



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE FAMILY DIVISION OF THE GRAND COURT OF THE
CAYMAN ISLANDS**

**CICA (Civil) Appeal No 28 of 2019
(FAM 66 of 2014)**

BETWEEN:

AH

Appellant

-AND-

AW

Respondent

BEFORE:

**The Rt Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal**

Appearances:

**Mr. Francis T Feehan QC instructed by Mr. Guy Dilliway-Parry
of Priestleys for the Appellant
Mr. Nicholas Yates QC instructed by Mr. Andrew Woodcock of
Hampson & Company for the Respondent**

Heard: 4 May 2020

**Draft Judgment
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Judgment delivered: 21 August 2020

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JUDGMENT

The President:

Introduction

1. 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-

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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.

The parties' financial resources

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.

Income

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.

Assets

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's 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.

AW

Income

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.

Assets

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.

The judge's order

8. After crediting AH with half AW's after-acquired assets, and applying her understanding of the Agreement, the judge ordered AH to pay AW CI\$747,878.99. It had been AH's case that only the assets acquired between the marriage and the final separation (CI\$215,225.33) fell to be shared, that taking into account the assets AW had acquired during that time, AW should receive the sum of CI\$126,624.00 (see paragraphs 61-3 of the judgment). However, in the course of an open exchange of offers, AH finally offered AW CI\$410,000.00.

Housing

9. The judge ordered AH to pay the deposit and all the acquisition costs (estimated at some CI\$200,000) on a house for Y to the value of CI\$900,000. AH had submitted that some CI\$800,000 was sufficient to purchase an appropriate house.

The net effect of the judge's decision

10. In broad terms, taking into account AH's pension entitlement and his capital account with the Firm, his net assets remaining following the judge's order amounted to some CI\$1,457,940, AW's to CI\$1,035,749. AH's net income would be [] as against AW's CI\$78,556.00.

The Agreement

11. Paragraph C, entitled, "*Intention to deal with financial arrangements*," states:

"(i) A [AH] and B [AW] wish to enter into an agreement ('Agreement') recording their wishes and intentions regarding their financial arrangements in the event of a decree of divorce, nullity or judicial separation.

(ii) A and B each intend that this Agreement shall set out their respective rights and obligations in respect of the other in the event of a decree of divorce, nullity or judicial separation."

12. Paragraph D, entitled, "*Separate property*," states:

"A and B have each acquired all of their respective separate property as set out in Appendix I...

A and B wish to retain following the marriage their respective Separate Property.

For the purposes of this Agreement, 'Separate Property' shall comprise the following:

- (a) A and B's assets, savings and pension provision acquired prior to entering into the marriage...*
- (b) Any additional property, assets or savings acquired by either A or B at any time in the future by way of gift or inheritance.*
- (c) Any increase in the value of the Separate Property..."*

13. Paragraph E, entitled “*Joint property*,” states:

“At the time of entering into this Agreement, A and B do not jointly own any property.”

14. Paragraph F makes it clear each party has received independent legal advice. Paragraph F(d) states:

“A and B acknowledge and agree that each has been informed that under the Laws of the Cayman Islands it is not possible, as at the end of this Agreement, to exclude the jurisdiction of the court to make orders pursuant to the Matrimonial Causes Law and that the terms of this Agreement do not necessarily reflect the manner in which a court might resolve their financial claims against each other in the event of a divorce, nullity or judicial separation.”

15. By paragraph H,

“A and B agree that the terms of this Agreement shall be binding upon them, wherever they may reside during the course of the marriage...”

16. Paragraphs 1 to 12 set out the terms of the agreement. Paragraph 3 deals with “*Separate property*.” It broadly provides for each party to have separate (as opposed to joint) property. Clause 3(d) provides:

“A and B each acknowledge that the other may from time to time receive gifts, including money or property, from friends or family members. Each agrees such gifts shall constitute Separate Property, and he or she shall make no claim in respect of such gifts either during the marriage or in the event of divorce, annulment or judicial separation.”

17. Paragraph 4 (the disputed paragraph) is entitled “*Joint property*.” It states:

“In the event of a dissolution of [sic] annulment of the marriage any assets (including income and bonuses), savings or property acquired by either A or B during the marriage, whether held jointly or severally, shall be distributed between A and B in equal shares...”

18. Paragraph 5 concerns the “family home.” It provides:

“In the event of divorce, nullity or judicial separation the equity in any family home acquired after marriage...shall be divided equally as follows:

(a) If A wishes to purchase B’s interest in the family home and B agrees...then B will transfer the property into A’s sole name, upon payment by A to B of a lump sum calculated as to one half of the following:

- (i) The open market value...*
- (ii) Less the outstanding balance on the mortgage...as at the date that A and B separate (the ‘Date of Separation’).*
- (iii) Less a further deduction of 2% of the open market value...such sum to represent the costs of sale...”*

19. Paragraph 6 is entitled, “Provision upon divorce, annulment or judicial separation.” It states:

“A and B have agreed that, in the event that their marriage is terminated by decree of divorce or annulment, or in the event of a decree of judicial separation within the first 7 years of the marriage, their financial claims will be defined and limited as follows:

Separate property

(a) Their respective Separate Property shall remain free of claim by the other as provided for herein.

Family home

(b) The family home will be dealt with in accordance with paragraph 5 above.

Joint assets

(c) Any other assets, property, savings or investments shall be dealt with in accordance with paragraph 4 above...

(d)

Child support

(e) A agrees that he will make suitable income provision for any children of the marriage by way of periodical payments for B for the benefit of the children, the amount of such periodical payments being fixed by agreement between the parties or in the absence of agreement, as ordered by the Court. Such periodical payments shall be made monthly...until the children of the family...cease full-time tertiary education. Suitable income provision will include any medical insurance costs, medical expenses, all educational and related costs, extra-curricular expenses and domestic assistance expenses. Insofar as the education of the child/children of the marriage, A and B agrees (sic) that such child shall attend a boarding school for their secondary education and such expenses shall be born by A.”

Pension provision

(f) ...

Debts

(g) A and B will remain solely responsible for debts in their sole name at the Date of Separation...”

Consent order

(h) Within proceedings for divorce, nullity or judicial separation, A and B agree to seek an order made by consent within such proceedings embodying the terms set out in this Agreement and otherwise dismissing claims with either A or B may have arising upon divorce, nullity or judicial separation.”

20. Paragraph 7 is entitled, “Agreement in full and final satisfaction.” It states,

(a) Both A and B intend that this Agreement resolves their respective rights and obligations regarding all forms of financial provision, including lump sum, property transfer, pension sharing and periodical payments in the event of a decree of divorce, nullity of [sic] judicial separation.

