

CASE COMMENTARY

PRE-NUPTIAL AGREEMENTS UNDER SCRUTINY

MacLeod v MacLeod [2008] UKPC 64

*Judith Bray**

THE BACKGROUND TO THE CASE

Traditionally, pre-nuptial settlements have not been enforceable in English law.¹ The scepticism of the courts has largely been based on public policy and a reluctance to allow the parties to a marriage to enter into any contract which purports to deprive the courts of its jurisdiction. There is also an underlying presumption that parties to a marriage do not intend their agreements to form legally binding contracts and finding adequate consideration may be difficult unless the agreement is incorporated in a deed.² A distinction is made between agreements drawn up either before or on marriage and which contemplate or provide for the separation of husband and wife at a future time which are always void³ on public policy grounds and those agreements which provide for or regulate a present separation which have been upheld by the courts.⁴ Parties to a marriage cannot by contract prevent the court from intervening on the breakdown of marriage and making financial provision and property adjustment orders, but where the parties have drawn up an agreement the courts may consider the agreement and uphold it.

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¹ *Hyman v Hyman* [1929] AC 601; See *X v Y (Y and Z Intervening)* [2002] 1 FLR 508 where Munby J articulates the current attitude of the English courts towards pre-nuptial agreements.

² See *Balfour v Balfour* [1919] 2 KB 571 raising the presumption that agreements between family members are not intended to be legally binding.

³ See *N v N (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 FLR 745 and *Westmeath v Westmeath* (1830) 1 Dow & Cl 519.

⁴ See *Wilson v Wilson* (1845) 14 Sim 405 and *Hyman v Hyman* [1929] (n 1) where the husband had covenanted to pay his wife two lump sums and £20 per week for the rest of her life if she agreed not to bring proceedings against him to compel him to pay more. As a result of a change in the law, the wife was able to bring divorce proceedings against her husband and in addition she had the right to claim maintenance from him the court upheld her claim.

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Nearly thirty years ago in *Edgar v Edgar*,⁵ the Court of Appeal upheld an agreement under which a wife had agreed not to seek any further capital or property provision from her husband in exchange for the payment of £100,000 and declined to uphold an order from the court below which had granted her a lump sum of £760,000. Although there was unequal bargaining strength between the parties the court placed weight on the fact that the wife had had the benefit of independent legal advice and had not been prejudiced. This decision was not universally welcomed by the judiciary.⁶

The main problem with the approach of the English courts is that such an agreement may not be enforceable so it leaves uncertain the question of financial provision. The courts may uphold the agreement in part or in whole or they may decide to add extra terms.⁷ This is not satisfactory and adds uncertainty when it is uncertainty that the parties are seeking to avoid. It also restricts the extent to which parties to a marriage can order their own financial affairs and although parties to a marriage may take extensive legal advice about such an agreement as Stephen Cretney wrote in 2003 “You cannot make such an agreement *proof* against the exercise of the overriding judicial discretion.”⁸ He adds “It is almost as if we insisted that every time a business or professional relationship is dissolved, the terms should be approved by the court.”⁹

At a time when the courts have moved towards taking equal division of assets as a starting point for financial provision on the breakdown of marriage¹⁰ it is hardly surprising that more couples are choosing to address the financial aspects of marriage breakdown before the relationship has ended and sometimes before the marriage has taken place particularly where the differential between the parties’ wealth and assets before marriage is marked.

⁵ [1980] 1 WLR 1410.

⁶ See dicta from Hoffman LJ in *Pounds v Pounds* [1994] 1 FLR 775: “ The result of the decision of this court in *Edgar v Edgar* [1980] 1 WLR 1410 and the cases which have followed it is that we have, as it seems to me, the worst of both worlds. The agreement may be held to be binding, but whether it will be can be determined only after litigation and that may involve, as in this case, examining the quality of the advice which was given to the other party who wishes to resile. It is then understandably a matter for surprise and resentment on the part of the other party that one should be able to repudiate an agreement on account of the inadequacy of one’s own legal advisers over whom the other party had no control and of whose advice he had no knowledge.”

⁷ In *NG v KR* [2008] (Pre-nuptial contract) [2008] EWHC 1532 (Fam).

⁸ Stephen Cretney “The Family and the Law: Status or Contract?” (2003) 15 *Child and Family Law Quarterly* 413.

⁹ *Ibid*, at 413.

¹⁰ *White v White* [2001] 1 AC 256.

