[2021 Gib LR 629]

B v. B

SUPREME COURT (Yeats, J.): October 28th, 2021

2021/GSC/29

Family Law—financial provision—financial agreements—court may take into account parties' post-divorce agreement as to fair financial provision even if not financial agreement under Part VIA of the Matrimonial Causes Act 1962

The petitioner applied for financial relief.

During matrimonial proceedings, the parties engaged in without prejudice discussions regarding the distribution of their assets and the payment by the husband of maintenance. In January 2021, the wife indicated that she agreed to a proposal made by the husband. Her solicitors sent a draft consent order to the husband's solicitors. The wife then decided that she no longer wished to continue with the agreement. The husband's solicitors were informed and the parties proceeded as if no agreement had been reached.

Shortly before the hearing of the wife's application for financial relief, the husband gave notice that he intended to ask the court to give effect to the purported settlement agreement.

The husband submitted that the court simply needed to be satisfied that (i) there was an agreement or substantial agreement between the parties on the disposition of the matrimonial property; (ii) the parties were legally represented when the purported agreement was negotiated and settled; and (iii) there was no undue influence or duress applied to achieve the agreement.

The wife submitted *inter alia* that the purported agreement could not constitute a binding agreement under Gibraltar law, as it did not meet the statutory criteria which would make it a binding financial agreement under Part VIA of the Matrimonial Causes Act 1962, and the court could not take account of it when deciding what financial orders to make.

In England, parties could not enter into binding ante or post-nuptial financial agreements but, in the course of ancillary relief proceedings following divorce, English courts gave effect to agreements entered into between the parties unless there was undue pressure, fraud *etc*. The wife submitted that English common law was of no application.

Held, ruling as follows:

The court could in principle take into account agreements that were not made pursuant to Part VIA of the Matrimonial Causes Act in determining what orders to make in ancillary relief proceedings. The court rejected the wife's submissions that, in Gibraltar, binding financial agreements had to conform with Part VIA of the Act and that as the purported agreement did not conform it had no validity and the court could not consider it in the ancillary relief proceedings. First, the purported agreement was an agreement to settle the ancillary relief proceedings. The intention was to enter into a consent order and the purported agreement was embodied in a draft order. There was no intention to execute a financial agreement pursuant to Part VIA of the Act. The fact that the parties could have opted to negotiate and enter into a financial agreement (outside the ancillary relief proceedings) was irrelevant. The rationale on which English case law was based was not displaced by the fact that, in Gibraltar, parties to a marriage had the option to enter into binding financial agreements. Secondly, the Act made provision for maintenance agreements to be entered into on separation by parties to a marriage or civil partnership. They were enforceable agreements but the court retained the power to make financial orders in proceedings brought by either party notwithstanding the agreements. There were therefore other agreements which could be entered into in Gibraltar other than agreements under Part VIA. In the present case, the purported agreement was not an attempt to enter into a Part VIA financial agreement. It was an agreement as to the terms which the parties themselves considered fair with the object of avoiding the expense and stress of a contested hearing. Part VIA of the Act enabled parties to enter into binding financial ante and post-nuptial agreements but it did not prevent them from entering into other agreements falling outside the scope of Part VIA or agreeing to settle ancillary relief proceedings. In the present case, the purported agreement, if its subsisted, was a negotiated agreement to compromise the wife's claim for ancillary relief. The fact that it did not meet the criteria in Part VIA meant that it was not contractually binding but the court could still consider whether to give effect to it (paras. 19–25).

Cases cited:

(1) *Edgar* v. *Edgar*, [1980] 1 W.L.R. 1410; [1980] 3 All E.R. 887; [1980] 2 FLR 19, considered.

(2) *Radmacher* v. *Granatino*, [2010] UKSC 42; [2011] 1 A.C. 534; [2010] 3 W.L.R. 1367; [2011] 1 All E.R. 373; [2010] 2 FLR 1900; [2010] 3 F.C.R. 583; [2010] Fam. Law 1263, considered.

(3) *S* v. *S*, [2014] EWHC 7 (Fam); [2014] 1 W.L.R. 2299; [2014] 1 FLR 1257; [2014] 2 F.C.R. 484; [2014] Fam. Law 448, considered.

(4) *Xydhias* v. *Xydhias*, [1999] 2 All E.R. 386; [1999] 1 F.C.R. 289; [1999] 1 FLR 683; [1999] Fam. Law 301, considered.

Legislation construed:
Matrimonial Causes Act 1962, s.31D: The relevant terms of this section are set out at para. 8.
s.31I: The relevant terms of this section are set out at para. 9.

