

Lord Justice Thorpe:

Introduction

1. This appeal requires consideration of two separate but inter-related areas of law and policy, one in the domestic and the other in the European context, relating to contracts that provide for the property consequences of divorce. In the domestic context this court has the advantage, denied to the trial judge, of the recent decision of the Privy Council in *MacLeod v MacLeod* [2009] 1 All ER 851 which, although deciding issues arising under a contract executed by the parties shortly before their separation and divorce, also considered in passing the current legal status of ante-nuptial contracts that provide for the financial consequences of a possible future divorce.

The European Dimension

2. I prefer to consider first the European context, which was unnecessary for the Privy Council to consider in *MacLeod*, and which was not expressly considered by the Judge below. I do so because this appeal, to whose facts I will refer later, involves the marriage of a French citizen and a German citizen celebrated in both London and Switzerland. Subsequently the couple co-habited in London and New York. Thus the case has all the hallmarks of internationality.
3. An aim of the European Union is to provide for its citizens both mobility and a common area of justice. European law did not much affect families prior to 1st March 2003. Before then there were only the provisions Brussels I relating to maintenance. The commencement date of 1st March 2003 given to Regulation Brussels II introduced jurisdictional rules for divorce and parental responsibilities respecting children of married parents throughout all but one of the then fourteen member states.
4. This interim measure was swiftly enlarged into Brussels IIBi, or Revised with its commencement date of 1st March 2005. These regulations did not deal with maintenance, the territory of Brussels I, or with the property consequences of divorce (see recitals 8 and 11 of Brussels II Revised).
5. In this uncharted territory, the search for harmonisation clearly poses great difficulty, given an enlarged Europe where 26 member states would be invited to the negotiating table. Whilst the civil law jurisdictions of Europe generally employ notarised marital property regimes to regulate both the property consequences of marriage and divorce, the common law jurisdictions attach no property consequences to marriage and rely on a very wide judicial discretion to fix the property consequences of divorce.
6. The ambition of the European Commission was to design a regulation Brussels III which would meet the problems created by diverse national laws and traditions. To that end a Green Paper was published in July 2006 inviting responses from member states by 30th November 2006. (It is worth recording that the Commission was also promoting a regulation for the reciprocal enforcement of maintenance orders and a regulation to harmonise the basis upon which divorce would be granted throughout the member states. Both proposals advanced applicable law provisions. For this and other reasons the UK exercised its election not to enter the negotiations and thus not

- to be bound by the outcome of the negotiations unless, at their conclusion, choosing to be bound).
7. The drafting of any subsequent UK response to the Green Paper proved extremely difficult, mainly because it engaged the expertise of family lawyers, wedded to the principle of Lex Fori, and trust and property lawyers, who are not adverse to the application of the relevant foreign laws.
 8. The English scholar best qualified to illuminate dark areas was Professor Elizabeth Cook who in November 2006 had jointly with Professor Barlow and Dr Collins published 'Community of Property: a regime for England and Wales' funded by the Nuffield Foundation. She joined a stakeholder group which the International Family Law Committee was invited to convene. Divergent views led the United Kingdom to submit what was no more than a formal response to the Green Paper but which promised a substantive response in due course. The question of what that substantive response should be was referred to the North Committee. For the meeting on 28th day of June 2007 Professor Cook and Professor Clarkson presented a joint paper which failed to unite those attending.
 9. Thereafter, Professor Hartley and Dr Cretney expressed further differing advice. The result of general dissent as to the way forward is that no substantive response to the Green Paper has been sent. The European Commission intends to convene a meeting of experts in Brussels on 28th September next.
 10. I record this detail only to illustrate how difficult it will be to devise a solution that will deliver uniformity of outcome throughout the member states of Europe. Prior to the advent of the Brussels II regulations we overcame the problem by applying the doctrine of forum conveniens: See *De Dampierre v de Dampierre* [1988] AC 92. The European civil law states overcome it by importing the applicable foreign law.
 11. The present appeal is almost a paradigm example of the caprice of outcome dependent on which European jurisdiction is first seized. Here, for himself, the husband was awarded over £5 million. In France or Germany he would have been awarded nothing for himself. At least England was the jurisdiction with which the marriage had the closest connection. It is seemingly bizarre that it was the wife who engaged this jurisdiction. However, Mr Nicholas Mostyn QC informed us that to engage the German jurisdiction she would have had to have resided there for at least six months before commencing proceedings.

Ante-nuptial contracts

12. I turn now to the evolution, in this jurisdiction of the ante-nuptial contract providing for the financial consequences of divorce. In *F v F* [1995] 2 FLR 45 the hugely rich husband relied on a marital property regime which confined the wife to the pension of a retired German Judge in the event of their divorce. Whilst acknowledging such contracts were commonplace in the parties' homeland I said:

“In this jurisdiction they must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and

limitation of standards that are intended to be of universal application throughout our society.”

13. I would not be so dismissive if such a case were now to come before this court on appeal. In considering where I stand today I take as my starting point the observations of Baroness Hale of Richmond in *MacLeod v MacLeod*. In introducing the appeal in the opening paragraph of her judgment she said:

“This case is about the validity and effect of a post-nuptial agreement made between a husband and wife while they were still living together. It dealt with their financial arrangements both while they stayed together and in the event of a divorce. It so happens that that agreement was an affirmation with important variations of an ante-nuptial agreement which the parties had made on their wedding day. But the case is not about the validity and effect of ante-nuptial agreements as such.”

14. However, she offered a clear obiter review of the present standing of ante-nuptial contracts in paragraphs 31-35 of her judgment when she said:

“31. The Board takes the view that it is not open to them to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the United States of America, including Florida, this has been done by legislation rather than judicial decision. There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future. Hence where legislation does provide for such agreements to be valid it gives careful thought to the necessary safeguards.

32. An illustration of some of the difficult policy questions involved in such legislation can be found in the response of all the judges of the Family Division to the proposals in the government’s 1998 Green Paper, *Supporting Families: a consultation document*, published in *Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor’s Ancillary Relief Advisory Group)* [1999] Fam Law 159. At 162 they expressed their ‘unanimous lack of enthusiasm for the pre-nuptial agreement’; they pointed out that there would have to be full

financial disclosure and separate legal advice for each side; they presumed that state-funded legal advice would in principle be available; that ‘it is the emotional moment when legal advice is most easily brushed aside’; and that in their view the advent of a child, necessarily not a party to the agreement, ‘should deprive the nuptial agreement of much if not all of its effect’.

33. It is said that calls for the legislative recognition of ante-nuptial agreements appear to have increased with the development of more egalitarian principles of financial and property adjustment on divorce, following the decisions of the House of Lords in *White v White* [2001] 1 All ER, [2001] 1 AC 596 and *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 3 All ER 1, [2006] 2 AC 618. If such calls are motivated by a perception that equality within marriage is wrong in principle, the more logical solution would be to examine the principles applicable to ascertaining the fair result of a claim for ancillary relief, rather than the pre-marital attempt to predict what the fair result will be long before the event. If such calls are motivated by fear that people who feel threatened by what might happen in the event of divorce will not get married at all, there is a need for serious research and consideration of the extent of and reasons for the reduction in marriage rates over recent decades. It certainly cannot be demonstrated that the lack of enforceable ante-nuptial agreements in this country is depressing the marriage rate here as compared with other countries where such agreements can be made.

34. The Board notes that the Law Commission for England and Wales, in their tenth programme of law reform, have declined to embark upon a review of the principles governing ancillary relief on divorce. But they have announced their intention to examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances: see Law Com No 311 (2008) pp13-14 (para 2.17).

35. In the Board’s view the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development. It is worth noting, for example, that in the Florida case of *Posner v Posner* 919700 233 So 2^d 381, where such agreements were recognised, attention was drawn to the statutory powers of the courts to vary such agreements. The Board is inclined to share the view expressed by Baron J in *NG v KR (pre-nuptial contract)*[2009] 1 FCR 35 at [130], that the variation power in s 50 of the 2003 Act (s 35 of the 1973 Act) does not apply to agreements made between people who are not yet parties to a marriage. Yet it

would clearly be unfair to render such agreements enforceable if, unlike post-nuptial agreements, they could not be varied.”

15. In explaining the extent to which I differ from that approach I need to set out evolutionary developments in greater detail.

The Domestic Dimension

16. In February 1998 the Solicitor General announced that the government intended to reform the law of ancillary relief as a matter of urgency to achieve greater certainty and predictability of outcome. The Lord Chancellor then commissioned a report on available options from his Ancillary Relief Working Group which was delivered on 30th July 1998. The group was composed of judges from all tiers, practitioners and academics. Wilson LJ was a member of the group and the author of the separate position statement on behalf of the judges of the family division cited in paragraph 32 of Baroness Hale’s judgment. The report that the working group submitted to the Lord Chancellor influenced the government’s proposals for consultation contained in the Home Office White Paper “Supporting Families” published in 1998. The government’s principal proposals were for the general reform of Section 25 but the subsidiary proposal was to give statutory force to ante-nuptial agreements subject to safeguards. These proposals were contained in paragraphs 4.20 – 4.23.
17. The government subsequently published some account of the responses to the White Paper proposals. There were 157 responses to the proposal to legislate for ante-nuptial agreements, 80 in favour and 77 against.
18. The government however, retreated without further explanation from its earlier stated intention and experts were left to contemplate a future without legislative reform.
19. The existence of an ante-nuptial contract in any case required the judge to consider what weight it should be given as one of the circumstances affecting the exercise of the Section 25 discretion. Over the following decade there is a clear trend in the reported cases: greater weight was being given to properly negotiated ante-nuptial contracts not vitiated by any abuse or manifest unfairness. What I said in *Crossley v Crossley* [2007] EWCA Civ 1491 contrasts well with what I had said in *F v F* more than a decade earlier. This trend is carefully reviewed by Baron J in paragraphs 111-129 of the judgment below.
20. Less well recorded is the impression that specialist practitioners were, with increasing frequency, instructed by affluent clients to draft ante-nuptial contracts. This trend no doubt influenced the report published by Resolution in 2005 entitled “*A More Certain Future – Recognition of Pre-marital Agreements in England and Wales.*” In its conclusion this carefully researched report urged that pre-marital agreements should become legally binding and enforceable subject to a single overriding safeguard of significant injustice.
21. By this date the Lord Chancellor’s Ancillary Relief Working Group had transposed into the Money and Property sub-committee of the Family Justice Council. The committee strongly supported the conclusion of the Resolution report and urged the government to act on it.

22. At the same time and alternatively the committee urged the Law Commission to undertake a general review of the law embodied in section 25 within its next work programme. The ensuing dialogue between the Committee and the Commission resulted in its decision, announced in June 2008 to examine the status and enforceability of agreements made between spouses or civil partners made before or after the marriage or civil partnership. The announcement continued:

“The legal recognition of marital property agreements is of great social importance. Relationship breakdown remains a significant phenomenon and financial and property disputes between separating spouses and civil partners often lead to distress and expense for all involved. There is a view that the fact that pre-nuptial agreements are not currently binding may deter people from marrying or entering into civil partnerships in some cases. The issue may be of particular importance to those who have experienced divorce and wish to protect their assets, however extensive, from a future claim for ancillary relief. It may also be crucial for couples who have entered into marital property agreements in jurisdictions in which such agreements are enforceable.”
23. This project is due to commence in late 2009 with a report and draft bill expected in late 2012. Professor Cooke, who in May 2008 was appointed a Law Commissioner, is obviously ideally qualified to lead this work.
24. I return to the relevant paragraphs from the judgement of Baroness Hale in *MacLeod* cited above.
25. Although these paragraphs are obiter they are clearly of the highest authority. I fully share the conclusion expressed in paragraph 35 that wholesale reform is for parliament and not the judges, particularly now the Law Commission is at work.
26. However, I have a different view of the policy issues commented on in the preceding paragraphs.
27. I would not accept that the genesis for the call for legislative provision for ante-nuptial contracts was the decision of the House in *White v White*. Nor would I accept that the seekers are the predominantly male super-rich, anxious to ensure that the contemplated marriage will not prove too expensive on its future dissolution. There are many instances in which mature couples, perhaps each contemplating a second marriage, wish to regulate the future enjoyment of their assets and perhaps to protect the interests of the children of the earlier marriages upon dissolution of a second marriage. They may not unreasonably seek that clarity before making the commitment to a second marriage. Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion.
28. I hold this opinion on the following foundations:

- i) Any provision that seeks to oust the jurisdiction of the court will always be void but severable.
- ii) Any contract will be voidable if breaching proper safeguards or vitiated under general principles of the law of contract.
- iii) Any contract would be subject to the review of a judge exercising his duty under s.25 if asserted to be manifestly unfair to one of the contracting parties.

29. I also hold my opinion because:

- i) In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace.
- ii) As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe.
- iii) Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts.

The present appeal

30. It is against that background that I turn to the resolution of the issues raised by the present appeal.
31. The outcome of any exercise of the discretion vested in the judge trying an ancillary relief case is always fact dependent and particularly so in the present case where Baron J had to review not only the marital history but also the circumstances surrounding the formation and execution of the ante-nuptial contract. I gratefully adopt Lord Justice Wilson's review of the facts and the Judge's findings.
32. Baron J summarised her findings as to the formation and execution of the ante-nuptial agreement in paragraph 137 of her judgment as follows:

“(a) The Husband received no independent legal advice.

(b) It deprives the Husband of all claims to the ‘*furthest permissible legal extent*’ even in a situation of want and that is manifestly unfair.’

(c) There was no disclosure by the Wife.

(d) There were no negotiations.

(e) Two children have been born during the marriage.

