

## Pre-nuptial Agreements – A Balancing Exercise

### AH v BH [2024] EWFC 125

#### Introduction

Mr Justice Peel recently provided judgment in the matter of **AH v BH [2024] EWFC 125**. The judgment provides a helpful reminder and summary of the pertinent law on the issue of pre-nuptial agreements, particularly what a ‘predicament of real need’ means some fourteen years after the leading authority of **Radmacher v Granatino [2010] UKSC 42**.

#### Background

The parties are both 40. The wife was brought up in country A. The husband was brought up in country B.

The parties began a relationship in 2016 and married in 2018. Their marriage was relatively short at 5 ½ years. They have two young children from the marriage who are age 4 and 2.

The husband set up a business in 2007 with his friend and its main operations are in country B.

The parties signed a pre-marital agreement (‘PMA’) and the Court was satisfied this was signed about 28 days prior to the marriage.

At the time of signing the PMA, Peel J reflects that the wife was ‘*financially independent she had a mortgage-free flat and employment*’ [24].

The wife’s circumstances changed during the marriage. She gave up her employment upon the birth of their first child.

The husband purchased the FMH in his sole name in 2018 for £2.79m. The wife sold her own flat in 2019 and contributed £100,000 from the sale proceeds to the refurbishment of the FMH, refurbishments which she oversaw. The sale of the wife’s flat also generated a stamp duty rebate of about £84,00 for the husband upon his purchase of the family home. By the end of the marriage, the Court assessed the wife’s assets as modest with an earning capacity ‘*nowhere near that of husband’s*’ [65]. Peel J often reflects within the judgment that the wife is and feels ‘*vulnerable and dependent*’ [62].

The husband’s business interest at the time of the PMA was about 45.3 million euros. By the end of the marriage, Peel J determined that on a like for like basis (ignoring discounts and tax) the business interest is about £75 million gross, meaning it increased by about £30 million during the short marriage.

The wife has sacroiliac joint dysfunction and anterior pelvic pain, caused by difficult childbirth. Both parties suffer with their mental health.

#### The Pre-Marital Agreement

The main terms of the PMA are set out in the judgment at paragraph 26 as follows:

- a. The parties agree that “their respective claims in the event of the breakdown of their marriage shall be determined in accordance with the terms of this Deed”.

- b. Their primary intention is that (a) joint property should be divided equally, (b) neither shall make a claim against the other's separate property and (c) W shall not make any claim against, or by reference to, H's business interests.
- c. Having regard to their backgrounds, and the approach of the courts of the countries from which they originate to questions of maintenance, neither believes that there should be a periodical payments claim against the other in the event of breakdown of the marriage.
- d. Joint property is defined as any property held in the joint names of the parties. Separate property is identified as the assets in the schedule to the Deed and all other assets in their respective sole names.
- e. They each acknowledge that they will be bound by the terms of the Deed regardless of the length of their marriage and any changes in the years to come unless superseded by a Supplemental Deed.
- f. The Deed "shall be reviewed" upon, inter alia, the birth of the first child. There was in fact no such review.
- g. The PMA establishes a separate property regime; neither will have a share in the other's separate property and there will be no matrimonial acquest (other than joint property as defined in the PMA).
- h. The parties agree that the terms of the PMA meet the anticipated reasonable needs of each of them.
- i. On breakdown of the marriage:
  - a. Joint property shall be divided equally.
  - b. Each party will retain their separate property.
  - c. There shall be a clean break.
  - d. In the event that the parties do not have children, neither shall make a payment to the other if the marriage lasts less than 4 years, and thereafter H shall pay W £200,000 for each year of marriage up to a maximum of £4m.
  - e. In the event that the parties do have children, should the marriage last less than 7 years H will pay W £600,000 and £200,000 for each completed year thereafter up to a maximum of £4m.
  - f. RPI shall apply to the lump sums.
  - g. In respect of children, a Schedule 1 claim remains open to be made, and the parties will abide by any order made by the court for financial provision for them.

It is of note that the parties did not review the PMA after the birth of their first child, as envisaged. Peel J comments that the inclusion of that term:

*'clearly indicates the parties contemplated that it might not be a fair document upon children being born. The fact that it was not reviewed does not prevent this court from considering the overall fairness of the PMA in the light of present circumstances'* [63].

### **Position of the parties**

The wife did not argue that there were vitiating factors which undermine the PMA. Indeed, the Peel J confirms that:

*'...it is clear and comprehensive; it was signed (depending on the precise date) about 28 days before the marriage by both parties; it includes unchallenged financial disclosure; each party had independent legal advice; each confirmed that they entered into the PMA freely and voluntarily, without coercion, pressure or duress of any kind; each confirmed that they*

*believed the terms of the PMA to be fair; each acknowledged that the PMA was a pre-condition to their marriage; each confirmed that they fully understood the nature and effect of the PMA' [23].*

Instead, the wife argued that **the PMA does not meet her needs** and should be departed from to the extent necessary to achieve a just outcome by reference to needs.

She proposed the finances are resolved as follows:

- a. Transfer of the FMH (valued at £5m gross) to her, to be sold upon the children finishing tertiary education at which point W would receive 50% outright, and H would receive the balance.
- b. £1,867,522 by way of income fund for her, calculated as £250,000pa for 10 years, reduced by estimated earning capacity, and to be offset by £200,000 from her own capital resources.
- c. £60,000pa child maintenance (£30,000pa per child).
- d. H to pay nursery and school fees.
- e. Clean break.

