvious mistakes of fact (see WM v HM (Financial Remedies: Sharing Principle: Special Contributions [2018] FLR 313).

96. The submissions of the Respondent went far beyond what is appropriate. I do not propose to set them out. Suffice to say that, having considered them, I am not led to re-consider my analysis or conclusion. For the reasons I have set out and shall not repeat, I have concluded that AW was responsible for delay in the second part of the proceedings in circumstances which would make it manifestly unfair for her to benefit to the full extent from the non-matrimonial assets accumulated by AH since the parties separated. However, as I have said, the court cannot resolve the issues between the parties as to consequences of those findings. I shall return to this topic when setting out the terms of the appropriate order."

7. Finally, in paragraph 101 of the judgment, I said:

"*In the result, and for the reasons I have explained, I would allow this appeal to the extent I have indicated. I would remit the case to the judge for the purpose only of:*

- *Re-calculating the available assets of AH by deducting any increase in them from July 2017 to June 2019.*
- *Considering whether, in the light of her conclusion, the strands of need, compensation and sharing are adequately provided for as far as AW is concerned*."

The judgment below

8. At paragraph 3 of her second judgment, the judge said that:

"*There are…two issues before the Court. Firstly, a factual exercise of recalculating the assets using the date July 2017 rather than the date of the Grand Court hearing in June 2019 and secondly to apply the guideline principles in considering whether the strands of need, compensation and sharing are adequately met with respect to the wife by the figure arrived at on recalculation*."

9. It is unnecessary to refer to the judge's summary of the different submissions regarding the asset schedule relating to 2017, which had featured in the original hearing. In paragraph 17, the judge said:

> "*While I accept that there was limited focus on the 2017 aspect of the schedule, there is nothing to suggest or demonstrate it is so unreliable that it ought not to be used for the purpose of recalculation or that it would be unfair to do so*."

10. Following further argument, the judge concluded that (paragraph 33):

> "*…the fifty percent asset sharing calculation to which the wife would be entitled as per the PNA using the date of mid-2017 is $348,210.00*."

11. In her "*Discussion and Conclusions"* the judge said (paragraph 56 and following):

> "*56. Having arrived at a conclusion with respect to the 2017 asset base and that the amount of $348,210.00 is the correct calculation as per the PNA, I am required to stand back and consider whether in all the circumstances this amount satisfies the strands of need, compensation and sharing. I have to consider what would be a fair division of assets taking into account the parties' respective financial needs or any need for compensation.*
>
> *57. I have first considered the needs of the wife. I reviewed the table at paragraph 210 of the judgment which sets out the monthly contributions made by the husband - excluding medical insurance, uninsured medical expenses and therapeutic treatments for Y.*
>
> *58. Nine of the twelve items listed in the table are items specific to Y with the cost of the nanny ($3,900.00) being the largest percentage portion of the whole amount paid of $9,577.00 per month.*
>
> *59. The other three items relate to costs for the household. However the submission that all outgoings for the home where she resides with Y are met by the husband and that the wife indirectly benefits from these paid outgoings is not entirely correct. This is because in each case the wife shoulders part of these monthly payments.*
>
> *60. Currently she meets 45% of the rental costs, 45% of utility costs, and additional grocery costs in excess of $950.00 per month.*
>
> *61. The wife's annual income in 2018 was [] or [] per month compared to per annum [] or [] per month for the husband…*
>
> *62. While the wife would receive some indirect financial benefit from the 55% payments made by the husband, this is not a case where all outgoings are*

covered such that there can be a finding that the majority of the monthly sum earned by the wife is likely to be saved…and that she is therefore likely to have much surplus income.

63. *Additionally when a house is purchased, which is to be held on trust for Y, the wife will reside in it with Y and will be responsible for funding 45% of the mortgage payments. Should the arrangements end and the house be sold, she would be entitled to 35% of the proceeds. As a long term capital build for her, this will be of limited benefit for her. This is not a home of her own.*
64. *…the wife has limited savings, limited assets and no surplus.*
65. *…More than one half of the wife's assets …was made up of her pension…*
66. *Her companies…had not yet generated substantial sums. She is of middle age. The time open to her to build wealth…at the substantial level already achieved by the husband, is not extensive. The husband's…standard of living will be much higher than what the wife will be able to afford on her own.*
67. *There is nothing in the contribution arrangements by the husband, relied on in the course of this hearing, which serve to improve this position….In the absence of any lump sum payment… the wife …must…rely entirely on her own efforts and businesses.*
68. *On the aspect of compensation, the main factors are that the wife is the primary carer for Y and that, given his special needs, this is likely to be a lifelong endeavour. While Y's needs are not at the level that the wife has to give up her career to stay home with him and it is of import that the husband pays for child care, there will undoubtedly be some impact on the wife given the extent of the endeavour. In the judgment it was stated:-*

