

Taking a different route

John Davies and Rebecca Heyworth highlight a case involving a deed entered into by spouses that was enforced in the Chancery Division following a foreign divorce



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'This case demonstrates that it is possible to enter into contractual agreements concerning maintenance on separation between unmarried couples, providing that this agreement is consistent with ordinary principles of contract law.'

In *Yedina v Yedin* [2017], a former wife obtained over £2m in damages from her former husband in respect of his failure to make financial provision in accordance with a deed signed following the breakdown of their marriage – albeit that at the time of the final hearing there was a dispute as to whether they were in fact divorced.

However, as set out below, this case is likely to have wider consequences in relation to the enforceability of contractual agreements between couples in the context of cohabitation agreements.

Factual background

The parties were both Ukrainian citizens, and married in Ukraine in 1986. The husband was a successful businessman and politician in Ukraine. In 1980 he started a manufacturing business with a close friend, a Mr Goncharov. The company was held 55:45 in the husband's favour and prospered during the parties' marriage.

Although it was not necessary for the husband to provide full financial disclosure in the Chancery Division, the judge noted that one publication put the husband's wealth at \$73m, and that although the husband denied this level of wealth, he was likely to be worth 'in the tens of millions of dollars'.

The parties decided to educate their children in England and in 1998 the wife moved, without the husband, to Kent.

In 2002, the parties purchased a property in Kent for the wife and children to live in. During this time, the husband continued to financially support the wife and the children, *inter alia*, by way of a salary paid to the wife through a company owned and run by a friend of the husband's in the region of £46,000 pa.

In 2006, as the children approached the end of their secondary education, it was anticipated by the parties that the children would attend London universities. Two flats were purchased in Knightsbridge ('Flat 2B' and 'Flat 3B'). It was the wife's case that both flats were to be purchased by or on behalf of the husband. The wife and children moved into Flat 3B, which was held by an offshore company of which the husband was sole shareholder. Flat 2B was rented out, with the rental proceeds used to meet the expenses of Flat 3B. Flat 2B was owned by a different offshore company, Skelling. Although the shares in Skelling were initially held by the husband they were transferred to the husband's business partner Mr Goncharov in 2007.

By 2008 the parties' relationship was in difficulties, although their evidence as to what happened was vastly different. The wife's case was that in March 2008 the husband showed her a Ukrainian dissolution certificate, which revealed that the marriage had been dissolved two years previously. However, he assured her that 'it would not make a difference to them' – and it was not disputed that the parties continued as before until November 2008 when the wife discovered that the husband had formed a new relationship with a lady in Ukraine and had had a child

by her. That discovery brought the parties' relationship to an end.

The husband claimed that in fact the wife had petitioned for divorce in Ukraine in 1997. The wife argued that she had no knowledge of any Ukrainian divorce proceedings until she saw the certificate in 2008, and that 'her petition' and other court documents produced by the husband were forgeries. It was not necessary for the court to make findings as to the true position, although the judge expressed the tentative view that the 1997 documents were not forgeries.

As a result of the breakdown of the relationship, the wife sought to 'secure her position in relation to property ownership and maintenance'. The parties agreed to transfer a number of family properties into the wife's ownership and control, including the Kent property and Flat 3B.

In February 2009, the parties signed a five-page document described as a 'Deed of Financial Provision'. The deed was drafted by a former solicitor, who had acted in the acquisition of the Knightsbridge flats.

The deed

This recorded that:

- the parties were 'contemplating divorce' (although, in fact, there was already a Ukrainian decree);
- the parties agreed to effect a permanent division of assets as if there were a divorce on a clean break basis;
- Flat 3B was to be transferred to the wife's control, and the husband to pay the outgoings and discharge the mortgage at the end of the term;
- various other properties, including a family flat in Kiev and a flat in Moscow, would be transferred to the wife's control;
- the wife would seek to purchase a new London flat and, if he approved, the husband would provide the purchase monies

on the basis that the Kent property would be sold and the proceeds put towards the purchase; and

- the wife would be paid maintenance of 'approximately £220,000' per annum, to be index linked.

