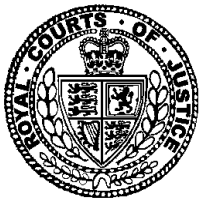

Neutral Citation Number: [2018] EWCA Civ 2862

Case No: B6/2017/0195

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Honourable Mr Justice Francis
[2016] EWHC 3431 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

- -

Between :

Dominika Anita Gabrielsson Brack	**Appellant**
- and -	
Per Cenny Brack	**Respondent**

- -
- -

Patrick Chamberlayne QC (instructed by **Sears Tooth**) for the **Appellant**
Martin Pointer QC and Peter Mitchell (instructed by **Irwin Mitchell**) for the **Respondent**

Hearing dates: 21st November and 22nd November 2018

- -

Approved Judgment

Lady Justice King :

1. This is an appeal from an order made by Mr Justice Francis, on 22 December 2016, in financial remedy proceedings.

2. The case centred on a series of three prenuptial agreements made between Dominica Brack (the wife), and Per Cenny Brack (the husband) in 2000. The judge found that, although there were no vitiating factors which would militate against the agreements being effective, the terms of the agreements were unfair in that they failed to provide for the needs of either the wife or the children of the marriage.

3. The judge also held that the prenuptial agreements contained a prorogation clause, the effect of which was to give exclusive jurisdiction in respect of the parties' maintenance obligations to the courts of Sweden (maintenance obligation includes all "needs" including housing). The judge held, however, that he retained residual jurisdiction to determine the "rights of the parties in property".

4. The judge went on to hold that, as "needs" had been prorogated to Sweden by virtue of the maintenance prorogation clause ("the MPC"), he was prohibited from making orders under the Matrimonial Causes Act 1973, other than in relation to strict property rights, even in relation to the unmet needs.

5. The judge accordingly attempted to make up the shortfall in the wife's needs by way of:

    i) An order for sale of the jointly owned matrimonial home pursuant to section 17 Married Women's Property Act 1882.

    ii) Orders under Schedule 1 Children Act 1989 whereby (a) the husband was to provide a property, up to the value of £2m, as a home for the children until they cease full time education, whereupon the wife's right to occupy the property would cease; (b) £35,000 towards the cost of a car for the wife; (c) child maintenance and a carer's allowance of £95,000pa.

6. The appeal raises two issues:

    i) On the facts of this case, was there a valid MPC in the agreements, or any of them, depriving the English courts of jurisdiction to provide directly for the needs of the wife in financial remedy proceedings?

    ii) As a matter of general principle, where there is no MPC and a court has found there to be a prenuptial agreement with no vitiating factors which, however, fails adequately to provide for the needs of the wife and any children, is the court limited to making only such orders as will meet the wife's needs?

Background

7. The husband and wife are Swedish by birth and nationality. They were married on 29 December 2000, having lived together for 6 years. The marriage broke down in 2014. There are 2 children of the marriage.

8. During the course of the marriage, the family lived variously in the United States, Belgium, and most recently, in the United Kingdom.

9. The husband was a racing driver. He achieved considerable success on the United States IndyCar circuit before a serious crash in October 2003 effectively brought his racing career to an end. Since his accident, the husband's principal source of income has been from the active management of his substantial asset portfolio.

10. Following the birth of the children, the wife was the homemaker. Other than her half share in the former matrimonial home, the wife has no assets in her own name and has debt, some of which is owed to the husband consequent on his having lent her £95,000 towards her legal costs (and upon which he charges interest at 5% per annum). That £95,000 has proved to be but a drop in the ocean. In the 4 years since their separation, the parties have spent in excess of £1m in legal fees in relation to the financial remedy proceedings, with further significant costs being incurred in relation to the arrangements for the children. By the time of trial, the wife was in debt to the tune of £350,000.

11. Each of the parties have made equal, but different, contributions to the marriage. At the time of trial, the assets accumulated during the duration of the relationship, amounted to a little under £11m; £1.8m of which represents the net equity in the former matrimonial home.

12. Having set out the background, which is relatively conventional in terms of the parties' respective contributions, the judge said:

> "[22]…apart from two significant issues to which I now turn, this may well have been a case where the assets would have been broadly shared between the parties. I recognise that there may still have been arguments about the extent to which some of the assets were non-matrimonial in character, but in my judgment it is highly unlikely that the parties would have spent hundreds of thousands of pounds on high quality legal advice and litigation about such arguments but would have reached a compromise tolerable to each of them."

13. The two "significant issues" to which the judge referred were:

    i) The impact of the three prenuptial agreements; and

    ii) Whether there was an effective MPC for the purpose of Article 4 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (the Maintenance Regulation). The effect of an Article 4 MPC, if valid, would be that all issues in relation to maintenance were within the exclusive jurisdiction of the Swedish courts.

14. In order to determine the issues, it was necessary:

    i) In respect of the prenuptial agreements, for the judge:

(a) to hear evidence and to make findings of fact in relation to the agreements and, in particular, to determine whether any of the standard vitiating factors of duress, fraud or misrepresentation were present, or whether there was pressure or exploitation of a dominant position by the husband which would serve to negate the effect of any agreement (*Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 (*Radmacher)* [71]). In the present case, the wife alleged that the husband had obtained her signature on each of the agreements by misrepresentation;

b) In the event that no vitiating factors were present, to decide whether the agreements were "fair" and to what extent the court should give effect to the agreements in question.

ii) In respect of the purported MPC, the judge had to decide whether there was, on the facts of the case, a prorogation clause valid under European law. This issue was and remains, a matter of construction and required no specific findings of fact.

The Prenuptial Agreements

15. Three prenuptial agreements were signed by the parties in the months leading up to their marriage. The first and third of those agreements, known respectively as the "Niagara agreement", dated 10 July 2000, and the "Gothenburg agreement", dated 26 December 2000 (being the locations where each were signed), were, for all relevant purposes, in identical terms and upon being translated from the Swedish, provided as follows:

"**PRENUPTIAL AGREEMENT**

and

PROROGATION AGREEMENT

The undersigned… who intend to contract a marriage with one another, by this conclude the following prenuptial agreement. Furthermore, we enter into a prorogation agreement in which we determine what law and court shall apply and as to the distribution of property between ourselves.

