Barristers' Chambers

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Case Update Flyer Issue 11
McLeod v McLeod [2008] UKPC 64

Introduction:

1. This decision of the Privy Council, on an appeal from the Manx courts has provided, an important clarification of the appropriate approach within ancillary relief proceedings in any case where an agreement exists between married parties as to their arrangements, either in marriage or after separation, as defined in **sections 34** and **35** of the **Matrimonial Causes Act 1973** ('alteration of maintenance agreements') and whether such an agreement is post nuptial, an Edgar separation agreement or an agreement reached in compromise of ancillary relief proceedings.

2. Further, the Privy Council has given a clear message that any significant changes to the validity of pre-nuptial agreements within England and Wales must, ultimately, await the Law Commission's review.

3. For the practitioner, the effect of this case, is that, whereas, previously, by reason of the wider discretionary powers available under the **section 25** exercise, the provisions of **sections 34** and **35** have been, broadly, ignored in ancillary relief proceedings, notwithstanding the existence of an agreement therein which also qualified as a 'maintenance agreement' under **section 34(2)**, in future, the 'starting point' in such a case must be these two statutory provisions.

4. In providing such guidance, Baroness Hale has, clearly, signalled the need to provide a uniformity of approach by the Court in ancillary relief cases involving agreements previously reached between married parties and an acknowledgement of the importance of such agreements to the Court's discretionary exercise.

5. Accordingly, in future, a Court is likely to uphold the terms of the agreement reached between the parties, unless:-

(i) the agreement is undermined by the usual contractual reasons such as fraud, misrepresentation, undue influence, etc; or

(ii) there exist any of the less formal vitiating factors recognised in **Edgar [1980]** of '...undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage... etc'; or

(iii) there has been a 'change in the circumstances in the light of which the financial arrangements under the agreement were made', so that those arrangements have become 'manifestly unjust' (**section 35**); or

(iv) there has been a failure to make proper provision for any child of the family (**section 35**); or

(v) (as added by Baroness Hale) where there has been no change in the circumstances, the terms of the agreement reached, contrary to public policy, have the effect of imposing on the state an obligation which ought properly to be undertaken within the family.

McCleod – The Case History:

6. The parties had married in Florida in 1994. There were significant age (22 years) and wealth differences. They had signed, on their wedding day, a pre-nuptial agreement, which had revealed the husband was then worth $10.3m (or £7m); by then, the wife's studies were already being funded by him. A year later they moved permanently to the Isle of Man (para 2 of the Judgment).

7. During the marriage, the pre-nuptial agreement was varied twice, by consent, providing for the parties in their marriage and if divorced. However, there was no provision expressly for the five children of the marriage (aged 13 to 7 years old) and the last agreed variation (2002 – the third agreement) had been undertaken when the marriage was already in difficulties. All three agreements had been with the advantage of separate legal advice and disclosure and there had been no undue pressure (para 5).

8. The pre-nuptial agreement (the first agreement) upon divorce had provided for each to keep their separate property and to share in any after acquired property according to formal legal title and, in addition, on a clean break, the wife would receive $25k for every full year of the marriage and should the husband pre-decease her, then $300k, if his death was within the first 5 years of the marriage and £1m, if after. All three agreements had provided that their construction be interpreted in accordance with the law of the State of Florida (para 6).

9. By the third agreement, the wife was also provided with an additional £250k lump sum to invest plus an annual allowance of £25k paid monthly, a further allowance of $36k pa paid monthly in relation to the maternal grandmother's expenses, the wife's expenses up to £100k in obtaining a further degree, the transfer of the husband's share of the parties' property

known as Dove Hill, free of marital running expenses and £1m in the event of either a divorce or the husband's death, as adjusted for inflation (para 10).

10. Their children's maintenance was to be the responsibility of the parent with care, save that their educational expenses would be met by the husband. However, if child support was payable to the wife, then the same would be by maintenance order as opposed to any increase in a capital award to her (para 11). Both parties expressly agreed that the terms were 'full and fair' (para 12).

11. On the marital breakdown in 2003, the husband issued divorce proceedings and the wife sought full financial relief, despite the limitations within the now post marital third agreement. The husband's wealth was now £13.8m and the wife's £184k. The parties remained in the FMH until 2005, when the wife moved out to rented accommodation with the children. It was agreed that the children would spend equal time with each parent (para 13).

12. The wife's claim was for 30% of the husband's wealth as it had been when they commenced the marriage and 50% of the 'acquest' during the marriage. The husband claimed the terms of the post nuptial agreement should be adhered to. The wife further claimed maintenance for the children at £600pm each, whereas the husband offered to pay £300pm per child and to pay to re-house at a further cost to himself of £750k on trust only until the children's independence when the same would revert back to him (para 14).

