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Seventh Edition

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Preface

I am delighted to be invited back as contributing editor to this seventh edition of *ICLG – Family Law*. In the last edition, I highlighted the need to promote the use of pre- and postnuptial agreements. This year, continuing that theme, my expert analysis chapter, *Harnessing the Lessons of the Latest Pre- and Postnuptial Agreement Judgments in England and Wales: Achieving 'As Much Certainty As Possible'*, highlights three recent cases that, if carefully analysed and applied, should assist to '*reduce the role of lawyers on the break-down of marriage*'. The financially stronger husband in *MN v AN*, who had complained when the agreement was being negotiated that his wife's proposals were a 'gold-digger's charter', in the end saved himself substantially more gold than he would otherwise have had to pay out had he not entered into the agreement. It was worth every penny.

Marcus Dearle
Senior Partner, Miles Preston

Harnessing the Lessons of the Latest Pre- and Postnuptial Agreement Judgments in England and Wales: Achieving 'As Much Certainty As Possible'

Miles Preston

Marcus Dearle

Introduction

It is sensible to recite in a pre- or postnuptial Agreement (PNA), in layman's terms, why it is that it is being entered into:

> 'The parties are entering into a marriage on the basis of mutual love for each other and to create a family. They both hope and believe that their marriage will be successful and happy.
>
> They also recognise that those optimistic hopes and beliefs might not be fulfilled and the marriage might break down and end with separation, annulment or divorce. They wish by this agreement to limit the potential for dispute in that event. They hope by this agreement to ensure that in the unhappy event of the breakdown of their marriage they do not engage in litigation to resolve what might otherwise be disputes about the law to be applied, the jurisdiction in which proceedings should take place or the financial provision which either of them is to make for the other.'

Until recently, however, it has not been easy to explain to a client exactly *how* the PNA will limit the potential for dispute and achieve a situation where they do not engage in litigation to resolve what might otherwise be disputes about the law to be applied, the jurisdiction or the financial provision and so forth, in particular with regard to dealing with the vitiating factor of duress – for example, how to deal with allegations:

- of pressure on (usually) the financially weaker party in the negotiations at and leading up to the time of signing the PNA; or
- that it is duress to state that you will not get married without an acceptable PNA being signed up to.

Three recent cases of *WC v HC* [2022] EWFC 22 (of 22 March 2022), *HD v WB* [2023] EWFC 2 (of 13 January 2023) and *MN v AN* [2023] EWHC 613 (Fam) (of 10 March 2023) have provided useful guidance by Peel J and Moor J, respectively.

These cases have also clearly dealt with issues such as:

- whether lack of legal advice is fatal;
- whether lack of financial disclosure is fatal;
- where a PNA pre-dated the decision in *Radmacher*, whether that is a vitiating factor; and
- whether obtaining advice from an experienced, specialist, family lawyer makes any difference.

Moreover, they have succinctly clarified the key rules to be drawn from *Radmacher*, including on the second limb of what 'fairness' means and how to deal with disputes over 'needs', 'compensation' and 'sharing'.

Pulling all the above strands together and applying the three cases will increase the prospect of achieving certainty. As Peel J put it in *WC v HC*, the purpose of PNAs is '*to achieve as much certainty as possible*' (paragraph 39).

The cases should also deter parties from unnecessary litigation with the imposition, for example, of clear costs consequences for a financially weaker party who unreasonably asserts that the PNA should be completely disregarded.

The Law on PNAs: Key Rules to be Drawn from *Radmacher*

In *WC v HC*, Peel J succinctly set out the law on PNAs and stated:

> *22. I do not need to look beyond Radmacher v. Granatino [2010] UKSC 42 from which the following essential propositions can be drawn:*
>
> *i) There is no material distinction between an ante-nuptial agreement and a postnuptial agreement (para 57).*
>
> *ii) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, "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" (para 69).*
>
> *iii) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).*
>
> *iv) 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 (para 71). 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 (para 72).*
>
> *v) 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 (para 75).*

In *HD v WB* [2023] EWFC 2 (of 13 January 2023), Peel J extended the explanation further. Clearly not wishing to reinvent the wheel, he repeated precisely the same wording from paragraph 22 in his judgment in *WC v HC* above and added four further paragraphs to clarify the law laid down in *Radmacher* on the importance of individual autonomy, what constitutes 'fairness', how sharing is dealt with if it is disallowed in a PNA, and a reminder that the court determines the final result:

> *iv) 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. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78)….

vii) *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 antenuptial 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 (para 81).*

viii) *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 (para 82).*

ix) *It is the court that determines the result after applying the Act (para 83).*

Drilling Down on the Meaning of 'Needs'

In the right circumstances, housing provision can be made on a trust basis so that money is eventually paid back and there can also be a step down

In *HD v DB*, Peel J held:

53. I take the view that whether a party should be confined to needs at the minimum level required to meet a "predicament of real need" will depend on the circumstances of the case. There is a world of difference between, say; (i) a childless couple whose marriage lasts for 2 years, enjoying only a modest lifestyle, at the end of which one party might need no more than short term maintenance or a highly attenuated housing budget (perhaps restricted to time limited rental), and (ii) as here, a couple with 3 children, who have been together 20 years, who each contributed to the welfare of the family in different ways, and who enjoyed a high standard of living. I adopt the words of King LJ which seem to me to describe accurately the flexibility of the discretionary exercise. Of course, the court will always, in conducting the s25 evaluation, have regard to the fact of a PNA and its terms. I would not therefore adopt the approach of W's counsel, which seemed to me to be too straitjacketing. Nor do I consider that the two stage gateway process suggested by H's counsel is made out on the authorities.

54. Thus, in the right case, a minimal award to meet basic needs may be appropriate, but it must depend on all the factors including the PNA, resources, length of marriage, contributions and lifestyle. The courts have shown themselves to be flexible on these matters, consistent with the discretionary exercise. By way of examples of meeting needs, and respecting the limitations intended by a PNA, courts have been willing to make housing provision on a trust basis, rather than outright. That was the solution in Radmacher itself, WW v HW (supra) and Luckwell v Limata [2014] 2 FLR 168, whereas in Ipecki v McConnell (supra) and AH v PH [2013] EWHC 3873 the housing provision was made outright. The term of such a trust basis has generally been for life, but sometimes with a step down in quantum at the conclusion of the children's tertiary education; in Radmacher itself, occupancy of a property for life was not in fact coupled with a step down.

Peel J went on:

96. I suspect what happened here is that neither H nor W thought the PNA would ever be needed. H signed up to provisions which he understood, but did not think would ever bite. H, now appreciating the consequences and regretting having signed it, seeks to cast doubt on the PNA, and in so doing has misrepresented what took place.

97. I conclude that this was a PNA freely entered into by each of them, with a full appreciation of its meaning and consequences. There are no vitiating factors.

98. Should it therefore be, as W submits, fully upheld, save for provision of a short term housing fund? Should it be determinative of the outcome? In my judgment, the answer is no. I have an obligation to look at all the circumstances and it seems to me that there are circumstances which, to my mind, render it sufficiently unfair to justify a degree of court intervention. These are the reasons why it should not be given full and determinative effect:

i) *Circumstances have changed. I appreciate that is often the case with PNAs, but here W received £55m gross from the sale of the family business a matter of 2 years later. H knew she was wealthy, but at the time of the PNA that wealth was tied up in illiquid shares. The financial landscape has changed significantly.*

ii) *Most significantly, in my view, the provision for H in the PNA does not address his needs fairly. The factor at (i) above is, in my judgment, relevant to the assessment of needs. After, as it turned out, 6 years of marriage, H is entitled under the PNA merely to £112,000, repayment of £250,000 and a modest sum under Clause 24.1. On such sums he cannot reasonably be expected to meet his housing needs, or income needs, in a way which bears at least some relation to the marital lifestyle enjoyed over some 20 years. The parties did not talk about H's needs. As lawyers were not consulted, there was no legal advice about needs, nor any inquiry into what fair provision for needs would be.*

99. I am satisfied that this is one of those cases where I can, and should, depart from the PNA so as to meet H's needs fairly. In so doing, I take into account all the circumstances, including the resources of W, the resources of H, H's earning capacity, the needs of the children, the marital lifestyle, the duration of cohabitation, H's full contribution to the welfare of the family during the relationship, his future contribution to the welfare of the children, and the terms of the PNA which, to my mind, operate as a limiting factor upon considering H's requirements.

