

JERSEY / JUDGMENT

G v H (Matrimonial)

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Matrimonial - reasons for refusing a preliminary hearing to establish the validity of the prenuptial agreement. [2018]JRC111A Royal Court (Family) 27 June 2018 Before : Judy Marie O'Sullivan, Registrar, Family Division Between G Petitioner And H Respondent Advocate B. J. Corbett for the Petitioner. Advocate V. Myerson for the Respondent.

reasons

the REGISTRAR: 1. The petitioner commenced divorce proceeding against the respondent in January 2018 on the grounds of the respondent's unreasonable behaviour. A decree nisi was pronounced and made absolute on in April 2018. The respondent filed an application for ancillary relief in April 2018. At the Preliminary Directions Hearing in April 2018 the petitioner (through her advocate) asked that the existence of a pre-nuptial agreement ("PMA") should be dealt with at a preliminary hearing, where its existence, if confirmed, should defeat the need for full financial disclosure and a full hearing. It is submitted on her behalf that this will, in line with the overriding objective, ensure the matter is dealt with justly but proportionately, cost effectively, expeditiously and fairly. The petitioner accepts that a PMA cannot oust or fetter the jurisdiction of the Court but she wishes to save both parties further significant expense, and the Court time. The respondent through his advocate submits that what weight can be afforded to the PMA can only be determined by the Court having regard to all the circumstances of the case, including the factors set out in section 25, ("the section 25 factors"), of the Matrimonial Causes Act 1973 ("the Act"). He wishes a final hearing to hear argument as to the validity and fairness of the PMA.

Background

2. The petitioner is some 10 years older than the respondent. At the time of their marriage he was a bachelor, with approximately £10,000, although his advocate submitted he was earning about £10,000 per month. The petitioner was a widow, with substantial inherited wealth. 3. The parties entered into a PMA 3 weeks prior to their wedding. The petitioner wanted to protect her significant wealth which she had inherited from her husband, ring-fencing the "non-matrimonial" property. The agreement had been sent to the respondent in 2013, apparently initially stating that he would receive £1 million if the marriage lasted less than 3 years, and £5 million if it lasted more than 3 years. The parties were due to attend a pre-wedding cruise but as the agreement was unsigned the cruise was delayed. The respondent attended the petitioner's lawyer's office, and was given a hard copy of the

agreement and told to get legal advice. His position is that it was not made clear to him that the terms had changed, namely that he would get £1million if the marriage broke down within 5 years, and £3million thereafter. He did go to Davies Ingram, advocates, and saw Advocate Jamie Orchard who required the respondent to sign a waiver as follows: "I confirm that I have not received any advice from Advocate Jamie Orchard specifically in relation to the terms and effect of the Agreement nor in relation to the enforceability of the Agreement in Jersey" 4. Notwithstanding this, the respondent signed the PMA in the presence of Advocate Orchard. The PMA states that it is to be legally binding, and both parties acknowledged they had the benefit of legal advice and had entered into it "freely and voluntarily." The petitioner's advocate submits that the respondent is literate, and was able to read the document in front of him, and had he felt the need for further legal advice, he could have taken it. It appears he did not flag up to the petitioner or her lawyer prior to the marriage there was a waiver from Advocate Orchard, and he signed on the basis he had had legal advice. The respondent has now been paid the £1million and received several motor vehicles and other chattels from the petitioner during the marriage. 5. During the marriage the parties entered into a partnership "the X Partnership". They enjoyed some considerable success. By about November 2014 the partnership was sufficiently profitable for the petitioner to inform the respondent that she had been advised that they should convert the partnership into a Limited Company. The respondent agreed. Company A Ltd (CAL) was accordingly set up and all of their partnership assets, and some £600,000 of cash were transferred to the company. Both parties continued to receive income from the company. 6. During the course of this divorce it has been revealed that the only legal shareholder of CAL is the petitioner. The respondent believes that the petitioner holds the shares as nominee or on trust for both of them, and it is submitted on his behalf that he was never asked to give away his partnership assets, and as far as he (and the Law) is concerned he owns half of the value of CAL by virtue of a resulting trust or otherwise. The value of CAL is estimated to be several million pounds. 7. The respondent had requested that full financial disclosure be made within the ancillary relief proceedings including full affidavits of means with documentation, questionnaires, replies and schedules of deficiencies. The petitioner argues this should not be necessary on the basis that there is a PMA in place. However, the respondent now proposes that affidavits of means are exchanged without supporting documentary evidence, but does require bank statements and credit cards statements for the last 12 month's preceding separation and the petitioner provides documentary evidence as to her financial position at the time of entering the PMA. In addition, liberty is then sought to apply for further disclosure, if required, relevant to the PMA and section 25 factors, to include questionnaire and replies to them. A Case Review Hearing is to be fixed, with dates being then set for a final hearing at which the validity and fairness of the PMA will be argued. 8. Both parties do agree that the respondent should write to the petitioner setting out what further disclosure is required in relation to the partnership, CAL, the loans made by the petitioner to CAL and related requests. The Law 9. Since *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2FLR 1900, PMAs are no longer regarded as contrary to public policy. There have been numerous cases regarding the weight to be