The wife brought an application in the Chancery Division of the High Court to enforce the terms of the deed, claiming that the husband had repudiated the contract and that she was entitled to damages as a result.

The transfers detailed were effected, and properties in Ukraine and elsewhere (including Flat 3B) were transferred into the wife's name. However, the purchase of the new London flat did not take place. The husband defaulted on the maintenance obligations immediately, although the wife continued to receive her 'salary' from the company connected to the husband until 2014, when she was informed that she would cease to be 'employed' without any further remuneration.

In February 2015, the wife heard that Flat 2B (the property that was rented out to pay the outgoings on her home, Flat 3B) was going to be sold. The husband then told the wife that Flat 2B did not belong to him, but to his business partner, Mr Goncharov, (who he claimed had provided the purchase monies) and that there was nothing he could do to prevent the sale. He also made clear that he would not repay the mortgage over Flat 3B at the end of the mortgage term.

Proceedings

The wife brought an application in the Chancery Division of the High Court to enforce the terms of the deed, claiming that the husband had repudiated the contract and that she was entitled to damages as a result. The husband employed a wide range of defences to try to convince the court that the deed should not be upheld, including:

- that the deed was *non est factum* ie, that he was misled into signing in the false belief it was some other kind of document;
- adducing medical evidence that he lacked capacity as at the time of its signature;

- claiming the wife had a degree of 'dominion' over him, and that he was unable to form an independent and informed judgement; and
- claiming that maintenance of 'approximately £222,000' should be void for uncertainty (and by virtue of unilateral mistake that the deed should read '£22,000' instead).

Court's findings

The court gave relatively short shrift to the husband's various defences as to the validity of the deed, finding that he was a 'very unreliable witness of fact' who had:

... arranged his financial affairs in such a way as to enable him to present those affairs in different ways depending on how it suited him to do so, irrespective of the truth.

The judge found that the husband knew the sort of document he was signing, and was able to understand its effect. The husband's medical evidence alleging he lacked capacity was described as 'hopeless', and there was no evidence of any undue influence (and the judge suggested that there was actually positive evidence to the contrary given that he had been an MP for over ten years, building up successful businesses and surviving what he described as threats of violence from third parties).

The judge found that the signing of the deed represented a 'fair and reasonable transaction which [the husband] entered into as a result of his own free will'. He also determined that the clause

region of £1.2m, to include the mortgage principal, arrears and outgoings in relation to Flat 3B, and accrued outgoings in relation to the Kent property. The court also made provision for payment of an as

In addition, she sought a sum of £12,000 per annum in relation to the outgoings of Flat 3B for 20 years as a lump sum of £240,000. The judge agreed with the annual figure, but ordered a multiplier of 15 years, meaning that the lump sum was £180,000.

In total, the court ordered that the wife was entitled to the sum of £2,024,777.98, in addition to the as yet unassessed sum for payment of tax.

An advantage of the claim being brought in the Chancery Division was that an award for damages could be made without too much investigation into the husband's ability to meet it.

relating to maintenance did not introduce uncertainty into the underlying obligation.

The court therefore found that the deed was valid.

The husband accepted that he had ceased to pay any of the maintenance-related payments. The claim for repudiation was therefore not challenged, and the court assessed that the wife was entitled to damages of in the

yet unassessed sum relating to the annual tax on enveloped dwellings by the husband.

In relation to maintenance, the wife claimed a lump sum of £639,518 rather than the £220,000 per annum provided for by the deed. This was calculated as her lost former salary of approximately £46,000 for a period of 16.5 years less a discount of 15% for early payment, which was accepted by the judge.

Impact and analysis

Choice of court

The very fact that the wife brought a claim in the Chancery Division, rather than the Family Division, is of particular interest. It is impossible to be certain whether she fully explored her options from a family law perspective; while the judgment states that she sought advice from family solicitors in 2009 the judge noted that, surprisingly, no expert evidence was produced to explain the effect of the Ukrainian decree. It therefore remains unclear whether the wife's financial claims in Ukraine

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have been dismissed. The wife's most obvious cause of action in the family court would have been an application under Part III, Matrimonial and Family Proceedings Act 1984 (MFPA 1984).