Baroness Hale commented in *MacLeod v MacLeod*¹¹ that there had been an increase in calls for legislative recognition of pre-nuptial agreements following the decisions of *White v White*,¹² *Miller v Miller* and *McFarlane v McFarlane*¹³ which could be prompted by a perception that equality within marriage is wrong in principle. She commented “the more logical solution would be to examine the principles applicable to ascertaining the fair result of a claim for ancillary relief, rather than the pre-marital attempt to predict what the fair result will be long before the event.”¹⁴ However parties may not wish to wait for these principles to be addressed and may prefer to order their financial affairs themselves and by way of contrast many other jurisdictions have upheld prenuptial agreements more readily and in two recent cases¹⁵ heard before the English courts the claimants were both originally from jurisdictions where pre-nuptial settlements are enforceable.¹⁶ If proper safeguards were put into place which protected both parties, particularly a party in a weaker position than parties to a marriage should have the option of concluding their own pre-nuptial agreement in the knowledge that it will be upheld should the marriage later break down. The attitude of the English courts now seems outdated and in need of reform.

THE FACTS OF THE CASE

In *MacLeod v MacLeod*¹⁷ the couple had entered into three agreements concerning their financial arrangements both while they stayed together and also on the breakdown of their marriage. The agreements were drawn up at different stages in their marriage. When the marriage eventually broke down the husband claimed that these arrangements were binding but the wife claimed that the court should not be bound. The agreements limited the wife’s financial claims on her husband and it was in her interests to argue that the courts should be able to apply the relevant statutory provisions freely.¹⁸ The husband however wanted to argue that the agreements had been entered into freely by the parties facilitate by legal advice and the agreements should

¹¹ [2008] UKPC 64.

¹² Above n 10.

¹³ [2006] 2 AC 618.

¹⁴ Above n 10.

¹⁵ See *NG v KR (Pre-nuptial contract)* above n 7 and *MacLeod v MacLeod* n 10.

¹⁶ In *NG v KR*, *ibid*, the court heard evidence about the validity of the prenuptial agreement in both French and German law. In *MacLeod v MacLeod* [2008], *ibid*, the court heard evidence about the validity of prenuptial agreements under the laws of Florida.

¹⁷ Above n 11.

¹⁸ Manx Matrimonial Proceedings Act 2003 similar to provisions under ss 23, 24, 25 of the Matrimonial Causes 1973.

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therefore be binding on the parties. The parties were both born and brought up in the United States, marrying in Florida on Valentines Day in 1994. In 1995 they moved to the Isle of Man where they lived for the duration of their marriage. The couple had five children born between 1995 and 2001. Both had been married before to different partners and there was a significant disparity in age and wealth between the parties. At the time of the marriage the husband was aged 49 and very wealthy, whereas the wife was aged 27 and had very few assets of her own. Three separate financial agreements were drawn up between the parties during the marriage and each was intended to create legal relations. The first agreement, a pre-nuptial agreement, was made on their marriage and both parties were separately advised by a lawyer. The couple agreed that, regardless of where they might live, the agreement should be construed in accordance with the laws of the State of Florida.¹⁹ The second agreement had lapsed and was not at issue before the courts. The third agreement was made seven years after their marriage in 2002, but reflected many of the terms of the first agreement made on the parties' wedding day in 1994 and it also included a number of new provisions. This agreement was made when the marriage was already in difficulties and like the second agreement was a post-nuptial agreement. The substance of the first agreement was that each spouse retained the separate property which they had brought into the marriage if they later divorced and each waived his/her right to claim any sort of maintenance. Ownership of after-acquired property was to depend on legal title. The third settlement was much more detailed and included the following: a sum of maintenance was to be paid to the wife on the breakdown of the marriage together with a lump sum payment of capital for her to invest; any property owned jointly was to be divided equally between them; a sum was to be set aside to enable the wife to continue with her education and obtain another degree and also a provision that the wife would not be called upon to pay any household expenses out of the sums during the term of the marriage. Provision was also made for financial support of the children.

By August 2003 the marriage had broken down and the husband issued divorce proceedings in September 2003. The parties remained living in the

¹⁹ *Posner v Posner* 233 So 2 d 381 (Fla 1970) held that both ante- and post-nuptial agreements were valid and generally binding. Even where there was evidence that the agreement might be a bad bargain it was not enough to set it aside. There is a distinction between an ante-nuptial agreement which is an agreement made in contemplation of marriage and settles property of which the parties to the marriage (or their children) are the beneficiaries. A pre-nuptial agreement is an agreement in contemplation of the failure of the relationship and seeks to legislate for the manner in which the parties' financial resources should be disposed and what limitations should be imposed. See Christopher Sharp "Pre-Nuptial Agreements: A Rethink Required" [2008] *Family Law* 741 at 748

matrimonial home together until April 2005 when the wife moved out and the parties agreed that the children should divide their time between them both. The agreements were considered during the application for ancillary relief by the wife.

