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Issue 13 Matrimonial Agreements and Case Management

'The Marital Agreement':
The freedom to contract is, clearly, one of the fundamental rights of the individual. However, until now, the consequences of doing so have been limited whenever exercised in anticipation of, or during, or for that matter after a marriage by both statute and case law. Very recent developments, particularly the greater acceptance of pre-nuptial agreements by both the public and the courts, have accelerated a revised approach to the sanctity of the several safeguards hitherto put in place to protect the weaker spouse from the rigours of contractual law, whenever reliance has been placed, in a matrimonial context, upon an agreement reached between such parties. Not surprisingly, given the course of such developments and the absence of reforming legislation, the position reached is, as yet, not without some complication.

There are four situations in which a pre or post marital agreement ('matrimonial agreements') can be reached between spouses[1]. They are:

(i) a pre-nuptial agreement;
(ii) a post-nuptial agreement;
(iii) a separation agreement;
(iv) in compromise of an ancillary relief claim.

Each of these types of agreement had, prior to the recent case of *Mcleod v Mcleod*[2], developed their own, apparently, non mutual and distinct jurisprudence. The decision of *Mcleod* and, in particular, the speech of Baroness Hale has now introduced a most welcome consolidation of three of these previously disparate approaches. Accordingly, whatever the nature of any valid 'matrimonial agreement' under (ii), (iii) or (iv) above, they qualify as 'maintenance agreements' under ss 34 and 35 of the Matrimonial Causes Act 1973. The court will approach the existence of the same in an identical way and of importance as a 'starting point' to the statutory exercise under section 25, subject to certain limitations[3]. Pre-nuptial agreements are the exception as, according to her Ladyship, the same must await the Law Commission's review and legislative change,

Validity - Safeguards:
Of course, before considering the approach under sections 34 and 35, matrimonial law requires that the agreement in question should satisfy a number of established criteria as a precondition to the same being accepted as a valid agreement. In this context, there are two basic principles to which regard has been paid whenever dealing with any one of these matrimonial agreements.

They are:-

(i) First, some agreements will be unenforceable on the grounds of public policy[4]; and
(ii) Second, as a contract, the agreement reached must not have been entered into as a consequence of a vitiating event such as fraud, mistake or misrepresentation etc[5].

Overall Relevance:
In what has been described by Lord Hoffmann as 'the worst of both worlds' for the matrimonial litigant[6], the law relating to matrimonial agreements accommodates an uncertainty of outcome. It is, however, important to recognise that the absence of strict enforceability of a matrimonial agreement will not, necessarily, prevent a court, in certain circumstances, having regard to the terms of the agreement reached between the parties under the statutory exercise within section 25 of the Matrimonial Causes Act 1973, as amended[7].

Unenforceability:
Although only two now survive, there were four areas in which the law treated a contract as being unenforceable on grounds of public policy. These were:-

(i) agreements between spouses or intended spouses for future separation;
(ii) specific collusive and other agreements in contemplation of divorce;
(iii) agreements which purported to oust the jurisdiction of the court.
(iv) agreements, which, in any way, seek to cast onto the public purse an obligation which ought properly to be shouldered within the family.

(i) Anticipating Separation:
Until the decision in *Mcleod*, the rule was that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which anticipated their future separation was against public policy and void[8].

Whereas, a contract which provided for an existing separation was entirely lawful and enforceable[9].

In *N v N*[10], Wall J described the position as follows:-

'Are ante-nuptial agreements as a class specifically enforceable? The attitude of the English Courts to ante-nuptial agreements (as opposed to ante-nuptial settlements, which are, of course, variable under section 24 of the Matrimonial Causes Act 1973) has always been that they are not enforceable. The difference between an ante-nuptial settlement and an ante-nuptial contract or agreement is that the former seeks to regulate the financial affairs of the spouse on and during their marriage. It does not contemplate the dissolution of the marriage. By contrast, an agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy as it undermines the concept of marriage as a life-long union'.

