

CASE COMMENTARY

THE EFFECT OF “FAIRNESS” ON PRENUPTIAL AGREEMENTS

Luckwell v Limata [2014] EWHC 502

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THE BACKGROUND TO THE CASE

Until the seminal judgment of *Radmacher v Granatino*¹ pre-nuptial or pre-marital agreements were given limited weight in English law. Prior to this decision there had been considerable debate about the status in law of all nuptial settlements both pre and post marriage. The key question for *Radmacher* was whether pre-nuptial settlements should attract equal weight as agreements drawn up during the course of a marriage. In *MacLeod v MacLeod*² the Privy Council finally resolved the issue with regard to post-nuptial settlements holding that agreements drawn up post marriage would carry weight when the court decides a claim for financial relief under s 25 Matrimonial Causes Act 1973. The English courts, unlike other jurisdictions, have always been reluctant to uphold agreements, which purport to deprive the court of its jurisdiction³ in deciding financial provision. There was also an underlying presumption that parties to a marriage did not intend their agreements to form legally binding contracts and finding adequate consideration within such agreements was often difficult unless the agreement is incorporated in a deed.⁴ The effect of the Supreme Court’s decision in *Radmacher* was not to reverse this approach. Pre-nuptial agreements were not made binding on the court but rather the court is invited to give weight to all nuptial agreements subject to certain safeguards. The subsequent decision in

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¹ [2010] UKSC 42.

² [2008] UKSC 64.

³ See *Hyman v Hyman* [1929] AC 601; *Edgar v Edgar* [1980] 1 WLR 1410; J Wall, ‘N v N (Jurisdiction: Pre-Nuptial Agreement)’ [1999] 2 FLR 745; J Connell, ‘M v M (Pre-Nuptial Agreement)’ [2002] 1 FLR 654; *X v Y (Y and Z Intervening)* [2002] 1 FLR 508.

⁴ See Judith Bray, ‘Pre-nuptial Agreements under Scrutiny’ (2009) DLJ 131.

*Luckwell v Limata*⁵ gives guidance as to when the court will be prepared to deviate from pre-marital agreements even when the parties have been given independent legal advice and both parties are fully aware of the possible effect of such an agreement.

THE DECISION IN RADMACHER V GRANATINO

The facts of this case are well known. Nicolas Granatino, a French national, claimed financial relief from his very wealthy wife, Katrin Radmacher, a German national on the breakdown of their marriage. This was in spite of a pre-nuptial agreement which both the parties had signed three months before marrying in 1998 in London. The agreement stated that neither party would seek financial provision from the other. It had been drawn up in Germany by a notary and was written in German and as the claimant was not fluent in written German it had to be translated into English by the German notary. The husband had not sought a formal translation nor had he sought legal advice although the German notary had urged him to do so. The agreement was intended to protect the current wealth and property interests of the wife who was also expected to receive further large sums from her family and it had been drawn up partly on the instigation of the wife's father. At the time of the marriage the husband was himself relatively wealthy; he came from what was described in the case as "a well-to-do family"⁶ and he was working as a banker for JP Morgan, earning a salary in excess of £120,000 and he had excellent future prospects. They made their home in London and had two children. However he became disillusioned with banking which had taken its toll on family life and decided to embark on an academic career taking up research studies at Oxford, which led to a considerable loss of salary. By then the marriage was in difficulties and the parties agreed to separate in 2006. In spite of the existence of the pre-nuptial agreement the husband claimed he was not bound by its terms and sought financial relief.

The Judge at first instance⁷ awarded the claimant a substantial sum by way of financial relief. She attached little weight to the pre-nuptial agreement because of the circumstances in which it had been signed; in particular the lack of legal advice although she did take note of the fact that he had agreed to be bound by an agreement which he had then signed. The Court of Appeal disagreed and held that the agreement should have been given decisive weight holding that the judge had been wrong to find that the circumstances in which the pre-nuptial agreement had been reached reduced the weight to be attached

⁵ [2014] EWHC 502 (Fam).

⁶ [2010] UKSC 42 [534].

