Family / Divorce

Hedging one's bets

For better or worse pre-nuptial agreements are here to stay, but who will be the richer or poorer as a result? **Julian Ribet** reports

IN BRIEF

- The court is now likely to give effect to pre-nuptial agreements unless it would not be fair to do so.

The widely reported judgment of the Supreme Court in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2010] All ER (D) 186 (Oct) concerns the principles to be applied by a court in considering the financial arrangements following the breakdown of a marriage when the court has to decide what weight should be given to an agreement made between husband and wife made before the marriage. Although referred to by the court as "ante-nuptial agreements", these agreements are more commonly known as pre-nuptial agreements.

Case background

The appellant husband is a French national and the respondent wife a German national. In August 1998, when the husband was aged 27 and the wife aged 29, they executed a pre-nuptial agreement in Germany. The agreement was executed at the instigation of the wife on the understanding that a further portion of her family's (considerable) wealth would be transferred to her, providing an agreement was signed. The agreement was subject to German law and in broad terms provided that neither party was to acquire any benefit from the property of the other during the marriage or on its termination.

The parties met in November 1997. They were both living in London. The wife came from a very rich German family. They became engaged in June 1998 and married in London in November 1998. At the time of the marriage the husband was working as an investment banker for JP Morgan & Co and had excellent prospects. The husband was advised by the notary who drew up the agreement to seek independent legal advice. He declined to do so.

The parties had two children born in 1999 and 2002. The husband subsequently became disenchanted with banking and in July 2003 embarked upon research studies at Oxford University. In October 2006 the parties separated. The wife petitioned for divorce and Decree Nisi was pronounced in July 2007. Despite the terms of the pre-nuptial agreement the husband brought a claim for ancillary relief seeking an order against the wife for periodical payments and for a lump sum.

In the High Court before Baron J the husband was awarded a sum in excess of £5.5m. The issue that lay at the heart of the proceedings was the weight that should be given to the pre-nuptial agreement. Baron J held that due to the circumstances surrounding the conclusion of the agreement the weight to be attached to it should be reduced. She felt, however, that the husband's award should be circumscribed to a degree to reflect the fact that he had signed the agreement, but she also made provision for the two children whose arrival had not been anticipated in the terms of the agreement. At first instance, Baron J awarded the husband £700,000 to put towards his debts, £25,000 to buy a car, £2.5m to buy a home of his own in London, €630,000 to buy a home in Germany (to remain owned by the wife or an entity set up by her) for the purposes of caring for his children during his periods of residence with them and £2.335m as a capitalised revenue "Duxbury" fund to provide him with a total annual income for life of over £100,000 per annum – taking into account an annual gross taxable earning capacity of £30,000 until retirement at the age of 65. She also awarded him periodical payments of £35,000 per annum for each child until they ceased full-time education. No indication was given in her judgment as to the extent of the discount, if any, that she made to take account of the terms of the agreement.

The wife appealed to the Court of Appeal against Baron J's Order. The Court of Appeal held that Baron J had been wrong to find that the circumstances in which the pre-nuptial agreement had been reached reduced the weight to be attached to the agreement. They felt that it was not evident that the existence of the agreement had had any significant impact on Baron J's award. In the circumstances of the case, in their judgment, she should have given the agreement decisive weight. It was their view that the award should make provision for the husband's role as the father of the two children but should not otherwise make provision for his own long-term needs. He would receive a fund for maintenance until the youngest child reached age 22 and at that point his English home would also revert to the wife. The court held that he would still receive the payment towards his debts and the child maintenance.

The husband then appealed to the Supreme Court. The Supreme Court dismissed the appeal by a majority of eight to one.

Ms Radmacher: eight to one majority

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Ms Radmacher with her legal team

Considerations

In its judgment the court set out the basic principles in relation to both pre- and post-nuptial agreements, namely:

- The court is not obliged at law to give effect to nuptial agreements. They will not necessarily be decisive and binding in every case.
- The parties cannot by agreement between themselves oust the jurisdiction of the court.
- The court must give appropriate weight to such agreements.

What factors therefore will the court consider when deciding how much weight to give to these agreements on a case-by-case basis? The court felt that there were three issues in the case before it which it needed to consider.

(i) Were there any circumstances attending the making of the agreement which should detract from the weight which should be accorded to it?

The court felt that for the agreement to carry full weight:

- Both the husband and the wife must enter into it of their own free will and without any undue influence, duress or pressure.
- Both parties should be fully informed of the ramifications of entering into the agreement.
- It was important whether or not there was a *material* lack of disclosure, information or advice. The court did not go as far as to say that legal advice was a necessity but that it was "obviously desirable".
- While the court felt that it was important to ensure that each party understands the implications of the agreement, and that full disclosure of the assets owned by the other party may be necessary to ensure this, it felt that if it was clear that a party was fully aware of the implications of the agreement and indifferent to the detail of the other party's assets, then there was no need to accord the agreement reduced weight simply because the party was unaware of those particulars.
- Each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.

In this case the court felt that the fact that the husband had not received independent legal advice did not negate the effect of the agreement.

(ii) Did the foreign elements of the case enhance the weight that should be accorded to the agreement?

The court felt that in 1998 when the agreement was signed, the fact that it was binding under German law was relevant to the question of whether the parties intended the agreement to be effective at a time when it would not have been recognised in the same way by the English courts. The court felt that after this judgment it would be natural to infer that parties entering into agreements governed by English law will intend that effect be given to them.

(iii) Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement?

Previous cases have already identified that the overriding criteria to be applied in ancillary relief proceedings is that of "fairness" which consists of: "need"; "compensation"; and "sharing".

If an agreement deals with those matters in a way that the court might adopt in the absence of such an agreement there is no problem about giving effect to the agreement. The court felt that problems arise when the agreement makes provisions that conflict with what the court would otherwise consider to be the requirements of "fairness". The existence of the agreement is capable of altering what is "fair".

Test

The court composed a test to be followed: "The Court should give effect to a Nuptial Agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

An agreement may make provisions that conflict with what a court would otherwise consider to be fair. However, an agreement should not be allowed to prejudice the "reasonable requirements" of any children of the family. An agreement should respect individual autonomy especially where the agreement addresses existing circumstances. The preservation of non matrimonial property under the terms of an agreement may be justified. Duress, fraud or misrepresentation will nullify the effect of the agreement.

Photo: © Gavin Rodgers / Rex Features

Mr Granatino & Fiona Shackleton

Where circumstances evolve so as to make it unfair to hold parties to their agreement they should not be held to it. It is the principles of "need" and "compensation" that would most readily render it unfair to hold parties to an agreement; "sharing" is therefore more likely to be replaced by the terms of the agreement.

No certainty

So where does this leave those who wish to protect their wealth on divorce? Much will depend upon the factual circumstances of each case. Pre-nuptial agreements remain a sensible option for divorced couples who individually have accrued substantial assets and who may have already seen those assets reduced and who have no intention of having any more children.

For younger couples setting out on the road to marriage the question of whether a pre-nuptial agreement is something that they wish to have may be more problematic. While it might make sense to try to agree at the beginning of a marriage what will happen to the finances if the marriage breaks down, it can lead to some difficult not to say unromantic conversations about hypothetical circumstances, yet to arise.

Pre-nuptial agreements are not always going to be binding, not at least without legislation to that effect. They are not necessarily going to provide certainty of outcome although their contents will now be of much greater importance when the court is considering how to divide up the parties' assets on a divorce. NLJ

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