There Needs to be *Undue* Pressure, Not Just Pressure

What if the financially stronger husband called his wife a 'gold-digger', and that the £2 million provision would be a 'gold-digger's charter'?

The three cases adopt a robust and realistic approach to the question as to whether there has been pressure. There has to be undue pressure and there is a recognition that, in the negotiation of PNAs, there will often be pressure, including heated arguments, which will not lead to findings that the PNA is vitiated.

In *WC v HC*, Peel J stated:

27. Both, I am sure, have been placed under enormous strain by these proceedings. The emotional toll on them, their relationship and, indirectly, the children cannot be underestimated [emphasis added].

The Pre-Marital Agreement

28. This Agreement was the product of discussions which lasted a number of months (the parties first discussed it in January 2004, their lawyers started corresponding in June 2004, and the first draft was prepared on 23 June 2004). Both parties had the benefit of English and Swiss legal advice; in W's case her English lawyers were

Macfarlanes. It is dated 12 August 2004, about 3 weeks before the marriage, and signed by the parties. The marriage had been delayed to enable a 3 week cooling off period after signing.

29. The agreement itself contains certificates signed by each party's solicitor. The certificate of W's solicitor states: "[W] stated to me, and it appeared to me, that she entered into the said agreement willingly and without any pressure, duress, undue influence or deception on the part of any other person, including [H]."

30. A letter dated 18 August 2004 from her solicitors stated that "[W] confirmed to us…that she was signing the agreement of her own free will. However, she also made clear that she had felt extremely stressed during the preceding weeks…", and for that reason the word "stress" had been removed from the solicitor's certificate. To my mind, this shows the care taken by W's solicitor to be satisfied of W's instructions when entering into the agreement. 31. I am confident that both H and W were under pressure from H's father. That is hardly surprising given that H's father was a man of immense wealth who saw it as his duty to ensure that the family wealth passed through the generations in a dynastic manner. Moreover, coming from a Swiss and B background, where such agreements were commonplace, it is likely that H's father was more comfortable with the notion of a premarital agreement than W, from an English background where, certainly at the time, such agreements were rare indeed. I am equally confident that W felt under stress and was uncomfortable with the process. The intended agreement was a source of tension for both W and H. However, in my judgment, none of the vitiating factors set out in Radmacher apply and I see no reason to discard, or ignore ab initio, the Pre-Marital Agreement:

i) I am satisfied that although W and H were under pressure, W was not under undue pressure to enter into it. 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. In my judgment, W cannot so demonstrate here.

ii) It included clauses that the agreement was entered into "of their own free will without undue influence or duress" and that "they would not be getting married unless they had entered into the agreement". I have already commented that their solicitors signed certificates to similar effect, and W's solicitor corresponded to H's solicitor saying that W was freely entering into the agreement.

iii) It was considered, discussed and negotiated over a period measured in months. W had the benefit of lawyers in both England and Switzerland.

iv) Immediately after the marriage, and in accordance with the agreement, 'X' Street and £1.3m were placed in joint names in accordance with the Pre-Marital Agreement. W thereby benefited from its immediate implementation.

Later, he stated:

32. … The section "Genesis of the Agreement" at Clause K(i) specifically refers to the past receipt by H of family monies, and the anticipated future receipt of dynastic assets which are intended to be excluded. Self-evidently, the agreement had one eye on the future wealth which was expected to cascade down to H.

In *MN v AN*, Moor J had to tackle similar allegations of pressure, setting the scene as follows:

13. On the evening of the 15 March 2005, the parties had, in the words of the Husband, "the mother of all arguments" in The London Property. There is dispute as to exactly what was said but there is no doubt that the net result was that the Wife left the property for up to a couple of hours. She says that the Husband was shouting at her down the street that she was a "gold-digger". He denies that but accepts he said, in the property, that the £2 million provision would be a "gold-digger's charter".

Coercion and control had also been raised:

25. She completed the "conduct" box, asserting that the Husband "behaved in a coercive and controlling manner towards me", adding that she reserved her position in that regard. I will have more to say about this in due course.

