



PRE-NUPTIALS: SENSE VERSUS SENSIBILITY

Many people think that pre-nuptial agreements are the preserve of the rich and famous and suitable only for people like Michael Douglas and Catherine Zeta-Jones – and, most topically, the McCartneys. In fact, in certain cases, they may be a sensible way forward even for those of us do not live in Hollywood.

Why have one ?

Pre-nuptial agreements are sometimes regarded as unromantic, but for many they are simply a practical step to take. A pre-nuptial agreement gives a couple the opportunity to decide how their assets will be dealt with if they ever go their separate ways. It can also include provision for division on early death (although the agreement is not a substitute for a will, which everyone ought to make). For those marrying for a second time, who may have property of their own and a strong wish that their children should benefit from it, a pre-nuptial agreement may be able to ring-fence this property for their children if the second marriage does not last.

Recent changes in the law mean that the court must consider dividing a couple's assets equally on divorce unless there is a good reason not to. A properly prepared pre-nuptial agreement may persuade a court that such a division is not fair. For example, where one person has substantially more assets than the other, a pre-nuptial agreement may protect their position.

If a couple separate and follow the terms of the pre-nuptial agreement it can simplify the separation process and save them both legal costs.

Are they legally binding ?

Unlike in Sweden and much of the rest of Europe and the United States, in this country pre-nuptial agreements are not legally binding. This means that if an agreement cannot be reached, the courts decide how the couple's assets should be divided (in fact, in most cases, solicitors are able to settle arrangements without a final ruling from the court).

That is not to say that the courts in this country simply ignore pre-nuptial agreements. They will be taken into account as one of the factors the courts consider. The agreement will influence the Judge, but not dictate the outcome.

In order for the courts to consider a pre-nuptial agreement as an important factor certain rules must be followed. The recent court decision in the case of *M v M [2002] 1 FLR 654* demonstrates how this works. Mrs M claimed she was pressurised into signing the pre-nuptial agreement when she was pregnant and vulnerable. She therefore asked the court to give her nearly 5 times the £275,000 she was due under the agreement. Mr M tried to hold the court to the original figure. The court did consider the agreement important, but only awarded Mrs M £875,000.

What must you do to ensure you do not fall foul of the rules like Mr M ?

- 1 Both parties should have their own independent legal advice before entering into the agreement.
- 2 Each should fully disclose to the other a true picture of their financial means and circumstances and a summary should be attached to the agreement.
- 3 The couple should agree how they will own assets they each take into the

marriage, and how they will hold assets acquired during their marriage.

- 4 Address how the equity in the matrimonial home will be divided and who will occupy it upon the marriage ending.
- 5 Address how their assets are to be divided in the event of the death of either of them.
- 6 Consider a review period (for example, following the birth of a child).
- 7 Sign the agreement at least 21 days before the marriage ceremony.

Who should consider a pre-nuptial ?

Everyone should think about entering into such an agreement, but those who may benefit particularly include:

- People marrying for a second time.
- People with substantial assets, such as a business or inheritance which they do not want to share equally.

Is the law going to change?

It is likely that the law will change in this country, but it may take some time. In 1998 the Government published a consultation paper called *Supporting Families* which broadly favoured pre-nuptial agreements. The Government felt that pre-nuptial agreements give people more choice and allow them to take more responsibility for their lives, but to date there has been no follow up to this paper.

*To find out more about pre-nuptial agreements, please contact **Emma Ries** on emmaries@cep-law.co.uk, or any member of the Family Law team.*

DEFINITIVE PROTOCOL FOR FAMILY LAWYERS

Family law is complex and at present, partly because of changes in society and partly from Government and European Commission demands, it is constantly changing. For most people, life does not present any more personal or potentially emotionally damaging disputes.

It is therefore essential that issues that arise are dealt with efficiently and sympathetically by the legal system. When a relationship breaks down, it is important for people to understand that the law is not a weapon to settle scores or justify aggressive point-scoring. The work of a lawyer aims to encourage a reasonable and constructive atmosphere in which to negotiate a settlement, by agreement between the parties if possible, or with the help of the Court. In many areas lawyers dealing with disputes between parties have adopted protocols to reduce both hostility and costs.