The terms of the PNC plainly recite at Clause 1 that the parties intend to establish their first matrimonial residence in London and it confirms by clause 7(2) that the law of their matrimonial

residence may come to apply to their legal relationship as spouses. It was therefore inherent in the agreement that another system of law might not apply its terms and so it could never be regarded as foolproof.”

33. Whilst giving proper respect to the conclusions of the judge who saw and heard the witnesses, I have considerable difficulty with these conclusions and with earlier findings in paragraphs 21-45 of her judgment. It does not seem to me that the following factors were sufficiently balanced:

- i) The husband, at the threshold of the marriage, was of great ability and was already well established in the field of international banking.
- ii) In both France and Germany the execution of a contract providing for the property regime of the intended marriage is standard practice for the young engaged couple. Equally normal would be a considerable parental contribution to the process.
- iii) The husband clearly had the opportunity to seek independent advice during the development of the contract. The final draft may only have arrived a week before the trip to Dusseldorf to execute the contract but clearly the husband could have sought advice during the drafting process.
- iv) It is surely significant that no less than 4 months then elapsed from the execution of the contract without question or demur from the husband.
- v) Although the exclusion of an account of the wife’s assets was the intention of the wife and her father, the husband well knew that she was a daughter of a significantly rich family. What was hers at the date of the marriage was likely to be of lesser significance than what was to come to her as her generation took control.
- vi) The absence of negotiations seems to me of little moment. It was the husband’s choice not to initiate negotiations.
- vii) Finally, it is to be assumed that the young couple expected to start a family after marrying.

34. Despite her findings, Baron J directed herself carefully and fairly as to the weight she should give the contract in paragraphs 92-95 as follows:

“92. Mr Mostyn QC argues that I should effectively ignore the fact that the Wife is German and had a pre-nuptial agreement which was/is valid and enforceable in the land of her birth. Equally, he asks that I ignore the fact that the Husband is French and that, even in his country of origin, the PNC would be accepted and enforced. To my mind to give no weight to these factors would be both unfair and unjust. These points are obviously matters which should be considered by me in the proper analysis of the appropriate outcome because the Act enjoins me to consider **all** the circumstances of the case.

93. Given the factual matrix, whilst I do not regard the foreign elements as determinative or ultimately fully decisive, they are definitely relevant because they are essential features. In particular, they are discounting factors in the sense that the amount of the Husband's claim (if not extinguished) should be reduced by pointing me towards the lower end of the bracket of any possible award.

94. In reality, Mr Mostyn QC partially acknowledges this analysis by basing his client's claim upon need rather than sharing or compensation. At its highest he asserts that need should be '*informed by the sharing principle*' but that assertion does not diminish the implicit concession that the PNC is a discounting factor.

95. I am clear that the Husband's claim should be based upon his needs as judged against the lifestyle that the parties lived and the fact that the Husband agreed that he did not intend to seek any financial award if the marriage ended. I so state even allowing for the 'vitiating factors' which, as I shall outline below, mean that the terms of the PNC will not be mirrored in the order that I make. It seems to me that vitiating factors go primarily to the Court's acceptance (or otherwise) of the precise terms and their possible implementation (or not). But they do not undermine the simple fact that the Husband agreed not to make a claim in event of divorce. His decision in 1998 was stark and so, even if it was flawed in the sense that he did not have disclosure or separate legal advice, it is worthy of note and must be taken into account in the appropriate disposal of his claim."

35. Then in paragraph 139:

"139. In assessing the Husband's needs I will take account of all of the circumstances of the case. For the avoidance of doubt, and for the reasons which I have set out above, I consider this award should be circumscribed to a degree to reflect the fact that at the outset he agreed to sign the PNC. Of course, from an English perspective the agreement was flawed and I take full account of the fact that the Husband's agreement was tainted because he did not know what his future wife was worth and did not have independent legal advice about the ramifications of the deal. Nevertheless, he understood the underlying premise that he was not entitled to anything if the parties divorced. In essence, he accepted that he was expected to be self-sufficient. As a man of the world that was abundantly clear. His decision to enter into the agreement must therefore affect the award."

36. However, in explaining her conclusions and award there is, with one exception, no further reference to the contract and the resulting discount.

37. Paragraph 140(a) quantifies the husband's housing needs thus:

“a) England

The Husband wishes to live in a nice area of London. He seeks a lump sum of £2.825 million inclusive of costs. He needs 3-4 bedrooms and he wishes to live in or about Chelsea because the children are familiar with the area and have friends close by. The Wife submits that he should live in Oxford or less fashionable parts of London (e.g. Putney). She considers that £1 million should suffice. On her case the house should be held on trust for the Husband's life and be available primarily as a base for the children. I consider the Wife's case to be unsupported. Whilst, I accept that the parties lived in rented accommodation throughout the marriage, I am of the clear view that, after some 8 years of marriage and in the context of the Wife's wealth, the Husband is entitled to a home of his own.

I have looked at the housing particulars which have been made available and taking Judicial notice of market conditions, I consider that the Husband needs £2.5 million inclusive of costs and refurbishment to enable him to buy a home in England as a base for himself and the girls. He has indicated that such monies as he receives for a house (subject to equity release if required over the years) will be passed to Chiara and Chloe upon his death. His acceptance will be incorporated as a recital to my order. This capital sum will enable him to purchase a small property in Chelsea or larger home elsewhere. The price of houses in the nice residential areas of North Oxford, whilst not as high as London, are very substantial and £2million plus would not be surprising with additional attendant costs. Equally, good country properties between London and Oxford command a premium for they are in commuter land. The sum set above is inclusive of the costs of redecorating and buying additional furniture for the property (given that the Husband will be retaining the contents of the former matrimonial home).”

38. That is the conventional language of a judge gauging the necessary housing fund by reference to agents' particulars and acquired experience. Whilst the Judge awards £325,000 less than Mr Mostyn QC sought, that also is conventional. Advocates deliberately allow for a margin of reduction. The Judge came very much closer to the husband's submission than to the Wife's. There is no suggestion or implication that the £325,000 disallowed was to reflect the ante-nuptial contract as opposed to what was reasonably required in the current market.

39. Paragraph 140 (c) deals with the Husband's claim to clear his debts. Of the £800,000 sought Baron J allowed £700,000, deducting only £100,000 as the best estimate of the costs of the Husband's fruitless application to this court to challenge the order permitting the relocation of the children to Germany. The Husband had been ordered to pay the Wife's costs of the application in the sum of £48,500 and his own costs of

the application were put at £50,000. It would have been bizarre if the effect of the order of this court had been reversed by allowing him the recovery of the costs on both sides as a debt. Again, where is there any discount for the ante-nuptial contract?

40. However, in dealing with the Husband's claim for additional capital items, I would raise no question, since, although again there is no reference to a discount to reflect the ante-nuptial contract, Baron J cut the total sought of £146,500 to £25,000.
41. Baron J dealt with the husband's claim for income for himself in paragraph 140 (d)(b) as follows:

“d) Income

(b) For the Husband

The Husband's budget excluding rent for the German home and the girls' maintenance was £125,000 per annum net. The Husband seeks £3.21 million for his Duxbury fund. That figure is based on the assumption that he will earn £30,000 gross from now until he is 65 years old. The Wife made no offer originally. By final submissions she was offering periodical payments at the rate of £35,000 per annum (based upon a net need of £60,000) until the children ceased full time education. She did not consider that those payments should be capitalised because of the terms of the PNC.

Given the wealth in this case and the manner in which the parties lived during the marriage, it could be argued that £125,000 net spendable per annum is not unreasonable. But given the overall factual matrix in this case, I do not consider that that sum would represent a fair result especially as I consider that a clean break has merit in this case. By so deciding I have balanced the need to produce a result which takes into account the PNC, the Wife's extensive fortune and the Husband's entitlement under English Law. I have come to the conclusion that the Husband needs a net spendable income of £100,000 odd. This Duxburizes (if there is such a word) at £2.331 million which I round up to £2.335 million.”

42. Whilst Baron J expressly factors in the pre-nuptial contract, what is the value of the discount to the wife? The assumption that the husband, with all his qualifications and ability will not earn more than £30,000 gross per annum (index linked) in the 28 years that remain to his retirement age seems unrealistic and thus highly favourable to the husband. Equally favourable is Baron J's capitalisation on a whole life basis. Thus the only scaling back was from his advocate's figure of £125,000 per annum to £100,000 per annum. Mr Mostyn QC says that that reduction reduced the capitalisation by £875,000. That is no doubt mathematically correct but it is the product of the generous decision to order capitalisation on a whole life basis.
43. Thus despite the appearance of the ante-nuptial agreement as a factor, the overall impression is of a negligible resulting discount.

Conclusions

44. For the reasons stated above I conclude that Mr Todd QC for the appellant has demonstrated a sufficiently erroneous exercise of the judicial discretion to succeed in his first objective to set aside some or all of the order below and then to achieve a reduction in the appellant's liabilities as assessed by this court in the exercise of our independent discretion.
45. Although I have questioned where the judge demonstrably factored in the discount for the ante-nuptial contract which she had acknowledged was the wife's due, I conclude that that discount is more logically achieved not necessarily by reducing the quantum of any of the elements of the award but by limiting the enjoyment of each to the years of the husband's parenting responsibility for the two children. On a generous judgment of the terminal date, I would choose Chloe's 22nd birthday.
46. Thus in my judgment the housing fund of £2.5 million should not be his absolutely (subject to some moral responsibility to devise it to the children by his will). It should be held for him only during the parenting years. Thus the transaction should be in the hands of two trustees to hold for the husband on parallel terms to those proposed for the contact home.
47. Equally the income fund should be capitalised to cover the husband's needs at a rate which we will in due course determine only until Chloe's 22nd birthday. Capitalisation was thought by Baron J to be wise and I would not differ from her in that.
48. This distinction does not operate in accessing the wife's contribution to clearing the husband's debts but I would not interfere with the judge's order for the reasons given by My Lord, Wilson LJ.
49. Likewise I would not interfere with Baron J's assessments of (a) the additional capital award (b) the Husband's needs for a contact home in the jurisdiction of the children's habitual residence (c) periodical payments by the wife for the children.
50. Essentially the major funds (housing and income for the husband) should be provided for him in his role as father rather than as former husband.
51. In my judgment, this approach is necessary to give proper weight to the ante-nuptial contract. Policy considerations fortify my conclusion. Section 25 allows the judges to factor into the discretionary balance considerations that would have been unthinkable in January 1971, the commencement date of this statutory power in its original form. We can take advantage of the flexibility that Section 25 provides to alleviate injustice that would otherwise result from the jurisdictional rules introduced by Brussels II and the widely divergent legal and social traditions of the civil and common law states of Europe.
52. There seems to be no purer route to fairer outcomes. The application of the relevant foreign law does not offer an attractive solution to family lawyers and policy makers in this jurisdiction, given that the obligation would extend to all foreign laws. The gulf between our statute law and Sharia law is wide indeed. Equally the member

states of Europe seem unlikely to adopt the doctrine of forum conveniens despite the precedent presented by Article 15 of Brussels II.

53. Thus, pending the report of the Law Commission, in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.
54. I now turn to the cross-appeal that the husband brings by way of Respondent's Notice.
55. It was common ground at the trial that the children would be habitually resident in Dusseldorf in accordance with the wife's proposals endorsed by the grant of permission to relocate. Baron J decided on the evidence that the sum of €600,000 should be paid by the wife to trustees to finance the purchase of a suitable contact home in or near Düsseldorf. Only four months later the wife announced her intention of shifting the children's habitual residence from Dusseldorf to Monaco. She has recently been granted permission by a German Judge to make the move, a move that will frustrate the care with which Baron J assessed the quantum of the fund. Property in Monaco costs hugely more than property in Düsseldorf and even property in the French hinterland is likely to be significantly more expensive. I can understand the husband's feeling that the wife is deliberately controlling events to frustrate him. Solely on the ground of fresh evidence I would allow the cross-appeal and remit to Baron J the assessment of the quantum of the fund to provide the contact home in the event of the wife moving to Monaco.
56. In this judgment I have not set out the submissions of counsel other than in passing. I would however express my appreciation of the very able way in which both Mr Todd QC and Mr Mostyn QC argued their respective cases.
57. Finally, I have had the advantage of reading, in draft, the judgments of My Lords with which I am in complete agreement.

Lord Justice Rix:

58. I agree in principle, in philosophy, and in the detail of their judgments, with my Lords, Lord Justice Thorpe and Lord Justice Wilson. I am grateful to them, as also to the excellent advocacy, both written and oral, with which we have been provided, for laying out the dispute and issues and suggested solutions. I agree with the outcome of this appeal that my Lords have proposed. I add some remarks of my own, with diffidence amounting to trepidation seeing that I am writing in a context with which I have not previously had experience, only on their urging. It goes without saying that they are in no way responsible for what follows.
59. There are four questions which it seems to me I might usefully pose concerning a pre-nuptial contract such as that found in this case: (1) What is the current and/or developing law for the purposes of section 25 of the Matrimonial Causes Act 1973? (2) Has Baron J erred sufficiently in the application of that law for this court to be entitled to interfere? (3) If so, what should be the result in this case? (4) In what

direction should the law proceed when it comes to be examined by the Law Commission and/or Parliament?

