Michaelmas Term
[2010] UKSC 42
On appeal from: 2009 EWCA Civ 649

JUDGMENT

Radmacher (formerly Granatino) (Respondent) *v* Granatino (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Collins
Lord Kerr

JUDGMENT GIVEN ON

20 October 2010

Heard on 22 and 23 March 2010

Appellant
Nicholas Mostyn QC
Deepak Nagpal

(Instructed by Payne Hicks Beach)

Respondent
Richard Todd QC
Geoffrey Kingscote
Jonathan Harris
(Instructed by Farrer & Co)

LORD PHILLIPS, LORD HOPE, LORD RODGER, LORD WALKER, LORD BROWN, LORD COLLINS AND LORD KERR

Introduction

1. When a court grants a decree of divorce, nullity of marriage or judicial separation it has the power to order ancillary relief. Ancillary relief governs the financial arrangements between the husband and the wife on the breakdown of their marriage. Sometimes the husband and wife have already made an agreement governing these matters. The agreement may have been made before the marriage ("an ante-nuptial agreement") or after the marriage ("a post-nuptial agreement"). Post-nuptial agreements may be made when the husband and wife are still together and intend to remain together, or when they are on the point of separating or have already separated. The latter type of post-nuptial agreement can be described as "a separation agreement". We shall use the generic description "nuptial agreements" to embrace both ante-nuptial and post-nuptial agreements.

2. A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or post-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to such an agreement. This appeal raises the question of the principles to be applied by the court when considering the weight that should be attached to an ante-nuptial agreement. The Privy Council recently considered this question in relation to a post-nuptial agreement in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 and it will be necessary to consider the implications of that decision.

3. The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard. The uncertainty as to the weight that the court will attach to such agreements has led to calls for reform. The history of steps taken towards the reform of our law is set out in the judgment of Thorpe LJ at paras 16 to 23 of his judgment in this case in the Court of Appeal. For present purposes it suffices to note the following.

4. In 1998 the Home Office published a consultation document, "Supporting Families", which included the following statement in para 4.21:

> "The Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce."

5. In para 4.23 the Government proposed that any such agreement should be subject to six safeguards. It would not be legally binding:

> "– where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made
>
> – where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance
>
> – where one or both of the couple did not receive independent legal advice before entering into the agreement
>
> – where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage)
>
> – where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made
>
> – where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist)."

6. There are many, including some members of the Family Bar and Bench, who would favour a reform along the lines proposed, but the Government has not taken its proposals further. The Law Commission is, however, currently considering this area of the law and is expected to report in 2012.

7. There can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation. What the Court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt towards an ante-nuptial agreement between the parties. Earlier this year Resolution, an organisation of over 5,700 family lawyers, published an updated paper on "Family Agreements", which proposes legislative reform to the law of ante-nuptial and post-nuptial agreements. This quotes statistics that show that about 45% of marriages are likely to end in divorce. It comments on the strain and expense that are involved in disputes about ancillary relief, which are increased by the uncertainty of the outcome.

8. In order to address the facts of this particular case it will be necessary, in due course, to set these out in a little detail. At this stage we propose to give a summary that will provide a context for the consideration of the relevant principles that will follow.

9. The appellant ("the husband") is a French national. The respondent ("the wife") is a German national. They signed the ante-nuptial agreement in Germany on 1 August 1998. The husband was then aged 27 and the wife 29. They were married in London on 28 November 1998. They had two children, Chiara, born on 4 September 1999 and Chloe, born on 25 May 2002. In October 2006, after 8 years of marriage, they separated.

10. The wife petitioned for divorce in the Principal Registry of the Family Division that same month. The husband cross-petitioned in November. They agreed to proceed undefended on cross decrees and were divorced in July 2007.

11. Meanwhile, the wife had applied for permission to take the girls to live in Germany. In September 2007, His Honour Judge Collins granted that application but made a shared residence order providing that the children should divide their time between their parents. Under his order, they were to spend just under one third of the time with their father and two thirds with their mother. The husband made an unsuccessful application for permission to appeal that order to the Court of Appeal. The wife took the children to live in Germany in February 2008. However, in November 2008 (after the judgment of Baron J in the ancillary relief proceedings), she applied to the German court for permission to take them to live in Monaco. The husband resisted this, but permission was granted in May 2009 and that is where they now live.

12. The ante-nuptial agreement was drawn up in Germany by a notary. It contained a choice of law clause that provided that the effects of their marriage, including the laws of matrimonial property and succession, were to be subject to the law of the Federal Republic of Germany. The main part of the agreement provided first for separation of property. In clause 3 it was declared that the statutory matrimonial regime was to be excluded, and that each party was to manage his or her assets entirely independently. By clause 4 the parties excluded the equalisation of pension rights. By clause 5 they waived claims for maintenance after the marriage was terminated. Clause 6 contained a waiver of the statutory right to a portion of the estate of the first one of them to die. The effect of the agreement was that neither party was to derive any interest in or benefit from the property of the other during the marriage or on its termination. It made no provision for what was to happen in the event of their having children.

13. The parties entered into this ante-nuptial agreement at the instigation of the wife. She came from an extremely rich family. Some of the family wealth had already been transferred to her, so that she enjoyed substantial unearned income. She expected to receive a further portion of the family wealth if, but only if, she entered into the ante-nuptial agreement to protect this. Her father insisted upon this. She herself was anxious that the husband should show, by entering into the agreement, that he was marrying her for love and not for her money.

14. The husband was working for JP Morgan & Co and, at the time of the ante-nuptial agreement, was earning about £120,000 a year and had excellent prospects. These were realised inasmuch as he earned about $475,000 dollars in 2001 and about $320,000 in 2002. He then became disenchanted with banking and embarked on research studies at Oxford with the object of obtaining a D Phil in biotechnology.

15. Despite the terms of the ante-nuptial agreement the husband brought a claim for ancillary relief, seeking an order against the wife both for periodical payments and for a lump sum. The hearing of his claim began before Baron J on 23 June 2008 and she handed down her judgment on 28 July 2008: [2008] EWHC 1532 (Fam) [2009] 1 FCR 35. The issue that lay at the heart of the proceedings was the weight that should be given to the ante-nuptial agreement. Baron J held that the circumstances surrounding the conclusion of the agreement fell foul of a number of the safeguards set out in para 4.23 of the Home Office consultation document (see para 5 above), and for that reason, the weight to be attached to it fell to be reduced. None the less, she held that his award should be circumscribed to a degree to reflect the fact that he had signed the agreement. Her award also had to make provision for the two children, whose arrival had not been anticipated in the agreement. In the event she awarded the husband a total of £5,560,000, on the basis that this would provide him with an annual income of £100,000 for life and enable him to buy a home in London, where the two children could visit him. She

awarded him periodical payments of £35,000 a year for each child until they ceased full time education. In addition she awarded a sum to enable him to buy a home in Germany (which would remain owned by the wife) where the two children could stay with him.

16. The wife appealed successfully to the Court of Appeal against Baron J's order. The Court held that Baron J had been wrong to find that the circumstances in which the ante-nuptial agreement had been reached reduced the weight to be attached to the agreement. It was not evident that the fact of the agreement had had any significant impact on her award. In the circumstances of the case she should have given the agreement decisive weight. The award should make provision for the husband's role as the father of the two children, but should not otherwise make provision for his own long term needs. The case was remitted to Baron J.

Ancillary relief

17. The power to grant a decree of divorce was conferred on a new Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act 1857. Section 32 of that Act gave the court power to order the husband to secure maintenance for the wife's life. The Matrimonial Causes Act 1866 gave the court power to order the court to pay unsecured maintenance to the wife. Having identified this starting point of the power to award ancillary relief we can jump to 1969.

18. The Divorce Reform Act 1969 revolutionised the English law of divorce by replacing the old grounds of divorce which were based on fault with the single ground that the marriage had irretrievably broken down. This change was accompanied by a fresh approach to the financial consequences of divorce, which was supplied initially by the Matrimonial Proceedings and Property Act 1970, the provisions of which were largely re-enacted as Part II of the Matrimonial Causes Act 1973 ("the 1973 Act"). Significant changes were made to these provisions by the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996. The following provisions of the 1973 Act, as amended, are particularly material.

19. Section 23 gives the court the power, on granting a decree of divorce, of nullity of marriage or of judicial separation to make a wide variety of orders. These include an order that either party pay to the other, or pay for the benefit of any child of the family, periodical payments, and that either party pay to the other, or for the benefit of any child of the marriage, a lump sum. Section 24 gives the court power to direct a party to transfer specified property to the other party or to or for the benefit of a child. No power is given to vary a property adjustment order. Section 24B gives the court power to make a pension sharing order. Section

31 gives the court power to vary a periodical payments order but not an order to pay a lump sum.

20. Section 25 provides that "it shall be the duty of the court" when deciding whether, and in what manner to exercise powers including those referred to above to have regard to:

> "all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen"

21. The section goes on to provide that as regards the exercise of its powers in relation to a party to the marriage the court shall in particular have regard to the following matters:

> "(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit … which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

22. The principles to be applied to the grant of ancillary relief have twice been considered by the House of Lords, in cases involving substantial assets. In *White v White* [2001] 1 AC 596 the parties had been married for 33 years, during which time they had together carried on the business of farming. Their net assets were some £4.6 million. The judge awarded the wife a lump sum of a little less than £1 million, on the basis that this would meet her reasonable needs. The Court of Appeal allowed her appeal and held that she was entitled to a lump sum of £1.5 million, reflecting her contribution both to the business and to the family. In the House of Lords, where the decision of the Court of Appeal was upheld, Lord Nicholls of Birkenhead gave the leading speech. He identified the following principles. Fairness, and indeed the 1973 Act itself, required the court to have regard to all the circumstances of the case, and there was one principle of universal application. No distinction should be drawn between the different ways in which husband and wife contributed to the welfare of the family. There should be no bias in favour of the money-earner against the home-maker and the child-carer. As a general guide equality in the division of assets should only be departed from for good reason (p 605).

23. Lord Nicholls went on to draw a distinction between property that one party brought to the marriage, or inherited during the marriage ("inherited property") and property acquired by the labours of one or both parties during the marriage ("matrimonial property"). Lord Nicholls recognised that there was a case for saying that a party should be allowed to keep inherited property, but commented:

> "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 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." (p 610)

24. In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 two appeals were heard together, one in respect of a marriage that had lasted less than three years. Lord Nicholls started his judgment under the heading "*The requirements of fairness"* by observing that under the 1973 Act the first consideration had to be given to the welfare of the children of the marriage. After this a number of strands could be identified. The first was financial needs. He commented at para 11:

> "The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

25. A second strand was compensation.

> "This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer." (para 13)

26. A third strand was sharing. Lord Nicholls postulated that marriage was a partnership. When a marriage ended each was entitled to an equal share of the assets of the partnership unless there was good reason to the contrary, albeit that the yardstick of equality was to be applied as an aid, not a rule. One good reason might be the difference between "matrimonial property" generated during the marriage and "non-matrimonial property" - property brought by one party to the marriage or inherited by or given to one party during the marriage.

27. There was general agreement among the other members of the House with these propositions, although not all agreed on the precise definition of "matrimonial property" nor on the relevance of the length of the marriage to the principle of sharing. Lady Hale, with whom Lord Mance agreed, identified a sub-category of matrimonial property, which the parties treated as separate property and which might not be subject to the sharing principle.

28. The implications of these two decisions were considered by the Court of Appeal, Sir Mark Potter P, Thorpe and Wilson LJJ in *Charman v Charman (No 4)* [2007] EWCA Civ 503; [2007] 1 FLR 1246. The court observed that in *Miller* the House had unanimously identified three main principles which governed distribution of property in ancillary relief proceedings – "need (generously interpreted), compensation and sharing" and that each of the matters set out in sub-paragraphs (b) to (h) of section 25(2) of the 1973 Act could be assigned to one of the three (paras 68-69).

29. As to the principle of sharing, the court said this, at para 66:

> "To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in para 68, below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale of Richmond in *Miller* at paras 141 and 143 to 'sharing … the fruits of the matrimonial partnership' and to 'the approach of roughly equal sharing of partnership assets'. We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paras 83 to 86, below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in *White* at p 605 F-G and p 989 respectively, and in *Miller*, at paras 24 and 26, Lord Nicholls of Birkenhead approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale of Richmond, that in *White* the House had set too widely the general application of what was then a yardstick."

30. The "exceptions identified in *Miller"* referred to the possible exception in respect of assets that the parties had treated as separate property. As to these the court commented that the discussion about these perhaps

> "foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed."

Nuptial agreements, separation agreements and public policy

31. It used to be contrary to public policy for a married couple who were living together, or a couple about to get married, to make an agreement that provided for the contingency that they might separate. Marriage involved a duty to live together and an agreement making provision for the possibility of separation might act as an encouragement to separate. Such agreements were void and the court would pay no regard to them: *Cocksedge v Cocksedge* (1844) 14 Sim 244; 13 LJ Ch 384; *H v W* (1857) 3 K & J 382. The same was not true of an agreement to separate or an agreement that governed a separation that had already taken place. Lord Atkin in *Hyman v Hyman* [1929] AC 601 at p 625-626 gave a short history of such contracts and commented on their effect:

> "We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognized by the Ecclesiastical Courts, such contracts were enforced by the common law. Equity at first frowned. Lord Eldon doubted but enforced them: cf. *St. John v. St. John* (1803) Ves. 525, 529 and *Bateman v. Countess of Ross* (1813) 1 Dow 235; and see the arguments of Sir Fitzroy Kelly and Mr Turner and of Mr Bethell in *Wilson v. Wilson* (1848) 1 H. L. C. 538, 550-553, 564, 565. Finally they were fully recognized in equity by Lord Westbury's leading judgment in *Hunt v. Hunt* (1861) 4 D. F. & J. 221, in which he followed Lord Cottenham's decision in *Wilson v. Wilson* 1 H. L. C. 538, 550-553, 564, 565, where his argument for the respondent had prevailed. Full effect has therefore to be given in all courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial courts seems to suggest that at times they are still looked at askance and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which

> are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy."