    > *"While she states that she has had to start her own business in order to give herself the flexibility to better care for Y ., the husband has been paying for nannies and will be paying for even more assistance for Y . in the future. There is no indication that this has affected her career in a way that calls out for the highest level of compensation. Nevertheless, she has had and will have primary care for Y on a long term basis and it is accepted that this may well be for a life time. It is agreed that some element of compensation should be included in any settlement." (Paragraph 236)*

69. *The husband argues that provision of childcare is an element of continuing compensation for the wife. While the impact of this level of assistance is not to be minimised, nannies will not have the overall responsibility for*

the household, are unlikely to be permanent in Y's life and are no substitute for a mother's continuing care and attention. Y …is now 8 years old. Because of the special circumstances, the wife as his primary carer will continue to make a significant contribution towards his welfare well into the foreseeable future. The husband will benefit from her contribution as although he will have visits with Y, he is relieved of the day to day responsibility for him.

70. *Having considered all the circumstances I do not consider that the recalculated sum of $348,210.00 meets the justice of this case in particular with respect to the strands of need and compensation. That sum would do very little to assist the wife with her limited resources and assets, on the road to independent living.*

71. *In my view, in all the circumstances, it would be unfair to confine an award to the strict line of the wife's daily needs. Need should be generously interpreted and should not necessarily be seen as a limiting factor where there is a substantial surplus of resources. Thus, where possible, need may properly include a margin for savings and contingencies. (See* ***Miller v. Miller, McFarlane v. McFarlane***[1]***)****. I am also mindful of the cited cases of* ***Brack v. Brack*** *and* ***FF v. KF*** *as referred to above. There is a clear need for such a margin in this case.*

72. *Secondly and importantly I consider that the recalculated sum would fail to adequately compensate the wife for a possible life time as the primary carer for Y.*

73. *The PNA would operate unfairly where the resulting sum is inadequate to satisfy the three principles with respect to the wife.*

74. *At paragraph 247 of the August judgment I stated:*

> *"Finally, I would add that if I am wrong as to the interpretation of the Agreement, and had it resulted in the sharing of only $126,624.00 with the wife, this being the calculation as at date of separation in 2014, I make it plain that I would have considered this to be entirely inadequate in the context of this case. I would have considered the absence of inclusion of the period of cohabitation prior to the marriage as an omission which had the potential to operate unfairly against the wife. I would have concluded that the strands of need, compensation and sharing required more than that amount and would have considered the non-matrimonial assets or post separation assets in order to address more fairly the circumstances of this case. I would have*

[1] Paragraphs 139 and 144

needed to bear in mind that while the contributions of the husband to the acquisition of the after acquired assets ought not to be disregarded, the wife's significant contributions in caring for the child also needed to be considered. The ultimate aim would be to provide greater assistance to the wife on the road to independent living. I would have said that the wife should be provided with an amount reflective of her contribution in the past and in the future and practically that she should be given a sum which allows her if she so chooses to make a down payment on her own home (possibly 10 % of $1.100,000.00) with 7% closing costs, about $300,000.00) and a further sum which would then allow her to have remaining, a small nest egg of savings ***which would form the basis for a capital build or to have a capital sum available in circumstances where her savings are said to be depleted*** *and there are outstanding legal costs."*

75. *I have highlighted the sentence which then identified considerations for an award outside of the PNA. In my view, the least amount which would meet the justice of this case in terms of need, compensation and sharing is a sum of $650,000.00 to be paid to the wife. This would be a fair outcome, balancing all factors, taking into account all the circumstances of the parties and of the marriage as detailed in the previous judgment, and applying the three important guiding principles.*

76. *I have arrived at this figure in the following way. The husband's 2017 assets are agreed after deduction of the assets held in his firm to be $1,824,165.00 before other deductions. The husband has agreed to add back most of the other deductions, challenging mainly the outstanding mortgage on the Clipper Bay land ($212,119.00) as a liability. The balance after this deduction would be $1,612,046.00. I have used a figure of 40% of this to calculate the sum to be shared with the wife for a total of $644,818.00 rounded up to $650,000.00.*