For many years, there have been in place good practice guidelines for family lawyers. The Solicitors Family Law Association (SFLA), of which all of our family lawyers are members, publishes Codes of Practice that have generally been adopted. Now, the Law Society's Family Law Committee (in consultation with the

SFLA, the Lord Chancellor's Department and the Legal Services Commission) has published a formal Family Law Protocol which sets out the procedure for all family lawyers in private law family disputes, particularly before court proceedings are started.

Examples include:

- 7 days' notice before the issue of divorce proceedings
- 6 weeks' notice to try to resolve disputes between unmarried cohabitants, before issuing proceedings relating to property
- 24 hours prior to a financial hearing, a Statement of Costs must be filed at Court and served on the party against whom any costs order is sought
- At any financial hearing, a costs estimate must be provided by both parties for the Court and the other party

Breaches of the protocols are likely to be penalised when it comes to considering the legal costs claimed. This will involve considering how cases have been handled by reference to requirements set down in the Protocol.

The Protocol Guide itself is pocket-sized and user-friendly, which makes it an invaluable working reference for every practitioner involved in family law. The clear message throughout is that disputing parties must be encouraged to approach resolution of family disputes in a non-aggressive, non-adversarial manner.

As is the way with family law, it is intended that this new 'bible' will be regularly updated to incorporate amendments to reflect future changes in law and constructive feedback received from various individuals and legal bodies, based on their observations and practical experience.

Frances Kelly (*Family Law team*) – franceskelly@cep-law.co.uk

PROPERTY

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Commonhold is a new system of land tenure. It has been under consideration for years. Although it is now on the statute book, implementation remains months away.

Where an individual ("A") undertakes with another person ("B") to perform a positive obligation relating to land (for example to maintain a building) that obligation cannot be enforced by B against any person to whom A sells the freehold interest. Thus if B sells part of a building to A, he cannot ensure that future owners (who buy from A) continue to maintain it. The only possible method under English law has been for B to grant A a lease, incorporating a duty to maintain. If A sells his lease to C, B can insist that C continues to maintain the premises. For this reason flats are almost invariably held under long leases. The obvious disadvantage to a lessee is that as the lease runs its course it becomes less and less valuable.

There have been many important reforms to the detail over the years, but no change to the fundamental principles - until now.

The obvious example is a block of flats. The concept will involve what amounts to freehold ownership of the relevant flat by each resident, and a share in the ownership of the building as a

whole through the medium of the commonhold association. This is to be a special type of limited company. In practice this is similar to the common circumstance of lessees collectively forming a company to buy the freehold of a block, each resident having a share in that company. The change puts such an arrangement on a statutory footing, with a standard, prescribed, constitution for the commonhold association. Membership will be restricted to owners of the flats in the block, and the association will be empowered to enforce the obligations of individual members. The real difference is that individuals will not be lessees, with a wasting asset. They will for practical purposes each enjoy the equivalent of freehold ownership, but the familiar leasehold structure of interdependent obligations, designed for the good of all residents, will remain.

It will be possible for existing blocks of flats to convert to commonhold, with unanimous agreement.

Much detail remains to be set out in regulations, without which the Act cannot be implemented. It will be some months before they are all published.

As the title of the Act suggests, it does not

merely introduce commonhold. There is much besides, to give lessees new rights and to enhance others. Lessees of flats and houses are already able in certain circumstances to force their landlord to sell them the freehold. Those circumstances are to be broadened. The same applies to the more widely used right to purchase an extension to an existing lease. There is a new right to enable flat owners to take over the management of the building, whether or not the landlord has failed in his duty to do so. There is also additional protection for lessees against unreasonable service charges, and landlords are to be constrained in the way they may pursue lessees for non-payment.

This Act, with its 183 sections, 14 schedules and extensive subordinate regulations yet to be published, will provide much food for thought for landlords, lessees and their professional advisers. The changes it introduces are significant. The exercise of new rights always takes time to gather momentum. We shall see how popular these changes become.

