No excuses

*Camilla Thornton examines case law post-*Radmacher *where a party has sought to overturn the terms of a nuptial agreement*

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'Only in cases where the parties' circumstances have changed in a way that was not anticipated will the courts look carefully at the fairness of justifying a pre-nuptial agreement entered into some time ago.'

It has been five years since the Supreme Court held in *Radmacher v Granatino* [2010] 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 the agreement...

There continues to be a trickle of cases in which the courts are asked by parties to adjudicate on their agreements. In this article I examine three such cases. Their common factor is a short marriage, but each one considers a different point of principle.

Material non-disclosure and interim maintenance

In *BN v MA* [2013] the parties had commenced their relationship in 2002. They had a son in 2005 and became engaged in 2009. They entered into a pre-nuptial agreement on 30 May 2012 that had been 'intensely negotiated' through solicitors since February 2010. The husband's wealth comprised property assets of £13.08m, business assets of 'unknown value' and an income of circa £390,000 net pa. The wife had two fully mortgaged flats in London. The agreement made provision for the wife upon divorce that was dependent on the length of the marriage.

The parties married in June 2012 but separated in August 2013, by which time the wife was pregnant with their second child. The wife issued divorce proceedings, a financial application in Form A and an application for interim maintenance. The pre-nuptial agreement had provided that should the marriage break down within two years, the husband would pay spousal maintenance of £96,000 pa and £24,000 pa for each child, redeem the mortgages on the wife's flats and make available £2m on trust for housing provision.

Mostyn J considered the extent to which the parties should be held to their agreement, which the wife claimed was flawed because of the husband's material non-disclosure. He was critical of the wife's application, questioning on what basis she sought the full range of financial remedies only 15 months after signing the agreement, and considered her to have failed to articulate her claim.

The judge found many of the clauses in the agreement 'highly influential' to the interim application, and made particular play of an 'important notice' that said:

> Do not sign unless you intend to be bound by its terms... you have independent legal advice which you understand and with which you are satisfied.

He commented (at para 17) that:

> ... given the important notice in its prominent font at the beginning of the document stating that it is intended to confirm separate property interests and to be determinative of the division of their assets, 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.

Mostyn J went on to say that there is now a single test for the treatment of all marital agreements (including those that fall into the categories of *Edgar v Edgar* [1980], *Xydhias v Xydhias* [1998] and post-nuptial agreements), and only in cases where the parties' circumstances have changed in a way that was not anticipated will the courts look carefully at the fairness of justifying a pre-nuptial agreement entered into some time ago (para 17).

Mostyn J relied on his own judgment in *B v S* (*Financial Remedy: Marital Property Regime* [2012], where he set out factors to consider in determining whether parties should be held to their agreement, ie that:

- no agreement can prejudice the reasonable requirements of a child;
- the principle of autonomy is 'extremely relevant'; and
- basic needs must be met to the extent that the agreement does not leave 'one partner in a predicament of real need, while the other enjoyed a sufficiency or more'.

The judge found that the parties had entered into their agreement with a 'full appreciation of its implications', as they had both received 'high-quality' legal advice (which he said was not a precondition, but depended on each individual case). He rejected the wife's claim that there was a material non-disclosure on the part of the husband, saying (at para 30) that what is important is a 'sufficiency of disclosure to enable a free decision to be made', which does not full require and frank disclosure, and that (para 32):

> ... one would not need really very much disclosure in order to justify as fair the level of 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.

Mostyn J concluded that (at para 33):

> ... when adjudicating a question of interim maintenance, where there has been a prenuptial agreement, the court should seek to apply the terms of the prenuptial agreement as closely and as practically as it can, unless the evidence of the wife in support of her application demonstrates, to a convincing standard, that she has a likely prospect of satisfying the court that this agreement should not be upheld.

He awarded interim maintenance for the wife as stipulated in the agreement, but gave the husband credit for overpayments as the wife was housed in a property worth £3m and not the £2m provided for in the agreement.

Improper pressure

In *Hopkins v Hopkins* [2015] the parties were in their 60s and had a son together in 1981. They did not cohabit until 2001. They married on 18 April 2009 but by February 2011 their relationship was in difficulties and the husband commenced divorce proceedings. Instead of serving the papers, he suggested a post-nuptial agreement. Both sides obtained legal advice and the agreement was signed in August 2011. The parties separated shortly afterwards and 16 months later the wife filed a financial application in Form A. The husband issued a notice to show cause and the wife claimed that the agreement should carry no weight, claiming duress, or undue pressure and the exploitation by the husband of a dominant position in the light of her emotional state. At the time the husband was worth over £38m and the wife circa £900,000 to include a property and a pension share.

Mr Nicholas Cusworth QC (sitting as a deputy High Court judge) examined the events leading up to the signing of the agreement, and in particular the correspondence between the wife and her solicitor. The wife's solicitor had advised her in strong terms not to sign the agreement and his advice had been supported by a QC who had warned that if she signed then the legal advice she had received would undermine any future attempt she made to challenge the agreement despite its unfairness. However, the wife's instructions were that she was not interested in doing better at court and wanted to sign. She gave an indemnity to her solicitor, through a signed disclaimer. The judge applied the analysis of Baron J in *NG v KR* (*Pre-nuptial contract*) [2008], in particular Lord Nicholls' comments in *Royal Bank of Scotland v Etridge* (*No 2*) [2001] that:

> ... to overturn the agreement, I have to be satisfied that this wife's will was overborne by her husband exercising undue pressure or influence over her...