Baroness Hale in *Mcleod* recognised that, as the former duty at law upon a husband and wife to live together was no longer enforceable, then the reason for the public policy against contracts anticipating the separation of spouses had disappeared. Accordingly, agreements anticipating the separation of the parties were no longer to be seen as void for this reason[11].

(ii) Collusion:
Until s 1(2)(d) of the Divorce Reform Act 1969, any collusive agreement between parties in a divorce was unenforceable[12]. Any agreement not to petition for divorce or defend a divorce is no longer objectionable.

(iii) Ousting Jurisdiction:
It remains the law that a term in a contract, which purports to deprive the court of jurisdiction which it would otherwise have, is contrary to public policy. Hence, a spouse cannot validly agree, whether expressly or impliedly, not to apply to the court for maintenance or other forms of ancillary relief as such a provision is contrary to public policy and unenforceable[13]. A contract containing such a clause, however, will remain in all other respects actionable[14].

(iv) Public Purse:
Baroness Hale in *Mcleod*[15] made it clear that the court will not enforce any term in a matrimonial agreement which sought, as a consequence of its provisions, to cast onto the public purse an obligation which ought properly to be shouldered within the family.

Mcleod – Matrimonial/Maintenance Agreements:
In *Mcleod*[16], Martin Pointer QC argued, on behalf of the appellant husband, that all agreements between married couples whenever reached and whether pre or post marriage should, as long as they did not seek to oust the court's jurisdiction, upon a divorce be valid and binding upon the parties. They should, in his submission, be 'presumptively dispositive' of claims for financial relief. This submission found considerable sympathy with the Board of the Privy Council.

However, because of the difference in nature of a pre-nuptial agreement from agreements reached between parties already committed to each other after marriage, Baroness Hale, giving the Board's judgment, was not prepared to endorse such an approach in the arena of pre-nuptial agreements. She agreed they were not covered by any power of the court to vary. This was unlike post marriage, post separation and ancillary relief compromise agreements ('matrimonial agreements'), which, in the judgment of the Privy Council free of the former public policy against agreements anticipating separation of married couples, now readily fell within the statutory definition of 'maintenance agreements' under sections 34 and 35 of the MCA 1973 and are equally subject to the court's powers of review and variation[17].

Accordingly, any approach whereby the court was to regard pre-nuptial agreements as 'presumptively dispositive' would have to await the review of the Law Commission's report and the subsequent intervention of further legislation to provide similar interventionist powers by a court[18].

However, in regard to 'matrimonial agreements', the Board was of the view that the intentions of spouses to regulate their financial affairs, once having entered into the marital state, was a matter of some considerable importance to the court's eventual approach on dissolution. It remained open to such spouses to rely upon the terms of the agreement reached or to apply to the court within ancillary relief proceedings. In either case, the provisions of sections 34 and 35 would apply.

'Maintenance Agreements' - Section 34:
The term 'maintenance agreement' as defined in the MCA 1973, s 34 19 provides (emphasis added):

> *'34 Validity of maintenance agreements*
> (1) If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then—
>
> > (a) that provision shall be void; but
> > (b) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to sections 35 and 36 below), be binding on the parties to the agreement.
>
> (2) In this section and in section 35 below—
>
> > **"maintenance agreement" means any agreement in writing made,** whether before or after the commencement of this Act, **between the parties to a marriage**, being—
> >
> > > (a) an agreement **containing financial arrangements**, whether made during the continuance or after the dissolution or annulment of the marriage; **or**
> > > (b) a separation agreement which **contains no financial arrangements** in a case **where no other agreement in writing between the same parties contains such arrangements**;
> >
> > "**financial arrangements**" means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family'.