Prenuptial Agreement

All property acquired by each of us independently before entering into marriage or which will be acquired during the marriage as well as any property which will replace that property together with all revenue generated by all property shall make up the private property of each of us independently, in which the other spouse shall have no right by marriage to community property or other joint property rights.

Prorogation Agreement

> Moreover, we agree that in the case of separation between the two of us Swedish law shall apply at the distribution of our property and that any dispute as to that property shall be settled in accordance with Swedish law before the City Court of Stockholm, Sweden."

16. Each of the documents was signed and dated by both the husband and wife.

17. At the time of the signing of the Niagara agreement and prior to the marriage, the husband and wife were living in the United States, where the husband was pursuing his racing career. On 11 December 2000 (18 days before the marriage), the second in time of the three agreements ("the Ohio agreement") was entered into by the parties. This document was a far more lengthy and detailed document than either the Niagara or Gothenburg agreements, and was wide-ranging in its prenuptial terms covering, by way of example; pensions, taxes and medical expenses, as well as (at Clause 12) the issues that would arise upon "Termination Of The Marriage". The wife received clear, legal advice that she should not sign the agreement on the ground that it was unfair, but, notwithstanding that advice, decided that she wished to do so.

18. Clause 12 of the Ohio agreement dealt with, *inter alia*, how the matrimonial home should be divided, and made financial provision for the children. Significantly for the purposes of this appeal, within Clause 12 is found the following provision:

> "Each party hereby irrevocably waives, releases and relinquishes any and all claims or rights that he or she now or hereafter might otherwise have, including without limitation any rights acquired of virtue of the marriage, to receive in the event of the termination of the marriage any payment whatsoever from the other party for alimony, maintenance or support, by whatever name designated, under the present or future laws of the Kingdom of Sweden or any other jurisdiction in which the parties now or hereafter reside."

19. A number of recitals precede the main body of the Ohio agreement, and a number of general provisions are found at the end of the document at Clause 19. These recitals and provisions together provide the context for the prenuptial agreement. So far as are relevant for the purposes of this appeal, the following recitals are of importance:

> **"WHEREAS,** it is the desire and intent of the parties to submit themselves to the jurisdiction of the judicial system of Sweden, and more particularly to the City Court of Stockholm, Sweden and;
>
> **WHEREAS,** the parties have caused a "Prenuptial Agreement and Prorogation Agreement" to be filed with the judicial authorities in Sweden, pursuant to Swedish law, whereby they, *inter alia* consent the City Court of Stockholm, Sweden and the application of Swedish law for the resolution of any dispute between them, and;

> **WHEREAS,** the parties intend that the said "Prenuptial Agreement and Prorogation Agreement" as filed in Sweden shall be incorporated in the within Agreement but shall not merge and shall survive, and;
>
> **WHEREAS,** the parties agree that in the event of any inconsistency, ambiguity, or conflict between the Swedish Prenuptial Agreement and Prorogation Agreement", and the within Agreement, the Swedish document shall take precedence and shall apply".

20. Within the general provisions, at Clause 19 is the following:

> "This agreement is entire and complete and embodies all understandings and agreements between the parties, except to the extent that these may conflict with a "Prenuptial Agreement and Prorogation Agreement" dated within ninety (90) days of this Agreement, to be filed with the judicial authorities in Sweden and more particularly described above. The terms of said agreements shall be incorporated in the within Agreement but shall not merge and shall survive… "
>
> "Nothing herein contained shall infer that the parties wish to have the agreement herein resolved in the courts of any jurisdiction other than the City Court of Stockholm, Sweden and nothing herein contained shall confer jurisdiction upon any Court in any jurisdiction other than the City Court of Stockholm, Sweden.
>
> In the event that the City Court of Stockholm, Sweden shall cease or decline to accept jurisdiction of any dispute between the parties, then, in that event, any such dispute shall be submitted to any Court within the geographical boundaries of the Kingdom of Sweden and shall accept the same, as if no court in Sweden shall accept such jurisdiction, any court accepting jurisdiction shall be required to apply Swedish law in resolution of any dispute between the parties.
>
> The parties agree that no dispute between the parties shall be submitted for resolution to any Court in any jurisdiction before the City Court of Stockholm, Sweden or such successor Swedish Court as is provided for above has first declined jurisdiction and the appellate process for such declination has expired."

21. It can be seen, therefore, that the provision within Clause 19 of the General Provisions set out above, anticipated that a further prenuptial agreement would be produced within 90 days of the Ohio agreement. It was this provision which led to the drafting of the Gothenburg agreement, the third and final agreement, dated 26 December 2000, in the terms set out at paragraph 15 above. That agreement was signed three days before their marriage.

The judge's findings of fact

22. Having heard both parties give evidence, the judge found the husband to be "cold". The approach of the husband towards both the wife and the prenuptial agreements (with the consequent financial "knock-on" effect upon their children) was, the judge said, "both mean-spirited and mean". Notwithstanding this however, the judge found the husband to be honest and truthful, and preferred his recollection of the circumstances surrounding the signing of the agreements to that of the wife. Where the judge had doubts as to whom to believe, he found those doubts to be resolved in favour of the husband. Having made this critical finding of credibility, the judge went on:

> "[38] However, because I find the husband to be financially mean does not have to lead me to the conclusion that he was a dishonest witness. On the contrary, his attitude led me to accept as far more likely than not that it was he that was giving truthful evidence about the circumstances that surrounded the signing of the prenuptial agreements. I accept that he was happy to carry on being unmarried. I reject the wife's assertion that the husband was guilty of serious misrepresentation in relation to the prenuptial agreements. It is also important to bear in mind that, at least in relation to the American agreement, the wife had independent legal advice and elected to ignore that advice. I cannot accept that the wife on three separate occasions signed a prenuptial agreement imagining it to be irrelevant and assuming its provisions to be of no impact…
>
> [39] I find that the parties did consensually enter into one or more prenuptial agreements and that, at the time when they were entered into, the effect of the agreement or agreements was not vitiated by factors such as fraud misrepresentation or undue pressure."