J. Allen (instructed by Phillips) for the petitioner;
C. Finch (instructed by Verralls) for the respondent.

1 **YEATS, J.:** The petitioner wife's application for financial relief was set down for a two-day hearing for July 20th, 2021. In the days leading up to the hearing, the respondent husband gave notice that he intended to ask the court to enforce a settlement agreement purportedly entered into between the parties in January 2021. This having been raised by the husband at such a late stage, I adjourned the hearing and ordered that the question of whether the court could give effect to this agreement be dealt with as preliminary issue. I gave directions for the wife to file evidence and submissions. I also ordered that the husband pay the costs occasioned by the adjournment of the hearing.

2 [*Omitted for publication*.]

3 During the course of these proceedings, the parties engaged in without prejudice negotiations regarding the distribution of their assets and the payment by the husband of maintenance. On January 14th, 2021, the wife indicated that she agreed to a proposal made by the husband. Her solicitors prepared a draft consent order which was forwarded to the husband's then solicitors on January 19th, 2021. On January 29th, 2021, the wife instructed her solicitors that she no longer wished to continue with the agreement. The husband's solicitors were informed and the parties then proceeded as if no agreement had been reached. The husband thereafter changed solicitors and instructed his current solicitors, Messrs. Verralls, on March 22nd, 2021. Preparations for the final hearing then continued including attendance at a pre-trial review on July 5th, 2021. No mention of the agreement of January 2021 was made until the husband's form M5 was served on the wife's solicitors on July 9th, 2021. In part 5.1 of the form, which requires the parties to set out what orders they are asking the court to make, the husband simply stated: "Enforcement of settlement agreement." (In this judgment I shall refer to the agreement said to have been made in January 2021 as "the purported agreement.")

4 The husband's position is that the parties agreed to a distribution of the matrimonial assets and that the court should give effect to that agreement (Mr. Finch accepting that the court cannot *enforce* the agreement but could *give effect* to it). It is said by Mr. Finch that the court simply needs to be satisfied of three things. Firstly, that there was an agreement or substantial agreement between the parties on the disposition of the matrimonial property. Secondly, that the parties were legally represented at the time the

purported agreement was negotiated and settled. Thirdly, that there was no undue influence or duress applied in order to achieve the agreement. If these conditions are met, the court should give effect to the purported agreement.

5 The wife's position is that the purported agreement cannot constitute a binding agreement under Gibraltar law and that consequently there is no agreement which the court can have regard to. Alternatively, if the court considers that a financial agreement was reached, the court should not in any event give effect to the purported agreement in the circumstances of this case. This judgment deals with the first of these points only.

6 Ms. Allen's submission was that the Matrimonial Causes Act 1962 ("the Act") creates binding financial agreements (both ante and post nuptial financial agreements). As the purported agreement does not meet the statutory criteria which would make it a binding financial agreement under the Act, this court cannot consequently take account of it when considering what financial relief orders to make.

Part VIA of the Matrimonial Causes Act

7 Part VIA of the Act (ss. 31A–31M) sets out the framework for establishing binding "Financial Agreements" for married couples. It was introduced on November 26th, 2009 when the Matrimonial Causes (Amendment) Act 2009 was passed in Parliament. There are three types of financial agreements provided for in Part VIA. Financial agreements entered into before the marriage; during the marriage; and after the decree of divorce has been granted. The Part then sets out the requirements which need to be complied with for financial agreements to be binding and other ancillary provisions regarding termination, enforcement *etc*.

8 In this case, the purported agreement was made after the decree absolute was granted. Ms. Allen submitted that therefore, in order for the purported agreement to be binding and enforceable, it must fall within the provisions of Part VIA and in particular those relating to financial agreements entered into after the decree of divorce has been granted. Section 31D deals with such agreements. It provides as follows:

"31D.(1) If—

(a) after a decree of divorce is granted in relation to a marriage (whether it has taken effect or not), the parties to the former marriage make a written agreement with respect to any of the matters mentioned in subsection (2);

(b) at the time of the making of the agreement, the parties to the former marriage are not the spouse parties to any other binding

agreement (whether made under this section or section 31B or 31C) with respect to any of those matters; and

(c) the agreement is expressed to be made under this section, the agreement is a financial agreement.

(2) The matters referred to in subsection (1)(a) are the following—

(a) how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with; and

(b) the maintenance of either of the spouse parties.

(3) A financial agreement made as mentioned in subsection (1) may also contain—

(a) matters incidental or ancillary to those mentioned in subsection (2); and

(b) other matters.

