Barristers' Chambers

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Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 Issue 22
Radmacher v Granatino – The 'natural inference'of teh Pre-Nuptial Agreement

Introduction:

1. The long awaited decision of the extraordinary sitting of 8 male and the only female of the 12 members of the Supreme Court has resulted in an outcome which again reveals the gender divide which, clearly, exists at the highest levels in legal approach to the weight to be given to the existence of a pre-nuptial or post nuptial agreement in the statutory exercise under **section 25** of the **Matrimonial Causes Act 1973.**

2. The Supreme Court had before them an appeal in which the questions for them to decide were whether the Court of Appeal:-

i) had erred in finding that a freely entered into pre-nuptial agreement ought to be given decisive weight under the **s 25** assessment; and

ii) in coming to its decision, had in error judicially legislated in contravention of the decision of **Macleod [2008] UKPC 64**.

3. The Court's decision was that the Court of Appeal had correctly found that the facts of the case contained no factors, which rendered it unfair under **s 25** to hold the husband to the pre-nuptial agreement. The President of the Court, Lord Phillips gave the majority judgment with Lord Mance adding further commentary in support. Baroness Hale, as the sole experienced family judge sitting, delivered the only dissenting judgment.

The Facts:

4. These are, by now, only too familiar to the reader and, therefore, can be summarised. The parties were married in 1998 in London. The wife is a German heiress and the husband

French by birth. They separated in 2006 after 8 years of marriage, having by then two children (now aged 11 and 8).

5. The Wife, at her family's family instigation, caused the parties to enter into a pre-nuptial agreement drawn by her family's lawyer in German and subject to German law providing that neither party was to gain any benefit from the other's capital during the marriage or on its termination. The wife was to receive further family wealth should the agreement be signed. The husband, at the time a city banker, declined the chance to seek independent legal advice and the wife, actively, resisted any disclosure to him of the details, as opposed to the fact, of her wealth. At the time of the hearing, the husband had left banking and was engaged in research at Oxford.

First Instance:

6. The High Court Judge, Baron J awarded the husband c £5.5m, which would provide him with a London home suitable for his children to stay with him and life income of c £100k pa. Baron J's approach had been to measure the pre-nuptial agreement against some six safeguards set out in the Government's green paper (1998) 'Supporting Families' and, thereby, to find the same flawed, not least because of the absence of independent legal advice and the absence of mention of children in the agreement. However, because the husband had been fully aware of the limitations being imposed upon him by signing the agreement, the Judge nevertheless took the agreement into account but with reduced weight as a factor under the **s 25** exercise.

Court of Appeal:

7. The wife's appeal to the Court of Appeal found that Baron J had erred and the Court held the pre-nuptial agreement should be given decisive weight under **s 25** and that in the circumstances the husband's financial relief should only be granted as to his role as a parent and not his own longer term needs. The husband had then appealed to the Supreme Court.

The Supreme Court:

The Majority View:

8. The **Macleod (2008)** decision of the Privy Council had rightly decided that it was no longer public policy to hold as void any nuptial agreement because such agreement made provision for the married parties' separation. In the event, this had already been achieved by legislation in relation to 'separation' (Edgar) agreements (see **ss 34/35** of the **MCA 1973**). However, the Privy Council had not gone far enough and the same position applied also to pre-nuptial agreements, which were no longer to be seen as void for the same reason. There was no material difference between pre or post nuptial agreements in this regard. The Court would, however, retain the power under **s 25** to overrule either.

9. The question was what weight should be given to the pre-nuptial agreement. This highlighted 3 issues:-

i) What circumstances would result in less weight being given to a pre-nuptial agreement? It was necessary that such an agreement should be entered into under free will and it was desirable the parties should be informed of the implications of doing so. But the real question would be whether, in any given case, there has been any *material* lack of disclosure, information or advice;

ii) Would the foreign element to the case increase the weight to be given to this pr-nuptial agreement? It was relevant to consider with all pre-nuptial agreements, the particular circumstances, which led to the same. Here the parties entered it in 1998 when it was binding under German law, but was then considered not to be so in the UK. However, after this decision now of the Supreme Court it will be natural to infer that parties, who enter into such an agreement governed by English law, intend that effect will be given on a divorce etc to the agreement.

iii) Did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement? It had to be acknowledged that the terms of a pre-nuptial agreement may conflict with what a Court may have considered fair without the agreement being present, but the principle is that a Court should give effect under s 25 to an agreement, which 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. Obvious examples of where it would not be fair would be where it prejudices the reasonable requirements of any children of the family. However, in other cases, the obvious tension will be that respect should be given to the right of individual autonomy and to the reasonable desire of parties to make provision for their existing property. Accordingly, in the right case, a pre-nuptial agreement will be capable of having decisive or compelling weight.