(b) Save as expressly provided herein, A and B each waive their rights to seek and obtain orders for financial provision from the other, whether of an income, capital or pension nature, and they each expressly

declare they will not, in the event of a divorce, annulment or judicial separation within the first 7 years of marriage, seek an order from the court determining their rights to make application for financial provision pursuant to the Matrimonial Causes Law (as amended) or any similar legislation that may replace it.”

The legal framework

The effect of a pre-nuptial agreement

21. The Supreme Court set out the position in England and Wales in *Granatino v Radmacher* [2011] 1 AC 534. Lord Phillips of Maltravers, at paragraph 75 and following, said:

“75. *White v White...and McFarlane v McFarlane...establish that the overriding criterion to be applied in ancillary relief proceedings is that of fairness and identify the three strands of need, compensation and sharing that are relevant to the question of what is fair. If an ante-nuptial agreement deals with those matters in a way that the court might adopt absent such an agreement, there is no problem about giving effect to the agreement. The problem arises where the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness. The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance. We would advance the following proposition...*

‘The court should give effect to a nuptial Agreement that is freely entered into by each party with full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.’

76. *That leaves the outstanding difficult question of the circumstances in which it would not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case...There is...some guidance that we believe it is safe to give directed to the situation where there are no tainting circumstances attending the conclusion of the agreement*

- 77 *...the first consideration must be given to the welfare...of any child...*

Autonomy

78. *The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord*

respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best...

Non-matrimonial property

79. *Often parties to a marriage will be motivated in concluding a nuptial agreement by a wish to make provision for existing property owned by one or another or property that one or another anticipates receiving from a third party...That distinction is particularly significant where the parties make express agreement as to the disposal of such property...There is nothing inherently unfair in such an agreement...*

81. *Of the three strands identified in White v White and Miller v Miller, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.*

82. *Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.”*

22. Baroness Hale of Richmond observed (in paragraph 175) that:

“The longer it is since the agreement was made, the more likely it is that later events will have overtaken it.”

23. In *Kremen v. Agrest* [2012] EWHC 45, Mostyn J, at paragraph 77 and following, summarised the position:

“...In determining whether “in the circumstances prevailing it would not be fair to hold the parties to their agreement:”

a. ...

b. Respect should be accorded to the decision of a married couple as to the manner in which their financial affairs should be regulated particularly where the agreement addresses existing circumstances and not merely the contingencies of an uncertain future... This is likely to be so where the agreement seeks to protect pre-marital property... By contrast it is less likely to be so where the agreement leaves in the hands of one spouse rather than the other the most part of a fortune which each spouse has played an equal role in their different ways in creating... If the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned...

It is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more... However, 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.”

24. Recently, in *Brack v. Brack* [2019] 1 WLR 3438, Lady Justice King (at paragraph 78) said that:

“...[I]t is now common ground that in financial remedy proceedings, where a judge has found there to be no vitiating features in relation to a prenuptial agreement, he is entitled, when applying the section 25 factors [of the Matrimonial Causes Act of England and Wales] in his search for a fair outcome, to take into account needs, compensation and sharing. In other

words, the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome.”

25. The Lady Justice continued (paragraph 102):

“102. It is undoubtedly the case that since the Supreme Court’s decision in Radmacher...the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in Radmacher [75] by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.

103. 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) [of the Matrimonial Causes Act 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...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.”

The Matrimonial Causes Law (2005 Revision)

26. The relevant legislation in the Cayman Islands is contained in sections 19 and 21 of the ***Matrimonial Causes Law***. Section 19 provides that:

“...in dealing with all ancillary matters arising under this Law, the Court shall have regard, first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.”

27. Section 21 provides:

“...[T]he Court shall, as appropriate, make orders for-

(a)...

(b) the disposition of matrimonial property, including the matrimonial home;

(c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon treaty of the said marriage;

(d) varying any other settlement of matrimonial property;

(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;

(f) providing for periodical payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse...”

28. As the President made clear in *McTaggart v McTaggart* [2011] 2 CILR 366, a decision to which I shall return, regard must be had to the different legislative background of the Cayman Islands when considering the application of the English and Welsh authorities in the Cayman Islands. There is, rightly, no dispute between Mr Feehan QC on behalf of AH and Mr Yates QC, on behalf of AW, that provided proper account is taken of that difference in legislative background, the authorities above set out the approach to be taken to nuptial agreements in the Cayman Islands. There is a dispute, to which I shall come, as to the effect in the present case of the different legislative background.

The meaning of the Agreement

29. There is no dispute but that the Agreement was freely entered into. I therefore turn to its meaning.

The difference between the parties

30. The difference between the parties can be shortly summarised. On the one hand, Mr Yates' submission was that the meaning of paragraph 4 (paragraph 17 above) is unambiguous and straightforward. Any assets acquired whilst the marriage subsisted are to be regarded as joint and fall to be distributed equally. On the other hand, Mr Feehan submitted that the words, 'during the marriage' must be interpreted in their proper context. He submitted, it is trite family law, both in England and Wales, and in the Cayman Islands, that property acquired after parties have finally separated is not matrimonial and therefore joint. It cannot conceivably have been the intention of the parties, under an agreement intended to protect AH's assets, that such property should be regarded as joint. The words 'during the marriage' must be taken to mean, up to the point of final separation, submitted Mr Feehan.

The judge's analysis

31. The judge accepted that matrimonial property has a particular and specific meaning in the context of family law, that property acquired after the final separation, and which is not the product of the joint endeavour of the parties, is unlikely to be matrimonial and therefore joint. She said (paragraph 132),

"However, it is unclear whether the words "during the marriage" have a particular and specialised meaning such that whenever they are used in any document in a family law proceeding, irrespective of context or setting, they must mean during the marriage up to the point of separation."

32. The judge found that it was "*less than believable*" that the parties would have left the interpretation of such an important provision to be construed as part of background knowledge. It was open to the parties to choose to act other than in accordance with what was the accepted definition of matrimonial property. Otherwise, as she found, they could simply have left the decision to be made by the court in the usual way.

33. She went on to say that:

"142 ...because the words ['during the marriage'] are open to two possible meanings...care must be taken to assess what the parties actually said and what they meant. It follows that in the absence of evidence as to discussions as to an agreed meaning or understanding or evidence as to the agreed intention, regard must first be had to the words used in the

Agreement, the context of that Agreement and the entirety of the Agreement...

145. *In my view, on a plain reading of paragraph 4..., the ‘trigger’ for the sharing is an act of judicial pronouncement, either of dissolution of the marriage or judicial separation. It is not the date of separation of the parties.”*

34. At paragraph 146 and following, the judge considered the whole of the Agreement “*in order to determine and test whether there is any room for ambiguity, giving (sic) the usual meanings which would apply.*” She said that paragraph 6(c), in which judicial separation is referred to, was “*definitive,*” she referred to paragraph 6(g), where there is reference to the ‘date of separation,’ and to paragraph 6(h), where there is reference to ‘judicial separation.’ She said (paragraph 152):

“A specific decision appears to have been made in both paragraphs 4 and 6 to use the book end of a judicial pronouncement as the defining date for the division of assets.”

