THE ROLE OF PRE-NUPTIAL AGREEMENTS AND POST NUPTIAL AGREEMENTS IN FINANCIAL REMEDIES[[1]](#footnote-1)

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1. In the landmark case of Radmacher v Granatino *[2010] UKSC 42; [2011] 1 AC 534* the Supreme Court established that nuptial agreements were no longer “contrary to public policy “and made clear that:

“*The court should give effect to a nuptial agreement that was freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would be unfair to hold the parties to their agreement*” **[paragraph 75, *Radmacher*]**

1. In paragraph 1 of its judgment, the court explained that a nuptial agreement was either an “ante-nuptial agreement” (more commonly known as a pre-nuptial agreement or “prenup” for short, made before the marriage) or a “post nuptial agreement”, made after the marriage, or indeed after separation. The Court decided that the distinction between pre- and post-nuptial agreements established in the decision of the Privy Council in *MacLeod v MacLeod* (an appeal from the High Court of the Isle of Mann) was wrong, and that the Court should approach both types of agreement in exactly the same way. This article therefore considers both types of agreement under the heading “agreement” as they are equally applicable in law.
2. As such then, the Supreme Court decided that nuptial agreements should be given effect to, subject to the weight the Court accords to agreements, and hence to what extent they should be given effect to.
3. The Supreme Court set out that “the first question” **[71]** is whether the nuptial agreement could be negated entirely (i.e. not given effect to at all) due to standard vitiating factors: fraud, duress, misrepresentation and so on. The Court also stated that undue pressure (falling short of duress) and “other unworthy conduct” might eliminate any weight being given by a Court to such an agreement. Material non-disclosure could also be a potential vitiating factor.
4. If not vitiated, the Court also set out factors at paragraphs **[74 to 83]** which would enhance or detract the *weight* to be given to an agreement (and therefore the extent to which the Court would, in it’s discretion under s.25 of the Matrimonial Causes Act 1973, apply it). Those factors are:
	1. Fairness **[75]**
	2. Whether the agreement “prejudices the reasonable requirements of any children of the family” – most commonly this will relate to whether the child’s need for housing with both parents, income needs, and educational needs are met. **[77]**
	3. Respect for the autonomy of the parties **[78]**
	4. Reflection of the non-matrimonial source of property **[79]**
	5. Whether or not future circumstances have been catered for within the agreement, e.g., whether any unexpected events (such as a party to the agreement becoming disabled) have happened since the agreement was concluded **[80]**. A sub-factor of this issue is whether either party has been left “**in a predicament of real need**” while “*the other enjoys a sufficiency or more*” **[81].** The Court indicated the latter situation would be likely to render it unfair “in the circumstances prevailing, to hold the parties to the agreement”.
	6. The Court also observed at **[114]** that independent legal advice was not necessarily a reason why an agreement would not be given effect to **[69],** although it was “desirable” and “would ensure that a party understands the implications of the agreement”, and indeed the agreement was given effect to in *Radmacher.* Subsequent case law has not spoken with one voice as to the necessity of independent legal advice, and the likelihood is the impact of this issue will vary from case to case, it is suggested. It will depend on the facts of the case.
5. In the view of the writer of this article, bespoke and specialist legal advice in terms of whether the agreement has been vitiated or whether the weight may be reduced on the above bases is essential in every case at an early stage, ideally before the issue of proceedings.
6. To summarise broadly, the Court will give effect to an agreement which the parties entered into, fully understanding its implications, as long as in the circumstances the Court thinks it would not be fair to do so, bearing in mind whether the agreement is vitiated by fraud, duress or misrepresentation (in which case it will not be given effect to), and subject to the factors relevant to the weight to be accorded to the agreement in question.
7. Properly drafted nuptial agreements have in numerous cases been successful in reducing the award given to a party to the marriage. The starting point in English law absent such an agreement is that the Court seeks to make an award which is “fair” which is treated as synonymous with equality, subject to a departure from equality which is to be made if there is “good reason”, often financial needs such as lack of income/earning capacity and to meet housing needs. Awards are commonly made not far from equality of assets and (in general) within the range of 66.6% to 33.3%
8. However, in several cases in which a prenuptial agreement has been carefully consider and drafted by skilled legal advisors, such awards have been made at far lower levels. By way of a few examples:
* *Luckwell v Limata [2014] 2 FLR 168*, per Holman J. The parties were aged 37 (W)and 45 (H). W came from a wealthy family. The assets in the parties direct ownership were approximately £7m in the hands of the wife. The Court awarded the husband £900,000 to purchase a home for himself and the children, such property to revert to the wife on the children attaining the age of 21 and a lump sum of £282,000 to buy a car, pay off debts and for other financial needs. Overall, this award amounted to a mere 17% of the assets, reducing to less than one percent on the £900,000 reverting to the wife.
* *KA v MA [2018] 2 FLR 1785,* per Roberts J, in which, after the application of a valid prenup, the award to the wife was £2.95m for a house and capitalised income requirements out of total assets of c. £32 million, or a mere 9% of the total assets.
* In the recent case of *AH v BH [2024] EWFC 125*, which involved assets of £52 million in assets in the husband’s name, Peel J applied a valid prenup seeking to preserve the husband’s separate property. The eventual award to wife the was just over £4m or 8% of the total assets. The judge specifically commented that “*Had the parties not signed the PMA[[2]](#footnote-2), W might have been entitled to received on a sharing basis as much as £7.5m, and possibly more. Even on a needs basis, I consider that, absent the PMA, her award would have been greater than I have provided for; retention of the FMH and a longer Duxbury term (perhaps even a whole life term) would have been arguable*.” [86].
1. It is clear then, that a professionally drafted and informed nuptial agreement is likely to have (if not vitiated and if not held to be “unfair” on the basis of the matters at paragraphs **[74 to 83]** of Radmacher) a substantial reducing effect on the extent of any award to the other spouse on a financial remedy application and can prove to be a highly protective factor for non-matrimonial property which has been inherited or generated by the other party. This note has concerned itself mainly with “big money” cases, which are among the most reported. Clearly, in cases of more limited assets nuptial agreements may play a more limited role given that when the assets are smaller there is a greater likelihood of the court holding one or the parties to be in a “predicament of real need” (*Radmacher*) but it will turn on the facts of the case. Expert legal advice around the law and in drawing up such agreements remains crucial.
2. Members of Harcourt Chambers’ Financial Remedy Practice Group are available at all times to give such advice and the clerks will be pleased to assist in recommending specialist counsel for the same.
1. This note is correct as to the law as of 14th August 2024. It does not constitute, and is no substitute for, legal advice on the individual facts of a particular case. [↑](#footnote-ref-1)
2. I.e. prenuptial agreement. [↑](#footnote-ref-2)