77. *The thinking is that the wife would have about $200,000.00 towards the purchase of her own home and the sum of $450,000.00 for savings for contingencies or use as a capital build. While this amount is small compared to the husband's resources, if she chooses, this would form the basis for long term capital investments which would assist her, together with her earnings from her businesses towards financial growth and independence.*

78. *Mindful of the need for overall fairness to both parties, I have also cross-checked the amount of $650,000.00 against the husband's total asset figures, i.e. to consider what he would retain. The husband's 2017 assets,*

excluding liabilities (not inclusive of guarantee of firm (joint and several liability)) is a little over $1.8 million ($1,805,635.00), thus the figure arrived at ($650,000.00) is about one third of this. The husband would in effect be left with 2017 assets of about $1,155,635.00. I concluded that the proposed amount to be shared would not be unfair to the husband in all the circumstances of this case…

…The conclusions are thus as follows:

i) *The sum on recalculation as at July 2017 as per the PNA is $348,210.00.*
ii) *In light of this recalculation, I have reviewed all the circumstances of this case and the submissions made and consider that the strands of need, compensation and sharing are not adequately provided for as far as the Petitioner/Respondent is concerned.*
iii) *Considering all the circumstances of this case, the sum of $650,000.00 would adequately provide for the strands of need, compensation and sharing.*"

Mr Feehan's submissions

12. Mr Feehan submitted that in the light of the decision of the Court of Appeal the only question for the judge to decide was whether application of the pre-nuptial agreement rendered unfairness to AW as far as need and compensation were concerned. Sharing, as he submitted, had been decided by this court's judgment, something which in argument, we accepted. The judge, submitted Mr Feehan, was required to consider the elements of need and compensation in the light of what the parties had agreed in the pre-nuptial agreement, something which she failed to do. She failed, as he submitted, to have regard to the authorities on need and compensation. She failed to consider, let alone give any weight to the parties' autonomy in agreeing the pre-nuptial agreement or consider what was fair in the light of what they had agreed. She took into account some of AH's assets which under the pre-nuptial agreement were ring-fenced, which had the effect of benefitting AW from the delay for which she was responsible. Moreover, submitted Mr Feehan, the judge alighted on the figure of $650,000 without any proper analysis or explanation. In doing so she ignored what she had said about need and compensation in her first judgment.

13. Mr Feehan drew the court's attention to a number of cases which, as he submitted, underlined where the judge went wrong.

14. In *Kremen v Agrest [2012] 2 FLR 414* Mostyn J stated that:

> *"…need may be interpreted as being that minimum amount required to keep a spouse from destitution. For example, if the claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement*" (para 72(iv)(c))

15. In *Brack v Brack [2019] 1 WLR 3438* King LJ held that (paragraph 103):

> *"… even where there is an effective pre-nuptial agreement, the court remains under an obligation to take into account all the factors found in section 25(2) of the 1973 Act, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in KA v MA retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs."*

16. In *FF v KF [2017] EWHC 1093 (Fam)*, a case in which a pre-nuptial agreement did not feature, Mostyn J held that:

> *"the main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise."*

17. In *Luckwell v Limata [2014] 2 FLR 168* it was said that:

> *"Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.*" (Para 67(6)(vi))

18. In *McTaggart v McTaggart [2011] CILR 366*, Chadwick P, citing Lord Nicholls' speech in *Miller v Miller* and *McFarlane v McFarlane* 2006 AC 618 said this about the strand of compensation (paragraph 41):

> *"Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer."*

19. Finally, in *FF v KF* (above) Mostyn J noted at paragraph 17 that:

> *"Since the decision of the House of Lords in Miller v Miller…these cases are now decided by the parallel application of the two principles of sharing and needs (compensation has never yet played a part in any case, and in my opinion is unlikely ever to do so)"*

20. Mr Feehan emphasised that in her first judgment Justice Richards stated (at paragraph 236) that:

> *"This is not a case which calls out for compensation on the scale of the Miller v. Miller, McFarlane v. McFarlane case. The income table… indicates that the wife was able to return to work and to earn a reasonable level of income albeit modest in comparison to that of the husband. She is a professional and her businesses appear to have good earning potential. While she states that she has had to start her own business in order to give herself the flexibility to better care for Y., the husband has been paying for nannies and will be paying for even more assistance for Y. in the future. There is no indication that this has affected her career in a way that calls out for the highest level of compensation. Nevertheless she has had and will have primary care for Y. on a long term basis and it is accepted that this may well be for a life time. It is agreed that some element of compensation should be included in any settlement."*