1. The current and/or developing law for the purposes of section 25.

60. Baron J usefully recorded her account of the fundamental principles concerning the section 25 jurisdiction at paras 83/91 of her judgment and in that context she turned to the developing law regarding pre-nuptial agreements at paras 109/129. My Lords have also in their own terms had regard to the latter at paras [16/20] and paras [129-132] of their respective judgments. I will not revisit what Wilson LJ has called that well-worn map. It is instructive, however, to attempt to restate in summary form the judge's conclusions, as pertinent to the present case:
- (i) In the field of family law England is a *lex fori* country. This is described as an essential pillar (para 87).
 - (ii) Nevertheless, where foreign elements are involved, in fairness these factors must be weighed in the balance, as part of the discretionary analysis (paras 89/91).
 - (iii) Pre-nuptial agreements, however, are not enforceable *per se*, being contrary to public policy (paras 109/110).
 - (iv) Nevertheless, the "courts are now much more ready to attribute the appropriate and, in the right case, decisive weight to an agreement" as part of "all the circumstances of the case" (para 111). She cited Thorpe LJ in *Crossley v. Crossley* [2008] 1 FCR 323 at para 15 where he described the pre-nuptial agreement there as "a factor of magnetic importance" (at para 117).
61. Baron J therefore concluded her account of the law in these terms:
- "118. This review shows that, over the years, Judges have become increasingly minded to look at the precise terms of the agreements and will seek to implement their terms provided the circumstances reveal that the agreement is fair. Despite this, having considered the Authorities, I am clear that the old common law rule remains to the effect that a party who has made a pre-nuptial agreement cannot sue on it as if it were a valid contract so as to enforce its terms; for example in the Queens Bench Division by seeking an injunction to enforce it or by seeking specific performance of its provisions.
119. Upon divorce, when a party is seeking **quantification** of a claim for financial relief, it is the Court that determines the result after applying the Act. The Court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the compelling factor."
62. That conclusion was expressed in general terms regarding pre-nuptial agreements as a whole. Where, however, as in the present case, the pre-nuptial agreement had foreign elements, being made by foreign nationals under a foreign law, the judge stated that

these had to be taken into account as well. In that respect she found, and indeed it was hardly a matter of dispute between experts, that the parties' agreement was valid and enforceable under the laws of both Germany (the nationality of the wife and the agreement's proper law) and of France (the nationality of the husband). She therefore concluded:

“92...To my mind to give no weight to these factors would be both unfair and unjust. These points are obviously matters which should be considered by me in the proper analysis of the appropriate outcome because the Act enjoins me to consider **all** the circumstances of the case.

93. Given the factual matrix, whilst I do not regard the foreign elements as determinative or ultimately fully decisive, they are definitely relevant because they are essential features...”

63. Since the judgment below, however, there has been the decision of the Privy Council in *MacLeod v. MacLeod* [2008] UKPC 64, [2009] 1 All ER 851. How, if at all, has that changed matters? Baroness Hale of Richmond set out her own account of the law as it has developed (at [25] – [28]) including within that account the cases concerned with pre-nuptial agreements. *MacLeod* was not concerned directly with pre-nuptial agreements, but Baroness Hale covered them in her observations and Thorpe LJ has set out most of the relevant citations in his judgment above. The critical effect of those passages is that Baroness Hale in effect acknowledged the law as it already existed but also stated the Board's view that the “difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development” (at [35]). In particular she both affirmed that it is “not open...to reverse the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense” (at [31]), and cited with apparent approval (at [27]) the conclusions of Baron J from which I have myself cited at para 61 above.
64. It follows that pre-nuptial agreements are at one and the same time *both* unenforceable and invalid as being against public policy *and* matters which the court is prepared to take into account (and possibly decisively) for the purposes of its section 25 jurisdiction. That is a situation which has been criticised as “the worst of both worlds” (see Hoffmann LJ in *Pounds v. Pounds* [1994] 1 WLR 1535 at 1550/1, cited by Baroness Hale in *MacLeod* at [29]) and has on the contrary been described by Mr Todd QC in this case as reflecting the “genius” of section 25. Be that as it may, it strikes me as anomalous, albeit plainly the present state of the law. On the one hand the pre-nuptial agreement is invalid as being contrary to public policy, and on the other hand it may be and is taken into account by the court. No doubt the court is *obliged* under section 25 to have regard to all the circumstances of the case (see the language of section 25 cited at para [120] in the judgment of Wilson LJ below). Nevertheless, there is a problem in having regard to an agreement which is contrary to public policy. Mr Mostyn QC made submissions to this effect, but, in the present state of the law, forlornly.
65. Although this state of the law is, as it seems to me, clear, the anomaly leads to problems. For instance, Thorpe LJ has said that insofar as the rule that pre-nuptial

contracts are void survives, he describes that rule as increasingly unrealistic (at para [29] above); whereas Wilson LJ has argued that in *MacLeod* the Privy Council, in the opinion of Baroness Hale, “authoritatively swept away the considerations of public policy which had been constructed by reference to [the spousal duty] and therefore the voidity of such contracts at common law” (see at para [119] below), leaving only invalidity by reason of statute, as per *Hyman v. Hyman* [1929] AC 601. However, Baroness Hale has herself distinguished between pre- and post-nuptial agreements on grounds of public policy: see at [31], [35] and [36]. At least one of her reasons raises the question whether one party to a prospective marriage can lawfully extract a price for entering into that marriage: a ground of policy which might be said to go to the heart of any regard being paid to a pre-nuptial agreement at all. It might be argued that those policy considerations should lead to principled or at least significant opposition to any or any serious regard being paid to pre-nuptial agreements. However, if the only difficulty about the validity of a pre-nuptial agreement is that it remains subject to the ultimate discretion of the court pursuant to section 25, it is not obvious to me that there is any need to describe such agreements as being void for reasons of public policy at all. It is simply that the extent to which they will be given effect remains in the power of the court. The ultimate discretion under section 25, as it has come to be exercised, is after all not very different from the power to vary a post-nuptial agreement, as being a maintenance agreement, under section 35 (although I recognise that there are specific conditions attached to that power to vary). In such circumstances it might be said that the only part of a pre-nuptial agreement which might be contrary to public policy was a clause which sought to *exclude* the power (and duty) of the court to exercise its ancillary relief jurisdiction under section 25. Even the presence of such a clause would not be so much a matter of a contract against public policy as an ineffective attempt to exclude a mandatory rule of law.

66. If it were open to me, which I recognise it is not, I would therefore have wanted to suggest that the language of invalidity and public policy is no longer appropriate and that section 25, as it has come to be applied to pre-nuptial agreements, can operate without it. It would simply be that in any question of ancillary relief the court would be bound to have regard to all the circumstances of the case.
67. It will be recalled that the pre-nuptial agreement in the present case was carefully drafted so as to avoid trespassing on mandatory rules of law. There is no express exclusion of the right to approach any court. The mutual waiver of claims is expressed as applying “to the fullest extent permitted by law”. It is recognised that “existing case law” may have things to say “in respect of the total or partial invalidity of broadly worded maintenance waivers in certain cases, particularly so far as such waivers have detrimental effects for the raising of children and/or the public treasury”. It is common ground in this case that the agreement in no way trespasses on the court’s full freedom to make any disposition with regard to the children’s interests that appears to it to be right.
68. This may be contrasted with the facts in *Hyman*, where the deed of separation contained a covenant by the wife not to take proceedings against her husband for the grant of maintenance or alimony beyond the provision made by the deed. The issue in the case was whether that could affect the court’s statutory power to award maintenance to the wife. Lord Hailsham said (at 614):

“...it is sufficient for the decision of the present case to hold as I do, that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.”

Viscount Dunedin (at 614), Lord Shaw of Dunfermline (at 616/7), Lord Buckmaster (at 625) and Lord Atkin (at 629) spoke to similar effect. Lord Hailsham had also said (at 609) that –

“this by no means implies that, when application is made, the existence of the deed or its terms are not most relevant factors for consideration by the Court in reaching a decision.”

69. I would not regard this decision as a basis for saying that all pre-nuptial agreements are void as being contrary to public policy.
70. A further difficulty of the anomaly whereby pre-nuptial agreements are said to be void as against public policy is that an agreement such as is found in the present case, with its foreign elements, may be argued to have greater regard paid to it than an English contract between English nationals. I would certainly agree that it ought to be relevant to the discretion of the court under section 25 that the parties to the agreement are German and French respectively, that the agreement is governed by German law, and that both German and French law recognise the validity of such agreements against the background of civil law regimes of matrimonial property. Those are circumstances which make it particularly propitious, other things being equal, for the English court to give even decisive weight to the parties' agreement (so far as concerns their personal situations, and thus putting on one side for that purpose, as is common ground, the interests of their children). Nevertheless, it is hard to articulate why an agreement made in similar circumstances between English nationals should not receive more or less equal treatment: although it has to be recognised that English law has not prepared the groundwork for such a conclusion. And it will be difficult to articulate, although I suspect it will be a matter of common concern, why the English court might pay greater regard to agreements made under some foreign systems of law than under others.
71. Above all, our present rule, while driven by a principle that public policy trumps private autonomy, has left it difficult or impossible to lay down even guidelines as to the circumstances in which the interests of private autonomy are to have weight. It may be necessary to accept, indeed to join in, the wisdom of Baroness Hale's remark that the case of pre-nuptial agreements is more appropriately left to legislative rather than judicial development: but in the meantime, it remains equally necessary to make as much sense as possible of the current rule and the current jurisdiction under section 25. The judge's solution, and it is in my view a good solution in these difficult circumstances, is to say that the guiding principle is that of fairness: see her para 118 cited above. A more detailed menu has been usefully formulated by Mr Hayward Smith QC, sitting as a deputy high court judge in *K v. K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, cited by Baron J at para 114 of her judgment. Nevertheless, it may be difficult to say what is meant by fairness: is it fairness in the

contents of the contract, in the circumstances of its making, or in the circumstances which have come about? In any event, fairness, as Wilson LJ has pointed out, is a matter which has to be assessed as between both parties to the agreement.

72. We are considering an agreement: but should we look at it as though it was a contract, in terms of contract law? Albeit in the context of post-contractual agreements, Baroness Hale referred with approval in *MacLeod* at [42] to the passages quoted at [25] from the judgment of Ormrod LJ in *Edgar v. Edgar* [1980] 1 WLR 1410 at 1417 and in particular to his observation that “[i]t is not necessary in this connection to think in formal legal terms, such as misrepresentation and estoppel”. She went on to say (*ibid*):

“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.”

73. That was said in the context of post-nuptial agreements and indeed as it may be of agreements leading up to a settlement of ancillary relief claims – hence, as it seems to me, the importance of the stress in such a case on “properly negotiated” agreements. The context of pre-nuptial agreements, however, is rather different. It is not so much, as I would respectfully hazard, because of the danger that a pre-nuptial agreement may be extracted as a price of marriage. In that respect, I would say that it is equally important to be aware that if the parties to a prospective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before marriage, rather than left to become a source of disappointment or acrimony within marriage. It is rather that I have in mind (and in this respect there is no real difference between an agreement made just before or just after a marriage) that a pre-nuptial agreement is intended to look forward over the whole period of a marriage to the possibility of its ultimate failure and divorce: and thus it is potentially a longer lasting agreement than almost any other (apart from a lease, and those are becoming shorter and subject to optional break clauses). Over the potential many decades of a marriage it is impossible to cater for the myriad different circumstances which may await its parties. Thorpe LJ has mentioned the very relevant case of a second marriage between mature adults perhaps each with children of their own by their first marriages. However, equally or more typical will be the marriage of young persons, perhaps not yet adults, for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement as in another perhaps very different example?
74. That may be a real example of a potential problem arising from marriage and divorce, but perhaps an unrealistic example of a pre-nuptial agreement, at any rate as things stand at the moment in this country. Pre-nuptial agreements are more likely to be entered into by those who are already, or whose parents are already, wealthy. Even so, these two scenarios may overlap. So any rule will need to maintain a flexibility that

will do justice in the particular case, as well as delivering a principle which provides as much clarity and certainty as possible.

2. *The judge's exercise of her discretion*

75. It follows that the judge has guided herself correctly as to the present state of the law. But has she applied that law correctly? In particular can the exercise of her wide discretion under section 25 be faulted?
76. It is submitted by Mr Todd on behalf of the wife that the judge has erred in application because it is impossible to see how she has given effect to her acknowledgment that the parties' pre-nuptial agreement should be given weight. On the other hand, Mr Mostyn refers to what the judge described as the "flawed" and "tainted" nature of the agreement and submits that in the circumstances (save with respect to the respondent's notice relating to the move to Monaco) the judge gave quite enough effect to such an agreement to withstand attack on appeal. He asks why after all *any* effect should be given to a flawed agreement which, as the judge found, was "defective under English law" because (a) the husband received no independent advice; (b) the agreement purported to deprive the husband of all claims even in a situation of want; (c) there was no disclosure of assets by the wife; (d) there were no negotiations; and (e) two children were born of the marriage (at para 137)? Her reasons for so describing the agreement had previously been set out at para 38. Wilson LJ has reviewed those reasons in detail and I will not also cover that ground.
77. The judge described her approach in three critical passages of her judgment. At para 93 she said of the agreement's foreign elements that whilst they were not determinative or ultimately fully decisive, "they are definitely relevant because they are essential features". At para 95, she said that the husband's claim "should be based upon his needs as judged against the lifestyle that the parties lived and the fact that the Husband agreed that he did not intend to seek any financial award if the marriage ended". Finally, in the first paragraph of the passage headed "Conclusion and award", at para 139, she spoke in these terms:
- "In assessing the Husband's needs I will take account of all the circumstances of the case. For the avoidance of doubt, and for the reasons which I have set out above, I consider that the award should be circumscribed to a degree to reflect the fact that at the outset he agreed to sign the PNC. Of course, from an English perspective the agreement was flawed and I take full account of the fact that the Husband's agreement was tainted because he did not know what his future wife was worth and did not have independent legal advice about the ramifications of the deal. Nevertheless, he understood the underlying premise that he was not entitled to anything if the parties divorced. In essence, he accepted that he was expected to be self-sufficient. As a man of the world that was abundantly clear. His decision to enter into the agreement must therefore affect the award."
78. Wilson LJ has described this last passage as something of a *via media* about which Mr Mostyn could make legitimate complaint. However, he has given his own reasons, with which I am in full agreement, for saying that the judge erred if she intended to discount the regard which she had for the agreement on the ground that it was flawed, tainted or defective in the five respects identified by her. Even if the circumstances of

its making, and its contents, could, from the point of view of the English law, have been improved, it is impossible to say that such “flaws” if it would be appropriate so to describe them, which I doubt, were such as to destroy the agreement as a factor to which the court should have any regard. Ultimately, I think that the judge acknowledged that, in the last four sentences of her para 139, where she was saying that, in the final analysis, the husband knew what he was doing, and was entering into the agreement with full consent in that knowledge. (See also in this connection her para 95, where she balances the “vitiating factors” with “the simple fact that the Husband agreed not to make a claim in the event of divorce”). In my judgment that must remain the test: barring misrepresentation or fraud, or undue influence, or such other defect serious enough to remove the necessary basis of consent, the pre-nuptial agreement, whether viewed as a contract or a mere legally ineffective agreement, stands as a matter to which regard must be had for the purposes of section 25. In this context, I am sceptical about demanding too much of the requirement of knowledge. Where further knowledge is expressly waived, as it was in this case, it seems harsh doctrine to deprive an agreement on that account of all effect as having been made without consent. If matters would nevertheless turn out to operate unfairly, there is room to take that into account at another stage.