'Maintenance Agreements' – Power To Alter And Grounds – Section 35:
Section 35 provides (emphasis added):-

> (1) Where **a maintenance agreement is for the time being subsisting** and each of the parties to the agreement is for the time being either domiciled or resident in England and Wales, then, subject to subsection ~~(4~~ 3), **either party may apply to the Court** or to a magistrates court for an order under this section.
>
> (2) If **the Court** to which the application is made **is satisfied either–**
>
> > (a) that **by reason of a change in the circumstances** in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), **the agreement should be altered so as to make different or, as the case may be so as to contain, financial arrangements; or**
> > (b) that **the agreement does not contain proper financial arrangements with respect to any child of the family**.
>
> **then that court** (subject to subsection ~~(~~3), (4) and (5)) **may** by order **make such alterations** in the agreement–
>
> > (i) **by varying or revoking** any financial arrangements contained in it; or
> > (ii) **by inserting** in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family,
>
> **as appear to the court to be just having regard to all the circumstances,** including, if relevant, the matters mentioned in section 25 (4); and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration.

Approach After Mcleod –Section 25:
Baroness Hale in Mcleod (emphasis added) stated:-

> '41. The question remains of the weight to be given to such an agreement if an application is made to the court for ancillary relief. In *Edgar v Edgar*, the solution might have been more obvious if mention had been made of **the statutory provisions relating to the validity and variation of maintenance agreements. One would expect these to be the starting point**. Parliament had laid down the circumstances in which a valid and binding agreement relating to arrangements for the couple's property and finances, not only while the marriage still existed but also after it had been dissolved or annulled, could be varied by the court. At the same time, Parliament had preserved the parties' rights to go to court for an order containing financial arrangements. It would be odd if Parliament had intended the approach to such agreements **in an ancillary relief claim** to be different from, **and** less generous than, the approach to **a variation application**. **The same principles should be the starting point in both**. In other words, **the court is looking for a**

change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change in the circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family.

42. The Board would **also** agree that **the circumstances in which the agreement was made may be relevant in an ancillary relief claim**. They would, with respect, endorse the oft-cited passage from the judgment of Ormrod LJ in Edgar v Edgar, at p 1417, in preference to the passages from the judgment of Oliver LJ, both quoted above at paragraph 25. In particular the Board endorses the observation that "it is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel". Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but the inequalities may be different in relation to different issues. The husband may be in the stronger position financially but the wife may be in the stronger position in relation to the children and to the home in which they live. One may care more about getting or preserving as much money as possible, while the other may care more about the living arrangements for the children. One may want to get out of the relationship as quickly as possible, while the other may be in no hurry to separate or divorce. All of these may shift over time. **We must assume that each party to a properly negotiated agreement is a grown up and able to look after him- or herself. At the same time we must be alive to the risk of unfair exploitation of superior strength. But the mere fact that the agreement is not what a court would have done cannot be enough to have it set aside**.' [19]

The Statutory Tension:

The present position appears to be that the existence of a valid matrimonial agreement will result in the court adopting as 'the starting point' the terms thereof as the resolution to the statutory exercise under section 25, unless one of three situations exist. These are:-

(1) that under section 35 there has been a change '...in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement)...' and, thereby, the terms reached have become 'manifestly unjust' so that '...the agreement should be altered; or
(2) the matrimonial agreement does not contain proper financial arrangements with respect to any child of the family' or
(3). There exists any basis under the approach set out in the case of *Edgar v Edgar*[20] for the court concluding there are 'good and substantial grounds' for holding that an injustice will be done by holding the parties to the agreement reached.

Clearly, upon every ancillary relief application, it remains the duty of the court to undertake the statutory exercise under the factors outlined in section 25 of the MCA 1973. The impact of the judgment in *Mcleod* now appears to indicate that in most, if not all future cases, the

process of consideration as outlined above, will satisfy that statutory exercise, where a valid 'matrimonial agreement' exists.

Edgar v Edgar:
Following the restraints explicit and implicit in the Hyman case in 1929, it was not until 1980 and the leading case of *Edgar v Edgar*[21] that the law relating to matrimonial agreements and, by analogy, pre-nuptial agreements, was moved on in the modern context.