⁷ Mrs Justice Baron.

to the agreement. It held that the award should make provision for the husband's role as the father of the two children, but should not otherwise make provision for his own long-term needs. The husband appealed to the Supreme Court. As mentioned earlier since *Macleod v Macleod*⁸ the English courts have given effect to post-nuptial agreements but were not prepared to give effect to ante-nuptial or pre-nuptial agreements. The reasons included: fear that pressure could have been brought by the party who had superior financial means when a marriage was imminent and a sense that pre-nuptial agreements would be more appropriate for legislative rather than judicial development. *Crossley v Crossley*⁹ was an exception where the terms of a pre-nuptial agreement were upheld in spite of the fact that it had stated that neither party should apply to court for financial relief. *Crossley* was held to be exceptional on the facts because it had been a short marriage, barely a year between two very wealthy individuals who had both taken legal advice before entering into the agreement. Both were marrying for the second time and both had children from a previous marriage.

The Supreme Court upheld the judgment of the Court of Appeal in *Radmacher* and gave weight to the pre-nuptial agreement. Although it welcomed the decision in *Macleod* for "sweeping away the archaic notions of public policy which have tended to obfuscate the approach to nuptial agreements".¹⁰ It held that *Macleod* was wrong to hold that ante-nuptial or pre-nuptial agreements are fundamentally different from post-nuptial agreements. Three key issues were identified by the Supreme Court:

- 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?

Under (a) the main factors which would detract from the agreement would include evidence of undue influence of pressure or any factor suggesting that the husband or wife did not enter into it with their own free will. Baron J had taken into account the lack of independent legal advice for the claimant but the Supreme Court held that in this case "insofar as the safeguards were not strictly satisfied, this was not material on the particular facts of this case."¹¹

⁸ [2008] UKSC 64.

⁹ [2008] 1FLR 1467.

¹⁰ *Macleod* (n 8) [561].

¹¹ *Ibid* [562].

CASE COMMENTARY

The Court accepted that in cases in the past the nationality of the parties may have had some influence on the issue. Where the parties were from a jurisdiction or jurisdiction where an ante-nuptial agreement would be binding then a court from the United Kingdom in the past would then take judicial notice of this. However the court concluded that “any agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in the future.”¹²

Finally, the court held that in the light of such cases as *White v White*¹³ and *McFarlane v McFarlane*¹⁴ the overriding consideration of any court in ancillary relief proceedings is that of fairness so that criteria must be applied to any ante-nuptial agreement. According to *MacFarlane* the court determines what is fair by looking at the three strands of need, compensation and sharing. These three strands should equally be applied to ante-nuptial agreements to determine whether the agreement and the following proposition should be applied to both ante-nuptial and post-nuptial agreements.

“The court should give effect to a nuptial agreement that is freely entered into by each party with full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.”¹⁵

It is this last factor that of “fairness” the court had to address in the recent case of *Luckwell v Limata*. When will the court hold the terms of an agreement not to be “fair” and so override an agreement that has been entered into freely by two parties who are both fully aware of the consequences of such an agreement? There were several similarities with the facts of *Radmacher*. As in *Radmacher* the case concerned an application for ancillary relief by a husband and there were children of the family who spent time with both parents. Again there was a marked disparity in the financial resources of the two parties. The wife was very wealthy although she fell short of the wealth of Katrin Radmacher. This presented a more difficult case for the court to determine because any financial provision for the father would impact on the lifestyle of the mother and the children, which was not the case in *Radmacher*.

¹² [2008] UKSC 64 [563].

¹³ [2001] 1 AC 596.

¹⁴ [2006] 2 AC 618.

¹⁵ *Radmacher* (n 1) [564].

THE HIGH COURT

The core issue of the case

This case concerned a claim by a husband for financial provision upon divorce. Before the marriage the parties had entered into a “Pre-marital agreement” in which the husband had agreed that he would not make any claim either during or after the marriage in relation to the wife’s separate property or gifts made to her by her family. Two separate “supplemental agreements” were made during the course of the marriage on occasions when the wife’s parents and in particular her father made substantial gifts to the wife. It was agreed that firstly, the marriage would not have taken place had the pre-marital agreement not been made and secondly, the parents would not have made gifts to the daughter unless the supplementary agreements had been made. In making a claim for financial provision the husband was found to be acting in breach of both these agreements. The core issue in the case was how much weight should be placed on the pre-marital and supplementary agreements, by the court in exercising its discretion under the Matrimonial Causes Act 1973, s 25 and further whether it would be right to dismiss the husband’s claim in the light of the agreements.