32. In *Hyman v Hyman* the husband had left the wife for another woman. Adultery by the husband was not at the time a ground for divorce unless there were aggravating circumstances, such as incest. The parties had entered into a deed of separation under which the husband had paid two lump sums and agreed to make weekly payments of £20 for the life of the wife. The deed included a covenant by the wife that she would not institute any proceedings to make him pay more than this. When the Matrimonial Causes Act 1923 gave the wife the right to petition for divorce on the grounds of her husband's adultery alone, the wife divorced her husband and applied to the court for maintenance pursuant to section 190(1) of the Supreme Court of Judicature (Consolidation) Act 1925. This gave the court the power, on any decree for divorce, to order the husband to pay maintenance. The husband argued that the wife was precluded by her covenant from bringing this claim. The House rejected this argument. Lord Hailsham LC held at p 614 that:

> "the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction."

Lord Atkin made the same point at p 629.

33. The subsequent history was set out by Lady Hale in *MacLeod v MacLeod* at paras 21 to 23. The same principle was applied to other statutory powers to award maintenance. In *Bennett v Bennett* [1952] 1 KB 249 the wife sought to enforce an agreement to pay maintenance given by her husband in consideration of her agreement not to seek a court order for maintenance. The Court of Appeal held that because that agreement was of no effect it did not constitute valid consideration for her husband's agreement and her claim failed.

34. This unfortunate situation was remedied by the Maintenance Agreements Act 1957. The preamble to this Act stated:

> "An Act to make provision with respect to the validity and alteration by the court of financial arrangements in connection with agreements

between the parties to a marriage, whether made during the continuance or after the dissolution or annulment of the marriage, for the purposes of those parties' living separately; and for purposes connected therewith."

35. The Act provided:

"1.—(1) This section applies to any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage for the purposes of their living separately, being—

(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or

(b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements.

(2) If an agreement to which this section applies includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, that provision shall be void but any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable but, unless void or unenforceable for any other reason, and subject to the next following subsection, shall be binding on the parties to the agreement: . . .

(3) Where an agreement to which this section applies is for the time being subsisting and the parties thereto are for the time being either both domiciled or both resident in England, and on an application by either party the High Court or, subject to the next following subsection, a magistrates' court is satisfied either—

(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted therefrom, the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements; or

> (b) that the agreement does not contain proper financial arrangements with respect to any child of the marriage,
>
> the court may by order make such alterations in the agreement by varying or revoking any financial arrangements contained therein or by inserting therein financial arrangements for the benefit of one of the parties to the agreement or of a child of the marriage as may appear to the court to be just having regard to all the circumstances or, as the case may be, as may appear to the court to be just in all the circumstances in order to secure that the agreement contains proper financial arrangements with respect to any child of the marriage; and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration."

36. These provisions are largely reproduced in sections 34 and 35 of the 1973 Act, albeit that the definition of a "maintenance agreement" does not state that it is an agreement made "for the purposes of their living separately". Wilson LJ at para 134 of his judgment in this case remarks that sections 34 and 35 have been dead letters for more than 30 years. It seems likely that issues as to maintenance have, since the 1973 Act came into force, been pursued in ancillary relief proceedings. As to these section 35(6) provides

> "For the avoidance of doubt it is hereby declared that nothing in this section or in section 34 above affects any power of a court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment (including a provision of this Act) to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings."

37. Although separation agreements do not override the powers of the Court to grant ancillary relief, they have been held to carry considerable weight in relation to the exercise of the court's discretion when granting such relief. In *Edgar v Edgar* [1980] 1 WLR 1410 the husband and wife had separated and in 1976, without any pressure from the husband but rather at the instigation of the wife, concluded a deed of separation which had been negotiated through solicitors. Under this the husband agreed to purchase a house for the wife, to confer on her capital benefits worth approximately £100,000, to pay her £16,000 a year and to make periodical payments for the children of the marriage. The wife agreed that if she obtained a divorce she would not seek a lump sum or property transfer orders.

38. The husband complied with all his obligations under the separation deed but, in 1978, the wife petitioned for divorce and applied for ancillary relief, including a lump sum payment. Ormrod LJ said this about the weight to be given to the separation agreement at p 1417:

> "To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. 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. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.
>
> I agree with Sir Gordon Willmer in *Wright v Wright* [1970] 1WLR 1219, 1224, that the existence of an agreement,
>
> > '… at least makes it necessary for the wife, if she is to justify an award of maintenance, to offer prima facie proof that there have been unforeseen circumstances, in the true sense, which make it impossible for her to work or otherwise maintain herself.'
>
> Adapting that statement to the present case, it means that the wife here must offer prima facie evidence of material facts which show that justice requires that she should be relieved from the effects of her covenant in clause 8 of the deed of separation, and awarded further capital provision."

39. Oliver LJ summarised his conclusions as follows at p 1424:

> "… in a consideration of what is just to be done in the exercise of the court's powers under the Act of 1973 in the light of the conduct of the parties, the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary."

The court held that no good reason had been shown not to hold the wife to her agreement.

40. Sitting in the Court of Appeal after his retirement, Sir Roger Ormrod in *Camm v Camm* (1982) 4 FLR 577 at p. 579, which was another case where ancillary relief was claimed in the face of the terms of a separation agreement, said:

> "It has been stressed all through those same cases that the court must attach considerable importance, the amount of importance varying from case to case, to the fact that there was an agreement, because the court, naturally, will not lightly permit parties who have made a contractual agreement between themselves, even if it is not legally enforceable, to depart from that contractual agreement unless some good reason is shown."

In that case the court did not hold the wife to her agreement, which she had entered into under great pressure and which failed to make adequate provision for her needs.

41. In *Smith v McInerney* [1994] 2 FLR 1077 the husband, who had entered into a separation agreement with his wife, sought a lump sum and property adjustment order when his circumstances changed as a result of being made redundant. Thorpe J cited *Edgar v Edgar* and *Camm v Camm* and remarked at p 1081:

> "As a matter of general policy I think it is very important that what the parties themselves agree at the time of separation should be upheld by the courts unless there are overwhelmingly strong considerations for interference."

42. The approach of the courts to separation agreements, as evidenced by the cases cited above, differed markedly from the approach to nuptial agreements that

merely anticipated the possibility of separation or divorce and which were consequently considered to be void as contrary to public policy. Contrast the statement of Thorpe J in *Smith v McInerney* quoted above with what he said at about the same time in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45. In the latter case a rich German husband relied on a marital property regime which confined the wife to the pension of a retired German judge in the event of their divorce (the wife was in the judicial civil service at the time of the marriage). Thorpe J accepted that such agreements were commonplace in the society from which the parties came, but he did "not attach any significant weight" to the ante-nuptial agreement, and said (at p 66):

> "The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society."

43. Judges sitting in the Family Division were prepared to give some weight to ante-nuptial agreements, but certainly not to the extent of holding that they should govern the terms of ancillary relief unless there were strong reasons for departing from them. In *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200, Wilson J suggested at pp 1203-1204 that there might come a case

> "where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial. Where other jurisdictions, both in the United States and in the European Community, have been persuaded that there are cases where justice can only be served by confining parties to their rights under prenuptial agreements, we should be cautious about too categorically asserting the contrary. I can find nothing in section 25 to compel a conclusion, so much at odds with personal freedoms to make arrangements for ourselves, that escape from solemn bargains, carefully struck by informed adults, is readily available here."

44. In *N v N (Jurisdiction: Pre-nuptial agreement)* [1999] 2 FLR 745, 752, Wall J recognised that although they were unenforceable, ante-nuptial agreements might have evidential weight in subsequent proceedings for divorce. Some weight was given to an ante-nuptial agreement in *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624 (Johnson J) (where a French ante-nuptial agreement was a significant factor in staying English proceedings); *M v M (Prenuptial Agreement)* [2002] 1 FLR 654, para 44 ("tending to guide the court to a more modest award than might have been made without it," per Connell J); and *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011 (CA)

(where parties had been married before). But contrast *Haneef v Haneef* [1999] EWCA Civ 803 (a decision on leave to appeal); *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042 (Coleridge J) (agreement signed on the eve of marriage without advice or disclosure and without allowance for arrival of children). See also *X v X (Y and Z Intervening)* [2002] 1 FLR 508, paras 78-103 (Munby J), and *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, 131-132 (R Hayward Smith QC sitting as Deputy High Court Judge) for a review of the authorities.

45. Some judges cited dicta in *Edgar v Edgar* in the context of ante-nuptial agreements without observing that those dicta were made in the very different context of a separation agreement – see *N v N* at p 753; *M v M* at para 21, *K v K* at p 131.

46. A change of attitude on the part of Thorpe LJ was apparent from his decision in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, 1472, at para 15 Thorpe LJ described the ante-nuptial agreement there as "a factor of magnetic importance." The marriage was a short marriage between two wealthy individuals who entered into an ante-nuptial agreement after having taken legal advice. Mrs Crossley asserted that her husband's disclosure had been inadequate and therefore the agreement should be avoided. The issue before the court concerned disclosure. Thorpe LJ drew attention to these facts: the marriage was a childless marriage of very short duration, for a substantial portion of which the parties were living apart; the marriage was between mature adults, both of whom had been previously married and divorced; both parties had very substantial independent wealth; the ante-nuptial agreement provided for the retention by each of the parties of their separate properties and division of joint property (of which there was in fact none). He accepted that the combination of these factors gave rise to a very strong case that a possible result of the section 25 exercise would be that the wife receives no further financial award, and concluded (at para 15):

> "All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case …"

47. Cases of post-nuptial settlements other than separation agreements are rare. One such was *NA v MA* [2006] EWHC 2900 (Fam); [2007] 1 FLR 1760. That case is of interest because, on one view, it anticipated the approach of the Privy Council in *MacLeod*. The very wealthy husband had discovered that his wife had committed adultery with one of his friends. He pressurised her into signing an agreement that provided that she would receive a specified lump sum and annual

payments if their marriage ended in divorce. The wife signed it because the husband insisted that she should do so if the marriage was to continue. Despite this, Baron J held at para 67 that "as the idea of an agreement evolved it hardened into a legal, post-nuptial agreement". It was on this basis, as we understand it, that the husband sought to have the agreement converted into an order of the court. When dealing with the law the judge did not distinguish clearly between ante-nuptial, post-nuptial and separation agreements. She said at para 12:

> "It is an accepted fact that an agreement entered into between husband and wife does not oust the jurisdiction of this court. For many years, agreements between spouses were considered void for public policy reasons but this is no longer the case. In fact, over the years, pre-nuptial 'contracts' have become increasingly common place and are, I accept, much more likely to be accepted by these courts as governing what should occur between the parties when the prospective marriage comes to an end. That is, of course, subject to the discretion of the court and the application of a test of fairness/manifest unfairness. It may well be that Parliament will provide legislation but, until that occurs, current authority makes it clear that the agreements are not enforceable per se, although they can be persuasive (or definitive) depending upon the precise circumstances that lead to their completion."

48. The judge went on to apply the law of undue influence, holding at paras 20 and 21

> "I am clear that, to overturn the agreement, I have to be satisfied that this wife's will was overborne by her husband exercising undue pressure or influence over her. I am also clear that if I do not overturn the agreement per se, I still have to consider whether it is fair and should be approved so as to become a court order."

She overturned the agreement on the ground of undue influence.

MacLeod v MacLeod

49. This was an appeal to the Privy Council from the High Court of Justice of the Isle of Man. It involved a claim for ancillary relief under the Manx Matrimonial Proceedings Act 2003, which contained provisions identical to sections 23 to 25 and 34 to 36 of the 1973 Act. The husband and wife had married in Florida in 1994, after signing an ante-nuptial agreement. A year later they

moved to the Isle of Man. Six years and five children later the marriage ran into difficulties and the parties executed a deed which made substantial variations to the ante-nuptial agreement. By August 2003 the marriage had totally broken down and in October 2004 a provisional decree of divorce was made. The wife sought ancillary relief, arguing that the deed of variation should be disregarded. The husband contended that it should be upheld, subject to one variation in favour of the wife.

50. The Board, in an advice delivered by Lady Hale, summarised the law in relation to nuptial agreements that we have set out above and pointed out the distinction between separation agreements and agreements providing for the consequences of a possible future separation. At para 31 the Board referred to the position of ante-nuptial agreements:

> "The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the United States of America, including Florida, this has been done by legislation rather than judicial decision."

51. The Board went on to draw a distinction between ante-nuptial and post-nuptial agreements, holding that the latter did constitute contracts. We do not agree with this distinction and, in order to explain where we part company with the reasoning of the Board, we must set this out in detail.

> "35 In the Board's view the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development. It is worth noting, for example, that in the Florida case of *Posner v Posner* (1970) 233 So 2d 381, where such agreements were recognised, attention was drawn to the statutory powers of the courts to vary such agreements. The Board is inclined to share the view expressed by Baron J in *NG v KR* (Pre-nuptial Contract) [2009] 1 FCR 35, para 130, that the variation power in section 50 of the 2003 Act (section 35 of the 1973 Act) does not apply to agreements made between people who are not yet parties to a marriage. Yet it would clearly be unfair to render such agreements enforceable if, unlike post-nuptial agreements, they could not be varied.

36 Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry. There is nothing to stop a couple entering into contractual financial arrangements governing their life together, as this couple did as part of their 2002 agreement. There is a presumption that the parties do not intend to create legal relations: see *Balfour v Balfour* [1919] 2 KB 571. There may also be occasional problems in identifying consideration for the financial promises made (now is not the time to enter into debate about whether domestic services constitute good consideration for such promises). But both of these are readily soluble by executing a deed, as was done here.

37 There is also nothing to stop a married couple from entering into a separation agreement, which will then be governed by sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act). As already noted, section 49 applies to 'any agreement in writing made at any time between the parties to a marriage'. There is nothing to limit this to people who are already separated or on the point of separating. It is limited to agreements containing 'financial arrangements' or to separation agreements which contain no financial arrangements. And 'financial arrangements' are limited to those governing their rights and liabilities towards one another when living separately. But section 49(1)(b) provides that such financial arrangements shall be binding 'unless they are void or unenforceable for any other reason'.

