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The scramble to secure jurisdiction on divorce - could a pre-nuptial agreement assist?

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**P.C.B. 221 Despite pre-nuptial agreements not being binding on the English courts, the election of jurisdiction in such an agreement can be persuasive to an English court considering a forum dispute with a non-EU country. Swift action to secure jurisdiction therefore remains advisable.*

Increasingly, wealthy individuals are seeking to organise their assets and affairs both before and during their marriage, by entering into a pre-nuptial agreement.

The general attitude of the English courts towards pre-nuptial agreements

Whilst pre-nuptial agreements are not binding upon the English courts, a pre-nuptial agreement is a circumstance of the case that can be taken into account and indeed they are becoming increasingly influential. What is often not appreciated is that a pre-nuptial agreement may be important in resolving jurisdictional issues, at least where the forum dispute is between the English courts and those of a non-EU country (where an EU country is involved, a pre-nuptial agreement will have no bearing on the jurisdictional issues, as is explained below).

The court has wide discretion in respect of the amount of weight it attributes to a pre-nuptial agreement. The amount of significance given to it by the court will depend on:

(a) the provision contained in the pre-nuptial agreement being "fair";

**P.C.B. 222* (b) the circumstances leading to the completion of the agreement, and it is suggested that certain guidelines are followed, being:

(i) each party should take independent legal advice;

(ii) each party should provide full and frank disclosure of his/her assets;

(iii) the agreement should be completed in good time before the wedding (ideally, at least three weeks in advance);

(iv) no undue pressure should be exerted on a party to enter into the agreement; and

(c) all other circumstances of the case (with first consideration for the welfare of any children of the family).

Disregarding this guidance can lead to the court giving little or no weight to a pre-nuptial agreement as in *J v V*¹ where Coleridge J. referred to the pre-nuptial agreement only to put it to one side. He acknowledged that in certain circumstances such agreements can be of significance, but where the agreement had been signed on the eve of the marriage, without independent legal advice having been taken, is absent of provision for future children and contains unfair provision for the wife (she was prevented from claiming against the husband's assets), the pre-nuptial agreement, "[fell] at every fence".

The treatment of pre-nuptial agreements in the English courts

It is, however, becoming increasingly common for couples to attempt to regulate the end of their marital relationships with contracts (including post-nuptial and separation agreements). The trend is also now for the judiciary to take more notice of pre-nuptial agreements (*K v K*² and *G v G*)³.

The recent Privy Council case of *MacLeod v MacLeod*⁴ primarily focuses on a post-nuptial agreement, but the parties had also entered into a pre-nuptial agreement. In her judgment, Baroness Hale notes the variable views of the judiciary towards pre-nuptial agreements, but refers to Baron J.'s observations in *G v R*⁵ that judges have become increasingly minded to look at the precise terms and will look to implement them where it is "fair" to do so. The court will have the ultimate decision upon what order is to be made but a pre-nuptial agreement will be a factor "and perhaps, in the right case, it [will be] the most compelling factor" (Baron J. at [119]).

***P.C.B. 223** In 2007, the Court of Appeal case of *Crossley v Crossley*⁶ gave pre-nuptial agreements a potentially greater significance than previously, albeit on somewhat exceptional facts. In that case property developer Stuart Crossley was worth £45 million and Susan Crossley, whose fortune was the result of three previous divorces, had £18 million. The marriage had been short (just 14 months) and childless (though each party had children from previous relationships). Thorpe L.J. confirmed that the judiciary can, in the right circumstances, require a party to show cause why a contractual agreement should not dictate the outcome of an ancillary relief claim. It should be noted, however, that this was principally in the context of a case management decision to limit initial disclosure, rather than elevation of the issue of the agreement to a preliminary issue. Nonetheless the Court acknowledged that the agreement was "a factor of magnetic importance" in that case.

Forum shopping

Wealthy individuals will frequently have an international aspect to their lifestyle that may leave them more open to a jurisdiction dispute, often termed as "forum shopping".

England is widely considered one of the more favourable jurisdictions for the less wealthy party upon divorce, particularly in respect of monthly maintenance payments. The term "forum shopping" is commonly used to describe a party who tries to select the jurisdiction in which to issue divorce proceedings according to where he/she anticipates the most preferable outcome for him/her will be. This is of course subject to a party being entitled to issue divorce proceedings in that jurisdiction and specialist advice will be required in each of the potential jurisdictions.

For the more wealthy party, this could mean (depending upon the other possible jurisdictions available) an attempt to secure an alternative jurisdiction to England. Conversely, for the poorer party it might mean bringing a claim in the English courts, as opposed to a forum considered less generous.

