

# A second bite at the cherry after a European divorce

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**CATEGORY:**

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On 14 February 2011 the Court of Appeal handed down a judgment which will allow an Italian man, separated and divorced in Italy, to make an application to the courts in England and Wales for financial relief. This latest decision grants Mr Traversa permission to make an application under Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III") for financial provision after his Italian divorce.

## Facts

Mr Traversa and Ms Freddi are both Italian nationals and were married in Italy in 1987. Ms Freddi came from an affluent family and was independently wealthy. Mr Traversa was from a 'modest Calabrian family'. They entered into a marriage contract in the standard Italian way, providing for the regime of separate property by the addition of the 'briefest words' in the relevant box in the marriage certificate. Mr Traversa received no legal advice at the time. After the marriage, the parties divided their time between England (where they successively invested in restaurant businesses) and Italy. The parties have two children, born in 1988 and 1991.

In March 2003 Ms Freddi issued separation proceedings in Italy and in November 2004 a separation order was made. Mr Traversa took little or no part in the proceedings. Ms Freddi retained the former matrimonial home situated in Palmers Green, London and a property in Italy; both of which were in her name in any event. Mr Traversa was ordered to pay child maintenance which was not paid or enforced.

Ms Freddi obtained a decree of divorce in Italy in February 2008 and in April 2008, served Mr Traversa with a notice to quit the former matrimonial home in London. He subsequently applied to the English Courts under Part III for financial provision.

At first instance, leave to make the Part III application was refused on the grounds that the parties' superior connection was with Italy. However following the momentous decision of the Supreme Court in the case of *Agbaje v Agbaje* [2009] (which set out the correct interpretation and application of Part III), Mr Traversa decided to apply for permission to appeal out of time, which was granted by Wilson LJ.

## Court of Appeal decision

By a unanimous decision of the Court of Appeal, Mr Traversa has been given permission to make an application for financial relief under Part III.

Applying the 'simple' test under *Agbaje* that the principal object of determining an application for leave is to 'prevent wholly unmeritorious claims being pursued' but allowing a 'solid' case to proceed, the Appeal Court Judges agreed that the fact that Mr Traversa had made no application for any form of financial relief in Italy, had been served with eviction proceedings and he would transfer the property in Italy in his sole name to Ms Freddi in return for the former matrimonial home in England, were sufficient to pass the 'solid' basis threshold test.

Whilst the Court of Appeal praised the argument of Ms Freddi's legal team (that following *Radmacher*, the decision of the parties to elect a separate property regime was enforceable and should therefore be sufficient to prevent permission for leave being granted), it was a point that needed to be tested, as to fairness in the present circumstances, by the Court at the resulting trial.

In addition, the Court of Appeal rejected a growing body of opinion that an order containing any element of maintenance fixes exclusive jurisdiction in relation to all financial issues on divorce. In this case the only financial order in Italy was for child maintenance.

## Implications

This decision confirms the threshold test set out by the Supreme Court in *Agbaje* to make financial claims of this sort where there is a pre-existing foreign order and applies it to the situation where the individuals involved are both European.

It confirms that the Court continues to protect its discretion to decide as to the fairness or otherwise of any pre-nuptial contract, or as in this case matrimonial property election, following *Radmacher*.

We will have to wait and see whether the Court decides that the outcome produced by the Italian Court in applying the separation of property regime is considered 'fair' in the current circumstances.

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