(4) A financial agreement (the new agreement) made as mentioned in subsection (1) may terminate a previous financial agreement (however made) if all of the parties to the previous agreement are parties to the new agreement."

9 So, the agreement must be made after a decree has been granted, it must be in writing, there must be no other binding agreement, the agreement must state that it is being made pursuant to s.31D and it must relate to the spouses' property, financial resources and/or spousal maintenance. There are however further considerations. Particularly relevant to this case is s.31I. This provides as follows:

"31I.(1) A financial agreement is binding on the parties to the agreement if—

(a) the agreement is signed by all parties;

(b) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with the independent legal advice from a legal practitioner as to the following matters—

(i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement;

(c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(d) the agreement has not been terminated and has not been set aside by a court.

(2) The court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary."

10 A financial agreement must therefore be signed by all parties and must contain a statement that each party received independent legal advice on its terms. The purported agreement was not signed by the parties. It is not therefore a binding financial agreement within the meaning of the Act.

11 Two further sections in the Act need to be referred to. Section 31L deals with circumstances in which a financial agreement may be set aside by the court. These include, amongst other reasons, where the agreement was obtained by fraud; where it is entered into to defraud creditors; or where a material change of circumstances has occurred in relation to the care, welfare or development of a child of the family which will cause hardship. Section 31M provides that any question as to whether a financial agreement is valid, enforceable or effective is determined in accordance with principles governing the law of ordinary contracts. Therefore, financial agreements made pursuant to Part VIA of the Act are binding in Gibraltar and are enforceable—subject to the provisos as to setting aside.

12 The law on financial agreements is different in England and Wales. There is no statutory equivalent to Part VIA financial agreements. Ms. Allen referred to the Hansard of the debate in Parliament when Part VIA was introduced into the Act. The promoter of the amending Bill said the following:

"The new Part VIA formally recognizes pre and post nuptial agreements and their enforceability if certain conditions are met. They are a novel concept in this jurisdiction and they represent a departure from the legal position in England and Wales. They are however recognised in other jurisdictions such as Canada and Australia. In fact the provisions of this Bill are modelled on Australian legislation."

13 So, what is the position in England? Are agreements made by parties to a marriage binding and enforceable?

The English case law

14 A number of English authorities clearly set out the position in that jurisdiction. The first is the Court of Appeal case of *Edgar* v. *Edgar* (1). There the parties had entered into a separation agreement which provided

that the wife would not seek claims for a lump sum or property adjustment order following their divorce. In the event, the wife did so apply and the judge ordered the husband to pay a lump sum. On appeal, it was held that the court did have the power to entertain the application notwithstanding the agreement, but that the agreement was an important aspect of the parties' conduct and the wife had failed to show sufficient grounds to justify going behind what had been agreed. Ormrod, L.J. discussed the circumstances in which a court would look behind an agreement and said the following ([1980] 1 W.L.R. at 1417–1418):

> "Eastham J. in the present case, approached the problem on these lines. He summarised the law in five propositions:
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> > '(1) . . . (and this is not contested) notwithstanding the deed of April 1, the wife is entitled to pursue a claim under section 23 of the Act. (2) If she does pursue such a claim, the court not only has jurisdiction to entertain it but is bound to take into account all the considerations listed in section 25 of the Act. (3) The existence of an agreement is a very relevant circumstance under section 25 and in the case of an arm's length agreement, based on legal advice between parties of equal bargaining power, is a most important piece of conduct to be considered under section 25. (4) Providing that there is equality above, the mere fact that the wife would have done better by going to the court, would not generally be a ground for giving her more as, in addition to its duty under section 25, the court had a duty also to uphold agreements which do not offend public policy. (5) If the court, on the evidence, takes the view that having regard to the disparity of bargaining power, it would be unjust not to exercise its powers under section 23 (having regard to the considerations under section 25), it should exercise such pavers even if no fraud, misrepresentation or duress is established which, at common law, would entitle a wife to avoid the deed.'
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> I agree with these propositions, subject to two reservations. First, as to proposition (4), I am not sure that it is helpful to speak of the court having 'a duty' to uphold agreements, although I understand the sense in which the word was used. Secondly, the reference to 'disparity of bargaining power' in proposition (5) is incomplete. It is derived from a phrase taken from *Brockwell v. Brockwell*, and for which I must accept ultimate responsibility. I used it as a short-hand way of describing a situation with which all experienced practitioners are familiar, where one spouse takes an unfair advantage of the other in the throes of marital breakdown, a time when emotional pressures are high, and judgment apt to be clouded. It is unfortunate, because Eastham J. has based his decision solely on this notion of disparity of

bargaining power as such, and not on the use, if any, made of it by the husband."

