Flannelled fools and paper tigers

or, how pre-nuptial agreements from overseas need an English spin

By Nick Bennett

A standing joke, and a condescending one, is that the rules of cricket are impossible to explain to anyone from outside the old British Empire: they can only properly be understood through a haze of nostalgia, tea and cucumber sandwiches on an endless summer afternoon at Lord’s.

This is, of course, nonsense: as the writer Ashis Nandy put it, cricket is actually “an Indian game accidentally discovered by the British”.

English divorce law, on the other hand, is probably peculiar to these islands. Lawyers from overseas are often puzzled by the amount of discretion given to English judges to do “fairness” in each individual case. That unpredictability, together with an historic liking for lifelong maintenance at very significant rates, continues to surprise.

This is not just an academic point: the English court’s jurisdiction to hear divorce claims runs wide. To summarise a complex set of rules, anyone who is “habitually resident” in this country, and potentially anyone domiciled here too, might have their divorce heard here. A meaningful connection to England raises the prospect of an English divorce under English law.

Since Radmacher, Farrer & Co’s case in the Supreme Court in 2010 which clarified English law in relation to pre-nuptial agreements, many overseas lawyers have taken the view that an agreement under foreign law will give their clients adequate protection. December’s judgment from the High Court in AH v. PH shows this is not necessarily so.

Mr and Mrs H were from a Scandinavian country (not specifically identified in the judgment). Both were in their early thirties. They had been married for four years, and had two young children. Mrs H had very little to her name. Mr H was the scion of a hugely successful family in business, and had a net worth of £76 million. That wealth was wholly inherited.

They signed a pre-nuptial agreement. In common with their country’s laws and traditions, it was concise and simple. It provided generously for Mrs H; in fact her entitlement under the agreement was greater than if they had divorced without it.

On the face of it, the agreement should have determined Mrs H’s claims. But the English judge declined to uphold it. There were three main reasons why.

First, the specific basis of the agreement was that Mrs H would live in Scandinavia on separation; but in fact she intended (at Mr H’s request) to stay in London. The agreement was intended to provide her with a home at Scandinavian prices: insufficient thought had been given to the likelihood that she would be based permanently in England.

Second, Mrs H had not understood or been aware of the possibility of making wider financial claims under English law. The agreement did not reflect any recognition of the more flexible, and more generous, English system. As she was being divorced under that system, the agreement could not bind her. The judge suggested, for the future, that agreements which were intended to apply in England should specifically record that fact.

Third, the agreement did not cover maintenance at all. This allowed the judge to make a maintenance order at an English level (£200,000 per year), and capitalise it; leaving Mr H to pay £2.25 million upfront. An agreement which ignores maintenance leaves the door open to a generous order on English principles.

Mr H’s chastening experience shows that, for mobile international clients with connections to England, English advice on a pre-nuptial agreement will always be worthwhile.
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