Barristers' Chambers

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Issue 14 Radmacher v Granatino [2009] EWCA Civ 649

Introduction:

1. This decision reflects a very low point in the application of the present Appellate system within our jurisdiction.

2. The statutory exercise under **section 25** of the **Matrimonial Causes Act 1973** has long provided the courts with one of the widest areas of discretion known in law to do what is fair between divorcing parties. Charged with such freedom at first instance, the Appellate Courts have hitherto exercised a restraint whenever seeking to interfere with the exercise of judicial discretion of the primary fact finding tribunal which 'heard the evidence and saw the witnesses' involved. (see Lord Hoffman in **Piglowska v Piglowski (1999) 2 FLR 763).**

3. Lord Justices Thorpe, Rix and Wilson have, it is suggested, blatantly abandoned this principle in substituting their own exercise of discretion in the pretence that what they have accepted was Florence Baron J's correct interpretation of the law relating to Pre-Nuptial Agreements ('PNA') was, nevertheless, 'plainly wrong' in application to the facts of the case. This, it is submitted, is a complete nonsense and represents nothing other than their collective intellectual desire from their high public office to 'politically' influence the Law Commission's review of this area.

4. However, as a result, the litigants before them are likely to be further engaged in the expensive appeal process and the law in this turbulent area has, once again, been thrown into confusion. Unless the case now proceeds to the House of Lords for the consideration, in particular, of Baroness Hale, who in **McCleod (2008)** has, arguably, already indicated an approval of the Baron J approach, we may all have to await the Law Commission's report and draft legislation in 2012.

5. As practitioners charged with the obligation to explain the law to the client, the outcome could, hardly, have been worse. We should, surely, be able to expect more judicial discipline from Lord Justices of Appeal sitting in the Family Division.

The Facts:

6. The reader will already be familiar with the facts of the first instance decision from the Oriel Flyer No 9 upon the case. Suffice it to repeat in summary that the Wife, who had family wealth of c £100m was ordered to provide the Husband with £5.56m in the form of an English housing fund of £2.5m, £700k to pay his debts and £2.335m capitalised maintenance along with periodical payments for the two children of £70k per annum and a house in Germany for his contact requirements of €600,000.

Baron J had found the PNA 'flawed' in a number of respects in that:-

- there had been no disclosure of the Wife's financial circumstances and the Husband had not fully known what he was giving up when he entered into the agreement;

- although, himself, a man of commercial experience, the Husband had had no independent legal advice before signing the agreement and he did not understand fully the legal consequences on divorce of what he was signing
- there had been no provision in the event of the birth of children;
- there had been no provision in the event of 'need', such as the Husband was experiencing as he was, by agreement, now in education and no longer employed in the City.

7. Her Ladyship found that these defects meant that 'in all the circumstances' whilst she could not entirely discount the fact that the Husband had signed the agreement, the weight of the PNA factor in the case was less than it would otherwise have been.

The Appeal Decision:

8. Their Lordships, in determining that they were entitled to interfere with the Judge's application of the established principles to PNA's, which principles involved taking the existence of the PNA into account 'under all the circumstances of the case' within the **section 25** exercise and, in the right case, using the same as the 'magnetic factor' in the exercise (see **Crossley v Crossley (2008)**), without apology, set out their respective motives. LJ. Thorpe was, clearly, intent on his ambition to move this area of the law closer to European harmonisation, whereas both Wilson and Rix LJJs made no secret of the fact that they were in favour of statutory intervention to make a PNA 'presumptively dispositive' of the **section 25** exercise.

9. For what must be motives not entirely connected with the merits of the case, their Lordships claimed the judgment of Baron J had failed to give to give the PNA 'decisive weight' in the statutory exercise. They rejected the Judge's findings that the PNA was flawed, fuelled by their express acknowledgment that both in France and Germany, the respective birth place of the parties, the PNA, as it stood, would have been regarded as valid and determinative of the issues before the court.

10. The reasoning used by their Lordships was that the Husband was well aware of the broad wealth of the Wife without specific disclosure and he had had opportunity to seek legal advice upon the terms of the PNA but had chosen not to do so. In addition, the fact that there was no provision for the children was to be addressed by the Court in any event and the absence of provision for the Husband was well known to him from the outset and was a requirement, which, had he not agreed to it, would have resulted in the parties not marrying in any event and, therefore, the Husband not having any marital claims anyway.

11. Sadly, much of this reasoning is wholly unimpressive to the seasoned practitioner, who is familiar in this area of the law with the pressures upon the weaker financial spouse-to-be to submit to the demands of the other partner or to their family's financial concerns as the marriage ceremony approaches. Quite the contrary to Wilson LJ's assertion that the requirement for independent legal advice is only to provide evidence that the party concerned has entered into the PNA with full knowledge; the real reason for such independent guidance is to emphasise the legal consequences of entering into such an agreement when set against the pressures being otherwise applied at what is often a highly emotional time. Thorpe LJ's assertion that the Husband had known from the outset that he was entering into an agreement where there was no provision for him and had he not signed the same he would, outside marriage, have remained without a claim anyway, appears merely to be stating the obvious quandary of the weaker party in all of these type of cases and is suggestive of the law requiring of such a party a 'take it or leave it' decision where there has neither independent legal advice or proper disclosure.

12. In the event, applying the PNA as a factor of 'decisive weight' in the **section 25** exercise, the Court of Appeal in place of the provision made by Baron J, denied the Husband's claims for himself as a spouse and approached his claim limited to his needs only as homemaker for the children. The capitalised maintenance provision was ordered to be reduced to provide for the Husband's requirements in relation to his time with the children until they reached the age of 22 years.

In Conclusion:

13. Wilson LJ. queried that if the Judge had found the agreement flawed then it may have been illogical of her, in any event, to have paid any regard to the terms of the same. However, Baron J was, clearly, mindful of the validity of the PNA within the parties' related foreign jurisdictions and the **section 25** exercise charges the court with the statutory duty to have regard to 'all the circumstances' and 'conduct which it is inequitable to disregard' and in such a context, matrimonial law has never been bound simply to determine the relevance of the parties dealings with each other on a strictly contractual basis alone. (see e.g. **Xhydias v Xydhias (1999)**).

14. This decision appears to suggest that whilst a pre-nuptial agreement cannot yet be legally binding, its terms are likely to be given 'decisive weight', if the same cannot be faulted on contractual grounds such as fraud, misrepresentation or undue influence. The concern is that the additional 'Edgar' bases of impugning such an agreement (i.e. unfair pressure, lack of independent legal advice etc) as emphasised in the case of marital agreements under **McCleod (2008)** see Oriel Flyer 11, appear, according to the Court of Appeal, to be of less currency or even of no application at all when dealing with an agreement reached prior to the marriage. Arguably, such added protection is, at least, as important, if not more so, in respect of such agreements – a consideration, apparently, wholly lost on their Lordships.

15. According to this decision and subject to appeal, neither lack of independent legal advice nor absence of full disclosure will necessarily deprive an agreement of its effect, especially if it can be shown that the party in question would have entered the PNA irrespective of the advice and/or disclosure that could have been given.

16. Finally, the decision also shows that where an agreement makes inadequate provision for a spouse as parent, this may nevertheless be remedied by an award akin to those made under Sch. 1 Children Act, without otherwise rendering the PNA of nil effect.

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