granted to PMAs since then, including the recent Jersey case of L-v-M (Matrimonial) [2017] JRC 062A.

10. Lord Philips at paragraph 52 in the Radmacher case said: "If parties who have made such an agreement, whether antenuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement." The weight to be attached to a pre-nuptial agreement was to be determined by a threefold approach by a court: (i) were there circumstances attending the making of the agreement which should detract from weight which should be accorded to it?; paras 68 -73 (ii) did a foreign element enhance the weight that should be accorded to the agreement?; para 74 which is not the case here (iii) did the circumstances prevailing at the time the court made its order make it fair or just to depart from the agreement? The "fairness" test at para 75 ". Lord Philips said that: "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. In Jersey, the effect of pre and ante nuptial agreements have come under review. In the case of L-v-M (Matrimonial) [2016] JRC 184A, a preliminary hearing was held to determine the discrete issue of what weight, if any, should be attached to the PMA. The question was held not to be answerable without further information about the parties' respective needs: "39. ..., I have concluded that I do have to take into account all of the circumstances of this case and that I cannot simply make an order at this stage that no weight should be attached to the pre-nuptial agreement. I am bound by Article 29 of the Matrimonial Causes Jersey Law 1949 to "have regard to all the circumstances of the case including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it and to their actual and potential financial circumstances." I need to hear the other circumstances which the parties feel need to be taken into account before deciding on the weight to be attached, if any, to the pre-nuptial agreement."
12. In the matter of II [2010] JRC 209 the court held that the post-nuptial agreement was not a formal agreement and had been entered into by duress.
13. In the case of Crossley v Crossley
[2007] EWCA Civ 1491 there was a PMA. It was a 2-year, childless marriage, the husband having £45 million prior to marriage and the wife some £18 million, they were both mature adults and the PMA provided that each retain their own wealth on divorce, with there being no joint assets. It was asserted on behalf of the wife that the husband had not made full disclosure of the fortune upon which the PMA had been negotiated. It was submitted on behalf of the husband there is an agreement and in all the circumstances of the case, the wife should be held to it. Mr Justice Bennett ordered that Affidavits of Means be completed without documents, without questionnaires and in the affidavits should set out why the PMA is or is not a "knockout blow." The wife filed an appeal challenging the case management. Mr Turner QC appeared on behalf of the husband Lord Justice Thorpe said