How can a pre-nuptial agreement assist to limit jurisdiction disputes with non-EU countries?

Upon marriage, wealthy individuals are therefore well advised to have entered into a pre-nuptial agreement that specifies the jurisdiction in which claims arising out of the marriage should be heard, given that an international lifestyle can leave the door open to divorce proceedings being issued in a number of jurisdictions (not all of which will be suitable).

***P.C.B. 224** Although pre-nuptial agreements are not binding, the English courts have generally followed the jurisdiction specified in a pre-nuptial agreement, though not always. It is important to remember that where a non-EU country is the alternative jurisdiction, the courts have discretion to review the position in light of the circumstances of the case and determine which is the most appropriate jurisdiction (which may not be the one specified in the agreement).

It is therefore important to be vigilant in the event of divorce proceedings being considered or issued because, even with a pre-nuptial agreement in existence, a speedy response may be required to protect a client's position and to try and obtain the appropriate jurisdiction as set out below.

Forum disputes with non-EU countries

The recent case of *Ella v Ella*⁷ clearly illustrates the need for caution. In this case the couple had entered into a pre-nuptial agreement which specified that any disputes would be dealt with in Israel. The parties, who had dual Israeli and British nationality, had lived in England with their three children for most of the 10-year marriage. There was therefore an argument for the English courts to deal with the divorce proceedings.

Proceedings were issued by the wife in England, and then by the husband in Tel Aviv. But, rather than apply for a stay of the Israeli proceedings, the wife instead engaged in the Israeli proceedings in

the early stages and entered into a Consent Order with the husband. The Israeli court therefore declared Israel to be the correct jurisdiction.

When considering the appropriate forum for the dispute, the English court regarded the election of jurisdiction in the pre-nuptial contract as an important factor and held Israel to be the correct jurisdiction. The husband's application for the stay of the English proceedings was therefore granted. This decision was upheld by the Court of Appeal, which noted that if the English proceedings had not been stayed, there would be competing litigation in concurrent jurisdictions as the wife had not applied for a stay of the Israeli proceedings (and in fact she was prevented from doing so pursuant to the Consent Order in the Israeli proceedings). It is certainly clear that had the wife approached the proceedings differently, the English courts may have accepted jurisdiction for the proceedings, which would have been preferable from her point of view in terms of financial settlement.

This is not an isolated case. In the 2007 Court of Appeal case of *Bentinck v Bentinck*⁸ the couple specified Switzerland in their pre-nuptial agreement as the ***P.C.B. 225** jurisdiction to govern relations between them. The parties had lived in Switzerland during the six-year marriage but had also had a home in England, in which the wife remained living with the parties' three children following separation.

When a jurisdiction dispute arose, again each party applied for a stay of the proceedings in the opposing jurisdiction. The husband appealed a decision in the English court for Swiss expert evidence to be filed in relation to his application for a stay. But by the time the husband's appeal was heard, the Swiss court had already determined jurisdiction. The English court therefore took the view that there was no sense in going through the exercise of looking at Swiss law when that had already been carried out by the Swiss court. It was therefore decided that Switzerland had jurisdiction to hear the case.

Another such case was *S v S*⁹ where the couple had a pre-nuptial agreement that specified New York State had jurisdiction. The husband's primary home was in New York whilst the wife's was in England, though she had previously lived in New York and had spent time with her husband there. The parties had married in England.

At the end of the nine-year marriage, the wife petitioned for divorce in England and the husband then, subsequently, petitioned in New York. Each party applied for a stay of proceedings in the opposing jurisdiction, but, by the time the husband's application was heard, the New York court had already claimed that it had jurisdiction of all matters relating to the pre-nuptial agreement.

The English court considered the practical implications of the New York court having already decided jurisdiction, as well as the fact that the husband would, in all likelihood, not have married without the agreement. The court noted that there was substantive provision for the wife in the pre-nuptial agreement and it felt satisfied that justice would be done in New York. The court therefore found New York was the correct jurisdiction on the basis of "fairness".

Progress may help

It should also be noted that a party having progressed proceedings in the jurisdiction of choice, supported by the election of that jurisdiction in a pre-nuptial agreement, can also be very persuasive for a court in determining a jurisdiction issue.

This was illustrated in the case of *C v C*¹⁰ where the couple specified France as the relevant jurisdiction. The parties were French nationals who had met in London and lived there for most of their five-year marriage.