35. The judge finally concluded (paragraphs 153 and 154) that:

“...There appears to be very little doubt as to the true sense and meaning of the words used. The construction which the words in paragraph 4 admit is that during the marriage refers to the period of the marriage until judicial pronouncement. There is clear evidence of the intention of the parties in this regard from the whole of the Agreement.

...I conclude that the plain meaning or construction of paragraph 4, is that the assets not identified as separate assets were to be shared equally between the parties as at the date of dissolution of the marriage. I accept the submission of Counsel for the wife, that the parties “contracted out” of the usual meaning of the words “during the marriage” in the context of identifying what is matrimonial property.”

Mr Feehan’s argument

36. As I have touched upon, Mr Feehan submitted that it is beyond argument that both in England and Wales, and in the Cayman Islands, what is accrued post final separation does not constitute matrimonial property. It is not jointly owned. It cannot be regarded as property acquired during the marriage. Need, compensation, and, rarely, the application of the principle of equality apart,

such property does not fall to be shared. That is particularly so following a marriage of short duration. Such an approach does no more than reflect that any other outcome would not be fair.

37. In support of that, as it seems to me, broadly uncontentious proposition, Mr Feehan, having drawn the court's attention to the analysis of Lord Nicholls of Birkenhead in the seminal case of *White v White* [2001] 1 AC 596, relied in particular on the following observations of Lord Nicholls in *Miller v Miller* and *McFarlane v McFarlane* [2006] 2 AC 618 (paragraph 21 and following), where, having set out the requirements of fairness in terms of financial need, compensation and sharing, Lord Nicholls said:

“Matrimonial property and non-matrimonial property

21 ...By section 25(2)(a) [of the Matrimonial Causes Act 1973] the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or likely to have in the foreseeable future.

22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not...in principle, the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

23. The matter stands differently regarding property (“non-matrimonial property”) the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the *White* case...

“Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when, and the particular circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.”

24. *In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage...*"

38. Mr Feehan submitted the principles in England and Wales were well summarised by Nicholas Mostyn QC (as he then was), in *Rossi v Rossi* [2006] EWHC 1482 (Fam), when he said (paragraph 13 and following):

"13. Thus, it has always been the case that, where a party has by virtue of his own industry created further assets after separation, such sole unmatched contribution should be recognised and reflected by the court in its award. On the other hand, if a matrimonial asset has simply increased in value during the period of separation as a result of passive inflationary economic growth (such as the increase in the value of a house) then it would seem obvious that such growth is an accrual to the original matrimonial property...

[24.3] Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.

[24.4] If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge, J. when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of

arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.”

39. In *McTaggart v McTaggart*, this court considered the principles to be applied in the Cayman Islands. In *McTaggart* there was no pre-nuptial agreement. The court proceeded on the basis that the applicable provisions were those in section 21(b), (e) and (f). The President said (paragraph 33 and following):

“33. It is...important to keep in mind when considering observations made by judges in England and Wales...that the underlying statutory provisions here, although similar to, are not the same as those in England and Wales. Section 23(1) of the Matrimonial Causes Act 1973 provides that, on granting a decree of divorce or at any time thereafter, the court may make...

*“(a) an order that either party to the marriage shall make to the other such periodical payments...as may be specified in the order;
(b) an order that either party...shall pay to the other such lump sum or sums as may be so specified.”*

Section 24(1) provides that the court may make a property adjustment order, that is to say...

“(a) an order that a party to the marriage shall transfer to the other party...property to which the first-mentioned party is entitled...”

34. The 1973 [Matrimonial Causes] Act [of England and Wales] does not (in terms) require the court to give separate consideration to the question- What order (if any) should be made for the disposition of matrimonial property?-although, in practice, the court will usually do so. Section 21 of the Matrimonial Causes Law, on the other hand, plainly does require the court to give separate consideration to that question. The court must do so in order to decide what order (if any) it is appropriate to make under section 21(b)...

35. The need to determine which of the parties’ assets are to be treated as matrimonial property invites the question: As at what date is that determination to be made? As I have said, “matrimonial property” is not

a concept which is defined in the Law. But it is, I think, generally accepted that - as Lord Nicholls observed in Miller...- its distinguishing feature is that it is the “financial product of the parties’ common endeavour...” On that basis, it may be expected that a line can be drawn at the date of final separation; property acquired prior to that date (at least if acquired during the course of the marriage) is likely to be the product of common endeavour, property acquired after that date (unless the fruits of pre-existing property) is unlikely to be the product of common endeavour.”

40. Having established that for reasons of fairness the law differentiates between matrimonial and non-matrimonial assets, Mr Feehan went on to argue that the Agreement must be construed in that context, not in a vacuum. The purpose of the Agreement was to safeguard AH’s assets, he submitted. It is not conceivable that he would have agreed to regard such non-matrimonial assets as joint and to be shared. That would defeat the purpose of the agreement. If, submitted Mr Feehan, the parties were agreeing to share non-matrimonial assets, they would have expressly said so. He emphasised the comments in paragraph 79 of *Granatino v Radmacher* (paragraph 21 above).
41. Mr Feehan further submitted that section 21(b) of the ***Matrimonial Causes Law*** only permits the court in the Cayman Islands to dispose of matrimonial property. The parties cannot by agreement extend the court’s jurisdiction and change the statutory definition of matrimonial property. When construing the Agreement, they cannot be taken to have done so.
42. Given that post-separation accruals are non-matrimonial, it was a necessary corollary, submitted Mr Feehan, that in any agreement regarding matrimonial property, the marriage ends at separation, as any family lawyer would know. Although nowhere in paragraph 4 do the words ‘matrimonial property,’ appear, property ‘acquired during the marriage’ could only mean property acquired before separation. Only such an interpretation, submitted Mr Feehan, would make effective the parties’ intention.
43. In support of his construction of the Agreement, Mr Feehan cited the observations made in *Robertson v French* [1803] 4 East 130 at paragraph 355, in which the court said:

“The same rule of construction which applies to all other instruments also applies equally to this instrument...that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and

popular sense, unless they have generally in respect to the subject matter, as by known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in particular instances, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.”

44. Mr Feehan was critical of the judge’s analysis of the Agreement (paragraph 34 above). He submitted, in short, that references in different clauses to ‘separation’ and ‘judicial separation’ do not help when construing clause 4. He further submitted that clause 6 sets out what should happen on divorce, annulment or judicial separation within 7 years of marriage. Clause 6(c), entitled “*Joint assets*,” provides that such assets are to be dealt with in accordance with clause 4. Assets acquired after separation are not joint assets. That suggests that Clause 4 cannot be read to refer to assets acquired after separation, but only to joint assets as generally understood.