Bringing a Pt III, MFPA 1984 claim is a two-stage process whereby the family court must first grant permission for the application to be made, before considering the substance of the application itself.

Looking at the facts, it appears that the family court would have had jurisdiction to determine a Pt III claim brought by the wife, and permission would have been granted. If this initial procedural hurdle is likely to have been passed, why, then, did the wife choose to bring a claim for repudiation of contract? We can only speculate, but the answer may partly lie in the broad discretion that the family courts have. In assessing the wife's claim, the family court would have considered all of the circumstances of the case, including the parties' needs, as well as their financial resources, in order to make an assessment of whether it would have been appropriate to make an order to alleviate any hardship.

Various properties had already been transferred to the wife, in accordance with the 2009 deed. The wife therefore appears on paper to be a wealthy woman. As explained above, even in the claim for breach of contract, interestingly the wife brought a claim for loss of salary of circa £46,000 per annum, rather than for the full £220,000 per annum, under the terms of the deed. It may be that an assessment of likely awards was made and the wife's legal team hedged their bets that she would be likely to receive a higher award in the Chancery Division than she would in the Family Division.

In addition, within Pt III, MFPA 1984 proceedings both parties would have had to submit full and frank disclosure of their respective financial positions. It may be that the wife feared that the husband's disclosure would be less than complete, but an advantage of the claim being brought in the Chancery Division was that an award for damages could be made without too much investigation into the husband's ability to meet it. The husband also claimed that the various transfers to the wife represented 'the

entire family property'. This proved not to be the case, but if the wife now holds, say, the majority of the assets then any such claim would be unlikely to succeed.

Maintenance agreements

This case demonstrates that it is possible to enter into contractual

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agreements concerning maintenance on separation between unmarried couples, providing that this agreement is consistent with ordinary principles of contract law. This could prove to be a useful tool in cohabitation cases. However, this creates an interesting inconsistency. Had the provisions in this case been included in an order in financial remedy proceedings, they would have been variable. Although the wife did not claim the full amount set out in the deed, there is nothing in the judgment to suggest that she would have been unsuccessful had she sought such an order. It remains to be seen how the Chancery Division will take the otherwise variable nature of maintenance provisions into account if enforcement of such deeds becomes commonplace.

A person in the husband's position could, however, have had one further argument available to him that he did not deploy. Sections 34 and 35, Matrimonial Causes Act 1973 (MCA 1973) make provisions in relation to 'maintenance agreements'. The deed falls squarely within the definition of a maintenance agreement for this purpose, being an agreement concerning financial arrangements 'whether made during or after the dissolution or annulment of the marriage'. Section 35, MCA 1973 provides that, subject to conditions, if the court is satisfied that 'by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made', it may order

alterations to the agreement by 'varying or revoking' its provisions, or by inserting such alternative provisions as may appear to the court to be just having regard to all the circumstances. However, it should be noted that s35(1), MCA 1973 provides that each of the parties to the agreement must be 'for the time

being either domiciled or resident in England and Wales'. It is not clear where the husband was domiciled or resident at the time of the judgment, or indeed whether he was aware of the possibility of deploying such an argument.

To the eyes of most family lawyers it would seem odd and unfair to allow the creation of extensive liabilities without the application of judicial discretion, particularly in cases such as this where the husband seemingly signed the deed with no legal advice.

Whether this case represents an 'oddy' or a new tool in relation to the enforceability of agreements remains to be seen.

Third parties

Finally, the husband's business partner, Mr Goncharov, was not joined to the proceedings, but he 'signified his willingness to be bound by the decision in this action, both in writing and orally'. At the end of the case Mann J invited Mr Goncharov to consider his position and make submissions (if he so wished) within 28 days. If the case were to have been heard in the Family Division, it is very likely that Mr Goncharov would have been joined to the proceedings. The fact that he was not, and did not indicate that he would challenge the court's decision, again served to benefit the wife. ■

Yedina v Yedin & anor
[2017] EWHC 3319 (Ch)