21. Mr Feehan placed considerable emphasis on what the judge said about need and compensation in paragraph 247 of her first judgment (set out in the second judgment at paragraph 74). He

characterised what the judge said in that paragraph as a ruling, by which she was effectively bound. Mr Feehan submitted that the judge assessed need in terms of providing AW with a sum to reflect her past and future contribution, a sum to make a 10% down payment on her own home (some $110,000), plus 7% closing costs, a total sum in the order of some $187,000, (not $300,000 as the judge mistakenly stated), plus a small nest egg of savings. Mr Feehan further submitted that the Court of Appeal, when remitting the matter to the judge, plainly contemplated (in paragraph 93 of its judgment) that the judge would apply what she had said in paragraph 247 to the factual situation with which she then had to deal with in the light of the judgment. Far from applying paragraph 247, the judge embarked, submitted Mr Feehan, on a completely fresh exercise when assessing need and compensation. She ignored the pre-nuptial agreement. She purported, in paragraph 75 of her judgment, to justify doing so in a way which does not bear analysis. She then, submitted Mr Feehan, effectively plucked the figure of $650,000 from the air.

22. Mr Feehan emphasised that the pre-nuptial agreement was generous in its provision for AW's needs. AH has to pay monthly maintenance of $9,577, monthly special treatment costs of $5,000, approximately $200,000, being the whole of the deposit and purchase costs of a home for the child and AW, and 55% of all mortgage, utility and maintenance costs. AW, on the other hand, only has to pay 45% of the mortgage, utility and maintenance costs of the home, AH pays $175,000 in maintenance plus 55% of all mortgage and housing costs. AH's annual contribution is well in excess of $200,000, including the cost of a full-time, specialist live-in nanny so that AW can continue what Mr Feehan described as her successful legal career.

23. Among other things, Mr Feehan submitted that in making an award of $650,000, the judge was awarding some 93.33% of the distributable assets as at mid-2017 in circumstances where, as he submitted, there was no real need. She justified that figure by reference to AH's assets of $1.824 million as at June 2017. That was a fundamental error submitted Mr Feehan. For that sum included assets which by the pre-nuptial agreement should have been excluded.

Analysis

Some preliminary observations

24. I agree with Mr Feehan that the judge was required to consider need and compensation in the light of the judgment of the Court of Appeal and having regard to the terms of the pre-nuptial agreement. Insofar as the award or any part of it was based upon sharing, it cannot stand. That said, I can understand how, given the terms of this court's remission to the judge, she came to refer to sharing, as well as need and compensation.

25. As is clear from this court's previous judgment, in her first judgment Justice Richards exhaustively considered the legal effect of pre-nuptial agreements. Although she did not repeat that analysis in the present judgment, I do not doubt that she will have had well in mind the legal effect of the pre-nuptial agreement, and the circumstances in which she was entitled to interfere. To the extent that Mr Feehan submitted she failed to have regard to this aspect, I do not agree.

26. In my judgment, as Mr Yates submitted, when deciding need and compensation, the judge was exercising a discretion, albeit constrained by the terms of the pre-nuptial agreement. This court will only interfere in her exercise of that discretion if what she decided was outside the legitimate range of decisions available to her; if, in other words, she was plainly wrong in the exercise of her discretion.

27. It is important to understand the effect of this court's first judgment. It concluded that it would be manifestly unfair, justifying the court's interference in what was agreed in the pre-nuptial agreement, to permit AW to benefit from the sharing of non-matrimonial assets to the extent she did as a result of her failure to act diligently. However, she was entitled to those assets up to mid-2017, namely a sum of $348,210.00 (see paragraph 56 of Justice Richards' second judgment). Because, wrongly, as the court decided, AH was of the view AW was not entitled to any non-matrimonial assets, she has not had the benefit of them. Had she had that benefit, she would, as Mr Yates submitted, have benefitted from any increase in their value when in her hands from mid-2017 to the present day. That is not rewarding AW for her delay or going behind the judgment of the Court of Appeal, as Mr Feehan submitted, but merely reflecting what should have happened had AH abided by the terms of the pre-nuptial agreement. The extent of any increase in value of those assets notionally in the hands of AW is uncertain. However, it is something which the judge would have been entitled to take into account.

