



7 Harrington St  
CHAMBERS

GRANT LAZARUS



**7** Harrington **St**  
CHAMBERS

A GRUMPY OLD  
MAN

BANGING ON  
ABOUT.....



# NUPTIAL SETTLEMENTS

WHITE PAPER  
MARCH 2025

**What counts and will sway the court over pre and post-nuptial agreements, in particular, whether they are fair and binding, supported by case law and practical examples?**

## Supporting Families 1998 (Home Office Consultation)

- 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)

# Radmacher v Granatino [2010] UKSC 42

- 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?

**“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.”**

Lord Phillips Para 75

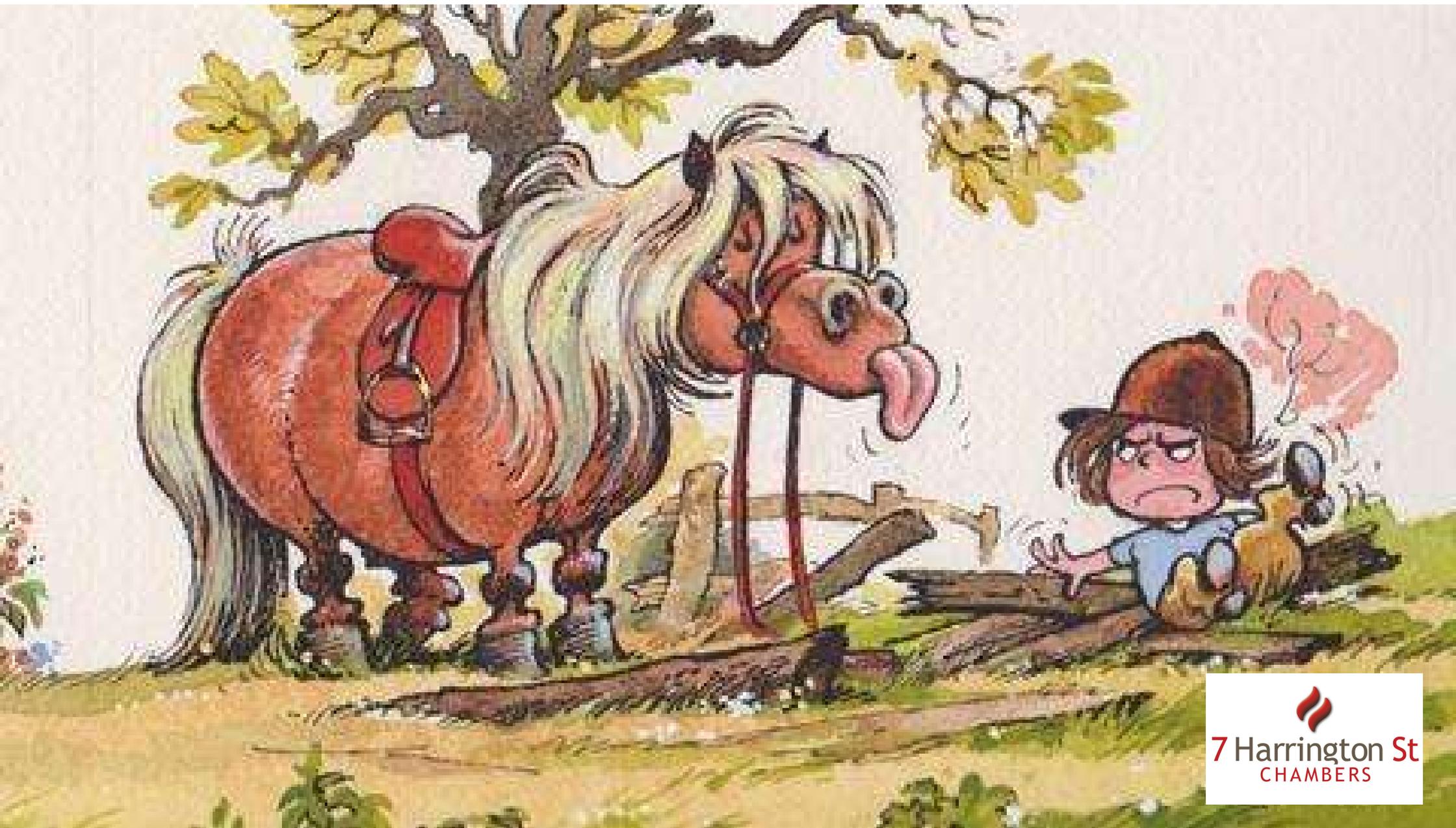
“...the law of marital agreements is in a mess.

