Barristers' Chambers

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Issue 43
BN v MA [2013] EWHC 4250 (Fam)
Pre-Nuptial Guidance – from you know who!

Introduction:

If there was ever a man on a mission – then it must be Mostyn J who appears to have set himself an ambition with each case he decides to progressively codify every aspect of Financial Remedy law – of course, Napolean did the same for France! The temptation to comment further is there but the author will resist. At the same time, via his judicial committee hat, he is heading the laborious task of standardising the financial orders which are to be used nationwide in the Single Family Court – an issue long overdue for attention. The truth is that Nicholas Mostyn has always been a lawyer of tremendous energy and capacity and one who has courageously shown a willingness to challenge the established principle and to modernise financial remedy law. We could do, dare I say, with more like him.

It is to be welcomed, therefore. that with the experience in practice he had in relation to cases such as ***Radmacher v Granantino*** [2011] 1 AC 534, and his own judicial summaries of this area of law in ***Kremen v Agrest No. 11*** [2012] EWHC 45 (Fam) and ***B v S*** [2012] EWHC 265 (Fam) that in advance of the imminently awaited Law Commission's recommendations relating to Marital Agreements, Mostyn J took the opportunity to summarise the present law as it presently applies to Pre-Nuptials and also at the same time to comment upon the approach to applications for legal services orders in this decision of ***BN v MA*** (2013). His observations in this case will undoubtedly remain relevant following the Law Commissions report.

Facts:

The parties (aged 55 and 40) with an international background, had originally commenced a relationship in 2002 and had a child in 2005. Uncommitted to each other until 2007, they became engaged in 2009 and married in June 2012. By May 2013, the wife became pregnant with their second child. However by August 2013, the parties had separated following an

alleged violent incident which had resulted in criminal proceedings against the husband which he was defending.

By September 2013, the wife had issued her divorce petition, based upon the parties' habitual residence in this jurisdiction and she followed with a full range application for financial orders. In November 2013 she issued interim applications for maintenance pending suit, an interim order for their child and a legal services order to assist with her litigation costs.

In 2009 upon their engagement, the wife had been studying in one country and the husband working in another, both abroad. In February 2010, the husband's solicitors had presented a draft pre-nuptial agreement and there followed '*intense negotiations'* until the need of May 2010 when the final draft was signed by both parties (see para 4 of Judgment).

The Pre-Nuptial:

His Lordship emphasised certain contents of the four page, 34 paragraphed signed document as important to the Court's approach to the same (see para 5). In particular,

on the first page in larger print was an express warning that the document was intended to create legal relations, to confirm the parties' separate property interests and be determinative of the asset division upon marriage breakdown. The warning continued that the parties should not sign unless they had each had legal advice, which they had understood and were satisfied with.

A summarised account of the terms of the Pre-Nuptial (paras 7 to 16) was read by his Lordship into his Judgment as again being relevant to the overall outcome of the hearing (Note: it is important in this respect to repeat such judicially considered aspects for those of us who will be assisted in drafting future such agreements).

> Clause 4: recorded that the parties wanted to record their wishes for their financial arrangements and the provision for any children.
>
> Clause 8: recorded that the parties wished the terms reached to be binding.

Clause 10: recorded that the agreement recorded their entire agreement and neither had agreed under duress, or undue influence or coercion including the that they were to be shortly married and there had been no inequality of bargaining power.

Clause 11: recorded that each was satisfied there had been a full and frank disclosure of means and circumstances within the Appendices A and B attached sufficient to enable the agreement and that the same showed a substantial disparity between their respective income and resources which was likely to continue.

Clause 12: recorded that the parties understood that the agreement may not reflect how a court might resolve any financial claims upon divorce.

Clause 21: recorded a definition of 'a relationship breakdown', including divorce, nullity, permanent separation or separation either considered permanent

Clause 22: recorded upon such a breakdown neither party would make any financial claim on the other or their estate, including where the marriage ended by death, save in accordance with the agreement terms incorporated as appropriate into a consent order.

Clause 24: recorded that in the event of a separation, the wife and any children would receive the provision in Appendix C in full and final settlement of any capital, pension or income claims under the 1973 Act or otherwise. Such provision would be capped to 30% of the total value of assets to which the husband was entitled, including by any trust.

The Solicitors certificate for the wife: declared that the wife had been independently legally advised as to her rights, whether the agreement was financially or otherwise advantageous and/or prudent to enter and whether as to all that was foreseeable the agreement was fair and reasonable.

Appendix A: recorded the husband's resources, which included six properties, including two in London and two abroad with another being bought. The schedule referred to two of the properties being owned by a company and His Lordship considered this was enough to reasonably infer that there was some trust involved bearing in mind the express reference as above to 'trust' in Clause 24. The total value of assets was given at £13.08 million and in addition the husband disclosed that he had a share of unknown value in the family business. His business income was given at net £350,000 per annum and his rental income from two of the properties at around €40,000 per annum.

Appendix B: recorded the husband's resources being two London flats valued at £250,000 each mortgaged 100 per cent at £250,000 in each case.