38 Leaving aside the usual contractual reasons, such as misrepresentation or undue influence, the only other such reason might be the old rule that agreements providing for a future separation are contrary to public policy. But the reasons given for that rule were founded on the enforceable duty of husband and wife to live together. This meant that there should be no inducement to either of them to live apart: see, for example, *H v W* 3 K & J 382, 386. There is no longer an enforceable duty upon husband and wife to live together. The husband's right to use self-help to keep his wife at home has gone. He can now be guilty of the offences of kidnapping and false imprisonment if he tries to do so: see *R v Reid* [1973] QB 299. The decree of restitution of conjugal rights, disobedience to which did for a while involve penal sanctions, has not since the abolition of those sanctions been used to force the

couple to live together: see *Nanda v Nanda* [1968] P 351. It was abolished by the Matrimonial Proceedings and Property Act 1970, at the same time as the Law Reform (Miscellaneous Provisions) Act 1970 abolished all the common law actions against third parties who interfered between husband and wife.

39 Hence the reasoning which led to the rule has now disappeared. It is now time for the rule itself to disappear. It has long been of uncertain scope, as some provisions which contemplate future marital separation have been upheld: see, for example, *Lily, Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165. This means that sections 49 to 51 of the 2003 Act (sections 34 to 36 of the 1973 Act) can apply to such agreements in just the same way as they do to any other. In particular, they can be varied in either of the circumstances provided for in section 50(2). The first is that there has been a change in the circumstances in the light of which any financial arrangements were made or omitted; following the amendment proposed by the Law Commission in 1969, this now includes a change which the parties had actually foreseen when making the agreement. The second is that the agreement does not contain proper financial arrangements with respect to any child of the family.

40 In the Board's view, therefore, the 2002 agreement was a valid and enforceable agreement, not only with respect to the arrangements made for the time when the parties were together, but also with respect to the arrangements made for them to live separately. However, the latter arrangements were subject to the court's powers of variation and the provisions which purported to oust the jurisdiction of the court, whether on divorce or during the marriage, were void. The existence of such powers does not deprive such agreements of their utility. Countless wives and mothers benefited from such agreements at a time when it was difficult for them to take their husbands to court to ask for maintenance. Enforcing an existing agreement still has many attractions over going to court for discretionary relief.

41 The question remains of the weight to be given to such an agreement if an application is made to the court for ancillary relief. In *Edgar v Edgar* [1980] 1 WLR 1410, the solution might have been more obvious if mention had been made of the statutory provisions relating to the validity and variation of maintenance agreements. One would expect these to be the starting point. Parliament had laid down the circumstances in which a valid and binding agreement relating to

> arrangements for the couple's property and finances, not only while the marriage still existed but also after it had been dissolved or annulled, could be varied by the court. At the same time, Parliament had preserved the parties' rights to go to court for an order containing financial arrangements. It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.
>
> 42 The Board would also agree that the circumstances in which the agreement was made may be relevant in an ancillary relief claim. They would, with respect, endorse the oft-cited passage from the judgment of Ormrod LJ in *Edgar v Edgar* [1980] 1 WLR 1410, 1417, in preference to the passages from the judgment of Oliver LJ, both quoted above, at para 25. In particular the Board endorses the observation that "It is not necessary in this connection to think in formal legal terms, such as mispresentation [sic] or estoppel". Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but the inequalities may be different in relation to different issues. The husband may be in the stronger position financially but the wife may be in the stronger position in relation to the children and to the home in which they live. One may care more about getting or preserving as much money as possible, while the other may care more about the living arrangements for the children. One may want to get out of the relationship as quickly as possible, while the other may be in no hurry to separate or divorce. All of these may shift over time. We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to have it set aside."

52. We wholeheartedly endorse the conclusion of the Board in paras 38 and 39 that the old rule that agreements providing for future separation are contrary to

public policy is obsolete and should be swept away, for the reasons given by the Board. But for reasons that we shall explain, this should not be restricted to post-nuptial agreements. If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.

53. We now turn to explain why we would not draw the distinction drawn by the Board between ante- and post-nuptial agreements. The Board advances two reasons for this, one specific the other general. The specific reason is that section 35 of the 1973 Act applies to post-nuptial but not to ante-nuptial settlements and it would be unfair to render the latter enforceable if they could not be varied (para 35). The general reason is that post-nuptial agreements are very different from ante-nuptial agreements. We shall deal with each in turn.

The specific reason

54. Our first reservation in relation to this reason is that we question whether the Board was right to hold that sections 34 and 35 apply to all post-nuptial agreements rather than just to separation agreements. We consider that the original provisions in the Maintenance Agreements Act 1957 applied only to separation agreements. The preamble to the Act and the statement in section 1(1) that the section applies to any agreement between the parties to a marriage *for the purpose of their living separately* so indicate. Furthermore post-nuptial agreements of couples living together that provided for the contingency of future separation were void, so Parliament cannot have intended the Act to apply to them.

55. When the provisions of the 1957 Act were incorporated into the 1973 Act, they did not include the preamble or the words that we have emphasised above. But it remained the case that post-nuptial agreements that made provision for the contingency of separation were considered to be contrary to public policy. For this reason we find it hard to accept that Parliament intended to extend the ambit of the relevant provisions.

56. More fundamentally, we do not accept that the protection of section 35 must be a precondition to holding that a nuptial agreement takes effect as a contract. If Wilson LJ is right to say that section 35 is a dead letter, the theoretical scope of its protection cannot be critical to the question of whether nuptial agreements have contractual effect.

The general reason

57. Is there a material distinction between ante-nuptial and post-nuptial agreements? Wilson LJ was not persuaded that there is (paras 125-126) and nor are we. The question should be tested by comparing an agreement concluded the day before the wedding with one concluded the day after it. Nuptial agreements made just after the wedding are not unknown and likely to become more common if the law distinguishes them from ante-nuptial agreements.

58. In *MacLeod* the Board made the following comments about the differences between ante- and post-nuptial agreements:

> "There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future." (para 31)

59. This is true, but does not apply fully to a post-nuptial agreement entered into at the start of married life, for that also purports to govern what may happen in an uncertain and unhoped for future.

> "Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry." (para 36)

60. As to the last sentence, this focuses on one possible type of duress. But duress can be applied both before and after the marriage. The same principle applies in either case. In either case the duress will lead to the agreement carrying no, or less, weight. As to the first two sentences, we do not see why different principles must apply to an agreement concluded in anticipation of the married state and one concluded after entry into the married state.

61. This is not to say that there are no circumstances where it is right to distinguish between an ante-nuptial and a post-nuptial agreement. The circumstances surrounding the agreement may be very different dependent on the stage of the couple's life together at which it is concluded, but it is not right to

proceed on the premise that there will always be a significant difference between an ante- and a post-nuptial agreement. Some couples do not get married until they have lived together and had children.

Does contractual status matter?

62. Is it important whether or not post-nuptial or ante-nuptial agreements have contractual status? The value of a contract is that the court will enforce it. But in ancillary relief proceedings the court is not bound to give effect to nuptial agreements, and is bound to have regard to them, whether or not they are contracts. Should they be given greater weight because in some other context they would be enforceable? Or is the question of whether or not they are contracts an irrelevance? This can be tested in this way. Did the identification of the fact that there were no public policy reasons not to treat post-nuptial agreements as contracts alter the weight that the Board attached to them in *MacLeod*? The Board did not say that they had to be given more weight as a result of sweeping away the public policy objections to them. Those objections had long ceased to be relevant and had not inhibited courts from giving some and, in some circumstances, decisive weight to ante-nuptial agreements. The circumstances surrounding the conclusion of a contract will either result in the contract being of full effect, or of no effect at all. The courts have always adopted a more nuanced approach to ante- and post-nuptial agreements. We cannot see why it mattered whether or not the agreement in *MacLeod* was a contract.

63. In summary, we consider that the Board in *MacLeod* was wrong to hold that post-nuptial agreements were contracts but that ante-nuptial agreements were not. That question did not arise for decision in that case any more than in this and does not matter anyway. It is a red herring. Regardless of whether one or both are contracts, the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.

The Board's approach to post-nuptial agreements

64. What was the approach that the Board held in *MacLeod* should be applied to post-nuptial agreements? The Board held that the court should adopt the same approach as that laid down by Parliament for varying maintenance agreements in section 35 of the 1973 Act, "looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust" (para 41). The Board also endorsed the "oft-cited passage" from the judgment of Ormrod LJ in *Edgar,* which we have cited at para 38 above.

65. These tests are appropriate for a separation agreement. They are not necessarily appropriate for all post-nuptial agreements. A separation agreement is designed to take effect immediately and to address the circumstances prevailing at the time that it is made, as well, of course, as those contemplated in the future. It will have regard to any children of the family, to the assets of husband and wife, to their incomes and to their pension rights. Thus it makes sense to look for a significant change of circumstances as the criterion justifying a departure from the agreement. The same will be true to a lesser extent where a post-nuptial agreement is made well on in a marriage, as in *NA v MA* and *MacLeod* itself, or at the start of a marriage if one or both parties bring significant property to it. But where a young couple enter into an agreement just after embarking on married life, owning no property of value, there will be no relevant circumstances prevailing at the time of their agreement. In that event change of circumstances will not be such a useful test. The circumstances will almost inevitably have changed by the time the marriage founders and the effect to be given to the post-nuptial agreement will depend on wider considerations.

66. *MacLeod* has done a valuable service in sweeping away the archaic notions of public policy which have tended to obfuscate the approach to nuptial agreements. But for the reasons that we have given we have not found that it assists in approaching the problem at the heart of this appeal for we have been able to accept neither its thesis that ante-nuptial agreements are fundamentally different from post-nuptial agreements nor, without reservation, its approach to post-nuptial settlements.

The issues raised

67. The issues raised on the facts of this case can be placed under three heads:

a. Were there circumstances attending the making of the agreement that detract from the weight that should be accorded to it?

b. Were there circumstances attending the making of the agreement that enhance the weight that should be accorded to it; the foreign element?

c. Did the circumstances prevailing when the court's order was made make it fair or just to depart from the agreement?

We shall have to consider these questions in the context of the facts of this case, but at this stage we propose to address the issues of principle that they raise.

Factors detracting from the weight to be accorded to the agreement

68. If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications. The third and fifth of the six safeguards proposed in the consultation document (see para 5 above) were designed to ensure this. Baron J applied these safeguards, found that they were not satisfied, and accorded the agreement reduced weight for this reason. The Court of Appeal did not consider that the circumstances in which the agreement was reached diminished the weight to be attached to it. In so far as the safeguards were not strictly satisfied, this was not material on the particular facts of this case.

69. The safeguards in the consultation document are designed to apply regardless of the circumstances of the particular case, in order to ensure, inter alia, that in all cases ante-nuptial contracts will not be binding unless they are freely concluded and properly informed. It is necessary to have black and white rules of this kind if agreements are otherwise to be binding. There is no need for them, however, in the current state of the law. The safeguards in the consultation document are likely to be highly relevant, but we consider that the Court of Appeal was correct in principle to ask whether there was any *material* lack of disclosure, information or advice. 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.

70. It is, of course, important that each party should intend that the agreement should be effective. In the past it may not have been right to infer from the fact of the conclusion of the agreement that the parties intended it to take effect, for they may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case. As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so. Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it.

71. In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in *Edgar v Edgar* at p 1417, although made about a separation agreement, is pertinent:

> "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."

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.

73. If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.

Factors enhancing the weight to be accorded to the agreement; the foreign element

74. The issue raised under this heading is whether the foreign elements of a case can enhance the weight to be given to an ante-nuptial agreement. In this case the husband was French and the wife German and the agreement had a German

law clause. We have already explained why we do not consider it material in English ancillary relief proceedings whether the nuptial agreement under consideration is or is not a contract. The court can overrule the agreement of the parties, whether contractual or not, and applies the same criteria when considering whether to do so. When dealing with agreements concluded in the past, and the agreement in this case was concluded in 1998, foreign elements such as those in this case may bear on the important question of whether or not the parties intended their agreement to be effective. In the case of agreements made in recent times and, *a fortiori*, any agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in relation to that question.

Fairness

75. *White v White* and *Miller v Miller* 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, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod:*

> **"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.**"

76. That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result. There is, however, some guidance that we believe that it is safe to give directed to the situation where there are no tainting circumstances attending the conclusion of the agreement.

Children of the family

77. Section 25 of the 1973 Act provides that first consideration must be given to the welfare while a minor of any child of the family who is under 18. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

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. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.

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 other, or property that one or other anticipates receiving from a third party. The House of Lords in *White v White* and *Miller v Miller* drew a distinction between such property and matrimonial property accumulated in the course of the marriage. That distinction is particularly significant where the parties make express agreement as to the disposal of such property in the event of the termination of the marriage. There is nothing inherently unfair in such an agreement and there may be good objective justification for it, such as obligations towards existing family members. As Rix LJ put it at para 73

> "…if the parties to a prospective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before the marriage, rather than left to become a source of disappointment or acrimony within marriage."

Future circumstances

80. 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 circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case. Once again we quote from the judgment of Rix LJ at para 73.

> "I have in mind (and in this respect there is no real difference between an agreement made just before or just after a marriage) that a pre-nuptial agreement is intended to look forward over the whole period of a marriage to the possibility of its ultimate failure and divorce: and thus it is potentially a longer lasting agreement than almost any other (apart from a lease, and those are becoming shorter and subject to optional break clauses). Over the potential many decades of a marriage it is impossible to cater for the myriad different circumstances which may await its parties. Thorpe LJ has mentioned the very relevant case of a second marriage between mature adults perhaps each with children of their own by their first marriages. However, equally or more typical will be the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?"

The answer to this question is, in the individual case, likely to be 'no'.

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.

83. So far as concerns the general approach of the court to ante-nuptial agreements, Wilson LJ at para 130 endorsed the following comments of Baron J at first instance

> "111. I am certain that English courts are now much more ready to attribute the appropriate (and, in the right case, decisive) weight to an agreement as part of 'all the circumstances of case' [within the meaning of section 25(1) of the Act of 1973] …
>
> 119. Upon divorce, when a party is seeking *quantification* of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor …"

We also would endorse these comments.