The facts of the case

The couple involved in the case were Francesco Limata (Frankie) and Victoria Luckwell. Victoria’s parents, Mike and Mary Luckwell, played a key role in the couple’s relationship but had separated in 1997. Frankie and Victoria married in July 2005 but had already been living together for about a year. The marriage date had been brought forward because Victoria was pregnant with their first child. Just less than two weeks before the wedding Frankie agreed to sign a pre-marital agreement [the PMA], which was prefaced with a recital stating:

“Victoria and Francesco each specifically acknowledges and agrees that the marriage would not be taking place without this Agreement having been negotiated and signed by each of them.”¹⁶

The agreement referred to the separate property of Victoria and that of Francesco and at the time Victoria owned a property in London called Elm Row which was worth £750,000 and Frankie owned a flat in Eastlake House which was worth £50,000. Apart from the flat Frankie had no significant

¹⁶ *Luckwell v Limata* [2014] EWCA 502 (fam) [12].

CASE COMMENTARY

assets or property whereas Victoria had “substantial inheritance prospects” from her parents. The judge drew particular attention to Recital K which acknowledged that in certain jurisdictions it may not be possible to oust the jurisdiction of the court’s power to override the terms of an agreement the parties intended that this agreement would be treated as binding and of full force and effect.¹⁷ The judge concluded that “he [Frankie] can have been under no doubt or illusion that in the event of separation and divorce the agreement was still intended to govern” but he also concluded that “Victoria knew from Recital K that the agreement could be ‘overridden’ by the court in certain jurisdictions and will unquestionably have been advised that England and Wales is one of them.”¹⁸ At the time when the agreement was drawn up Frankie had received independent legal advice from a solicitor experienced in pre-marital matters which had been highlighted as a key requirement in *Radmacher*¹⁹ and of course the claimant had not availed himself of such advice in that case.

After the marriage the parties made a series of moves around various properties in London. Initially they moved to a flat at Westbourne Terrace bought with capital from Victoria and her father Mike. After less than a year they moved again to a house in Avonmore Road costing approximately £1 million including legal fees. The cost was financed by Mike and Mary, Victoria’s parents. The judge concluded that without the pre-marital agreement the parents would not have agreed to finance this purchase. A second agreement was drawn up referring to the first PMA. It expressly stated that this house in Avonmore Road would be treated as Victoria’s separate property. Within a matter of months the couple moved again into property at Connaught Square owned by Mike. This was in the words of the Holman J “a fine, period house in a prestigious square, the value of which has escalated in the last few years”.²⁰ Soon afterwards the property was offered to Victoria by Mike on certain terms and conditions. There was no question that the house was being offered to Frankie as well. The judge recognised that at this time December 2007 Mike had a very low regard for Frankie. “I am quite clear that by now Mike had low regard for Frankie and did not trust him an inch. He clearly regarded him as lazy and workshy...He had always regarded Frankie as a gold-digger who had married for money and from whom Victoria’s money and the assets he now proposed to give Victoria had to be utterly protected.”

Mike requested that a second supplemental agreement be drawn up before Mike was prepared to transfer the house in Connaught Square to Victoria.

¹⁷ Ibid [18].

¹⁸ *McLeod v McLeod* [2008] UKPC 64 [19].

¹⁹ *Radmacher* (n 1).

²⁰ *McLeod* (n 18) [31].

Frankie would be allowed to live there but never to own it. One important condition in this agreement was that Victoria would never sell, mortgage or charge Connaught Square without Mike's prior consent. This was not put into writing but in evidence Mike agreed that he thought Victoria would feel bound by the promise she had made to him. Of course this had no effect in law and the judge stated that the court would not be bound by this promise or any other oral agreement between the parties. By 2008 both parties were living at Connaught Square with their young son and two further children were born. Frankie had a series of jobs but was eventually made redundant and the family began to suffer serious problems. Both Victoria and Frankie suffered from mental health issues and then a third child was born with serious health issues.