Further, he stated that:

35. The Wife's section 25 statement is dated 12 December 2022. She says that her Husband's treatment of her made her seriously doubt her own intellectual abilities so she became incapable of making sensible, independent decisions for herself. She felt financially and emotionally vulnerable and entirely dependent on the Husband. She felt patronised and infantilised….

40. I have already recounted the Husband's early open proposals. By 11 November 2021, he was making it clear that his case was that the correct outcome should be that the Wife should exit the marriage with provision calculated in accordance with the PNA. At the time, he put this at £11.875 million together with child periodical payments of £130,000 per annum.

42. The Husband's open offer is dated 30 January 2023. He contends that the court should give full effect to the PNA. He will pay £7 million to the Wife offshore to cover her income needs, on the basis that she will not bring it onshore until after pronouncement of Decree Absolute.

44. Both parties filed helpful documents in advance of the case. On behalf of the Wife, Miss Bangay KC and Miss Mottahedan reminded me that this PNA was reached five years prior to the decision of the Supreme Court in the case of Radmacher v Granatino. They asserted that it was vitiated by undue pressure and that it did not meet the Wife's needs.

The judge, as Peel J had already emphasised in *WC v HC* earlier, rammed the point home by referring to the importance of promoting '*certainty*' and reducing '*the role of lawyers*' as stressed by counsel for the financially stronger husband:

45. Mr Michael Horton KC, who appears with Miss Sophie Hill, on behalf of the Husband, makes the point that executing a PNA is supposed to promote certainty and reduce the role of lawyers on the breakdown of a marriage. It is said that, if this PNA is not upheld, the whole raison d'être for such agreements is called into question [emphasis added]. *They note that Ms Rae and Mr Newton have not been called to give evidence. It is said that it is fanciful to suggest that the Wife's lawyers just did what the Husband wanted. There were five proposals and four draft agreements. It is not unfair pressure to say you will not get married without an acceptable PNA. The Wife seeks £18.1 million out of £46.3 million, which is approximately 40% although that percentage would rise significantly if there was a deduction for the latent tax.*

Is it Unfair or Undue Pressure to State that the Marriage Will Not Happen if a PNA is Not Signed?

No. Moor J dealt with the point:

60. [Mr Horton] also reminds me that it is not unfair or undue pressure to state that you will not get married without an acceptable pre-nuptial agreement (see, for example, KA v MA at [60]. This must be correct as the ability to apply for financial remedies after the breakdown of a relationship is entirely dependent on there having been a marriage. A wife cannot secure the right to apply for financial remedies via a marriage by signing a pre-nuptial agreement only to renounce the agreement thereafter on the basis that she only signed it because he said there would be no marriage if she did not.

Is a 'Furious Row' Undue Pressure?

Not necessarily:

> *61. Finally, Mr Horton refers me to paragraph [63] of KA v MA for the proposition that an engaged couple negotiating a pre-nuptial agreement can have a row, even a "furious row" without it amounting to undue pressure. I am not sure I would go that far. It all depends on the nature of the "furious row" and the effect on the parties, but I accept that the fact of a "furious row" cannot, of itself, vitiate an agreement* [emphasis added]. *He goes on to say that pressure arising from the situation is inevitable but, for the agreement to be vitiated, there must be undue pressure (see WC v HC [2022] EWFC 22; [2022] 2 FLR 1110; Peel J at [36]). This is undoubtedly correct.*

For ease of reference, paragraph 63 of *KA v MA* [2018] EWHC 499 (Fam) (Roberts J) is as follows:

> *63. Does the 'furious row' (per the wife) over the course of the following weekend constitute the sort of pressure or unconscionable conduct which might enable the court to reach a clear finding that when she authorised the release of the signed agreement the following Tuesday, her free will had by then been overborn by the husband's conduct? As I have found, she was clearly upset and in tears when she spoke to her solicitor that morning about the prenuptial agreement. That distress may well have been engendered by a dawning recognition of the fact that, in agreeing to its terms and authorising its release to the husband's solicitors, she was indeed compromising her full financial entitlement in the event of a future divorce. I have no doubt that she was psychologically torn between her wish to proceed with the plans she had been making for the wedding and the husband's request to agree to a potentially binding document which might well, at some point in the future, operate to her significant financial detriment. That said, the evidence in this case does not lead me to a conclusion that this wife was effectively disabled from negotiating with the husband supported as she was by the legal advice she had received from her solicitor.*

