

Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate

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Introduction

In English Law, the division of matrimonial assets upon divorce is a matter of principled judicial discretion, guided by s.25 of the Matrimonial Causes Act 1973. In deciding which assets should be shared, and in what proportions, a judge must have regard to considerations such as the welfare of any child of the family, the financial needs of either party to the divorce, as well as their respective current and future income levels. In addition, a number of judicially-developed principles give further guidance. In *White v White*,¹ it was clarified that ultimately a judge must seek to achieve ‘fairness’ in his or her division of the assets. In this case, Lord Nicholls specified only that this meant ‘there is no place for discrimination between husband and wife and their respective roles’.² Fairness was given further shape in *Miller v Miller, McFarlane v McFarlane*,³ where the three strands of fairness were developed – the principles of ‘needs’, ‘compensation’, and ‘sharing’. However, some have argued that a fourth principle has now appeared – that of ‘autonomy’, where parties can have a more significant say in how their matrimonial assets are divided in the form of prenuptial agreements.⁴

Until 2010, English law had always been shy about recognising, and giving effect to, prenuptial agreements. Past decisions, such as *F v F*,⁵ made clear that prenuptial agreements were to be frowned upon as they undermined the institution of marriage by inviting the newly-wed couple to contemplate the end of their union. This initial outright refusal gradually softened over the years. The current position is that summarised in the landmark decision of *Radmacher v Granatino*.⁶ Here, the Supreme Court recognised that judges should, depending on the circumstances, give weight to such agreements as part of their exercise of discretion under the Matrimonial Causes Act 1973. The Court cautioned that judges were not to blindly follow the terms set by the divorcing couple, but were to assess the substantive and procedural fairness of the terms; taking into account those that met the tests and discarding others. The current approach is best summed up as follows:⁷

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.

¹ [2000] UKHL 54, [2001] 1 AC 596.

² *ibid* 605.

³ [2006] UKHL 24, [2006] 2 AC 618.

⁴ See, e.g., Alison Diduck, ‘Ancillary Relief: Complicating the Search for Principle’ (2011) 38(2) *Journal of Law and Society* 272.

⁵ [1995] 2 FLR 45.

⁶ [2010] UKSC 42, [2010] 2 FLR 1900.

⁷ *ibid* [75].

Though much has been written about the merits of prenuptial agreements generally,⁸ there has not been as much focus on the adequacy of the standards of procedural fairness laid down in *Radmacher*. An agreement is ‘procedurally fair’ when it is ‘voluntarily and knowingly made, with an understanding of its legal consequences, after each party was made aware of the material facts relevant to the agreement (particularly the other party’s financial resources).’⁹ By analogy with contract law, this typically means prior to signing the prenuptial agreement both parties should have received independent legal advice and disclosure of each other’s assets. Neither party should have been under any duress or undue influence to consent to the agreement.

Using a selected range of judgments both pre- and post-*Radmacher*, this article will examine judicial assessments of the procedural fairness of prenuptial agreements. The focus in particular will be on the requirements for a prenuptial agreement to be valid, namely independent legal advice and financial disclosure – two factors that relate to the amount of, and accuracy of, the information that a party receives prior to signing a prenuptial agreement. This essay seeks to examine not only the results of the cases, but also how the courts have developed and interpreted these requirements of procedural fairness. It will be argued that there is some lack of consistency and nuance when it comes to judicial approaches to procedural fairness, and that this results in failures to fully account for the impact of surrounding context on parties’ decision-making processes. Though recent case law shows that judges are beginning to take a more nuanced approach to analysing the procedural fairness of an agreement, a predominantly malleable and vague approach to the exact requirements of procedural fairness leaves weaker parties vulnerable and perpetuates the questionable assumption that parties are on fully equal footing as autonomous beings when entering these agreements.

As the arguments for better regulation of procedural fairness are presented in this article, it is important to remember that, so long as the agreement does not leave either party in a ‘predicament of real need’,¹⁰ a party to a prenuptial agreement is theoretically able to set any terms he or she wants, and therefore contract out of any of the other important principles of fairness that were developed in case law – indeed this is exactly what happened to Mr Granatino in *Radmacher*. The agreement he had signed purported to bar him from any financial claims as against his wife. The Supreme Court only deviated from the agreement insofar as they thought was necessary to accommodate Mr Granatino’s ‘needs as a father, carer and home-maker for the children [...]’. There is no case for making that home and financial support his to command for the whole of his life-time.¹¹ The fact that the couple now had children led the court to conclude that it would not be wholly fair, based on the ‘needs’ strand of fairness, to deny Mr Granatino any entitlement to his wife’s assets as the agreement had not envisioned what should happen in such circumstances. It is though crucial to note that his entitlement to financial support was limited only to what was required to fulfil his duties as a father.