84. We now turn to apply these principles to the facts of this case.

The background to the signing of the agreement

85. At the time the parties met in November 1997 they were both living in London. The wife comes from a very rich German family, whose wealth is derived primarily from two very successful businesses in chromatography, filtration and the processing/refinement of paper, and the manufacture of paper. The husband comes from a family which is well-off, his father having been a senior executive with IBM, at one time in charge of its European operations. He now resides in London for tax reasons, but retains property in Antibes. When the couple met the husband had been working in London for about 2 years with JP Morgan & Co, and was earning about £50,000, which was a substantial sum at that date, particularly given his age, and which had increased to about £120,000 by the time the ante-nuptial agreement was executed. They became engaged in June 1998 and were married in November 1998. They made London their home.

86. It was the wife who suggested that the parties should enter into an ante-nuptial agreement. Although the judge was sure that the wife wanted her husband to love her for herself, the wife emphasised her father's insistence, because she felt it made her seem less insensitive to her future spouse, given that the terms excluded all his potential rights (even in times of crisis). The wife did not make it obvious that she personally demanded it as a precondition of marriage. The judge found that the husband was eager to comply because he did not want the wife to be disinherited, he wanted to marry her, and he could not perceive of circumstances where he would wish to make a claim.

87. The wife's family decided that this agreement would be drawn up in Germany by a notary, Dr N Magis, who had undertaken other work for the family. The instructions to Dr Magis came originally from the wife's mother on 6 July, 1998, who told him that the marriage was to be in London in the autumn and that neither of the parties wished to make any claim on the other in the event of divorce. Dr Magis pointed out that such a deal might leave a young mother with children in difficulty but he was informed that the daughter's income was some DM500,000 a year plus other monies managed by their father and so despite the future son-in-law's excellent income "even in the worse case scenario there would be no risk to their daughter". On the same day, 6 July, 1998, Dr Magis spoke by telephone to the wife. She confirmed the facts given by her mother. It was agreed that the draft was to be prepared as quickly as possible in order to give the husband "an opportunity to prepare for the conclusion of the contract" which was to be signed on the first weekend of August. Dr Magis was insistent that the husband had sufficient time so that he could take advice if he wished and fully understand the implications of what he was signing.

88. On 17 July, 1998 Dr Magis sent by fax to the wife a draft of the agreement, under cover of a letter in which he wrote: "You wanted to discuss the content of the agreement with your future spouse and have it translated into a language convenient for him". In the draft, which was in German, there was a clause for the parties to insert the approximate value of their respective assets; but the wife telephoned Dr Magis that day and said that the clause should be deleted and that she and the husband would separately notify each other of the value of their assets.

89. A second draft was produced by 20 July, 1998 and it was sent to the wife's father. On 23 July, 1998 the wife telephoned Dr Magis and told him that she had discussed the draft with her father and he wanted additions in relation to company shares – specifically that the husband should not be able to inherit them directly or "circuitously via their children". It was agreed that this would be dealt with by the wife's drawing up a will. A final draft version was made available to the wife in London at about this date.

90. The judge found that it was highly unlikely that the wife showed the husband the first draft, or that she informed him about her mother's or father's involvement in the drawing up the terms of the agreement. But the judge rejected the husband's evidence that he did not see the draft at all. The judge found that the wife showed him the final draft which was available on about 24 July, 1998, about one week before the signing ceremony. The basic terms were made clear to the husband, but the husband was not made aware that Dr Magis wanted him to have a translation to give him a proper opportunity to consider the precise terms and see a lawyer.

91. On 1 August, 1998 the parties attended at the office of Dr Magis near Düsseldorf. Their meeting with him lasted for between two and three hours. The husband told Dr Magis that he had seen the draft agreement but that he did not have a translation of it. Dr Magis was angry when he learned of the absence of a translation, which he considered to be important for the purpose of ensuring that the husband had had a proper opportunity to consider its terms. Dr Magis indicated that he was minded to postpone its execution but, when told that the parties were unlikely again to be in Germany prior to the marriage, he was persuaded to continue. Dr Magis, speaking English, then took the parties through the terms of the agreement in detail and explained them clearly; but he did not offer a verbatim translation of every line. The parties executed the agreement (which bears the date of 4 August, 1998) in his presence.

92. Not only did the husband not take advantage of Dr Magis' wish to postpone execution so that he could take independent legal advice, but in the 4 months or so following the execution of the agreement at the beginning of August 1998 until the marriage in London on 28 November, 1998, the husband did not take the opportunity to seek independent advice.

Events leading up to the breakdown of the marriage

93. The parties lived together in London for more than a year after the marriage. In April 2000 the husband was posted to New York by his employers, J P Morgan. The family moved there, but the wife did not find life in America congenial. So she returned to London in May 2001. The husband was transferred back to London in October of that year. Their older daughter (now 11) was born here in September 1999 before they left and their younger daughter (now 8) in May 2002 after their return. In July 2003 he left his employers and embarked on his research studies at Oxford. Both parties "accepted that [he] was miserable and discontented [and] a change of tack was inevitable". He embarked upon research for a doctorate in biotechnology at Oxford University, thinking that a "combination of scientific knowledge and his banking experience would put him in a good position to capitalise upon and exploit his financial expertise in future

years" (Baron J, paras 50 and 51). During the first five years of the marriage, while he was working for J P Morgan, the husband generated a very substantial amount of income. He had amassed about $500,000 of capital out of his earnings, but during the next two years he expended it for the benefit of the family. Meantime the wife's father had transferred to her a substantial amount of capital, which raised her shareholding in the two groups of companies to their present level. He also paid her a substantial sum in return for her surrender of any entitlement under German law to a portion of his estate on her death.

94. The husband's work at Oxford led him to spend many nights away from home. By this time the marriage was already in difficulties. By August 2006 separation had become inevitable and the wife moved with the children from the matrimonial home, a rented flat in Knightsbridge where the husband still lives into another rented flat in Knightsbridge. From then on there was no way back, and proceedings for divorce followed soon afterwards. Wilson LJ's assessment was that throughout the marriage the family's standard of living had been extremely comfortable, albeit tempered by the wife's aversion to profligacy: para 117.

95. It was originally the husband's intention to return to the financial sector once he had obtained his doctorate, but he no longer wishes to do so and Baron J held that this course would not be open to him in any event.

The foreign element and the agreement

96. The wife was German, and the husband was French. The agreement was drafted by a German lawyer under German law. They were then living in London and London was plainly intended to be their first matrimonial home.

97. The agreement stated (in recital 2) that (a) the husband was a French citizen and, according to his own statement, did not have a good command of German, although he did, according to his own statement and in the opinion of the officiating notary (Dr Magis), have an adequate command of English; (b) the document was therefore read out by the notary in German and then translated by him into English; (c) the parties to the agreement declared that they wished to waive the use of an interpreter or a second notary as well as a written translation; and (d) a draft of the text of the agreement had been submitted to the parties two weeks before the execution of the document.

98. Clause 1 stated the intention of the parties to get married in London and to establish their first matrimonial residence there. By clause 2 the parties agreed that the effects of their marriage in general, as well as in terms of matrimonial property

and the law of succession, would be governed by German law. Clause 3 provided for separation of property, and the parties stated: "Despite advice from the notary, we waive the possibility of having a schedule of our respective current assets appended to this deed."

99. Clause 5 provided for the mutual waiver of claims for maintenance of any kind whatsoever following divorce:

> "The waiver shall apply to the fullest extent permitted by law even should one of us – whether or not for reasons attributable to fault on that person's part – be in serious difficulties.
>
> The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above.
>
> Each of us is aware that there may be significant adverse consequences as a result of the above waiver.
>
> Despite reference by the notary to the existing case law in respect of the total or partial invalidity of broadly worded maintenance waivers in certain cases, particularly insofar as such waivers have detrimental effects for the raising of children and/or the public treasury, we ask that the waiver be recorded in the above form …
>
> Each of us declares that he or she is able, based on his or her current standpoint, to provide for his or her own maintenance on a permanent basis, but is however aware that changes may occur."

100. Clause 7(2) recorded that Dr Magis had pointed out to the parties that, despite the choice of German law, foreign law might, from the standpoint of foreign legal systems, apply to the legal relationships between the parties, in particular in accordance with the local law of the matrimonial residence, the law of the place and/or nationality of the husband, with nationality and the place where assets were located being especially relevant to inheritance. The agreement said: "The notary has pointed out that he has not provided any binding information about the content of foreign law, but has recommended that we obtain advice from a lawyer or notary practising in the respective legal system." By letter to the parties dated 3 August, 1998 Dr Magis again stressed that, before taking up permanent residence abroad, they should take the advice of a local lawyer in relation to the effect of the agreement there.

101. The unchallenged evidence before the judge was that: (a) the agreement was valid under German law; (b) the choice of German law was valid; (c) there was no duty of disclosure under German law; (d) the agreement would be recognised as valid under French conflict of laws rules.

102. The terms of the agreement recite that the parties intend to establish their first matrimonial residence in London and it confirms by clause 7(2) that the law of their matrimonial residence may come to apply to their legal relationship as spouses. It was therefore inherent in the agreement that another system of law might apply its terms and so it could never be regarded as foolproof.

Applicable law

103. In England, when the court exercises its jurisdiction to make an order for financial relief under the Matrimonial Causes Act 1973, it will normally apply English law, irrespective of the domicile of the parties, or any foreign connection: *Dicey, Morris and Collins, Conflict of Laws*, vol 2, 14th ed 2006, Rule 91(7), and e.g. *C v C (Ancillary Relief: Nuptial Settlement)* [2004] EWCA Civ 1030, [2005] Fam 250, at para 31.

104. The United Kingdom has made a policy decision not to participate in the results of the work done by the European Community and the Hague Conference on Private International Law to apply uniform rules of private international law in relation to maintenance obligations. Although the United Kingdom Government has opted in to Council Regulation (EC) No 4/2009 of 18 December, 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations, the rules relating to applicable law will not apply in the United Kingdom. That is because the effect of Article 15 of the Council Regulation is that the law applicable to maintenance obligations is to be determined in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations, but only in the Member States bound by the Hague Protocol.

105. The United Kingdom will not be bound by the Hague Protocol, because it agreed to participate in the Council Regulation only on the basis that it would not be obliged to join in accession to the Hague Protocol by the EU. The United Kingdom Government's position was that there was very little application of foreign law in family matters within the United Kingdom, and in maintenance cases in particular the expense of proving the content of that law would be disproportionate to the low value of the vast majority of maintenance claims.

106. For the purposes of the present appeal it is worth noting that the Hague Protocol allows the parties to designate the law applicable to a maintenance obligation, but also provides that, unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties (Article 8(1), (5)).

107. The ante-nuptial agreement had provision for separation of property and exclusion of community of property of accrued gains (clause 3), in relation to which the chosen law would have governed: *Dicey, Morris and Collins*, vol 2, para 28-020. But although the economic effect of *Miller/Macfarlane* may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime: *cf* Case C-220/95 *Van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-1147, [1997] QB 759; *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 WLR 709, para 57.

108. In summary, the issues in this case are governed exclusively by English law. The relevance of German law and the German choice of law clause is that they clearly demonstrate the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them (see para 74 above).

The decision of the trial judge

109. Baron J held that the ante-nuptial agreement was not a valid contract under English law: paras 129, 132. Nevertheless she said that in assessing the husband's needs she would take account of all the circumstances of the case and that his award should be circumscribed to a degree to reflect the fact that at the outset he agreed to sign the agreement. As she explained in para 139:

> "… he understood the underlying premise that he was not entitled to anything if the parties divorced. In essence, he accepted that he was expected to be self-sufficient. As a man of the world that was abundantly clear. His decision to enter into the agreement must therefore affect the award."

110. Baron J found that the ante-nuptial agreement fell foul of a number of the safeguards set out in para 4.23 of the Home Office consultation document and was, prima facie, unfair: para 38. She said that its preparation was very one-sided and therefore was demonstrably not neutral: para 76(d). She held that it was defective under English law because the husband received no independent advice; that it

deprived him of all claims to the furthest permissible legal extent even in a situation of want, which was manifestly unfair; that there was no disclosure by the wife; that there were no negotiations; and that two children had been born of the marriage: para 137. It was with these factors in mind that she conducted her assessment.

111. In the result the judge awarded the husband £700,000 to put towards his then debts of £800,000 and £25,000 to buy a car; £2.5m to buy a home of his own in London; €630,000 to buy a home in Germany (to remain owned by the wife or an entity set up by her) for the purpose of caring for his children in accordance with a shared residence order during his periods of residence with them (for 15 years); and £2.335m as a capitalised revenue *Duxbury* fund to provide the husband with a total annual income for life of £100,000, taking into account an annual gross taxable earning capacity of £30,000 until retirement at age 65. Thus the husband's award amounted in total to £5.560m (excluding the award of €630,000 for housing in Germany). She also awarded him periodical payments of £35,000 for each child until they ceased full time education. No indication is given in the judgment of the extent of the discount, if any, that she made to take account of the terms of the ante-nuptial agreement.

The decision of the Court of Appeal

112. The wife sought and was granted permission to appeal against this order to the Court of Appeal. On 2 July 2009 the Court of Appeal (Thorpe, Rix and Wilson LJJ) set aside the order of Baron J: [2009] EWCA Civ 649. Thorpe LJ said that, despite the appearance of the ante-nuptial contract as a factor, the impression given by the judge's award was of a negligible resulting discount: para 43. He held that, in order to give proper weight to the ante-nuptial contract, the sum of £2.5m for housing should not be the husband's absolutely but should be held by him only for the years of parenting. The income fund should be capitalised at a rate to cover his needs only until the younger child's 22nd birthday. Thus, while he would not interfere with the awards for the car, for the payment of the husband's debts, for housing in Germany and the periodical payments for the children, the major funds should be provided for his role as a father rather than as a former husband: para 50. Wilson LJ, who delivered the leading judgment on the facts, said that the judge's application of the law to the facts was plainly wrong. She erred in the exercise which she conducted under section 25 of the Matrimonial Causes Act 1973 in not giving decisive weight to the ante-nuptial contract. The result was that relief should have been granted to the husband only indirectly, in his capacity as a home-maker for the girls: paras 135, 149. Rix LJ, agreeing with both judgments, also said that the ante-nuptial contract should be given decisive weight in the section 25 exercise: para 81.