Analysis

45. Although the effect to be given to a pre-nuptial agreement is ultimately a matter for the court, it seems to me its construction is no different from that of any other agreement reached between two parties. As Mr Feehan and Mr Yates accepted in argument, what one or other party may subjectively have understood or intended is not to the point when construing its meaning. As Lord Neuberger, President, in a judgment with which Lord Sumption and Lord Hughes agreed, said in the Supreme Court in *Arnold v Britton and others* [2015] UKSC 36, (a case not drawn to the judge’s attention) at paragraph 15 and following:

“15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”...And it does so by focussing on the meaning of the relevant words...in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the...[agreement], (iii) the overall purpose of the clause and the...[agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions...”

16. *For present purposes, I think it is important to emphasise...*
17. *First, the reliance placed in some cases on commercial common sense and surrounding circumstances...should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*
18. *Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning...*
19. *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations...have to be read and applied bearing that important point in mind.*
20. *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-*

advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.*
22. *Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention...”*

46. The language of this Agreement is not complex. When a provision within the Agreement is intended to refer to a separation or judicial separation, it states as much. While I accept that what is said in clause (c) of paragraph 6 does not sit entirely happily with what is said in paragraph 4, paragraph 4 is on its face unequivocal and clear. It states what should happen on dissolution or annulment of the marriage in respect of assets acquired during the marriage. Had the intention been to limit the provision to the date of final separation, that could simply have been stated. To adopt the language of Lord Neuberger, its meaning is most obviously to be gleaned from what it says.
47. As to Mr Feehan’s submission that in an agreement intended to protect his interests, AH could not be taken to have agreed to a provision contrary to those interests, as Lord Neuberger put it, “[W]hile commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight. The purpose of interpretation is to identify what the parties agreed, not what the court thinks they should have agreed.”
48. Neither does it seem to me the natural reading of paragraph 4 was necessarily as contrary to AH’s interests as Mr Feehan submitted. By the time the Agreement was signed, the parties had been together for a non-continuous period of at least five years and continuously for two. That

was a circumstance which an agreement between them could be taken to recognise. The wording of paragraph 4 could be taken as a means of compensating AW for that period. Indeed, the judge found (paragraph 247 of the judgment) that she would have considered the absence of inclusion of the period of cohabitation in the Agreement as an omission which had the potential to operate unfairly against AW.

49. Be that as it may, the fact that in hindsight what was on its natural meaning agreed has turned out badly, is no reason to depart from the natural language, as Lord Neuberger made plain.
50. I cannot accept Mr Feehan’s submission that the parties by their Agreement were seeking to re-define section 21(b) of the *Matrimonial Causes Law*. If parties do agree to share non-matrimonial property, they are merely agreeing not to be bound by the consequences of the distinction section 21(b) sets out, something they are entitled to do. Although not an answer to the point, if Mr Feehan is right, it would mean that no pre-nuptial agreement in the Cayman Islands could effectively provide for non-matrimonial property to be shared. However, that is not in my judgment the case. Parties may agree to share non-matrimonial property. Section 21(e) provides the court with a sufficiently wide discretion to take that agreement into account when making any order.
51. I do accept, as Mr Feehan submitted, that absent need or compensation, it is rare for non-matrimonial property to be shared. However, that is not invariably so, as the observations of Lady Justice King in *Brack v. Brack* make plain (paragraphs 24-5 above). It must depend on the particular circumstances. As Lord Wilson of Culworth said when giving the judgment of the Privy Council in *Scatcliffe v Scatcliffe* [2017] 2 FLR 933:

“...As was recognised in *Charman v Charman (No 4)* [2007] EWCA Civ 503...it was decided in the *White* and *Miller* cases that not only matrimonial property, but also non-matrimonial property was subject to the sharing principle. In the *Miller* case, Lord Nicholls...however, suggested...that, following a short marriage, a sharing of non-matrimonial property might well not be fair...Lord Nicholls...had also stressed in *White v White*...that, irrespective of whether it fell to be shared, a spouse’s non-matrimonial property might certainly be transferred in order to meet the other’s needs...”

52. In the result, it does not seem to me, that the family law context necessarily suggests that the parties could not have agreed to share non-matrimonial property in an agreement such as the present. It cannot be taken to have been the parties’ intention that in seeking to construe the

meaning of paragraph 4, regard had to be paid to the legal distinction between matrimonial property and non-matrimonial property so as to give the words ‘during the marriage’ a meaning which, on their natural construction they do not bear. I agree with the judge that it was ‘less than believable’ that the parties would have left the interpretation of such an important provision to be construed as part of background knowledge. I find that on a proper construction, paragraph 4 of the Agreement provides that any assets acquired during the subsistence of the marriage fell to be distributed between AH and AW in equal shares. They fell to be valued at the time of the hearing, as was held in *McTaggart v McTaggart*.

Child support

53. In construing paragraph 6(e) (paragraph 19 above), the judge said:

“The husband...contends that by paragraph 6(e) of the Agreement, he agreed to provide suitable income provision for any child of the marriage and that suitable does not mean he is to bear the responsibility for paying all the costs. He urges that they should be shared based on income proportions. However, the paragraph itself defines what is suitable income provision as including “any medical insurance costs, medical expenses, all educational and related costs, extra-curricular expenses and domestic expenses.” In my view it is also plain from this that he committed to paying all of these expenses...”

54. The judge also said (paragraph 205):

“The husband committed in the Agreement to meeting the general maintenance costs of the children of the marriage. I accept the evidence of the wife that this was something they discussed and to which he agreed. It is plain from the wording of the Agreement. He agreed to and should meet the entirety of these costs.”

55. Mr Feehan submitted that the paragraph cannot require payment of all the costs. If it did, it would not refer to ‘suitable income provision,’ or provide for them either to be agreed or ordered by the court.

56. As it seems to me, on a natural reading of the paragraph, AH agreed, firstly, to make suitable income provision for any children, secondly, that what amounts to suitable provision was to be agreed or decided by the court but that, thirdly, *all* the itemised expenses did in any event

amount to suitable provision. What was left for agreement or decision by the court were any expenses which were not itemised. In short, I agree with the judge.

Should AH be held to the Agreement?