23. In respect of the consequences of the prenuptial agreement, if implemented with complete rigour, the judge said:

> "[55]. In this case, giving effect to the agreement would leave the wife with one half of the value of *Wildwood*, [*the former matrimonial home]* less debts of some £350,000, leaving about £560,000 The husband indicated to me that, in the event of this outcome, he would not press for the repayment of the loan of £95,000, so the wife's resources would grow to £656,000 although (his concession was very carefully limited to the acceptance by the court, in full, of his open offer). That amounts to 5% or 6% of the family assets. The Supreme Court in *Radmacher* plainly left the courts with a wide residual discretion as to the definition of what is fair in any given case. I am satisfied that the prenuptial agreement would work unacceptable unfairness on the wife and that, worse still, it would adversely affect the best interests of the children of the family…. I do not believe that it can be considered fair after a marriage of this length and with these contributions and with these children, for

> the wife to be left with almost nothing and for the husband to be left with almost everything. Certainly it would put the wife and children in a predicament of real need."

The Judge's Approach and Judgment

24. The judge, having made findings favourable to the husband as to the validity of the prenuptial agreements, moved on to tackle the issue of the prorogation clause. Until such time as the judge had determined whether there was, or was not, a valid MPC, he was unable to decide whether the English courts' jurisdiction in the financial remedies case was in any way constrained and, if so, to what extent.

25. In his judgment, the judge set out the critical terms recited above from the Niagara and Gothenburg agreements before going on to set out the relevant recitals from the Ohio agreement. The judge dealt with the matter briefly over two paragraphs, making no reference to either Clause 19 (identifying Sweden as having jurisdiction) or to Clause 12 (the clause whereby the wife waived any rights to maintenance for herself). The judge identified that the validity of a prorogation clause required consideration of Article 4 of the Maintenance Regulation which provides (so far as is relevant):

> "1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them:-
>
> (b) a court or the courts of a Member State of which one of the parties has the nationality
>
> 2. A choice of court agreement shall be in writing."

26. The judge went on to analyse the validity of the prorogation agreement as follows:

> "[43] This therefore requires the satisfaction of two criteria: (a) the parties shall have agreed; and (b) that the agreement should be in writing. I have already found that the parties each consented to the agreement; and the agreement is of course in writing. The wife accepted during the course of her oral evidence that she understood that each of the three agreements provided for the resolution by a Swedish court of any issue that might arise between them concerning the agreement or its implementation. Moreover, the evidence of Mr Satine [*the American lawyer who prepared the American agreement*] leads me to conclude that the wife understood the agreement into which she was entering and knew that there was a Swedish forum clause. I have already found that there were no vitiating factors at the time when the agreement was entered into and therefore I find that this is a valid prorogation clause.
>
> [44] I reject Mr Chamberlayne's contention that the prorogation clause is invalid due to the fact that there is an inconsistency between the American and the Swedish agreement. The

> language of the American agreement in respect of Swedish jurisdiction is entirely clear and, in any event, the American agreement expressly says that in the event of any inconsistency between the Swedish and the American agreement, the Swedish agreement shall take precedence and shall apply."

27. On my reading of the latter part of [44], it would appear that the judge had formed the view that the Swedish agreements in themselves contained a valid prorogation clause, both as to property and maintenance. The judge concluded by holding that the effect of the prorogation clause was that Article 4 was engaged, and that accordingly, the court's jurisdiction to make orders for maintenance was excluded. The judge was "clear" that, as a consequence, the court's jurisdiction was now confined to dealing with "rights in property arising out of a matrimonial relationship".

28. The reference by the judge to "rights in property arising out of a matrimonial relationship" (whilst not set out by him in the judgment) is a reference to Article 1, an Article most recently found in Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels recast); but which can be traced back, in identical terms, through Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Brussels 1) and in its original form in the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (the 1968 Brussels Convention). It was the 1968 Brussels Convention that was the applicable convention at the date the agreements between these parties were signed; Brussels 1 not having come into effect until 1 March 2002.

29. Article 1 provides that in respect of jurisdiction, recognition and enforcement:

> "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The Convention shall not apply to:
>
> …the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;"

30. It follows that England retains its domestic law jurisdiction in relation to "rights in property arising out of a matrimonial relationship" (Article 1), regardless of the terms of any of the three agreements, and that only maintenance (needs) can be prorogated (Article 4).

31. At trial and on appeal in the Respondent's notice, Mr Pointer QC, on behalf of the husband, submitted that the judge was wrong in law, having concluded the MPC to be valid, to conclude that he was thereafter entitled in an English divorce to make, or consider making, an award based on the so-called sharing principle because:

> "(a) under English law no rights in property arise from a matrimonial relationship;

> (b) The only powers the court has under the Matrimonial Causes Act 1973, sections 23 and 24 are to make financial provision and property adjustment orders which are wholly discretionary orders and are necessarily based on a consideration of the various factors in Matrimonial Causes Act 1973 section 25; and
>
> (c) There is under English law no such thing as a 'sharing award' or 'sharing claim' as that is merely the rationale for the exercise of the court's powers and the orders it makes under Matrimonial Causes Act 1973 , sections 23 and 24.

32. It follows Mr Pointer submitted that, where the court is limited to making orders for rights in property arising out of a matrimonial relationship, in English law that permits the court only to make declaratory orders of existing property rights.

33. The judge rejected Mr Pointer's submission, holding that the wife was making (subject to the prenuptial agreement) a claim for a fair share of the assets of the marriage and that those assets were "rights in property arising out of a matrimonial relationship". That conclusion cannot be faulted in the light of the judgment of Lord Justice Thorpe in *Moore v Moore* [2007] EWCA Civ 361 at [71].

34. The judge rightly concluded that an effective MPC would deny him jurisdiction to make an award by reference to the needs of the wife (per the decision of the ECJ in *Van den Boogaard v Laumen* [1997] 2 FLR 399 at [21] – [23]), but that he retained residual jurisdiction over "rights in property arising out of a matrimonial relationship" which rights, he held, included jurisdiction in respect of the wife's "sharing" claim and the parties' "strict property rights" saying:

> "[52] In my judgment, what the wife makes here, subject to the pre-nuptial agreement to which I shortly turn, are claims for a fair share of the assets of the marriage and these are clearly rights in property arising out of a matrimonial relationship in the sense referred to in *Van den Boogaard*. Accordingly, in my judgment, the prorogation clause, albeit properly entered into, and not negated by one of the traditional vitiating factors, is not caught by the Maintenance Regulation insofar as it deals with any sharing or real property claims, unless those claims are negated by the terms of the pre-nuptial agreement itself…"

[I think that in the above citation the judge must have referred to "the prorogation clause" in error, and intended rather to refer to "the prenuptial agreements".]