The husband proposed:

- a. The FMH to be sold, and W to receive 40% (about £1.9m) to purchase a property on a Schedule 1 type basis i.e to revert to H at the end of the children's tertiary education. That sum is inclusive of moving costs and SDLT.
- b. H to pay W £818,025, lump sum provision to which she is entitled under the terms of the PMA.
- c. H to pay nursery and school fees.
- d. H to pay child maintenance in the total sum of £60,000pa (£30,000pa per child) until February 2025, then £36,000pa (£18,000pa per child) until the younger child reaches secondary school, and thereafter in accordance with a CMS assessment.
- e. Clean break.

## **The Law**

Peel J provides a comprehensive and helpful summary of the law from paragraphs 42 – 60 which the reader is encouraged to review.

The leading authority is of course ***Radmacher v Granatino* [2010] UKSC 42**.

Given the wife was not seeking to undermine the PMA by raising vitiating factors, the primary issues in this case were fairness and need.

***Radmacher v Granatino*** provides that:

*"Of the three strands identified in **White v White** and **Miller v Miller**, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, **in one partner being left in a predicament of real need**, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be*

unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned" [81].

Peel J explores the meaning of a 'predicament of real need' from paragraph 46 of the judgment. Of note:

- a. Peel J does not view Mostyn J's approach in ***Kremen v Agresi (No 11) [2012] EWHC 45 (Fam)*** and ***Cummings and Fawn [2023] EWHC 830 (Fam)*** as meaning that in every case involving a PMA needs must always be assessed in a '*parsimonious, restrictive way, regardless of the factual context*' [47]. Peel J states it will depend on the facts.
- b. The Court has a wide judicial discretion as emphasised by King LJ in ***Brack v Brack [2018] EWCA Civ 2862 [103]***:
  - a. '*Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children.*'
- c. Peel J states at paragraph 50 that the **latitude and flexibility available to judges applies to the assessment of needs as much as it applies to the other section 25 factors** of the Matrimonial Causes Act 1973.

Peel J goes on to specifically look at cases where the Court has approached housing needs when balancing a PMA and the needs of the other party from paragraph 52. He concludes that:

*'...there is not a single reported PMA case where a primary carer of the children, with no significant assets of his/her own, has not received a sum of money for housing outright. After a draft judgment was sent to the parties, H's legal team referred me to **BN v MA [2013] EWHC 4250 (Fam)** where, it is suggested, such an order was made. I do not think that case in fact assists H as it concerned a Maintenance Pending Suit hearing where the judge fixed the award at the level of maintenance set out in the PMA; the outcome in respect of housing at final hearing was not in issue' [53].*

### **The Court's Decision**

Peel J concluded that it would be unfair for there to be a Schedule 1 type housing arrangement such that the wife would be required to leave the property upon the children finishing tertiary education because:

*'I do not think it fair to run the risk of the children, who by then will be adult, seeing their mother in heavily reduced financial circumstances whereas their father will be far wealthier' [66].*

However, the Court also found that the FMH would 'over-house' the wife and children.

In summary, the Court ordered:

- a. The FMH should be sold, and the wife awarded 56.7% (£2.75m) of the proceeds and the husband with the balance. The Court did not floor the £2.75 million for the wife.
- b. The Court ordered the H to pay the W a lump sum of £300,000 on sale of the FMH to cover stamp duty, costs of purchase and any refurbishment.

- c. The Court did not make the wife's outright sum for housing subject to a charge to the husband upon the children finishing tertiary education. Peel J explains at paragraph 70 that this is because: (a) W will not be able to purchase a vast or extravagant property for £2.75m, (b) the difference between £2.75m and a reasonable sum for W alone is likely to be relatively modest in the context of the assets in this case, (c) it may be that the entirety of the sum would be needed if, for example, she wanted to move to a smaller property but in a more desirable location, (d) she should not be forced to sell when she will hope for her children and in due course grandchildren to return to stay (e) she should have the option of releasing funds for her own income needs if required, particularly as the capitalised periodical payments may not be sufficient and (f) it is unreasonable for her to look constantly over her shoulder, with the attendant anxiety of a forced sale at some point in the future.
- d. The Court considered a budget of £150,000 per annum to the wife (including £40,000 for the children) to be fair. The Court capitalised the £110,000 p/a over a 10-year period to allow a clean break and ordered the husband to pay child maintenance of £20,000 p/a until the children completed tertiary education.
- e. The Husband to pay nursery/ school fees and an order for interim maintenance was made.

### **Conclusion**

Notably, throughout the judgment Peel J reflects that had the parties not signed the PMA, it is likely the wife would have achieved far more; both in terms of need (for example retaining the house and a longer maintenance term) and sharing.

However, Peel J concludes that:

*'I am satisfied that this decision gives appropriate weight to the PMA, protecting H's business interest and restricting the extent of W's claims, while at the same time reflecting W's ongoing long-term responsibilities for the children, the relationship generated impact on her, the extent of the wealth and the family's standard of living. The outcome leaves H with the vast preponderance of the assets, while meeting the needs of W and the children, albeit to a lesser degree than would have been the case absent the PMA' [88].*

This judgment is demonstrative of the tension the Court faces between not being overly paternalistic, which *Radmacher v Granitino* warns against, and using its discretion to ensure the section 25 factors and the needs of the wife (in this case) and children are appropriately met. It is, as ever, a balancing exercise.

Poppy Sparrow

15 Winckley Square Chambers