THE ANCILLARY RELIEF PROCEEDINGS

The ancillary relief proceedings were heard in June 2006 in the Isle of Man before the Deputy Deemster Williamson.²⁰ The wife claimed full financial provision and asserted that the three agreements should be disregarded. The husband claimed that the third agreement should be upheld. The Deputy Deemster applied the Manx Matrimonial Proceedings Act 2003.²¹ His order was very similar to the couple's final agreement and the wife was granted maintenance on the terms of the agreement but he overturned a provision that when the wife purchased a family home with a lump sum provided by the husband, the house should be held under a trust, declaring 'the wife's house must be hers'. He held that it would be wrong for her to live with the uncertainty of losing her home when the youngest child finished full-time education. This provision was similar to a *Mesher*²² order which allows the court to defer sale of the matrimonial home, usually until the children reach the age of seventeen or when they complete their full-time education. This order has been used less frequently by courts in recent years for the reasons given by the Deputy Deemster.²³ Both parties appealed this decision to the Appeal Court.²⁴ The wife claimed a right to a larger sum in maintenance and the husband argued that any house purchased by the wife for herself and her children should be held under a trust following the terms of the first and third agreements. The wife's cross appeal was rejected although the maintenance provision for the children was considered to be too low and was remitted to the trial judge. The appeal of the husband was also rejected. The appeal to the Privy Council was made by the husband alone. The sole issue was whether the housing needs of the wife and the children should be catered

²⁰ The Deputy Deemster is one of four permanent judges of the High Court in the Isle of Man and has jurisdiction over all family matters including divorce and ancillary matters.

²¹ This section is equivalent to s 25 Matrimonial Causes Act 1973 which lists the factors that the courts must take into account in deciding on an order for financial provision.

²² *Mesher v Mesher* [1980] 1 AER 126 CA.

²³ *B v B (Mesher Order)* FL 462.

²⁴ This is called the Staff of Government Division and it hears appeals both from courts of summary jurisdiction as well as other divisions of the High Court. A minimum of two judges will hear the appeal.

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for by the lump sum, as ordered by the judge, or whether any property purchased was to be held under a trust, as proposed by the husband. His appeal was based on the enforcement of the 2002 agreement.

THE PRIVY COUNCIL

The Privy Council grasped the opportunity to review the validity and effect of separation and maintenance agreements in general. Baroness Hale repeated the words of Lord Hailsham LC in *Hyman v Hyman*:

“the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.”²⁵

It was pointed out that separation and maintenance agreements had been considered by the *Royal Commission on Marriage and Divorce 1951-1955*²⁶ where the Commission had recommended that a wife should be bound by her covenant not to apply to the court for maintenance for herself unless there was a change in the circumstances and that the husband should also be able to go to court to ask for a variation if their circumstances changed. An undertaking not to apply to court for maintenance for the children would remain contrary to public policy. These provisions were incorporated in a slightly amended form in the Maintenance Agreements Act 1957 and later further amended and incorporated into the Matrimonial Causes Act 1973. These recommendations all relate to those agreements that make provision where the parties have already separated which the court accept can be upheld. There are parallels in Manx law. Under ss 49-51 Manx Matrimonial Proceedings Act 2003 maintenance agreements were upheld as valid where they were maintenance agreements within the meaning of the Act.²⁷ On the facts of this case the Privy Council suggested that it would generally be wrong in principle to interfere with the decision of the Court at first instance because in this case

²⁵ Above n 1.

²⁶ 1956 Cmnd 9678 at pp192-195.

²⁷ Under Manx Matrimonial Proceedings Act 2003, s 50, a financial agreement means provisions governing the rights and liabilities towards one another, when living separately, of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family.

the Deputy Deemster had had the opportunity to see the witnesses in person and had heard all the evidence nevertheless the Board reached the conclusion that he was wrong in this case. They accepted that the wife was getting far less than she would have been granted under the statutory provisions but she had been party to the agreement and in their view there was no reason to interfere with it. The wife had entered the third agreement freely at a time when both parties foresaw the possibility of separation. The Board then allowed the appeal and remitted the case back to the High Court for an appropriate trust deed to be drawn up. Therefore the Privy Council, having reviewed the position of the wife and her potential entitlement under the law, decided to uphold the terms of the post-nuptial agreement as agreed by the parties.