Therefore, it is of utmost importance for both parties to a prenuptial agreement to recognise that the document that they are agreeing to bind themselves to is capable of curbing, or

⁸ See, e.g., Jonathan Herring, Robert George et al, ‘Ante-Nuptial Agreements: Fairness, Equality and Presumptions’ (2011) 127 LQR 335.

⁹ Gail Brod, ‘Premarital Agreements and Gender Justice’ (1994) 6 Yale J. of Law and Feminism 229.

¹⁰ *Radmacher* (n 6) [81].

¹¹ *Radmacher* (n 6) [130].

removing, the legal rights to which they might otherwise have been entitled to under the statutory or judicial principles. Prenuptial agreements are inevitably entangled with issues of gender and economic inequalities, because their terms are usually set by the wealthier spouse seeking to protect their assets from their more economically vulnerable spouse.¹² To quote Baroness Hale:¹³

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.

1. Independent Legal Advice

Prenuptial agreements are drafted in a wide variety of circumstances and though they involve lawyers, the costs of the legal service may be provided for by only one party to the prenuptial agreement, which raises questions as to the adequacy of advice received by the other party. The Law Commission's recommendations suggest that 'lawyers will need to ensure that they advise fully on the client's specific situation, rather than only providing generic information about qualifying nuptial agreements.' Complicating matters further are cases with a multi-jurisdictional aspect, involving couples who drafted their agreements elsewhere before moving to, and divorcing, in England. The following paragraphs will explore some of the difficulties that arise with regards to the adequacy of legal advice received by parties prior to signing a prenuptial agreement.

The facts of *Radmacher* do not mirror the typical circumstances under which a prenuptial agreement is made. The wife's father insisted upon the agreement to protect the family wealth. The applicant, Mr Granatino, had been a City banker for many years before deciding to study a DPhil in Biotechnology at Oxford University. The agreement that he signed purported to exclude him from making any financial claims against his wife in the event of their divorce. Mr Granatino had not received independent legal advice prior to signing the agreement, but the Supreme Court decided that it would be fair to hold him to the agreement as his level of sophistication indicated that he had sufficient understanding of the consequences that he consented to. The insistence on a flexible approach to procedural requirements, including the need for independent legal advice, appears to cater primarily to situations where a spouse who can be assumed to know what he was doing is disallowed from arguing that procedural gaps should reduce the weight of the agreement. The lack of a hard and fast rule as to whether legal advice is needed means that the courts resort to making assumptions about the parties' understanding of the agreement, attributing thoughts and motives behind the parties' actions at the time the agreement was signed.

Though the presence of legal advice is often said to contribute considerably in favour of giving great weight to an agreement,¹⁴ the assumed superfluous nature of independent legal advice has become a running theme in cases following *Radmacher*. In *V v V*,¹⁵ the judge found that 'neither of the parties had advice as to the impact in Swedish law (the jurisdiction in which the

¹² Brod (n 9).

¹³ *Radmacher* (n 6) [137].

¹⁴ See, e.g., *Luckwell v Limata* [2014] EWHC 502 (Fam) [133]: 'There is no doubt that very great weight indeed should be given to the agreements in this case [...] They were entered into freely by a mature man after expert legal advice'.

¹⁵ [2011] EWHC 3230 (Fam).

agreement was concluded), or in English law, of property being marital property or not being marital property [...] they entered into the agreement on what they understood its effect to be absent advice',¹⁶ but that the couple 'as intelligent people, were aware of its obvious purpose, notwithstanding that the wife (and, on the evidence and findings, the husband) did not have advice concerning it, or its effect'.¹⁷ Similarly in *Z v Z (No. 2)*,¹⁸ despite 'no formal advice given by the Notaries',¹⁹ the judge held that 'the Agreement was entered into by both parties freely and with full understanding of its implications'.²⁰ A similar finding was made in *SA v PA*,²¹ where again the judge acknowledged that the wife 'had only the impartial but not strictly independent advice of the notary' but concluded that 'the wife freely entered into [the agreement] with a sufficiency of advice to enable her to appreciate its implications'.