The relevant considerations appropriate to a matrimonial agreement reached between parties, who enjoyed or had enjoyed an intimate relationship with one another required a greater degree of circumspection than an agreement formed in a commercial setting. Hence, in a well known extract, Ormrod LJ held:

> 'To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Under pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important, too, is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue' .

(i) 'Formal Legal Terms':
The Court in *Edgar*, clearly, stated that the required analysis of a prior agreement within the section 25 exercise was not to be restricted to whether or not accepted contractual principles had or had not been fulfilled. Clearly, as set out above, if the contractual principles have not been complied with, the court would not, in any event, save exceptionally where relevant to do so, consider the terms of any agreement relied upon. [22]

(ii) 'All the Circumstances':
There are now many reported cases where the Court has, since *Edgar*, fully analysed the circumstances in which the parties reached their agreement in an exercise to determine whether there are 'good and substantial grounds' for determining that an injustice will be done by enforcing the terms reached[23]. The most recent example of such a thorough review is to be found in the case of *NG v KR* in relation to a pre-nuptial agreement and, of course, Mcleod in relation to a post nuptial settlement[24].

(iii) 'Bad legal advice':
Ormrod LJ in *Camm v Camm*[25], usefully, explained his reference to 'bad legal advice' as follows:-

> 'And I made it clear that that was not, of course, an exclusive list. I still think it was right to refer to bad legal advice, although in that passage I was not thinking in terms of negligence by the solicitor. The unfortunate fact in this case was that the hearing below was occupied to a considerable extent in questioning the wife's solicitor, who is himself the defendant in a pending action for negligence which may or may not be proceeded with. In that passage I certainly was not thinking in terms of negligence: I was thinking in terms of exactly what I said, "bad legal advice", and we are all familiar with cases in which parties are badly advised. That is to say, it is not necessarily negligent advice to take a course or permit a client to take a course which a more experienced, or a stronger minded legal adviser would have discouraged. It seems to me plain if one compares the facts of this case with the facts in *Edgar v Edgar* that the quality of legal advice on which parties act is of some relevance to the justice of the case. In *Edgar v Edgar* the wife was fully legally advised, and strongly advised not to enter into the deed of separation containing a particular clause which limited her capital thereafter; but nonetheless, she went ahead. In this case there was very much less clear legal advice by her solicitor and the whole matter was dealt with, obviously, on quite a different level. In *Edgar v Edgar* the whole thing was formally negotiated between solicitors for a period of months, and there could have been no possible misunderstanding or shadow of a doubt in the mind of the wife when she elected to ignore the legal advice she had been given. In this case there is no question, I think, of the wife ignoring any legal advice. It is said that she was told, somehow, that the effect of entering into this agreement might deprive her of all future maintenance but, like Mr Thorpe, I would have expected that, at least, she would have been required by her solicitor to sign a document which would make it absolutely clear that she knew what she was doing. I think the quality of legal advice is relevant on the issue of justice, but not in terms of negligence actions. That is the situation, so far as the wife is concerned, with which we now have to deal'.

(iv) 'Unfair pressure':
There is no doubt that Ormrod LJ was not, strictly, confining factors such as 'undue pressure' to the doctrine of 'undue influence', which, again, is a recognised vitiating factor under ordinary contractual principles applicable to the enforceability of all agreements at law. However, the law on the doctrine of undue influence has moved on from its position when Edgar was decided and so it is appropriate at this point to consider developments which have occurred, whilst emphasising that, even if the circumstances presented do not merit a finding of 'undue influence', there may in certain cases remain some scope for a submission that there still existed 'undue pressure' sufficient to provide the required 'good and substantial grounds'.

In *Royal Bank of Scotland Plc v Etridge (No 2)*[26], Lord Nicholls stated:-

> '[7] Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley* (1807) 14 Ves 273, at 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.'

Baron J in *NA v MA*[27] observed on the above as follows:-

> '[18] This is a fair formulation to enable the assessment of any given set of circumstances. However, in a case involving a husband and wife, where it is clear that interdependence and mutual influence are the basis of the relationship, I consider that the court has to take special care when assessing the manner in which each party's conduct affected the other. For example, if a wife has been accustomed to placing reliance upon her husband's decisions, she might be much more easily influenced than an individual in a commercial transaction.'