Basic needs must be met to the extent that the agreement does not leave 'one partner in a predicament of real need, while the other enjoyed a sufficiency or more'.

and concluded that the couple's age, maturity and experience counted in favour of the agreement being upheld, as did the fact that the wife had received detailed legal advice, that was 'expressed by her lawyers to be watertight' (para 38).

Various arguments were put forward by the wife's counsel to include that the wife had not read the agreement or sufficiently absorbed it, that she had signed under duress having been bullied and intimidated by the husband (including alleged assault), and that some of her emails to her solicitor were dictated by her husband. The judge rejected her arguments, finding (para 65):

> ... that the wife at this time was rational, thoughtful, saddened by her situation, but certainly well capable of independent thought. She knew her own mind, and was keenly aware of her own objectives. There is no evidence that at this time, just after the alleged incident upon which her case now places so much reliance, that her will was overborne and she was not capable of balancing the alternatives before her. In this context, I find that the fact that the wife chose to reject the professional advice that she was receiving was entirely explicable, and not reflective, of itself, of any improper pressure being applied to her by the husband.

Having concluded that there were no vitiating factors, the judge considered the issue of fairness, noting that (at para 89):

> ... the wife's case before me has been principally for a generous needs based assessment. This in itself must be a reflection of the fact that this agreement represents an acknowledgment by both parties that needs based quantification is fair to the wife. The difference between their two positions has essentially been whether those needs should be generously or more realistically assessed. That therefore is where the existence of the agreement has made a difference. That is fair.

The judge concluded that the wife was some £200,000 short and that this was to be paid by the husband. Ironically, this additional amount was consumed by the wife's legal fees and therefore she was no better off than she had been under the agreement.

Inequitable conduct

The final case of *H v H* [2016] involved a wife aged 64 and a husband aged 72. The marriage (which was the fifth for both parties) lasted 12 weeks and resulted in an allegation of anal rape by the wife (in respect of which the husband was acquitted by the Crown Court). To protect the husband's wealth for his children and grandchildren (which was valued at £4m), the parties had entered into a pre-nuptial agreement that made no provision for the wife and left them both with what they had brought into the marriage.

The pre-nuptial agreement did not provide for the interim position and as the marriage was for less than a year, the wife brought a claim for financial support pursuant to s27, Matrimonial Causes Act 1973 and for a legal services order. The husband was ordered to pay interim maintenance of £1,500 per month and £1 for legal fees for every £1 he spent on his own 'in order to achieve equality of arms'.

As soon as she was able to the wife filed for divorce and issued a financial application in Form A. The husband filed a notice to show cause as to the pre-nuptial agreement. The wife in *H v H* argued that it would be unfair to make no financial provision for her because the husband's conduct had caused the marriage to break down. HHJ Booth did not find the wife's evidence to be credible either in relation to the alleged incident or her financial situation. She concluded that although something had happened on the night in question, the wife's account was exaggerated. She held that, as the agreement was for a specific purpose understood by both parties, and in the light of their mature years, having both been married multiple times before and having had legal advice (which the wife had ignored), this was a 'paradigm case for upholding such an agreement', highlighting the short length of the marriage and that there had been no opportunity for there to be changes in the parties' lives, ie (para 68):

> ... nothing had changed for these parties that was not in contemplation at the signing of the prenuptial agreement.

As for the parties' financial claims and the question of fairness, the wife's counsel argued that although the wife had always lived in rented accommodation, the fact of the marriage meant that she should receive a sum that would enable her to purchase a property or alternatively a life interest over a property and that her income needs should be met by the husband on a *Duxbury* basis, following which there should be a clean break because otherwise she would be left to fall back on the state for support. However, the judge disagreed, saying (at para 70):

> ... it is relevant that there are obligations created by the marriage itself, but the parties are entitled to regulate those obligations and in this case have done so by their agreement. In many cases it may be appropriate for the court to impose long term obligations on parties to a marriage to avoid the economically weaker party being thrown on the mercy of the state. I do not accept that the facts of this case inevitably lead to that conclusion but it is something I must weigh in the balance.

The wife in H v H argued that it would be unfair to make no financial provision for her because the husband's conduct had caused the marriage to break down.

On the basis that the husband had already expended £300,000 in legal fees, the judge concluded that he should not have to pay any more and that the terms of the agreement should stand. As for the question of whether inequitable conduct would be sufficient to undermine a nuptial agreement and for the court to consider fairness in a different light, HHJ Booth said that it might but 'that is an argument for a different case'.

Conclusion

These cases illustrate how difficult it is to challenge a nuptial agreement, particularly one that is short-lived. They also show how important it is for lawyers to not only make it very clear to their clients that they should only enter into an agreement if they are prepared to be bound by its terms, but also to keep proper records of the advice given both orally and in writing. In those instances, where a client does give instructions to challenge an agreement, they must be given proper costs information so that they can make an informed decision as to whether the costs of the litigation will justify the advantage they may achieve. ■

B v S (Financial Remedy: Marital Property Regime)
[2012] EWHC 265 (Fam)
BN v MA
[2013] EWHC 4250 (Fam)
Edgar v Edgar
[1980] EWCA Civ 2
H v H
[2016] EWFC B81
Hopkins v Hopkins
[2015] EWHC 812 (Fam)
NG v KR (Pre-nuptial contract)
[2008] EWHC 1532 (Fam)
Radmacher v Granatino
[2010] UKSC 42
Royal Bank of Scotland v Etridge (No 2)
[2001] UKHL 44
Xydhias v Xydhias
[1998] EWCA Civ 1966