It is ripe for systematic review and reform.”

Lady Hale para 133  
( favouring  
Parliamentary rather  
than Judicial reform)

**“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?”**

Lady Hale’s preferred  
Question para 169



1. Should there be a Preliminary Issue hearing?
2. How many days/weeks ahead of the wedding ceremony should/must the PNA be signed?
3. Is full disclosure mandatory?
4. Is independent legal advice mandatory?
5. How unfair do the consequences of a PNA need to be for a Court to decide not to follow the parties' (agreed) intentions? (and what will the Court then do?)
6. Should the PNA make provision for Review?
7. Is the law relating to Nuptial Agreements 'oven ready' for reform?

# The Preliminary Issue Hearing: Does R have to 'show cause'?

Crossley v Crossley [2007] EWCA Civ 1491

- smash and grab. Forms E with no supporting documents or Qs
- S v S (Ancillary Relief) [2008] EWHC 2038 no further docs after agreement at round table meeting
- (per Peel J) WC v HC [2022] EWFC 22 Pre and Post NA **can be** “*presumptively dispositive*”
- But (per Eleanor King J in S v S) OK to have prelim issue hearing as to existence of PNA or entitlement to resile by reason of fraud, misrepresentation, duress/undue pressure, but if fairness of PNA is the issue- to have a preliminary issue hearing may be to determine the case in a vacuum, and to fail to consider all circs and the statutory criteria

# Timing (Law Commission 2014 now 28 Days); Full Disclosure; Independent Legal Advice

## Timing

To sign less than 28 days before wedding is NOT fatal.

- *BL v OR [2023] EWFC 229* (Cohen J : 21 days)
- *HD v WB [2023] EWFC 395* (Peel J : the day of the wedding)
- *Helliwell v Entwistle [2024] EWHC 740 (Fam)* (Francis J : the day of the wedding)

Disclosure: Although full disclosure is the ‘gold standard’ it may not matter that the richer party fails to disclose the full extent of their (non-marital) wealth  
Again, Francis J in *Helliwell v Entwistle* (at para 103)

“whilst understanding that full and frank disclosure is always the gold standard to aim for in a prenuptial agreement, if, as here, there is an understanding that one party is exceptionally wealthy, you cannot, as the economically weaker party, simply get out of the consequences of the prenuptial agreement because the number that was provided in terms of the wealth was a number that was lower than the truth or lower than it should have been. The judge will look at the effect in each individual case.”

# BUT

TRNS v TRNK [2023] EWFC 133 Cohen J

Dismissed H's 'Notice to show cause' re a Post Nup (after a separation and reconciliation) as H had failed to update accounts to show business worth £14.5m and not merely the £935k paid at purchase

...the final para of judgement was that Cohen J would hear from parties further in the light of his findings.....

# Independent Legal Advice

- The important point is **understanding**. The absence of legal advice is not an Edgar ‘vitiating’ factor. But the provision of a Certificate of Independent Legal Advice removes one of the potential issues.
- Go back to Radmacher requirement. No requirement for Independent Legal Advice but
- **“with a full appreciation of its implications”**
- H in Radmacher **chose not to take legal advice**
- ***BI v EN EWFC [2024] 200*** Cusworth J. PNA signed 7 days before wedding and with and no legal advice, but with understanding of its effect.

