

Marital Agreements

Siân Smith & Krishma Patel

What are nuptial agreements?

- Pre-nuptial agreements
- Post-nuptial agreements
- Before 2010, it was often argued that pre-nuptial agreements were contrary to public policy and the sanctity of marriage in that they encouraged divorce.
- Until the landmark decision in *Radmacher v Granatino* [2010] UKSC 42

Radmacher v Granatino [2010] UKSC 42

- Ms Radmacher was a German heiress who married Mr Granatino, a French banker. Parties married in London after signing a pre-nuptial agreement in Germany 3 months earlier. Agreement provided that in the event of a divorce neither of them would benefit from the property of the other.
- Parties separated after 8 years of marriage. At this point, Mr Granatino was working as an academic earning £30,000 per annum. He applied to the courts for financial relief from Ms Radmacher.
- At first instance, the court awarded him £5,560,000 to enable him to buy two homes and to provide him with capitalised income for life. The court looked at the pre-nuptial agreement but considered it was of diminished importance, particularly as Mr Granatino had not had legal advice on the agreement.
- Ms Rachmacher appealed the decision and said that the pre-nup should be given decisive weight. She was successful in her appeal and Mr Granatino then appealed to the Supreme Court. His appeal was unsuccessful

Radmacher v Granatino [2010] UKSC 42

In ***Radmacher v Granatino [2010] UKSC 42***, the Supreme Court considered the weight that should be given to a nuptial agreement by a court when exercising its discretion under *section 25* of the MCA 1973. The Supreme Court held:

"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement." (*At paragraph 75.*)

Radmacher v Granatino [2010] UKSC 42

- The key question is ‘what is fair?’
- Fairness can be assessed by applying the following three-stage test, as set out in ***Radmacher*** (paragraph 75):
 - a) The agreement must be freely entered into.
 - b) The parties must have a full appreciation of the implications of the agreement.
 - c) It must be fair to hold the parties to their agreement in the circumstances prevailing.

a) The agreement must be freely entered into

71: 'The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.'

72. 'The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.'

(b) Parties must have a full appreciation of the implications of the agreement

- Each party should be in possession of all the information **material** to his decision to sign the agreement.
- Independent legal advice is strong evidence of a party's understanding of the implications of the nuptial agreement, though not conclusive.

69: 'Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.'

(c) It must be fair to hold the parties to their agreement in the circumstances prevailing

- “A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.” (paragraph 77)
- “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.” (paragraph 78)
- “There is nothing inherently unfair in” agreements in relation to, for example, inherited property “and there may be good objective justification for it, such as obligations towards existing family members”. (paragraph 79)
- “Where the ante-nuptial agreement attempts to address the contingencies unknown and often unforeseen, of the couple’s future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement, ... the longer the marriage has lasted, the more likely it is that this will be the case”. (paragraph 80)
- “It is ...needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement” for example where the pre-nuptial agreement results in “one party being left in a financial predicament” or “if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth”. (paragraphs 81-82)

Weight to be attached to the agreement

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

“It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage.” (Edgar v Edgar [1980] 3 All ER 893 referred to in Radmacher).

Vitiating factors

- Duress, undue influence, mistake, misrepresentation
- Undue pressure, exploitation of a dominant position or other unconscionable conduct
- Emotional state and vulnerability
- Inadequate knowledge and understanding
- Lack of legal advice
- Lack of disclosure
- Change of circumstances

Lack of legal advice and disclosure

Kremen v Agrest [2012] EWHC 45 (Fam)

“it will only be in an unusual case where it can be said that, absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a full appreciation of its implications...”

Versteegh v Versteegh [2018] EWCA Civ 1050

“In my judgment, when an English court is presented with a PMA such as the present one; signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to Radmacher to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system.

Lack of legal advice and disclosure

CMX v EJX [2022] EWFC 136

“There is no doubt whatsoever that it was freely entered into by each party. I do not consider that the lack of independent legal advice or full disclosure is fatal. First, they did get advice from the Notary. Second, the parties were well aware of their respective positions at the time. Did they have a full appreciation of the Contract's implications? I have come to the clear conclusion that they did. It is important to remind oneself that such Marriage Contracts are very common in France. ”

“Those who sign marriage contracts must understand that it is a significant step with very important consequences. These contracts will be enforced in France and will not simply be torn up in this jurisdiction.”

V v V [2012] 1 FLR 1315

HD v WB [2023] EWFC 2

Undue pressure?

CMX v EJX [2022] EWFC 136

“In almost every Pre or Post Marital Agreement one or other, or both, parties are under a degree of pressure, and emotions may run high. The collision of the excitement engendered by prospective marriage, and the hard realities of negotiating for the breakdown of such a marriage, can be acutely difficult for parties. Tension and disagreement may ensue. If, as here, one side of the family is applying pressure, the difficulties are accentuated. But in the end, each party has to make a choice and unless undue pressure can be demonstrated, the court will ordinarily uphold the agreement. ”

MN v AN [2023] EWHC 613 (Fam)

Undue pressure

AT v BT [2023] EWHC 3531 (Fam)

"So the pressure to which the wife was being subjected was:

- (1) Four months pregnant.
- (2) Leaving her position in private equity in Country X.
- (3) Getting married tomorrow.