57. The judge spent some time, seemingly at the invitation of counsel, considering the parties subjective understanding of the meaning of the Agreement. As I have made plain, that was irrelevant when construing what it meant. As to AH's understanding, she said (paragraph 140):

“The husband asked the Court to consider that it is inconceivable that had he been aware of the true import of the Agreement that he would have signed it in its current form. Overall from his evidence, the sense I had was that the truth lies somewhere in between. I thought it more likely than not that he read what was there, understood and accepted it. Thus, it did not appear to me that he had not appreciated the implications of it (i.e. that the date of calculation for sharing of assets was to be as at the date of dissolution of the marriage by a court). I thought it more likely that it is either that he did not consider the length of time which matters would have taken to be resolved in the courts or he did not appreciate the level to which his asset position would have changed with respect to assets which he was to acquire after separation and before dissolution of the marriage...It is not that he had not appreciated the true import of the Agreement with respect to the requirement for the sharing of assets between separation...and dissolution...Assessing him as best I could, I found it difficult to accept that he understood the Agreement in terms of some background meaning or that he did not understand what it said. He was a generally forthright witness but seemed somewhat tentative about this particular aspect. The overwhelming sense I had was that he was trying to be careful in his answers in this area, being fully conscious of the financial impact on himself. Moreover, he was so clear and direct about financial matters and precise asset calculations, that it is hardly believable that he would have understood the Agreement in terms of a background meaning and not have insisted that his lawyers make this abundantly clear in the Agreement or at the very least discussed it with his wife. That is particularly so given that the various references to a “Date of Judicial Separation” and one to “Date of Separation” must at least have raised the spectre that such a date was a possible end point. The onus was on him to clarify matters since the Agreement was being prepared at his urging.”

58. In short, the judge concluded that AH had read and understood the full import of paragraph 4 of the Agreement. What he may not have factored in was how long the marriage might subsist after a separation, or by how much his assets might increase during that time.
59. What AH understood or intended, or may, or may not, have factored in, is not, for the reasons I have explained, relevant. The crucial issue is whether, in the light of the objective meaning of the Agreement, it is in all the circumstances fair (again an objective test), to hold AH to its terms. Those circumstances include how long the marriage has subsisted after the separation and the substantial increase in the value of his assets during that time.

The essence of Mr Feehan's submissions

60. In essence, Mr Feehan submitted that it would not be a fair outcome in all the circumstances to hold AH to the terms of the Agreement. He relied on the reasoning behind that line of cases to which he had referred in his argument on the construction of the Agreement in which, in broad terms, it was held that it would not be fair for after acquired, non-matrimonial assets to be shared. He further submitted that the outcome of such sharing on the facts of this case was unfair to AH.

The judgment

61. Having carefully analysed many cases concerning the application of pre-nuptial agreements, the judge, in a passage with which neither counsel disagreed, said (paragraph 113):

“113. In summary, I take the guiding principles from these cases to be that where there is a pre-nuptial agreement which is valid, in the sense that it is not negated by vitiating factors, a court should have regard to and give weight to the agreement except where it would be unfair to do so. It would be unfair to do so if the effect of its operation was to place, firstly, the children of the marriage and/or one of the parties in a position of real need. Need is to be interpreted in the context of each case, having regard to the circumstances of the parties, including their standard of living. Despite the existence of an agreement, the court is required to consider the statutory factors and strands of need, compensation and sharing. In giving effect to an agreement and recognising the autonomy of the parties to regulate their own financial affairs, a court would usually interfere with an agreement only to the extent necessary. In the majority of cases, that interference would take the form of ensuring that the strands of need and compensation are satisfied. It is with respect to the

strand of sharing that the court is least likely to interfere or with or vary an agreement.”

The sequence of events and delay

62. As I have said, the parties separated on 28 March 2014. By June 2019, no less than five years after the separation, the marriage had still not been dissolved. During that five years, AH’s assets increased substantially. An important element of Mr Feehan’s case was that it was not fair for AW to benefit from assets to which she had made no contribution, and which had accumulated, partly at least, as a result of the way she conducted the proceedings. Mr Feehan was particularly critical of AW’s conduct regarding AH’s interest in his Firm. The judge, submitted Mr Feehan, failed properly to grapple with the issue of AW’s delay.

63. On the topic of delay, the judge said (paragraph 22 and following):

“22. The matter came before me for hearing on the 3rd June 2019, having continued unresolved for some five years. It may therefore be helpful to set out in some detail the sequence of events. This even more so given the fact that the delay has had a significant impact on the import of the Agreement, and that each side blames the other for some portion of the delay.

23. In response to the Petition for divorce, the husband filed an answer and cross petition on the 30th April 2014 disputing allegations as to his behaviour. He sought to appeal a costs order made against him in September 2015. The Petition was amended following the grant of leave to do so by Williams J., on the 2nd June 2016, and was ordered proved on the 1st of December 2016. At

24. In addition to the summonses for interim maintenance orders as detailed above, much of the intervening period has been taken up with various requests for disclosure and responses thereto. The husband changed attorneys once and the wife has had three changes of attorneys.

25. The wife says that the husband has delayed matters significantly by filing the cross petition and that there have been three adverse cost orders made against him, one of which was in relation to disclosure. The husband says that it is the wife, particularly in the latter half of the five-year period, who has delayed matters by failing to attend at his Firm in order to examine certain documents and by the making of repeated requests for disclosure.

26. *The latter issue arose because the husband in his list of separate assets attached as a schedule to the Agreement identified “partnership interest” in his Firm as a separate asset and described this as “Ownership percentage as a Partner/owner of firm.” As it turned out, this description was erroneous, but it led to much correspondence between the parties. In his Affidavit of 9th October 2015, the husband explained that he has never had a copy of a partnership deed from his Firm. What he does have is a joining agreement but, as this document is confidential, it required the approval of seniors of the Firm before it could be released...*
27. *There were various requests for further and better particulars made between the parties with the wife stating that an important outstanding issue was whether the husband had an equitable interest in the Firm for which he worked. It was not until the 17th June 2016 that an Affidavit was filed on behalf of the husband’s Firm...This essentially confirmed that he was not the holder of shares in the entity and the distribution of his salary as he had previously outlined...Within that Affidavit was an offer for Counsel for the wife to inspect the Firm’s documents in relation to the interests of the husband. The husband says that various appointments and arrangements were made by the Firm which were cancelled by the wife or by her Attorney and that the wife did not act positively on this offer until the end of 2018.*
28. *The husband also complained that the wife’s disclosure was deficient in not providing all her bank statements and a valuation for her self-employed business.”*

64. In paragraph 29, the judge set out over two pages, a detailed chronology of events. Among other things, it records that on 2 June 2016, the court extended time for AH fully to comply with an order for disclosure which the court had made on 4 September 2015. The disclosure related to the nature of his interest in his Firm. The order of 2 June 2016 had an attached penal notice. The judge, in the subsequent judgment dealing with costs, set out the position in further detail. On 17 June 2016, in compliance with the order of 2 June 2016, AH provided the affidavit from a director of his Firm “*setting out in full detail the nature of the husband’s interest in the Firm and extending [an] invitation to review documents:*” see paragraph 40 of the costs judgment. On 1 February 2017 the invitation was sent again. It was accepted on 26 May 2017. On 3 August, on the day of the proposed review, it was cancelled. There were other invitations and cancellations. Following urging from the court at a hearing of 4 December 2018, the review finally took place on 27 February 2019. On 3 June 2019 AW finally abandoned her previous

assertions regarding this aspect of the case. In the costs judgment (at paragraph 43) the judge said:

“43. In my view a legitimate issue arose as to the husband’s status in the Firm given the manner in which the husband described his interest in the pre-nuptial agreement. In the face of this, the wife’s’ initial attempt to clarify the matter was entirely reasonable in the circumstances. The husband seeks his costs incurred since 2014, for complying with the wife’s disclosure requests concerning the Firm. He says that he made earnest efforts to provide full disclosure. I do have a concern that following the receipt of the Affidavit of 17th June 2016 which sets out the detail as to the nature of his interest and after having been offered the opportunity to review the relevant documents there was considerable delay in accepting this opportunity. The Affidavit of [a Director of the Firm] of 17th June 2016 was an important response from someone other than the husband. The Attorneys on behalf of the Firm wrote to Counsel for the wife in December 2016 and January 2017 and an invitation to inspect was re-sent on 1st February 2017. That invitation was not acted upon until the 27th February 2019. The matter also appears to have been further pursued beyond the review of the documents. The wife may well have persisted long beyond the point reasonably necessary.”

65. The judge later said (in paragraph 46 of the costs judgment) that:

“[For AW]...to have persisted beyond February 2019 stretches the boundaries of reasonableness.”

66. Her subsequent order limited AW’s costs on that issue to those incurred up to February 2019.

The judge’s assessment of fairness of outcome

67. Again, because Mr Feehan attacked the judge’s conclusions, I need to set out what the judge said in some detail (paragraph 163 and following):

“163. I must therefore go on to consider whether the construction of the Agreement which would result in the sharing of assets beyond the point of separation of the parties is a fair outcome in the light of the entirety of the circumstances of this case. This is not necessarily the outcome which

the Court would have reached in the light of the well-established principles. In doing so it is important to bear in mind the circumstances in which non-matrimonial property as distinct from matrimonial property may be shared as per the case of McTaggart v McTaggart.

164. I approach the question of fairness as recommended by the authorities above. In this case it is the economically advantaged party who raises the issue of fairness. This is perhaps an unusual case in that the Agreement appears to have extended rather than restricted the rights of claim of the less affluent spouse. An extensive review of the cases...did not identify one with similar issues...

166. In considering whether the outcome arising from the construction of paragraph 4 of the Agreement is a fair one in the circumstances of the case, there are changing circumstances to be considered. The question is whether these serve to make its operation unfair.

167. The parties could not have anticipated that they would have a child with special needs who requires long term treatments and support over an extended period beyond that of a non-special needs child...The Agreement makes no provision for Y above the requirements of the usual child maintenance payments. It is likely that the terms of the Agreement would have been different had this been known. The result of this unforeseen circumstance is that in addition to the sharing of his after acquired assets, the husband will be called upon to pay all or the majority of therapeutic costs for Y in addition to maintenance contributions over a longer term than the anticipated school age period...

169 ...the parties could not have anticipated the very lengthy period which has elapsed between separation and finalisation of divorce. Had they considered this, no doubt one or other of them would have raised this as an issue at the time of drafting. The issue of delay has been raised with both parties blaming the other...

170. In his oral evidence, the husband accepted that he prolonged matters by filing a cross petition and there have been three adverse costs orders against him...There was also a lack of timely responses to correspondence. He accepts full responsibility and said that perhaps he had not been given the best legal advice before he changed his legal team in early 2017.

171. It is however the assertion of the husband that the wife herself has contributed to delay by changing her legal teams on three occasions with

time in between to identify new attorneys, delayed inspection of documents...between 2016 and early 2018 and requested an adjournment of the last hearing date in December 2018. In short, without conducting a minute...analysis, fault for the delay in the first half of the proceedings is accepted by the husband and he alleges delay on the part of the wife as to the second half of the proceedings. This is an allegation which appears to have some factual support...I did not get a sense of deliberate delay from either party...

172. The fact of delay does however raise a mirror to the uncertain and perhaps unsatisfactory way in which the wife's sharing claim is to be calculated according to the Agreement. Put another way, it puts a premium on delay...Objectively, it is open to manipulation and, as a route to calculation must be viewed as unsatisfactory.

173. However...it did strike me that both parties must have realised that a judicial pronouncement was not going to happen immediately, they must have realised that some time would be needed for the court process to be completed, however long or short. I don't think that in such circumstances they can say it is unfair because it took longer than we thought it would, even though we did not specify a time frame and left it open ended.

174. Counsel for the husband made [the additional point]...that if the Agreement provides for post separation assets to be shared it is inherently and manifestly unfair because the equal sharing principle would then be made to apply to the product of the sole endeavour of one party. This latter argument does not consider the autonomy of parties in ordering their financial affairs and their ability to "contract out" of the usual principles...

176. The question is whether in the light of all the circumstances, it can be said that the Agreement would operate unfairly against the husband in particular respect with the sharing provision.

177. Counsel for the wife argues...that is cannot be unfair where the husband is left in a situation where he still has more than enough...Counsel submits with some force that in every case where such an agreement is departed from, it is because the terms are too harsh in that it does not provide enough for one party. That is plainly not the case here.

178. This submission...accords with a long line of cases...In my view, the summary and general principle from the cases is that it is not enough to

say that there are changing circumstances, what must follow is an examination of those changing circumstances which have arisen. If the effect of those circumstances is that one party is left in a situation of real need, then the Court has a positive duty to vary the terms of the Agreement. In this case, there are the additional contributions perhaps not contemplated by the Agreement for the benefit of the child which the husband may be required to make now and further into the future than anticipated, (approximately \$200,000 per annum). Having asked what the effect upon him of this is, the answer overwhelmingly, is that, given his level of income and resources (some [] plus rental income), it cannot be said that this is likely to have even a modest impact upon him, far less a debilitating one. The same practical approach and answer applies to the sharing of assets...

179. I could not therefore conclude in line with the authorities that giving effect to the Agreement as a whole will operate unfairly against him.

180. In light of this while I bear in mind in accordance with section 21(d) of the Law there is a discretion to vary the terms of the Agreement, I propose against this background to respect the autonomy of the Parties and to consider the Agreement as one aspect of this case in the course of considering the entirety of the circumstances of the case.”