For further information contact **Tim Bartlett** on timothybartlett@cep-law.co.uk

FROM DAY ONE

What are the rights of an employee from the moment he or she starts work?

Many employers are not wholly aware of the rights that their staff acquire from the very first day of employment. One of the first questions that we often need to ask our clients when they are faced with actual or potential claims is 'how long has he or she been employed?'. Most corporations know that an unfair dismissal claim cannot be made unless there has been a continuous period of employment of one year and for redundancy it is two.

However, there are myriad rights and entitlements that your new recruit will acquire the moment he walks through that door. For example, even your temporary employee will immediately begin to accrue his statutory entitlement of 20 days paid holiday per annum. If you need to employ him for 3 months to cope with increased business over the Christmas period then unless it is made clear that he cannot be off for certain days he may tell you that he intends to take a break on Christmas Eve and the day after Boxing Day. Statutory holidays, however, can be included in the 20 day calculation if the mean employer wishes to do so.

The right to a minimum wage applies immediately (currently £4.10 per hour going up to £4.20 in October) as does the formula for calculating the maximum 48 hour working week (this is based on the average working week over a 17 week period starting on day one). This cannot be unilaterally excluded during a trial period.

A pregnant employee may take time off work to attend antenatal care the day after she starts. Later, she will be entitled to her 18 weeks ordinary maternity leave without having to have worked for a qualifying period.

No minimum length of service is required for an employee to qualify for statutory sick pay although the period off work has to be four or more consecutive days of sickness or incapacity. An employer may have a need to take disciplinary action against a new member of staff. If he does so then that employee has the right to be accompanied by a fellow employee or any trade union representative even if such a hearing occurs at a very early stage of a trial period.

There are also implied terms of a contract of employment that will come into play. The duty of mutual trust and confidence and a duty of fidelity (including confidentiality) are two cases in point. These set up an immediate relationship of responsibility and loyalty at work on both sides.

Another important provision is what is known as the 'equality' clause. In addition to the immediate right for men and women to have equal pay there is the right not to be discriminated against. Be it potentially on grounds of sex, race, or disability, a new member of staff is protected against such acts not only from the first day of employment but, perhaps surprisingly, for a period even earlier

than that. A potential employee may bring a claim against a possible future employer if it is considered he or she has been discriminated against during the interview or selection process.

However, it should not be thought that these protective rights are designed to be a nuisance to employers. Recognised and adhered to they enhance the working relationship, increase efficiency, and provide staff with a happy and safe environment. This all helps to safeguard a business's biggest asset.

Some Rights from Day One:

- No discrimination on grounds of sex, race or disability.
- Accrual of 20 days paid holiday per annum begins.
- Part time workers qualify for the same protection of statutory rights as full time employees.
- Right to maximum 48 hour working week begins.
- Right for employees to be accompanied at disciplinary hearings.
- Entitlement to 20 minute breaks every 6 hours of work.
- Minimum wage of £4.10 per hour currently.
- Ordinary maternity leave.

Barry Jameson heads our *Employment team*:
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COMMERCIAL LITIGATION AT CUMBERLAND ELLIS PEIRS

Angela Togher has recently joined CEP as an associate and head of the Commercial Litigation Group. This brings the members of our designated Commercial Litigation Group to 4 fee earners. Angela is assisted by Tom Murphy, Michael Jaques and Sherrie Okuns. The Commercial Litigation Group undertakes a full range of commercial litigation work.

Commercial litigation is relevant to most of our clients when our assistance is needed for debt collection and credit control purposes. As most businesses will know, an efficient debt collection system is essential as part of the effective running of the business to minimise the risk of losing money to individuals and companies who become insolvent. This is, particularly, a matter of concern during times of recession. CEP runs a fully-automated debt recovery service which we offer on a fixed fee basis, provided that claims are undefended. Our debt recovery team is conscious of the

concerns of clients not to throw good money after bad and will always be happy to advise on likely costs of taking defended matters further, and the likelihood of eventual recovery.