10. When applying these principles to the facts, the Court of Appeal had, correctly, concluded that there were no factors which rendered it unfair to hold the husband to the agreement. This husband was extremely able and his own needs were, broadly, met, indirectly, from the generous financial relief given to him to cater for the needs of his two daughters until each reached maturity and independence. It could not be said that there was any issue of compensation engaged because the husband's decision to leave his career in the city was not directed by the demands of his family, but actually reflected his own personal choices.

11. Hence, fairness under **s 25** did not entitle him to a share of his wife's wealth, which she had received from her family independently of the marriage (and in part also because the pre-nuptial agreement had been signed), when he had already intentionally agreed he should not be so entitled when he married her.

The Minority View:

12. Baroness Hale maintained that there was a difference when dealing with the provisions set out in an agreement relating to a marriage rather than when dealing with other contractual arrangements. This was because even a modern marriage still possessed '*an irreducible minimum*', including a couple's mutual duty to support one another and their children. So the

issue was how far individuals should be at liberty to rewrite that essential feature of the marital relationship as they chose.

13. It had to be accepted that the law of marital agreements is in a mess and ripe for systematic review and reform. The Law Commission is currently examining the status and enforceability of pre nuptial agreements and will make detailed proposals for legislative reform and that has to be the preferred and democratic way of achieving comprehensive and principled reform.

14. In reality, however, the object of any pre-nuptial agreement is to deny the economically weaker party (usually the wife) the ancillary relief she would otherwise be entitled to.

15. Baroness Hale disputed a number of matters accepted by the majority, including the acceptance of the Court of Appeal's decision as to the fairness of the provision made for the husband in this case in all the circumstances. She did not accept that pre and post nuptial agreements were the same as the Majority did and her stance was that such agreements required a different approach under **s 25.**

16. In particular, it was wrong, in her view, within the **s 25** exercise for the Court to introduce any presumption in favour of holding parties to a pre-nuptial agreement they had signed. Under **s 25,** the principle should simply be doing what was fair in all the circumstances. In such a context, she was critical of the Court of Appeal's approach, which appeared not to give any weight to the fact that these parties had entered into a marriage as opposed to cohabiting together. In such circumstances she would have given more weight to this agreement than the first instance Judge (Baron J) but she would have been more generous in the provision to the husband by providing at the very least with his own home.

Comment:

17. Until legislation changing the position, pre-nuptial agreements are still not actually referred to in **s 25** of the Act and yet the Majority's view in this case is that the court, in future, should proceed on the basis that it will be natural to infer that parties, who enter into such an agreement governed by English law, intend that effect will be given on a divorce etc to such an agreement and that a court should, therefore, give effect under **s 25** to the agreement, if freely entered into with a full appreciation of its implications **unless**, in the circumstances prevailing, it would not be fair to hold the parties to their agreement.

18. This will appear to many to be interim (and impermissible) judicial legislation in advance of the more measured findings of the Law Commission report in 2012 and any subsequent decision of Parliament to change the existing law.

19. There are real concerns expressed by Baroness Hale, the only female member of the Court and the only experienced family law judge amongst those assembled, that this extra emphasis to the terms of a pre-nuptial agreement upon the outcome of the **s 25** exercise may in practice serve to undermine the broader approach as to fairness of outcome determined by both **White** and **Mcfarlane/Miller,** by giving the existence of a pre-nuptial agreement a

presumptively higher than mutual status with the other circumstances in a case. Certainly, she already was concerned at published precedents (one of them mine), which she perceived (wrongly on any full reading) attempted to reduce the wife's recovery to that of a paid housekeeper only – a danger, which she openly canvassed was less obvious to the Majority of the Court by reason of their gender.

20. The effect of this decision is, therefore, to give yet a further emphasis to the importance of having a pre-nuptial agreement in place where a spouse-to-be or his or her family have or anticipate significant wealth and there is every indication that, whilst the circumstances as to how the agreement was reached will, for now, remain fact sensitive to every case, the Court will also in every case regard the existence of such an agreement as a factor of primary importance and will 'naturally infer' that the parties, by that agreement, intended that it would be given effect to by the Court upon divorce etc.

21. Short of the ultimate personal power in the other spouse to say 'No' and that power should not be minimised, there is concern that indirectly **s 25** is being judicially, as opposed to legislatively, adjusted to the detriment, in the main, of women as the likely weaker financial partner and Baroness Hale expresses her obvious anxiety that the terms of the agreement rather than fairness will triumph as a result in practice.

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