Again in *Etridge*, Lord Nicholls of Birkenhead stated, (at 795), in regard to the burden of proof in such cases:-

> '[13] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.
>
> [14] Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred

> his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.'

and

> [20] Clearly, this statement of law requires some modification for the special relationship between spouses that I have outlined. Nevertheless, I am clear that, to overturn the agreement, I have to be satisfied that this wife's will was overborne by her husband exercising undue pressure or influence over her'.

(v) 'Inadequate Knowledge':

The principle of full and frank disclosure is at the very heart of the section 25 exercise and absence of the same, where significant, will undermine in most cases the effectiveness of any agreement reached or consent given by either party in matrimonial proceedings. In *Livesey v Jenkins*[28] Lord Brandon stated:-

> 'When the question of the validity of the consent order, as distinct from that of the earlier agreement, is looked at, it becomes apparent that the principle of full and frank disclosure of all material facts, depending as it does … on the terms of s 25(1) of the 1973 Act, could not in any circumstances be rendered inapplicable by the manner in which the earlier agreement was negotiated and reached. The principle concerned does not depend in any way on the concept that the parties must, in reaching an agreement for a consent order, show uberrima fides in the contractual connotation of that expression. It depends rather on the statutory requirement imposed by s 25(1), that the court must exercise its discretion to make orders under ss 23 and 24 in accordance with the criteria described by that subsection, and that, unless the parties make full and frank disclosure of all material matters, the court cannot lawfully or properly exercise such discretion … '

(vi) 'Other Considerations':

There may be 'other considerations' such as expenditure incurred in reliance upon the agreement entered into.

In *Camm v Camm*[29] Sir Roger Ormrod stated:

> 'Of course, in some of these cases, where an agreement is made like this, the husband may take steps in reliance upon the agreement to incur heavy expenditure which he otherwise would not have done or may do other things relying on the fact he is not liable for periodical payments. If that is so, and we have had such cases—I remember one in particular where the husband took on a very large mortgage relying on the fact that he did not have to make any periodical payments—that sort of consideration must be taken into account too …'.

Specifically, of course, it should be noted that the considerations expressly listed by the court in *Edgar v Edgar* (above) were said not to be 'an exclusive catalogue'. Hence, there may yet

be other circumstances under *Edgar* in which the court would conclude that 'good and substantial grounds' existed to justify the court's intervention.

'Justice Of The Case':
Whatever may be the outcome of the court's analysis of the Edgar requirements, at the conclusion of every exercise of considering the factors set out in section 25, the court, with or without a matrimonial agreement, has, finally, to step back and consider the question of the overall fairness or justice of the case before it. Hence, even if all the boxes are ticked in terms of the circumstances which led to the agreement, the appropriateness of the legal advice given the time taken to consider the terms of the agreement and the amount of disclosure provided, the Court will not follow the terms of the agreement, if there exist 'good and substantial grounds' for concluding that overall unfairness will result from doing so.

The principles of the 'ultimate objective' and the 'strands of fairness', as summarised under 'needs, compensation and sharing', will require, in accordance with the guidance under *White v White* and *Miller / Macfarlane*[30], to be considered as a fundamental aspect of this final stage of the process as to whether the terms reached within the matrimonial agreement remain fair 'in all the circumstances'.

In reality, where a matrimonial agreement is to be considered upon any ancillary relief application, the process to be undertaken, as set out by the judgment of Baroness Hale in *Mcleod* will satisfy the requirements of fairness under section 25, whilst at the same time giving the necessary emphasis to the terms of the agreement reached in all cases, where the same remain relevant [31].

The post *Mcleod* position is that the court will be, in many more cases than before, likely to follow the terms of such a matrimonial agreement, irrespective of whether the court would, in different circumstances, have made a more generous settlement. In addition, where there are circumstances in which the agreement validly reached is not entirely appropriate, the indication appears to be that the court's interference will be only that which is required to rectify the shortfall as opposed to a wholesale review of the finances anew [32].

