

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION
3

4 CAUSE NO. FAM 66 OF 2014
5

6 BETWEEN: DJ PETITIONER
7

8 AND:
9 BJ
10 RESPONDENT
11

12 Appearances: Mr. Nicholas Yates Q.C. instructed by Mr. Andrew
13 Woodcock of Hampson & Co for the Petitioner
14 Mr. Frank Feehan Q.C. instructed by Guy Dilliway-
15 Parry of Priestleys for the Respondent
16

17 Before: The Hon. Justice Cheryll Richards Q.C.
18

19 Hearing: 28th October 2020

20 Draft Judgment Circulated: 22nd February 2021
21
22



23 HEADNOTE

24 *Family Law – Recalculation of assets, application of the three principles of Need,*
25 *Compensation and Sharing*
26

27 JUDGMENT
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29
30

1 1. This matter was remitted by the Cayman Islands Court of Appeal (“CICA”) with an
2 Order dated 3rd September 2020 in terms as follows:

3
4 i) “The Respondent/Appellant’s appeal succeeds to the extent that joint assets, as
5 defined by the Pre-Nuptial Agreement, available for distribution should be re-
6 calculated by deducting any increase in them from July 2017 to June 2019 and
7 that the payment to the Petitioner/Respondent as per the Order of 16 August
8 2019 should be reduced accordingly (“Recalculation”).

9
10 ii) ... to undertake the Recalculation and to consider whether, in light of the
11 Recalculation the strands of need, compensation and sharing are adequately
12 provided for as far as the Petitioner/Respondent is concerned.

13
14 iii) The Recalculation should be made at a hearing to take place by Zoom and be
15 listed at the first available opportunity with a time estimate of ½ day
16 (“Hearing”).

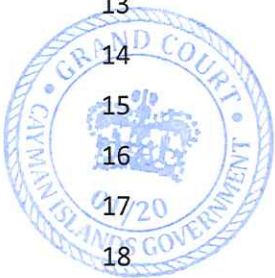
17
18 iv) The Parties are to exchange and file skeleton arguments in relation to the
19 Recalculation 7 days prior to the Hearing.

20
21 v) The costs of the first instance proceedings and the appeal shall be determined by
22 the CICA on written submissions by the parties to be submitted not later than 14
23 days from filing of the Order confirming the Recalculation.

24
25 vi) ...”

26
27 2. For the purpose of continuing to maintain the anonymity of the parties, I shall refer to
28 DJ, the Petitioner/Respondent as the wife and BJ, the Respondent/Appellant as the
29 husband.

30
31 3. There are thus two issues before the Court. Firstly a factual exercise of recalculating the
32 assets using the date July 2017 rather than as at the date of the Grand Court hearing in
33 June 2019 and secondly to apply the guideline principles in considering whether the



1 strands of need, compensation and sharing are adequately met with respect to the wife
 2 by the figure arrived at on recalculation.

3
 4 4. The Order of the 16th August 2019 referenced above in paragraph 1 followed on from a
 5 final ancillary hearing in the Grand Court in June 2019 and a judgment of the 5th August
 6 2019. The sum identified for sharing as per the Order of the 16th August 2019 was
 7 calculated to be \$1,816,851.00 less \$309,270.00 being assets held in the husband's
 8 Firm's capital account and a total arrived at of \$1,507,581.00, one half of which would
 9 be \$753,790.50 less \$5,911.51, the small profit earned by the wife's business for a total
 10 of \$747,878.99.

11
 12 5. The assets of the husband were previously calculated by reference to his Affidavit of
 13 22nd March 2019. The schedule of assets and liabilities attached to that Affidavit showed
 14 assets and liabilities as at 10th July 2017 and as at the 23rd November 2018. The assets
 15 listed for 2017 totaled \$2,242,364.85 and were as follows:

16
 17 **2017 ASSET SCHEDULE**

#	Item	Description	Value as at 10 th July 2017 \$
1-14	Bank Accounts		105,707.25
15-17	Brokerage Accounts		957.87
18-27	Investment shares		387,312.98
28-32	Private investment		98,870.21
33	Personal Loan		23,492.18
34-36	Motor cars	1993 Jeep Renegade, 1997 Honda CRV, 2011 Jeep Grand Wagoner	53,000.00
37	Boat	14" Yellow Panga with a 30 horsepower motor and trailer	2,500.00
38	Land	Undeveloped Cayman land in GT – Clipper Bay	264,040.00
39	Land	Undeveloped Cayman land in GT	115,000.00
40	House	Walkers Road, GT	230,000.00
41	Apartment	Careenage, Edgewater Way, Prospect	365,000.00
42	Social Security	Social Security Benefits	*
43		Workers Compensation Insurance Policy	*
44	Insurance Policy	Americo – Life Insurance Policy	17,024.21
45	Insurance Policy	Americo – Life Insurance Policy	22,561.22
46		Partnership Interest	418,200.00
47		Current Acct.	*

48	Pension	Cayman Islands Chamber of Commerce Pension Plan	136,473.17
		Total	\$2,242,364.85

1

2 **PRELIMINARY ISSUES**

3 6. There was disagreement between the parties not only as to the factual position but as to
4 the approach which is to be taken to the recalculation exercise.

5

6 7. Counsel on behalf of the wife submitted that in order for the Court to carry out the
7 recalculation exercise, the wife should have been afforded the opportunity to file
8 additional evidence as to the level of the husband's assets as at mid-2017 as well as to
9 her current assets, liabilities and needs. There was thus initial inquiry as to whether the
10 hearing date was to be treated as a case management date, with directions to be given
11 for the filing of evidence.