at paragraph 14 said of the case;- “Mr Turner accepts that the court must conduct the section 25 exercise by reference to all the statutory criteria. He accepts that the existence of the agreement cannot oust the court's obligation to apply section 25. He accepts that a prenuptial agreement is one aspect of the case. However, he emphasises that this is a childless marriage of very short duration, for a substantial portion of which the parties were living apart. The marriage was between mature adults, both of whom had been previously married and divorced; both parties have and had prior to the marriage very substantial independent wealth. The prenuptial agreement provides for the retention by each of the parties of their separate properties and division of joint property if any, and finally that there is no such joint property. Upon those facts Mr Turner, correctly in my view, adds that the combination of these factors gives rise to a very strong case that a possible result of the section 25 exercise will be that the wife receives no further financial award.” Lord Justice Thorpe, at para 15 and 16 said “15. All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case. As to the second and third grounds that the judge was bound by the provisions of Rule 2.61, I am quite unpersuaded, as was the judge, that these individual rules were intended to be some sort of straitjacket precluding sensible case management. I would particularly stress the overriding objectives that govern all these rules, carefully and fully drafted in Rule 2.51D. It is easy to attach this case on its facts to a number of the objectives there articulated. It is very important that the judge in dealing with the case should seek to save expense. It is very important that he should seek to deal with the case in ways proportionate to the financial position of the parties. It is very important, more so today than it was when these rules were drafted, that he should allot to each case an appropriate share of the court's resources, taking into account the need to allot resources to other cases. In his general duty of case management he is required to identify the issues at an early date and particularly to regulate the extent of the disclosure of documents and expert evidence so that they are proportionate to the issues in question.

16. Finally in relation to ground 4, the assertion that the judge prevented the petitioner from filing a questionnaire, Mr Turner quite rightly points out that that inhibition was not designed and did not have the effect of preventing the wife from raising her assertion of material non-disclosure; he simply provided an alternative mechanism, namely the stating of the case in a swiftly written letter which would then be answered by the husband in his Form E.” The case was most important for holding that the existence of a PMA enabled directions to be made which limited the issues and disclosure required. Essentially it was held that, whilst the case was uncommon on its facts, indeed there were “magnetic factors” it had some general importance: “in that it demonstrates the discretionary power of the judge to require a party to show cause why a contractual agreement should not rule the outcome of ancillary relief claim, not just when the contract is made post-separation and in contemplation of an application, but also when the contract has been made prenuptially or

postnuptially but before the breakdown of the marriage.” (para 18) Lord Justice Keene said of Bennet J’s order which was being appealed: “If Bennett J’s order prevented a consideration of the factors referred to in section 25 of the 1973 Act, one would of course be greatly concerned, but I do not accept that that is the position.....The Form Es (affidavit of means) will stand, and each party must explain in the relevant section why the prenuptial agreement is of such importance or, from the wife’s point of view, why it is not and that there should be a full investigation and a full hearing.” I emphasise those final words. That door therefore is not necessarily closed, but likewise such a course of action may not be the outcome.” The court did not order a preliminary issues hearing and it was accepted that the court in the Crossley case had to conduct a section 25 exercise.