79. In my judgment, therefore, despite the obvious care and well-recognised experience which she brought to her decision, to which I would respectfully pay tribute, Baron J made the following errors: (1) while recognising the agreement as effective for the purposes of having regard to it under section 25, she discounted it as a nevertheless flawed and tainted agreement; (2) in this connection she regarded the agreement as ineffective to deprive the husband of any claim for his needs, although that was his agreement; and (3) although she purported to discount an award based on his needs by reference to his agreement, it is difficult, for the reasons given by my Lords, to find that she applied any real discount over and beyond a conventional or legitimate scepticism over the quantification of the husband’s claims. This is particularly the case where the judge expressly said that she was having regard to the foreign elements as “essential features” of the case.
80. Therefore it is necessary for this court to make up its own mind as to the appropriate award.

3. The result in this case.

81. In the circumstances, I agree in effect with my Lords that this is a case in which the pre-nuptial agreement made by the parties should be given decisive weight in the section 25 exercise. Their agreement was entered into willingly and knowingly by responsible adults. The husband had a proper understanding of the consequences of his agreement. It is to be inferred that without that agreement no marriage would have taken place, and that the wife’s father would not have made over to her the additional resources which followed her marriage. The parties entered into their agreement with the help and advice of a German lawyer, under German law, making an agreement which was familiar to the civil law under which both parties and their families had grown up in Germany and France. The husband had thereafter chosen his own course in life, and, in giving up his earlier career as a banker and becoming a student, has acted in what he has considered to be his own best interests. Fortunately and because

of his own considerable abilities, he has succeeded in his new direction in life. What the future will bring to him as an able scientist, academic or researcher remains to be seen, but he is doing exactly what he wants to do. The marriage has been blessed with children, and there is shared residence between the parents, but their pre-nuptial agreement in any event recognised that the interests of the children should stand outside the parents' agreement. The provision of a home for the husband and for his needs as a father, carer and home-maker for the children will, in the circumstances, more than adequately provide him with the means to support his own needs. There is no case for making that home and financial support his to command for the whole of his life-time. By the time the younger daughter is out of education or has reached 22, he will have had every opportunity to make his own life and to earn such a living as will reflect his own aspirations.

82. I am therefore in full agreement with my Lords' proposals and their rationale and would allow this appeal on that basis.

4. *The future*

83. This is essentially in the hands of the Law Commission and Parliament. In the meantime the courts will have to continue to apply section 25 in accordance with its developing jurisprudence. I have expressed myself in sceptical terms as to the virtues of a doctrine of invalidity on the ground of public policy. I see great force in a doctrine of presumptively valid. I would merely observe that, while the public interest in a fair and just exercise of the court's discretion remains, there is fairness and justice too in a proper appreciation of party autonomy: and that there are dangers in overly paternalist or patronising attitudes or in an insufficiently international outlook.

Lord Justice Wilson:

84. I readily accept the invitation extended to me by Thorpe and Rix LJJ first to set out the factual circumstances upon which all our three judgments are based. I will set them out in Sections A to E.

A. The Judge's Orders

85. The judgment of Baron J, [2008] EWHC 1532, is reported as *NG v. KR (pre-nuptial contract)* at [2009] 1 FCR 35. It was at her direction that the identity of the parties was thus disguised by initials; but their identity has now entered the public domain.
86. The main orders of the judge, dated 28 July 2008, were as follows:
- i) The "wife" (as it is convenient to describe her notwithstanding the pronouncement of a decree absolute of divorce) should by 31 July 2008 make a lump sum payment to the "husband" of £5,560,000.
 - ii) The wife should by 1 December 2008 provide €630,000 for the purchase in her own name, and for the furnishing, of a property in Düsseldorf, to be chosen by the husband and to be subject to such rights of occupation on his part, to the exclusion of the wife, as would endure until the younger (or survivor) of their two daughters, Chiara and Chloe, were to attain the age of 18 or, if later, to

cease full-time education, provided that, were she to attend university in England, his rights would not in any event continue beyond her attainment of a first degree and that, were she to attend university abroad, they would not in any event continue beyond her 22nd birthday.

- iii) The above provisions were in full and final settlement of all claims for ancillary relief by each party against the other.
- iv) The wife should make periodical payments to the husband for the benefit of Chiara and Chloe (“the girls”) at the rate of £35,000 p.a., index-linked, for each of them until, in each case, she were to cease full-time education, provided that, were she to attend university in England, the payments would not in any event continue beyond her attainment of a first degree and that, were she to attend university abroad, they would not in any event continue beyond her 22nd birthday.
- v) There should be no order for costs between the parties.

87. In her judgment the judge explained that the lump sum of £5,560,000 was designed to meet the husband’s needs and comprised the following:

- i) £2,500,000 in order to enable the husband to purchase, inclusive of costs and refurbishment, a small property in Chelsea, or a larger property in Oxford or the Thames Valley, “as a base for himself and the girls”. A recital to the order recorded the husband’s assurance that he would bequeath to the girls the equity in the property therewith to be purchased by him. But there was a proviso that the assurance did not “prevent him from releasing equity from the said property”. The words appear to recognise the husband’s ability to release equity to himself for the meeting of his own perceived needs at any stage of his life; and so, while there is no reason to doubt the husband’s *bona fides* in presently intending to pass the value of the property to the girls upon his death, the judge’s provision did not ensure that such would inevitably occur.
- ii) £700,000 in order to enable the husband to meet most of his debts.
- iii) £25,000 in order to enable the husband to buy a car. And
- iv) £2,335,000, a *Duxbury* award, in order to provide the husband, in the light of his perceived likely earning capacity (as to which see [92] below), with a net spendable income from all sources of £100,000 p.a., adjusted for perceived likely inflation, for the rest of his statistical life.

B. Permission to Appeal

88. On 3 October 2008 Lawrence Collins LJ (as he then was) and I conducted a hearing on notice of the wife’s application for permission to appeal against Baron J’s order for payment of the lump sum. By our judgments, [2008] EWCA Civ 1304, we concluded that her proposed appeal had a real prospect of success and indeed raised an important point of principle and thus that we should grant her permission. In the light however of the facts not only that the wife had failed to pay the lump sum whether by 31 July 2008 or at all and to make other, interim, payments directed by the judge but also, in

particular, that she appeared to have taken steps to hide her liquid assets in order to obstruct enforcement of the lump sum order in the event that it were to survive her proposed appeal, we attached conditions to the grant of permission pursuant to CPR 52.3(7). The principal condition was that she should pay £5,560,000 and other specified sums into an account in the joint names of the parties' solicitors no later than 31 October 2008. In that she complied with this condition, and with the others which we attached, the appeal has proceeded.

C. Current Circumstances

89. Chiara was born on 4 September 1999 and so is now aged nine. Chloe was born on 25 May 2002 and so is now aged seven.
90. The husband is aged 37, is of French nationality and was born, brought up and educated to university level in France. His father, who is wealthy, now resides in London for tax reasons but retains a property in Antibes, of which, under French law, the husband would inherit a share. The husband is also now firmly based in England. Currently he continues to occupy the former matrimonial home, a flat in Knightsbridge, which he rents at £87,000 p.a.
91. The husband is studying for a D. Phil. at Hertford College, Oxford. His research studies began in 2003 and his dissertation was due to be completed in 2006. But its completion and thus his anticipated doctorate have been delayed as a result of the inherent complexity of his research, of the breakdown of the marriage, of these proceedings and of his substantial role in the care of the girls. He may complete his work for the doctorate later this year and hopes thereafter to continue to work as a researcher, whether still at Oxford or elsewhere. His field is biotechnology in general and the isolation of enzymes and gene products in particular. His supervising professor describes him as an absolutely outstanding student. The husband has already patented some of his discoveries, which might be of interest to drug companies in relation to the treatment of cancer and might thus be a source of future income for him, albeit unquantifiable as well as speculative.
92. The judge thus considered it likely that the husband would soon be in receipt of a modest income as an academic researcher. In this regard she ascribed to him an earning capacity of £30,000 p.a. There has been considerable confusion as to whether such was a gross or a net figure. In different parts of her judgment the judge referred to £30,000 both as net and as gross; and at one point Mr Todd told us that it was net. Mr Mostyn concedes however that all references to net are mistaken and that the figure taken into the judge's calculations was gross. Indeed, in that, as I have explained, the lump sum award included a capitalisation on the *Duxbury* basis of periodical payments reflective of the husband's perceived needs for the rest of his statistical life, the judge needed to identify a figure for his earning capacity for the rest of his likely working life. A highly controversial, if subsidiary, feature of her judgment was her decision in this regard to ascribe an index-linked gross income of only £30,000 pa to the husband in respect of his likely earnings not just for the next few years but until he attained the age of 65, i.e. for the next 27 years.
93. The husband has no assets. Indeed he is heavily in debt, largely reflective of his costs not only of the financial proceedings but also of proceedings in England in relation to the relocation of the girls which I will explain in [96] below. The judge took his total

indebtedness to be £800,000, the components of which were in round terms as follows:

- i) his costs of the financial proceedings (up to July 2008): £556,000;
- ii) his costs of the proceedings at first instance in relation to the relocation of the girls: £85,000;
- iii) his costs of his attempted appeal to this court relating to their relocation: £50,000;
- iv) the wife's costs of his attempted appeal, which this court ordered him to pay: also £50,000; and
- v) other debts: £59,000.

94. The wife is aged 40 and is of German nationality. Her family in Germany is of substantial affluence, generated in particular by its ownership of two groups of companies which manufacture paper and apply specialist treatments to it. The wife has a 16% shareholding in one group and a 23.4% shareholding in the other. The shares generate (or did generate, according to the most recent figures available to the judge) an annual income for the wife of £2,700,000 gross or £1,500,000 net. From these figures Mr Mostyn sought before the judge to extrapolate a capital value for her shares of £52,000,000; but his calculation, at a simple 5% gross yield, was controversial and the judge decided that the amount of her income from the shares represented an indication of their value which it was unnecessary to seek to translate into a specific sum.
95. Apart from her shares in the two groups, the wife has liquid assets amounting, in July 2008, to £54,000,000.
96. In February 2007, four months after she had moved with the girls out of the matrimonial home into separate rented accommodation in Knightsbridge, the wife applied for leave to remove them to live with her in Düsseldorf, close to where her family lives and where the two groups of companies operate. The simple proposition at the centre of her application for relocation was that, in the light of the breakdown of the marriage, she wished to go home; but a specific aspect of it was her aspiration to work part-time as head of the department of human resources in one of the groups. On 28 September 2007, following a contested hearing over three days, His Honour Judge Collins CBE granted leave to the wife to relocate with the girls to Germany. But he did so on the basis that they would spend very substantial periods of time with the husband both in London, in Germany and elsewhere on holiday; and he cast those periods not into a contact order but into an order that the husband should share with the wife the residence of the girls and thus that they should 'reside' with the husband during them. Judge Collins also required the wife to obtain in Germany a mirror order reflective of the arrangements which he had directed. On 11 December 2007 this court refused the husband's application for permission to appeal against the relocation order and ordered him to pay the wife's costs of the application. Then there were further hearings before Judge Collins, largely about the terms of the mirror order. At their conclusion he directed that the husband and wife should each bear their own costs of all the proceedings before him.

97. Prior to the conclusion of those proceedings, with the permission of Judge Collins, the wife had taken the girls to live in Düsseldorf: they moved there on 2 February 2008. On a temporary basis, pending the wife's purchase of a house outside the city which in the event has not occurred, they moved into rented accommodation in the city; and the girls began to attend an international school.
98. Since February 2008, pursuant to the orders of Judge Collins, the girls have been residing with the husband to the following extent:
- i) for one half of each school holiday and of each half-term school holiday, whether in London, or in France or elsewhere; and
 - ii) on alternate weekends during school term, from Friday to Monday, in Germany, save that on five weekends in each year (not, I assume, additional to the alternate weekends) the husband is permitted to bring them to London.

It was in the first instance as a result of the pendency of this appeal that the purchase of the German property by the wife for the use of the husband, directed by the judge, has not taken place; so the husband has rented accommodation in Düsseldorf for his use with the girls during the term-time weekends.