12

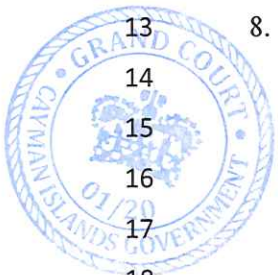
13 8. Counsel on behalf of the husband submitted that it would be wholly disproportionate to
14 allow the litigation to continue further and to incur further costs, that it would be contrary
15 to the principle of finality for the wife to now be permitted to reopen the litigation and
16 that this Court should be wary of any attempt to widen the evidential scope of the
17 exercise.

18

19 9. This latter submission is one which is accepted. The CICA gave clear and specific
20 directions which did not include requiring and considering fresh evidence.

21 **APPROACH TO 2017 SCHEDULE**

22 10. The Court was invited by Counsel on behalf of the wife to view the 2017 schedule with
23 caution and to note that as it was never an issue in the case that sharing should cease in
24 2017, the schedule attached to the 22nd March 2019 Affidavit was never tested in cross
25 examination during the Grand Court hearing in June 2019 and the accuracy of the figures
26 therein is not accepted. Counsel said that there is no information as to whether the values
27 stated as at 2017 were correct or not and no evidence to support that they were.
28 Moreover Counsel stated that the full schedule was not in the hearing bundle until part
29 of the way through the hearing. What had been in the bundle had been at page 354 and
30 was a much reduced version of it.



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11. Counsel for the husband accepted that there had been an initial error in the copying of the schedule for the hearing bundle but explained that this had been remedied before the hearing was completed. He submitted that there was no serious challenge or disagreement to the schedule at trial and by way of substantive response made the following specific points:

- i) The Affidavit referencing the schedule was provided to the CICA by Counsel for the wife to assist in understanding the asset base as at 2016 and onwards. There was no indication of concern as to its accuracy at the time it was provided.
- ii) The Order of Williams J. in 2018 included the statement that “this is not a case in which there has been a failure of disclosure on the part of the husband”.
- iii) The schedule was supported by background documentation which while not included in the final hearing bundle had been available to those acting for the wife to check this schedule against that documentation and to make such arguments as they wished to make and none were made.
- iv) The schedule had not been properly copied for the trial bundle. Once this error was realised, a full copy of the fold out page showing the full schedule was served within a week and that they had the opportunity to check this against the documentation which they already had.

12. The factual dispute continued after the recalculation hearing. Following that hearing Counsel for the wife provided to the Court a copy of page 354, the schedule of assets referred to in the said Affidavit as it originally appeared in the June 2019 hearing bundle.

13. On the 2nd November 2020, Counsel on behalf of the husband responded to indicate in summary that the schedule of assets had been provided well in advance of the trial, and had been fully tested in correspondence including by way of requests for further and better particulars. The full response is set out below:





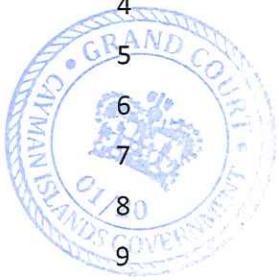
1
2 “i. Although the printed trial bundle mistakenly contained a poor copy of the schedule
3 containing the 2017 asset figures (which was attached to Mr. Woodcock’s email
4 despite not being requested by the Court), that mistake was detected before trial and
5 a full copy of the schedule was provided prior to the hearing (see attached email to
6 Mr. Woodcock dated 3 June 2019). Further, this exhibit was also attached to the
7 Respondent’s Affirmation dated 4 December 2018 which was also in the trial bundle
8 (see attached email dated 3 June (2020) (sic) which confirms);

9
10 ii. It is inaccurate to suggest (or infer) that the Petitioner first received this schedule
11 at or shortly before the trial. In fact it was first sent to the Petitioner on 1 September
12 2017, then exhibited to the Respondent’s 4 December 2018 Affirmation and then
13 finally exhibited to the Respondents 22 March 2020 Affirmation (albeit in the latter
14 case with an administrative error corrected before the hearing). Further, the 2017
15 figures were fully tested in correspondence at the time that the schedule of those
16 figures was originally served. A request for further and better particulars of the
17 schedule was sent by W’s then solicitors (McGrath Tonner) on 11 October
18 (2020)(sic) and responded to on 12 January (2020)(sic) (exhibited to 4 December
19 Affirmation);”

20
21 14. On the 3rd November 2020, Counsel on behalf of the wife responded to indicate in
22 summary their position as to the unreliability of the schedule by reference to certain
23 items on the schedule and that they had come on record shortly before the trial and had
24 not had the papers from the previous attorneys.

25
26 15. On 4th November 2020 Counsel on behalf of the husband responded to indicate in
27 summary that the schedule had been available well in advance and during the Grand
28 Court hearing in June 2019, was the subject of inquiry and that what was sought to be
29 raised now as to debts was not raised at the trial. The full response is set out below:

30 “Our email of 2 November 2020 was primarily intended to correct a potentially
31 significantly misleading impression caused by Mr. Woodcock sending through a
32 folded over document which could be construed to infer that our client’s assets and
33 liabilities schedule (“Schedule”) was not provided to the Petitioner well in advance
34 of the hearing or not available at the hearing (which is demonstrably not the case).



