Briefing Note
Pre-Nuptial Agreements Worthless or Worthwhile?
Updated - January 2015

Background

English law, in relation to marital property agreements, is regarded as retrograde and paternalistic by failing to reflect today’s society and how couples wish to arrange their relationships and regulate their future affairs.

Historically these agreements were treated with suspicion: they were seen to undermine the institution of marriage, encourage divorce and therefore contrary to public policy and consequently unenforceable as contracts even if they met all the other circumstances for a validly binding contract.

Along came the Radmacher trilogy...

A slow but steady revolution has been sweeping through the English law courts, challenging the current state of affairs culminating in the Supreme Court’s decision in the case of Radmacher -v- Granatino in October 2010. That case has become the new law on the subject.

The facts and characters are well known. Wealthy German heiress marries younger French man, also from an affluent background. They signed a German pre-nup 3 months before their marriage at W’s insistence as without it she would be disinherited from her family’s substantial wealth. Neither took legal advice. In short the agreement provided that neither party was to acquire any benefit from the property of the other during the marriage or on its termination.

The couple spent most of their married life in England and W commenced divorce proceedings in the UK. During the course of the marriage H gave up his well paid city career to become an academic. There were 2 children. On the breakdown of the marriage H wanted to backtrack from the agreement and claim against W’s assets.

Part 1 - The Husband’s moment of Glory

The ancillary relief proceedings were heard first in the High Court before Mrs Justice Baron who awarded H £5.56m including a lump sum of £2.5m to meet his housing needs. Baron J gave only a cursory nod to the agreement which she found to be defective because of the lack of legal advice, financial disclosure, provision in the event of children and because it deprived H of all claims in a situation of want and was therefore manifestly unfair. Baron J said that H understood the basic premise of the agreement and that this had affected her award. But her discount was later said to be negligible. W appealed successfully.

Part 2 - The Plot Thickens

The Court of Appeal took a different view and said that the agreement was a circumstance of “decisive” weight and greatly reduced H’s award the effect of which was that he was provided with a house in England for when the children stayed with him the ownership of which would revert to W when the children were grown up. H was also awarded a considerably lower capitalised maintenance fund to cover his needs while the children were living with him. H appealed.

Part 3 - Third Strike and the Husband is Out!

Eight Supreme Court judges upheld the Court of Appeal decision although notably the leading family, and only female judge, Lady Hale, strongly dissented.

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Legal 500 UK 2014
So are pre-nups now worth the proverbial paper they are written on?

Three clear points have emerged as a result of the decision.

The public policy argument has been thrown out with the bath water, the distinction between pre and post separation agreements has also been washed away but the Court’s ultimate jurisdiction to decide a party’s financial claims remains.

This can be summarised by Lord Phillips’, one of the 9 supreme court judges, statement of principle regarding the legal status of marital property agreements.

The Court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

The new “unless” test: The essential elements

The prevailing circumstances that would render an agreement unfair were addressed by the Supreme Court by way of a 3 part enquiry:-

• fairness at the time the agreement was entered into,
• other external factors such as relevant foreign law (i.e. are pre nuptial agreements recognised and binding in the country in which they are signed). This was an influential factor in Radmacher as opting out of the default marital property regime in Germany and France is commonplace.
• and fairness at the time the case is before the Court.

The Supreme Court has indicated that agreements which follow the general contractual criteria and safeguards are all the more likely to be upheld.

• was the agreement entered into freely, without undue influence or pressure and were the parties informed of its implications.
• was there proper financial disclosure
• was the intention of the parties undisputed
• did the parties each receive clear legal advice

The Supreme Court was reluctant to lay down the rules as to when or when not it would be fair but gave certain indications

• agreements which prejudiced the needs of any children of the family are less likely to be upheld.
• agreements regarding non matrimonial property are more likely to be given effect
• agreements which address existing circumstances i.e. separation agreements are likely to be given effect to.
• the court might adopt the terms of a pre-nuptial agreement even if they do not follow what a court would regard as fair.

