Barristers' Chambers

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Z v Z [2011] EWHC 2878 – Issue 29
Ante Nuptial Agreements and 'Needs' post Radmacher

Introduction:

1. What was abundantly clear from the Supreme Court's decision in **Radmacher v Granatino (see Flyer 24)** was that, until Parliament addressed the issue, whatever the wording of an ante-nuptial agreement between the parties, upon distribution on divorce, the 'needs level' of either party would continue to be protected under the **s 25** statutory exercise. This first reported decision, since, confirms that position, whilst at the same time also again highlighting the fact that, where an ante-nuptial agreement is in being and is held to be material, the effect of the same will be to limit or prevent (dependent upon te agreement wording) any additional recovery within the 'sharing principle'.

The Facts:

2. H (53) and W (50) were both French and university educated. They had met in 1985 when H was working in his family's business and commenced cohabitation in 1990 in Paris. By then, H was working for VCF and W, having worked in the cosmetics industry, was an advertising consultant. Between 1985 and 1994, their relationship had already been broken by two periods of separation occasioned by H's unwillingness to commit. In February 1994, after the second separation, the parties' purchased in joint names with equal contributions their future marital home in Paris. In the June, they signed an ante-nuptial agreement before two notaries under French law, whereby they expressly opted out of the default 'community of property' regime so as to hold their assets separately. In the July, the parties married in a civil ceremony, which was to be celebrated in a church ceremony two years later. At the time of the hearing, they had 3 children aged 14, 12 and 9.

3. Whilst living initially in Paris, the family were to move first to Holland with H's work with VCF in 1999, then back to Paris in 2002 and then to London in 2007. By then, the relationship was in trouble, with H having formed another relationship. Both parties had instructed lawyers before leaving Paris and exchanged separation documents without further progress. However, in the UK, they determined to have a 3 month separation and so ordered their living arrangements to prevent their

children realising the position. However, by July 2008, the marriage/committed relationship of 18 years was over and H left.

4. Ryder J determined the jurisdiction contest (para 17 of report) in favour of W's application that the parties had been habitually resident in the UK and her petition was permitted to proceed to decree nisi in 2010. W then pursued her previously stayed claims for financial orders.

5. It was agreed the parties net asset worth was £15m of which W held almost £1.3m and H the balance (para 19). Of this, the parties' held c £723k each in their equal shares of the FMH in Paris and, save for some similar inheritance values held and shares in an investment property acquired by them, the major part of the overall value retained had emanated from H's private equity and venture capital employment (para 22). There was an unlikely possibility of c £4m in contingent tax liabilities being levied against the agreed asset value held (para 25). H was coming to the end of his likely time with VCF because of his age and his income which was still very significant would be considerably lower, in this event. W remained a housewife, as she had been since the birth of the first child.

The Parties' Stances:

6. W contended that the ante-nuptial agreement denying her any share should not apply to the distribution in this case, where the substance of the assets represented the 'marital acquest'. She claimed she should equally share in the overall asset value of £15m and should, additionally, gain a lump sum offset for H's c £1m pension, whilst accepting that her recovery should entail transfer of shares to 'share the risk' and be open to any contingent tax liabilities for the same reason. But, in this event, she should have a nominal maintenance award, lest her eventual post tax capital position meant she needed ongoing support. She also wanted £40k pa per child ppo (para 29).

7. H contended that post **Radmacher**, it was 'fair' to hold W to the non sharing agreement. However, as such an ante nuptial agreement did not exclude 'maintenance', he conceded, in such circumstances, that he was vulnerable to a wide interpretation of 'maintenance', which permitted W to claim a 'needs' provision, which he argued should be limited to her 'reasonable requirements' as applicable under pre **White (2000)** law and which, he claimed, amounted to c £5.3m or 35% of the overall value and he would stand the risk on any future contingent tax on a clean break with £24k pa per child ppo (para 30).