These cases illustrate the jump in reasoning that judges typically make, where they come to conclusions about the parties' understanding of the agreements based on tangentially relevant information about their education and career backgrounds. Truly, it is difficult to argue the soundness of these decisions when consideration is given to the fact that without legal advice, a spouse is likely unaware of what his or her entitlement under the default regime is and would thus not perceive the full extent of the benefits which he or she is giving up.

Judges have often said that there is a diminished importance attached to receiving legal advice because the parties are intelligent and well-educated. Thus it is assumed that even if legal advice had been given, it would not have affected the parties' decisions to sign the prenuptial agreement.²² But there are numerous uncertainties surrounding this flexible approach. Firstly, there is latent ambiguity to this test. It is unclear whether legal advice should have affected the decision to sign a pre-nuptial agreement, or a particular pre-nuptial agreement. If it is the former it clearly ignores the reality that, faced with the option either to agree to a pre-nuptial agreement or to refuse and not marry a person they are emotionally attached to, most would rather sign a pre-nuptial agreement. If it is the latter, then the focus of the inquiry must shift to whether the claimant would have agreed to those specific terms had he or she received legal advice about their effect.

The courts' cavalier approach to the need for legal advice suggests that the test in use is the former version. However, this is problematic because the lack of legal advice need not necessarily affect the very decision to sign a pre-nuptial agreement before the absence of advice can be considered consequential. A better test should perhaps be to ask whether, given the complexity of the terms of the agreement, the personalities of the parties and their relationship with each other, a reasonable person would have deemed it appropriate to seek legal advice. In a relationship where one party leaves financial arrangements completely up to the other, for example, the first party should be encouraged to seek independent legal advice if she were to

¹⁶ *ibid* [49].

¹⁷ *ibid* [48].

¹⁸ [2011] EWHC 2878 (Fam).

¹⁹ *ibid* [46].

²⁰ *ibid* [45].

²¹ [2014] EWHC 392 (Fam) [57].

²² See, e.g., *V v V* (n 15) [49]: 'the wife did not seek advice because she did not know that she should do so, but the whole tenor of her evidence, and of the findings made, was that if she had been given advice on the impact of the agreement in Swedish and/or English law she would have entered into it willingly'.

consider signing a pre-nuptial agreement on her partner's terms. Though it may be more difficult in practice to employ this more complex test, it has the advantage of better reflecting the contextual realities of the situation and will function more effectively as a means of ensuring that disadvantaged parties receive adequate protection.

Secondly, there is almost no discussion in the cases of how or why judges come to conclusions about parties' level of legal understanding based on factors such as educational background. It is not explained, for example, how the fact that 'the Wife obtained an MA from Dauphine University in Paris' is really relevant to the question of whether she would have understood the legal effects of a pre-nuptial agreement in England without any advice.²³ Having a degree and understanding fully the possible legal implications of an agreement are not, after all, the same thing - the former does not necessarily entail the latter. Though it may be reasonable to assume that having a degree entails a better likelihood of legal understanding, unless an applicant has done a law degree specifically it is at best careless to assume that an applicant has an adequate understanding of the prenuptial agreement without any professional assistance.

Thirdly, the courts have not really explained or justified why having full awareness of the implications means merely having a basic understanding of the agreement. Neither have the courts really discussed the particular challenges facing cross-jurisdictional cases; involving couples who married and created their prenuptial agreement in one jurisdiction, and subsequently divorced in another. Such issues have only recently been addressed. The presence of an agreement made in a foreign jurisdiction was considered a pivotal circumstance in the cases of *Y v Y*,²⁴ and *B v S*.²⁵ In *Y v Y*, Roberts J held that the lack of independent legal advice meant that the wife had not entered the agreement with a full awareness of the implications. The agreement was drafted and signed in France, but the couple later divorced in England and the wife had not been advised as to what its effects would be in English law. Her basic understanding of the agreement was also worryingly inadequate. The wife knew only that the agreement established a 'separation of property regime' as opposed to the 'community of property regime'; the default regime for married couples in civil law countries where upon marriage the couple is considered to share legal ownership of all their property.²⁶ However, she had not been advised that it would have precluded any financial claims she might make on her husband's assets upon divorce.