Appendix C: recorded that the provision made was to be different, depending on the length of the relationship to its termination. If only less than two years then on a certain basis and if two to nine years, ten to fifteen years, and fifteen years plus, then on different bases. The relevant basis on the facts was the less than two years category, in which the husband had agreed to obtain the redemption of the mortgages on the wife's two flats and the extension of their leases to the maximum extent available in law, which would result in him having to find capital of £528,000 and for the lease extensions another £250,000. In addition, there was to be housing provision from £2 million in Trust, varied upwards via the national Halifax house price index from the date of the agreement. Annual spousal payment was to be £96,000 index linked from the date of the agreement and for each child and any child later born, as the agreement expressly contemplated, £24,000 annually.

Decision:

His Lordship was of the view that having regard to the notice to the parties at the start of the agreement, it had been obvious that the principal object of the exercise in this and every pre-nuptial was to avoid subsequent expensive and stressful litigation; and, therefore, the law adopts '*a strict policy of requiring the demonstration of something unfair before it will open the Pandora's Box of litigation'* after an agreement of this nature (Para 17).

He noted that within 5 days of lodging her petition, the wife had issued applications for interim financial orders. His Lordship stated (at para 22):

> *'…one has to ask on what possible basis the wife considered it appropriate to issue an application for the full range of financial remedies, she having signed the prenuptial agreement in the terms which I have mentioned but 15 months earlier. Certainly neither then, nor at any later stage, has the wife, in correspondence or indeed in an affidavit, articulated on what basis she can justify repudiation of the agreement*.'

Mostyn J reminded himself (para 24) of the jurisprudence relating to marital agreements and the various cases in which such agreements have been dealt with being ***Granatino v Radmacher*** in relation to nuptial agreements in general and in particular pre-nuptial

agreements; postnuptial or intranuptial agreements made while the parties are living together and are intending to live together as in ***MacLeod v MacLeod*** [2010] 1 AC 298; separation agreements made after the marriage has broken down, but before divorce proceedings, as in ***Edgar v Edgar*** [1980] 1 WLR 1410 and financial remedy compromise agreements made in divorce proceedings where the compromise has yet to be approved by the court as in ***Xydhias v Xydhias*** [1999] 1 FLR 683.

At para 25, Mostyn J emphasised that the effluxion of time since an agreement had been entered into was, in most cases of pre-nuptial agreements, the reason for the court's concern in such cases, compared to say a *Xydhias* type agreement, which would have been concluded far more recently, to pay particular attention as to the fairness of justifying what may have agreed against changes which the parties may not have predicted.

Fairness of Upholding the Agreement:

His Lordship was in no doubt that the Supreme Court in ***Radmacher's*** case had intended to lay down a single test for all nuptial agreements, be they pre, post, intra, separation or compromise in nature and that was:

> '*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'*(see para 26).

There were certain important factors to have regard to when considering the '*circumstances prevailing'* as to fairness in holding the parties to the agreement. These were:-

i) no agreement can prejudice the reasonable requirements of any child;

ii) the parties' autonomy (see paras 77/79 ***Radmacher's*** case) – so that that respect should be accorded to a married couple's decision as to how their financial affairs should be regulated, particularly where the same addresses existing circumstances and not merely the contingencies of an uncertain future;

iii) autonomy is also important where the agreement is freely signed between parties of some sophistication who had received good independent legal advice and also where the agreement reached seeks to protect pre-marital property owned separately by either party, which the agreement in question sought to do. This was to be

contrasted with an agreement which sought to allocate money yet to be earned disproportionately in favour of the earner rather than the home keeper –in which the Supreme Court pointed out in paragraphs 80 and 81, it may well be easier to find that the agreement is unfair (see para 28).

iv) no agreement can overreach basic needs (see para 82 ***Radmacher's*** case). So that where an agreement would leave one party in a predicament of real need, while the other enjoyed a sufficiency or more, that too was likely to be unfair – although it should be noted that the Supreme Court considered '*a predicament of real need'*, at least on the facts of that case, was merely one that did not leave the claimant, Mr. Granatino, in a state of destitution (para 29).

Agreement Freely Entered with Full Appreciation of Implications:

Mostyn J considered there is no rule at all that full disclosure, or full legal advice, is a necessary pre condition to satisfy this requirement. Instead, the question is whether there has been a material lack of disclosure, or information, or legal advice. In the usual run of cases (albeit not a case where the party is a highly intelligent sophisticate such as Mr. Granatino), a full appreciation of the implications will normally carry with it a requirement of having, at least, enough legal advice to appreciate what one is giving up. However, this did not arise here as the quality of the advice given in this case could not be questioned (para 30).

Did the husband here give sufficient disclosure, which has to be such that '*each party should have all the information that is material to his or her decision'* (see para 69 of Supreme Court decision) – ie that does not require "full and frank disclosure" but rather, only a sufficiency of disclosure to enable a free decision to be made.

As to this, His Lordship found difficulty in discerning how the wife intended to put her case to justify repudiation of the agreement and in the absence in the matrimonial jurisdiction of the need for specific pleading, the husband was only regrettably to hear the explanation from the mouth of the wife's counsel in court – namely that she claimed first he was guilty of material non-disclosure; and, second, that there were circumstances around the signature of the agreement, particularly relating to the haste with which it was formed, which should lead the court to conclude, applying Lord Phillips' test, that it would be unfair to apply the agreement.