15 *Xydhias* v. *Xydhias* (4) concerned whether the husband could resile from an agreement which had been reached in the run-up to the ancillary relief hearing. Thorpe, L.J. set out the principles that would apply in deciding whether the court would make an order on the terms that had been agreed between the parties. He said ([1999] 1 FLR at 691

> "My cardinal conclusion is that ordinary contractual principles do not determine the issues in this appeal. This is because of the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. The decision of the Privy Council in *de Lasala v de Lasala* [1980] AC 546, (1979) FLR Rep 223 demonstrated that thereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it . . . An even more singular feature of the transition from compromise to order in ancillary relief proceedings is that the court does not either automatically or invariably grant the application to give the bargain in the force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in s 25 of the Matrimonial Causes Act 1973 as amended."

His Lordship then continued (*ibid.*, at 692):

> "In consequence, it is clear that the award to an applicant for ancillary relief is always fixed by the court. The payer's liability cannot be ultimately fixed by compromise as can be done in the settlement of claims in other divisions. Therefore the purpose of negotiation is not to finally determine the liability (that can only be done by the court) but to reduce the length and expense of the process by which the court carries out its function."

16 *Radmacher* v. *Granatino* (2) was a turning point for the recognition of pre-nuptial agreements by English divorce courts. The UK Supreme Court held that weight should be given to an agreement made in contemplation of a marriage if it would be fair to do so, and that, in appropriate circumstances, the court could hold the parties to their agreement even if the court considered that it would have made different orders if it had assessed the matter independently of the agreement. Lady

Hale, in a judgment disagreeing with the majority on a number of other points, made reference to agreements to compromise ancillary relief claims. She said the following ([2010] UKSC 42, at para. 149):

> "149. So another type of marital agreement (a type (c) agreement) has come on the scene, an agreement to compromise the parties' mutual financial and property claims on divorce. Unlike orders made by consent in ordinary civil proceedings, however, the matrimonial order derives its authority from the court and not from the parties' agreement, even if embodied in a deed (see, for example, *de Lasala v de Lasala* [1980] AC 546). The court has an independent duty to check the agreed arrangements and to approve them (see *Xydhias v Xydhias* [1999] 2 All ER 386, at p 394). As Butler-Sloss LJ put it in *Kelley v Corston* [1998] QB 686, at p 714,
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> > 'The court has the power to refuse to make the order although the parties have agreed to it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp.'
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> In fact, as *Xydhias* itself showed, this too can cut both ways. The fact that the order derives its authority from the court rather than the parties' agreement also means that the court can treat them as having agreed upon the essentials of their arrangements, even if their agreement would not be contractually binding because they have not agreed upon all the details. The court may therefore decide to give effect to these, even though it is not a legally binding contract."

17 In *S* v. *S* (3), the President of the Family Division, Sir James Munby, gave guidance about the approach the courts should take in approving a consent order which was giving effect to an award made in an arbitration dealing with the parties' finances. In explaining the policy considerations behind the court ordinarily giving effect to an agreement entered into by the parties (and applying those considerations to giving effect to the arbitral award which the parties had agreed to be bound by), the President said as follows ([2014] EWHC 7 (Fam), at paras. 7–9):

> "7. The strong policy argument in favour of the court giving effect to an agreement that the parties have come to themselves for the resolution of their financial affairs following divorce has been recognised for a long time: see the discussion in *X v X (Y and Z Intervening)* [2002] 1 FLR 508 of the line of authorities of which *Dean v Dean* [1978] Fam 161, *Edgar v Edgar* [1980] 1 WLR 1410, *Camm v Camm* (1983) 4 FLR 577 and *Xydhias v Xydhias* [1999] 1 FLR 683 were the most prominent.
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> 8. Thus by the turn of the Millennium it was well established that the court would not lightly permit parties who had made an agreement

> between themselves to depart from it. Indeed, as a matter of general policy what the parties had themselves agreed would be upheld by the courts unless contrary to public policy or subject to some vitiating feature such as undue pressure or the exploitation of a dominant position to secure an unreasonable advantage.
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> 9. In *X v X*, para 103, I said that a formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the court unless there were 'good and substantial grounds' for concluding that an 'injustice' would be done by holding the parties to it. In propounding that formulation I adopted the language used by Ormrod LJ in *Edgar v Edgar* in preference to that of Thorpe J in *Smith v McInerney* [1994] 2 FLR 1077. I said that Thorpe J's references to 'the most exceptional circumstances' and 'overwhelmingly strong considerations' seemed to me, with respect, to put the matter perhaps a little too high. With the benefit of hindsight I was too questioning of what Thorpe J had said. Not for the first time he had seen, more clearly and presciently than others, the way in which the law was moving and, indeed, had to move."