COMMENT

English courts have never formally enforced pre-nuptial settlements when considering financial provision under the Matrimonial Causes Act 1973 although the courts have been prepared to take them into account when assessing financial provision.²⁸ However the fact that they are not enforceable leaves their status uncertain and as pointed out by Christopher Slade QC in 2008 some would say “they are not worth the paper they are written on.”²⁹ *MacLeod v MacLeod* gave the Privy Council an opportunity to review this. In the light of some recent cases such as *Crossley v Crossley*³⁰ and *K v K*³¹ these agreements have taken on greater significance being one of the many factors under s 25 of the Matrimonial Causes Act 1973 to be considered by the court. In *Crossley* the Court of Appeal had accepted that a pre-nuptial agreement which provided that neither party would apply for financial provision could be influential in a claim for maintenance by a wife in a short marriage.³² By way of contrast the Privy Council was prepared to uphold a post-nuptial settlement in *MacLeod* but emphatically refused to enforce a pre-nuptial agreement. Their view contrasts with the position in a number of other countries such as certain states in the US, Canada and Germany which all recognise such settlements and are willing to give them effect. The courts in England and

²⁸ See *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120; *M v M (Prenuptial Agreement)* [2002] 1 FLR 654.

²⁹ Christopher Slade QC “Pre-Nuptial Agreements: A Rethink Required” [2008] *Family Law* 741.

³⁰ [2008] 1 FLR 1467.

³¹ Above n 28.

³² Thorpe LJ: “if ever there is to be a paradigm case in which the court will look to the pre-nuptial 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.”

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Wales view such agreements with scepticism. This suspicion is founded on the longstanding principle that the jurisdiction of the court cannot be ousted by the parties. Traditionally it was felt that to agree division of assets before a relationship has broken down or indeed even before the parties have married is contrary to public policy because such the parties appear to be entering the agreement contemplating its downfall. A strong case for reversing this view on behalf of Mr MacLeod was discounted by the Privy Council who held that it was not open to them to reverse the long standing rule that pre-nuptial agreements are contrary to public policy and thus not valid and binding in the contractual sense. In the event the provision of the post-nuptial settlement allowed his appeal to be upheld.

The Privy Council having reviewed the position in other jurisdictions which uphold pre-nuptial settlements, drew attention to the fact that in most jurisdictions the enforcement of pre-nuptial settlements had been introduced through legislation rather than through judicial decision and as a result the court thought that the legislature was better able to build in the necessary safeguard if such settlements were to be upheld. It was pointed out by Baroness Hale that the change in the law in Florida which would have allowed the agreement between the MacLeods to be enforced had they remained living there had unusually been introduced through judicial decision rather than legislation. This would seem to be an unduly cautious approach given the facts of MacLeod and the full disclosure and availability of advice given to the wife on signing the first agreement.

The Privy Council also highlighted the earlier lack of enthusiasm amongst the Judiciary for pre-nuptial agreements when invited to respond to the Law Commission proposals in 1999.³³ The main reason for this lack of enthusiasm was the difficulty of full financial disclosure and the need for separate legal advice for each side which would need public funding to be readily available and the fact that any agreement would lose its effect as soon as a child was born to the couple. The Privy Council noted that the Law Commission have recently announced their intention³⁴ to examine the status and the enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances in their 10th programme of Law Reform and will commence work in September 2009 with a proposed report and draft bill to be expected by September 2012.

³³ *Supporting Families: A Consultation Document*: see “Ancillary Relief Reform. Response of the Judges of the Family Division to Government Proposals (Made by Way of Submission to the Lord Chancellor’s Ancillary Relief Advisory Group)” [1999] *Family Law* 159.

³⁴ Law Com No 311 para 2 17.

There has traditionally been an understandable distaste in upholding an agreement which may have been forced on one party as a precondition of marriage. This issue was at the heart of the facts of the recent case of *NG v KR*³⁵ where the husband of a very wealthy German wife sought to have a German pre-nuptial agreement set aside.³⁶ He argued that he had been forced into the agreement without fully understanding the provisions. Baron J's judgment in that case following *Crossley v Crossley*³⁷ showed that a pre-nuptial agreement can be influential and will not be disregarded but the court will not feel it is bound by the provisions. This case highlights the problems faced by practitioners when advising their clients.³⁸ It is not possible to predict how much weight a court will attach to the agreement. It is surely time for a statutory framework to be drawn up for pre-nuptial agreements which combines certainty for all with protection for the weaker party?

³⁵ Above n 7.

³⁶ The basis of the husband's case was the lack of legal advice, the non-disclosure of his wife's wealth and the lack of provision for the birth of his children and also the fact that it had made no provision at all for either party in the event of divorce.

³⁷ Above n 30.

³⁸ See Ashley Murray "Drafting Prenuptial Agreements: *NG v KR*" [2009] *Family Law* 142 at 145: "for the practitioner, pre-nuptial drafting involves difficult judgments a depth of understanding of fairness within ancillary relief, a crystal ball as to future legislation, and a wealth of experience in reigning in the over-zealous client from attempting to protect too much."