99. On 25 November 2008, by a letter passing between the parties' German lawyers, the wife made a surprising announcement, namely that she wished to move with the girls to live permanently in Monaco. The terms of the letter, for which the wife, through a different German lawyer, has since apologised, were profoundly unfortunate in that the move to Monaco was presented to the husband in effect as a *fait accompli*: it said simply that ten days previously she had decided to move there with the girls and that they would be moving there within the following three weeks. The husband's immediate objection precipitated an application by the wife to the Düsseldorf District Court, Family Court, for permission to relocate with the girls to Monaco. At the time of the hearing before us her application remained pending and, partly in view of the enthusiasm of the girls for the move as reported to the German court, it then seemed to us to be likely to succeed. Indeed, since the hearing, counsel have informed us by letter that on 28 May 2009 the German court has indeed granted the necessary permission to the wife, pursuant to which, on 4 June, she and the girls have duly moved to Monaco. The wife's grounds for the move appear to have related to tax avoidance, to conflicts with one of her sisters in relation to the ownership and management of the family businesses and to the weakness of the girls in the German language which, although they were attending an English-speaking school in Düsseldorf, is said to have hampered their integration into German life. The wife's recent proposal to move to Monaco generated the late proposed cross-appeal by the husband against the judge's provision for the purchase of accommodation for him in Germany in the sum of €30,000.

D. The Circumstances Surrounding the Pre-Nuptial Contract

100. The parties met in November 1997 in London, where they were both by then living. The husband was then aged 26 and the wife was then aged 28. They became engaged in June 1998 and began to live together; and they were married on 28 November 1998.

101. During that year prior to the marriage the wife and one of her sisters were operating a boutique in Beauchamp Place, which was to prove unsuccessful. The husband, who had come to London two years previously, had begun a career in investment banking in the City, in which he seemed destined for great success. He was working for J.P. Morgan and Co. in their emerging markets sector. It is important to note his income. In 1997, which probably means in that calendar year, he earned in dollars what was then equivalent to £50,000 gross; and in 1998, when their pre-nuptial contract was executed, he earned what was then equivalent to £120,000 gross.
102. Upon their engagement in June 1998 the parties discussed, and in effect immediately agreed to enter into, a pre-nuptial contract. They each fully understood the nature of the contract into which they were agreeing to enter. It was to be a contract which provided that the marriage would confer upon neither of them any interest in property brought into it by the other; that such resources as were to accrue to each of them during the marriage would remain owned by that party alone; that, both during the marriage and (more relevantly for present purposes) in the event of divorce, neither would have any claim against the property or income of the other; and that, in the event of termination of the marriage by death, the survivor would have no rights against the deceased's estate beyond such, if any, as were inalienable under German law.
103. The suggestion that the parties should enter into a pre-nuptial contract was broached by the wife rather than by the husband. She wanted to enter into the contract with the husband for two reasons. First, her father was insistent that, like her sister, she should do so in order to protect the family's wealth and he indicated (or at least implied) to her that otherwise he would take steps to disinherit her. Second, she was independently insistent upon their entry into it because, although, as I will explain, she was far less wealthy than she was to become during the marriage, she already then had a substantial unearned income and regarded the husband's entry into it as an important indication that he wished to marry her for love rather than for money. The judge found however that it was only the first reason which the wife made obvious to the husband; as the judge observed, one can well understand why she found it easier to explain to him that the demand for the contract emanated from her father.
104. On 6 July 1998 the wife's mother attended Dr Magis, a notary in Germany who had previously undertaken work for the family, and instructed him to draft the contract for her daughter. The mother told him that the marriage was to be in London in the autumn and that neither of the parties wished to make any claim on the other in the event of divorce. Dr Magis observed that such a contract might leave a young mother with children in difficulty; but the mother responded that her daughter was well provided for and that, notwithstanding her fiancé's excellent income, there would be no risk for her even in the worst case scenario. Their discussion is of some interest because, even though it may seem obvious to us, with the benefit of hindsight, that the only foreseeable effect of the contract was to preclude claims by the husband against the wife, it may be that in 1998, when the husband seemed to have been launched upon a successful career in the City, it was reasonably seen also to have a *possibly* preclusive effect on claims by the wife against him if certain circumstances eventuated.
105. On the same day, 6 July 1998, Dr Magis spoke by telephone to the wife. They agreed that he should draft the contract as quickly as possible in order to give the husband an

opportunity fully to understand it and, if he wished, to take advice on it prior to its execution, which (so she and Dr Magis proposed) would take place in his office in Germany on 1 August 1998.

106. On 17 July 1998 Dr Magis sent by fax to the wife at the boutique in Beauchamp Place a draft of the contract, under cover of a letter in which he wrote in German “You wanted to discuss the content of the agreement with your future spouse and have it translated into a language convenient for him”. In the draft, which of course was also written in German, there was a clause for the parties to insert the approximate value of their respective assets; but the wife telephoned Dr Magis that day and said that the clause should be deleted and that she and the husband would separately notify each other of the value of their assets.
107. On 20 July 1998, on the wife’s instructions, Dr Magis sent to her father a copy of a revised draft of the contract. On 23 July the wife informed Dr Magis that she had discussed the draft with her father and that he wanted it further to be amended. In the event, however, it was agreed that the effect of the father’s suggested amendment would better be achieved by her execution of a will.
108. On about 24 July 1998 the wife received from Dr Magis the revised draft of the contract. The judge found that on about the same date she showed it to the husband, who had not seen the first draft. In so finding the judge rejected the evidence both of the wife (that by then she had already shown the first draft to the husband) and of the husband (that he saw no draft at all until 1 August). The judge proceeded to find that, when showing it at that time to the husband, the wife made its basic terms clear to him; but the judge expressed herself unconvinced that the wife had gone through it with him line by line. The judge also found, first, that the husband told the wife that he did not need a translation of the draft but, second, that the wife had not explained to him that Dr Magis wanted him to have a translation.
109. The judge further found that the wife never told the husband that she had requested Dr Magis to exclude the clause relating to the value of their assets; and that the wife never purported, even separately from the contract, to notify the husband of the value of her assets. Indeed the judge found that the wife wanted to keep her “asset base” secret from him.
110. On 1 August 1998 the parties duly attended at the office of Dr Magis near Düsseldorf. Their meeting with him continued for between two and three hours. The judge accepted the evidence of Dr Magis that the husband told him that he had seen the draft contract but that he did not have a translation of it. Dr Magis (so the judge found) was angry when he learnt of the absence of a translation, which he considered to be important for the purpose of ensuring that the husband had had a proper opportunity to consider its terms. Indeed Dr Magis proceeded to indicate that he was thus minded to postpone its execution but, when told that the parties were unlikely again to be in Germany prior to the marriage, he was persuaded to continue. Accordingly (so the judge found) Dr Magis, speaking English, took the parties through the terms of the contract in detail and explained them clearly; but he did not offer a verbatim translation of every line. Thereupon the parties executed the contract in his presence.
111. In the recital to the contract the parties (according to an agreed translation) stated:

“[The husband] is a French citizen and, according to his own statement, does not have a good command of German, although he does, according to his own statement and in the opinion of the officiating notary, have an adequate command of English. The document was therefore read out by the notary in German and then translated by him into English. The parties to the contract declared that they wished to waive the use of an interpreter or a second notary as well as a written translation. A draft of the text of the contract was submitted to the parties two weeks before the execution of the document.”

Later, in the clause which provided for separation of property, they stated:

“Despite advice from the notary, we waive the possibility of having a schedule of our respective current assets appended to this deed.”

112. In the clause which provided for the mutual waiver of claims for maintenance following divorce, the parties stated:

“The waiver shall apply to the fullest extent permitted by law even should one of us – whether or not for reasons attributable to fault on that person’s part – be in serious difficulties.

The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above.

Each of us is aware that there may be significant adverse consequences as a result of the above waiver.

Despite reference by the notary to the existing case law in respect of the total or partial invalidity of broadly worded maintenance waivers in certain cases, particularly insofar as such waivers have detrimental effects for the raising of children and/or the public treasury, we ask that the waiver be recorded in the above form ...

Each of us declares that he or she is able, based on his or her current standpoint, to provide for his or her own maintenance on a permanent basis, but is however aware that changes may occur.”

113. There was also a clause by which the parties agreed that the effects of their marriage in general, and in relation to matrimonial property in particular, should be subject to German law. A later clause recorded, however, that Dr Magis had pointed out to them that, notwithstanding their choice of German law, foreign legal systems might not apply German law to their relationship but might instead, for example, apply the law of the matrimonial residence; and had recommended that they should obtain advice from a lawyer in practice in the relevant legal system. By letter to the parties dated 3 August 1998 Dr Magis again stressed that, before taking up permanent residence

abroad, they should take the advice of a local lawyer in relation to the effect of the contract there.

E. Events during the Marriage

114. The parties' marriage in November 1998 was in London, where thereafter they lived for more than a year and where Chiara was born. In April 2000 J.P. Morgan posted the husband to New York. The family moved there but the wife did not find the U.S. congenial so in October 2001 the husband was transferred back to London, where the family resumed residence and where Chloe was born.
115. During the marriage the wife's father transferred substantial capital to her. By transfers in 2002 and in 2005 he brought her shareholdings in the two groups of family companies from 10% and 13.8% respectively to their present levels of 16% and 23.4%. In 2005 he also paid €25,000,000 to her in return for her surrender of any entitlement under German Law to a portion of his estate on death. The judge recorded the wife's submission that in the absence of the pre-nuptial contract her father would not have made any of these transfers to her. Not least in the light of the father's insistence upon entry into the contract, the correctness of the wife's submission seems self-evident; and I consider that a fair reading of the judge's judgment is that she accepted it. It may not even have been actively in issue.
116. During the first five years of the marriage, while he continued to work for J.P. Morgan, the husband generated a very substantial income. It reached its apogee in 2001, when he earned \$473,597 (then about £330,000); and it remained substantial in 2002, when he earned \$318,506 (then about £210,000). By 2003, however, he had become disillusioned with his career; so he then left J.P. Morgan and embarked on his research studies at Oxford. Rejecting the husband's evidence to the contrary as deliberately false, the judge found that, when he embarked on his doctorate, the husband planned to return to the financial sector once he had achieved it; indeed to work as a venture capitalist funding enterprises in relation to which his anticipated expertise in biotechnology would be of great value; and indeed, as he then hoped, to generate very substantial wealth in that way. The judge went on to find, however, that over the following five years the husband abandoned the aspiration of returning to the City, which by 2008, not least in the light of the global economic difficulties, would no longer have remained viable in any event.
117. By the time when he began his research, the husband had amassed capital of \$500,000 out of his earnings; but over the following two years he expended it for the benefit of the family. His work at Oxford led him to spend many nights away from the home. But, even before he embarked on it, the marriage had fallen into difficulty. It finally ended in October 2006 when, with the children, the wife moved into the separate accommodation in Knightsbridge. Throughout the marriage the family's standard of living had, naturally, been extremely comfortable, albeit tempered by the wife's aversion to profligacy.

F. Treatment of Pre-Nuptial Contracts Under the Law

118. When in a non-matrimonial case a defendant contends that the claimant's claim against him has, by contract between them, been compromised or otherwise barred, he either applies for a stay or pleads the contract by way of defence, and even in the

latter event usually seeks to make good his contention at the hearing of a preliminary issue: see Foskett on The Law and Practice of Compromise, 6th ed, at [11-03]. In *Hyman v. Hyman* [1929] AC 601 the husband attempted in that way to secure dismissal at the outset of the wife's claim for maintenance against him by reference to the provisions of their deed of separation. He was unsuccessful by reason of the wording of the statute which then empowered the court to award maintenance to the wife, namely s.190 of the Supreme Court of Judicature (Consolidation) Act 1925. Subsection (1) thereof empowered the court to make secured provision, for a period up to the end of the wife's life, of such sum "as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable"; and subsection (2) empowered it to award unsecured maintenance to her during their joint lives of such sum "as the court may think reasonable". The House construed these words as conferring powers from which spouses could not by private treaty derogate: per Lord Hailsham LC at 608, Lord Shaw at 616, Lord Buckmaster at 625 and Lord Atkin at 629. The references in some of the speeches to public policy – in particular the importance that the Poor Law Guardians should not inappropriately become responsible for sustenance of the wife – seem to me to have been introduced only by way of justification for the statutory construction which their Lordships favoured rather than as a freestanding basis of their decision: see Lord Hailsham LC at 608 and Lord Atkin at 628/9.

119. In *MacLeod v. MacLeod* [2008] UKPC 64, [2009] 1 All ER 851, the Board of the Privy Council, by its judgment delivered by Baroness Hale, reminded us that, in contrast to the contract in *Hyman*, which provided for the consequences of a separation which had already occurred, contracts (whether pre-nuptial or post-nuptial) which made financial arrangements for a separation which had *not* already occurred had historically faced rejection for a further, entirely different reason. For they were contrary to public policy and therefore void at common law for inducing breach of the duty of spouses to live together: see [19] of the judgment. At [38] and [39] the Board helpfully explained why the spousal duty no longer subsisted and authoritatively swept away the long-standing rule of public policy which had been constructed by reference to it and therefore the voidity of such contracts at common law. I know of no authority for the existence of some separate, long-standing rule of public policy which, remaining extant, still operates so as to preserve the voidity at common law of pre-nuptial contracts as opposed to post-nuptial contracts; so I fear that I do not fully understand the Board's apparent suggestion to the contrary, at [31]. The result – in my view – is that the only difficulty which still confronts those who wish to rely on contracts (whether pre-nuptial or post-nuptial) as a defence to claims for ancillary relief is the difficulty generated by statute. In the light, however, of the decision in *Hyman*, such is a formidable difficulty; and I suggest that, since that decision was made, the difficulty has become even more clearly insuperable.
120. The basis of my suggestion is change in the terminology of the relevant statute. The change was introduced by s.5 of the Matrimonial Proceedings and Property Act 1970 and is now reflected in s.25 of the Matrimonial Causes Act 1973 as follows:

“(1) It shall be the *duty* of the court in deciding whether to exercise its powers ... above ... to have regard to *all* the circumstances of the case ...

