

Series on Financial Matters in Family Proceedings – Crossley Applications: Holding your spouse to your nuptial agreement

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Nuptial agreements usually address the division of assets in the event of a marital breakdown. If discussed early, they may avoid costly and acrimonious litigation between estranged couples.

Pre-nuptial and post-nuptial agreements (PNA) are treated differently in different jurisdictions and in Hong Kong, although a PNA is not legally enforceable per se, the Courts will give “full weight” to such an agreement if it is entered into with the benefit of independent legal advice, with full appreciation of its financial implications and in ample time for the parties to consider and the agreement is not seen as unfair to one spouse.

The case of *Crossley v Crossley* [2007] EWCA Civ 1491 demonstrates the discretionary power of the court to require a party to “show cause” as to why a contractual agreement should not rule the outcome of an ancillary relief claim, when the contract was made pre or post marriage and before the breakdown of the marital relationship. Hence, an application made to the Court to show cause is known as a “Crossley application”.

If a spouse wants to wriggle out of a PNA, how do we hold them to the spirit of the contract? The resiling spouse has the burden of proof to satisfy the Court as to why the agreement should not be enforced. The Court may be convinced if there were vitiating factors (such as duress, fraud and misrepresentation) at the time the agreement was executed. Unconscionable conduct, such as undue pressure or exploitation of one’s dominant position to secure an unfair advantage, may also be a deciding factor.

Furthermore, when there are prevailing circumstances at the time of divorce which renders it unfair to enforce the agreement, the Court may also release the parties from the same.

L v F [2023] HKFC 108

In the recent case of *L v F*, the Court laid down some clear guidance on how the Court deals with Crossley applications in ancillary relief proceedings. The brief facts of this case are: the Wife was a renowned philanthropist in Hong Kong and the granddaughter of a successful entrepreneur; the husband a Swiss banker. Six months prior to their marriage, the parties, with separate legal representation, started negotiating the terms of the PNA, which they signed one day before their marriage registration.

Thirteen years into the marriage, the Wife filed for divorce. With a net worth of around HK\$200M (excluding shareholdings in over 10 companies, 48 properties, various pieces of artwork and jewellery), the Wife issued a Crossley application and sought directions from the Court to limit the scope of her financial disclosure to the Husband, should he fail to “show cause” as to why he should not be bound by their PNA.

The Husband’s case

The Husband initially took issue with the execution of the PNA, claiming that “*the PNA came as a ‘surprise’, was prepared ‘in a rush’ and on terms which were ‘blatantly clear to him’ to be ‘non-negotiable’.*” He further put forward an odd claim that he was legally advised to include fictitious accounts in his financial disclosure to the PNA, so that his assets would be “*roughly the same*” as the Wife’s. At trial, the Husband abandoned this argument, which the Court considered to be a “sensible” move, as there was clear evidence showing that he was actively involved in negotiating the PNA terms.

On the ground of fairness, the Husband argued that it would be unfair to hold him to the PNA as he was financially destitute. He painted a desperate picture of himself by claiming that he was jobless, that all his businesses had failed, that no companies would hire him, and that he was forced to leave Hong Kong because it was unaffordable.

The Wife's case

The Wife contended that the PNA was “of magnetic and overriding importance and should be given the fullest possible effect.” The Wife produced evidence to prove the Husband's proactive negotiation of the PNA terms, and argued that the Husband was unable to support his poverty claim.

It was also the Wife's case that the parties had conducted their marriage strictly in accordance with the PNA. For example, during the marriage, the parties were financially independent of each other and paid for their own expenses. The Husband would further repay loans from the Wife and pay her a monthly fee for his accommodation.

The Court's ruling

The Court held that the Husband failed to show cause as to why he should not be bound by the PNA. The Judge further ordered that there be limited discovery within the parameters of the disputed issues, to enable the Court to follow the processes set down in *DD v LKW [2010] 13 HKCFAR 537* at the ancillary relief proceedings. The Court also found, amongst other things, that the PNA captured the parties' intention and was consistent with their conduct all the way up until their divorce, which is highly significant, as it suggests that the parties themselves all along regarded the PNA, as determinative of how their finances are to be managed.

Nuptial agreements do not oust the Court's jurisdiction to consider other factors

In a Crossley application, the Court is not so much concerned with the final outcome of the ancillary relief application, but rather whether the parties should be bound by the PNA. Thus, as a matter of sound case management, Crossley applications can be heard as a preliminary issue, if the Court is of the view that it can help parties to save costs and time. It is also important to note, that nuptial agreements do not oust the Court's discretion in respect of ancillary relief proceedings

The Courts in Hong Kong have a wide discretion in deciding how family assets should be divided in divorce proceedings. Whilst the Courts respect parties' autonomy in entering into nuptial agreements, such agreements cannot oust the Court's discretion in ancillary relief proceedings and in particular, to consider the factors under section 7 of the Matrimonial Proceedings and Property Ordinance (for details, please refer to our article [here](#)). In fact, it is well recognized that a nuptial agreement can be considered as one of the factors in the section 7 exercise.

In *L v F*, the Wife sought substantially limited financial disclosure should the Husband fail to show cause. Given the Wife's vast wealth, the Court recognized that a preliminary hearing would save the Wife from a “long and expensive (and even contentious) exercise” of financial disclosure.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters. Should you have any questions on nuptial agreements and related matters, please reach out to us if you would like to know more.

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