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Z v Z: European Matrimonial Property Regimes take hold of the English Courts

This was a case involving the application of financial remedies before Moor J. The parties were French and had entered into a French marriage contract 14 years before separation. They had moved to England during their marriage and divorce proceedings were issued in England. The central issue was whether the wife should be held to the marriage contract or whether it should be disregarded entitling her to an equal share of their assets.

The case of Radmacher v Granatino[1] brought the international and jurisdictional facets of many divorcing husbands and wives squarely into English territory. *Radmacher* involved a German pre-nupital agreement. In short a German domiciled women and a French domiciled man entered into an agreement governed by German law. This agreement was capable of recognition in both Germany and France. The agreement was given decisive weight by the English Supreme Court notwithstanding both the husband and the wife having, at the time of their divorce, significant connections to England and Wales. Perhaps more importantly the judge reached these conclusions having found that the parties had entered into the agreement without legal advice and had not undertaken any financial disclosure. Accordingly, the often quoted statement that pre-nuptial agreements are not binding in English law disguises the truth that such agreements can now heavily influence or even determine the manner in which the English Court exercises its discretion when making a financial award following relationship breakdown.

The Supreme Court in *Radmacher* were however notably silent as to the treatment of matrimonial property regimes, and many commentators were left wondering where the law would go from here. This question has now been answered by a recent High Court case.

The case of Z v Z[2] was heard before Moor J in the High Court of the Family Division. This did not concern a pre-nuptial agreement (a concept known by all English practitioners) but in fact a matrimonial property regime. This form of civil code is well known in Europe and as far as the authors are aware this case was the first time that the ramifications of a matrimonial property regime as a form of pre-marital contract has been considered in our common law jurisdiction.

Most European countries have civil law jurisdictions. Despite it being common practice throughout Europe, English lawyers find the concept of electing either a matrimonial regime of community or separation of property somewhat alien. Our common law jurisdiction requires discretion to be applied having to take account of 'all of the circumstances of the case' with particular reference to a statutory checklist of common sense considerations (age of the parties, duration of the marriage, available assets, income, and with primary consideration given to the welfare of minor children: s.25 Matrimonial Causes Act 1973).

[1] Radmacher v Granatino [2010] UKSC 42
[2] ZvZ(No2)[2011] EWHC 2878 (Fam)

Therefore, the concept of the binding election of a property regime is a concept that many find difficult to comprehend let alone put into practice. However, due to the latest High Court decision of the Family Division we have now firmly entered international waters.

Z v Z

Both parties were French having married in July 1994. As is required under French law, they entered into a property regime stipulating the financial division in the event of divorce before two notaries just before their marriage on June 27, 1994. They elected a separation of property regime.

On February 18, 1994 the parties purchased their first and it seems only, matrimonial home in Paris in joint names. The wife helped with the deposit and the husband paid for considerable refurbishment. They also purchased one further property in Suresnes in 1997. Due to their respective contributions the wife owned 15 per cent and the husband owned 85 per cent.

At the time of the hearing in October 2011 the parties were living in London having moved to a rented property in August 2007. By the time of the divorce the parties had three children aged 14, 12 and 9.

Moor J hearing the case in the High Court was of the view that should he disregard the matrimonial property regime entered into whilst the parties were living in France over 14 years earlier, then this would be a case for the equal division of the assets based on the well trodden path of *White v White*[3]. This short statement shows that whilst not binding, both pre-nuptial agreements and the election of a matrimonial property regime can and do cause the court to depart from otherwise accepted principals of equal financial division save if there is a good reason otherwise.

In total the asset base in Z v Z was around £15 million. The wife owning around £1 million and the husband's share was around £14 million.

The wife instigated divorce proceedings on July 3, 2008. The husband contested jurisdiction and in October 2009 Ryder J held that both parties were habitually resident in England and Wales on the date that the wife presented her petition. Financial proceedings we therefore continued and transferred to the High Court.

The Positions of the Husband and the Wife

The wife's case was that in accordance with England and Wales jurisprudence, the assets of the marriage should be divided equally. She stated that it would be unjust to hold her to the French matrimonial property regime. All assets were generated during the marriage and each party had contributed equally to the marriage. Once the wife's 'needs' had been addressed then the wife argued that the 'sharing' principle should apply to the remainder of the assets.

In stark contrast the husband stated that the matrimonial property regime excluded a sharing of the assets and that following *Radmacher*, the wife should be held to this agreement. One point to note is that the agreement did not exclude maintenance claims and therefore these could be dealt with on a needs basis.

In France the default regime is community of goods but the parties elected separation of goods. Both parties entered into the agreement freely, they both entirely understood its implications, they were both very aware of each other's financial position and the agreement was witnessed, as is usual, by two notaries. The Judge made it clear that neither party

[3] White v White [2001] 2FLR 981, HL

received formal advice. Moor J was therefore faced with a properly executed French matrimonial property regime.

The wife argued that on a number of occasions the husband promised her that he would not enforce the agreement and therefore argued that it would be unfair now for it to be enforced. The husband did write a letter to the wife when they were considering separation setting out his thoughts about the financial division of their assets. He implied that he would ignore the separation of property regime as his proposal was more generous. The husband had not signed the letter.

The Judge's view of this letter concluded that this was "negotiations between two spouses in emotional turmoil" and cannot be thought of in terms of pure contract law. This is a key lesson. The parties should have entered into a subsequent deed varying their original regime.

Moor J upheld the French agreement although he did take into account the wife's maintenance claims and in the end he awarded the wife in the region of 40% of the global assets. He believed that this was a suitable departure from equality to reflect the agreement and sharing was not appropriate. Clearly, this represents a departure from the regime that the parties had elected. However, it just as clearly represents a departure from what otherwise would have been a clear case for an equal division outcome. In short, it could be said that the trilogy to be considered by the Court of needs, sharing and compensation can potentially through either pre-nuptial or property regime agreements be curtailed to providing just for needs.

Lessons

We can no longer, protect our clients against the laws and issues that arise in other jurisdictions. Shortly before the decision of Z v Z, on June 18, 2011 Council Regulation (EC) number 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance regulations (the Maintenance Regulation) came into force with direct. Article 15 of this Maintenance Regulation states that all member states (excluding the UK, Ireland and Denmark) can now apply law other than their own in relation to maintenance issues following a divorce.

The UK has not opted into Article 15 and hence will not apply, at least for the time being, the law of another country. However, not applying the law of another country is not the same as having no regard for that law, and as Z v Z concludes one can no longer absolutely ignore the ramifications of a European property regime and merely pretend that the Court should not be influenced by the parties contracted intentions.

Apart from the exclusion of Article 15 the UK is now bound by the Maintenance Regulation in general terms which is intended to govern all maintenance obligations arising from a family relationship. In short England and Wales may be entertaining claims for maintenance when say, the French Courts are dealing with the capital claims. In addition England automatically enforce an order made in European courts without any special procedure.

Summary

In the last year, two very important developments have occurred within the European perspective. Z v Z has acknowledged the weight of foreign matrimonial property regimes in the English courts and the Maintenance Regulation has brought the concept of having foreign orders and foreign proceedings being determined in the UK.

All practitioners need to now consider and be fully aware of any international considerations in every case.

For further information please contact:

James Carroll
Partner
020 7440 4839
James.Carroll@russell-cooke.co.uk

Kate Hamilton
Solicitor
020 7440 4841
Kate Hamilton@russell-cooke.co.uk

www.russell-cooke.co.uk