13. It was unchallenged that the Floridian courts would recognise the terms of the agreements as varied, even if the same had been a bad deal for either party (para 7).

McLeod – The Earlier Decisions:

14. The first instance judge had, by variation and in addition to the subsisting third agreement, awarded a further capital sum to the wife of £1.25m, considering the same to be appropriate provision for the family's accommodation and which should not be the subject of any trust. Otherwise, he kept to the provisions of the third agreement and approved the husband's offer of maintenance for the children (para 15).

15. Upon a first appeal, the Manx appeal court considered the third agreement was not a comprehensive financial provision for children of the family and, rejecting the suggested trust arrangement, directed that matter be reviewed by a court, if not agreed.

McLeod – The Issues:

16. The husband then appealed to the Privy Council. The remaining issue was as to the wife's housing needs, being either the first instance judge's provision in regard to the direct payment

to the wife of an additional capital sum or a trust of the same as suggested by the husband. It was accepted that, but for the terms of the third agreement, the husband could not complain as to the first instance judge's exercise of discretion under the Manx equivalent of **section 25** of the **Matrimonial Causes Act 1973**. Hence the validity and effect of the third agreement had to be resolved (para 18).

McLeod – Baroness Hale:

17. In a wide ranging review (para 19 onwards) of the development of the law relating to all agreements in marriage, Baroness Hale, delivering the decision of the Privy Council, found that under the Manx equivalent of **sections 34** and **35** of the **1973 Act**, the Court retained jurisdiction to revoke, alter or vary any term of any 'maintenance agreement' made between the parties to a marriage (para 23). She also found that the **Edgar v Edgar [1980] 1 WLR 1410** approach (per Ormrod LJ) of upholding agreements entered into between married parties, unless there was 'good and substantial grounds' making it unjust to do so, was to be applied to both post nuptial, separation and ancillary relief proceedings compromise agreements (para 26). By contrast, she found that a more cautious approach was, presently, applied in relation to pre-nuptial agreements, which remained unenforceable as ordinary contracts but the terms of which would be implemented, if considered to be fair, within the section 25 exercise (see **NG's case** and **Crossley v Crossley [2007] EWCA 1491**in previous Oriel Flyers) (para 27).

18. The husband's counsel's submission had been that, whether pre or post nuptial, all such agreements should be valid and binding and 'presumptively dispositive' of claims to ancillary relief. In the judgment of Baroness Hale, the present position, whereby pre-nuptial agreements were neither valid or binding in the contractual sense must remain until Parliament intervenes.

19. However, Her Ladyship agreed with Baron J in **NG's case** that the Court's current review powers (**section 35**) over 'maintenance agreements', probably, did not include pre-nuptial agreements and any future legislative changes recognising the latter should also include parallel powers of Court review (para 35).

20. As to the terms of both post nuptial and separation agreements, these fell within the remit of the Court's powers of review under **sections 34** and **35** of the **1973 Act** and any previous historical public policy rule, which may have inhibited the validity of provisions therein as to the parties' future financial position, following separation, was no longer applicable, as there was no longer any enforceable duty upon a husband and wife to live together (para 38).

21. Hence, it followed that the 2002 third agreement was enforceable as a post nuptial agreement both as to the arrangements between the parties when they were together and also

when they had separated and, as such, remained subject to the Court's powers of review (para 40).

22. It followed that wherever the terms of a post nuptial or a separation agreement were in issue, then the 'starting point' would be **sections 34** and **35** of the **1973 Act** and, logically, this would also be the case where the terms reached in an ancillary relief proceedings compromise agreement were in issue before a Court.

23. To this, Baroness Hale, also added the Privy Council's approval of the well known dicta of Ormrod LJ. in **Edgar's case** (p 1417 and para 25) to the possible relevance of the circumstances in which the agreement had been made.

24. In the circumstances presented, Baroness Hale, in adopting the starting point of the jurisdiction under **section 35** of the **1973 Act**, determined that the third agreement between the parties had contemplated the changes which had occurred and, as there was nothing in those circumstances which cast doubt upon the validity or the weight which should be given by the Court to the agreement (as per **Edgar**), then there was nothing which existed which should lead the Court to vary the financial arrangements already made for the wife, albeit they were much less than she could have expected had there been no agreement (paras 43 and 45).

25. However, in relation to the children of the family, the position was, clearly, different. The provision overall made by the judge at first instance was inadequate for the children. He had increased the capital available for the Wife in the expectation that she would use the same for the family's accommodation needs, but without requiring her to do so. In the light of the other provision made in the agreement for the wife, the Privy Council considered this was wrong in principle and the judge had failed to make adequate provision for the children and, therefore, this was to be addressed by the establishment of a trust, as the husband had submitted, for the benefit of both the wife and the children during the latter's agreed dependency period. The matter was to be remitted back to the High Court for an appropriate deed to be drafted (para 46).

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