By November 2012 the marriage was in serious difficulties and Frankie left the family home. In March 2013 Victoria presented a petition for divorce. After Frankie moved out of the family home the personal circumstances of the parties were starkly different. Victoria led an affluent lifestyle supported by her parents from whom she received £81,000 per annum enabling her to have a series of foreign holidays and to engage the services of a nanny. By contrast Frankie had no fixed address and lived firstly with his mother who ran a bed and breakfast hotel and then with the help of a loan he took a short lease of a small flat where he could have his children to stay. He had very limited earnings from a job paid at the minimum wage. With this background the claimant husband made a claim for financial provision. The case can be seen as a challenge to the effectiveness of a pre-nuptial agreement made with the aid of legal advice and where both parties are fully aware of the effect of signing an agreement.

The preliminary issue: should the case be heard in private?

The case was heard before Mr Justice Holman who sat throughout in public. The preliminary issue to be determined by the judge was whether the case should be heard in public. He applied Rule 27.10 of the Family Procedure Rules 2010²¹ and decided that the effect of the rule was that it provided a starting point or default position that proceedings for a financial remedy after divorce will be held in private rather than a presumption in favour of cases of this nature being heard in private. He gave a number of persuasive reasons why he thought this case should be heard in public. Firstly he pointed to the strong shift towards greater transparency in family law

²¹ Family Procedure Rules, r 27. 10 provide: '(1) Proceedings to which these rules apply will be held in private, except – (a) where these rules or any other enactment provide otherwise; (b) subject to any enactment provide otherwise.'

hearings²² which he felt was only satisfied by inviting the public into the court room and would not be satisfied by merely publishing judgments. “Whilst greater publication of judgments will make for greater transparency, publication of the judgment alone suffers from the limitation, or even defect, that the public can only read what the judge chooses to say. It is only if the public are able to see and hear from themselves how the proceedings unfold in the court room, what the oral evidence and arguments are, and indeed how the judge comports himself, that there is true transparency, open justice and public accountability.”²³ He argued that since witnesses in other types of cases have to give their evidence in public there was no reason why witnesses in a case determining financial provision should be allowed to give evidence in private. Finally he referred to the fact that the core issue in this case concerning the weight to be given to a pre-nuptial agreement was one of considerable and legitimate current and public interest.²⁴ He concluded that the case should be heard in public.

The findings of the trial Judge

Having considered the facts of the case, Mr Justice Holman pointed out that it was then his statutory duty to apply the different subsections of s 25 Matrimonial Causes Act. His approach followed *Radmacher* was to consider the agreement and the supplementary agreements but only insofar as the factors in s 25 had been met. The most significant factors in this case were the resources of each party, their needs and their contributions. He concluded that at the time of trial neither party had any earned income although Frankie, who was currently studying for a degree had the capacity to earn a reasonable salary in the future. He also pointed out that although both parties needed a suitable home Frankie did not have a permanent home so the children could come to visit him. He then applied *Radmacher* and made some significant comments on the effect that pre-nuptial agreements now have on applications under s 25. Counsel for the applicant husband drafted a number of propositions of law which the judge adopted and quoted at length.

“1. It is the court, and not the parties, that decides the ultimate question of what provision is to be made;

²² He referred to the Practice Guidance on Transparency in the family courts; Publication of judgments, issued by the President of the Family Division on 16 January 2014 which came into effect on 3 February 2014 therefore preceding the start of the hearing in this case.

²³ *Luckwell* (n 16) [5].

²⁴ *Ibid.*

2. The over-arching criterion remains the search for ‘fairness’, in accordance with section 25 as explained by the House of Lords in *Miller/McFarlane* (ie needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to ‘need’;

3. An agreement (assuming it is not ‘impugned’ for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;

4. The weight to be given to an agreement may be enhanced or reduced by a variety of factors;

5. Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement. ie There is at least a burden on the husband to show that the agreement should not prevail;

6. Whether it will ‘not be fair to hold the parties to the agreement’ will necessarily depend on the facts, but some guidance can be given:

- i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;
- ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;
- iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;
- iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of the making of the agreement unfair now, particularly if the position is not as envisaged;
- v) It is unlikely to be fair that one party is left in a predicament of real need while the other has ‘a sufficiency or more’;