35. The judge, having made findings on the evidence and considered the law in respect of the MPC, had the following elements in play as he came to determine what orders were open to him to make:

i) There was a valid MPC which governed the jurisdiction in respect of the husband's maintenance obligations.

ii) There was a prenuptial agreement in respect of which there were no vitiating features which (on the face of it) would serve to undermine its effectiveness.

iii) Giving effect to the agreement in full would, however, "work unacceptable unfairness" and put the wife and children in a "predicament of real need".

iv) The judge retained jurisdiction in respect of the "rights in property arising out of a matrimonial relationship". Those rights, he held, excluded needs (consequent upon the MPC) but included any "sharing" claim made on behalf of the wife.

36. The judge decided that absent an MPC, where assets were available, the needs of the wife should be met by "invading the husband's separate property" [60]. The judge did not make a finding by reference to the terms of any of the agreements that the wife's claims to sharing had, on the facts of the case, been "negated", but rather went on to hold that he was constrained to approach the present case solely on a "needs" basis, as a result of the decisions in *Z v Z* [2011] EWHC 2878 and *Luckwell v Limata (Luckwell)* [2014] EWHC 502; [2014] 2 FLR 168, two prenuptial agreement cases where there were no vitiating factors, and where the courts had excluded sharing and made orders limited only to meeting the reasonable needs of the wife.

37. The judge, therefore, believed that so far as the prenuptial agreements were concerned, upon a proper application of the authorities to his findings of fact, he was deprived of the ability to make any order which went beyond provision for the needs of the wife, notwithstanding his earlier view as to the extent of the wife's rights in property arising out of a matrimonial relationship (set out at paragraph 33 above). Once the MPC, which the judge had found to be within the agreements, was factored in, the judge concluded that he was unable to make even a needs-based order. The judge therefore considered that he was left with only limited jurisdiction within the financial remedies application, that is to say to deal with the parties' strict property rights, by which the wife was limited to her half share in the former matrimonial home. In those circumstances, the judge was driven to make orders under Schedule I of the Children Act 1989 as the only way to provide for the children of the family.

The Appeal

38. By ground 1, the wife submits that the judge made a fundamental error of law as to the effect of the prenuptial agreements. It is submitted that the judge took the "legally incorrect" view that, where a prenuptial agreement is found to be unfair, he was thereafter precluded from making an award in favour of the wife (save one based upon her needs). The essential ground is expanded by Mr Chamberlayne in this way:

> "Given that the assets in this case were all matrimonial (in the usual sense of all having been earned during the marriage), and having found the PNAs to be unfair, the judge was free to make (and should have made) an award in the wife's favour based on the sharing principle. He could have made the award 50 percent of the assets had he concluded that no weight should have been attached to the PNAs, or he could have made a reduced sharing claim if he had concluded that reduced weight (rather than no weight at all) should have been attached to the PNAs."

39. Ground 2 of the appeal goes to the validity, or otherwise, of the MPC. It is said that the judge wrongly concluded that there was a valid MPC preventing him from making any award in the wife's favour based upon her financial needs.

Is there a valid Maintenance Prorogation Clause?

40. This court took the view on appeal, as had the judge at first instance, that logically the first question to be answered is that posed by Ground 2, that is to say, whether there is, or is not, a valid MPC. Absent the MPC, the case reverts to being a conventional financial remedy case where most if not all of the assets have been accrued during the course of the marriage, but where there is a prenuptial agreement in respect of which the judge has made specific findings of fact. Such a discretionary determination is a task to be undertaken by a judge at first instance and not by this court. On this basis, Mr Chamberlyne QC, on behalf of the appellant wife and Mr Pointer QC, on behalf of the respondent husband, were each invited to make their submissions in respect of the MPC before any consideration was given to the effect of the prenuptial agreement and Ground 1.

The Maintenance Prorogation agreement

41. It is common ground (confirmed by agreed expert evidence), that under Swedish law, neither the Niagara nor the Gothenburg agreements are in fact enforceable in Sweden, either in respect of the prenuptial agreement element, or the prorogation agreements contained in them. This is because prorogation clauses concerning matrimonial property (as opposed to maintenance) entered into prior to a matrimonial dispute are not enforceable under Swedish law. Further, in relation to the separation of property agreement, Swedish law requires that to be valid it must be entered into in contemplation of or after the start of divorce proceedings. These agreements were signed before the marriage.

42. There is some dispute between the parties as to exactly what Mr Pointer's position was at first instance, but it matters not, as it is accepted by Mr Pointer that neither the Niagara agreement, nor the Gothenburg agreements contain MPCs (enforceable or otherwise). All they contain are unenforceable prenuptial and prorogation clauses in relation to property.

43. It follows that if, at [44] (see paragraph 26 above), the judge, in referring to the fact that the Swedish agreement should "take precedence over the American agreement" (the Ohio agreement), was making a finding that the Swedish agreements contain valid MPCs, in addition to the property prorogation clauses, he was in error.

44. Both parties now agree that if there is a valid MPC, it can be found only in the Ohio agreement. The court, as a matter of construction, must therefore consider:

    i) Whether the requirements in Article 4 itself are satisfied; and

    ii) If so, does the relevant clause, purporting to be an MPC in the Ohio agreement fall foul of the provision in the agreement itself that specifies that, in the event of any "inconsistency, ambiguity or conflict" between the Swedish agreement and the Ohio agreement, the Swedish agreement will take precedence? If that is

> the case, the only relevant purported prorogation agreement is the one found in the Swedish agreement in respect of property and not maintenance.

45. We have been asked to determine the appeal on the basis that Article 4 of the Maintenance Regulation applies, notwithstanding that the agreements were made many years before the Maintenance Regulation came into force.

46. The Maintenance Regulation contains transitional provisions at Article 75 which provide:

> "1. This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established as from its date of application, subject to paragraphs 2 and 3."