1 *To correct yet further potentially misleading statements in .. most recent email:*
2 *The Schedule: 1) was available to the Petitioner on the court file (exhibited to two*
3 *affidavits); 2) was in fact in the hearing bundle at trial; and 3) had been provided*
4 *to the Petitioner on no less than three occasions the first being in September 2017*
5 *and indeed was the subject of a request for further and better particulars which was*
6 *responded to;*

7 *It has never previously been asserted that Hampsons does not have the relevant case*
8 *papers, it is not accepted that Priestleys were aware that KSG had exercised a lien*
9 *over the case papers, indeed no request has been made of Priestleys for papers at*
10 *any stage in proceedings;*

11 *It was entirely the Petitioner's decision to change attorneys at a very late stage."*

12
13
14 16. Having considered all the circumstances highlighted, it is clear that this 2017 schedule
15 formed a part of the material filed well in advance of the June 2019 hearing. No
16 disclosure failures on the part of the husband were identified by the Court in hearings
17 prior to June 2019. The copying error made in respect of the hearing bundle appears to
18 have been swiftly remedied and can only have been of very limited effect given the
19 availability of the full copy at an earlier time.

20
21 17. While I accept that there was limited focus on the 2017 aspect of the schedule, there is
22 nothing to suggest or demonstrate that it is so unreliable that it ought not to be used for
23 the purpose of recalculation or that it would be unfair to do so.

24
25 **2017 CALCULATION**

26 18. On the day of the hearing, the disagreement on the factual aspect of the calculation was
27 limited to two narrow areas shown in bold below, the more impactful of the two being
28 the value of the Clipper Bay Land in 2017, it having been purchased by the parties in
29 2014 and whether or not the outstanding mortgage on this property, being then
30 \$212,119.00 ought to be deducted from the asset calculation.

31
32 19. The table below sets out the positions of both parties at the start and end of the hearing

	Husband's Calculation \$	Wife's Calculation \$
Value of Husband's assets as at 10 th July 2017 ¹	2, 242,365	2, 242,365
Deduct Assets of Firm	418,200	418,200
Balance	1,824,165	1,824,165
Deduct Non-Firm Liabilities as per PNA S. 3 (f) :		
BOB credit card #1	11,570	0
BOB credit card # 2	2,538	0
CS Overseas Credit card	155	0
Bank loan secured against Land in Clipper Bay	212,119	0
Apartment Loan Careenage, Prospect	148,631	0
Total deduction	375,013	0
Balance after deduction	1,449,152	1,824,165
Deduct Assets listed by H. at Appendix 1 of PNA 17 items and amounts which are all agreed by both H and W		
Balance after two sets of deductions	440,681	815,694
H's makes concessions resulting in additions of some of deductions made above as follows :		
Ignore loan on Careenage Property	148, 631	
BOB credit card #1	11,570	
BOB credit card #2	2,538	
Total additions to be made	162,739	
Revised asset value for H.	603,420	
One half	301 710	407,847
Start: Wife – Add back difference in value of the Clipper Bay land 420,016 less 264,040		145,976
End: By agreement – accepting that the value of Clipper Bay Land increased by 93,000 between purchase in 2014 and 2017	46,500	46,500
	\$348,210	\$454,347

1 **VALUE OF CLIPPER BAY LAND IN 2017**

2 20. Ultimately an agreement was reached by both parties as to the value of the Clipper Bay
3 land in 2017. I am grateful to both Counsel for their pragmatic and sensible approach to
4 this issue.

5

¹ As per Affidavit of H of 22nd March 2019



1 21. Agreement was reached in the following way. Counsel on behalf of the wife initially
2 noted that the valuation in 2019 put forward by the wife for this land was \$420,016.00.
3 The husband had contended at the June 2019 hearing that there was a mortgage against
4 the property of \$196,968.00 so that the asset value was less than the amount claimed by
5 the wife. The Court in its August 2019 judgment following the June 2019 hearing
6 reduced the asset figure by the value of the outstanding loan on the property
7 (\$196,968.00). Counsel argued that the figure in the Judgment is already net of that loan
8 and should not be further reduced which is what the husband is now seeking to do.
9 Counsel submitted that in order to arrive at the correct value the difference between the
10 two figures of \$420,016.00 (which is the figure in paragraph 229 of the judgment) and
11 the one that has been used in the 2017 schedule which is \$264,040.00 had to be added
12 back.

13
14 22. By his calculation the sum to be added back was then \$145,976.00 as a result of which
15 the one half share to the wife would be \$480,835.00. He pointed to the fact as illustrative
16 of the unreliability of the schedule and the need for caution, that the value of the Clipper
17 Bay land, of \$264,040.00 was shown as the same for 2018, as for 2017. Counsel argued
18 that the figure of \$264,040.00 in the schedule is net of the mortgage, not gross and that
19 either it is being done twice or these figures are simply wrong because the property could
20 not have increased in value from the 23rd November 2018 to February 2019 from
21 \$264,040.00 to \$420,000.00 despite the argument from the other side as to increases in
22 land values in the Cayman Islands.

23
24 23. Following my inquiry as to the existence of any documents previously produced to show
25 the value of this land in 2017, after a short recess, Counsel for the husband indicated that
26 he had been shown a document, (a copy was provided to the other side) which is the
27 purchase document for this property in late 2014. He said that this is a document which
28 both parties would have had because they purchased the property together. This
29 document, gives the purchase price of US\$322,000.00 so that the Cayman Islands dollar
30 price is \$264,040.00. This was the price that both parties knew about all the way through
31 the proceedings up until 2019.