Radmacher: 'A Two-Stage Exercise'

Moor J went on to deal with his conclusions and crucially how to apply *Radmacher* with '*a two-stage exercise*':

> *My conclusions*
> *76. Miss Bangay submits that I should perform a two-stage exercise. First, I must decide if there are any circumstances surrounding the making of the PNA which should eliminate or reduce the weight to be attached to the agreement. Second, I must see whether the PNA operates fairly now having regard to all of the section 25 factors to include the marital standard of living and needs, reminding myself that the children are the court's first consideration.*
> *77. I propose to proceed in that way. Before doing so, it is of note that the proposals made by the Wife make no reference whatsoever to the PNA. It is her case that it should just be completely ignored, other than in relation to child periodical payments, the quantum of which is very large and clearly in her interests to accept. I consider her overall position to be bold and difficult to advance successfully.*
> *78. I will deal first with my findings as to the PNA. I am absolutely clear that it cannot be ignored. The question I have to ask myself is whether it should simply be upheld. I have already made a number of findings of fact earlier in this judgment during my review of the evidence. I now make the necessary remaining findings. First, both parties were represented by first rate firms of family law solicitors at the top of their respective games. I have already made the point that Ms Rae and Mr Newton have not been called to give evidence before me. Their file is not available and I accept that no criticism of the Wife can be made in relation to that. I simply cannot accept, however, that Clintons did not do its job properly or that the lawyers just allowed their client to be browbeaten into a thoroughly unsatisfactory agreement that was not remotely in her interests. The opposite was clearly the case. The solicitors took their roles very seriously. They went to a respected firm of accountants to analyse the effect of the proposals on their client. Having said that, they did not recommend she did not sign. They did not get her to sign an indemnity as is common in such circumstances if lawyers are troubled about an agreement. The reason is clear. The deal was a reasonable deal. It was certainly within the bracket of reasonable agreements that could have been reached. As is now apparent, after a marriage lasting fourteen years, the PNA provided for their client to receive £7 million as a Duxbury fund and £4.75 million for her housing, a combined total of £11.75 million. Moreover, it could not be said that sharing was ignored. She would have got half of the marital acquest if that was greater. She got very generous child maintenance. After twenty-five years, the PNA would be torn up and ignored.*

The court again, as in *WC v HC*, accepted that the financially weaker party was under pressure: Moor J reiterated that '*it has to be undue pressure*' and '*even if there was undue pressure, the existence of top-quality legal advice is a very strong countervailing factor*'.

> *79. There was full disclosure. There was proper legal advice. The only criticism that is made relates to the allegation of undue pressure. Even then, I note that there was a significant cooling off period between the evening of 15 March 2005 and the eventual execution of the PNA with a date of 3 June 2005. Moreover, the Husband has at least the respectable argument that, even if there was undue pressure, the existence of top-quality legal advice is a very strong countervailing factor. Nevertheless, I must decide whether the Husband did exert undue pressure on her, whether it was during the "mother of all arguments" on 15 March 2005 or at any other time.*
> *80. I am clear that he did not. I accept that the Wife was under pressure, but that is not sufficient. It has to be undue pressure. I accept that he was saying that there would be no marriage without a pre-nuptial agreement but that is commonplace and, again, cannot be a vitiating factor by itself. Moreover, although some friends and family might have been aware of the intended marriage, no formal invitations had gone out. Even the "Save the Date" notification was not sent out until after agreement had been reached as to the PNA. Although the Wife had been investigating venues and arrangements, nothing had been formally booked.*
> *81. As noted during the oral evidence, I was struck by the fact that the argument took place on 15 March 2005, not after the Wife's proposals were sent on 4 March 2005. It is these earlier proposals that the Wife says infuriated the Husband. If that was the case, I would have expected the "mother of all arguments" to have been after PHB received the letter and communicated its terms to the Husband on approximately 7 March 2005. There was no such argument then. Thereafter, the Husband communicated with PHB in a constructive manner and even sent an email saying that it was the Wife who was unhappy and it was ruining their relationship. The argument happened after PHB sent the Husband's counter-proposals, the Wife had received them and she had gone home. I find, on the balance of probabilities, that she was angry about these proposals and she instigated the argument. I accept that the Husband then lost his temper, but it was a two-way argument. He did call her a gold-digger but I find both said things that they would not normally say* [emphasis added]. *There was no physical violence. The Wife did decide to leave. This was sensible of her as both needed a cooling off period. He did follow her downstairs and, on the balance of probabilities, shout after her down the street. This would have embarrassed her but it does not mean she was under undue pressure* [emphasis added].
> *82. The idea "to cool off" clearly worked. The Wife thought about things and returned. There followed negotiations. I have not heard even a hint of an allegation of impropriety from either side about those negotiations. As I have already made clear, I cannot accept that it is not proper for parties to negotiate themselves in such circumstances.*