113. The husband cross-appealed on the sum awarded for housing in Germany based on fresh evidence. His appeal on that matter was allowed and it was remitted to the judge to determine the appropriate figure in the fresh circumstances. Wilson LJ noted that the wife had conceded that, notwithstanding her success in the appeal and thus of her submission that the husband's claim should be limited to that of a home-maker for the girls, it was appropriate for her to be ordered to meet the costs of the financial proceedings up to July 2008 when Baron J delivered her judgment and to clear the husband's other debts: para 152. Nevertheless the costs of the appeal were awarded to the wife. She was ordered to pay the costs of the cross-appeal.

Discussion

The circumstances in which the ante-nuptial agreement was made

114. The Court of Appeal differed from the finding of the trial judge that the ante-nuptial agreement was tainted by the circumstances in which it was made. Wilson LJ, with whom the other two members of the court agree, dealt with these matters in detail. The judge had found that the husband had lacked independent legal advice. Wilson LJ held that he had well understood the effect of the agreement, had had the opportunity to take independent advice, but had failed to do so. In these circumstances he could not pray in aid the fact that he had not taken independent legal advice.

115. The judge held that the wife had failed to disclose the approximate value of her assets. Wilson LJ observed that the husband knew that the wife had substantial wealth and had shown no interest in ascertaining its approximate extent. More significantly, he had made no suggestion that this would have had any effect on his readiness to enter into the agreement.

116. The judge held that the absence of negotiations was a third vitiating factor. Wilson LJ observed that the judge had given no explanation as to why this was a vitiating factor, and that the absence of negotiations merely reflected the fact that the background of the parties rendered the entry into such an agreement commonplace.

117. We agree with the Court of Appeal that the judge was wrong to find that the ante-nuptial agreement had been tainted in these ways. We also agree that it is not apparent that the judge made any significant reduction in her award to reflect the fact of the agreement. In these circumstances, the Court of Appeal was entitled to

replace her award with its own assessment, and the issue for this court is whether the Court of Appeal erred in principle.

Need

118. Baron J had held that the ante-nuptial agreement was "manifestly unfair" in that it made no provision for the possibility that the husband might be reduced to circumstances of real need. Wilson LJ at para 144 appears to have thought that there was nothing unfair about this and, inferentially, that had the husband been in a situation of real need the agreement would none the less have been good reason for the court to decline to alleviate this by an order of ancillary relief. We would not go so far as this.

119. We stated at para 73 above that the question of the fairness of the agreement can often be subsumed in the question of whether it would operate unfairly in the circumstances prevailing at the breakdown of the marriage, and this is such a case. Had the husband been incapacitated in the course of the marriage, so that he was incapable of earning his living, this might well have justified, in the interests of fairness, not holding him to the full rigours of the ante-nuptial agreement. But this was far from the case. On the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology. Furthermore the generous relief given to cater for the needs of the two daughters will indirectly provide in large measure for the needs of the husband, until the younger daughter reaches the age of 22. Finally the Court of Appeal did not upset the judge's order that the wife should fund the discharge of debts of £700,000 owed by the husband, only a small part of which she had challenged.

120. In these circumstances we consider that the Court of Appeal was correct to conclude that the needs of the husband were not a factor that rendered it unfair to hold him to the terms of the ante-nuptial agreement, subject to making provision for the needs of the children of the family.

Compensation

121. There is no compensation factor in this case. The husband's decision to abandon his lucrative career in the city for the fields of academia was not motivated by the demands of his family, but reflected his own preference.

Sharing

122. This dispute raises the question of whether, as a result of his marriage, the husband should be entitled to a portion of the wealth that his wife has received from her family, in part before the marriage and in part during, but quite independently of it. When he married her he agreed that he should have no such entitlement.

123. Our conclusion is that in the circumstances of this case it is fair that he should be held to that agreement and that it would be unfair to depart from it. We detect no error of principle on the part of the Court of Appeal. For these reasons we would dismiss this appeal.

LORD MANCE

124. I concur with the conclusion reached by the majority and with most of the majority's reasoning. I address only three specific areas: (i) whether ante- and post-nuptial agreements have contractual force; (ii) the starting point when considering the weight such agreements bear; and (iii) the Court of Appeal's exercise of its discretion.

125. *(i) Do ante- and post-nuptial agreements have contractual force?* In the old cases, the public policy objections, seen as existing to both ante- and post-nuptial agreements, were based on "the policy of the law, founded upon the relation which exists between the husband and wife, and the importance to society of maintaining that relation between them": *Cartwright v Cartwright* (1853) de G, M & G 982 p.990; and see *H v W* (1857) 3 K & J 382, where a provision in an ante-nuptial settlement, whereby income would be paid to the husband instead of the wife if the wife lived separately from him "through any fault of her own" was held void, because it might induce the husband to consent to her living apart and to "refuse to take steps to enforce the restitution of conjugal rights": p.386. The reasoning in these cases is, as Lady Hale observed in *MacLeod v MacLeod* [2010] 1 AC 298, in legal terms obsolete.

126. The objections thus swept away are not however the only objections which would exist to any regime which made ante- or post-nuptial agreements binding *tout court*. Parties who make such agreements are not necessarily on an equal standing, above all emotionally. They may not have a full appreciation of such an agreement's significance and likely impact. Above all, they may well not foresee, or cater adequately for, the way in which not only their relationship but their whole

lives and individual circumstances may change, especially over time and very often as a direct or indirect result of their marriage.

127. In a context, like the present, where the English courts have jurisdiction and grant a decree of divorce or nullity, the further objections identified in the preceding paragraph are catered for by Part II of the Matrimonial Causes Act 1973. Hence, the majority's description in para 63 of the legal effect of any ante- or post-nuptial agreement as a "red herring" in this case. The principle established in *Hyman v Hyman* [1929] AC 601, precluding the ousting of the court's statutory jurisdiction after such a decree, must in my view apply to any such agreement.

128. Like Lady Hale, para 136 (1) and (2) and para 154, I go no further and express no view on the binding or other nature of an ante-nuptial agreement. It is not difficult to envisage circumstances in which, if such an agreement were to be regarded as having contractual force, its enforcement could be sought before a court, particularly an overseas court, lacking the jurisdiction under Part II of the 1973 Act which applies only when the forum is an English divorce court. I also agree in this respect with what Lady Hale says in para 157.

129. *(ii) The starting point*: The majority (para 75) and Lady Hale (para 167) both accept the overriding criterion or guiding principle for exercise of the statutory discretion as being one of fairness. But they suggest differently worded tests for approaching this exercise where there has been an ante-nuptial agreement. I cannot think the difference in wording likely to be important in practice. It appears to relate primarily to the starting point or onus, when feeding into the discretionary exercise the circumstances as they currently appear compared with those that existed or were contemplated at the date of the ante-nuptial agreement. The words "intending it to have legal effect" in Lady Hale's first sentence must, in relation to any future ante-nuptial agreement, be implicit in the majority's formulation "freely entered into by each party with a full appreciation of its implications". If Lady Hale's second sentence had used the word "unfair", rather than "fair", its effect would, as I see it, match precisely that of the second part of the majority's formulation ("unless in the circumstances, etc …."). My own inclination, in agreement with the majority, is that this is how the application of the overriding criterion should be approached. Given an ante-nuptial agreement, made freely and with full appreciation of the circumstances, it is natural in the first instance to ask whether there is anything in the circumstances as they now appear to make it unfair to give effect to the agreement. But the ultimate question remains on any view what is fair, and the starting point or onus is, as I have said, unlikely to matter once all the facts are before the court.

130. *(iii) The Court of Appeal's exercise of discretion*: I agree with the majority that there is no reason to set aside the Court of Appeal's re-exercise of the

statutory discretion, undertaken after concluding that Baron J had erred in principle. Baron J held the husband to be entitled to a house of his own (para 140(a)). The Court of Appeal limited this aspect of the award - confining his entitlement to the period, generously assessed, during which he could be expected to provide a home for the children, and concluding that he had no further needs requiring him to retain such a house outright or for a longer period. Viewing the position overall, I do not see that we would be justified in concluding that the husband has or is likely after that period to have needs generated as a result of parenthood which will not be covered by the Court of Appeal's order or his own resources. It follows that I agree with Rix LJ's conclusion (para 81) that: "The provision of a home for the husband and for his needs as a father, carer and home-maker for the children will, in the circumstances, more than adequately provide him with the means to support his own needs. There is no case for making that home and financial support his to command for the whole of his life-time."

LADY HALE

131. The issue in this case is simple: what weight should the court hearing a claim for ancillary relief under the Matrimonial Causes Act 1973 give to an agreement entered into between the parties before they got married which purported to determine the result? I propose to call these "ante-nuptial agreements" because our legislation already uses the term "ante-nuptial" to refer to things done before a marriage. I should also point out that, although our judgments talk only of marriage and married couples, our conclusions must also apply to couples who have entered into a civil partnership.

132. The issue may be simple, but underlying it are some profound questions about the nature of marriage in the modern law and the role of the courts in determining it. Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children. We have now arrived at a position where the differing roles which either may adopt within the relationship are entitled to equal esteem. The question for us is how far individual couples should be free to re-write that essential feature of the marital relationship as they choose.

133. A further question is how far this question can and should be determined by this Court and how far it should be left to Parliament, preferably with the advice and assistance of the Law Commission. There is not much doubt that the law of marital agreements is in a mess. It is ripe for systematic review and reform. The Commission has a current project to examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances and a consultation paper will be published shortly (see Law Commission, *Annual Report 2009-10*, 2010, Law Com No 323, paras 2.68 to 2.75).

134. This is just the sort of task for which the Law Commission was established by the Law Commissions Act 1965 and in which it has had such success, particularly in the field of family law. The Commission can research and review the law over the whole area, not just the narrow section which is presented by the facts of an individual case. It can consider such research as there is into the use and abuse of marital agreements of all kinds. It can commission research into the experience and attitudes of practitioners and the public. It can identify and discuss the full range of policy arguments, including a detailed examination of the experience of legislative reform in other common law countries (see, for example, I M Ellman, *Marital Agreements and Private Autonomy in the United States*, where initial enthusiasm has been tempered by experience in practice). It can examine critically their economic impact, and in particular whether they can be expected to increase certainty and decrease cost, or whether in fact the reverse may happen, and in any event whether the suggested benefits will outweigh the suggested costs (see, for example, R H George, P G Harris and J Herring, "Pre-Nuptial Agreements: For Better or Worse?" [2009] Fam Law 934). It can develop options for reform across the whole field, upon which it can consult widely. In the light of all this, it can make detailed proposals for legislative reform, which can be put before Parliament.

135. In short, that is the democratic way of achieving comprehensive and principled reform. There is some enthusiasm for reform within the judiciary and the profession, and in the media, and one can well understand why. But that does not mean that it is right. This is a complicated subject upon which there is a large literature and knowledgeable and thoughtful people may legitimately hold differing views. Some may regard freedom of contract as the prevailing principle in all circumstances; others may regard that as a 19th century concept which has since been severely modified, particularly in the case of continuing relationships typically (though not invariably) characterised by imbalance of bargaining power (such as landlord and tenant, employer and employee). Some may regard people who are about to marry as in all respects fully autonomous beings; others may wonder whether people who are typically (although not invariably) in love can be expected to make rational choices in the same way that businessmen can. Some may regard the recognition of these factual differences as patronising or

paternalistic; others may regard them as sensible and realistic. Some may think that to accord a greater legal status to these agreements will produce greater certainty and lesser costs should the couple divorce; others may question whether this will in fact be achieved, save at the price of inflexibility and injustice. Some may believe that giving greater force to marital agreements will encourage more people to marry; others may wonder whether they will encourage more people to divorce. Perhaps above all, some may think it permissible to contract out of the guiding principles of equality and non-discrimination within marriage; others may think this a retrograde step likely only to benefit the strong at the expense of the weak.

136. These difficult issues cannot be resolved in an individual case, in particular a case with such very unusual features as this one. Different people will naturally react to this particular human story in different ways, depending upon their values and experience of life. There may be some, for example, who are astonished that an intelligent young man, who was apparently happy to sign away all claims upon his bride-to-be's considerable fortune, should now be seeking to make any claims upon her at all. There may be others who are astonished that a fabulously wealthy young woman should begrudge what is a very small proportion of her estate to ensure that the father of her children can live in reasonable comfort for the rest of his days.

137. Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled (see, for example, G F Brod, "Premarital Agreements and Gender Justice" (1994) 6 Yale Journal of Law and Feminism 229). This is amply borne out by the precedents available in recent text-books (see, for example, I Harris and R Spicer, *Prenuptial Agreements: A Practical Guide* (2008, Appendix D), or H Wood, D Lush, D Bishop, and A Murray, *Cohabitation: Law, Practice and Precedents* (2009, 4th ed, pp 583 – 592)). Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year? Yet that is what these precedents do. In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.

138. It is for that reason that I have chosen to write a separate judgment, for although there is much within the majority judgment with which I agree, there are some points upon which I disagree. Specifically:

(1) I disagree with the view, mercifully *obiter* to the decision in this case, that ante-nuptial agreements are legally enforceable contracts.

(2) I disagree with the view, also mercifully *obiter* to the decision in this case, that it is open to this court to hold that they are.

(3) I disagree with the view that, in policy terms, there are no relevant differences between agreements made before and agreements made after a marriage.

(4) I disagree with the way in which the majority have formulated the test to be applied by a court hearing an application for financial relief, which I believe to be an impermissible gloss upon the courts' statutory duties. However, I agree that the court must consider the agreement in the light of the circumstances as they now exist and that the way the matter was put by the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, was too rigid, and in some cases, too strong; and I broadly agree with the majority upon the relevant considerations which the court should take into account.

