

PRE-NUPTIAL AGREEMENTS: *RADMACHER V GRANATINO*

BACKGROUND

The “big money” case of *Radmacher v Granatino* came to Court again for a second time this year, following its first appearance in the High Court last summer (as *NG v KR*). Katrin Radmacher, originally from Germany, and Nicolas Granatino, of French origin, met in London in 1997 and were married a year later, later having two children now aged 7 and 9.

Ms Radmacher is a member of one of the wealthiest families in Germany and Mr Granatino was, at the time they met, a successful investment banker although he later gave up his £320,000 a year job to undertake a PhD and become a biotechnology researcher at Oxford. The husband also came from a relatively wealthy background although not at the same level of wealth enjoyed by the wife. The couple separated in 2006 and the wife relocated to Germany with the children, following a contested hearing.

THE HIGH COURT JUDGMENT

Following the separation the case came before Baron J, who has heard many of the leading cases of recent years, last June. In making a decision on the financial award to be received by the husband, the facts that the husband and wife had entered into a pre-nuptial agreement and that they were, respectively, French and German were pivotally important.

The husband, who had no capital by the time of the hearing, due in part to his legal expenses, was awarded a lump sum of £5.56m to be paid by the wife on a “clean break” basis in order to meet both his housing needs, pay his debts and provide him with a sum to invest to produce an income of £100,000 per year. The wife also had to pay the husband child maintenance as he had joint residence of Chiara and Chloe and to purchase a house in Dusseldorf, near to where she was to be living with the children, to enable the husband to have contact with the children in Germany at weekends.

The full extent of the wife’s fortune was not clear but there was £54m held in various investment accounts together with a share holding that produced a gross income of £2.7m per year (which was said to have, by the husband’s QC, to show that the shares had a capital value of at least £52m).

Given the very high level of the wife’s wealth, together with the presence of the two children, the husband might, despite this not being a long marriage, expected to have received a higher award than he did, were it not for the pre-nuptial agreement which the parties signed. This provided that the husband was to receive no award for himself, as distinct for any award to him for the benefit of the children, in the event of the couple divorcing.

THE WIFE'S APPEAL

The wife appealed Baron J's order on the basis that she had not taken sufficient account of the effect that the pre-nuptial agreement should have on any award to the husband. This is despite the fact that the judge at first instance did explicitly acknowledge the presence of the pre-nuptial agreement but effectively reduced the depressing effect it would have on the award by pointing to a number of factors that, to her mind, reduced its weight.

The Court of Appeal (Lords Justice Thorpe, Rix and Wilson) agreed with the wife and allowed her appeal. Their Lordships considered that Baron J had erred in law by not giving sufficient weight to the effect of the pre-nuptial agreement.

They considered the factors that the High Court Judge said should reduce the impact of the pre-nuptial agreement which were:

- Lack of independent legal advice regarding the pre-nuptial agreement to the husband;
- Absence of disclosure of the wife's means;
- Absence of negotiations;
- The birth of the children; and
- The fact that the pre-nuptial agreement precluded the husband from making a claim even in circumstances of real need.

In rebutting the above factors the Court of Appeal judges held that:

- Even if he did not know exactly how wealthy Ms Radmacher was, Mr Granatino was well aware that she was the daughter of a very rich family;
- The husband did have the opportunity to seek independent legal advice even if he did not take that up and was very well aware (as Florence Baron herself found) that he was signing a pre-nuptial agreement that meant that, on divorce, he would receive nothing for himself;
- The parties had expected to have a family at the time they entered into the pre-nuptial agreement;
- The lack of negotiations was immaterial.

Interestingly, the factors to which Florence Baron drew attention in her judgment are those which lawyers generally advise their clients would be likely to significantly reduce or even negate the effect of a pre-nuptial agreement.

What appears to have been a very significant factor in the case was that in the counties of origin of the husband and wife, France and Germany, the pre-nuptial agreement would have been followed therefore barring the husband from any claims on the wife on divorce (for himself).

Although Thorpe LJ is careful to say that, in making his decision, he is not applying foreign law, it does appear that all three judges were very much impressed by the fact that the parties would have been held, in Europe, to the contract and gave significant weight to that. Generally, all three judges felt that, despite her statements to the contrary, Baron J had not, in fact, properly reduced the husband's claims pursuant to the effect of the pre-nuptial agreement.