32
33 24. Counsel for the husband proposed the following:-
34

1 *“At 2019, the wife agreed a valuation of \$420,000 except that, of course, there was*
2 *then to be the deduction of the mortgage, which Your Ladyship ruled, should be the*
3 *case. But taking \$420,000 as the price of the property in 2019 as a sensible way of*
4 *dealing with this and a proportionate way of dealing with this, we propose that if*
5 *there's any doubt as to any increase in value between 2014 and 2017, the best thing*
6 *to do is to take a straight line increase graph from \$264,000 to \$420,000.*

7
8 *That implies an addition of about \$31,000 a year between 2014 and 2019 and that*
9 *would add \$93,000 to the figure which is on the blue and white schedule.*

10
11 *And rather than create enormous costs by adjourning this case, yet again, and*
12 *getting more expert evidence, we say that the outcome of that would be that the wife*
13 *would be paid on our figures, an extra \$46,500, which gets her less than \$30,000*
14 *short of the figure, if we are right about ordinary deductions, which I'm certain we*
15 *are right about deductions of mortgages and other liabilities.*

16
17 *That gets us less than \$30,000 short of the green figure at the bottom of the per 'H'*
18 *column in Mr. Yates' schedule.*

19
20 25. Counsel on behalf of the wife took instructions and advised agreement with this course.
21 He stated:

22 *“We are very content to agree that very pragmatic way forward suggested by My*
23 *Learned Friend. We are grateful to him for that, it seems to be the right way through*
24 *this in the circumstances.*

25
26
27 *So I calculate the payment that the husband contends for is \$348,210.00 on that*
28 *basis, and the one we now contend for is \$454,347.00. The only difference between*
29 *us now being whether the Scotiabank loan associated with Clipper Bay land should*
30 *be deducted or not.”*



1 **APPLICATION OF THE PRE-NUPTIAL AGREEMENT**

2 26. It was therefore agreed that the value of the Clipper Bay land in 2017 was \$357,000.00
3 from which the husband says should be deducted the outstanding mortgage amount
4 which was then \$212,119.00.

5
6 27. Counsel for the wife submits that it should not be deducted because of paragraph 3(f) of
7 the Pre-nuptial Agreement of 16th February 2012 (“the PNA”). This provides in part that:

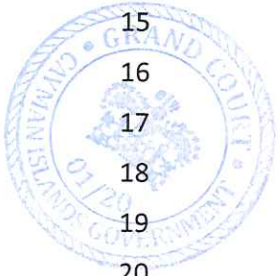
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9 *“All debts incurred before and during the marriage shall be the separate*
10 *financial obligation of the party who incurred the debt and the other party*
11 *shall not be responsible in any way towards that obligation”.*
12

13 28. By virtue of this provision the wife submits that the entirety of the sum of \$375,000.00
14 including the mortgage for the Clipper Bay land should not be deducted from the total
15 asset figure. This means, said Counsel for the wife, that the mortgage debt should be
16 ignored, that what the husband is trying to do is to take the debt off twice but that it
17 should not be removed at all because it is a debt and the PNA says that it should be
18 ignored. Counsel also stated that this means that the wife should not be paying for half
19 of that debt, which is what she will be doing if it is included on the schedule.

20
21 29. Counsel for the husband submitted that the plain meaning of the PNA is that the
22 borrower of the funds is responsible to repay the same and that where the husband
23 borrowed money against property it is for him to repay it and not the wife. It cannot
24 possibly mean that in looking at a schedule of assets, the liabilities should be ignored.
25 Counsel stated that it would be wholly contrary to all principle not to deduct liabilities
26 from assets to reach a net position for distribution.

27
28 30. Counsel for the wife pointed to an inconsistency in the approach to deductions on the
29 part of the husband who has agreed that the value of some items but not all of the sum
30 of \$375,013.00 should be added back and thus be included in the total asset value as at
31 2017. The three agreed items are, the Careenage property and two of three credit card
32 amounts, adding to the net asset base, the sum of \$162,000.00.

33
34 31. The wife argues that in the face of this concession there is no good reason for the debt
35 on the Clipper Bay land to be treated differently. The response from Counsel for the



1 husband is that the husband in good faith has made these concessions and that the reason
2 for adding back the value of the Careenage property is that this is a pre-marital liability².
3 This entire asset is excluded as it is ring-fenced and is also a liability. The interest in the
4 Clipper Bay property is not ring-fenced but is to be valued net of the mortgage.

5
6 32. In my view paragraph 3(f) of the PNA is to be given its plain and ordinary meaning. The
7 responsibility to repay debts incurred rests with the person who incurred the debt. This
8 has nothing to do with net asset values. Indeed this was the approach taken in the August
9 judgment.

10
11 33. Approaching the matter in this way, the mortgage liability is to be deducted to arrive at
12 a net asset value. Consequently in my view, the fifty percent asset sharing calculation to
13 which the wife would be entitled as per the PNA using the date of mid-2017 is
14 \$348,210.00.