18 In England, parties cannot enter into binding ante or post nuptial financial agreements. (There is no equivalent to Part VIA of the Act.) Nonetheless, these authorities clearly show that, in the course of ancillary relief proceedings following divorce, English courts will give effect to agreements entered into between the parties unless there was undue pressure, fraud *etc*.

Discussion

19 The simple point being made on behalf of the wife is that, in Gibraltar, binding financial agreements need to conform to Part VIA of the Act. That the Gibraltar Parliament has decided to create binding financial agreements but the English legislature has not. As the purported agreement does not conform to Part VIA of the Act, it is of no validity and the court cannot consider it in the ancillary relief proceedings. As such, it is said that the English common law is of no application. In my judgment, these are not valid propositions.

20 First, the purported agreement was an agreement to settle the ancillary relief proceedings. The intention was to enter into a consent order and the purported agreement was embodied into a draft order. There was no intention to execute a financial agreement pursuant to Part VIA of the Act. The position is therefore no different to that in *Xydhias* (4). The fact that here the parties could have opted to negotiate and enter into a financial agreement (outside of the ancillary relief proceedings) is irrelevant. The rationale on which the English decisions are based is not displaced by the

fact that in Gibraltar parties to a marriage have the option of entering into binding financial agreements.

21 Secondly, although I am unable to say whether in practice these are common, Part V of the Maintenance Act makes provision for maintenance agreements to be entered into on separation by parties to a marriage or civil partnership. They are enforceable agreements but the court retains the power to make financial orders in proceedings brought by either party notwithstanding the agreement. (It is to be noted that s.62 of the Maintenance Act expressly states that Part V of that Act does not apply to a financial agreement made under Part VIA of the Matrimonial Causes Act (or Chapter 3 of the Civil Partnership Act, which is the equivalent to Part VIA in a civil partnership context).) There are therefore other agreements which can be entered into in Gibraltar other than just agreements under Part VIA of the Act.

22 I have also had regard to a secondary argument in *Xydhias* which revolved around a requirement contained in the UK Law of Property (Miscellaneous Provisions) Act 1989 that a disposition of land can only be made in writing. The husband had relied on that provision to say that because the agreement related to disposition of interests in property but had not been signed by or on behalf of each party, it could not be relied on by the wife. Thorpe, L.J. dismissed this argument saying the following ([1999] 1 FLR at 693–694):

> "In my opinion this point too is settled by a proper analysis of the nature and effect of an agreement to compromise ancillary relief proceedings. The agreement, if concluded, is not one for the disposition of an interest in land but an agreement as to the terms which the parties themselves considered fair with the object of avoiding the expense and stress of a contested hearing. One of the terms of the agreement may be that the husband will submit to a transfer of property order in respect of the final matrimonial home. Such an order once made would require the husband's signature to a transfer. But if he declines to sign the document the district judge will sign in his stead."

This passage supports my conclusion. The purported agreement is not an attempt at entering into a Part VIA financial agreement. It is, in Thorpe, L.J.'s words, an agreement as to the terms which the parties themselves considered fair with the object of avoiding the expense and stress of a contested hearing.

23 After the hearing, Mr. Finch brought r.4 of the Family Proceedings (Matrimonial Causes) Rules 2010 to my attention. This sets out the overriding objective of the Rules. The Rules require the court to deal with cases in ways which are proportionate and which save expense. Further,

that active case management includes helping the parties to settle the whole or part of the case. It is clear that encouraging and assisting parties to settle their disputes is an important aspect of the court's function.

24 Part VIA of the Matrimonial Causes Act enables partners to enter into binding financial ante and post nuptial agreements. However, this does not prevent parties to a marriage entering into other agreements falling outside the scope of Part VIA or agreeing to settle ancillary relief proceedings. In this case, the purported agreement, if it subsists, was a negotiated agreement to compromise the wife's claim for ancillary relief. The fact that the purported agreement does not meet the criteria in Part VIA means that it is not contractually binding. However, the court can still consider whether it should give effect to it. Whether it does so will be subject to a consideration of the *Edgar* principles.

Conclusion

25 I conclude that the court can, in principle, take into account agreements which are not made pursuant to Part VIA of the Matrimonial Causes Act in determining what orders to make in ancillary relief proceedings following divorce.

Ruling accordingly.