Provision for the needs of Y

68. AH agreed to meet the down payment and acquisition costs of a house on the basis it was held on trust for Y. The judge said (paragraph 191 and following):

“191 ...[In] my view...[Y]. does not need a million dollar home [as was submitted by [AW]]. It can hardly be said with any force that because of his needs the cost of the home must therefore be in the higher price range. More to the point neither can it be said that the price range of \$700,000.00 to \$800,000.00 [as was submitted by [AH]] is so out of line that it bears no relationship to the husband’s wealth and status...

192. I do feel however that it is in [Y]’s best interests that a house be acquired with sufficient room for a nanny to live in, if one can be identified, a room for himself and for his mother. I am of the view that a live in nanny would provide him with added hands on care and may also give the wife greater flexibility in her work hours and in the building of her career. For this reason, I would therefore set the ceiling slightly higher in the sum of

\$900,000.00. Thus a range of between \$800,000.00 to \$900,000.00, to include any fixtures and furnishings which may be required...

193 *...it is...reasonable [that [AH]] ...should meet the down payment and the acquisition costs in full at the level he has offered. This would be a 10% deposit...which [with other costs] would likely be in the region of \$200,000...*

199 *...I consider it to be fair and reasonable that the husband should pay 55% of the mortgage and the wife 45%. Maintenance and upkeep of the home should be apportioned in the same ratios."*

69. The judge said that in the light of AH's greater level of income and resources, he should continue to meet all the costs of therapy for Y. She found too that in accordance with paragraph 6 of the Agreement, AH should pay all the costs of general maintenance for Y. As I previously have indicated (paragraph 54 above), the judge found this was something AH and AW had discussed and agreed.

70. The judge assessed fair and reasonable maintenance costs, given AH's monthly resources, as CI\$9,577.00 per month (paragraph 212). She also applied the disability proviso of section 22 of the Law, to the effect that such payments should be continued during the period of Y's disability, effectively, in this case, for Y's life.

The needs of the parties

71. The judge said (paragraph 217) that both parties were able to meet their day to day needs. She said AW had limited savings, limited assets and no surplus. She accepted the truth of AW's disclosure of her earnings (paragraph 221). She said (paragraph 234) that AW would have the long-term care of Y. Her past and, particularly, her future contribution in that regard had to be recognised.

72. As to a clean break, the judge said (paragraph 235 and following):

"235. The wife is already well on her way to independent living...This should be a case of a clean break.

236. The two strands of compensation and sharing with respect to the wife and how a clean break is achieved require careful consideration. This is not a case which calls out for compensation on the scale of the Miller v. Miller...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...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.

237. As to sharing: It is the sharing of after acquired assets as contemplated by the Agreement which poses the most difficulty. The issue as to whether paragraph 4 applies and its meaning as well as whether it would operate unfairly in the circumstances of this case, have been resolved as set out above. The final issue is the amount which is to be shared...”

73. The judge concluded that having taken account of AW’s assets, the payment by AH of CI\$747,878.99 would be a fair outcome in all the circumstances and in accordance with the Agreement (paragraph 245).

74. The judge finally said (paragraph 247):

“247 ...[I]f 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 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.”

Argument

75. Mr Yates submitted that the judge was correct both in her analysis of the law and the decisions she reached in respect of fairness. He emphasised how high was the hurdle to overcome assessments made in the exercise of the judge’s discretion. While Mr Feehan accepted that in deciding whether it was fair to give effect to the Agreement, the judge was exercising a judicial discretion, he was critical of her exercise of it in a number of different respects.
76. Firstly, the judge recognised in paragraph 163 of her judgment (paragraph 67 above), the outcome was not one which she would necessarily have reached. That, submitted Mr Feehan, begged the question as to whether it could be fair. For, by definition, the court could only reach a fair outcome.
77. Secondly, the judge said that the Agreement extended rather than restricted the rights of the less affluent party. Given the Agreement was intended to protect the more affluent. That alone, submitted Mr Feehan, should have given the judge reason to doubt the fairness of giving effect to it.
78. Thirdly, while Mr Feehan accepted AH would not be placed in need as a result of giving effect to the Agreement, he emphasised how substantial were the sums AH was required to pay. They amounted to a substantial proportion of his income, plus a lump sum. They failed to recognise AH’s responsibilities to his new family and their overall impact.
79. Fourthly, the obligation to support Y will be life-long. As the judge said, submitted Mr Feehan, that could not have been foreseen at the time the Agreement was made. Up to the age of 21, the cost of therapeutic care and maintenance would amount to some C\$1,3168,939. Moreover, Mr Feehan submitted, fairness demands that AW should make a contribution to Y’s maintenance. He further asked the court to review her income history since 2014 and compare her declared earnings with her expenditure on her credit card.

80. Fifthly, and, as it seems to me, most importantly, Mr Feehan submitted that AW has unfairly benefitted from her own delay in pursuing the proceedings during a time when AH's income and assets increased substantially. The judge, submitted Mr Feehan, failed in the substantive judgment adequately to grapple with the issues of her delay. It took two years, he submitted, to resolve her 'cruel' and 'aggressive' petition. There was a fruitless campaign to prove AH had an interest in the partnership of the Firm during which time his income and capital substantially increased. Mr Feehan particularly relied on the sequence of events set out in the costs hearing. It was not fair, he submitted, that AW's delay should be set against AH's assets. Mr Feehan submitted that AW benefitted by an amount in the order of CI\$250,000 from her delay, although he did not refer to any evidence, or set out the precise period to which he was referring. The observations in *Rossi v Rossi* at paragraph 24.7 were material as far as delay was concerned, he submitted:

"In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of accrual has treated the other party fairly during the period of separation..."

81. Sixthly, the judge failed to take into account how short the marriage effectively was, submitted Mr Feehan. It was shorter than the period of separation during which time the assets were acquired. During the time the parties were together, each kept separate accounts. Mr Feehan was critical of a comment the judge made at paragraph 82 of her judgment, when she said:

"It is noted also from...[Miller v Miller] that the third strand of sharing applies to a short marriage just as it does to a long marriage although for the former, this may have an impact on the quantum to be shared."

82. Finally, Mr Feehan submitted that there was no proper basis for the judge to have awarded CI\$900,000 in respect of the house when a sum of CI\$700,000-800,000 would have sufficed.
83. In the round, Mr Feehan's submission came to this. It was not fair that when paying up to CI\$200,000 towards a home for Y and AW, and a substantial on-going provision of between CI\$150,000-200,000 per year, that AH should pay AW nearly CI\$750,000 mostly acquired after they separated and when engaged in hotly contested litigation. Mr Feehan submitted that a fair outcome as far as a capital payment is concerned, would be that argued for below, namely, that AW should receive CI\$126,624.00 (see paragraph 8 above). On the basis that the judge

interpreted the Agreement correctly, he submitted, in part relying on the judge's observations in paragraph 247 of the judgment (paragraph 74 above), that a fair outcome would be the deposit and costs of a home for AW for CI\$1,100,00 in a total sum of CI\$187,000 (the judge's calculation of CI\$300,000 being, he submitted, an obvious error) plus a 'nest egg' of savings of CI\$50,000. That would mean AH would pay CI\$200,000 for a home on trust for Y, 55% of the mortgage on that home, payment of all its out-goings plus a nanny and therapy payments of CI\$14,577.00 per month and a lump sum of \$237,000 (comprised of CI\$187,000 plus CI\$50,000).