In *B v S*, Mostyn J noted that having a full appreciation of the implications does not carry with it a requirement to have received specific advice as to the operation of English law on the agreement in question. However, 'it must mean more than having a mere understanding that the agreement would just govern in the country in which it was made [...] the parties [must have] intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution'.²⁷ Thus he suggested that the requirement need not go so far as to make it mandatory that parties be advised as to every possible jurisdiction they might live in, but they should at least

²³ *Z v Z* (n 18) [4].

²⁴ [2014] EWHC 2920 (Fam).

²⁵ [2012] EWHC 265 (Fam).

²⁶ *Y v Y* (n 24) [5].

²⁷ *ibid* [20].

be warned that different jurisdictions might affect the impact of the agreement to ensure that they intend the agreement to have effect any way.

In *Kremen v Agrest*,²⁸ which concerned a post-nuptial agreement, the judge acknowledged that the wife had received some help from her husband's relative with regard to the signing of the agreement. However, he concluded that she did not receive truly independent legal advice. This meant that whilst the wife 'would have understood the literal words of the agreement she did not know what rights under English law she was foregoing by the agreement. Her agreement was therefore not an informed one.'²⁹ Similarly in *BN v MA*, though Mostyn J repeated that legal advice was not strictly necessary, he acknowledged that 'in the usual run of cases [...] a full appreciation of the implications will normally carry with it a requirement of having at least enough legal advice to appreciate what one is giving up.'³⁰

These cases offer a more substantive notion of what it means to give fully informed consent. The legal effects of pre-nuptial agreements in England mean that it is often the case that simply having a basic understanding does not usually suffice because the outcome of such agreements tempers the exercise of the court's jurisdiction to make financial provisions, and by extension limits the reach of principles of equality that were developed in the case law. For example, the agreement in *Radmacher* purported to exclude all financial claims as between the spouses. In the end the court, in giving effect to the agreement, gave Mr Granatino provision based only on his needs as a father, whereas under the default regime he could have argued for an allocation based on the principles of sharing and compensation as well. Such terms are arguably a more serious consequence than opting for a separation of property regime (usually the case with pre-nuptial agreements concluded in other European jurisdictions, where the parties would simply agree that their property would remain under separate, rather than shared, ownership upon their marriage). Thus, the courts should consistently emphasise that full appreciation of the implications of an agreement means that a spouse should understand what he or she would otherwise be entitled to under the default discretionary regime in England. This is particularly important considering that there may be very stark differences between what a spouse would receive with an agreement in effect, and what would have been received under the exercise of statutory judicial discretion.³¹

Finally, in the context of contractual undue influence, Auchmuty³² questions the assumption that legal advice would have made no difference. She objects to the idea that signing an agreement in the absence of advice should be acceptable, and in effect argues for a greater appreciation of the nuances of internal pressure experienced by couples in prenuptial agreements.

²⁸ [2011] EWCA Civ 259.

²⁹ *ibid* [64].

³⁰ [2013] EWHC 4250 (Fam) [30].

³¹ See, e.g., Paul Pavlou, 'Prenuptial Agreements: Back where we were? *Kremen v Agrest*' [2012] 42(8) Family L.J. 957: in *Kremen v Agrest* 'had the agreement been enforced the wife would have been left with approximately £1.5m', but because the judge here decided to give no weight to the agreement, 'the sharing principle applied and the wife was given a total lump sum of £12.5m, of which, £8.3m was 'maintenance'.' In *Radmacher* (n 6) itself, Mr Granatino's financial entitlements were limited to a reasonable assessment of his needs.

³² Rosemary Auchmuty, 'Royal Bank of Scotland Plc v Etridge (No. 2)' in Rosemary Hunter, Clare McGlynn, and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (1st edn, Hart Publishing 2010) 165.

In her feminist rewriting of the *Royal Bank of Scotland v Etridge (No 2)* judgment,³³ she points out, '[w]ho knows whether Mrs Etridge would really have signed the legal charge had she understood its full effect? [...] It is at the very least patronising, and may even constitute evidence of actual undue influence, to assume she would have signed the document anyway, even in full possession of the facts'.³⁴ In the context of pre-nuptial agreements, this criticism highlights the importance of the courts engaging in more careful analysis of whether legal advice would have been appropriate given the circumstances, rather than simply assuming that legal advice would have made no difference, as detailed above in cases such as *V v V* and *SA v PA*.