Whilst debt recovery may be the most commonly encountered experience of commercial litigation, other disputes inevitably arise from time to time. The Commercial Litigation Group covers a full range of commercial litigation work. We list areas covered:

- Enforcement of Judgments (both UK and Foreign)
- Contractual disputes
- Negligence (including professional negligence and personal injury)
- Company disputes
- Intellectual property disputes
- Defamation



- Civil fraud
- Insolvency (personal and corporate representing debtors, creditors and trustees/liquidators)
- Miscellaneous torts (eg trespass, interference with contracts)

The Commercial Litigation Group has experience with dealing with matters pursued in the County Court and the High Court or through alternative dispute resolution. We are all fully aware of clients' concerns about costs and work with them to reach the most commercial and swift solution to their problem.

*If you would like any further information about the Commercial Litigation Group please visit our website at www.cep-law.co.uk or contact **Angela Togher** at angelatogher@cep-law.co.uk*

Salvete

Since the last edition, we have been joined by four new members.

Angela Togher is an associate in the Litigation department. Angela joined us from Joelson Wilson & Co and heads our Commercial Litigation team. She has travelled extensively in South East Asia and South America, and is interested in creative writing.

Margaret Dowdles has joined the Property department. Margaret is qualified both as a Scottish and as an English solicitor, and has considerable experience in firms in Glasgow and London. Margaret is a DIY enthusiast and is never happier than with a paintbrush in her hand.

The Family Law team welcomed **Emma Ries** who has gained wide experience in London and elsewhere. Emma braves the North London traffic by cycling into work each day. She is an Arsenal supporter (another one! Ed)

Sherrie Okuns is an assistant in the Litigation department. Sherrie came from Morgan Cole where she dealt both with administration and with legal work. Sherrie keeps fit and enjoys an active social life.

Valete

Deborah Jeff from the Family Law team left in March to take up a new position with Rooks Rider. Our best wishes to her, and also to Hayley Botwright, secretary in the Litigation department, who left in June.

Jubilee Day

Members of staff were invited to dress down for the day and show their patriotism by wearing red, white and blue; the winner of the most patriotic outfit went to Natalie Wheeler, and to Colin Millicent for true British reserve. A waitress coffee service was provided at the

Athletic pursuits

A lot of running has been going on recently. Adam Edwards, our fit young partner from the Commercial team, inserted contact lenses, donned a T-shirt bearing the legend "Curly" and proceeded to run the London Marathon in under 4 hours. Congratulations on a fine effort.

Adam then joined William Hammon (5407) and James Lamont (5408) for the City of London Lawyers Road Race at the end of May – all three finished in the top 300 (out of 2,000 runners). This highly impressive performance was witnessed by a good number of supporters from CEP. See below for pictures of both events. (Ultra-cool fashion note: James wore grey socks with his running shoes).



On 7th June we invited a number of clients to join us for a big screen showing of the England – Argentina World Cup match. Dele Obilade and Edward Limbrey did a splendid job of organisation (down to ensuring an England victory) and a special mention to Pat Kirk and Natalie Wheeler for all their help with the catering.

Richard Lester performed his annual duty as a Steward at Henley Royal Regatta at the beginning of July. Although Richard's glory days on the water (stroke of the British eight at the 1976 Montreal Olympics, and silver medallist) are over he still cuts a fine figure in the launch, attracting admiring glances from those members of the firm who visit the regatta.

Finally on the subject of sport, we have arranged a cricket match with our friendly stockbrokers, Gerrard, to take place in mid-August. This has now become a most enjoyable annual event.

beginning of the day for members of staff by Andrea London, Natalie Wheeler and Katie Adkin, and delicious food (both home baked and shop bought) was donated by staff for the day. The money raised went to MacMillan Cancer Relief, a favourite charity of this firm, with additional donations going to other charities.

Events

Opera-loving members of the firm will be making their annual pilgrimages to the open-air performances in Holland Park in July and August.

The views and recommendations in this publication are those of Cumberland Ellis Peirs and have been obtained from a variety of sources. Whilst we believe that our sources are reliable, we cannot guarantee that the information in this publication is accurate and it may be condensed or incomplete. No responsibility can be accepted for the accuracy of the information in this newsletter and no action should be taken in reliance on it without advice.

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