15 **THE SUBMISSIONS – NEED, COMPENSATION, SHARING**

16 34. The broad submission made on behalf of the wife is that from the draft judgment of the
17 CICA, the Appellate Court was of the clear view that the substantive award should be
18 reduced by a minimal amount of \$23,301.94 to the sum of \$724,577.05 and that this
19 amount should not change in the course of the recalculation exercise in order for justice
20 to be done to the three strands of need, compensation and sharing.³

21
22 35. The husband's primary submission is that the amount arrived at in calculating one-half
23 share of the 2017 asset base of over \$301,787.43 meets all the elements of need,
24 compensation and sharing and importantly that this amount accords with the reasoning
25 of this Court as set out in paragraph 247 of its August 2019 judgment. Counsel submitted
26 further that it is misleading to say that the CICA came to a clear view that the substantive
27 award should be reduced by only \$23,301.94. This was an argument which was rejected
28 by the CICA which concluded at paragraph 94 of its judgment that it was not in a position
29 to resolve the disagreement and ordered the Recalculation. In arriving at the figure of
30 \$724,577.05, the CICA was not aware that this figure involved ring-fenced assets.

² Paragraph 8 (5)

³ Paragraph 20 of W's submissions



1 Counsel argued that the submission that this Court should not decrease the award is an
2 invitation not to recalculate the available assets as ordered by the CICA.

3 **NEED**

4 36. Under the heading of 'Need', Counsel for the wife submitted that need is a really serious
5 issue in this case and also justifies an enhanced provision. Counsel argued that any
6 reduction below the initial sum arrived at by the CICA as stated above would not provide
7 adequately for the needs of the wife on the facts of this case and in light of her ongoing
8 contribution to the child of the marriage, J and his welfare. Any change of residence of
9 J would leave the wife with very few assets.

10
11 37. It was argued that the wife should be permitted to provide further evidence as to her
12 needs or that in the carrying out of the discretionary exercise, the Court should err on the
13 side of caution and in her favour.

14
15 38. Counsel asked that the Court consider the following matters.

- 16
17 i) The wife is 48 years old.
- 18
19 ii) She has very limited ability in the future to generate assets because of the care that
20 she gives to J. Unlike the husband she will not have the ability to amass great wealth
21 in the future. That ability has been severely hampered for her. This is in contrast to
22 the husband who has a huge surplus every year, of income over expenditure and the
23 ability to amass great wealth in the future. Therefore it is likely that the amount that
24 the wife receives is all that she will have for the rest of her life and therefore her
25 needs dictate that she retains the type of figure initially mentioned by the CICA.
- 26
27 iii) The wife is not going to benefit materially or at all from the contribution that she
28 will be making to the property in which she is going to live with J. In any case,
29 although she will be contributing 45% to the mortgage she will only be entitled to
30 benefit from 35% because of the fact that she will be residing in the house.
- 31
32 iv) Should J cease living in the property for any number of reasons, then the amount she
33 receives will be all the wife will have to then go on the road to independent living.



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39. Counsel drew the Court’s attention to the judgment of the Court in the case of *Brack v. Brack*⁴ and highlighted the following paragraph therein:

*“In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, 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.”*⁵

40. Counsel also made reference to the case of *FF v. KF*⁶, in support of the submission that as part of the discretionary exercise, the “needs” principle is open to a broad construction depending on the context of each case. The Court stated therein:

“The main drivers in the discretionary exercise are the scale of the payer’s wealth, the length of the marriage, the applicants’ age and health and the standard of living, although the latter factors cannot be allowed to dominate the exercise.”

41. Counsel for the husband argued in response that the wife’s needs would be met by the recalculated sum. This, on the basis that her needs ought to be seen in the context of the fact that the husband will bear the greater financial burden of J’s care. As a result of this, the wife will have funds to cover all of his educational and therapeutic needs including a full time nanny and home care. She has been able to resume her career and her companies have shown the potential for growth. The wife has the indirect benefit of all that is provided for J, including J’s housing. She will have a fully furnished home and save for 45% contribution to the mortgage costs will have all the outgoings and the utility

⁴ 2018 EWHC Civ. 2862

⁵ Paragraph 103

⁶ 2017 EWHC 1093



1 bills paid. In addition she will retain her own assets assessed at \$287,870.00 and a further
2 sum of \$301,787 for a total of \$589,657.00. All she has to find is money for herself. She
3 is a successful business woman in her own right and earns close to \$80,000.00 per year.
4

5 42. Counsel submitted that there is no possible sense in which the wife is going to be
6 destitute or at risk and no health concerns with J such as to suggest that he is not going
7 to outlive his parents and thus that this provision by the husband which indirectly
8 benefits the wife will not be on a long term basis.

9 **COMPENSATION**

10 43. With respect to compensation, Counsel on behalf of the wife submitted that any further
11 reduction from the figure arrived at by the CICA would not be compliant with the overall
12 objective of fairness and would not reflect a proper amount for compensation in the
13 context of this case.
14

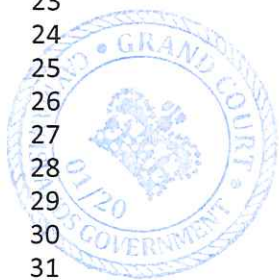
15 44. It is urged that the wife has suffered relationship-generated disadvantage given the long
16 term care which she needs to provide for J and the impact this has had on her ability to
17 generate an income. It was urged that if it is the case that the sharing element is dealt
18 with by the PNA then compensation must be in addition to any sharing amount.
19

20 45. Counsel placed reliance on the following passage from the judgment of the Court in the
21 case of *McTaggart v. McTaggart*⁷

22 “41 Two of those three strands—need and sharing—require little, if any,
23 elaboration. But it is, I think, necessary to say something of the third:
24 compensation. Lord Nicholls explained the concept in these terms (*ibid.*, at
25 paras. 13–15):