CASE COMMENTARY

vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement.”²⁵

The Judge placed great emphasis on the fact that the children of the family in *Luckwell* spent time with each parent and so he concluded “the financial circumstances of each of their parents are likely to impact upon their welfare”.²⁶ The task for the judge in this case was to carry out a balancing exercise between the needs of Frankie in his role as the children’s father and the weight to be placed on the three agreements, each entered into freely with the benefit of expert legal advice and without the vitiating factors in many cases of duress or non-disclosure. He emphasised the damaging effect on the children of the stark contrasts in current standard of living which existed between the mother and the father. “Even if not in his capacity as a former husband, then certainly in his role as a loving and committed father, Frankie has a very pressing need for secure accommodation in which he can accommodate all three children together and which does not demean him too much relative to their mother.” This is a clear and established principle of family law.²⁷

The final order of the Judge was to ensure that the father was adequately rehoused by Victoria in a property which could accommodate all three children when they visited him. He ordered that a house should be purchased at a price not exceeding £900,000. This house would be owned by Victoria and when the youngest child reached the age of 22 the house would be sold and the proceeds divided between the parties with 45% reverting to Victoria and 55% used to fund a home for the father. There was an additional order that the wife should pay the husband an additional £292,000 for furniture, a car and to meet his liabilities, which amounted to debts in excess of £220,000. He also commented during the course of his judgment on the huge cost of the hearing to the parties which had run into a figure of just over £550,000 with further ancillary costs of over £100,000 and the likelihood that that sum would rise further. It was in his words “an exceptionally bitter hearing”.²⁸

²⁵ *Luckwell* (n 16) [130].

²⁶ *Ibid* [131].

²⁷ Mr Justice Holman cited the following words of Sheldon J in *Cartwright v Cartwright* (1983) 4 FLR 463, 471 to illustrate this point: ‘when considering the financial background of the parties, the standard of life that they and the children have been accustomed to, and that the children will undoubtedly continue to enjoy while living with [their mother], I am of the opinion that it is of importance to the children, to their maintenance of good relations between them, that he too should have a settled and secure home to which they can come.’

²⁸ *Luckwell* (n 16) [6].

THE LAW COMMISSION REPORT ON PRE-MARITAL SETTLEMENTS

Mr Justice Holman referred to the fact that the Law Commission was due to report on pre-nuptial arrangements at the same time as he gave judgment in this case.²⁹ The report was made the day before judgment and in the event the findings of the Report would not have impacted on the outcome of this case but were significant in the context of the status of pre-nuptial agreements. The Law Commission reported on pre-nuptial settlements as part of its wider project on matrimonial property: *Matrimonial Property, Needs and Agreements: the Future of Financial Orders on Divorce and Dissolution*.³⁰ It acknowledged that the discretion reserved to the courts as to how much weight should be accorded to a pre-nuptial agreement was at odds with the treatment of pre- and post-nups in many parts of the world and also is at odds with the wishes of many couples.³¹ The recommendation in the Law Commission was for the Government to enact legislation to introduce “qualifying nuptial agreements” which would be enforceable contracts, not subject to the scrutiny of the courts. These contracts would enable couples to make their own contractual arrangements about the financial consequences of divorce or dissolution.³² A “qualifying nuptial arrangement” would be subject to certain procedural safeguards and could not be used to contract out of “financial needs”. It is unlikely therefore that the agreement in *Luckwell v Limata*³³ would have been enforceable as even if it met the conditions for such an agreement the claimant husband would still have been able to demonstrate “financial need”. The procedural safeguards recommended by the Law Commission included: the need for the agreement to be contractually valid (without evidence of undue influence or misrepresentation); all agreements must be made by deed and each party must sign a statement saying that they understand the nature of the agreement; agreements must not be made within 28 days of the marriage; the need for disclosure of material information about the other party’s financial situation and the need for legal advice to be given to each party. The Government responded to the publication of the Report with a short Press Release announcing that the

²⁹ Ibid [5].

³⁰ Law Commission, ‘Matrimonial Property, Needs and Agreements’ (26 February 2014) <http://lawcommission.justice.gov.uk/docs/lc343_matrimonial_property.pdf> accessed 24 August 2014.

³¹ See Law Commission, ‘Matrimonial Property, Needs and Agreements: The Future of Financial Orders on Divorce and Dissolution: Executive Summary’ (TSO 2014) [1.10].

³² Ibid [1.11].

³³ *Luckwell* (n 16).

