

Recognition of English Pre-Marital Agreements

The Supreme Court judges have been pondering over their decision in the already famous *Granatino v Radmacher* case following the Court hearing in March 2010. The *Radmacher* case of course addresses the impact of a German pre-marital agreement in an English divorce. In the meantime, a new step has been recently taken by a French court in giving effect to the terms of an English pre-marital agreement in a French divorce. This case illustrates the differences and similarities hidden behind the term 'premarital agreement', and the need for European harmonisation of the law.

The concept of a pre-marital agreement is different in France (and Germany) to England. In France, such agreements are legally valid and binding. They divide assets and the 'enrichment' of those assets during the marriage but do not (at least now) provide for the element of 'fairness' that an English pre-marital agreement would include in order to try to prevent the divorce court from making an order for financial provision if the marriage ends. When French law applies, parties cannot contract out of having to possibly pay a 'prestation compensatoire'. The divorce judge keeps a free hand in this respect, but should take the provisions of the pre-marital agreement into account. Had *Granatino v Radmacher* been decided in France under French divorce law, the judge would have upheld the German pre-marital agreement, ie granted the husband a 'prestation compensatoire' in capital to 'offset the differences in standard of living'.

In England, pre-marital agreements are essentially linked to divorce and avoid the application of the principles of sharing and compensation purportedly to achieve 'fairness'. The application of these principles in English law may result otherwise in an equal, or close to equal, division of all the parties' wealth. Under French law, it is not possible to exclude the right to a 'compensatory payment' on divorce, whereas in German law it can be waived (as in *Granatino*). So, the

enforcement of the English pre-marital agreement in France was not certain. The following example of the case of Alan and Marie illustrates the problems at hand, and how the French judge took into account the consequences of the existence of an English pre-marital agreement.

THE CONTEXT

After a few years of romantic involvement, Alan, an English businessman, wanted to marry his French girlfriend, Marie. He was many years older than she, and he had health problems. Both had been previously married and had children. She lived and had a clerical job in France. He hoped she could adapt to living in England. He also wanted to protect his wealth for his children from his first marriage if things did not work out. He had a few million pounds from the sale of a business and she had virtually nothing. Jeremy Posnansky QC, Alison Bull and Nigel Shepherd from Mills & Reeve (Manchester) and Alain Cornec from Villard Cornec (Paris) advised Alan in 2005 on the putting in place of an English pre-marital agreement.

The contract provided for English law to apply, since it was envisaged that the couple would be living in England and to seek to protect the assets in England as effectively as possible. In case of the breakdown of the marriage, each spouse would keep his or her assets and Marie would get £50,000 (index-linked) for each year of marriage (up until the filing of a divorce petition). There would otherwise be a clean break between them. At the time of marriage, Alan also bought Marie a flat in her name in France, then worth about £300,000.

THE DIVORCE CASE

Things did not work out well. The same legal team at Mills & Reeve and Villard Cornec advised Alan. Under European rules, the divorce petition could be filed in England where Alan had resided all his life and where most of the assets were. France also had jurisdiction as Marie effectively lived there. Had French divorce law applied, the separation of assets could not have been set aside but the limitation of the 'equitable' element at £50,000 pa would not have bound the judge. Effectively, by

French standards, the amount provided in the pre-marital agreement was very generous. But one of the key reasons for issuing proceedings in France was that French courts have recognised and enforced foreign pre- and post-nuptial agreements for a long time. Alan filed for divorce in France because the pre-marital agreement was more likely to be recognised there although divorce proceedings could be substantially longer than in England. Jurisdiction was therefore secured under Brussels II.

At the initial 'conciliation' hearing, Alan offered to pay Marie the full amount if she agreed to divorce by consent, which could have been done there and then, with all issues being solved immediately. Marie refused and asked for maintenance to which 'she was entitled under French public policy'. Her chances of getting a larger 'equitable' amount than the pre-marital agreement were small but she might get maintenance in addition. The family judge initially awarded Marie £4,000 monthly maintenance for the duration of the case and £3,000 as an advance towards her legal costs. Whether the maintenance pending suit and the advance on costs would be offset against the capital agreed under the pre-marital agreement was left to be decided later at trial, which took place a year later. The amount of £50,000 pa was not disputed by either spouse. It was far more anyway than Marie would have obtained from the French court in the absence of a pre-marital agreement, especially added to the gift of a flat then worth about €450,000.

THE DECISION

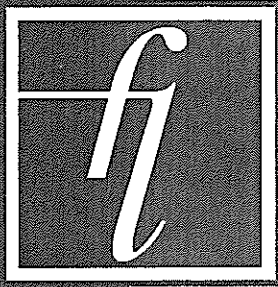
The decision of the French court was handed down earlier this year and upheld all the terms of the English pre-marital agreement:

- Marie will get what had been agreed in the pre-marital agreement;

- the interim maintenance and the provision for costs will be offset against the total amount due;
- the rate of exchange £/€ is that at the date of the decision (meaning that the amount Marie receives will be worth very much less to her now than if she had accepted the position at the initial hearing).

Despite Marie's initial statement that she would appeal the judgment, her appeal has been withdrawn, and the decision is now final. One relevant factor is that maintenance is charged with income tax in France, whilst capital received on divorce is tax free. At the time of writing, it remains to be seen what the Supreme Court's decision in the *Granatino v Radmacher* case will be but for now the inexorable movement towards English pre-marital agreements being legally binding in England and recognised abroad continues.

Alain Cornec and Alison Bull



Family Law

- ◆ Publication of Information: Children, Schools and Families Act 2010 **708**
- ◆ Hey Big Spender! Add Backs and Reckless Spending **714**
- ◆ Professional Ethics: Counsel Acting in Family Proceedings **718**
- ◆ The *Hallam* Pensions Formula: RIP? **722**
- ◆ Enforcement of Contact Orders: The Never Ending Story **727**
- ◆ Overseas Assets and Ancillary Relief **732**
- ◆ *JKN v JCN: Owusu v Jackson* meets BIR at Last **740**
- ◆ A Practical Guide to the Age Appropriate Amendments to the Mental Health Act 2007 **743**
- ◆ Parents Who Lack Capacity to Conduct Public Law Proceedings **745**
- ◆ The President's Guidance In Relation To Split Hearings: May 2010 **752**
- ◆ Family Graduated Fees: LSC Guidance **754**
- ◆ ADR Professional: Family Mediation: Another Way? **756**
- ◆ Association of District Judges News **759**
- ◆ Resolution News **761**
- ◆ FLBA News **763**