(2) ... the court *shall* in particular have regard to the following matters ...”

(italics supplied)

These words, which expressly cast upon the court a duty to consider all the circumstances, are much stronger than the words “as having regard to ..., the court may deem to be reasonable” which were in effect repeated in the statutes successively in force from 1925 until 1971. In my view, until they are changed in order to accommodate such a defence, the current words make the task of the party who wishes to rely upon a nuptial contract as a defence *in limine* to an application for ancillary relief impossible.

121. It is thus unsurprising that in modern times no serious attempt has been made to deploy a nuptial contract as a defence to an application for ancillary relief in what one might call the pure, non-matrimonial manner, namely as a contract which should defeat the claim *in limine* unless it can be impugned on conventional contractual principles. In this appeal Mr Todd seeks to deploy the pre-nuptial contract as a defence in a modified manner, allegedly apt to its matrimonial context, namely by the proposition that it should be “presumptively dispositive”, i.e. should dispose of the husband’s claim unless the latter can rebut the presumption by the demonstration of, say, strong reason otherwise. Indeed Mr Todd describes this as his primary contention.
122. It is noteworthy that Mr Todd’s primary contention (“presumptively dispositive”) is precisely analogous to the primary contention of counsel for the husband in *MacLeod*: see [30] of the Board’s judgment. In the light of the fact that in *MacLeod* the relevant contract was post-nuptial and of the Board’s particularly cautious observations about pre-nuptial contracts (as to which see [123] to [126] below), one would have expected that, even if – as a statement of existing law – the contention was seriously arguable, it stood a better chance of success in *MacLeod* than in the hands of Mr Todd in the present case. But in *MacLeod* the contention was not accepted. So at the hearing before us, while Mr Todd was valiantly persevering with his primary contention, I came to five provisional conclusions, to all of which, in the end and for reasons which in part require further explanation, I still adhere:
 - i) A presumption of the dispositiveness of any nuptial contract is inconsistent with the terms of s.25 of the Act of 1973.
 - ii) The recent rejection of the presumption by the Board in *MacLeod* is demonstrably correct.
 - iii) Even were the Board’s rejection of it not demonstrably correct, and notwithstanding that decisions of the Board are not binding on this court, it would be profoundly unhelpful for us to reach a different conclusion from it and we should do so only if our analysis were to afford no other option to us.
 - iv) Mr Todd’s submission in this regard is as unnecessary as it is unrealistic.
 - v) Nevertheless, as a headline summary of what our law *should* provide rather than of what it *presently* provides, a presumption of dispositiveness of a

nuptial contract has much to recommend it, notwithstanding the difficulty of precisely articulating what should be required to rebut it.

123. In [14] above Thorpe LJ has set out paras [31] to [35] of the Board's judgment in *MacLeod*, which comprises most of its observations on pre-nuptial contracts. I readily agree with its suggestion, at [35], that "the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development". Indeed, as already appears, I would go further. For I have explained why I consider that the validity and effect of all nuptial agreements, post-nuptial as well as pre-nuptial, are not open in any significant way to judicial *development*, i.e. beyond such treatment of them as the law currently provides. I also agree that, just as the central decision of a couple to marry is momentous (albeit not always so regarded), so also is their decision prior to marriage to enter into a contract that, in the event of divorce, their financial rights and obligations, as spouses, will be satisfied by a payment only of £X, or sometimes by no payment at all, whatever the circumstances which then obtain. So in my view statutory development of the law relating to pre-nuptial contracts needs to protect intended spouses from the effect of having agreed to receive provision which may be substantially less than that to which they would otherwise be entitled, unless they entered into the agreement not only freely but also *knowingly*, which I will use as short-hand for their having had a clear appreciation of its possible consequences.
124. Insofar, however, as our views in this court about pre-nuptial contracts do not entirely coincide with those of the Board in *MacLeod*, I consider, as do my Lords, that it is open to us to express them; and that, in the light of the forthcoming project of enquiry on the part of the Law Commission into the optimum rules for recognition of all types of nuptial contract, it will be helpful for us to contribute to the generation of debate by so doing.
125. In summary I would not wish to express myself as negatively about pre-nuptial contracts as did the Board in *MacLeod* and, in particular, I would not draw as sharp a distinction as it drew between pre-nuptial contracts and post-nuptial contracts. I readily acknowledge the difference between the compromise or even waiver of potential rights by the still single woman (if for convenience I may use that gender) and the compromise or even waiver of existing rights, albeit embryonic in scale during the early stages of marriage, by the married woman. Equally I acknowledge the difference between the statement of the unmarried man that, in the absence of the woman's entry into a contract, he does not intend to marry her and the statement of the married man that, in the absence of her entry into it, he does not intend to continue to be married to her: for again, in the latter case, the married woman has rights, albeit in some circumstances embryonic in scale. Furthermore, although in this respect there is no significant difference between a contract made weeks prior to a marriage and one made weeks afterwards, one can subscribe in general terms to the proposition that a compromise or waiver of contingent rights prior to marriage occurs at longer distance from the circumstances which would obtain in the event of divorce and thus that it is more hazardous and needs so to be understood.
126. But in my view none of these features, even when considered cumulatively, gives rise to the extent of the difference between pre-nuptial contracts and post-nuptial contracts suggested by the Board in the passages in *MacLeod* quoted by Thorpe LJ and, in particular, in its summary at [36], as follows (which he has not quoted):

“Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.”

In my view a party to an existing marriage (say, for convenience, a husband) may be just as able as his unmarried counterpart to extract from his wife her entry into a nuptial contract in return for a *quid pro quo* which, though different, may be just as important to her as to her unmarried counterpart and the price of which, as a married woman, she may well consider herself in no stronger position – perhaps even in a weaker position – to decline to pay than if she were still single. An excellent recent example is the decision of Baron J herself in *NA v. MA* [2006] EWHC 2900, [2007] 1 FLR 1760: after seven years of marriage the wife entered into the contract following the husband’s ultimatum that she should either sign it that day or not return to the home (see [113]). So in my view statutory development needs to provide as much protection for existing spouses as for intended spouses against the effect of nuptial contracts entered into otherwise than freely and knowingly.

127. In 1998 the Lord Chancellor’s Ancillary Relief Advisory Group, headed by Thorpe LJ, was invited to report to the Lord Chancellor on possible reform of the law of ancillary relief, including in relation to pre-nuptial contracts. It fell to me, as the only judge of the Family Division who was then also a member of the Group, to collate the views of the 17 judges of the Division and to report them to the Group for annexation to its report to the Lord Chancellor. My report, dated 13 June 1998, was later published at [1999] Family Law 159; and reference is made to it by the Board in *MacLeod* at [32]. Having recorded, at [7] of my report, that the majority of the judges were of the view that slightly, but only slightly, greater prominence might be given to a pre-nuptial contract by so amending s.25(2) of the Act of 1973 as to require the court to “have regard” to it, I continued, at [8], as follows:

“A minority of us would go a little further. Despite our unanimous lack of enthusiasm for the pre-nuptial agreement, the provisional view of the minority is that, where there is an agreement, whether pre- or post-nuptial, which satisfies the elementary requirements, the shape of the law should be that it be enforced “unless...”. The minority feels that the current law of ancillary relief has inherited a paternalistic strain, rather too hostile to contract (formerly collusion) and in this respect rather too jealous of its own discretion, for the protection, in effect, of the downtrodden wife, and that, while she still exists, she may no longer be apt as a governing stereotype; that even in Edgar, [cited at [128] below], progressive though it was, the dicta too readily deprived agreements of weight, for example in their reference to bad legal advice; and that the overall balance needs gentle redress but, by means of the “unless” clause, making enforcement subject to the interests of the child and to a residual discretion to depart in the plain case.”

I was a member of the minority to which I there referred; and of course its hesitant suggestion was for reform which would make a pre-nuptial contract presumptively dispositive. Following the passage of 11 years, I will, if consulted, be arguing to the Law Commission for reform along the same lines; but I will be doing so far more urgently and far less hesitantly. I suffer forensic discomfort about the lack of clarity in the treatment of pre-nuptial contracts under our present law and a loss of confidence in the justice of an approach which differs from that adopted by most of the other jurisdictions to which we have the closest links, even jurisdictions, such as Australia and most of the states of the U.S., in which there is no marital property regime of which the pre-marital contract is the mechanism for opting out. But the very basis of our present law also concerns me. Its usually unspoken premise seems to be an assumption that, prior to marriage, one of the parties, in particular the woman, is, by reason of heightened emotion and the intensity of desire to marry, likely to be so blindly trusting of the other as to be unduly susceptible to the other's demands even if unreasonable. No doubt in its application to each case the law must guard against the possible infection of a contract by one party's exploitation of the susceptibility of the other. But, as a general assumption, the premise is patronising, in particular to women; and I would prefer the *starting-point* to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed.

128. In [25] and [42] of its decision in *MacLeod* the Board considered the decision of this court in *Edgar v. Edgar* [1980] 1 WLR 1410 in relation to a post-nuptial, indeed post-separation, contract. Specifically approving the stress laid by Ormrod LJ at 1418F on the need to enquire whether the wife's entry into the contract reflected exploitation by the husband of superior bargaining power, the Board summarised its view of the current law, at the end of [42], as follows:

“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.”

Such is a helpful exposition of existing law; and it falls not far short of an informal presumption of dispositiveness. I wish to see statutory reform which introduces a formal presumption of dispositiveness and which expressly extends to pre-nuptial as well as to post-nuptial contracts.

129. What, then, is the existing law in relating to pre-nuptial contracts by which the present case fell to be judged?
130. The correct answer was surely given by Baron J herself in the judgment under appeal; and, in giving it, she echoed what she had well said in *NA v. MA*, cited above, at [12]. In the judgment under appeal she said:

“111. I am certain that English courts are now much more ready to attribute the appropriate (and, in the right case, decisive) weight to an agreement as part of “all the circumstances of the case” [within the meaning of s.25(1) of the Act of 1973]

...

119. Upon divorce, when a party is seeking *quantification* of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties' agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor ...”
131. In reaching her conclusion the judge had charted upon what has become a well-worn map the hesitant development of our law's treatment of the pre-nuptial contract to its present status as a circumstance of possibly decisive weight. She had begun by citing the famously negative comments of Thorpe J (as he then was) in *F v. F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 at 66 E – H; had paused to note my own swift dissociation from his comments in *S v. S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200 at 1203D – 1204A; had cited the 16 relevant questions incisively posed and answered by Mr Hayward Smith QC, sitting as a deputy judge of the Division, in *K v. K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 at 131B – 132G; and had concluded by reference to the important recent decision of this court in *Crossley v. Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467. *Crossley* was a case in which it appeared *at first sight* that, irrespective of the scale of the husband's resources, the claim of the already wealthy wife, following little more than a year of marriage, would be met with a finding that the pre-nuptial contract was a circumstance of decisive weight. This court therefore dismissed the wife's appeal from an order to the effect that, at any rate initially and subject always to its power to adjourn for the husband to provide further evidence, the court of trial should conduct its exercise under s.25 without affording to the wife an opportunity to probe the husband's initial presentation of the scale of his resources, in case the result of that initial exercise should indeed drive a dismissal of her claim irrespective of their scale. The case also gave to Thorpe LJ, in a judgment with which Keene and Wall LJJ agreed, an opportunity to mark a substantial development in his thinking in the 13 years since making his comments in *F v. F*, cited above, by observing, at [17], that (and then proceeding to explain why) “the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.”
132. It is important to note that in *MacLeod* the Board cast no doubt on the validity of the above analysis of the state of the current law in relation to pre-nuptial contracts; Mr Mostyn does not suggest otherwise. The Board referred with approval, at [27], to the words of Baron J, cited above, in [119] of the judgment under present appeal, and also, [at 28], to the decision in *Crossley*. It was only judicial *development* of the existing law which it recognised to be inappropriate. With respect to Mr Todd, there can be no real doubt about the current state of the law.
133. Before Baron J the wife made a surprising submission, alternative to her main submissions; and, in the light of comments by the Board in *MacLeod* on the same subject, I add my reaction to it, albeit in effect only by way of a footnote. The wife's alternative submission was that, particularly in the light of her human rights, the contract had to be construed as a “maintenance agreement” within the meaning of s.34 of the Act of 1973 and that, in that allegedly there was no ground (indeed perhaps in the circumstances no jurisdiction) for the court to alter its terms under s.35, it was binding on the husband under s.34. In that, insofar as relevant, a “maintenance

agreement” is defined by s.34(2) as an “agreement ... made ... between the parties to a marriage ... whether made during the continuance or after the dissolution ... of the marriage”, Baron J concluded that, having been made prior to the marriage, the contract could not be construed as a “maintenance agreement” and thus that s.34 was not engaged. The wife does not appeal against her conclusion. Unsurprisingly, in its judgment in *MacLeod*, the Board, at [35], expressed itself inclined to share Baron J’s view on that point. Nevertheless the Board expressed great interest in the application of ss. 34 and 35 to *post-nuptial* contracts and, in doing so, implied that even the existing law thereby made a possibly significant distinction between pre-nuptial contracts (being neither alterable under s.35 nor otherwise binding under s.34) and post-nuptial contracts (being thus alterable and otherwise binding). Thus the Board set out in detail, at [23], such provisions of the Matrimonial Proceedings Act 2003 in the Isle of Man as are substantially equivalent to ss. 34 and 35 of the Act of 1973; and thereby, and at [24], the Board pointed out that the latter section conferred on the court a power to alter the terms of a maintenance agreement by reason of a change, even if foreseen, in the circumstances in the light of which the arrangements in it were made. The Board proceeded to stress, at [37], that ss. 34 and 35 applied to all post-nuptial contracts and not only to post-separation contracts; at [40], that the court’s power to alter under s.35 was not able to be ousted by the contract and that “enforcing an existing agreement [under s.34] still has many attractions over going to court for discretionary relief”; and, at [41], that, whether a post-nuptial contract fell to be weighed as an allegedly decisive circumstance under s.25 or whether it fell to be the subject of attempted enforcement under s.34 by one party and of attempted alteration under s.35 by the other, the same principles should be the starting-point, namely whether there had been “a change in the circumstances in the light of which [the] financial arrangements were made”, which the Board then explained as being “the sort of change which would make those arrangements manifestly unjust”.