Central Issue:

9. Absent of the agreement provisions, Moore J was satisfied, in the circumstances and in the light of the parties' equal contributions to their acquisition of wealth within the relationship, that there should be equality of division (para 31). He stated, therefore, that he had to determine if the signed agreement took the case out of the 'sharing principle' and, if it did, what then would be W's 'needs generously assessed' (para 32).

The Law:

10. Moore J. accepted (para 34) that since **Radmacher** there had been a 'seismic shift' in the approach to be adopted, repeating the Majority view that (Lord Phillips):-

"*The court should give effect to a nuptial agreement that 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*".

11. The Judge observed that the Supreme Court had declined to identify circumstances where is would be fair to hold parties to an agreement, but had held the husband in that case to an agreement that most lawyers would have considered unfair prior to that decision. In addition, the Supreme Court had, clearly, indicated that agreements excluding 'sharing' were easier to hold as 'fair', as opposed to those which sought to exclude or limit 'needs' and 'compensation' (paras 35 to 38). Further, whilst it was relevant to 'fairness' to have regard to what a party may have got in the jurisdiction in which the agreement was signed, it would not be right to reduce the award simply because it may have been lower in that other jurisdiction (para 40).

The Decision:

12. Moore J accepted that without the ante-nuptial agreement, H would not have agreed to marry W (para 43). The agreement was the product of their free will and full understanding and would have been binding in France (para 45). There had been no formal advice or disclosure, but these were not material issues as W knew fully what the agreement meant and H's broad financial position (para 46).

13. W had argued that H had promised her that he would not enforce the agreement or, if he did pursue divorce, he would be more generous to her. However, the burden of proving such a contention in the face of denial was very heavy and such evidence would need to extremely clear. In this case,

the burden had not been discharged and a letter written by H on separation suggesting more generous terms did not satisfy the **Edgar** test in terms of separate legal advice etc (paras 50 to 62).

14. The Judge undertook the **s 25** exercise and concluded, on a clean break, W needed a £3.25m housing fund and a **Duxbury** award representing £100k pa capitalised maintenance, declining a reduction for when the children left her and taking out of such an amortised award assessment her comparatively modest family inherited property, whilst allowing £25k pa ppo for each of the children. In this way, W would hold c £6m or 40% of the non pension value. In the light of the ante-nuptial agreement, this represented the appropriate departure from the 'sharing principle'. However, if the contingent tax liabilities were to apply it would not be fair for W to end up with more than half and so, should such be levied and exceed more than £3m, then W must indemnify H for half of the excess and, in this event, her nominal maintenance should be preserved lest, thereby, she was forced beneath her future 'needs' level. Alternatively, H could elect to underwrite any contingent tax for the clean break (paras 63 to 85).

Commentary:

15. Following **Radmacher's** decision, it must be an essential part of any solicitor's advice to the client to consider the need for an ante-nuptial agreement. This most recent case is, yet, again a reminder that relatively modest initial financial circumstances can result in significant wealth upon a divorce, in respect of which the presence of an ante-nuptial agreement, at the very least, limiting recovery to a party's needs level would be of considerable potential benefit. Of course, time will tell to what extent the Profession is yet alert to this position or whether many are unwisely still awaiting the Law Commission's final report (2012) before including discussion about such agreements within the terms of their standard advice to clients.

16. Whether Parliament does or does not act upon the Law Commission's anticipated forthcoming proposals for the establishment of 'qualifying agreements' to enable parties to, effectively, opt out of even a 'needs level' provision upon divorce subject to certain safeguards, ante-nuptial agreements have landed and are an essential aspect of any client's desire for forward planning.

17. The detailed record signed by the client of the advice given will need to be retained indefinitely and each advisor should take advice themselves from their professional bodies as to whether there are

any circumstances in which it would be appropriate with their client to limit any liability arising in respect of such agreements to the level of their indemnity liability cover.

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