However, His Lordship could not find material inconsistencies between what the husband had disclosed as his resources in the agreement and what he had said about them in evidence. Indeed, in a marriage of less than 2 years there would not have to be much disclosure to justify the level of provision made, especially where it was all basically non matrimonial. In addition, there was little basis for any attack relating to the circumstances surrounding the signing of the agreement and none identified in the wife's affidavit filed (para 32).

Decision on Applications:

When dealing particularly with interim maintenance applications, the court should seek to apply the terms of the prenuptial agreement as closely and as practically as it can, unless the wife's evidence demonstrates, to a convincing standard, that she has a likely prospect of satisfying the court that this agreement should not be upheld. Providing that the wife is not left in any real predicament of need, in the absence of such convincing evidence, the court should seek to apply the terms of the pre-nuptial agreement as closely as it can (para 33).

Hence, His Lordship held the maintenance pending suit provision for the wife and child should be as in the agreement and should rise with the birth of the expected second child by a further £24,000 pa, with various credits being given in relation to the value of the wife's occupation of and running charges in respect of a more expensive jointly owned property provided to her now than the prenuptial agreement provided for and potential further credits should she also choose to occupy another of the husband's properties.

Legal Services Order:

Mostyn J stated (para 36) that the statutory provision does no more than to codify the principles to be collected in this regard in the authorities, most recently in ***Currey v Currey*** [2007] 1 FLR 946. Therefore, under s. **22ZA(3)** the court cannot make a costs allowance unless it is satisfied that without the amount of the allowance, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings, and for the purposes of this provision the court must be satisfied in particular that the applicant is not reasonably able to secure a loan to pay for the services (see s. **22ZA(4)(b)**).

At para 37, in considering the more general matters, Parliament required the court under s. **22ZB(1)(c)** to have regard to the subject matter of the proceedings, including the matters in issue in them. His Lordship considered that such reflected paragraph 21 of ***Currey,*** where

Lord Justice Wilson (as he then was) said the subject matter of the proceedings will surely always be relevant. In this case, the wife had received offers from litigation loan suppliers albeit at a steep rate of interest, to borrow from one £400,000, and from another, £250,000, although in each instance the interest may be rolled up. Hence where these loans were available and the interest could be rolled up, the wife did not satisfy the first criterion as specified in s. **22ZA(4)(a)** and she was found to be reasonably able to secure a loan to pay for the services.

His Lordship commented that under **s. 22ZB,** he would have been reluctant to have made any award in any event in the absence of a detailed schedule of the costs, the wife's breakdown of costs in her affidavit being manifestly, and completely insufficient for an award under the provision. In addition also, having regard to the subject matter of the proceedings, and the view reached that the wife's claim was extremely speculative and possibly borderline irresponsible his Lordship would also not have made a legal services order provision. Accordingly also the wife was to be condemned for 75% of the husband's costs.

Commentary:

This may be a decision based upon interim as opposed to final financial orders and upon facts which speak loudly of the lack of overall merit in the challenge mounted to the alleged unfairness of the pre-nuptial agreement signed by the parties. However, practitioners will find the detail in the Judgment of the pre-nuptial terms under analysis and the parts thereof highlighted by Mostyn J instructive and valuable to fine tuning their own drafting techniques. In addition, the weight applied to the signed agreement will be in line with the recommendations of the much awaited Law Commission report.

In addition, His Lordship seeks to put to rest suggestions that there are different approaches preserved after ***Radmacher*** as to whether the court is dealing with pre or post marital agreements (cf Macleod, Edgar and Xydhias). All, according to Mostyn J, are subject to the same test – 'in the circumstances prevailing is it fair to hold the parties the agreement'.

Mostyn J further emphasises that up to date agreements and ones not seeking to unequally distribute mutually acquired resources are likely to survive the test of fairness. In addition, he seeks to strengthen the view expressed previously by himself and Charles J that whilst the 'needs' of the claimant spouse are historically the bottom basement of divorce provision beneath which no case can be permitted to fall within our jurisdiction whatever the relevance of a signed pre-nuptial, this may not prevent a court by reason of the existence of a duly signed pre-nuptial agreement, determining the basic needs provision applicable in a given

case as not much higher than the level of destitution. Added to this, His Lordship confirms that the level of disclosure required by either party prior to the signing of an agreement will be that which amounts to '*a sufficiency of disclosure to enable a free decision to be made'*.

Regrettably, His Lordship also suggests that the new legal services order provisions are simply a codifying of the approach to litigation funding endorsed by the Court of Appeal in ***Currey*** and both the merits of the substantive financial application sought to be funded and the details of the costed funding are important aspects in evaluating the application's overall merits. In this, of course, practitioners will find little to hearten the initial hope to the introduction of these statutory cost allowance provisions that the same had achieved in part the much needed re-balancing of the interim rights of the non owning spouse pending a final hearing.

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11 February 2014
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