CASE COMMENTARY

Ministry of Justice has tasked the Family Justice Council to take forward the Law Commission's recommendation to clarify the law of "financial needs" on divorce or dissolution of a civil partnership.³⁴

COMMENT

Until *Radmacher v Granatino*³⁵ English courts had never formally given weight to pre-nuptial settlements when considering financial provision under the Matrimonial Causes Act 1973. This view contrasts with the position in a number of other countries such as Canada, certain states in the US, and Germany, which all recognise such settlements and are willing to give them effect.³⁶ *Radmacher* allowed the courts to place full weight on pre-nuptial agreements but set out certain conditions, which should first be met. The parties must enter into the agreement freely, without undue influence or pressure, having all the information material to his or her decision and they should both intend that it should be effective to govern the financial consequences of the marriage coming to an end. The court was unanimous in holding that such an agreement could not be allowed to prejudice the reasonable requirements of any children of the family under the age of 18. The underlying principle, which emerges from it, is that no agreement will be upheld if it is deemed to be "unfair" and the court held that it can be rendered "unfair" in two ways. Firstly, by the occurrence of contingencies unforeseen at the time of the agreement and secondly where, through circumstances prevailing at the time of separation, one partner would be left in a predicament of "real need" while the other enjoyed a sufficiency. The guidance given by *Radmacher* has been welcomed by both academics,³⁷ practitioners³⁸ and the Judiciary³⁹ but it has many limitations and it is still open to the court to interpret when contingencies have arisen that were unforeseen at the time of the agreement and also what constitutes real need.

³⁴ www.gov.uk/Moj@MoJPress 016/14 Press Release Justice Minister The Rt Hon Simon Hughes MP Published 17 April 2014.

³⁵ *Radmacher* (n 1).

³⁶ See generally Jens Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012); Katharina Boele-Woelki, Joanna Miles and Jens Scherpe (eds), *The Future of Family Property in Europe* (Intertec 2011).

³⁷ See generally Jens Scherpe, 'Marital Agreements: Private Autonomy and Fairness' [2011] CLJ; Jens Scherpe, 'Fairness, Freedom and Foreign Elements – Marital Agreements in England and Wales after *Radmacher v Granatino*' [2011] CFLQ 513.

³⁸ Ashley Murray, 'Pre-Nuptials, LSPs and Compensation Guidance: Before and After the Law Com Report' [2014] FLJ 491.

³⁹ See Mr Justice Mostyn in *Kremen v Agrest* [2012] EWHC 45.

Therefore there remains the issue of defining what a court deems to be “unfair”. One circumstance mentioned in *Radmacher* was when one party is left in “real need”. “Need” is a subjective concept and is subject to a judge’s interpretation. In *Radmacher* the “need” of Nicolas Granatino was in marked contrast to the “need” of Frankie Limata in *Luckwell*. In both cases the courts overrode the autonomy of the parties and awarded financial provision. Holman J observed in *Luckwell* “If benevolent parents wish to provide gifts to their child, but not to his or her spouse, how (in the absence of legislative change) can they ever safely do so in reliance upon agreement of this kind if they do not prevail in this case?” He continued by commenting that he had sympathy with the father of Victoria who had said in court that it would be outrageous if the court made an order at all.⁴⁰ Nevertheless an order was made in favour of the claimant husband.

The lengthy Report of the Law Commission show that the law concerning financial provision on divorce is in grave need of reform.⁴¹ It accepted that the parties need to be given some autonomy in reaching an agreement concerning their own financial affairs should the marriage breakdown on cost alone this reform is urgently needed. However it is difficult to see the law extending to upholding any agreement even where it meets the qualifying conditions which can be deemed “unfair”. Holman J awarded the claimant husband financial relief in *Luckwell* not because “need” were a trump card that will always trump agreements but instead because the agreement itself was inherently “unfair”. It made no provision at all for the husband and in his view it was this factor that made it “unfair”. This suggests that autonomy in pre-nuptial agreements will always be subject to possible scrutiny by the courts where the actual terms and not the circumstances of the agreement are deemed to be “unfair”. Lawyers advising the parties when drawing up a pre-nuptial agreement will have to advise their clients on what a court might deem to be considered “unfair” or else their client will risk long and expensive litigation as seen in *Luckwell*.

⁴⁰ *Luckwell* (n 16) [136].

⁴¹ ‘Matrimonial Property, Needs and Agreements’ (*Law Commission*, 17 October 2014) <<http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm>> accessed 24 August 2014.