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Agreement in principle:
How do you reopen or vary
agreement-in-principle
deals that never made it
into a sealed consent order?

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“If you have reached agreement, then it is almost impossible to persuade a Court that the agreement should not be upheld. This means that you should not accept an offer unless you are confident that you can live with it and you should not make an offer unless you can live with it being accepted (and therefore made almost certainly binding) by the other party”

- Me (before pretty much every pFDR/ FDR I have ever done)

Basics

- *Xydhias v Xydhias* [1999] 1 FLR 683
 - Agreement ≠ Court order
 - Court must evaluate the order and decide whether or not to exercise its discretion in accordance with the agreement
 - Ordinarily the fact of agreement would serve to reduce legal costs/ time expended in reaching finality

- *Granatino v Radmacher* [2010] UKSC 42, [2011] 1AC 534
 - *“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.”*

- Is there a difference between the principles applied for pre or intra-nuptial agreements and post-nuptial settlements (including *Xydhias* type agreements)?
- No; *Helliwell v Entwistle* [2025] EWCA Civ 1055

- BUT the likely proximity of a *Xydhias* agreement to the Court's exercise of discretion may be an important practical distinction
- Compare a typical *Xydhias* situation with e.g. *MN v AN (Prenuptial Agreement)* [2023] 2 FLR 756 where it was argued (without notable success) that subsequent events had weakened the force of the agreement

- Disclosure
 - Enough to make a decision (per Radmacher),
 - Xydias situation is often in proceedings or agreed to full disclosure as part of process
 - Expectations may well be different
- Legal advice (or opportunity to take legal advice)
- Standard contractual principles
- Undue influence
 - WC v HC [2022] EWFC 22

- Fairness

- *Luckwell v Limata* [2014] EWHC 502

- Otherwise unimpeachable pre-nuptial contract still not fair overall and so departed from by the Court to meet needs (just)

- We are unlikely to be advising our clients to settle at a point below fairness and so unless they ignore our advice how often is this going to arise in a *Xydhias* situation?

- New clients?

- Super-intervening events; Barder
 - Unlikely to apply in the ordinary context of Xydias agreements

TRNS v TRNK [2023] EWFC 133

- As part of negotiation of a post-nuptial agreement, H failed to reveal that the gross value of a business had increased massively since the last round of disclosure
- Post-NA was not upheld on the grounds of material non-disclosure
- Obligation to update disclosure exists right up to the completion of the agreement

- Not all non-updating of disclosure will be relevant and justify the agreement being set aside
- However, anything which would affect the ability of the other spouse to make an informed decision **must** be disclosed

Cummings v Fawn [2023] EWFC 830

- The facts
 - August 2020 W entered into an FR agreement and then resiled from it
 - September 2021 W entered into an FR agreement and then resiled from it
 - 10 February 2022, W entered into a further agreement (in the form of a signed consent order)

- On 22 February 2022, W sought to resile from the agreement, asserting that it was not fair (it not meeting her needs)
- W accepted that the order was a concluded agreement (but relied on it not being fair)
- Later she also argued that there had been material non-disclosure in relation to the details of an inheritance
- The first instance judge upheld the agreement (on trial a few months later)
- On appeal Mostyn J set aside the agreement and ordered H to pay costs

- What lessons do we learn?



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- To assess needs, the Court must make findings on the balance of probabilities as to what those needs are (including liabilities)
- BUT the assessment of those needs will be at the 'left hand side of the bookcase'

- H had not provided proper disclosure in relation to his inheritance (even though W knew about the inheritance and could have asked questions and did not)
- “Fraud unravels all”
- Material non-disclosure = fraud

- “[75] Therefore, where the court is dealing with an application to set aside a consent order, (or, as here, an application that a draft consent order should be rejected) on the ground of fraudulent non-disclosure, **the court should not entertain any argument that the victim of the non-disclosure could, with due diligence, have discovered the material facts...**

and should apply stringently the principle that the consent order, and the underlying agreement, must be set aside unless the non-discloser can show by clear and cogent evidence that a reasonable person in the position of the victim of the deception would, if she had full knowledge of the facts, have reached the same agreement.”

Helliwell v Entwistle [2025] EWCA Civ 1055

- Court of Appeal approved Mostyn J's reasoning in *Cummings*
 - All agreements are subject to the same legal principles
 - Deliberate non-disclosure = fraud
 - A stringent approach must be taken in relation to deliberate non-disclosure in relation to any form of agreement (whether pre, intra or post-nuptial)
 - Absence of due diligence not an excuse

Procedural considerations

- Warn clients who may be non-disclosing of potential consequences (even where questions have been poorly drafted)
- Be aware that not everything may be relevant even if deliberately non-disclosed (albeit the non-discloser needs to provide '*clear and cogent*' evidence to rebut the presumption)

- How to manage such a situation?
 - Crossley v Crossley/ S v S?
 - Formal pleadings?
 - Disclosure by list?
- Does your approach change depending on whether or not you are the one seeking for the agreement to be upheld?

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