26 “Another strand, recognised more explicitly now than formerly, is
27 compensation. This is aimed at redressing any significant prospective
28 economic disparity between the parties arising from the way they conducted
29 their marriage. For instance, the parties may have arranged their affairs in
30 a way which has greatly advantaged the husband in terms of his earning
31 capacity but left the wife severely handicapped so far as her own earning
32 capacity is concerned. Then the wife suffers a double loss: a diminution in
33 her earning capacity and the loss of a share in her husband’s enhanced
34 income. This is often the case. Although less marked than in the past, women

⁷ 2011 (2) CILR 366



1 *may still suffer a disproportionate financial loss on the breakdown of a*
2 *marriage because of their traditional role as home-maker and child-carer.*
3 *When this is so, fairness requires that this feature should be taken into*
4 *account by the court when exercising its statutory powers. The Court of*
5 *Appeal decision in SRJ v. DWJ (Financial Provision) [1999] 2 FLR 176,*
6 *182, is an example where this was recognised expressly.*

7
8 *Compensation and financial needs often overlap in practice, so double-*
9 *counting has to be avoided. But they are distinct concepts, and they are far*
10 *from coterminous. A claimant wife may be able to earn her own living but*
11 *she may still be entitled to a measure of compensation.”*
12 *Baroness Hale said this (ibid., at para. 140):*

13
14 *“A second rationale, which is closely related to need, is compensation for*
15 *relationship-generated disadvantage. Indeed, some consider that provision*
16 *for need is compensation for relationship-generated disadvantage. But the*
17 *economic disadvantage generated by the relationship may go beyond need,*
18 *however generously interpreted. The best example is a wife, like Mrs*
19 *McFarlane, who has given up what would very probably have been a*
20 *lucrative and successful career. If the other party, who has been the*
21 *beneficiary of the choices made during the marriage, is a high earner with*
22 *a substantial surplus over what is required to meet both parties’ needs, then*
23 *a premium above needs can reflect that relationship-generated*
24 *disadvantage.”*
25

26 46. Counsel for the husband submitted in reply that compensation is not a major element in
27 this case, and that this Court has already found this to be the case. Compensation has to
28 be seen in the context of this Court’s summary analysis in paragraph 247 of its judgment
29 and in the context of what the husband provides for J. He pays for all of J’s needs in
30 total, including nannies, so that the wife can enjoy her career. This provision by him is
31 in itself a continuing compensation to her. She has been able to pursue a successful
32 business career. The marriage was short and there is not even an attempt at calculating
33 relationship-generated disadvantage. Counsel said that at paragraph 247 of its judgment,
34 this Court set out a framework to also include the element of compensation. There should
35 be no change in what has already been decided by this Court as a fair outcome to these
36 proceedings.

37 **SHARING**

38 47. With respect to sharing, Counsel for the wife submitted that to apply a simple deduction
39 between the 2017 and 2019 assets without more would not take into account the growth
40 from which the wife would have benefitted had she received those assets in 2017, or of
41 the two years of cohabitation before the marriage. Counsel argued that it would be unfair

1 for the wife to lose three years of growth on the assets over the period from which the
2 husband would have benefitted and the wife did not.

3
4 48. Counsel for the husband submitted that to allow the wife to share in accruals during a
5 period of delay caused by her conduct would be contrary to the ruling of the CICA on
6 the matter. It would be unfair for her to do so and to benefit from an increase in value
7 because of conduct of the case which caused significant delay. Additionally the CICA
8 has ruled that time stops at 2017, some 3 years after separation which time period is
9 responsive to any concern about pre-PNA accrual, the period of prior cohabitation
10 having been found to be two years. Sharing is as per the PNA and it is likely that the
11 resulting share would be regarded as fair as the wife will not be left in a position of real
12 need.

13
14 49. The overarching argument of Counsel for the husband is that the amount proposed by
15 the husband on recalculation meets the summary analysis of the Court at paragraph 247
16 of its judgment and that the Court cannot vary from what was said in that paragraph.
17 Counsel said in oral submissions:

18 *“Now we can't know what Your Ladyship means by a small nest egg but \$300,000*
19 *in total, we submit, would plainly cover the notion of a small nest egg, \$100,000 on*
20 *top of a good start in housing with a deposit and purchase price all taken care of*
21 *sets the wife on what you say is your intention, which is to give her:*

22
23 *“The aim would be to provide greater assistance to the wife on the road to*
24 *independent living.”*

25
26 50. Counsel for the wife submitted that the Court should not limit itself to a mere
27 mathematical analysis and is empowered to make adjustments because the CICA has
28 asked that the strands of sharing, needs and compensation be reviewed with respect to
29 the recalculated sum.

30
31 51. I accept the submissions made by Counsel on behalf of the wife. Given the specific and
32 clear directions of the CICA, I do not consider that I am limited in the manner suggested
33 by Counsel for the husband. As I understand it, my task goes further than a factual

1 exercise and includes the exercise of a discretionary element in that having arrived at a
2 recalculated sum, I am to review and consider whether in all the circumstances of this
3 case, the three elements are satisfied by the new sum. This has to mean more than a paper
4 or rubber stamping exercise.

5 **SUBMISSIONS ON COSTS**

6 52. Counsel on behalf of the wife also submits that as part of this exercise, any order made
7 by this Court should be on the basis that no subsequent costs orders are made against the
8 wife, otherwise a needs driven award is likely to be rendered nugatory. It is submitted
9 that this can be achieved by this Court stipulating that any award made to the wife should
10 be increased correspondingly to any cost orders or a figure is given and expressed to be
11 on the basis that no further costs orders are made against her.