47. These proceedings were instituted after the Maintenance Regulation came into force on 18 December 2008. It seems likely, however, that were a court considering the matter under the 1968 Brussels Convention, it would conclude that nothing in the three agreements would have been capable of being a valid prorogation clause under Article 17 of the 1968 Brussels Convention (the relevant Article under that Convention). Both parties were domiciled in Sweden and chose Sweden, their country of domicile, as their choice of jurisdiction; as such, the potential dispute was a domestic matter with no international element capable of involving the Article 17 jurisdiction (see the *Jenard Report Section 6: Article 17).*

48. There has however been a ruling in the ECJ in *Sanicentral ECLI: EU:C: 1979: 242, para 7* which says that:

> "Articles 17 and 54 of the convention must be interpreted to mean that, in judicial proceedings instituted after the coming into force of the convention, clauses conferring jurisdiction included in contracts of employment concluded prior to that date must be considered valid even in cases in which they would have been regarded as void under the national law in force at the time when the contract was entered into."

49. I am satisfied that for these purposes in relation to prorogation clauses conferring jurisdiction in a matrimonial dispute, the same principle must apply. In those circumstances, the agreements are to be interpreted on the basis that the relevant regulation is the Maintenance Regulation, notwithstanding that a prorogation clause agreed between these Swedish parties, choosing Sweden as their choice of jurisdiction, would have been void at the date it (or they) were made in 2000.

50. Turning then to Article 4; as there is no MPC in either the Gothenburg or the Niagara agreements, in order to satisfy Article 4(1), the court must be satisfied that the Ohio agreement demonstrates an agreement, at the time it was made, for maintenance to be prorogated to the jurisdiction of the Swedish courts.

51. The parties satisfy the status criteria in Article 4, each of them being Swedish nationals (4(1)(b)). Further, the agreement as a whole is in writing (4(2)). The question is therefore whether, for the purposes of Article 4(1), it can be said that, the Ohio

Agreement drafted in 2000, contains a valid MPC. In other words did the parties agree that "the following court or courts of a (named) Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them"?

52. In *Estasis Salotti di Colzani v Rüwa* [1976] ECR. 1831; [1976] 12 WLUK 98; [1977] 1 CMLR 345, (*Estasis)* the court considered the application of Article 17 of the 1968 Brussels Convention (the earlier Article which allowed a prorogation clause by agreement). The judgment of the European Court held that:

> "The way in which Article 17 of the convention of 27 September 1968 is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down on Article 2 and the special jurisdictions provided for in Article 5 and 6 of that convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirement to set out in Article 17 governing the validity of the clauses conferring jurisdiction must be strictly construed."

53. This is a reference to the fact that, in permitting the parties to choose a jurisdiction, Article 17 (as is Article 4) is providing an exception to the general rules, whereby jurisdiction is governed by domicile (Article 2), or (prior to the Maintenance Regulation) the place where the maintenance creditor is domiciled, under the special jurisdiction in Article 5.

54. *Estasis* was itself a case where the requirement for the agreement to be in writing was held not to have been satisfied. The court said:

> "2. The case of a clause conferring jurisdiction, which is included among the general conditions of sale of one of the parties, printed on the back of the contract, the requirement of writing under the first paragraph of Article 17 of the Convention of 27 September 1968 is only fulfilled if the contract signed by the two parties includes an express reference to those general conditions."

55. *Estasis* emphasised that the purpose of the formal requirement is to ensure that consensus between the parties was in fact established. In *Deutsche Bank AG & Ors v Asia Pacific Broadband Wireless Communications & Anr* [2008] EWCA Civ 1091, Lord Justice Longmore considered an exclusive jurisdiction clause, (in that case, Article 23(1) of Brussels1) which contains a similar requirement that the "agreement conferring jurisdiction" shall be in writing or evidenced in writing.

56. Lord Justice Longmore had in mind the *Estasis* case [15] and said that the court had to determine whether the clause conferring jurisdiction was in fact the subject of consensus "which must be clearly and precisely demonstrated" given that the very purpose of the Article's formal requirements was to ensure that the consensus was in fact established. He said at [30]:

> "That is authority for the proposition that if the formal requirements are established (e.g. that the clause is in writing) that will be enough to ensure that consensus is established for the purpose of enabling the case to be determined."

57. *Joint Stock Company "Aeroflot- Russian Airlines" v Berezovsky & Ors* [2013] EWCA Civ 784 was another case where the issue of jurisdiction was before the court. Lord Justice Aikens referred to both the *Deutsche Bank* case and to *Estasis* and considered the ratio of *Deutsche Bank* as set out at [43] above to be binding on the Court of Appeal. It follows, therefore, that the ratio of *Deutsche Bank* is equally binding in this case and, providing always that the formal requirements are established, that will be sufficient to ensure that consensus is established for the purposes of enabling the case to be determined. It follows that if there is a clause capable of amounting to a MPC in the Ohio agreement, consensus has been established by the fact that the agreement is in writing.

58. Prorogation clauses are very straightforward and require no complex drafting. That is why, in part, compliance with the requirement that the agreement is in writing is enough to satisfy the need for consensus between the parties. All that a MPC in this case would require would be a clause saying: "The parties agree that the Courts of Sweden shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which has arisen or may arise between them."

59. The question then to be considered by this court is whether, absent an unequivocal and clear maintenance prorogation clause, there is anything in the Ohio agreement which amounts to a valid MPC in the light of the *Estasis* case as confirmed by the Court of Appeal in *Deutsche Bank.*

60. The part of the Ohio agreement which Mr Pointer relies upon as amounting to a maintenance prorogation clause (which I set out again for ease of reference) is the following part of Clause 19:

> "Nothing herein contained shall infer that the parties wish to have the agreement herein resolved in the courts of any jurisdiction other than this City Court of Stockholm, Sweden and nothing herein contained shall confer jurisdiction upon any court in any jurisdiction other than the City Court of Stockholm, Sweden.
>
> "In the event that the City Court of Stockholm, Sweden shall cease or decline to accept jurisdiction of any dispute of the parties, then, in that event, any such dispute shall be submitted to any court within the geographical boundaries of the Kingdom of Sweden and shall accept the same, and if no court in Sweden shall accept such jurisdiction, any court accepting jurisdiction shall be required to apply Swedish law in resolution of any dispute between the parties.
>
> The parties agree that no dispute between the parties shall be submitted for resolution to any court in any jurisdiction before the City Court of Stockholm, Sweden or such successor Swedish

> Court as is provided for above has first declined jurisdiction and the appellate process for such declination has expired."