Case Management:
There have been a number of recent examples within ancillary relief of where the Court has been prepared to exercise greater control of the issues to be pursued between parties at a final contest[33]. This has been held to be within the requirements of the 'overriding objective'[34]. In *Crossley*, where parties' with histories of previous marriages and large wealth had entered a pre-nuptial agreement and the wife retained £18m in her own right, the signing of the agreement was seen as likely to dominate the court's approach at any final hearing and, accordingly, the judge at first instance had made directions limiting the issues and disclosure required. On appeal from that approach, Thorpe LJ stated:-

> '[15] All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case. As to the

> second and third grounds, that the judge was bound by the provisions of r 2.61, I am quite unpersuaded, as was the judge, that these individual rules were intended to be some sort of straitjacket precluding sensible case management. I would particularly stress the overriding objectives that govern all these rules, carefully and fully drafted in r 2.51D. It is easy to attach this case on its facts to a number of the objectives there articulated. It is very important that the judge in dealing with the case should seek to save expense. It is very important that he should seek to deal with the case in ways proportionate to the financial position of the parties. It is very important, more so today than it was when these rules were drafted, that he should allot to each case an appropriate share of the court's resources, taking into account the need to allot resources to other cases. In his general duty of case management he is required to identify the issues at an early date and particularly to regulate the extent of the disclosure of documents and expert evidence so that they are proportionate to the issues in question'.

The greater prominence of the matrimonial agreement afforded by the judgment of Baroness Hale in *Mcleod*[35] is likely to lead to an increase in such applications to limit the normal disclosure and trial preparation required. In the process, it will be inevitable that, in those cases where such an abbreviated disclosure course is taken, the wording of any interlocutory order cannot fail to reveal the thinking of the judge at the preliminary hearing to the application made. Hence, in *Crossley*[36], the wife later abandoned her application and it may be said that Heather Mills may have negotiated a more advantageous outcome had she responded in the same way to the preliminary indications given to her by Bennett J in *McCartney v Mills*[37].

Additionally, as was the case in both *Crossley* and *S v S*[38], there is likely to be a Notice to Show Cause as to why the agreement reached should not be made into the final ancillary relief order by one of the parties to the matrimonial agreement, either as a response to the application for ancillary relief or as the basis for his or her own application for ancillary relief or as directed by the judge[39.] Again, Thorpe LJ stated in *Crossley*:-

> '[18]… this case, although extremely uncommon on its facts, has some general importance, in that it demonstrates the discretionary power of the judge to require a party to show cause why a contractual agreement should not rule the outcome of an ancillary relief claim, not just when the contract is made post-separation and in contemplation of an application, but also when the contract has been made pre-nuptially or post nuptially but before the breakdown of the marriage'

However, the nature of the section 25 exercise is that the court must conduct its own assessment under the MCA, so that, without settlement, there will need to be, at the very least, an abbreviated final hearing on those arguable issues remaining, but tailored by the court's preliminary assessment as to their merits and their proportionality or otherwise to the overall value of the claim.

Clearly, in the light of *Mcleod*[40], where the ancillary relief claim follows speedily in the shadow of a recently concluded agreement against which the court sees little prospect of

establishing any reasonable objection or significant change in circumstances or any of the Edgar factors, the existence of the agreement will be treated as 'a magnetic factor' in the statutory exercise, with the inevitable consequences.