12
13 53. Counsel noted that the assets of the wife at the final hearing were calculated to be
14 \$287,870.00 and asked that the Court accept from him that there has been an erosion
15 since then and that these have now been reduced to about \$200,000.00.

16
17 54. Counsel for the husband submitted that costs are not a matter for this Court in accordance
18 with the order of the CICA and that it cannot be a proper or principled approach to
19 increase the order to the wife because of the risk that the wife may have to pay some
20 costs.

21
22 55. In my view the issue of costs does not fall within the remit of this Court. The Order is
23 clear that this is reserved to the CICA. The invitation by Counsel for the wife for this
24 Court to make some sort of statement in relation to costs amounts to making a
25 determination on this reserved issue, however indirect this may be and is an invitation
26 which I cannot accept.

27 **DISCUSSION AND CONCLUSIONS**

28 56. Having arrived at a conclusion with respect to the 2017 asset base and that the amount
29 of \$348,210.00 is the correct calculation as per the PNA, I am required to stand back and
30 consider whether in all the circumstances this amount satisfies the strands of need,
31 compensation and sharing. I have to consider what would be a fair division of assets
32 taking into account the parties' respective financial needs or any need for compensation.

33

- 1 57. I have first considered the needs of the wife. I reviewed the table at paragraph 210 of the
2 judgment which sets out the monthly contributions made by the husband - excluding
3 medical insurance, uninsured medical expenses and therapeutic treatments for J.
4
- 5 58. Nine of the twelve items listed in the table are items specific to J with the cost of the
6 nanny (\$3,900.00) being the largest percentage portion of the whole amount paid of
7 \$9,577.00 per month.
8
- 9 59. The other three items relate to costs for the household. However the submission that all
10 outgoings for the home where she resides with J are met by the husband and that the
11 wife indirectly benefits from these paid outgoings is not entirely correct. This is because
12 in each case the wife shoulders part of these monthly payments.
13
- 14 60. Currently she meets 45% of the rental costs, 45% of utility costs, and additional grocery
15 costs in excess of \$950.00 per month.
16
- 17 61. The wife's annual income in 2018 was \$78,556.00 or \$6,546.00 per month compared to
18 \$754,000.00 per annum or \$62,866.00 per month for the husband. From her monthly
19 income, in addition to meeting the portions of the household costs, the wife will have
20 her own personal costs for herself for clothing, her own transport and other personal
21 items.
22
- 23 62. While the wife would receive some indirect financial benefit from the 55% payments
24 made by the husband, this is not a case where all outgoings are covered such that there
25 can be a finding that the majority of the monthly sum earned by the wife is likely to be
26 saved because all her household and daily living expenses are met and that she is
27 therefore likely to have much surplus income.
- 28 63. Additionally when a house is purchased, which is to be held on trust for J, the wife will
29 reside in it with J and will be responsible for funding 45% of the mortgage payments.
30 Should the arrangements end and the house be sold, she would be entitled to 35% of the
31 proceeds. As a long term capital build for her, this will be of limited benefit for her. This
32 is not a home of her own.
33



1 64. At paragraph 217 of the judgment, I concluded that on the evidence which I had seen,
2 the wife has limited savings, limited assets and no surplus.

3
4 65. I have considered the asset position of the wife as set out in the judgment at paragraph
5 223. More than one half of it was made up of her pension rather than cash or a capital
6 investment base.

7
8 66. Her companies which had been recently started were on the ascendancy but had not yet
9 generated substantial sums. She is of middle age. The time open to her to build wealth,
10 moreover, at the substantial level already achieved by the husband, is not extensive. The
11 husband's significant earnings mean that his standard of living will be much higher than
12 what the wife will be able to afford on her own.

13
14 67. There is nothing in the contribution arrangements by the husband, relied on in the course
15 of this hearing, which serve to improve this position. In summary the wife is able to feed,
16 clothe and house herself. She will not have to provide funding for major items for J.
17 There is some contribution to her daily needs and these are met but in a way which is
18 not likely to allow her to see growth in her wealth or realise increased financial security.
19 In the absence of any lump sum payment, she must therefore rely entirely on her own
20 efforts and businesses.

21
22 68. On the aspect of compensation, the main factors are that the wife is the primary carer for
23 J and that, given his special needs, this is likely to be a lifelong endeavor. While J's
24 needs are not at the level that the wife has to give up her career to stay home with him
25 and it is of import that the husband pays for child care, there will undoubtedly be some
26 impact on the wife given the extent of the endeavor. In the judgment it was stated:-

27
28 *“While she states that she has had to start her own business in order to give herself*
29 *the flexibility to better care for J., the husband has been paying for nannies and will*
30 *be paying for even more assistance for J. in the future. There is no indication that*
31 *this has affected her career in a way that calls out for the highest level of*
32 *compensation. Nevertheless she has had and will have primary care for J. on a long*
33 *term basis and it is accepted that this may well be for a life time. It is agreed that*
34 *some element of compensation should be included in any settlement.” (paragraph*
35 *236)*
36



1 69. The husband argues that provision of childcare is an element of continuing compensation
2 for the wife. While the impact of this level of assistance is not to be minimised, nannies
3 will not have the overall responsibility for the household, are unlikely to be permanent
4 in J's life and are no substitute for a mother's continuing care and attention. J is now 8
5 years old. Because of the special circumstances, the wife as his primary carer will
6 continue to make a significant contribution towards his welfare well into the foreseeable
7 future. The husband will benefit from her contribution as although he will have visits
8 with J, he is relieved of the day to day responsibility for him.