14. Mrs Justice King in her judgment in *S v S* (Ancillary Relief) [2008] EWHC 2038 (Fam), confirmed that the starting point in any consideration of authorities relating to agreements should always be *Edgar v Edgar* [1980] 3 All ER 887. That case, para 22 set out the court’s duty under section 25(1) to have regard to all the circumstances of the case and, in particular, to the matters detailed in paragraphs (a) to (g). “...Important too”, [as Lord Ormerod stated in that case] “is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement.’ Mrs Justice King went on to hold at paragraph 23 (ii) that whether or not there is an agreement and to what extent it should have effect, should be considered against a backdrop of section 25. She referred to the case of *Smith v Smith* [2000] 3 FCR 374 where the court at first instance fell into the trap of considering an agreement as a preliminary issue in isolation without any consideration of the section 25 factors. The result was an order which held the wife to an agreement which failed to meet her basic needs. Despite that, Mrs Justice King held that: “there is no reason why in an appropriate case, the status of an alleged agreement should not be dealt with as a Notice to Show Cause, determined against the backdrop of a consideration of the s.25 factors.”
15. She did accept the view of the applicant’s lawyer in the case that it would be wrong to ‘stay’ the ancillary relief proceedings and to list the agreement as a preliminary issue isolated from a proper consideration of the section 25 factors. She did not accept that there may not be circumstances in which there is a factor of such magnetic importance that it must necessarily dominate the discretionary process. “In such a case’, she held at 23 (ii), ‘the vehicle of a ‘notice to show cause’ can appropriately be regarded as the proportionate and just route by which to determine the extent to which the factor should be determinative of the action.” At v) Mrs Justice King states: “The overriding objective to deal with cases justly, set out in FPR r.2.51D, allows judicial case management to seek to save expense and deal with matters in a way that is proportionate to the financial position of the parties and allots an appropriate share of the court’s resources. The FPR 1991 are not intended to be a straightjacket precluding sensible case management.” However, at paragraph 87 despite Mrs Justice King considering it was one of the category of cases where there is a factor of magnetic importance, was not prepared to adjourn the ancillary relief proceedings as the

agreement had to be considered in the context of section 25 of the Act.

16. Mr Justice Mostyn in his judgment in the case of BN v MA [2013] EXHC 4250 (Fam), which considered an application for interim maintenance pending suit by the wife, and also involved a PMA pointed out at para 17 “...it must be obvious that the principal object of the exercise in this case (as indeed in every case where a nuptial agreement is signed) is to avoid subsequent expensive and stressful litigation; and it is for this reason, as will be seen, that the law adopts a strict policy of requiring the demonstration of something unfair before it will open the Pandora’s box of litigation where there has been an agreement of this nature.”
17. Referring to Edgar, Xydhias, and MacLeod at para. 26., Mostyn J said: “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.” He went on to say that where the parties with the benefit of legal advice have entered into an agreement, which they have both freely signed, then “respect should be accorded to that decision” (para.28).
18. Mostyn J accepts that no agreement can overreach basic need. At para 29 he points out that:- “if the agreement had the effect of leaving one partner in a predicament of real need, whilst the other enjoys a sufficiency or more, then such a result is likely to be unfair.”
19. The Supreme Court in Radmacher, went on to qualify the concept of ‘real need’, as being “merely one that did not leave the claimant (...) in a state of destitution” (para.29). The ability of a party to support him or herself has an important bearing upon the assessment of need. In addition, a court would note that an award to meet need is being met from non-matrimonial assets. The respondent in this matter has already received £1 million and the wife submits this is not a state of destitution.
20. Radmacher was applied in the Jersey case of L-v-M (Matrimonial) [2017] JRC 062A when the Court did find a case of real financial hardship, and as a result departed from the terms of the PMA. In L-v-M (Matrimonial) the effect of the PMA, after the passage of time and changes in circumstance, would have left the elderly petitioner (66) with nothing after a marriage of 15 years. In this case the Respondent has had a £1,000,000 lump sum, several cars and other chattels bought for him by the petitioner during their a four-year marriage . He is only 48, so is at least 17 years of work until retirement and was earning £10,000 per month.
21. On the subject of disclosure, Mostyn at para.30 of BN v MA refers to paragraph 69 in the Radmacher judgment which states that: “there is no rule at all that full disclosure, or full legal advice, is a necessary pre-condition for the satisfaction of this criterion. On the contrary, the question is in the individual case whether there has been a material lack of disclosure, or a material lack of information, or a material lack of legal advice.”

