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Parker, Marie

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Pre-Nuptial Agreements and Principles: Further Clarification Required

Brack v Brack [2018] EWCA Civ 2862

Marie Parker*

School of Law, Bangor University, UK

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The uncertainty surrounding pre-nuptial agreements is still very much present, and the issues presented in *Brack v Brack* [2018] EWCA Civ 2826 required the Court of Appeal to deliver yet further judicial clarification. The Swedish couple married on 29 December 2000, following 6 years of living together. Their marriage broke down in 2014. They had two children during the course of their marriage, and they had lived in the United States, Belgium and most recently in the United Kingdom. The husband was a successful racing driver, the wife took on the role of homemaker following the birth of their children. Each spouse had made different but equal contributions to their marriage. The couple had accumulated just under £11 million during the course of their relationship.

Within the five months leading up to their marriage, the couple created three prenuptial agreements and the case refers to these by the location in which they were signed. The first agreement, ‘the Niagara agreement’, was dated 10 July 2000, and their third and final agreement, ‘the Gothenburg agreement’, was dated 26 December 2000. The Court of Appeal describe these as having ‘identical terms’ for all relevant purposes (para [15]). Each of these agreements contained the prorogation agreement (an agreement on jurisdiction) with the aim to ensure Swedish law would be applied to the distribution of property. These two agreements set out that each party would maintain their own private property and have no right to community property or other joint property rights. The second agreement, ‘the Ohio agreement’ was entered into on 11 December 2000. This was a much lengthier agreement, and notably the wife had been advised that this agreement was unfair, but signed it nevertheless. The agreement set out how the matrimonial home should be dealt with and contained a clause by which each party would relinquish all claims in the event of the termination of the marriage. The effect of this agreement would have been that the wife would have waived any right to maintenance for herself, and been left with one half of the value of the matrimonial home, which amounted to around 5% of the family assets. The choice of jurisdiction was also set out as Sweden in this agreement.

In the High Court, Mr Justice Francis considered the terms of the agreements to be unfair as they did not provide for the needs of the wife or the children. The wife’s claim regarding misrepresentation was rejected, with the result that no vitiating factors were found to be present. The judge’s reasoning led him to conclude that he was unable to go beyond provision for the wife’s needs. Yet due to the existence of a valid prorogation clause, he was unable to

* m.l.parker@bangor.ac.uk

make even a needs-based order. Instead, he decided that he still had jurisdiction over strict property rights, whereby the wife would be entitled to her half of the matrimonial home. The wife appealed to the Court of Appeal.

The appeal raised two issues. Firstly, the question was raised as to whether there was a valid prorogation clause within the agreements. Second, and more importantly in terms of refining the general principles in this area, the question was raised as to whether a court was limited to making an order limited to needs where an agreement, free from any vitiating factors, is present in a given case.

Regarding prorogation, both parties agreed that the only possible valid clause could be found in the Ohio agreement as it was settled that neither the Niagara agreement nor the Gothenburg agreement were deemed to be enforceable under Swedish law. This was because the jurisdiction clause related to matrimonial property, and this is not permitted under Swedish law. The upshot of the Court of Appeal's assessment of the Ohio agreement resulted in the court concluding that the parties had failed to create a valid clause due to problematic drafting. Lady Justice King commented:

‘a choice of jurisdiction clause is simple to draft in clear unambiguous terms, and the necessary consensus will have been established once committed to an agreement. Failure to express a choice of jurisdiction in unambiguous terms can result, as here, in international jurisdictional disarray leading to delay and lengthy, complex litigation at extortionate cost.’ (para. [75]).

This part of the judgement is significant for practitioners and acts as a stark reminder of the importance of clear drafting.

The position with regard to the needs-based order had narrowed to the point where there was consensus between the parties that where an agreement is free from vitiating factors a judge is entitled to take into account needs, compensation and sharing. The question remained however as to what limits, if any, the judge should take into account when undertaking a fresh assessment of the wife's claim for financial remedies. Counsel for the wife argued that the judge had made an error in law by concluding that he was constrained to consider the case on the basis of needs only. Conversely, counsel for the husband took the view that the judge had not made an error at all, and that the needs-based conclusion was a result of his exercise of discretion in deciding that he would limit the wife's claim to needs alone, before then considering the impact of the prorogation clause.

As a result of judicial law making it has been established that when considering a pre-nuptial agreement the court must take into account the principles of fairness and autonomy. In *Radmacher v Granatino* [2010] UKSC 42 the Supreme Court established 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’ (para. [75]).

Lady Hale dissented, and stated that this test was an ‘impermissible gloss upon the courts' statutory duties.’ (para. [138]). Furthermore, the Supreme Court set out, ‘The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy.’ (para. [78]). It is important to remember that these principles have been crafted by the judiciary in order to develop the law in this area in a logical way, without any intervention or guidance from Parliament. In order to assess the balance between fairness and autonomy,

three further judge-made principles must be taken into consideration: needs, compensation and sharing. No hard and fast rules were established in *Radmacher* with regard to these principles, but the Supreme Court did go as far as to say that agreements which attempt to modify needs and compensation would be more likely to be considered to be unfair (para. [81]).

In the High Court, Mr Justice Francis referred to *Z v Z (No 2) (Financial Remedy: Marriage Contract)* [2011] EWHC 22878 and *Luckwell v Limata* [2014] EWHC 502. In both of these cases all of the circumstances had been considered, the agreements had been upheld in so far as they excluded sharing and needs-based orders had been made. The Court of Appeal concluded that Mr Justice Francis had felt that he was in a 'straitjacket' as a result of considering these authorities and so approached the case on a needs only basis. (para. [100]). The Court of Appeal were careful to point out that they were not proposing that the wife should be provided with an award in excess of her needs, only that he should make an order which he considers to be fair, taking into account all of the circumstances. Lady Justice King also noted that when carrying out this assessment it would be usual to provide a settlement in excess of needs, contrary to the terms of the agreement, and that a settlement limited to needs would be more likely (para. [103]). Lady Justice King concluded with the sound advice to the couple that they should seek a resolution without further litigation, noting that '...the parties have subjected themselves and each other to punishing litigation for over 3 years and at a huge financial and emotional cost.' (para. [108]).

The case brings together a number of significant issues. It acts as a reminder as to the potential for uncertainty in this area and that the law surrounding pre-nuptial agreements is neither simple nor clear. The judiciary have created layers of principles that need to be weighed up in such cases. These developments have been regarded as controversial (Cretney 2003, Bailey-Harris 2005 and Clark 2011), but the courts have been creative with their discretionary powers in the interests of achieving justice. However, *Brack v Brack* shows that further clarification is still required. The financial and emotional cost involved in such cases should not be ignored. Further clarification and more certainty could, and should, be achieved by legislative reform.

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