134. The suggested introduction into the consideration of post-nuptial contracts in proceedings for ancillary relief following divorce of an analogy with the power to alter a maintenance agreement under s.35 is, if I may speak for myself, entirely unexpected; and it will need careful, albeit genuinely respectful, scrutiny in the cases in which it arises. Sections 34 and 35 have been dead letters for more than thirty years. To the best of my recollection, neither at the bar nor on the bench have I been party to a case in which they have even fallen to be considered; but I hasten to add that I have discovered a brief, parenthetical reference to them, as being the foundation of a novel argument, in *Morgan v. Hill* [2006] EWCA Civ 1602, [2007] 1 FLR 1480, at [21]. As the Board in *MacLeod* itself in effect pointed out, at [23], the progenitor of the sections was s.1 of the Maintenance Agreements Act 1957, enacted in an era when, if after separation one spouse wished to be divorced but the other spouse, innocent of a ‘matrimonial offence’, declined to petition, the consequence was that they remained married indefinitely. In such circumstances it was important to create a facility, outside the context of divorce, for spouses to have access to a court, in particular to a magistrates’ court, for a maintenance agreement between them to be altered and, subject thereto, for it to be binding and enforceable. Furthermore in 1957 the court had no jurisdiction, even in the context of divorce, to order capital provision to be made outright (i.e. by payment or transfer) by one spouse to the other. The word “maintenance” then in effect meant periodical payments, secured or unsecured: see, for example, s.16 Maintenance Orders Act 1950. Although in theory the parties could then *agree* that one should make a capital payment to the other, it is unrealistic to

consider that the Act of 1957 was in any way devised in order to address the paradigm examples of the modern post-nuptial contract, namely agreements that, upon *divorce*, the financial claims of one spouse should either be nonexistent or be satisfied by provisions which almost always include, and usually comprise, a *capital* payment. To chart changes, foreseen or unforeseen, pursuant to s.35 of the Act of 1973 seems to me to be a very different exercise from that of weighing all the circumstances *ab initio* under s. 25 of it; and, pending statutory reform or further interim guidance in a suitable case by the Supreme Court, it may be helpful for courts at any rate to remember that the weighing exercise under s.25 is mandatory.

G. The Judge's Application of the Existing Law to the Facts

135. Baron J has been a judge of the Division for six years. I have studied hundreds of her judgments, in particular in the field of substantial ancillary relief, and, with admiration, have agreed with all of them. Now for the first time, following protracted thought, I disagree with her, indeed to the necessary extent of considering her application of the existing law to the facts of the present case to be plainly wrong.
136. Thorpe LJ has set out, at [32] above, the five reasons enumerated by the judge for her conclusion that the contract between the parties was defective under English law. I will consider each of them, albeit not entirely in the order in which she enumerated them.

(a) Lack of Independent Legal Advice

137. In most cases it is necessary and in every case it is desirable that the party against whose claim a pre-nuptial contract is raised should have received independent legal advice prior to entry into it. Why so? Because proof of receipt of independent legal advice is often the only, and always the simplest, way of demonstrating that that party entered into it knowingly. In the present case, however, the husband did not deny (or if, in evidence not visible to us, he did so, his denial was not accepted by the judge) that he had a clear appreciation of the possible consequences of the contract. On the contrary the judge found that it was abundantly clear to him that its effect was that, in the event of divorce, he was to be self-sufficient. Nor did the husband suggest that, had he taken independent legal advice and been advised not to enter into the contract, he would not have entered into it or would even have sought to secure variation of its terms in his favour. In the national and cultural *milieu* of the husband, as in that of the wife, the contract was a commonplace prelude to marriage; there is no suggestion in the judgment that he regarded the demand for it as either provocative, surprising or unfair.
138. But, had the husband wished to take independent legal advice, particularly perhaps on the effect of the contract in England in the anticipated event that his married life with the wife was to be spent here, he had more than sufficient opportunity in which to do so. He was aged 27 and an investment banker earning £120,000 p.a. On about 24 July 1998 the wife showed him the draft and made its basic terms clear to him; and he responded to her that he did not need a translation of it. To the submission that it was perfectly possible for the husband to have asked for a translation (or procured a translation for himself) and to have sought legal advice in London during the following week, or indeed to have demanded the postponement of the date, 1 August

1998, planned for the execution of the contract in order to afford him further time in which to take legal advice, the judge responded:

“Moreover, given the time available, it is not surprising that [the husband] said, as I find that he did, he did not need a translation. I do not think that he was made aware that Dr Magis wanted him to have such a translation to give him a proper opportunity to consider the precise terms and see a lawyer. All this was, as I find, extremely unfair to the Husband because he had no realistic period for mature reflection or opportunity to take proper advice. Moreover, given the Wife’s attitude that this document was more for her father’s than her own needs I am satisfied that the Husband took it far less seriously than he should have. To this extent he was lulled into a false sense of security.”

With respect, I find the judge’s reasoning impossible to accept. Had 1 August 1998 been the date set for the *marriage*, the parties’ discussion about the contract only a week earlier might be said to have afforded the husband too short a period for reflection or receipt of legal advice. But, whether or not its date had by then been fixed, the marriage was not to be celebrated until months later. It might have been inconvenient either to postpone the trip to Germany planned for the execution of the contract on that date or indeed to make a second, later trip for that purpose; but the parties were under no significant pressure to execute the contract on that date and, had the husband requested postponement in order to take legal advice, Dr Magis would have been the first to stress to the wife that the request was reasonable. At the hearing we asked Mr Mostyn to explain why, as suggested by the judge, the wife’s presentation to the husband that the impetus for entry into the contract emanated from her father had led the husband to take it far less seriously than he should have taken it and had thus lulled him into a false sense of security. Mr Mostyn was unable to explain – and thus to defend – the judge’s reasoning in that regard.

139. Indeed, at the office of Dr Magis on 1 August 1998, the husband had a further, perfect opportunity to postpone execution of the contract until he had been furnished with a translation and had taken independent legal advice. For, angry at learning that the husband had not been so furnished, Dr Magis himself indicated that he was minded to postpone execution but was persuaded, no doubt by both parties, to proceed with it. Thus the husband was directly exposed to the emphasis placed by Dr Magis upon his right to have further time in which to digest the effect of the contract; but the husband in effect responded that he neither needed it nor wanted it.
140. It may be that, even if only in the interests of simplicity, any legislative reform of the law’s treatment of nuptial contracts will include, for example as a condition of their presumptive dispositiveness, a requirement that independent legal advice should – in *every* case, irrespective of its surrounding circumstances – have been received in relation to them by both parties prior to execution. But the fluidity of the present law perhaps at any rate enables the court to apply common sense to a situation in which, as here, a husband well understands the effect of the contract, has ample opportunity to take independent legal advice and decides not to do so; and thus to reject his argument that the absence of such advice enables him to escape its effect.

(b) Absence of Disclosure of the Wife's Means

141. Prior to execution of the contract the wife did not disclose the approximate value of her assets to the husband; nor, for that matter, did the husband disclose the level of his income to her. Mr Mostyn strongly relies on the judge's findings that the wife requested Dr Magis to exclude from the contract the clause relating to the value of their assets and that she wanted to keep her "asset base" secret from the husband. But in my view more is needed before this feature vitiates the contract. To be specific, there has to be a causative element. What is lacking is any finding by the judge (or even, so I understand, suggestion by the husband) that, had there been accurate mutual disclosure, he *would* not have, or *might well* not have, or perhaps even *might* not have, entered into the contract. He knew that the wife already had substantial wealth and he showed no interest in ascertaining its approximate extent. Finance was at that time the subject of his career; he does not contend that he felt unable to ask for details of the wife's wealth before agreeing not to claim against it in the event of divorce. On 1 August 1998 Dr Magis, speaking in English, clearly and in detail explained to both parties the terms of the agreement, including the term that, despite advice from Dr Magis himself, they waived the possibility of appending to the contract a schedule of their assets. It was entirely open to the husband, even then, to say that he considered the advice of Dr Magis to be wise and that mutual disclosure should take place; and the wife's likely displeasure cannot in my view sensibly be regarded as foreclosing that option.

(c) Absence of Negotiations

142. It was at Mr Mostyn's suggestion that the judge included the absence of negotiations as a third vitiating feature. But she did not explain why it was a vitiating feature; nor, in his argument on the appeal, does Mr Mostyn explain it. Absent explanation, perhaps I may simply say, without disrespect, that it seems to me to be plainly wrong to regard the absence of negotiations as vitiating the contract. Their absence was testament only to the fact that the background of the parties rendered their entry into such a contract a commonplace.

(d) The Birth of the Girls

143. In my view the birth of the girls does not impact upon the effect to be ascribed to the contract because, as the wife concedes, the contract does not purport to, and cannot under English law, affect her obligation to provide funds "for their benefit" in the widest sense of that phrase. The terms of the contract appear to recognise that even under German law the parties' mutual waiver of rights of maintenance following divorce was invalid insofar as it had "detrimental effects for the raising of children". In any event, under the law of England and Wales, the position is clear and agreed, namely that the husband's right to claim provision for the benefit of the girls under, or as if under, Schedule I to the Children Act 1989 is unaffected by the contract. Indeed, in the light, for example, of the decision of this court in *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865, provision for the benefit of the girls will, in the circumstances of this case, include very substantial provision for the benefit of the husband insofar as he is to be a carer of them and a home-maker for them (being roles which, for convenience and because it better suits the periods during and beyond their adolescence, I will condense into the one word "home-maker"). Indeed Judge Collins decided that it was in the interests of the girls not only

to spend substantial periods of time with the husband but also to make their “residence” with him as well as with the wife. In the light of her wealth, of the expensive quality of the life which she will provide for the girls while resident with her and of the exiguous scale of the husband’s present resources and of his likely income at any rate for the next few years, the wife must in any event make substantial provision for their benefit in terms both of the purchase of their home with him in London (as well as abroad, for use at weekends during term-time) and of their maintenance, of which, as a home-maker for them, he will be the indirect beneficiary for many years.

(e) Preclusion of Claims even in Circumstances of Real Need

144. The judge concluded that the preclusion of the husband’s claims even were he to be in circumstances of real need was “manifestly unfair”. In my view, however, it was essential that her examination of the fairness of the preclusion should have taken into account the circumstances which precipitated it. These were that the husband was fully aware that the contract precluded mutual claims even in circumstances of real need (indeed its terms, explained to him by Dr Magis, expressly so indicated); that such was the basis of their marriage and indeed a commonplace basis for those circumstanced as they were. The judge noted the wife’s evidence that, in the absence of entry into the contract, she would not have married the husband; the judge did not reject that evidence and the clear tenor of her judgment is that she accepted it. Thus, had he not entered into the contract, the husband would not have married the wife and would have been unable in any event to make a claim against her, even in circumstances of real need. Moreover any examination of fairness by the judge required her to focus on the situation of the wife as well as on that of the husband. In this respect it is too glib to conclude that she can well afford to make the substantial capital payment ordered by the judge. The contract by which, prior to the marriage, the husband represented his position to the wife was the basis on which it took place and on which her family made substantial advances of capital to her during its subsistence. Even if it could be regarded as unfair to the husband to allow the contract to precipitate rejection of a claim based on real need, it would in my view also have to be regarded, in a different but not necessarily less potent sense, as unfair to the wife not to allow it to do so.
145. To my individual consideration of the judge’s five points, I add two general concerns.
146. My first concern is the judge’s apparent failure to carry through into her conclusions her acceptance that the foreign dimension of the case was “definitely relevant”. Under the national law of each of the parties, the contract is binding on them (presumably on the basis that, in the circumstances, their law regards such not to be unfair to them). Indeed in the contract the parties specifically elected that German law should govern the financial effects of their marriage; and the fact that they also recorded the advice of Dr Magis that other systems of law might not act upon it does not detract from the significance of their election as a circumstance. In my view the foreign dimension should have fortified a conclusion that the contract should carry decisive weight in the rejection of the husband’s claims other than as a home-maker for the girls; but, even on the basis of the judge’s conclusion that the effect of the contract should not be decisive, it is hard to see how, when she came to do her calculations, she made allowance for the dimension.