The courts may not have wished to impose a blanket requirement of independent legal advice when they have explicitly discretionary powers under s.23 of the Matrimonial Causes Act to divide the parties' assets. However, it is still worrying that the courts should so easily conclude that legal advice was unnecessary based on assumptions about the parties' level of education, and, as Auchmuty has said, whether such behaviour is 'normal' for a married relationship. The courts have, as a result, refused to make any comment on the appropriateness of waivers to one's rights to legal advice, or the failures of spouses to encourage their partners to seek legal advice before signing their rights away. The role of the judiciary is not merely to resolve disputes but it is also to develop the common law. These cases are an appropriate medium through which the importance of legal advice should be stressed, and best practice ought to be promoted when it comes to negotiating prenuptial agreements. The courts' silence on this issue is even more at odds when one considers that practitioners' guidelines will typically require that parties should receive legal advice before signing prenuptial agreements.³⁵

Perhaps it would be best if judges more frequently acknowledged, 'it will only be in an unusual case [...] that absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a full appreciation of its implications'.³⁶

2. Financial Disclosure

There is no requirement for full and frank financial disclosure – only material lack of disclosure will affect the weight to be given to an agreement. Many of the comments made by judges in the case law suggest that the requirement of financial disclosure is not generally viewed as important. In *Z v Z (No. 2)*³⁷, Mostyn J said 'there was no need for disclosure as both parties knew the financial position of the other'.³⁸ He acknowledged that the wife may not have known the full details of the husband's carried interest and co-investment schemes, but held that it sufficed that she 'knew he was doing well at VCF and making ever greater amounts of money'.³⁹ A similar

³³ [2001] UKHL 44, [2001] 2 FLR 1364.

³⁴ *Ibid.*

³⁵ See, e.g., Richard Todd and Elisabeth Todd, *Todd's Relationship Agreements* (1st edn, Sweet & Maxwell 2013) para 2-036. See also, Jens Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (1st edn, Hart Publishing 2012) 128: '[g]oing forwards, practitioners will still likely advise their clients to follow the [suggested guidelines], if only to try nip in the bud any suggestion of undue influence or irregularities'.

³⁶ *Kremen v Agrest* (n 28) [73].

³⁷ *Z v Z* (n 18).

³⁸ *ibid* [46].

³⁹ *ibid.*

approach was taken in *Radmacher*. Though Mr Granatino never had full disclosure of his wife's assets, the court held that full and frank disclosure was not necessary – 'it was correct in principle for the Court of Appeal to ask whether there was any material lack of disclosure [...] 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.'⁴⁰

The importance of financial disclosure was highlighted in the Law Commissions' recommendations on nuptial agreements, where it was noted that:⁴¹

Disclosure is in the interests of the payee, for whom the qualifying nuptial agreement may provide significant sums, as much as the payer. The payee may wish to check that the payments that have been promised can and will be made. For example, it may be a cause for concern regarding enforcement of payments, if the wealthy party does not have sufficient assets in the English jurisdiction to make the payments promised in the qualifying nuptial agreement.

In his book, Scherpe briefly discusses the merits of a requirement of full financial disclosure.⁴² Though he does not deny that financial disclosure is an important aspect towards ensuring agreements are made fairly, Scherpe is highly sceptical of allowing parties to argue successfully that because there had not been full disclosure, the agreement was not made with a full awareness of the consequences and therefore should be given less weight, or set aside completely. 'Should the policy behind the law seriously allow an argument,' he asks, 'such as 'I thought he/she was worth £10 million and therefore agreed to the separation of property – had I known he/she was worth £125 million, I would never have done so?''⁴³ He argues that in ordinary cases, disclosure would not have affected the decision to sign the agreement and that, 'as with all formal requirements...these generally can be dealt with by the other, particularly the substantive, safeguards.'⁴⁴

It is interesting that Scherpe should have touched on the subject in this way, because decisions made in reliance on facts that turn out to be false is a matter that the law has dealt with thoroughly, in a wide range of contexts – from the doctrine of mistake and misrepresentation in contract law to mistaken payments in the law of unjust enrichment, to lack of disclosure in consent orders in family law. The importance of both parties having as complete and accurate information as possible when negotiating some form of agreement should not be understated.