In my judgement, that plainly amounts to undue pressure. I want to make it clear that I am not criticising the husband in saying that. I am not suggesting that the husband was being overbearing or acting inappropriately, I am merely reciting the simple facts of the pressure which the wife was placed under at this time."

Coercive and controlling behaviour

Traharne v Limb [2022] EWFC 27

Coercive and controlling behaviour would fall within the Edgar criteria if proved and relevant – undue pressure or exploitation of a dominant position.

“H's behaviour is relevant only as to whether it led to W entering into the agreement. I do not find that H's behaviour can objectively be described as coercive or controlling or that it led to her entering into the PNA. To put it another way, whilst W's psychological makeup and previous history of relationship breakups had deprived her of being able to make a rational and considered decision as to what was in her best interests, this was not caused by H's conduct.”

Unsigned agreement

WC v HC [2022] EWFC 22

Normally, an agreement will take effect as a result of both parties signing. The principle of autonomy, articulated by Mostyn J in *BN v MA* [2014] EWHC 2450 when emphasising the importance of a party signing (and, I suggest, by corollary, not signing) is relevant. I would not want, however, to lay down an immutable law. **Each case is fact specific.** It may be, for example, that parties agree in correspondence that agreement has been reached, and signatures are not required. It may be that parties do not sign, but clearly consider themselves bound and act accordingly. But in this case, it **seems to me to be unreasonable for an agreement to be formally binding upon W in the absence of her signature when that very same agreement expressly, and in terms, only takes effect upon both parties signing.** The purpose of such agreements is to achieve as much certainty as possible, and it strikes me as unfair for W to be strictly held to a document which was carefully drawn up to require, as an express clause of the agreement, both parties' signatures.

Vulnerability

SC v TC [2022] EWFC 67

“In summary on this area of the case, I have reached the conclusion that it would be wrong for me to place weight on the Pre-Marital Agreement. Not only was it very much to the husband’s disadvantage in financial terms, I have reached the overall conclusion that, at the time that it was signed, he was a vulnerable person (in the ways described above) and the wife rather took advantage of that vulnerable situation to gain a substantial financial advantage.”

“Further, I have reached the conclusion that to enforce the agreement runs the risk of leaving the husband in a predicament of real need, possibly leaving him in inadequate accommodation and/or running the risk that he would have no option other than to do the one thing he wants to avoid – going into a care home.”

The Law Commission's Matrimonial Property, Needs and Agreements Report 'the 2014 Report'

The 2014 Report recommended:

- Introducing “qualifying nuptial agreements”: Enforceable contracts, which would enable couples to make binding arrangements for the financial consequences of divorce or dissolution.
- In order for an agreement to be a “qualifying” nuptial agreement, certain procedural safeguards would have to be met.
- Qualifying agreements could not, however, be used by parties to contract out of meeting the “financial needs” of each other and of any children;
- a draft Nuptial Agreements Bill, which would introduce qualifying nuptial agreements in England and Wales

The extent to which Parliament may adopt the reforms proposed by the Law Commission remains to be seen.

Requirements for 'qualifying nuptial agreements' – 2014 report

The report makes the following recommendations:

- '(a) The agreement must be contractually valid (and able to withstand challenge on the basis of undue influence or misrepresentation, for example).
- (b) The agreement must have been made by deed and must contain a statement signed by both parties that he or she understands that the agreement is a qualifying nuptial agreement that will partially remove the court's discretion to make financial orders.
- (c) The agreement must not have been made within the 28 days immediately before the wedding or the celebration of civil partnership.
- (d) Both parties to the agreement must have received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.
- (e) Both parties must have received legal advice at the time that the agreement was formed

We have recommended that it should not be possible for a party to waive their rights to disclosure and legal advice.'

Influence of the 2014 report and the 28 day rule

Although the recommendations are influential, case law after the publication of the report suggests pre-nuptial agreements have still been upheld where agreements are signed less than 28 days beforehand

Examples:

- a) SA v PA (Pre-Marital Agreement: Compensation) [2014] EWHC 392, [2014] 2 FLR 1028
- b) Versteegh v Versteegh [2018] EWCA Civ 1050, [2018] 2 FLR 1417,
- c) HD v WB [2023] EWFC 2
- d) Helliwell v Entwistle [2024] EWHC 740 (Fam)

SA v PA (Pre-Marital Agreement: Compensation) [2014] EWHC 392, [2014] 2 FLR 1028

- English wife and a Dutch husband, with four children
- Capital assets amounted to approximately £3.8m
- High Court found the pre-nuptial agreement to be valid even though it was signed on the eve of the wedding ceremony, in circumstances where the wife was pregnant and had only received impartial (and not independent) advice from the notary.
- Court satisfied that the wife had entered the agreement freely with a full appreciation of the agreement's terms and implications.
- Court also found that the parties had intended the agreement would be binding upon them in all jurisdictions.