147. Mr Mostyn raises a spirited counter-argument that the judge erred in the wife's favour in accepting that the foreign dimension was "definitely relevant". He criticises the development of what, in *C v. C (Ancillary Relief: Nuptial Settlement)* [2004] EWHC 742, [2004] Fam 141, at [36], I described as the occasional need in proceedings for ancillary relief to take a "sideways look" at the law of a foreign jurisdiction with which the parties have a primary connection. The development began in the judgment of Thorpe LJ in *Otobo v. Otobo* [2002] EWCA Civ 949, [2003] 1 FLR 192, at [57]; and Mr Mostyn submits that it is inconsistent with the judgment of Sir John Arnold P in this court in *Thyssen-Bornemisza v. Thyssen-Bornemisza (No 2)* [1985] FLR 1069, at 1076C, followed, evidently with slight reservation, by Thorpe LJ himself in *Dart v. Dart* [1996] 2 FLR 286, at 291F – 292D. Speaking for myself, I do not regard the remarks of the President as representing the ratio decidendi of *Thyssen-Bornemisza*; furthermore I am clear that he can have meant only that, even if it was one of the circumstances of the case under s.25(1), Swiss law was not entitled to be afforded any weight on the facts of that case. The President's remarks are far too slender a thread upon which to hang the exclusion of the law of a foreign jurisdiction from eligibility as one of "the circumstances of the case" within s.25(1) even in the rare case in which the parties have a primary connection with it – and/or by which their financial claims might so easily have instead fallen to be determined. I add those last words in particular in the light of what Thorpe LJ has described in [11] above as the "caprice of outcome" generated within the E.U. by the jurisdictional rules set in Council Regulation (EC) No 2201/2003 ("Brussels II Revised"). On any view, however, the present case affords unpromising terrain for the launch by Mr Mostyn of his assault on the development which began in *Otobo*. For here, highly unusually, the parties made an explicit choice of foreign law; and for the court to decline to have regard to it would border on the absurd.
148. My second concern relates to the consequences which, by her orders, the judge attached to four out of those five conclusions which I have found myself unable to share. The first three of her conclusions relate to factors which surrounded the way in which the contract was made and which in her view rendered it "defective"; and the fifth to its preclusion of claims even in circumstances of real need. I confess that I have considerable sympathy for Mr Mostyn's complaint that, if one factor (let alone three factors) surrounding the way in which a contract is made indeed renders it defective, it is hard to understand how, even in the loose, soft-edged exercise of attaching weight to circumstances under s.25, any weight at all can be attached to it. I therefore entertain some doubt whether it was logical for the judge to proceed – or to purport to proceed – down some *via media*. Furthermore, had the preclusion of claims even in circumstances of real need been a proper objection to the contract, the proportionate response would have been to allow the husband to claim only to the extent necessary for the service of his real need. But a claim thus limited bears no relation to the substantial issue in this case. The husband's claim as a home-maker for the girls will more than cover his real need for the foreseeable future because a home-maker in real need will be unable satisfactorily to discharge his or her duties towards the children. The substantial issue is whether the wife should make available to the husband funds for his accommodation and maintenance for the period from when the girls no longer need a home with him until the rest of his statistical life; and, although the judge's award of capitalised maintenance was based on her estimate of the husband's current 'needs' projected forward for the rest of his statistical life, it was

impossible for her to have been satisfied – nor did she so state – that, during any part of that distant period, he would otherwise be in circumstances of real need.

H. Conclusions on the Appeal

149. Like my Lords, I conclude that the judge erred in not giving decisive weight to the contract in the exercise which she conducted under s.25. The result is that relief should have been granted to the husband only indirectly, in his capacity as a home-maker for the girls.
150. In my view our conclusion should have the following consequences upon the judge's award.

(a) The award of £2,500,000 in respect of accommodation in England

151. Notwithstanding the wife's suggestion of a much lower sum in this regard (albeit which at one stage she offered to make available to the husband for the rest of his life) the judge found that £2,500,000 represented the overall cost of purchase of an appropriate home in England "as a base for [the husband] and the girls". I do not consider that our conclusion yields any logical argument for reduction of this sum. What it yields, of course, is a requirement that, in lieu of outright payment of the sum to the husband, the home in England thus to be purchased should be held by trustees on a trust which affords the husband exclusive occupation of it for so long as his home-making duties, generously interpreted, subsist and which provides that thereafter its value will revert to the wife or to her order. For the terms of the trust we have in many respects a helpful template in the terms under which the judge directed that the accommodation for the husband abroad should be held. These latter terms – as opposed, now, to the size of the sum to be provided by the wife for that purpose – are not challenged. Although, as a trust, the vehicle for the holding of the English home will be different and will necessitate consequential changes, many of the internal features of the arrangement can and should correspond with those favoured by the judge in relation to the accommodation abroad. In some quarter of the mammoth conflict between these parties lurks a gremlin who seems to prevent them from agreeing even on simple matters; and, because he is likely to work his customary mischief, the parties will need to be granted liberty to apply to Baron J to determine issues as to the terms of the trust.

(b) The award of £700,000 in respect of debts

152. Of the husband's debts totalling £800,000, the judge ordered the wife to enable him to meet £700,000 of them. She disallowed his claim to be enabled to meet the balance of £100,000 because it represented the costs both of himself and of the wife referable to his attempted appeal to this court against the order in respect of the relocation of the girls which, on refusing permission to appeal, this court had ordered him to bear. Of the £700,000 which was the subject of the judge's order, the wife appeals against only a small part, namely £85,000. The balance of £615,000 represented the costs of the financial proceedings (up to July 2008) in the sum of £556,000 and other debts totalling £59,000: see [93] above. Importantly the wife concedes that, irrespective of

the success of her appeal and thus of her essential submission that the husband's claim should be limited to that of a home-maker for the girls, it is appropriate for her to be ordered to meet such costs and clear such other debts. She thereby absolves us from the need to consider in detail the basis upon which a home-maker for children may secure an order for the clearance of debts. Nevertheless it is easy to accept in general terms that it is for the benefit of a child that a home-maker for her (or him) should not remain encumbered by debt, although of course it has always to be fair to expect the other parent to shoulder it. The live issue in relation to £85,000 is simply stated. The sum represents the husband's costs of the relocation proceedings incurred at first instance, in relation to which Judge Collins made no order as to costs and which he thus determined that the husband should himself bear. So Mr Todd makes a predictable submission: namely that, in circumstances in which Judge Collins had expressly declined to make a direct order that the wife should pay the husband's such costs, it was wrong in principle for Baron J to require her to pay them indirectly, as part of the lump sum, and thus that, in effect, Baron J thereby subverted the order of Judge Collins. Mr Todd's submission addresses a point which arises not infrequently in similar contexts. I have considerable sympathy for it and I regard Baron J's provision in this regard as open to substantial logical objection. Nevertheless, in financial proceedings between spouses and parents, the courts do at times, albeit uncomfortably, conclude that pragmatism should trump logic; and I am unable to agree that the judge exceeded the boundaries of her discretion in deciding that the husband's debt of £85,000 should fall for the same treatment as his debts of £615,000.

(c) The award of £25,000 in respect of a car

153. It is important for the girls that the husband should operate a decent car and the wife does not challenge this award.

(d) The award of £2,335,000 in respect of maintenance

154. This award must be reformulated so as to reflect that the husband's claim is only as a home-maker for the girls. The reformulation is not straightforward, particularly if it is predicated on what I regard as a helpful concession by the wife, made through Mr Todd at the hearing before us. No doubt it is highly unusual for the court under Schedule I to the Act of 1989 to cast an allowance for a parent as a home-maker for a child as an order for payment of a lump sum to be made to the parent for the benefit of the children rather than as part of the order for periodical payments to be made to the parent for their benefit. Indeed capitalisation in such a context may be said to be unprincipled because it cannot precisely cater for developments in the circumstances of the children down the years in which they will remain in need of support. But for good reason, albeit in a wider context, Baron J took the view that, to the extent that it was reasonably practicable, the wife's obligations to the husband should be capitalised. The wife's helpful concession, however unusual, is that, even were the court to accept her submission that the husband's claim for maintenance should be limited to a claim for an allowance as a home-maker, she would not object to its again being capitalised, albeit on that reduced foundation. The concession displays an appropriate degree of trust that the husband would do all in his power to deploy the capital in accordance with the purpose underlying its award.

155. But the exercise of capitalisation is not straightforward. At least the starting-point is clear, namely that the necessary assumptions should be generous towards the husband because they should be generous towards the girls. The residence of the girls with the wife will be funded at an extremely high level and there is no need for a disparity, so substantial as to be invidious, between its quality and that – in financial terms – of their residence with the husband. I suggest therefore that we should adopt what would appear to be the most distant *terminus ad quem* set by the judge for the husband's use of the German property and for his receipt of periodical payments for the girls and should thus proceed on the premise that the allowance for him as a home-maker should continue for almost the next 15 years, namely until Chloe's 22nd birthday on 25 May 2024. So the most obviously necessary change in the calculation of the award referable to maintenance is that it should run not for the rest of the husband's statistical life but only until that date.
156. But what figure should be taken to represent the husband's annual need as a home-maker rather than, generally, as a husband? The answer must be predicated on the fact that the wife will, additionally and in any event, be providing the husband either with £70,000 pa with which to meet his direct expenditure for the girls pursuant to the judge's order (not subject to appeal) for her to make periodical payments for their benefit or (so I should add in the light of an apparently pending application by the husband to Baron J to capitalise even those payments) with the capitalised equivalent thereof. But, even thus predicated, the answer is not easy. How much less does the husband need as a home-maker for the girls than he needs generally? Finally there remains the considerable difficulty which surrounds the proper approach to the husband's earning capacity. I confess that I cannot find the evidence which could have justified the judge's ascription to the husband of an index-linked gross earned income of only £30,000 p.a. for as long as the next 27 years. But is that strikingly low figure just about defensible as an estimate, generous to him, of his earning capacity for the next 15 years, when he will continue, albeit to a reducing extent, to be distracted from his research or other remunerative activities by his need to provide a home for the girls? Then, however, a further interesting question arises: to the extent that the husband has general needs in excess of those properly to be regarded as his needs as a home-maker, should his future earnings notionally be applied in the first instance to his meeting those excess needs rather than his needs as a home-maker? If so, of course, the sum payable by the wife will be greater. We have not received focussed argument on these questions and cannot presently answer them. It is tempting to remit them for reconsideration by Baron J but I consider that it would be preferable for us, if possible, to answer them ourselves and thus to enable a capitalised figure, in substitution for that of £2,335,000, to be incorporated into our order. I thus propose a direction that, within 7 days of the delivery of our judgments, the husband should file and serve written submissions upon these questions; that, within 7 days of her receipt thereof, the wife should file and serve written submissions in answer to them; and that, within 7 days of his receipt thereof, the husband should be at liberty to file and serve written submissions in reply to them.

I: The Proposed Cross-Appeal

157. The fair determination of the proposed cross-appeal, the background to which I have set out at [99] above, is not entirely straight-forward. Baron J accepted – it may not

even have been disputed – that, in that the wife had moved with the girls to Düsseldorf, the husband needed accommodation there for the purpose in particular of contact with the girls on most alternate weekends during term-time. So the judge received substantial evidence about the cost of appropriate accommodation there. The husband argued before her that the cost of it should be included within the lump sum to be paid to him outright. To this end Mr Mostyn postulated various problems which might attend the wife’s rival suggestion that she should own that accommodation and that the husband should merely be given a right to occupy it. Thus Mr Mostyn wrote:

“Also, what if W moves to say, Monaco, leaving a property in her name in Germany with H having a right of occupation only. How does H enforce a sale of a property in W’s name so that H can buy somewhere there?”

There is nothing to indicate that Mr Mostyn then had any reason to believe that the wife might move to Monaco. His reference to it appears to have been serendipitous, chosen as no more than an example of a state to which a wealthy German woman in search of a tax haven might wish to move. At all events Baron J sought to meet Mr Mostyn’s suggested problem by providing in her order in relation to the German property that:

“If the [wife] moves to a different town, city or country (and for the avoidance of doubt this provision does not indicate that the [husband] has consented to such a move) as a result of which the [husband’s] home with the children pursuant to the order of HH Judge Collins dated 29 September 2007 is affected, the [husband] shall be entitled, if he so chooses, to have a Replacement Property purchased in the new town, city or country to which the [wife] has moved by using the net proceeds of sale of the [Düsseldorf property].”

158. The issue in the proposed cross-appeal may now simply be stated.
159. The husband contends that, in the light of the facts (a) that the figure chosen by Baron J in July 2008 for the cost of the foreign property (€600,000, together with €30,000 for furniture) was based upon evidence as to the cost of appropriate accommodation in Düsseldorf (b) that within only four months a substantial question-mark was placed against the relevance of that evidence by the wife’s announcement of her aspiration to move with the girls to Monaco and (c) that, as appeared likely at the hearing before us, the German court has now permitted the move to take place and that it has taken place, this court ought to set aside the figure of €600,000 and to remit to Baron J the task of quantifying the appropriate figure in the fresh circumstances. To a recent affidavit the husband has exhibited particulars of sale of three-bedroom apartments in Monaco at prices ranging from €4,725,000 to €10,500,000. His clearly implied suggestion, which to my mind does him no credit, is that the figure properly to be substituted for €600,000 is somewhere within that range. Why his accommodation has to be in the principality itself, rather than in his own native land within easy reach of it, I cannot imagine. Perhaps he is taking a pedantic view of his entitlement to have a replacement property purchased “in the new town, city or country, to which the [wife] has moved”. But, if he is to be allowed to reopen the figure contained in the judge’s settlement of property order, the wife must obviously

also be allowed to argue for a sensible enlargement of those words. At all events it may be that, even in Provence, the figure of €600,000 would not cover the cost of purchase of reasonable accommodation for the husband and the girls, still less of the size and quality envisaged by the judge in relation to Düsseldorf.

160. By contrast the wife contends that, by her provisions, the judge expressly catered for the possibility that the accommodation abroad for the husband and the girls should be otherwise than in Düsseldorf in consequence of some future move on her part with the girls away from that city; and that there is no thus need for the court to direct re-examination of the judge's assessment of its cost.
161. Reluctant as I am to propose the precipitation of yet further litigation of issues between the parties, I have been persuaded that in principle, and when stripped of its obvious exorbitance, the husband's argument for re-enquiry is sound: for circumstances which, in the relevant sense, may be very different from those which the judge addressed have arisen very shortly and unexpectedly after she did so. I would grant the husband permission both to file his fresh evidence in support of his cross-appeal and to bring his cross-appeal; would allow it; would set aside the figure of €600,000 in the order of Baron J referable to the accommodation abroad; and would remit to her the determination of the appropriate figure in the fresh circumstances.