There are two problems with Scherpe's arguments that the current state of the requirement of material financial disclosure is entirely satisfactory. Firstly, it is clear that decisions made in reliance on facts that turn out to be false are not looked upon lightly in other areas of the law. In contract law, the doctrine of misrepresentation ensures that parties' consent to a contract is not tainted by misinformation.⁴⁵ Similarly, in the law of unjust enrichment parties

⁴⁰ *Radmacher* (n 6) [69].

⁴¹ Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No. 343, 2014) para 7. 55.

⁴² Scherpe (n 34) 495-98.

⁴³ *ibid* 497.

⁴⁴ *ibid* 498.

⁴⁵ Misrepresentation Act 1967.

may claim restitution on grounds that a benefit has been transferred based on a mistake of fact,⁴⁶ or law.⁴⁷ It is difficult to see why inadequate information for spouses negotiating prenuptial agreements should not be treated equally seriously. Secondly, drawing an analogy from property law, the intent of the parties when making a transfer of property is often of great significance – the law generally does not presume that people would readily give away their property voluntarily, with no conditions attached, unless there is evidence to prove otherwise. It is difficult to see why the same approach should not apply to prenuptial agreements – after all, parties to these agreements are often signing away their rights to property that they might otherwise have been statutorily entitled to under the Matrimonial Causes Act.

It may be true that, as Scherpe asserts, precise numbers will not affect the decision of the parties to sign a prenuptial agreement. In many cases the agreement would have been signed regardless of the figures revealed at the negotiation stage, either because of strong emotional pressures – both from the other spouse and family members – affecting the spouse’s decision-making process, or simply due to excessive optimism, leading the spouse to take much less caution with the prenuptial agreement. However, Scherpe’s response, that only material disclosure should suffice because disclosure is unlikely, is problematic. It is impossible to know with full certainty whether a person would have agreed to something or not if given that particular piece of information – indeed it would be paternalistic to make assumptions about this, and in any event surely a better response would be to take greater precautionary steps. The simplest solution would be to require full disclosure from both parties in the process of drafting a prenuptial agreement, as giving both parties all the information that may be relevant will ensure that parties cannot later contest the agreement by alleging that they have not been sufficiently informed.

Moreover, considering that a prenuptial agreement seeks to limit the legal rights of a spouse to property that he or she may otherwise be entitled to, the burden should fall on the party seeking to deprive the other of these rights to show that the applicant has been presented with all the material information prior to signing the agreement. This party should then explain why, if he or she has deliberately omitted information, it was not material to the applicant’s decision to sign the agreement. The respondent is the one who is usually in a position of power over the applicant in these circumstances, and should thus be made to defend his or her decision not to share information which the applicant now claims would have affected his or her consent to the terms of the agreement. As noted by Marston:⁴⁸

The courts’ cavalier treatment of the inequities in prenuptial negotiations only heightens the unfairness of both the bargaining process and the results. Courts often fail to acknowledge the impact of unequal bargaining power on the provisions of prenuptial agreements by emphasizing the contract itself rather than the legal rights the parties have forgone by signing it.

Judicial insensitivity to the presence of circumstances flagging up the possibility of vitiated consent implicitly condones questionable behaviour in negotiations between spouses.

⁴⁶ *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677.

⁴⁷ *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38, [1999] 2 AC 349.

⁴⁸ Allison Marston, ‘Planning for Love: The Politics of Prenuptial Agreements’ (1997) 49(4) *Stan. L. Rev.* 912.

Finally, given recent developments in the law, it would be inappropriate for the procedural requirements of prenuptial agreements to continue to require only material financial disclosure, without distinguishing between different types of respondents. As much as it is within the interests of policy to encourage people to arrange their affairs privately so as to minimise dependence on the already over-burdened family courts, this must not incentivise people to hide their assets from their spouses when negotiating an agreement. The recent Supreme Court judgement in *Sharland v Sharland*⁴⁹ provides a good example of a more nuanced approach to financial disclosure. Though this case concerns fraudulent non-disclosure of assets whilst making a consent order, the same principles could equally apply in the context of prenuptial agreements, as both situations concern ensuring that parties make sufficiently informed decisions. In particular, Baroness Hale's speech evidences the recent trend in family law to borrow legal approaches from contract law.⁵⁰

Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and non-disclosure in contract may be instructive [...]. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case.