61. It was argued forcefully by Mr Pointer that, whilst there is no reference to maintenance in Clause 19, Clause 12 includes maintenance as an integral part of the agreement to which the choice of jurisdiction clause will, therefore, apply.

62. Mr Chamberlayne submits that, although the agreement is in writing (with the signature of each of the parties at the end of the document) there is nothing within the part of Clause 19 set out above which relates to maintenance; it is not open, Mr Chamberlayne submits, to the husband to "piggy-back" a term of the prenuptial agreement in relation to maintenance onto Clause 19 which relates solely to jurisdiction in order to make good the deficit.

63. Clause 12 is headed "Termination of the Marriage" and goes on to say that:

> "The parties recognise that it is in their best interests to set forth their agreement as to their respective rights in the event of a termination of their marriage…."

64. As part of that agreement, each party "irrevocably waived" their rights to maintenance in whatever form. Whilst Clause 19 specifically provides for any question of "rights" under the agreement to be determined and construed under the laws of Sweden, there is no specific choice of jurisdiction clause in respect of maintenance.

65. In *Deutsche Bank*, the clause in question was unequivocal and said: "The English Courts have exclusive jurisdiction to settle any dispute in connection with any Finance Document". As a consequence, the fact of the agreement was sufficient to establish consensus. In my judgment there is a strong argument that where, as in *Estasis,* the clause which is said to be the subject of the agreement is, itself, incomplete or unclear, the requirements of Article 4 will not be satisfied, notwithstanding that the agreement is in writing and signed by the parties.

66. It should be remembered that under EU law only maintenance can be prorogated, all other aspects of matrimonial finance being excluded from the regulation and subject therefore to domestic law, pursuant to Article 1. In the present case, the clause relied upon makes no reference at all to maintenance, but rather leaves the reader to work through the prenuptial terms and, having done so, include maintenance, the only matter capable of prorogation, into the jurisdiction clause by inference.

67. In *Estasis,* a prorogation clause found within the Terms and Conditions on the back of the agreement was not adequate to satisfy the requirements of Article 4 without specific reference to the clause within the agreement itself. Having considered the submissions of both parties, I have concluded that the same must be equally true where the meaning of the clause relied upon is itself unclear, particularly where, as here, the critical wording must be read across from a part of the document, dealing specifically with rights and not jurisdiction. In my judgment, the requirements in Article 4 are not satisfied, notwithstanding that the agreement is in writing.

68. I have concluded that there is nothing within the Ohio agreement which is capable of being a valid MPC. If, however, I am wrong about that, the terms of the Ohio agreement

itself, in my view, militate against a finding that it contains a valid MPC. The Ohio agreement specifically incorporates the Swedish prenuptial and prorogation agreement within it, and goes on to provide that in the event of any "inconsistency, ambiguity or conflict" the Swedish document shall take precedence.

69. The court was presented with extracts from the Oxford English Dictionary as to the meaning of the word "inconsistent". Mr Pointer submits that the Ohio agreement is not inconsistent with the Swedish agreement as the Swedish agreement does not provide a prorogation clause in relation to maintenance. The Ohio agreement therefore, he submits, represents an extension of the Swedish agreement, which agreement is subject to Swedish jurisdiction.

70. For my part, I could see the attraction of such an agreement but for two matters; one significant, and one which I regard as fatal to Mr Pointer's arguments.

71. First, the Ohio agreement that was signed by both the parties, specifically incorporates the Swedish agreement. The Swedish agreement, it is now accepted, does not contain a maintenance prorogation clause. Whilst presenting Mr Pointer with difficulties, this would not necessarily be fatal given his "extension" argument. What is fatal, in my judgment, is that, pursuant to the Ohio agreement, the Gothenburg agreement was signed some 15 days later, on 26 December 2000 and the Gothenburg agreement is drafted in the same, limited, terms as the Niagara agreement. In other words, the Gothenburg agreement:

    i) Had been anticipated under the terms of the Ohio agreement to be "remade" at a date after the signing of the Ohio agreement;

    ii) Was specifically incorporated into the Ohio agreement;

    iii) Was, under the terms of the Ohio agreement to take precedence; and

    iv) Does not provide a maintenance prorogation clause (although it clearly could have done) but simply repeats the limitation of the prorogation clause to "property" in identical terms to those found in the Niagara agreement.

72. It follows that even if it could be said for the purposes of Article 4, that, within the Ohio agreement, the combination of the references to Swedish jurisdiction, together with oblique references to the prenuptial provisions in relation to maintenance, was capable of amounting to a valid MPC (which I doubt), such a clause is, in my judgment, inconsistent and / or in conflict with the subsequent Gothenburg agreement drafted and signed some days later, an agreement clearly identified as taking precedence over the Ohio agreement.

73. It may well be that the parties had intended, in 2000, to give Sweden jurisdiction in relation to all matters arising out of their marriage, but, if that was the case, they singularly failed to do so. They did not, as a matter of English, European or Swedish law, achieve their goal. The agreements failed even to achieve an effective choice of jurisdiction clause in respect of property alone in the Niagara and Gothenburg agreements, those agreements having been drafted prior to a dispute arising.

74. In my judgment the parties failed to confer jurisdiction as to maintenance by the terms of the Ohio agreement. There is, therefore, no MPC, and it follows that there is not, as in *Sanicentral*, a clause which, whilst void at the date when the agreement was made under the 1968 Brussels Convention, must now, pursuant to Article 75 of the Maintenance Regulation, be considered to be valid.

75. As I have said, a choice of jurisdiction clause is simple to draft in clear and unambiguous terms, and the necessary consensus will have been established once committed to an agreement in writing. Failure to express a choice of jurisdiction in unambiguous terms can result, as here, in international jurisdictional disarray leading to delay and lengthy, complex litigation at extortionate cost.

76. I am therefore satisfied that there is no valid MPC in this case which constrained the judge's jurisdiction and prevented him from considering and making orders in respect of the wife's needs.

Ground 1: the consequences of the prenuptial agreement: sharing or only needs?