Thorpe LJ says that:

"thus despite the appearance of the ante-nuptial agreement as a factor, the overall impression is of a negligible resulting discount".

THE JUDGMENT'S EFFECT

This will perhaps be surprising to family lawyers as there certainly appeared to be scope, at first instance, for the husband's award to have been higher than it was if the pre-nuptial agreement had not existed. Given the foreign element to the case, it is possible that one effect of this judgment would be that a pre-nuptial agreement will be seen to have a potentially greater depressing effect on the level of an applicant's award where both (or one?) of the parties are from a country where pre-nuptial agreements would be followed.

Lord Justice Rix recognises this potentially discriminatory effect in his Judgment when he says that the parties' "...circumstances [nationality] make it particularly propitious ... for the English Court to give even decisive weight to the parties' Agreement..." but "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."

THE 'CONTRARY TO PUBLIC POLICY' ARGUMENT

It is particularly significant in the judgment is that the old maxim that pre-nuptial agreements are said to be “contrary to public policy” is disputed by all three judges who, collectively, seemed to feel that this is no longer a valid argument and in doing so disagree with the judgment of the Privy Council in the recent case of *Macleod* in which post-nuptial agreements were held to be enforceable, subject to variation by the court, distinguished from pre-nuptial agreements which were still said to be contrary to public policy.

THE COURT'S APPROACH TO PRE-NUPTIAL AGREEMENTS AFTER *RADMACHER V GRANATINO*

The current approach of the courts would therefore seem to be that whilst it is no longer good enough to say that pre-nuptial agreements should be regarded as contrary to public policy, they cannot (within the current limits of the law) be regarded as a complete defence to an application for ancillary relief, without this issue be legislated on. Instead, pre-nuptial agreements are (as was already the case) one of the factors to be taken into account by the court when adjudicating on financial relief, falling within the heading of “all of the circumstances of the case.”

Radmacher v Granatino can therefore be seen as the continuation, or perhaps even culmination, of the recent trend in English family law towards greater weight being given to the effect of a pre-nuptial agreement on a financial award. The case is certainly the strongest statement yet that, in the right circumstances, a pre-nuptial agreement can operate to reduce or even prevent an award even, it would appear, in circumstances where one party (like Mr Granatino) is in real need (comparatively speaking of course).

That said, Mr Granatino need not worry too much, at least at present, as under the terms of their Lordships' judgment he is still to receive both a lump sum of capitalised maintenance, this time around calculated on the basis that the maintenance will cease when the youngest child reaches 22 rather than continuing for his life, and a lump sum of £2.5m to meet his housing need as the girls' father.

On this point their Lordships did not alter the amount that Baron J decided was appropriate but have provided that he is not to receive this sum outright but instead is to be the beneficiary of a trust arrangement with the house to effectively go back to the wife when the youngest child reaches 22. Mr Granatino will have to look to his long-term security over the coming years. He has, after the judgment of the Court of Appeal, effectively been left in the same position as he would have been as if he and Ms Radmacher had never been married but had had two children. We will have to see whether he chooses to appeal.

ADVICE?

In the meantime, anyone considering entering into a pre-nuptial agreement should still take early and comprehensive expert advice on whether to enter into a pre-nuptial agreement and, if so, what its terms should be. It would be very dangerous to make an assumption that, following this judgment, a pre-nuptial agreement will automatically determine the outcome of financial relief on divorce, even in circumstances where there has not been proper disclosure of each parties' assets nor independent legal advice. The case is set to return to court in any event, whatever Mr Granatino chooses to do about this most recent judgment. Following Ms Radmacher's recent move from Germany to Monaco with the children, Mr Granatino has cross-appealed on the specific issue of the house that she was to have purchased for him in Germany, saying that the sum agreed for the purchase of a house in Germany will not be sufficient in Monaco. Their Lordships have returned this point to Baron J, who will now have to deal with the thorny issue of the housing fund for the husband in these new circumstances.

Outside the court arena the Law Commission is about to start a project to examine the status and enforceability of pre-nuptial and pre-civil partnership agreements (and agreements between spouses/civil partners). A report and draft Bill is not expected until late 2012, leaving further time for the law to develop judicially in the interim, although it will not be open to the courts, as opposed to the Government, to make pre-nuptial agreements binding or enforceable as of right.

This briefing offers general guidance only. It reflects the law as at October 2009. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

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