Baroness Hale distinguished between innocent misrepresentation and fraudulent misrepresentation. Drawing on the decision in *Smith v Kay*,⁵¹ she stated that whilst there would be scope to argue in cases of innocent misrepresentation that the difference in financial disclosure was not material to the decisions made in the consent order, in cases of fraudulent misrepresentation the defendant cannot deny the materiality of the misrepresentation.⁵² Furthermore, though it would be possible to argue that the misrepresentation would not have led to a significantly different result in the consent order anyway, it would not be fair to place the burden of proving the materiality of the misrepresentation on the claimant – the onus should be on the defendant to prove that the misrepresentation was not material.⁵³

Baroness Hale's approach to financial disclosure is more satisfactory. Much of the discussion about financial disclosure, among academics and the judiciary, does not distinguish between cases of innocent and fraudulent non-disclosure. The burden of proof is always on the claimant to show that the lack of disclosure was material to his or her decision to sign the prenuptial agreement. This is highly unfair as the weight accorded to an agreement is conditional upon both parties entering the agreement with sufficiently informed consent – and the respondent's own deliberate, deceitful misconduct would have resulted in the applicant not having the requisite accuracy of information to make a truly voluntary decision.

Perhaps the only recent exception is the curious case of *WW v HW*.⁵⁴ Here, the prenuptial agreement was entered at the request of the wife, who was considerably wealthier than the applicant husband. The agreement provided that neither husband nor wife would make any

⁴⁹ [2015] UKSC 60, [2016] AC 871.

⁵⁰ *ibid* [31].

⁵¹ (1859) VII HLC 749.

⁵² *Sharland* (n 49) [32].

⁵³ *ibid* [33].

⁵⁴ [2015] EWHC 1844 (Fam).

financial claims upon the other should they divorce, save for claims related to child maintenance. Instead of undervaluing his wealth and assets, the applicant overvalued them, because he wanted to secure the agreement and thus the marriage as the wife had made the agreement a condition of the marriage. The husband later sought to derogate from the agreement. The judge proved to be rather unsympathetic to him and it seems clear that the fact that the husband had been dishonest and deliberately misrepresented his finances meant he could not then seek to have the agreement work in his favour.

It remains to be seen whether the emerging approach in *WW v HW* will be followed in subsequent cases, but it is to be hoped that this will be the case. As a matter of principle this would make the law on financial disclosure in prenuptial agreements more consistent with the developments in *Sharland*. This will also ensure that parties to prenuptial agreements are as well informed as possible of the assets at stake, and safeguard the finality of the agreements by limiting scope for contesting them on grounds of insufficient disclosure.

Conclusion

The importance of clear principles to guide judicial assessments of procedural fairness in prenuptial agreements is often underestimated. This is most evident in the numerous judicial comments made about procedural fairness being subsumed under the question of substantive fairness. As a result, developments in the case law have been somewhat erratic and in some cases the legal principles are unclear. This article has attempted to show the manifestation of inconsistencies and lack of clarity in two of the factors of procedural fairness. The need for independent legal advice is often taken lightly, with judges making questionable assumptions about the parties' level of understanding of the legal subject matter. This is especially worrying given that the level of understanding needed to be 'fully-informed' is set at a worryingly basic level. A similar attitude is taken to financial disclosure, the general consensus being that lack of disclosure will rarely affect the weight of a prenuptial agreement, even if done so fraudulently.

Bearing in mind that determining whether a prenuptial agreement is procedurally fair is not an exercise of judicial discretion,⁵⁵ it is easy to see why the development of clear legal principles and more stringent requirements with regards to independent legal advice and full financial disclosure is crucial to ensuring that parties, especially more vulnerable ones, are adequately protected. There are signs that the judicial principles are improving – more recent cases, such as *BN v MA*, *Y v Y* and *WW v HW* suggest stricter approaches to the requirements of independent legal advice and financial disclosure. These cases arguably better capture the essence of the original core principle of procedural fairness enunciated by Lord Philips in *Radmacher*, that agreements must have been entered into 'freely [...] with a full appreciation of its implications.'⁵⁶ It is hoped that such positive developments will continue in the absence of settled statutory rules setting out mandatory procedural requirements.

⁵⁵ *Radmacher* (n 6) [75].

⁵⁶ *ibid* [169].