77. Having heard argument in relation to the validity of the MPC, the court told the parties of our conclusion that there is no valid MPC which would result in the Swedish courts alone having jurisdiction to determine issues in relation to the maintenance (needs) of the wife. It was then submitted by Mr Chamberlayne that, prior to the matter being remitted to the judge in order for him to carry out the conventional exercise referred to above, the court must nevertheless consider Ground 1 and the wife's appeal against the judge's approach to the prenuptial agreement. Whilst a respondent's notice was filed on behalf of the husband seeking to uphold the judge's order in this respect on other grounds, the arguments within it largely fell away during the hearing. It became apparent, however, that there was a dispute about the basis upon which the matter is to return to the judge.

The effect of the Prenuptial Agreements

78. The area of disagreement between the parties has narrowed considerably. It is neither necessary nor helpful to analyse each side's respective starting point, whether at first instance or in this court. Suffice it to say that it is now common ground that in financial remedy proceedings, where a judge has found there to be no vitiating features in relation to a prenuptial agreement, he is entitled, when applying the section 25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome.

79. The residual issue between the parties, therefore, relates to what limitations, if any, on the facts of the case and against the backdrop of the judge's findings, should the judge impose upon himself in his fresh consideration of the wife's claim for financial remedies.

80. Consideration of this issue has involved a microscopic analysis by Counsel of three paragraphs of the judgment, as follows:

> "[60]…However, where, as here, a valid agreement has been entered into and there are no vitiating factors present, then in my

> judgment it would be wrong simply to disregard the agreement; rather it is the court"s duty to step in to alleviate the unfairness. That will not usually be simply to restore the parties to the position that they would have been in absent the agreement. In the instant case the parties agreed to a regime of separate property, so the starting point here is that, apart from the matrimonial home, the husband owns everything. Where assets are available (as here) to meet the wife"s needs, these should be met by invading the husband"s separate property. The extent to which need is "generously" or otherwise interpreted will of course vary from case to case.
>
> 61. This is the approach which was taken by Moor J in *Z v Z* [2011] EWHC 2878 (Fam) where the court upheld a French *separation de biens* insofar as it excluded sharing but the court went on to meet the wife"s reasonable needs. A similar approach was adopted by Holman J in *Luckwell v Limata* in 2014.
>
> 62. The effect of the above is, however, very serious indeed for the wife, when I return to the consequences of the prorogation agreement, <u>for it means that I am now to approach the case on a needs basis</u>. "
>
> *(My emphasis)*

81. Mr Chamberlayne QC, on behalf of the wife, submits that this amounts to a pure error of law. The judge, he submits, concluded that in law he was constrained to consider only a needs-based settlement. Notwithstanding his clear concern as to the outcome, the judge (submits Mr Chamberlayne) felt himself to be driven to conclude that, having found there to be a valid prenuptial agreement, he was now limited to a needs-based outcome and that, as he put it at paragraph [68], the wife had "lost her sharing claim" by reason of the prenuptial agreement.

82. Mr Pointer, on behalf of the husband, says whilst as a matter of law, "sharing" remained open to the judge on a proper reading of the paragraphs quoted above, the judge had not made an error of law but rather he had exercised his discretion in deciding to limit the wife's claim (absent a valid MPC) to needs alone.

83. It is helpful in this regard to look at the approach of various courts in respect of this issue, which inevitably starts with the judgments of the Supreme Court in *Radmacher*. The starting-point must be with the well-known principle expressed by Lord Phillips in his judgment at [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.*"*

84. Lord Phillips went on, under the heading of "autonomy", to say:

> "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."

85. Of particular relevance to the issues before this court, Lord Philipps reverted to the three strands of needs compensation and sharing:

> "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."

86. This theme was picked up by Baroness Hale in her judgment. Baroness Hale described situations where couples have contracted out of sharing but not out of compensation and support [177]. She went on to say:

> "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… 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."

87. In *Versteegh v Versteegh* [2018] EWCA Civ 1050, Lewison LJ set out what he regarded as the key points in *Radmacher.* In so far as is relevant to the issues now before the court he said:

> "[177] vii) Thus, the court should give effect to a PMA 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: [75]
>
> viii) Typically, it would not be fair to hold the parties to their agreement if it would prejudice the reasonable requirements of any children of the family [77]; or if holding them to the agreement would leave one spouse in a "predicament of real need": [81]
>
> ix) But in relation to the sharing principle the court is likely to make an order reflecting the terms of the PMA: [82], [177] – [178]
>
> 178. I reject Mr Bishop's submission that if a PMA is unfair in the circumstances (e.g. because it fails to cater for the reasonable requirements of children or for the wife"s needs) it must be discarded entirely, rather than tempered to take account of the unfairness. His submission is, in my judgment, inconsistent with the way in which the Supreme Court dealt with the application of the PMA to the sharing principle."

88. For my part, in my judgment in *Versteegh* at [82], I emphasised that an effective prenuptial agreement is an example of a case where, upon a proper consideration of all the circumstances of the case (per section 25 (1) MCA1973]), a court can conclude that the assets should be divided unequally, and that such an outcome would represent, as it was put by Lady Hale, a "modification of the sharing principle" [178].

89. The court has been taken to the judgments in the two cases referred to by the judge in his judgment, namely; *Z v Z (No 2) (Financial Remedy): Marriage Contract)* [2011] EWHC 2878, [2012] 1FLR 1100 (Z v Z); and *Luckwell v Limata* [2014] EWHC 502, [2014] 2 FLR 168 *(Luckwell).* In *Z v Z,* although there were some inherited assets on either side, the majority of the assets had been accrued by the husband during the course of the marriage, the judge, as has Mr Justice Francis in the present case, carefully considered all the circumstances leading up to the agreement which was in the form of a French *separation de biens*. Having done so, the judge rejected all the arguments raised to say that it would not be fair for him to uphold the agreement in so far as it excluded sharing, and went on to make a needs-based order. The judge observed that it might have been "very different" if the agreement had also purported to exclude maintenance claims in the widest sense [64].