(5) I disagree with the approach of the Court of Appeal to the actual outcome of this case, which the majority uphold. In my view it is inconsistent with the continued importance attached to the status of marriage in English law. This is independent of the weight to be attached to the agreement in this case.

(6) I consider that the reform of the law on ante- and post-nuptial agreements should be considered comprehensively, not limited to agreements catering for future separation or divorce.

I understand that Lord Mance shares my misgivings on points (1) and (2) above. He also takes the view that the difference between our formulations of the test, referred to in point (4) above, is unlikely to be important in practice. As the ultimate question is what is fair, the starting point is unlikely to matter once all the facts are before the court. I hope that he is right.

The story so far: the different types of agreement between husband and wife

139. It may be helpful to give a brief account of how the law has got into its current mess (for which I must take some of the blame). The common law

regarded husband and wife as one person, and that person was the husband. He acquired ownership or control over all his wife's property and income, along with liability for her pre-marriage debts. She had no contractual capacity of her own and so of course they could not make contracts with one another. If the wife's family had property, it became common to make a marriage settlement which would preserve property for the wife's separate use. This was for the purposes of avoiding the property getting into her husband's hands, providing some security for the wife, and preserving it for their children or to revert to the wife's family if the couple were childless.

140. Legislation in the 19th century progressively extended the concept of the wife's separate property, so that after the Married Women's Property Act 1882 everything which a woman owned on marriage or acquired thereafter remained or became her separate property. The system of separate property thus established remains the only matrimonial property regime applicable in the law of England and Wales. It also meant that the wife eventually acquired full contractual capacity and so a husband and wife could now make contracts with one another as well as with third parties.

141. Agreements between a husband and a wife fall into three broad categories: (a) those made during their cohabitation, (b) those made upon or during their separation, and (c) those made in connection with current matrimonial proceedings. Of these, separation (type (b)) agreements have the longest history. Unlike modern ante-nuptial agreements, their original purpose was usually to make some sort of provision for the wife rather than to deprive her of it. At common law, the husband did have an obligation to support his wife, but until statute intervened she could only enforce this by pledging his credit for "necessaries". There is no need here to trace the evolution of the statutory remedies but two points are worth noting: first, the obligation to maintain while living apart generally depended upon the husband either having committed a matrimonial offence or having agreed to maintain his wife in a separate household; and secondly, the obligations of husband and wife only became fully mutual with the major reforms which came into force in 1971 and are now largely contained in the Matrimonial Causes Act 1973. Moreover, until then there were many more people who lived apart for a long time without ever taking divorce or other matrimonial proceedings. An enforceable contractual obligation was therefore usually a great advantage for the wife.

142. There is nothing to stop a husband and wife from making legally binding arrangements, whether by contract or settlement, to regulate their property and affairs while they are still together (type (a) agreements). These days, the commonest example of this is an agreement to share the ownership or tenancy of the matrimonial home, bank accounts, savings or other assets. Agreements for housekeeping or personal allowances, on the other hand, might run into

difficulties. In *Balfour v Balfour* [1919] 2 KB 571, a husband agreed to pay his wife £30 per month when he returned to his work in Ceylon while she remained in England for medical reasons. Duke LJ doubted whether the wife had given consideration for the husband's promise. Atkin LJ would have had no difficulty in finding that her promise to spend the money for its intended purposes was consideration, but held that the couple had never intended that the arrangement should have contractual force: ". . . the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations" (p 579). But any problems posed by the doctrine of consideration or the need to express contractual intent could be solved by making the agreement by deed.

143. However, agreements between husband and wife were also subject to two quite separate rules, each of which has a basis in public policy. The first rule ("public policy rule 1") was that agreements between husband and wife (or indeed between third parties and husband and/or wife) which provided for what was to happen in the event of their *future* separation or divorce were contrary to public policy and therefore void. This rule was developed in the context of agreements or settlements which made some or better financial provision for the wife if she were to live separately from her husband (for a comparatively recent example, see *Re Johnson's Will Trusts* [1967] Ch 387). Such an agreement could be seen as encouraging them to live apart – for example, by encouraging her to leave him, if it was sufficiently generous or more than she would get if she stayed with him, or encouraging him to leave her, or to agree to her going, if it were not so generous. Such encouragement was seen as inconsistent with the fundamental, life-long and enforceable obligation of husband and wife to live with one another.

144. The second rule ("public policy rule 2") was developed in the context of separation agreements (type (b) agreements). Agreements for an immediate or existing separation between the spouses were not caught by public policy rule 1. Their purpose was usually two fold. They relieved the couple of the duty to live together: this meant that neither was guilty of the matrimonial offence of desertion and neither could petition for or enforce a decree of restitution of conjugal rights. They might also make provision for the wife and any children. In return she might agree not to go to court for a maintenance order. However, in the leading case of *Hyman v Hyman* [1929] AC 601 it was firmly established that such agreements could not oust the statutory powers of the courts to award financial provision should the couple divorce.

145. As recounted in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, at paras 20 to 24, that rule was later held to apply to other statutory powers to award maintenance. But in *Bennett v Bennett* [1952] 1 KB 249, it was held that, at least if the wife's promise not to go to court was the main consideration for the husband's promise to pay and could not be severed, the whole agreement

(although made by deed) was contrary to public policy and therefore the husband's promise to pay was unenforceable. Following consideration by the *Royal Commission on Marriage and Divorce 1951-1955* (see *Report*, (1956) (Cmd) 9678, pp 192 – 195), that problem was resolved, and the rule in *Hyman v Hyman* confirmed, by the Maintenance Agreements Act 1957. The promise not to go to court was void but this did not render void or unenforceable the other financial arrangements in the agreement. Recognising that this might cause hardship to the payer as well as the payee, the *quid pro quo* was a power to vary or revoke those arrangements, if there was a change in the circumstances in the light of which they were made or the agreement did not contain proper financial arrangements for a child of the family. The provisions in the 1957 Act were later amended in two significant respects by the Matrimonial Proceedings and Property Act 1970 and are now consolidated in the Matrimonial Causes Act 1973, ss 34 to 36. First, while the 1957 Act applied only to agreements made between husband and wife "for the purposes of their living separately", sections 34 to 36 of the 1973 Act apply to "any agreement in writing made [at any time] between the parties to a marriage". Secondly, the agreement may be varied even if the change in circumstances is one which the parties had foreseen when making the agreement. Subject to this, agreements for a present or immediate separation were and remain valid and enforceable like any other contract.

146. The Court of Appeal in this case suggested (at para 134) that the power to vary such agreements has become a "dead letter". It is easy to see why this might be so. Matrimonial practice has changed out of all recognition since the days of the 1957 Act. In those days, many couples separated without ever obtaining a divorce. A divorce could only be obtained if one of the parties had been guilty of a matrimonial offence (or had been incurably of unsound mind for at least five years). The theory was that the innocent spouse was punishing the guilty one by divorcing him or her. There could be no question of divorce by consent. Until 1963, collusion was an absolute bar to obtaining the relief which, often enough, both parties desperately wanted. So the parties had to be very cautious about anything which made it look as if they had agreed terms for their divorce. And the powers of the divorce court to award financial provision were much more limited than they are now. The parties might well agree terms in a separation agreement which were quite different from, and perhaps more generous than, anything which the court might order.

147. All of that has now changed. One of the first priorities of the Law Commission was the reform of family law, and their efforts led to the radical changes brought about by the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970, and the Law Reform (Miscellaneous Provisions) Act 1970. All of these came into force on 1 January 1971. The first two were consolidated in the Matrimonial Causes Act 1973. The sole ground for divorce is now that the marriage has irretrievably broken down; separation and

consent to a divorce is one of the ways of proving this. The theory of the innocent party punishing the guilty has gone. Divorce has become a great deal simpler and easier to obtain. It is fair to assume that there are now far fewer married couples living apart for long periods without divorcing than there were in the 1950s.

148. The court also has comprehensive powers to award financial provision, to transfer and settle property, and to share out pension rights. So the court can now do most things that the couple might want to agree. Divorcing spouses are actively encouraged to agree between themselves what the consequences of their divorce should be. Indeed, despite the impression given in the high profile cases which reach the press, that is what the great majority of people do (see, for example, J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (2000); M Maclean and J Eekelaar, *Family Law Advocacy* (2009)). If they do reach agreement, it is standard practice to embody its terms in a consent order. This is, on the one hand, because public policy rule 2 means that they cannot oust the jurisdiction of the court in any event and, on the other hand, because a properly drafted court order can finally dispose of the parties' claims against one another (see, for example, *Dinch v Dinch* [1987] 1 WLR 252).

149. So another type of marital agreement (a type (c) agreement) has come on the scene, an agreement to compromise the parties' mutual financial and property claims on divorce. Unlike orders made by consent in ordinary civil proceedings, however, the matrimonial order derives its authority from the court and not from the parties' agreement, even if embodied in a deed (see, for example, *de Lasala v de Lasala* [1980] AC 546). The court has an independent duty to check the agreed arrangements and to approve them (see *Xydhias v Xydhias* [1999] 2 All ER 386, at p 394). As Butler-Sloss LJ put it in *Kelley v Corston* [1998] QB 686, at p 714,

> "The court has the power to refuse to make the order although the parties have agreed to it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp."

In fact, as *Xydhias* itself showed, this too can cut both ways. The fact that the order derives its authority from the court rather than the parties' agreement also means that the court can treat them as having agreed upon the essentials of their arrangements, even if their agreement would not be contractually binding because they have not agreed upon all the details. The court may therefore decide to give effect to these, even though it is not a legally binding contract.

150. Thus it is not surprising if practitioners have forgotten about the power to vary marital agreements. Most couples can be persuaded to get a divorce instead.

The focus has therefore changed, away from the technical question of whether or not the agreement between the spouses is enforceable as an ordinary contract, in favour of the broader question which is before us now: what is the weight to be given to an agreement between a husband and a wife as to the financial consequences of their separation or divorce by a court which is invited to make orders about it?

151. But before turning to that question, it is necessary to consider the fate of the public policy rule 1 (see para 141 above) and the decision of the Judicial Committee of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298. *MacLeod* was concerned with an agreement made by deed between a married couple while they were still living together. It provided partly for what was to happen while they were still together and partly for what was to happen in the (by then not unlikely) event of their divorcing in the future. Its terms were similar, but not identical, to the terms of an ante-nuptial agreement entered into before the couple married in the State of Florida, where such agreements are legally binding.

152. The Board held that the rationale for the first rule of public policy no longer held good. Since the abolition of the decree of restitution of conjugal rights by the Matrimonial Proceedings and Property Act 1970, s 20, the spouses no longer have a legally enforceable obligation to live together. Providing for what is to happen in the event of a future separation or divorce no longer conflicts with the legally enforceable obligations of marriage. Hence the Board held that a post-nuptial agreement providing for future separation was valid and enforceable in the same way as any other contract between spouses. The Board would not, however, have felt able to take that step had there not been a power to vary such a contract in the light of changes in the circumstances since it was made or for the sake of the children for whom they were responsible. The injustice of enforcing maintenance agreements without any power of variation had been recognised by Parliament when it enacted the 1957 Act and confirmed in what is now section 35 of the 1973 Act.

153. Secondly, the Board held that these powers of alteration applied, not only to agreements for a current or immediate separation, but also to agreements for a future separation. Although the "financial arrangements" contained in the agreement must relate to a period when the couple are living separately, section 34(2) defines a "maintenance agreement" as "any agreement in writing made . . . between the parties to a marriage". It was no longer limited to agreements made for the purpose of their living separately. The Board did express the view, *obiter*, that sections 34 to 36 did not apply to agreements made between people who were not yet husband and wife and offered some observations, again *obiter*, about why the matter should be left to Parliament.

154. To sum up the position relating to agreements between husband and wife:

(1) There is nothing to stop husbands and wives from making legally enforceable agreements about their property and finances which are to operate while they are living together, subject to the normal contractual requirements.

(2) There is nothing to stop husbands and wives who are on the point of separating, or who are already separated, from making legally enforceable agreements about their financial rights and obligations while they are living apart.

(3) Following *MacLeod v MacLeod*, there is also nothing to stop husbands and wives who are not yet separated from making legally enforceable agreements about their financial rights and obligations while they are living apart.

(4) However, the court has power to vary the financial arrangements for their separation, made in agreements between husbands and wives, under sections 35 and 36 of the 1973 Act.

(5) None of these agreements can oust the jurisdiction of the court to make financial orders should the parties separate or divorce.

(6) Even if the parties have agreed what the court's order should be, the order derives its authority from the court and not from the parties' agreement.

(7) The court therefore has its own independent duty to check the arrangements agreed between the parties and to evaluate them in the light of its statutory duties under section 25 of the 1973 Act.

Ante-nuptial agreements

155. So where does this leave ante-nuptial agreements, made, not between husband and wife, but in contemplation of the couple's impending marriage, and providing, perhaps among other things, for the possibility of their eventual separation or divorce? If the rationale for public policy rule 1 no longer applies to post-nuptial agreements, following *MacLeod*, it is hard to see how it can still apply

to ante-nuptial agreements. So why should these not also be regarded as valid and enforceable in the same way as separation agreements and, if *MacLeod* is right, other post-nuptial agreements?

156. It was not necessary for the Board to decide that question in *MacLeod* and it is not necessary for this Court to decide it now. The Court of Appeal in this case accepted that the law could only be changed by legislation and neither party has suggested otherwise to this Court. Without legislation, it is not self-evident what the right answer should be. There are many different permutations. (i) It could be that *MacLeod* was right to hold that sections 34 to 36 of the 1973 Act apply to post-nuptial agreements providing for a future separation and also right to express the view, *obiter*, that they do not apply to such agreements made before marriage. (ii) It could be that *MacLeod* was wrong to hold that sections 34 to 36 apply to any post-nuptial agreement, other than an agreement for a present or immediate separation. (iii) It could be that the Board was wrong to consider that the words "made between the parties to a marriage" in section 34(2) apply only to agreements made while the parties are in fact married. (iv) It could be that the existence of a power of variation is not as important as the Board thought that it was, in assessing whether there are still public policy objections to holding such agreements contractually binding.