NOTES
1 ***NG v KR (Pre-nuptial contract)*** **[2008] EWHC 1532 (Fam), Baron J.**
2 ***Mcleod v Mcleod*** **[2008] UKPC 64**
3 see below.
4 see ***Soulsbury v Soulsbury*** **[2007] EWCA Civ 969;**
5 see section 10 below under 'undue pressure'.
6 See, ***Pounds v Pounds*** **[1994] 4 All ER 777, CA.**
7 See, for recent examples, ***Ella v Ella*** **[2007] EWCA 99;** ***Morgan v Hill*** **[2006] EWCA Civ 1602; NA v MA [2006] EWHC 2900 (Fam); [2007] 1 FLR 1760, Baron J and** ***NG v KR (pre-nuptial contract)*** **[2008] EWHC 1532, Baron J.**
8 see ***N v N (Jurisdiction: Pre-nuptial Agreement)*** **[1999] 2 FLR 745 and** ***X v X (Y and Z Intervening)*** **Munby J. [2002] 1 FLR 508.**
9 see ***Hyman v Hyman*** **[1929] AC 601.**
10 (1999) 2 FLR 745 and ***NG v KR (pre-nuptial contract)*** **[2008] EWHC 1532, Baron J.**
11 see ***Mcleod v Mcleod*** **[2008] UKPC 64, paras 38 to 39.**
12 see ***Hope v Hope*** **[1856] 22 Beav 351,**
13 see ***Hyman v Hyman*** **(1929) AC 601,** ***Sutton v Sutton*** **[1984] Ch 184, and** ***N v N (Jurisdiction: Pre-nuptial Agreement)*** **[1999] 2 FLR 745.**
14 See ***Mcleod v Mcleod*** **[2008] UKPC 64 and section 34 MCA 1973.**
15 See ***Mcleod v Mcleod*** **[2008] UKPC 64 at para.41.**
16 ***Mcleod v Mcleod*** **[2008] UKPC 64; para 30.**
17 ibid para 38.
18 ibid para 39.
19 Baron J in ***NG v KR (Pre-nuptial contract)*** **[2008] EWHC 1532 held that an agreement entered into before marriage was outside the definition of a 'maintenance agreement' under the MCA 1973. See also** ***Mcleod v Mcleod*** **[2008] UKPC 64.**
19 ***Mcleod v Mcleod*** **[2008] UKPC 64.**
20 see below.
21 [1980] 3 All ER 887
22 See ***NA v MA*** **[2006] EWHC 2900 (Fam); [2007] 1 FLR 1760, Baron J. and** ***NG v KR (pre-nuptial contract)*** **[2008] EWHC 1532, Baron J**
23 see e.g. ***K v K (Ancillary Relief: Prenuptial Agreement)*** **[2003] 1 FLR 120;** ***J v V (Disclosure: Offshore Corporations);*** **[2003] EWHC 3110; [2004] 1 FLR 1042;** ***NA v MA*** **[2006] EWHC 2900.**
24 ***NG v KR (pre-nuptial contract)*** **[2008] EWHC 1532 and** ***Mcleod v Mcleod*** **[2008] UKPC 64.**
25 [1983] 4 FLR 580. Cf. also ***Harris v Manahan*** **[1997] 1 FLR 205**
26 [1998] 4 All ER 705.
27 [2006] EWHC 2900
28 [1985] AC 424, 440
29 [1982] 4 FLR 577, at 586
30 [2000] UKHL 54 and [2006] UKHL 24.
31 see pre ***Mcleod*** **guidance to the existence of agreements within section 25 in** ***X v X (Y and Z) Intervening,*** **Munby J, and in** ***S v S*** **[2008] EWHC 2038 (Fam) by Eleanor King J.**
32 see limited intervention in ***Mcleod*****'s case.**
33 ***McCartney v Mills*** **[2008] EWHC 401 (Fam),** ***Crossley v Crossley*** **[2008] EWCA Civ 1491,** ***S v S*** **[2008] EWHC 2038.**
34 [2008] EWCA Civ 1491
35 [2008] UKPC 64
36 [2008] EWCA Civ 1491
37 (2008) EWHC 401
38 ***S v S*** **[2008] EWHC 2038. See also** ***Dean v Dean*** **(1978) 161;** ***X v X (Y and Z intervening)*** **(2002) 1 FLR 508.** ***Crossley v Crossley*** **(2007) EWCA 1491;**
39 [2008] EWCA Civ 1491,
40 [2008] UKPC 64

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