90. In *Luckwell* [2014] 2FLR168, the husband had no assets and the principal asset was the former matrimonial home which had been given to the wife by her father. Holman J took the view that the agreements in that case were highly relevant, having been entered into after legal advice with no vitiating factors. The husband was, however, on any view in a "predicament of real need", and Holman J took the view that in the absence of the agreements it was inconceivable that any court would not have made a substantial award to the husband [143]. Notwithstanding that conclusion, the judge afforded "as much weight as possible to the fact and contents of the agreements", and whilst he ordered the wife to provide a sum for the husband to purchase a property for his occupation, he nevertheless made an order that the property be sold when the youngest child became 22, and that upon sale 45% of the net proceeds of the sale were ordered to be repaid to the wife. Sharing was thereby wholly excluded.

91. More recently, Roberts J had cause to consider a prenuptial agreement in *KA v MA (Prenuptial Agreement:Needs)* [2018] EWHC 499. This was a case where, as here, it was held that the wife had freely entered into the prenuptial agreement. It was accepted by Counsel for the wife that in those circumstances the computation of the wife's award should be driven by her generously interpreted assessed needs rather than any application of the sharing principle [52]

92. The central issue in *KA v MA* was the assessment of those needs and, far from there being any suggestion that sharing should form any part of her provision, the question was as to the extent (if at all) the assessment of those needs should be constrained by the existence of the prenuptial agreement together with the future welfare of the child of the marriage [79].

93. Roberts J rightly reminded herself that, notwithstanding the existence of the prenuptial agreement, she had to have regard to all the factors set out in s25(2) MCA 1973 with the first consideration being the welfare of the child [90].

94. She concluded:

> "[110] I am satisfied that a fair outcome in the assessment of both housing and income needs in this case must reflect the fact that this wife agreed to restrict the ambit of her financial claims should the marriage end in divorce."

95. In this case, Francis J, having found none of the vitiating factors to be present, rightly concluded that the Supreme Court in *Radmacher* had left the court with a wide residual discretion as to the definition of what is fair in any given case [55] and rejected what he believed to be Mr Chamberlayne's submission that a "very unfair prenuptial agreement" should be "ripped up".

96. It might be thought that, up until this stage, the judge's view is entirely uncontroversial. It is at the next stage of his analysis that Mr Chamberlayne submits that the judge fell into error by concluding that the effect of the prenuptial agreement, following the approach taken by Moor J in *Z v Z* and Holman J in *Luckwell*, was to restrict him to making an order limited to one to meet the wife's needs [62].

97. Mr Chamberlayne submits that the judge was wrong to conclude:

    i) That the wife had "lost her sharing claim by reason of the prenuptial agreement"; and that, therefore,

    ii) Having found the prenuptial agreement to be unfair, the judge erred in directing himself that he was thereafter limited to making only such order as would satisfy her needs;

98. In the judgment, it is clear that the judge took the view that, having found there to be an effective prenuptial agreement, he could only (to use the judge's own, phrase) "invade the husband's assets" to the extent necessary to provide for the wife's needs, and that payment of additional funds (by way of the sharing principle) was not open to him. The judge decided this notwithstanding his finding that *Radmacher* left him with a wide discretion as to what is fair in any given case. Having found himself unable to make an award providing for the wife's needs as a consequence of what he had held to be a valid MPC, the judge was left with no other option within the financial remedies proceedings other than to make declarations in relation to the parties' strict property rights.

99. In summary, therefore, the route followed by the judge in relation to the prenuptial agreements was that:

    i) He found there to be no vitiating features which would preclude the implementation of the agreement;

    ii) He was aware from *Radmacher* that parties to such agreement are able to "contract out" of sharing;

    iii) In *Z v Z* and *Luckwell*, where the agreements had been held to be valid, the courts had made only needs-based orders.

    iv) He concluded said that [62] "the effect of the above is… that I am now to approach the case on a needs basis".

100. In my judgment, this analysis cannot properly be characterised as an exercise of discretion by the judge on the facts of the case; rather it is clear from the totality of the judgment that he felt himself to be in a straitjacket and that on the authorities, he was driven inexorably to conclude that he only had power to make a needs-based order.

101. In my judgment, the judge did fall into error in going so far as to conclude that the effect of *Z v Z* and *Luckwell* meant that the wife had inevitably "lost" her sharing claim by reason of the prenuptial agreement.

102. It is undoubtedly the case that since the Supreme Court's decision in *Radmacher*, and up to and including Roberts J's judgment in *KA v MA* in March of this year (2018), the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in *Radmacher* [75] by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.

103. In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA*, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

104. It follows that the appeal must also be allowed in relation to Ground 1, given that, in my judgment, the judge was in error in regarding himself as being precluded, consequent upon the prenuptial agreements, from making an order in favour of the wife that was not based on her needs.

105. I should emphasise that in allowing the appeal, the court is not advocating an award in excess of the wife's needs, nor is it saying that having considered the case, and taken into account all the circumstances of the case, the judge will not reach the same conclusion as he did before, namely that this is a "needs case". All this court is doing is remitting the case to the judge, now absent a valid MPC, in such a way as to leave him in a position to exercise his broad discretion, to make such order as he deems to be fair in all the circumstances

Conclusion

106. It follows that:

i) The court is satisfied that there is no valid MPC in this case prorogating any assessment of the wife's maintenance/needs to the Swedish Courts, and that accordingly the appeal on Ground 2 succeeds.

ii) The judge fell into error in concluding that, having found there to be an effective prenuptial agreement which did not meet the wife's needs, he was thereafter constrained to make an order limited to providing for those needs.

iii) Whilst the court must in each case consider all the s25 factors, there is nothing which prevents a wife (or husband) from contracting out of "sharing" and, in such a case where there are no vitiating factors, the court may well in the exercise of its discretion interfere with the terms of the prenuptial agreement only to the extent necessary to provide for the needs of the wife and any children.

iv) Accordingly, the appeal on Ground 1 also succeeds.

107. If my Lords agree, the appeal is allowed and the matter is remitted to the judge for further consideration of the wife's claim for financial remedy against the background of the facts as found by the judge.

108. I would simply add this, the parties have subjected themselves and each other to punishing litigation for over 3 years and at huge financial and emotional cost. The court would encourage the parties, whether through mediation or negotiation with the assistance of their legal teams, to now seek a resolution to the case without the need for further litigation.

Lord Justice Lewison:

109. I agree

Lord Justice Peter Jackson:

110. I also agree