Clarification as to the validity of jurisdiction clauses in pre-nuptial agreements (Brack v Brack)

24/01/2019

Family analysis: Andrzej Bojarski, barrister in The 36 Group (36Family), discusses the Court of Appeal's approach in Brack v Brack regarding the validity of jurisdiction clauses in pre-nuptial agreements, and the scope of the court's discretionary powers when dealing with an application for financial relief in the face of a valid pre-nuptial agreement.

Brack v Brack [2018] EWCA Civ 2862, [2019] All ER (D) 18 (Jan)

What are the practical implications of this case?

The decision of the Court of Appeal in *Brack v Brack* provides very useful clarification of the law as to the validity of jurisdiction clauses in pre-nuptial agreements for the purposes of Article 4 of Council Regulation (EC) 4/2009 (the EU Maintenance Regulation), and as to the scope of the court's discretionary powers when dealing with an application for financial relief in the face of a valid pre-nuptial agreement.

In particular, the decision clarifies the following points:

• a jurisdiction prorogation agreement between the parties to a marriage may be valid for the purposes of Article 4 of the EU Maintenance Regulation even when that agreement was made before the EU Maintenance Regulation came into effect
• a maintenance jurisdiction prorogation clause should be in unambiguous terms, and where it is not set out in unambiguous terms the court may decline to find that it is a valid prorogation clause for the purposes of the EU Maintenance Regulation
• although a claim for financial relief made after the signing of a valid pre-nuptial agreement in which the parties have contracted out of 'sharing' is usually likely to be dealt with on the basis of needs alone, the court retains a broad discretion and may make an award in excess of needs if the circumstances of the case require that for fairness

What was the background?

The parties to the divorce proceedings were Swedish by birth and nationality. During their 20 years together, they lived in various countries, and finally in the UK. The parties had assets of around £11m. The judge at first instance found that this would have been a case for equal sharing but for two features:

• the parties had entered into three pre-nuptial agreements which heavily limited the wife's claims
• whether there was a maintenance prorogation clause which vested jurisdiction in matters concerning maintenance with the court of Sweden pursuant to Article 4 of the EU Maintenance Regulation

Three pre-nuptial agreements were signed by the parties in different locations in the USA and Sweden in the months leading up to the marriage. It was the husband's case that one of the agreements (when read alongside one of the others) contained a valid prorogation clause agreeing that Swedish law would apply to their separation and proceedings would be before the City Court of Stockholm.

At first instance, Francis J found that the pre-nuptial agreements were validly made. He found that the effect of the pre-nuptial agreements would be to leave the wife with a net share of the assets worth £656,000, or roughly 5-6% of the family assets. The judge found that would 'work unacceptable unfairness' and leave the wife and children in a predicament of real need.

However, Francis J also found that the maintenance prorogation clauses in the agreements were valid and they fixed jurisdiction for matters concerning maintenance with the courts of Sweden. He therefore concluded that the English court was limited to dealing with 'rights in property arising out of a matrimonial relationship'. However, having found that the pre-nuptial agreements were valid, he decided that the law meant that any sharing claim was excluded by the pre-nuptial agreements and he was constrained to approach the case only on a needs basis.

Accordingly, the judge concluded that the combination of the prorogation clause depriving the court of the right to deal with 'maintenance' claims—giving that word the wide meaning it has under the EU regulations—and the pre-nuptial agreements, which limited the court to considering the wife's needs, left him only able to determine the parties' strict property rights. This thereby limited the wife's claim to her half share in the family home. He concluded that the maintenance prorogation clause meant that he could not even make a needs-based order, even though he found that the wife had unmet needs. In order to provide for the needs of the children of the family the judge felt he could only do so by making orders for their benefit pursuant to Schedule 1 to the Children Act 1989.

The wife appealed both as to the validity of the maintenance prorogation clause and that the judge was wrong to find that he could not make a sharing award in the face of valid pre-nuptial agreement.

The husband cross-appealed on the basis that the judge was wrong in law to make an award based on the sharing principle because no rights in property arise from a matrimonial relationship (ie England does not have a community of property regime), and there is no such thing as a sharing award in the Matrimonial Causes Act 1973. This means where the court is dealing with rights in property arising out of a matrimonial relationship (due to the restrictions arising from a valid maintenance prorogation clause), it is limited to making declaratory orders of existing property rights.

What did the Court of Appeal decide?

The Court of Appeal dealt first with the validity of the maintenance prorogation clause. It was common ground, and the court accepted, that the EU Maintenance Regulation applied notwithstanding that the relevant pre-nuptial agreements were signed many years before the EU Maintenance Regulation came into force (see paras [45-49]).

The validity of the maintenance prorogation clause depended on the construction of the relevant pre-nuptial agreement. That was the pre-nuptial agreement signed by the parties in Ohio. The other two purported pre-nuptial agreements were in fact unenforceable in Sweden, and therefore of no direct effect. After reviewing the case law relating to jurisdictional prorogation clauses in commercial contracts (paras [52-57]), the court looked to see whether the terms of the Ohio pre-nuptial agreement demonstrated 'consensus' on the issue of jurisdiction. The Court of Appeal found that the clause the husband relied upon did not expressly refer to maintenance and was ambiguous. The court found that it was insufficiently clear to satisfy the requirements of Article 4 of the EU Maintenance Regulation. Accordingly, there was no valid maintenance prorogation clause and the English court had the full range of powers available to it.

Although the Court of Appeal's finding on the validity of the maintenance prorogation clause fundamentally undermined the basis of Francis J's decision, and meant the matter would have to be remitted for further hearing, the wife pressed the Court of Appeal to also rule on the question of the extent to which the finding of a valid pre-nuptial agreement meant that the court was constrained to decide the case on the basis of needs alone (ie excluding sharing and compensation claims).

On that issue, it ultimately became common ground that the court retained a broad discretion even in the face of a valid pre-nuptial agreement, ie (at (para [78]):

> '…where a judge has found there to be no vitiating features in relation to a prenuptial agreement, he is entitled, when applying the section 25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome.'

The court went on to consider the reported cases on pre-nuptial agreements since *Radmacher v Granatino* [2010] UKSC 42, [2010] All ER (D) 186 (Oct) and rejected the proposition that by a valid pre-nuptial agreement a spouse will have 'lost' their sharing claim (paras [83-101]). Although the courts in the reported cases since *Radmacher* have

respected the parties' decision to contract out of 'sharing' and interfered with valid pre-nuptial agreements only to the extent that was required to ensure that needs are satisfied, that does not prescribe the outcome in every case. Therefore, there may be cases, 'albeit unusually', where notwithstanding any valid pre-nuptial agreement an award may be made in excess of the applicant's needs (see paras [102-103]).

Andrzej Bojarski of 36Family is a barrister, arbitrator and mediator specialising in financial cases arising from relationship breakdown. He usually deals complex cases involving a mixture of family, chancery and international law. He is a Fellow of the International Academy of Family Lawyers and a member of both the Family Law and Chancery Bar Associations.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.