157. It will come as little surprise that I adhere to the views expressed by the Board in *MacLeod.* They accord with the wording of the Act. This was not a particularly adventurous piece of statutory construction, once it is realised that the change in the definition of the agreements covered by sections 34 to 36 was made in the same Act of Parliament, the Matrimonial Proceedings and Property Act 1970, which also swept away the basis of public policy rule 1, the enforceability of the duty to live together. Indeed, that change of wording may be said to strengthen the Board's construction. Making such agreements enforceable, subject to a power of variation, would be entirely logical and consistent. It would, however, have been considerably more adventurous to interpret the words "made between the parties to a marriage", in section 34(2) of the 1973 Act, to include a couple who were not yet husband and wife when the agreement was made. After all, another feature of the reforms which came into force on 1 January 1971 was the abolition of the action for breach of promise of marriage.

158. Furthermore, without a power of variation, there remain serious policy objections, albeit different from the original ones, to recognising ante-nuptial agreements as valid and enforceable in the contractual sense. Is it to be assumed that, although section 34(1) does not apply, public policy rule 2 (the rule in *Hyman v Hyman*) does? If it does, what is the answer to the *Bennett v Bennett* problem if the beneficiary spouse wishes to sue upon the agreement? If it does not, can it be right that the intending spouses can oust the jurisdiction of the courts before their marriage but are unable to do so afterwards? If, on the other hand, either of the

spouses wishes to enforce the agreement without going to the family court, can it be right that they should be able to do so without any power of variation no matter what the circumstances?

159. It is no answer to these questions, it seems to me, that these days most people do go to the divorce courts. They should not be obliged to do so. The existence of a power of variation means that they are likely to agree a variation for themselves without going to court. There are still people with conscientious objections to divorce. There are still people who are reluctant to accept that their marriage is over even though there may be temporary difficulties. There are other people who will not be able to go to the divorce courts here because they have been pipped to the post by the "first to file" jurisdictional rules in the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003). But in any event, this Court should not be developing the common law in such a way as to produce an injustice and thus to encourage people to seek a divorce when they would not otherwise wish to do so. Even if the old rationale for public policy rule 1 has gone, I still believe that it is the public policy of this country to support marriage and to encourage married people to stay married rather than to encourage them to get divorced.

160. A better answer, it may be, is that *MacLeod* did not need to decide whether post-nuptial contracts providing for a future separation were legally binding either. It too was a case about the weight to be given to such an agreement when the couple came to divorce. Some may think that the question whether an agreement is contractually binding has little if any relevance to the weight which it should be given by the court. Others, however, may think differently, especially if the agreement contains provisions to be implemented during cohabitation which have in fact been honoured. At all events, as the author of (but not the only contributor to) the Board's unanimous advice in *MacLeod*, I must accept some of the blame for the mess in which we now find ourselves.

161. All of this is to emphasise that this Court is not deciding whether ante-nuptial agreements are contractually binding. Nor is it overruling *MacLeod* on the question of post-nuptial agreements. The matter is obviously one for the Law Commission to sort out. My only plea is for a comprehensive and rational approach. Should public policy rule 2 (the rule in *Hyman v Hyman*) apply to all marital agreements, before or after marriage, before or after separation, and to all its terms, whether operating during cohabitation or after the couple have separated? Or if that rule is to be disapplied to any or all of them, to what extent and in what circumstances? Should there be a power to vary all marital agreements and all their terms, and if so in what circumstances and on what grounds? Should all, some or none of their terms be legally enforceable? By what rules of private international law should such agreements be governed? This last is a particularly complicated question, particularly in a case such as this, where the agreement

included both a choice of matrimonial property regime and also a choice of applicable law. It would be a great help if we could clarify our choice of law rules relating to matrimonial property regimes. All of these questions require careful consideration.

162. Once again, I adhere to the view expressed in *MacLeod*, that there may be important policy considerations justifying a different approach as between agreements made before and after a marriage. This is recognised in those jurisdictions which have legislated to make ante-nuptial agreements enforceable. It is, for example, common for them to contain safeguards which do not apply to agreements made after the marriage. Most important is whether, and if so in what circumstances, couples should be allowed to contract out of the fundamental obligations of the married state which they are about to enter.

Taking the agreement into account

163. It follows from the well-established principles outlined in paragraph 147 above that, as the court always has to exercise its own discretion, if there is to be a starting point for the exercise of that discretion it has to be the statutory duty under section 25 of the 1973 Act. This applies to all applications for orders for financial provision, property adjustment and pension provision ancillary to divorce, judicial separation and nullity decrees. It is in mandatory terms (see paras 20 and 21 above). Furthermore, the same rules and considerations apply to (now almost unheard of) applications to the divorce court under section 27 of the 1973 Act for financial provision in cases of neglect to maintain (see section 27(3)) and to applications for financial provision in magistrates' courts under the Domestic Proceedings and Magistrates Courts Act 1978 (see section 3(1) and (2) of that Act, which mirror section 25(1) and (2)(a) to (g) of the 1973 Act). Corresponding provisions also apply between civil partners (see Civil Partnership Act 2004, s 72(1) and (2) and Scheds 5 and 6).

164. Until 1984, as is well known, section 25 contained a "tailpiece" which directed the court as to the overall objective of its discretion. This was so to exercise its powers:

> ". . . as to place the parties, so far as it is practicable . . . to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".

This was deleted from section 25 by the Matrimonial and Family Proceedings Act 1984. Implicitly, as Lord Nicholls of Birkenhead said in *White v White* [2001] 1 AC 596, at p 604, "the objective must be to achieve a fair outcome". But in deciding what was fair, the courts had, perforce, to work out some principled reasons for making any order at all, in the context of a separate property regime. The House of Lords eventually did so in the trio of cases, *White v White* (above) and *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618. Put simply, the House discerned three possible rationales for making an order: the sharing of matrimonial assets, meeting needs arising from or during the marriage, and compensating for sacrifices made because of the marriage. I do not understand the majority judgment in this Court to be casting any doubt, either on the overall objective of a fair outcome, or upon the three possible reasons for the redistribution.

165. *White* is important for another reason. The leading opinion, with which Lord Hoffmann, Lord Hope of Craighead and Lord Hutton agreed, was delivered by Lord Nicholls. He emphasised that there should be no discrimination between the different contributions of the spouses to the welfare of the family which should be seen as equally valuable. But he also emphasised at pp 605-606:

> "This is not to introduce a presumption of equal division under another guise. . . . a presumption of equal division would go beyond the permissible bounds of interpretation of section 25. In this regard section 25 differs from the applicable law in Scotland. . . . *A presumption of equal division would be an inpermissible judicial gloss on the statutory provision.* That would be so even though the presumption would be rebuttable. . . . It is largely for this reason that I do not accept [counsel's] invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof." [My emphasis]

166. These observations are, in my opinion, equally applicable to the consideration of any nuptial or ante-nuptial agreement in the mandatory exercise under section 25. It would be "an inadmissible judicial gloss" to introduce a presumption or a starting point or anything which suggested that there was a burden of proof upon either party. In any event, the concept of an onus or burden of proof is inapplicable in a discretionary exercise such as this. He or she who asserts a fact must, of course, prove it. But it is for the court to carry out the exercise of discretion in the way in which Parliament requires it to do.

167. In my opinion, the test adopted by the majority (in para 75) comes close to introducing such a presumption. For this once again I must accept some responsibility. In *MacLeod v MacLeod* , at para 41, the Board said this:

> "It would be odd if Parliament had intended the approach to such agreements in an ancillary relief claim to be different from, and less generous than, the approach to a variation application. The same principles should be the starting point in both. In other words, the court is looking for a change in the circumstances in the light of which the financial arrangements were made, *the sort of change which would make those arrangements manifestly unjust*, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family." (emphasis supplied)

This may have come as a surprise to those former practitioners, such as Wilson LJ, who (for the reasons explained earlier) had never had occasion to look at section 35. But it would of course have been odd for Parliament to adopt one test when looking at the variation of a legally enforceable contract and another test when looking at the weight which should be given to such a contract in proceedings for ancillary relief.

168. With the benefit of hindsight, I would qualify that statement heavily in two ways. First, and most important, there seems no warrant for the inclusion of the word "manifestly" before "unjust". That is nowhere to be found in the legislation. Secondly, in so far as it may be derived from cases on separation agreements, such as *Edgar v Edgar* [1980] 1 WLR 1410, it fails to acknowledge the manifold factual differences which there may be between the different types of marital agreement. It is, as the majority point out, one thing to look for a very significant change of circumstances in a case such as *Edgar*, which concerned a deed of separation made when the parties were already separated and quite shortly before the divorce proceedings were begun, or indeed in *MacLeod*, where the marriage was already in serious trouble and the parties had the possibility of early separation and divorce very much in mind. It is another to adopt the same approach when the agreement was made many years ago, before there was any question of the couple separating, and there are bound to have been many changes in the circumstances in which it was made. In this respect, therefore, I agree with the majority that the *MacLeod* test was too strict.

169. It seems to me clear that the guiding principle in *White, Miller and McFarlane* is indeed fairness: but it is fairness in the light of the actual and

foreseeable circumstances at the time when the court comes to make its order. Those circumstances include any marital agreement made between the parties, the circumstances in which that agreement was made, and the events which have happened since then. The test to be applied to such an agreement, it seems to me, should be this:

> **"Did each party freely enter into an agreement, intending it to have legal effect and with a full appreciation of its implications? If so, in the circumstances as they now are, would it be fair to hold them to their agreement?"**

That is very similar to the test proposed by the majority, but it seeks to avoid the "impermissible judicial gloss" of a presumption or starting point, while mitigating the rigours of the *MacLeod* test in an appropriate case. It allows the court to give full weight to the agreement if it is fair to do so and I adhere to the view expressed in *MacLeod* that it can be entirely fair to hold the parties to their agreement even if the outcome is very different from what a court would order if they had not made it. It may well be that Lord Mance is correct in his view that the difference between my formulation and that of the majority is unlikely to be important in practice. I would prefer not to take that risk.

170. As Lord Nicholls emphasised in *Miller*, at paras 26 to 29, there can be no inflexible rule about how a judge should approach the task. It may be that a judge, if called upon to decide matters, will find it convenient to conduct the usual section 25 exercise before deciding what weight to give to the agreement. He or she will then have a view of how the usual principles would apply to the particular facts of the case. It may be, on the other hand, that the case is so clear cut, as in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, that it is more convenient to begin with the agreement. If, for example, all the agreement seeks to do is to preserve property acquired before the marriage for the benefit of the spouse to whom it belongs, the court would be most unlikely to interfere unless the outcome would put a spouse or children in real need. It is not for this Court to be prescriptive about how a trial judge should conduct the statutory exercise.

171. In principle, though, I agree that the test should be the same, whether the agreement is a compromise of the proceedings, a separation agreement, a post-nuptial agreement made while the couple are together, or an ante-nuptial agreement. But the way in which it works out may be very different, depending upon the facts of the case. I therefore also agree that it is difficult to be prescriptive about the factors to be taken into account, and the weight to be given to them, because this would be to "fetter the flexibility that the court requires to reach a just result" (para 76, above). It may be, however, that the court will generally attach more weight to a separation agreement, made to cater for the existing and future

separation of the parties, than to a post-nuptial agreement, made while the parties are still together but also to cater for the possibility of a future separation, and more weight to such an agreement than to an ante-nuptial agreement, catering for a marriage which has not yet taken place and for a separation which the parties neither want nor expect to happen.

The circumstances in which the agreement was made

172. The court will be looking first for a clear indication that the parties intended a divorce court to give effect to their agreement. The textbook and other precedents which I have seen certainly do their best to make this clear. The court should also take into account the parties' understanding as to the legal effect of their agreement. This is bound to change as a result of *MacLeod* and this case. People who entered into separation agreements should always have been advised that they were legally binding as contracts unless and until varied and although not binding upon the divorce court would often be respected on the *Edgar* principles. People who entered into post-nuptial agreements in England and Wales will have been given rather different legal advice until *MacLeod* and people who enter into ante-nuptial agreements will have been given rather different advice until this case. People who have entered into such agreements in other countries will also have been given different advice. The parties' expectations and understandings as to the effect of their agreement should they later divorce will therefore be an important factor in deciding what is fair.

173. If the parties did expect the court to give effect to their agreement, the court will then ask whether there were any vitiating factors, such as fraud, duress or misrepresentation, which would make a contract voidable in English law. If there were, the agreement should in principle be ignored. But that is not all. It would be wrong to take a more legalistic view of such factors in the case of ante- and post-nuptial agreements than has long been taken in the case of separation agreements. Hence the wise words of Ormrod LJ in Edgar v Edgar [1980] 1 WLR 1410, 1417 (quoted in para 38 above) that "it is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel". There may be something in the circumstances in which the agreement was made which, while falling short of a vitiating factor in the usual contractual sense, indicates that one party has taken an unfair advantage over the other.

174. Relevant to whether one party has taken advantage of the other will be whether there were the safeguards which have generally been regarded as essential in those countries in the common law world which have legislated to give validity to such agreements. These normally include mutual disclosure of assets, independent legal advice, and a degree of distance in time between the agreement and the wedding. These were also included in the safeguards proposed in the

Home Office Consultation Paper referred to in the majority judgment at para [5]. These factors should be taken into account in deciding how much weight should be given to the agreement whether or not they are sufficient to "vitiate" it in the *Edgar* sense. On the other hand, in the case of an ante-nuptial agreement, the court cannot avoid also asking itself whether the marriage would have taken place at all without it, difficult though it may be to discern an accurate answer to that question in the light of later events. This too can cut both ways, because it may or may not indicate that one has taken an unfair advantage of the other.