22. According to the judgment in Radmacher, “what is important is that each party should have all the information that is material to his or her decision”, which does not require “full and frank disclosure”, it requires only a sufficiency of disclosure to enable a decision to be made [para.30]. In this case the prenuptial agreement contained a full schedule of assets, which the petitioner states was a full disclosure of assets.
23. As is further pointed out by Mostyn in para 32 of BN v MA “...it must be the case surely, that one would not need very much disclosure in order to justify as fair the provision to be made in a prenuptial agreement in the event of the marriage ending within two years where all the assets in question can properly be characterised as non-matrimonial.”
24. It would appear that non-matrimonial assets are to be granted the intended protections set out in a nuptial agreement, particularly in the event of a short marriage. The wife submits that the above cases support the idea that any disclosure proceedings should be kept to a minimum where there is a valid pre-nuptial agreement in place.
25. In S v S [2014] EWHC 7 (Fam) Sir James Munby, gave a judgment regarding an arbitration agreement, but drew parallels between the weight to be accorded to arbitration agreements and pre-nuptial agreements. Where one of the parties seeks to resile from such an agreement, the court: “if need be of its own motion, can always, by the appropriately robust use of its case management powers, limit the ambit of the issues to be considered at the hearing; for example, as was done in both Crossley v Crossley and S v S (Ancillary Relief), by focussing the hearing exclusively on those issues relevant to the magnetic factors.” (para.14.) Decision
26. In making my decision as to case management directions, I have borne in mind the Overriding Objective as set out in Rule 47 of the Matrimonial Causes Rules 2005, which include:- “(b) saving expense;
(c) dealing with the case in ways that are proportionate –
(i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”
27. The petitioner seeks an order that a preliminary hearing be held to establish the validity of this prenuptial agreement, taking into account the section25 factors. She wants the respondent to be asked to show cause why he should not be held to his bargain, and for the terms of the pre-nuptial agreement to be upheld. However I do not consider it possible for these matters to be dealt with at a preliminary hearing. I note the cases referred to, including the Crossley case, S v S and the L v M case. A judge will need to consider “all the circumstances” of the case, namely not only the PMA but also the creation of CAL, what is

the respondent's interest in it and its value as well as the PMA in deciding what is fair in all the circumstances. The PMA therefore cannot be looked at in isolation.

28. The petitioner proposes a schedule of assets, not an affidavit of means. It is submitted on her behalf that if there are queries about the accuracy of the schedules, there should be narrative affidavits not dealing with disclosure but dealing with the matters raised by section 25. Advocate Corbett says that that the petitioner's assets are considerable and the burden of producing, for example company accounts would be enormous. However I note that even in the Radmacher and Crossley cases, where there was considerable wealth, affidavits of means were provided. The respondent does not propose the affidavits of means be exchanged with supporting documentary evidence and I support this proposed direction. I also order that bank statements and credit cards statements for the last 12 months are provided by both parties. The respondent needs to set out why he considers that the PMA is not validly entered into and is unfair, and why he considers that the PMA should not rule the outcome of the ancillary relief application, with the petitioner having the right to answer this. I am not therefore ordering the petitioner provide documentary evidence in support of her financial position at the time the PMA. I will however order liberty to apply.
29. Both parties do agree that the respondent should write to the petitioner setting out what further disclosure is required in relation to the partnership, CAL, the loans made by the petitioner to CAL and related requests. With regard to questionnaires, and replies these may be necessary in the context of CAL. Authorities Matrimonial Causes Act 1973. Radmacher (formerly Granatino) v Granatino [2010] UKSC 42, [2010] 2FLR 1900. L-v-M (Matrimonial) [2017] JRC 062A. L-v-M (Matrimonial) [2016] JRC 184A. In the matter of II [2010] JRC 209. Crossley v Crossley [2007] EWCA Civ 1491. S v S (Ancillary Relief) [2008] EWHC 2038 (Fam). Edgar v Edgar
- [1980] 3 All ER 887. Smith v Smith [2000] 3 FCR 374. BN v MA [2013] EXHC 4250 (Fam). S v S [2014] EWHC 7 (Fam). Matrimonial Causes Rules 2005.

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