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Adult Autonomy to the Fore: Court of Appeal upholds Pre-Nuptial Agreement

The eagerly awaited judgment in the case of *Granatino v Radmacher* was handed down on 2 July 2009 by the Court of Appeal. It contains a ringing and authoritative endorsement of pre-nuptial agreements in English law.

The Facts

The parties were married in November 1998 in England. The wife was from a wealthy German family which owned and ran a large paper manufacturing business. The husband was French and had been a successful banker earning as much as \$470,000 at the zenith of his earning power.

Prior to their marriage, the parties had entered into a pre-nuptial agreement at the wife's request. They signed it in Germany whilst visiting in August 1998. The terms of the agreement provided that neither party would gain financially from the other in the event that they divorced. The husband had first been shown a draft of the agreement in German only a week before the signing ceremony before the notary and there had been no disclosure of assets and no negotiation of the terms. The husband had not sought a translation of the document nor had he received any separate legal advice.

The parties resided in Chelsea throughout most of the marriage and had two daughters who were both born in England. In 2003, Mr Granatino gave up his career in the City in order to undertake a DPhil in biotechnology at Hertford College, Oxford, with the intention to return to the financial sector at a later date. In evidence given at first instance, it was ascertained that Mr Granatino had initially informed his wife that he would continue to contribute towards half of the family's outgoings. However, by 2006, his savings were depleted and it was left to Ms Radmacher to fund the family's entire expenditure.

The parties separated in 2006 and the wife petitioned for divorce in London in 2007. A joint residence order in respect of the two girls was made and Ms Radmacher was given leave to remove them to Dusseldorf.

When the case came before the High Court, the wife was worth approximately £100 million, a fortune which comprised capital of approximately £54.3 million plus company shares which provided her with an income of approximately £2 million net per annum. She also had other income of approximately £600,000 per annum. By contrast, the husband submitted that his earnings as an academic were only expected to be approximately £30,000 per annum for the foreseeable future and that it was no longer his intention to return to work in the City.

The issues at first instance

The husband originally sought an order for £6.9 million, to include capital for housing in England and Dusseldorf (to facilitate contact with his daughters) and a capital fund of £3.21 million in lieu of ongoing maintenance (based on a net spendable income of £125,000 per annum). The husband made the significant concession that all of the wife's assets derived from her family and that this had the effect of limiting his claim to his needs only rather than a (larger) percentage share of the assets. However, it was also submitted on behalf of the husband that the pre-nuptial agreement should play no role in determining the case.

In response, the wife offered to provide the husband with a property in England where he could reside during his lifetime (but would not be owned by him outright), a property in Dusseldorf during the children's minority and child maintenance until they completed secondary education. The wife submitted that the pre-nuptial agreement was valid and enforceable in Germany and in France and that the permanent removal of any assets from the wife would constitute an improper interference with her property rights contrary to Article 1 of the 1st Protocol of the European Convention for the Protection of Human Rights as set out in the Human Rights Act 1998. It was further submitted on behalf of the wife that the husband should deploy his banking skills again in order to restore his earning power to a substantial level.

The decision at first instance

Baron J awarded the husband a lump sum of £5.56m. Of this, £2.5 million was for a home in England as a base for him and the children and £2.335 million was for capitalised maintenance based on a net spendable income of approximately £100,000. In addition, the wife was ordered to pay to the husband £70,000 per annum in respect of child maintenance and to provide him with rent-free housing in which he could stay when spending time with the children in Germany (which will revert to the wife or the children upon the youngest child reaching the age of 18).

The judge's reasoning was as follows:

- The pre-nuptial agreement was defective from an English perspective because:
 - (a) It had not been translated for the husband (who was not a German speaker)
 - (b) There was insufficient time for him to consider its terms and seek independent advice before signing
 - (c) It deprived the parties of all claims, even in a situation of want, which is manifestly unfair
 - (d) No disclosure had been given by the wife
 - (e) There had been no negotiations. Instead, the wife's family had simply instructed the notary to draft the agreement
 - (f) It made no provision in the event of the birth of any children during the marriage.