Later events

175. The focus both of my test and that of the majority is upon whether it is now fair to give effect to the agreement. The longer it is since the agreement was made, the more likely it is that later events will have overtaken it. Marriage is not only different from a commercial relationship in law, it is also different in fact. It is capable of influencing and changing every aspect of a couple's lives: where they live, how they live, who goes to work outside the home and what work they do, who works inside the home and how, their social lives and leisure pursuits, and how they manage their property and finances. A couple may think that their futures are all mapped out ahead of them when they get married but many things may happen to push them off course – misfortunes such as redundancy, bankruptcy, illness, disability, obligations to other family members and especially to children, but also unexpected opportunities and unexplored avenues. The couple are bound together in more than a business relationship, so of course they modify their plans and often compromise their individual best interests to accommodate these new events. They may have no choice if their marriage is to survive. And these are events which take place while it is still hoped that the marriage will survive. There may be people who enter marriage in the belief that it will not endure, but for most people the hope and the belief is that it will. There is also a public interest in the stability of marriage. Marriage and relationship breakdown can have many damaging effects for the parties, their children and other members of their families, and also for society as a whole. So there is also a public interest in encouraging the parties to make adjustments to their roles and life-styles for the sake of their relationship and the welfare of their families.

176. All of this means that it is difficult, if not impossible, to predict at the outset what the circumstances will be when a marriage ends. It is even more difficult to predict what the fair outcome of the couple's financial relationship will be. A couple who always thought that one would be the breadwinner and one would be the homemaker may be astonished to find that the homemaker has become a successful businesswoman who is supporting her homemaker husband rather than the other way about. A couple who assumed that each would run their own independent professional life and keep their finances entirely separate may find this quite impossible when they have children, especially if they have more than

one or one of them has special needs. An older couple who marry a second time round may think it fair at the time to preserve their assets for the sake of the children of their first marriages, but may find that one has to become a carer for the other and will be left homeless and in reduced circumstances if the grown-up children take priority even though they are now well-established in life and have no pressing need of their inheritance.

177. All of these are changes which would entitle the court to vary a separation (or post-nuptial) agreement which turned out to be unfair, even if the parties had foreseen them, and should now be taken into account in deciding whether it is fair to uphold their agreement. On the other hand, if things have indeed turned out much as the parties expected and intended, it could well be fair to give effect to their agreement. Some of the precedents I have seen are of comparatively wealthy couples making a prediction of comparatively generous sums which ought to provide for the "reasonable requirements" of the recipient spouse in a way which might well have attracted the "millionaire's defence" in the days before *White v White*. In effect, therefore, they are contracting out of sharing but not out of compensation and support.

178. Provided that the provision made is adequate, why should they not be able to do so? On the one hand, the sharing principle reflects the egalitarian and non-discriminatory view of marriage, expressly adopted in Scottish law (in section 9(1)(a) of the Family Law (Scotland) Act 1985 and adopted in English law at least since *White v White.* On the other hand, respecting their individual autonomy reflects a different kind of equality. In the present state of the law, there can be no hard and fast rules, save to say that it may be fairer to accept the modification of the sharing principle than of the needs and compensation principles.

The relevance of conduct?

179. It must also be borne in mind that these are often complicated agreements, providing not only for what is to happen on divorce or death, but also for what is to happen during the marriage. The parties' subsequent conduct in relation to the agreement must be among the relevant circumstances when considering what weight should be given to it. Both parties may have conducted, and continued to conduct, their lives on the basis that their affairs are and will be governed by their agreement. In *MacLeod*, for example, the agreement made provision for the wife while they were still together and the husband had put this into effect. In this case, the wife acquired further assets from her father, which would not have happened had the agreement not been in place. Such factors obviously increase the weight which should be given to the agreement.

180. Conduct in relation to the agreement itself is one thing. But what about conduct in the relationship generally? In the section 25 exercise, the courts do not take conduct into account unless there is a substantial imbalance between the parties, such that it would be inequitable to disregard it. Such cases are very rare. But what if the agreement were to provide for different outcomes, depending upon how the parties have behaved during the marriage? What, for example, if the precedent referred to earlier, providing for the wife to have a predetermined sum for each year of marriage, were also to provide that she should only have this if she has been a good housewife? These are deep waters indeed, but in my view the court would be just as reluctant to enter into such an inquiry in relation to a nuptial agreement as it is now in relation to the section 25 exercise and correspondingly reluctant to hold the couple to their agreement. All the examples that I have seen, both in textbooks and in real cases, are scrupulous in making no reference to marital conduct.

The foreign element

181. In strict legal terms the so-called "foreign element" is irrelevant. If the proceedings take place in England and Wales, the applicable law is that of England and Wales, irrespective of where the parties come from, how long they have been here, or how close their connection is with this jurisdiction. The United Kingdom has made a deliberate choice not to adopt the Hague Protocol on the law applicable to maintenance obligations and has only agreed to participate in the Council Regulation (EC) No 4/2009 on the basis that it would not be required to do so. English family lawyers seem to have a horror of having to apply foreign law which must appear strange to European lawyers who are quite used to doing so. Anyone who chooses to divorce here must be advised that the court will apply English law and not the law of the country which the parties have chosen or with which the marriage has the closest connection.

182. In another sense, however, the foreign element cannot be totally irrelevant. It may affect the relevant considerations in a number of ways. It may be a crystal clear indication that the parties intended their agreement to be legally binding, not only upon themselves, but also on the court. On the other hand, a foreign couple may have been warned, as this couple were warned, that their agreement might not have the same effect in other countries as it did in the country where it was made. But it means that their expectations may have been very different. The agreement may also have affected their later behaviour to a greater extent than it would have done had they not regarded it as legally binding.

183. None of this is to suggest that evidence of foreign law will be necessary in a foreign case. The relevance is not as to the effect of a foreign agreement in English law because, by the time the case gets to the divorce court, it has none. The

relevance is as to the parties' intentions and expectations at the time when they entered into it.

This case

184. The agreement with which we are concerned was ante-nuptial, in the sense that it was made before the marriage. However, it did more than provide for what was to happen should the couple separate or divorce. It purported to choose German law as the law applicable to all aspects of the marriage; it determined the matrimonial property regime which would govern the marriage, in this case separation of property rather than the deferred community of property which is the default position in German law; it excluded the statutory equalisation of their German pension rights; each party waived the right to a compulsory portion of the estate of the first to die which they would otherwise have under German law; and each party waived any claim to maintenance of any kind whatsoever in the event of their divorce. Most of this is already English law. The matrimonial property regime of England and Wales has to all intents and purposes been a separate property regime since 1882. English law does not provide for the compulsory equalisation of pension rights or for the survivor automatically to inherit a compulsory portion of the estate of a deceased spouse. The difficulty lies with the exclusion of all claims to maintenance on divorce, because in English law this cannot be done (nor, it appears, is it entirely effective in German law).

185. No-one has argued that this agreement should be ignored. That might have been a tenable view while public policy rule 1 survived (and even while it was still thought to have survived, the courts were increasingly inclined to take these agreements into account) but that view is no longer tenable now that the rule has gone. Equally no-one has argued in this Court that the agreement should be "presumptively dispositive". As we have seen, that would be inconsistent with the statutory regime governing financial relief.

186. As may often be the case with these agreements, if the judge had first asked herself what would have been the fair outcome without the agreement and then asked herself what difference the agreement should make, she might well have come closer to the solution adopted by the Court of Appeal. She would have asked herself whether any of the three principles identified by the House of Lords in *White, Miller,* and *McFarlane* would justify an award to the husband. She would have concluded that there was no scope for the sharing of matrimonial assets, because in effect there were none. Unusually, this couple had acquired no matrimonial home or other property together. The wife was already independently wealthy before they married and was given even greater wealth during the marriage. But this was undoubtedly intended for her alone. It would not have come to her had her family not been confident that it would remain her separate

property. The judge might well also have concluded that there was no scope for compensating the husband for sacrifices made for the sake of the marriage and the family, although I have some reservations about this. The husband had (perhaps) sacrificed a career in investment banking for a much less lucrative career in scientific research. But it could be said that that was for his own sake rather than for the sake of the family. In the circumstances, he was probably right to concede that the basis of any award should be "needs" rather than "sharing" or "compensation".

187. However, "needs" is a convenient shorthand for a rather more complicated concept, which is the (now) mutual commitment which each spouse makes to support the other. Under the former "tailpiece" or statutory objective, this was a life-long commitment, surviving divorce although ending on the receiving party's remarriage. Under the present law, it is no longer life-long. Each party has a responsibility to try to adjust to living without such support. But they may still be entitled to support for requirements which arose as a result of or during the marriage. Usually, of course, this is because of the demands of child-rearing and the (often life-long) financial disadvantage which results. But among the statutory factors is disability. If this arises during the marriage, it may be entirely proper to expect the normal support commitment to continue after the marriage ends.

188. In some cases, the support requirement generated by the marriage might go further than this. Most spouses want their partners to be happy – partly, of course, because they love them and partly because it is not much fun living with a miserable person. So, choices are often made for the sake of the overall happiness of the family. The couple may move from the city to the country; they may move to another country; they may adopt a completely different life-style; one of them may give up a well-paid job that she hates for the sake of a less lucrative job that she loves; one may give up a dead-end job to embark upon a new course of study. These sorts of things happen all the time in a relationship. The couple will support one another while they are together. And it may generate a continued need for support once they are apart. Whether this is seen as needs or compensation may not matter very much. It can only be for this reason that the husband in this case had any real claim upon his wife apart from his claims as the father of her children.

189. In those circumstances, is it fair to give effect to their agreement? First, did the parties intend it to have legal effect? There can be no doubt that they did. Second, were there any contractually vitiating circumstances? There is nothing to suggest that there were. Thirdly, is there anything in the circumstances in which it was made to suggest that the wife-to-be was taking an unfair advantage of her husband-to-be? I think not. He did not have an English translation and he did not have independent legal advice. He was presented with a "take it or leave it" agreement. This must have been what the judge meant when she referred to the lack of negotiations, and it could be an indication that an unfair advantage has

been taken. But in this case the husband did know the essence of what he was agreeing to and there is nothing at all to suggest that he wanted to negotiate for something different. He was not a naïve young person in a vulnerable position. He was a financially sophisticated and highly educated young man. He was marrying for love and not for money. In common with the Court of Appeal, therefore, I see nothing in the circumstances in which the agreement was made to make it unfair to hold the parties to it (although I worry that this very experienced and thoughtful judge who had the advantage of seeing and hearing the parties may have seen something which we have not).

190. However, that does not inevitably mean that it is fair to give the agreement its full weight in the circumstances as they now are. We would not, for example allow this wife to cast the burden of supporting her husband onto the state. More relevantly, the agreement did not cater for the fact that they might have children together. It is common ground that provision must be made for their two children. His Honour Judge Collins CBE decided that it is in their best interests to spend time living with each of their parents. These are the children of an extremely rich mother, although she did not want the family to have an unduly lavish life style. Nevertheless, since there are ample means available to enable them to do so, the children should be able to enjoy the same standard of living while they are with their father as they have when they are with their mother. Hence it was accepted that he should have a home for them, not only in England, but also when they were spending time with him in Germany or (now) near the mother's home in Monaco, and also the means to support them generously in their homes with him.

191. The issue is whether this should all come to an abrupt end when the youngest child grows up. When unmarried parents separate, the court has no power to make provision for the parents. It can only provide for the child and indirectly for the parent by taking the child's need for care into account when making provision for the child. Provision for the child has to cease when the child ceases education or vocational training, unless there are special circumstances (Children Act 1989, Sched 1, para 3(2)). And the courts have held that capital payments, or property settlements, to provide the child with a home should revert to the other parent when the child grows up. There is therefore no power to provide for an unmarried parent whose financial position has been irredeemably compromised by the demands of bringing up children or looking after the family. Married parents are different, in that the court has power to make provision, not only for the child, but also for the parent. There is no reason in principle why the court should limit its support in the same way that it has to limit its support for the unmarried parent. Quite the reverse: this is what distinguishes marriage from cohabitation in our law. Where parents are married, the court can look beyond the needs of the child while growing up and look independently at the needs of the parent, and in particular those generated as a result of parenthood. Not only this, these days parents often expect to continue to be a resource for their grown-up children, a base to which

they can return and a source of the unconditional love and support which is what parenthood is all about.

192. That may well be why the wife agreed to discharge most of the husband's debts and also acknowledged before Baron J that the husband should have a house, not just while the children were growing up, but for life. The Court of Appeal appeared so anxious to disagree with the *obiter* views of the Board in *MacLeod* that it decided to treat these parents as if they had never been married. That cannot be the right approach. This couple were married in England. They intended to make their matrimonial home in England. They had been advised that their agreement might not be effective under the laws of another country where they chose to live. The main concern of the wife and her family was to ensure that the husband acquired no proprietary claim to shares in the wife's family companies – which might then become forfeit. This was in no way prejudiced, as the judge made clear, by a lump sum order which the wife could readily meet out of her cash income.

193. In my view the Court of Appeal erred in principle in treating a parent who has been married to the other parent in the same way as they would treat a parent who has not. If, for example, a parent has irredeemably compromised her position in the labour market as a result of her caring responsibilities, she is entitled to at least some provision for her future needs, even after the children have grown up. It would not be fair for an ante- or post-nuptial agreement to deprive her of that. Where parents are not married to one another, there is nothing the court can do to compensate her. But where they are, there is. A nuptial agreement should not stand in the way of producing a fair outcome.

194. I would therefore have varied the judge's order so that the husband was entitled to his English home, or any home bought to replace it, for life. I would also have asked myself whether there were likely to be any continuing support needs attributable to his parental status after the children grew up. The answer to that is probably "no" although I also consider that the husband's decision to leave his lucrative career in banking and acquire further qualifications with a view to changing direction was not as completely selfish as some may have thought it to be. The wife appears to have agreed with it at the time. And why should she not? The couple were rich enough each to be able to pursue their own dreams. She had not been happy in New York and perhaps she understood why her husband was no longer happy in banking. If the decision was taken for the good of the family as a whole, this would have been for the benefit of the children as well as their parents. Happy parents make for happy children. Discontented parents make for discontented children. The judge found that, once that step had been taken, there was no going back.

195. It may be that the case should have gone back to the judge on this basis, as well as on the cross-appeal, for we are not in a position to make findings of fact which she did not make. But while I am clear that she did not give enough weight to the agreement in this case, I am equally clear that the Court of Appeal erred in equating married with unmarried parenthood. Marriage still counts for something in the law of this country and long may it continue to do so.