Versteegh v Versteegh [2018] EWCA Civ 1050, [2018] 2 FLR 1417

- pre-nuptial agreement signed just one day before the wedding
- 3 non-minor children of the 21-year marriage
- husband was an affluent businessman and the wife a homemaker
- Assets of some £273m
- Both parties were Swedish nationals and married in Sweden. Pre-nuptial agreement stated that the parties would each retain their own assets, acquired before and during marriage
- Although the pre-nuptial agreement was signed only one day before the wedding, the Court of Appeal held it was valid.

HD v WB [2023] EWFC 2

- Husband and wife both aged 46. Parties married in 2014. Parties shared three minor children. The assets in the case, (held almost exclusively in the wife's name) exceeded £43million. There was a pre-nuptial agreement dated 26 July 2014 (the date of the parties' wedding). The Court was tasked with what weight, if any, was to be given to it.
- Husband argued that he had not understood the pre-nuptial agreement and in any event, it did not meet his needs. Wife argued that the agreement should be upheld as it was entered into willingly, had been understood by the husband and would fairly meet his needs upon realisation of his business interests.
- Peel J concluded that the pre nuptial agreement was not vitiated – it had been freely entered into by the parties. Pre nuptial agreement was departed from on a needs basis, but Court did not hold it invalid noting the 28 day rule.

Helliwell v Entwistle [2024] EWHC 740 (Fam) *Subject to appeal*

- Parties married for 3 years and there were no children. W's case was that she had assets of £61.5m, H's case was that W's assets were £74m. H stated that he has assets of c.£850,000.
- W worked for her father's company in Dubai and had income from all sources of approx. £600,000 a year. H asserted that W earns £1m a year. H did not work and said he was unable to.
- The parties signed a prenuptial agreement on the day of their marriage, which provided each to retain their separate property, any jointly owned property would be split between them and neither would bring a claim against the other in any jurisdiction.
- W applied to have the prenuptial agreement upheld. H argued it should not be enforceable as it did not adequately cater to his needs.
- In the High Court, Mr Justice Francis found that the agreement was written in '*straightforward plain English*' and the husband '*knew exactly what he was doing*' – even though he had received very limited legal advice and financial disclosure from the wife.
- The Court held the husband to the terms of the agreement albeit accepting that the prenup failed to meet his needs. An order was made providing for a payment of £400,000 to the husband to meet those needs.

Fairness

Luckwell v Limata [2014] EWHC 502 (Fam)

“It is the court, and not the parties, that decides the ultimate question of what provision is to be made.”

“The over-arching criterion remains the search for 'fairness', in accordance with s 25 of the MCA 1973 as explained by the House of Lords in *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186 (ie needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to 'need'”

Fairness - the court's discretion

Brack v Brack [2018] EWCA 2862

"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."

Assessment of needs

WW v HW [2015] EWHC 1844

The level at which a party's needs should be assessed, if they are not met by an agreement which might otherwise be binding upon them, must surely depend upon all the circumstances of the case, amongst which the fact of the agreement may feature prominently as a depressing factor. But each case will be different."

KA v MA (prenuptial agreement: needs) [2018] EWHC 499 (Fam)

"I am satisfied that a fair outcome in the assessment of both housing and income needs in this case must reflect the fact that this wife agreed to restrict the ambit of her financial claims should the marriage end in divorce."

Fairness – needs

Ipecki v McConnell [2019] EWFC 19

'I do not take the language used by the Supreme Court, namely “predicament of real need” as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.'

HD v WB [2023] EWFC 2

Assessment of needs

AH v BH [2024] EWFC 125

Identified examples of different approaches taken to housing needs:

- Schedule 1 type housing award until completion of tertiary education
- Schedule 1 type award with a proportion of sale proceeds being awarded outright
- Martin style arrangement – occupation for life
- Outright award – no reversionary terms

Challenges to Marital Agreements

- Are there any vitiating factors?
- Is the agreement fair – does it satisfy the requirements of needs and/or compensation?
- Vitiating factors v needs/fairness case

Challenging a PMA

Issues to consider with client:

- Legal advice – obtain solicitors' file
- Disclosure
- Emotional state and pressures at the time of the agreement
- Timing of the agreement
- Nature of relationship between the parties
- Whether the marriage would have gone ahead
- Heads of Agreement?
- What has changed?
- Have review clauses been implemented?

Preliminary issue?

HJB v WPB (Financial Remedies) (Separation Agreement – Application to Show Cause) [2024] EWFC 187

The outcome of the case cannot be determined finally at the preliminary issue hearing - if the determination of the preliminary issue is that the agreement is binding and therefore 'presumptively dispositive' the court will still need to consider all the section 25 factors.

BI v EN [2024] EWFC 200

In cases where there is a PMA and substantial assets which are subject to significant valuation issues – a preliminary hearing may be appropriate to enable the next steps to be taken proportionately.

Loh v Loh-Gronager [2024] EWFC 241 (Fam)

Questions?

Feel free to email us:

- sian.smith@42br.com
- krishma.patel@42br.com

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