9
10 70. Having considered all the circumstances I do not consider that the recalculated sum of
11 \$348,210.00 meets the justice of this case in particular with respect to the strands of need
12 and compensation. That sum would do very little to assist the wife with her limited
13 resources and assets, on the road to independent living.

14
15 71. In my view, in all the circumstances, it would be unfair to confine an award to the strict
16 line of the wife's daily needs. Need should be generously interpreted and should not
17 necessarily be seen as a limiting factor where there is a substantial surplus of resources.
18 Thus where possible, need may properly include a margin for savings and contingencies.
19 (See *Miller v. Miller, McFarlane v. McFarlane*⁸). I am also mindful of the cited cases
20 of *Brack v. Brack* and *FF v. KF* as referred to above. There is a clear need for such a
21 margin in this case.

22
23 72. Secondly and importantly I consider that the recalculated sum would fail to adequately
24 compensate the wife for a possible life time as the primary carer for J.

25
26 73. The PNA would operate unfairly where the resulting sum is inadequate to satisfy the
27 three principles with respect to the wife.

28
29 74. At paragraph 247 of the August judgment I stated:

30
31 *" Finally, I would add that if I am wrong as to the interpretation of the Agreement,*
32 *and had it resulted in the sharing of only \$126,624.00 with the wife, this being the*
33 *calculation as at date of separation in 2014, I make it plain that I would have*
34 *considered this to be entirely inadequate in the context of this case. I would have*
35 *considered the absence of inclusion of the period of cohabitation prior to the*

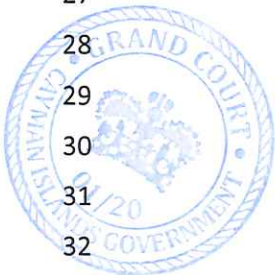
⁸ Paragraphs 139 and 144

1 marriage as an omission which had the potential to operate unfairly against the
2 wife. I would have concluded that the strands of need, compensation and sharing
3 required more than that amount and would have considered the non-matrimonial
4 assets or post separation assets in order to address more fairly the circumstances of
5 this case. I would have needed to bear in mind that while the contributions of the
6 husband to the acquisition of the after acquired assets ought not to be disregarded,
7 the wife's significant contributions in caring for the child also needed to be
8 considered. The ultimate aim would be to provide greater assistance to the wife on
9 the road to independent living. I would have said that the wife should be provided
10 with an amount reflective of her contribution in the past and in the future and
11 practically that she should be given a sum which allows her if she so chooses to
12 make a down payment on her own home (possibly 10 % of \$1,100,000.00) with 7%
13 closing costs, about \$300,000.00) and a further sum which would then allow her to
14 have remaining, a small nest egg of savings which would form the basis for a
15 capital build or to have a capital sum available in circumstances where her savings
16 are said to be depleted and there are outstanding legal costs.”
17

18 75. I have highlighted the sentence which then identified considerations for an award outside
19 of the PNA. In my view, the least amount which would meet the justice of this case in
20 terms of need, compensation and sharing is a sum of \$650,000.00 to be paid to the wife.
21 This would be a fair outcome, balancing all factors, taking into account all the
22 circumstances of the parties and of the marriage as detailed in the previous judgment,
23 and applying the three important guiding principles.
24

25 76. I have arrived at this figure in the following way. The husband's 2017 assets are agreed
26 after deduction of the assets held in his firm to be \$1,824,165.00 before other deductions.
27 The husband has agreed to add back most of the other deductions, challenging mainly
28 the outstanding mortgage on the Clipper Bay land (\$212,119.00) as a liability. The
29 balance after this deduction would be \$1,612,046.00. I have used a figure of 40% of this
30 to calculate the sum to be shared with the wife for a total of \$644,818.00 rounded up to
31 \$650,000.00.
32

33 77. The thinking is that the wife would have about \$200,000.00 towards the purchase of her
34 own home and the sum of \$450,000.00 for savings for contingencies or use as a capital
35 build. While this amount is small compared to the husband's resources, if she chooses,
36 this would form the basis for long term capital investments which would assist her,
37 together with her earnings from her businesses towards financial growth and
38 independence.
39



1 78. Mindful of the need for overall fairness to both parties, I have also cross-checked the
2 amount of \$650,000.00 against the husband's total asset figures, i.e. to consider what he
3 would retain. The husband's 2017 assets, excluding liabilities (not inclusive of guarantee
4 of firm (joint and several liability)) is a little over \$1.8 million (\$1,805,635.00), thus the
5 figure arrived at (\$650,000.00) is about one third of this. The husband would in effect
6 be left with 2017 assets of about \$1,155,635.00. I concluded that the proposed amount
7 to be shared would not be unfair to the husband in all the circumstances of this case.
8

9 **CONCLUSION**

10
11 79. The conclusions are thus as follows:

- 12
13 i) The sum on recalculation as at July 2017 as per the PNA is \$348,210.00.
14
15 ii) In light of this recalculation, I have reviewed all the circumstances of this case
16 and the submissions made and consider that the strands of need, compensation
17 and sharing are not adequately provided for as far as the Petitioner/Respondent
18 is concerned.
19
20 iii) Considering all the circumstances of this case, the sum of \$650,000.00 would
21 adequately provide for the strands of need, compensation and sharing.
22
23

24 **Dated this the 5th day of March 2021**

25
26 



27 **Honourable Justice Cheryll Richards Q.C.**
28 **Judge of the Grand Court**