- A pre-nuptial agreement cannot in any event be enforced under English law as if it were a contract. The Court determines claims for financial relief after applying the criteria set out in the Matrimonial Causes Act 1973, which provides a "bespoke remedy" in each case. The pre-nuptial agreement is a factor to be taken into account in this process and is, in some cases, a compelling factor, but it is not determinative

- The English courts always apply English law irrespective of the nationality or domicile of the parties or whether they had entered into any personal agreements as to jurisdiction. Therefore the “choice of law” clause in the pre-nuptial agreement and the parties’ nationalities and domiciles did not bind the Court to apply foreign law
- Notwithstanding the above, Baron J stated that the Court must not act in a blinkered fashion. All the circumstances of the case must be weighed in the balance. It was relevant that the wife is German and that the pre-nuptial agreement would be valid and enforceable in Germany, just as the husband is French and it would also be enforceable in France. The award was reduced to reflect these foreign elements and the fact that the husband had agreed to sign the pre-nuptial agreement at the outset and had, as a ‘man of the world’, understood its underlying premise that he was expected to be self-sufficient in the event of a divorce
- The husband’s decision to embark upon an academic life had not been made jointly and so it would not be fair to expect the wife to bear the full burden of the effects of his decision in the sense that she could not be expected to fund a lavish banker’s lifestyle for the rest of his life
- The English Court is enjoined to apply the Matrimonial Causes Act 1973 fairly and there are clear guidance and principles which judges must apply. There is nothing arbitrary in the application of the 1973 Act and section 25 thereof strikes a fair balance between existing property rights and the claiming party’s entitlement to share, receive compensation and have their needs met, which is well within the “margin of appreciation” afforded to the UK under European Union law. Therefore a party’s human rights are not breached as a result of the method by which the English courts resolve financial applications on divorce
- Baron J commented additionally that there had been an unnecessary focus on human rights and she expressed disapproval of the level of legal costs (amounting to approximately £80,000) expended by the parties on this issue.

The wife was subsequently granted leave to appeal.

The Decision of the Court of Appeal

The wife’s appeal was allowed. The husband’s housing fund of £2.5 million would be available to him (through a trust arrangement) only until the youngest child reached the age of 22, and maintenance would only be payable to him over the same period. That maintenance would be capitalised. Lord Justice Thorpe stated that *‘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.’*

This outcome was underpinned by the following conclusions:

- It remains the case that pre-nuptial agreements are not binding *per se*. Nor are they ‘presumptively dispositive’ of financial claims on divorce. The judge must follow the statute and consider what weight to accord to an agreement in each case
- However, *‘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 litigation in the divorce courts (per Lord Justice Thorpe). Lord Justice Rix added:

'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 there are dangers in overly paternalist or patronising attitudes or in an insufficiently international outlook.'

- The old objection to pre-nuptial agreements – that they are contrary to public policy - is now either defunct or unrealistic
- It was abundantly clear that the wife would not have consented to marry without the agreement, and nor would the wife's father have consented to make to her the significant advances of capital that she had received during the marriage
- The agreement's various flaws did not in this case detract from its influence upon the court, principally because the husband knew the deal that he was making and the basic financial context in which he was making it, he had opportunities to take time and advice or to negotiate (which he declined) and he was neither duped nor pressurised
- English law should not find itself in a position of isolation in today's international world, and many other jurisdictions in the EU and beyond have endorsed the pre-nuptial agreement
- Having herself decided that the pre-nuptial agreement should have some relevance for the outcome, the trial judge had not made any discernible discount to the husband's award referable to the agreement
- The fact that in this case the agreement would have been binding in France or Germany *'fortified a conclusion that the agreement should carry decisive weight'*
- In future cases of this type, the judge should give due weight to the arrangements that the parties had chosen for themselves. That is not (where those arrangements involve a foreign document) to apply foreign law: it is a legitimate exercise of the discretion available to English judges under English law
- Agreements of this type should not – and this agreement did not - attempt to limit or govern the provision of financial support referable to the children.

Ramifications

There seems to remain a lingering scepticism among the public, including the wealthy and those advising them, as to the effectiveness of pre-nuptial agreements. Any such scepticism must surely now be dispelled.

Each pre-nuptial agreement will still need to be taken on its merits. However, if this example is followed, courts will be more inclined only to allow a claiming party financial provision which is allowed under the agreement or which is referable to his or her role in bringing up the children. The latter case may well involve trust arrangements whereby the assets revert to the payer once the children are adult.

This decision should not be taken however as a 'green light' to home-baked, one sided pre-nuptial agreements foisted by one party on the other on the eve of the wedding with no independent advice and a fair measure of arm-twisting. If an agreement is to be given weight by the court, it needs to be 'fair' (from the point of view of both parties), properly understood and freely signed.

Despite the unusual circumstances, these elements were eventually held to be present in this case. The presence of independent legal advice and financial disclosure would certainly have made those elements a great deal easier to detect.

It should be noted that the judges themselves appeared to favour amendment of the statute law to further enhance the status of the pre-nuptial agreement. That is a possibility (and no more than that) for the future.

It remains to be seen whether the husband will seek permission to appeal to the House of Lords.

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