***P.C.B. 226** When the husband issued divorce proceedings in France, the wife issued proceedings in England. Preliminary hearings had taken place in both the French and English courts but by the time the English court was considering the appropriate forum, matters had progressed further in France. This, together with the fact the parties had formerly elected France as the appropriate jurisdiction on two occasions (in the pre-nuptial agreement and subsequently again in their Wills), was a pertinent factor in France being chosen as the correct jurisdiction for the proceedings.

A factor ...

The case law illustrates that a jurisdiction clause in a pre-nuptial agreement could be an important and persuasive factor for an English court when considering the appropriate forum for divorce

proceedings where the alternative jurisdiction is a non-EU country.

It will not, however, automatically dictate the appropriate forum. In the circumstances, careful consideration should be given to any jurisdiction clause in a pre-nuptial agreement and the steps required in the event of a breakdown of the marriage.

Challenging jurisdiction

Where a pre-nuptial agreement has already come into play, a challenge to a jurisdiction will invariably involve applying for a stay of the proceedings in the disputed arena under the Domicile and Matrimonial Proceedings Act 1973 (the Act) s.5(6).

When considering whether to grant a stay, the English court will apply a balance of fairness test and take convenience into account, having regard to all relevant factors (Sch.1 to the Act). Convenience for witnesses and delay resulting from the decision to stay/not to stay are relevant factors that are listed in the Act, but additional factors include (but are not limited to) which court was first seised (where proceedings were first issued and steps taken to serve) and whether substantial justice will be carried out in the alternative jurisdiction.

As in *S v S*, if the other forum is going to strictly enforce a pre-nuptial agreement, the court is likely to consider the appropriateness of the provision within the pre-nuptial agreement as part of their decision.

Forum disputes between EU countries

In a jurisdiction dispute between EU countries (save for Denmark), the appropriate forum will be determined pursuant to directly applicable European law, namely *Council Regulation 2201/2003* (commonly referred to as “Brussels II ***P.C.B. 227** Amended”). The court first seised will have exclusive jurisdiction, regardless of convenience. This is essentially the rule of “first past the post”.

As a result, the jurisdiction clause in a pre-nuptial agreement will almost invariably carry no weight.

A person wanting to secure jurisdiction should therefore issue proceedings first, and must not then delay in proceeding with the legal process. In such circumstances the second court must stay proceedings until the first court has established that it has jurisdiction. Upon the first court establishing jurisdiction, the second court will then decline jurisdiction.

Conclusion

Pre-nuptial agreements do not bind the English courts but, where the circumstances are right, the judiciary may apply their discretion and attach significance to the terms of the agreement. So when divorce proceedings are issued, the election of jurisdiction in a pre-nuptial agreement may well be persuasive or even determinative where a dispute arises in UK versus non-EU country cases.

The case-by-case treatment of pre-nuptial agreements does mean that one cannot rely upon the jurisdiction specified in the agreement as being determinative. A pre-nuptial agreement can be useful in supporting a jurisdiction choice, but a party to the agreement should not rely on this alone; one must remain vigilant. In order to secure the jurisdiction of choice it remains crucial to act quickly because speed is of the essence. It is clear from the case law involving disputes with England versus non-EU countries that the successful party is generally the one whose proceedings have progressed further in their chosen court.

Getting the right advice and taking swift action will therefore be hugely beneficial. This is particularly the case where the choice of potential jurisdiction is between two (or more) EU countries, as the “first past the post” rule leaves no room for delay.

P.C.B. 2009, 3, 221-227

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1. *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam); [2004] 1 F.L.R. 1042.
 2. *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 F.L.R. 120 Fam Div.
 3. *G v G (Financial Provision: Separation Agreement)* [2004] 1 F.L.R. 1011 CA (Civ Div).
 4. *MacLeod v MacLeod* [2008] UKPC 64; [2009] 1 All E.R. 851.

5. *G v R (Pre-Nuptial Contract)* [2008] EWHC 1532 (Fam); [2009] 1 F.C.R. 35.
6. *Crossley v Crossley* [2007] EWCA Civ 1491; [2008] 1 F.L.R. 1467.
7. *Ella v Ella* [2007] EWCA Civ 99; [2007] 2 F.L.R. 35.
8. *Bentinck v Bentinck* [2007] EWCA Civ 175; [2007] I.L.Pr. 32.
9. *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 2 F.L.R. 100 Fam Div.
10. *C v C (Divorce: Stay of English Proceedings)* [2001] 1 F.L.R. 624 Fam Div. (Pre-Brussels II Amended). See the discussion of EU jurisdictions below.

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