Analysis

84. AH sought this ante-nuptial agreement to protect his economic interests. It was freely reached. There were no vitiating features. He appreciated what paragraph 4 said, albeit he may not have factored in a possible delay between any permanent separation and divorce during which time his income and assets might substantially increase. He agreed to the provisions in paragraph 6(e), although he did not factor in that he and AW might have a child with a disability with a life-long need for support.
85. As Lord Phillips made clear in *Granatino v Radmacher*, a court should give effect to such a nuptial agreement unless in the prevailing circumstances it would not be fair, as presently applicable, to hold AH to it.
86. In each of the cases cited, the court was considering whether it was fair to the party intended to be, and being, economically disadvantaged by the agreement, to hold him or her, to its terms. As the judge said in paragraph 113 of her judgment (paragraph 61 above), the court in such cases has recognised the parties' autonomy to regulate their own financial affairs, and only interfered to the extent necessary, mostly to ensure that the strands of need and compensation are satisfied, less frequently, with respect to the strand of sharing. As I understand it, the underlying rationale for the court's interference in those cases is to ensure that the court's order, which is ultimately its responsibility, does not deprive the economically weaker party of what he or she is entitled to under the law, at least to the minimum extent. However here, AH is asking the court to interfere on his behalf in an agreement he freely reached in circumstances where no question arises of him being placed into a position of need, or of there being a failure to compensate him, or recognise his right to equality. The issue this case raises is whether, in such circumstances, the court should interfere in such an agreement at all, and if so, to what extent.

87. In my view, the court should be particularly hesitant in interfering in such circumstances. It should respect the parties' autonomy. However, it would not be inconsistent with the court's general approach as set out in the authorities for it to interfere to the minimum extent necessary when otherwise it would be lending itself to an order which would result in manifest unfairness.
88. That does not mean that the court will interfere because the application of an agreement will result in an outcome which is not that which the judge otherwise would or might have reached. As the present Agreement in terms stated, it was intended to exclude application of the Matrimonial Law, which otherwise would alone have been the basis of any outcome. It is open to the parties to contract out of the normal consequences. As Lord Phillips said in *Granatino v Radmacher*, the fact of the agreement is capable of altering what is fair. Neither does it mean that because an agreement may have extended the rights of the less affluent, when its intention was to do the reverse, that is a reason why the more affluent should not in principle be held to it. I do not accept Mr Feehan's submissions to the contrary.

Failure to act diligently

89. In *Rossi v Rossi* (paragraph 80 above) the court was not considering the application of a pre-nuptial agreement. However, the reasoning behind the observations in paragraph 24.7 seems to me to apply with equal force to a situation in which the court is considering whether, or the extent to which, it should hold a party to an agreement requiring him to share assets acquired after a final separation. It would in my view be a manifestly unfair outcome justifying the court's interference to permit a party 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.
90. At paragraph 172 of the judgment (paragraph 67 above), the judge concluded there was 'factual support' for the suggestion that AW, albeit not deliberately, was responsible for delay in the second part of the proceedings. In the costs judgment she went further. She found that AW, having been invited to inspect the documents going to AH's interest in the Firm on 1 February 2017, did not do so until 27 February 2019. She also said, that having reviewed the documents, AW continued to pursue the issue until, as I understand it, only abandoning such pursuit on 3 June 2019. As I have said, the judge concluded that AW's 'may well have persisted long beyond the point reasonably necessary;' that she was stretching the boundaries of reasonableness.
91. The judge applied the terms of the Agreement strictly. She made no allowance for any lack of diligence by AW in pursuing her claim, even to the extent of seeking to reflect AW's lack of reasonableness beyond February 2019. She failed to take into account the implications of what

I accept was a broad conclusion in the main judgment that AW was responsible for the delay as far as the second part of the proceedings was concerned. As I understand it, the consequence of AW's failure to act diligently in that part of the proceedings was an increase in AH's assets from which, on the basis of the judge's order, AW benefitted.

92. As I have set out above (paragraph 64), on 17 June 2016 AH provided independent evidence of the nature of his interest in the Firm. AW was invited to review the relevant documents. She did not do so. She or her attorneys did not respond to several further requests. When there was finally such a review in February 2019 (at the urging of the court), it took a further 4 months before AW abandoned her fruitless pursuit of this aspect of the case. Had AW or her former attorneys acted with due diligence, the review of the Firm's material should have taken place by the end of September 2016 at the latest, followed by a speedy decision to abandon pursuit of that part of the case. While obviously it is impossible to be precise, it seems to me that had that happened, and being as fair to AW as I can be, the case should probably have been heard some 2 years before it was, that is to say, by the middle of 2017.

93. The draft judgment was distributed to the parties for correction in the usual way. 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.

Other matters

Provision for Y

97. I accept that the obligation in respect of Y is substantial. That in part reflects AH's income, something which would fall to be taken into account throughout Y's life. AW could not have been shut out from seeking an increase in support for Y to reflect an increase in AH's income at any time. The extent of support for Y reflects the terms of paragraph 6(e) of the Agreement. In my judgment, holding AH to the terms of paragraph 6(e) cannot justify the court's interference. Neither can AW's delay. It needs too to be borne in mind that AW may well have the care of Y for the rest of his life.

The house

98. As to the cost of a house for Y, the difference between AH's and the judge's assessment was not in all the circumstances large. The judge adequately set out the competing positions

(paragraph 70 above). There is no basis for this court now to interfere with the exercise of her discretion.

The duration of the marriage

99. I accept the parties were together for a short time. I accept too that after a permanent separation any entitlement to a share of the after-acquired assets would have been limited to need and/or compensation. However, any order in respect of those assets has to take account of the terms of the Agreement, irrespective of the length of the marriage. Moreover, I repeat that at the time the Agreement was reached, AH and AW had been cohabiting continuously for two years and lived together on and off for some five years. The Agreement did not take any part of that period into account.

The judge's findings regarding AW's financial position

100. Finally, there seem to me no grounds for this court to interfere with the judge's findings regarding AW's financial position. These were very much matters for her.

Conclusion

101. 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.

Costs

102. I would consider the question of costs (both of the appeal and below) in the light of the judge's further ruling (probably on paper).

Field JA:

I agree.

Martin JA:

I also agree.