Indeed, in many cases, it is sensible that they do so. In this case, it led to the bones of an agreement but there was always the safeguard of lawyers for both sides to look at what the parties had agreed and advise them impartially and in their interests on the terms. I reject Miss Bangay's categorisation of the negotiations as a "capitulation" by the Wife. It was no such thing. She did accept that there should not be a payment of £2 million after two years but, in exchange, the Husband agreed that the annual payment should be £500,000 per annum. This was closer to the Wife's original figure of £600,000 per annum than his initial figure of £300,000 per annum, or even the £300,000 to £400,000 in his solicitors' letter dated 14 March. The fact he told his solicitors that he might be prepared to go to £450,000 per annum is irrelevant as that had not been offered. Miss Bangay is therefore wrong to categorise it as him only moving from £450,000 to £500,000. Moreover, there were other concessions as well, such as half The London Property after eight years, not ten, if there were no children and a cap at 42% of his overall wealth rather than 35%. There was also the sunset clause at twenty-five years.

83. Thereafter, the lawyers looked at it. I accept there were subsequently some further amendments but the Wife cannot criticise that, given her contention that the lawyers should have been negotiating all along. I am also satisfied that the changes worked both ways and did not involve any "capitulation" by anyone. In short, the parties reached a sensible agreement. The lawyers either approved it or, at least, did not stand in the way. "Save the Date" notifications were then sent out. The final version of the PNA was executed by both parties and dated 3 June 2005.

85. It follows that I am quite clear that there is no vitiating factor in this case that means that this PNA should be ignored; nor is there any factor that means that I should give it less weight than would otherwise be the case. Litigants must realise that it is a significant step to instruct top lawyers to prepare a prenuptial agreement prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement. These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide that certainty. Litigants cannot expect to be released from the terms that they signed up to just because they don't now like what they agreed [emphasis added].

97. I conclude that this was a PNA freely entered into by each of them, with a full appreciation of its meaning and consequences. There are no vitiating factors.

Lack of Legal Advice and Full Disclosure is Not Fatal

In *CMX v EJX*, Moor J held that in that case, where there was a French marriage contract and it was signed before a notary, the lack of independent legal advice or full disclosure was not fatal:

62. I first turn to the question of the Marriage Contract. 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. In reaching my conclusion, I have been very struck by the fact that the parties went to the firm of Notaries used by the Wife's family. It is difficult to say with certainty how this came about but nobody has suggested that it was the Husband or his family that were pressing for this Marriage Contract. After all, the Husband was a student studying for his exams, albeit that he did have a good job offer with A Bank up his sleeve. Moreover, somebody must have asked the firm to prepare the first draft of the Contract and I find it almost impossible to believe it was the Husband.

63. In general, I have found the evidence of the Husband considerably more persuasive on this issue than that of the Wife. There is no doubt in my mind that the Notary would have explained the Contract and its ramifications to the parties in detail. It was her obligation to do so and it is inconceivable that she would not have done so. I was particularly taken with the Husband's evidence that, when the Notary started talking about the consequences on a divorce, he tried to stop her but was 'given a ticking off'. This can only have been because the Notary knew she had to deal with it.

64. This Wife is extremely intelligent. She had been working for three years in responsible employment. I cannot accept that she would not have known that the whole point of such Contracts was to deal with the position on divorce or separation given that there is no real need for them otherwise. In any event, even if she did not, the Notary told her. At the time, she was earning more than the Husband. She wanted to retain her career and keep the rewards from that career. Whilst I cannot be entirely sure of the motivation of her or her family, I am clear that the Radmacher test for upholding this Contract is satisfied. 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.