28. In assessing whether the pre-nuptial agreement sufficiently provided for AW's needs, and adequately compensated her, the judge was entitled, as it seems to me, to have regard to all of AH's 2017 assets ($1,612,046.00, paragraph 76 of the second judgment). The court would otherwise have been assessing need and compensation on the assumption that the ring-fencing provided for in the pre-nuptial agreement was fair, which was the very thing which the court was seeking to assess.

29. I do not accept, as Mr Feehan submitted, that the judge was bound to abide by what she said in paragraph 247 of her first judgment. What she said in that paragraph was not part of her decision in that case. The figures she was then considering were different from those she was considering

in her second judgment. I see no reason why, when specifically faced with having to consider need and compensation on the basis of the figures then before her, the judge should have been constrained from a full and proper analysis of the issues. That cannot have been the intention of the Court of Appeal.

The judge's consideration of need

30. The judge first considered the topic of need in paragraphs 57-67 of the judgment. In doing so, she set out the different financial circumstances of AH and AW. I merely underline some of the more striking aspects. In 2018 AH earned [] as against AW's []. AW has limited savings, assets and no surplus. More than half AW's assets are in her pension. AW will not be able to save a significant extent of her earnings. Should the house have to be sold, AW would only be entitled to 35% of it. It is not "a home of her own." AW is now middle aged. The time to build up her wealth has passed. Her standard of living will be substantially below that of AH. The judge concluded that:

> "*In the absence of any lump sum payment, she must…rely entirely on her own efforts and business.*

31. In my view, no real criticism can be made of what the judge said in paragraphs 57-67.

Compensation

32. The judge first considered the topic of compensation in paragraphs 68 and 69 of her judgment. She referred to what in my view is a matter of considerable importance in this case, namely that AW is the primary carer for Y and, given his special needs, that that is likely to be a lifelong endeavour. As the judge said, albeit the child's needs do not mean AW has to remain at home, and that AH pays for child care, the primary responsibility upon AW in the circumstances is considerable and will impact upon her.

33. Again, in my view, no real criticism can be made of what the judge said in paragraphs 68-9.

Was the judge entitled to find that the recalculated sum of $348,210.00 did not meet the justice of the case?

34. The issue is whether, as she set out in paragraphs 70-73 of her judgment, the judge was entitled to find that $348,210.00 did not meet the justice of the case in respect need and compensation, and to conclude in consequence that the terms of the pre-nuptial agreement should to some

extent be disapplied. In my judgment, she was. She was entitled to interpret need generously, and to conclude that that sum would do very little to assist AW with her limited resources on the road to independent living. The judge was right to have regard to the need to compensate AW for a possible lifetime as the primary carer for the child. While in paragraph 73 the judge only briefly referred to the pre-nuptial agreement, and did so in terms of the three strands of need, compensation and sharing, I have no doubt she had the relevant legal principles well in mind, as I have said. Moreover, her justification for disapplying the agreement to some extent was clearly not based upon the strand of sharing, but upon the strands of need and compensation.

35. I do not accept that she did not have well in mind the relevant authorities. On the contrary, she cited significant relevant ones (in paragraph 71 of her judgment). In the final analysis, she had to consider the facts of the case before her.

36. In short, I have concluded that the judge was entitled to disapply the terms of the pre-nuptial having regard to the strands of need and compensation.

Was the judge entitled to award the sum of $650,000?

37. The issue is whether, on the basis of the strands of need and compensation, the judge was entitled to award the sum of $650,000. Although the judge more than once repeated the mantra of need, compensation and sharing when referring to the award, she essentially justified it on the basis of the strands of need and compensation, as I have previously indicated. Paragraph 77 encapsulates the judge's thinking, as it seems to me. Part of the $650,000 would go towards the purchase of AW's own home, while the balance would be for contingencies or for capital build. In paragraph 78, the judge indicated that an award of $650,000 would amount to about a third of AH's total assets, "*which would not be unfair to the husband in all the circumstances of the case*."

38. I have anxiously considered whether, having, as she was entitled to, disapplied the pre-nuptial agreement to some extent, an award of $650,000 was outside the legitimate range of awards available to the judge. While it does seem to me to be a generous award in all the circumstances, I have concluded that it was within the legitimate range of awards available to her.

39. In the result therefore, I would dismiss this appeal.

Costs

40. As anticipated by the previous judgment of this court, the question of costs should be considered on paper (see paragraph 102 of the previous judgment). Submissions on costs should be made within 28 days of the final order of this court.

The Rt. Hon Sir Alan Moses, Justice of Appeal

41. I agree.

The Hon C Dennis Morrison, Justice of Appeal

42. I also agree.