Our firm view is that there is now a presumption towards marital agreements being upheld and, despite them still not being automatically legally binding, it is advisable in the right scenario to encourage the happy couple to sign on the dotted line. After all if pre nups are accepted and tolerated by most of our European neighbours and our American cousins surely they will find a place in the hearts of us Brits. Are the English so unequipped, compared to the rest of the world, that they should be hindered from achieving the level of self-order they clearly want (whether for good or for bad) without the sanction of the Courts. So given that most people accept that pre nups and marital agreements are here to stay is there a need to go any further? This is the question that the Law Commission was tasked to decide a question that has been banded around the corridors of Whitehall and among the legal profession for a number of years.

Radmacher v further reform – qualifying nuptial agreements?

Does the current legislation provide the right basis for determining the effect of marital property agreements or is reform needed to provide couples with unfettered autonomy to enter into marital agreements without the interference of the Court.

The Law Commission produced a report in February 2014 after several years of consultation.

The Law Commission recommended the law should be reformed so as to introduce “qualifying nuptial agreements” which would be binding contracts and enforceable if certain conditions were met (dealing with independent legal advice, disclosure and timing), without the need for court
The responses demonstrated support for the introduction of such agreements, subject to certain safeguards. However, whilst there was considerable support for restricting the effect of such agreements to pre-acquired, gifted and inherited property, the Law Commission concluded that such agreements should not be limited in this way.

What is clear however is that agreements without safeguards for the financially weaker party at the point that they are made, or that are enforced regardless of the terms would, in the Law Commission’s view, be unacceptable. Hence the Law Commission recommended that a provision to the effect that it is not possible to contract out of provision for needs would provide an important safeguard for qualifying nuptial agreements.

Qualifying agreements would have to deal with the financial needs of the parties and any children.

But that leaves the big question of what in each case amounts to “financial needs” so the Court commission has also recommended the Family Justice Council publish guidance covering the meaning of “financial needs”; at what level they should be met, and for how long. As yet, it is not known whether any new Government will accept the Law Commission’s proposals, so this space as to be continually watched.

Post Radmacher cases

Whilst we await to see what the Radmacher effect may have on legislation, there have been a number of cases since that have looked at the weight to be accorded to pre-nuptial agreements post Radmacher. Most of these cases involved a foreign element; usually husbands asking the Court to adhere to a matrimonial property regime in another European jurisdiction or to enforce an agreement, and wives commencing proceedings in the UK and asking the Court not to apply the regime or agreement. Unfortunately, we are still waiting for a standard UK pre-nuptial agreement to be properly tested and the full effect of Radmacher in the UK and what really is “unfair” remains to be seen.

The nearest guide we have to that is the recent case of Luckwell v Limata in February 2014. The husband signed a pre nup and two supplemental agreements that he would make no claim against the wife’s wealth (inherited/gifted from her family). The wife had assets of £6.7 million (nearly all tied up in her home). The husband only had debts of £226,000. He was totally dependent on his wife. The Court held, as per a comments in Radmacher, that he was in a “predicament of real need” and at least had to have a roof over his head and his debts paid off. He was awarded a sum to clear his debts, plus £900,000 for a home which would be sold when the children grew up and he would then have 55% of the proceeds outright for a new home.

The key points are that the “needs” in this case trumped the three agreements, surprisingly, the wife had to sell her home, but unquestionably, without the three agreements, the husband would have been awarded much more.

Conclusion

For now the message from the highest Court in the land is loud and clear. In a nutshell, the Supreme Court has held that such agreements can be decisive of the financial outcome if the marriage ends in divorce. It said that English courts are “bound to have regard to them”, and has provided a new and clear test by which they should be judged. But, as ever, the “unless” test of fairness means our legal system continues to prefer uncertainty over autonomy.

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