# Absence of legal advice continued

- *NM v PM [2024] EWFC 199 (B)* DDJ Nahal- Macdonald.
- Preliminary issue hearing as to construction of PNA (Q: were properties acquired after marriage excluded by agreement). H a solicitor and W a family barrister (not FR). CHOSE not to take advice, but both fully understood. (So far as GL aware, not appealed)

How unfair is "unfair enough" (and then what will the Court do?)

Radmacher – Phillips LJ

- '[t]he 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.
- WHAT DOES THIS MEAN?

*Kremen v Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement) [2012] 2 FLR 414 (Mostyn J) at 72*

*‘need may be interpreted as being that minimum amount required to keep a spouse from destitution’.*

On the other hand, he disapplied the PNA because of inadequate disclosure and lack of any legal advice.  
*(H was businessman who tried to hide all assets)*

But then..... *Ipeckci v McConnell [2019] 2 FLR 667* and  
*Cummings v Fawn [2024] 1 FLR 117*

- Again Mostyn J
- ‘I do not take the language used by the Supreme Court, namely “*predicament of real need*” as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play would be markedly less than needs in ordinary circumstances.’
- In every needs case there is a range of possible future standards of living of the application within which the court can alight in a pure exercise of discretion immune from appellate review.’

And for the ultimate proof that the answer is always 'how long is a piece of string'

- Peel J in *AH v BH [2024] EWFC 125* at paras 46-49





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# Does a ‘predicament of real need’ mean that the Court must/will interfere?

*NO v PQ [2023] EWFC 36 B* Recorder Taylor

Not necessarily.

Not even a PNA or a Post NA, or a formal Separation Agreement, but both parties had acted on informal agreement, and H had lost his ‘share’ in a a failed business venture. H now in a ‘predicament of real need’ and sought half of FMH- but not to meet housing needs which were met by new partner, rather to start another new venture.

The Court refused.

# Provision for Review?

- (at least) 2 schools of thought
  1. If PNA doesn't provide for review, can't be criticized for failing to review.
  2. If the parties don't provide for review (and actually review, even if not alter ) there may well be a change in circumstances that leads court to conclude that the consequences of the PNA are NOW unfair.

The longer the marriage has subsisted, the greater the chance that the present circumstances are now very different from what had been envisaged. ( See Holman J in *Luckwell v Limata [2014] EWHC 502*)

# Statutory Reform?

- A topic that would take (more than) 25 mins by itself
- (Part of) Baroness Deech (and Baroness Shackleton) proposals
- See Baroness Deech in FRJ July 2024 at <https://financialremediesjournal.com/content/reform-of-financial-provision-on-divorce.6f2834c64f574ec4b237f04117e05f4c.htm>
- But then see Sam Hillas KC at <https://financialremediesjournal.com/content/a-reply-to-baroness-deech-rsquo-s-argument-for-reform.cdc353de38014dfbad8c4b4560dbf5d4.htm>

And then

- Pre-Nuptial Agreements: an ‘Oven-Ready’ Solution to a Pressing Problem? A House of Lords Debate at <https://financialremediesjournal.com/content/pre-nuptial-agreements-an-‘oven-ready’-solution-to-a-pressing-problem-a-house-of-lords-debate.1be5582dbe234d5ba08acc560f0c760a.htm>

# Conclusions (when drafting)

1. Give yourself and both parties time
2. Try to ensure full disclosure and independent legal advice.
3. Try to avoid creating a predicament of real need
4. Review at least on birth of children.

# Conclusions (when drafting) continued

5. If Counsel, ensure that your Professional Indemnity Insurance on retirement is sufficient.....

# Conclusions (when relying on or contesting)





Grant Lazarus

Barrister and MCI Arb (and Grumpy Old Man still  
banging on about .....everything)



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