65. There is no doubt that this Marriage Contract would have failed the Radmacher test if it had attempted to exclude a needs based award as it would not then have been fair but the Contract does no such thing. It follows that I must go on to consider the correct needs based award to make to this Wife following this long marriage in which she has made as full a contribution as she could possibly have made.

In *HD v WB*, Peel J stated that:

45. Sound legal advice is "desirable" (Radmacher at para 69), but not essential [emphasis added]. *In V v V [2012] 1 FLR 1315 Charles J held that the agreement should be upheld notwithstanding lack of legal advice or disclosure because it was readily understood by an intelligent (but legally unadvised) reader (para 50), and both parties intended the marriage settlement to be effective and were aware of its obvious purpose. In Versteegh v Versteegh [2018] 2 FLR 1417, a similar approach was adopted. When considering the absence of legal advice, the court should, in my view, look at all the circumstances, including whether the party had the opportunity to take legal advice, and whether the party had a sufficient understanding of the meaning and consequences of the PNA. I cannot accept that absence of legal advice is, by itself, a vitiating factor, or "fatal" to W's case, as H suggests in his counsels' opening note, such that no weight can be attributed to it.*

A PNA Pre-dating *Radmacher* is Not Fatal

In *KA v MA*, Roberts J stated:

55. Whilst I accept that this agreement was concluded before their Lordships had recast the legal test in relation to enforceability, the principle is nevertheless relevant in this case because of the importance to the husband of securing some concession from the wife prior to his agreement to marry that his premarital wealth should be protected subject only to his obligations to meet her financial needs in the event of a future divorce. She knew that a formal agreement which reflected those wishes was a precondition to their marriage. She had been advised by specialist lawyers that if she signed such an agreement, she might be bound by its terms to the detriment of any potential award under either or both of the MCA 1973 or the 1989 Act (in respect of claims for M). I have already found that her desire to marry the man who was the father of her only child and to whom she had committed her life was sufficiently strong to override those risks which she hoped and expected might never materialise. However, given the degree of reliance which the husband placed on securing that agreement as the condition precedent to the marriage, the principle of autonomy and the parties' intentions has to be factored into the overall assessment of fairness in this case.

Peel J also dealt with the point in *HD v WB*:

> *84. The other point made on behalf of the Wife is that this PNA pre-dated the decision in Radmacher. I have already made some points in relation to this but I am clear that it cannot be a vitiating factor. First, if it was, Mr Granatino would not have been held to the agreement he made with Ms Radmacher. Second, this Wife was told by Clintons that she had to proceed on the basis that it would be upheld. Third, she told me on more than one occasion that the reason for the PNA was in case the law changed. I find that this is not what she was told at the time but, if that is her case, she cannot then argue that the fact that there was a subsequent decision is grounds for her being relieved of the terms she signed up to.*

As did Moor J in *MN v AN*:

> *59. Mr Horton, on behalf of the Husband, referred me to KA v MA [2018] EWHC 499 (Fam); [2018] 2 FLR 1285 at [55] for the proposition that the mere fact that the agreement pre-dates the Radmacher decision does not mean it should not be given full weight. Indeed, that must be right or Mr Granatino would not have been held to the agreement he signed. Moreover, in this case, the Wife said, during her evidence, on more than one occasion that she thought the PNA would apply if the law changed. Whilst I will have to make a finding as to whether that was the position or not, it deals with any residual issue about this PNA pre-dating Radmacher.*

Deterrence and 'Reducing the Role of the Lawyers'

A party who fails in his application that the PNA should be completely disregarded faces costs consequences

In *HD v WB*, Peel J stated:

> *Costs*
>
> *116. After I sent out the judgment in draft, I heard applications by each party for costs orders. H seeks the sum of £417,000, being his costs incurred since his open offer of May 2022. W seeks 20% of her costs, i.e about £170,000.*
>
> *117. The starting point for costs in financial remedy proceedings is that each party should bear their own costs. By FPR 2010 28.3(6) the court may depart from the starting point and make a costs order against one, or other, or both parties. Factors to be taken into account are listed at 28.3(6) and include:*
>
> *"(b) any open offer to settle made by a party;*
> *(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
> *(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;*
> *(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and*
> *(f) the financial effect on the parties of any costs order."*
>
> *118. Rule 4.4 of Practice Direction 28A states that:*
>
> *"The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court."*
>
> *119. In Rothschild v de Souza [2020] EWCA 1215 the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. Examples of first instance decisions where the judge made costs order notwithstanding that such order would cause the payee to dip into (and thereby reduce) the needs based award include Sir Jonathan Cohen in Traherne v Limb [2022] EWFC 27, Francis J in WG v HG [2018] EWFC 70 and my own decisions in WC v HC [2022] EWFC 40 and VV v VV [2022] EWFC 46.*
>
> *120. In this case, each party's open offers missed the target by a considerable margin. Neither party put forward an open proposal which came close to my final decision. I do not know what without prejudice negotiations have taken place, but I do not consider that either party can legitimately seek a costs order based on the open negotiations.*
>
> *121. H can point to the fact that I came down against W on her case that H can, and should, access his business interest within 4 years. I made clear findings on this point. On the other hand, W can point to my dissatisfaction with H's presentation (particularly in his Form E) about the value of his business interest, and the 2020 business dividend. Most significant, however, in my judgment, is H's attempts throughout the proceedings to persuade the court that the PNA should be completely disregarded. That issue occupied a very large amount of the court's time and energy, and infected the whole case. It dominated the proceedings throughout. I found against H, and did not accept his evidence on the disputed circumstances under which the PNA came into being. Had he not challenged the PNA in this way, I am confident that the proceedings would have been significantly shorter and less expensive* [emphasis added].
>
> *122. In my view, H must bear some of the costs, principally because of his approach to the PNA. Doing the best I can, it seems to me that a payment by him of 20% of W's costs is reasonable. I will, however, apply a discount of 30% to the figure of £170,000 which is sought, to reflect a notional deduction for the standard basis of assessment. Thus, H shall pay £120,000 towards W's costs, such sum to be netted off against the lump sum provision which I have made in his favour. I consider that it is reasonable and proportionate to invade, to that extent, the needs based award made by me in his favour. He cannot be insulated from the consequences of litigation. For the avoidance of doubt, I decline to make a costs order against W in favour of H, an application which I thought was ambitious.*

Marcus Dearle is Senior Partner at Miles Preston, Immediate Past Chair of the International Bar Association Family Law Committee, and a Fellow of the International Academy of Family Lawyers. He is ranked in the *Chambers High Net Worth Guide* in the Family/Matrimonial Finance: Ultra High Net Worth Section (UK-wide). He is a 26-year veteran of Withers in London and Hong Kong and has over 34 years of experience acting in complex domestic and international family law cases. Marcus has specialist expertise, in particular acting for trustees in HNW and UHNW divorce and trust cases, advising on UHNW pre- and postnuptial agreements (PNAs) and dealing with international divorce litigation involving PNAs and trusts. He also has recognised pioneering expertise in international surrogacy law and medico-legal/fertility law issues. In addition to being admitted in England and Wales, he uniquely practises in Hong Kong family law from London. He is also admitted, but not practising in, the BVI. Marcus is recognised as a leading trusts and divorce litigation practitioner, advising UHNW clients in Legal Week's *Private Client Global Elite* directory: the directory is entirely reliant on peer nominations. He currently represents Sir Frederick Barclay in his divorce – defending him in complex committal proceedings involving international trusts. He took over the case just after the family remedy trial judgment on 31 March 2021: see the reported judgments – *Barclay v Barclay* [2021] EWFC 40, 5 July 2021, and *Barclay v Barclay* [2022] EWHC 2026 (Fam), 28 July 2022.

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Miles Preston is a pre-eminent family law practice in the UK and has unrivalled international expertise – as it can uniquely offer both England and Wales, and Hong Kong, law advice on the ground in London. The firm, founded in 1994, is the original leading boutique divorce and family law practice in London. Following its success, a number of other boutique practices have set up in London. It acts for clients, whether they are facing marriage or relationship breakdown, and disputes relating to children, or if there is a commercial element and the clients are trustees of offshore or onshore trusts.

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