

PRE-NUPTIAL AGREEMENTS - WORTHLESS OR WORTHWHILE?

Pre-Nuptial agreements - worthless or worthwhile?

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 last year. 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.

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 Philips', 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.

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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 are 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
- agreement 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 has been tasked with deciding 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 - The next part

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 consultation paper has just published the Law Commission's findings. The Consultation Paper seems to err on the side of caution; while it recognises the arguments for autonomy and certainty it concludes that to some extent these elements are provided for under the current system. It certainly suggests that agreements which cover pre acquired, gifted or inherited property, akin to those arrangements adopted by our European neighbours are more likely to be upheld. The Paper also reinforces the need for standard contractual safeguards, the agreement to be in writing, financial disclosure, legal advice but appears slightly more relaxed on the timing requirements i.e. there would be no specific deadline before a marriage by which an agreement would have to be signed, in order for the agreement to meet the formalities of a "qualifying nuptial agreement".

Agreements which fail to provide for the needs of children or which leave one spouse dependent on state benefits would not be enforceable. The Paper also advocates certain safeguards based on passing time and events i.e. agreements should be accorded less weight the longer the marriage lasts or cease to have effect after a certain period of time.

Fairness is also seen as a possible safeguard but this is already accommodated for by the current law so Reform would have to go a stage further and look at restrictions based on "manifest unfairness" or "serious injustice". Would this provide more certainty - the Paper thinks not.

Alternatively Needs could act as the safeguard with restrictions placed on agreements where one or both parties needs are not met. This immediately questions how those needs are to be assessed and how statutory guidelines could be drafted.

Regrettably at the time of writing no definitive outcome has been reached as the Commission has invited responses to its paper the deadline for which is 11 April 2011.

Much will depend on how vocal the pro-marriage lobbyists are and how willing the coalition government is to dip its toe into these controversial waters once the Commission reaches its final decision and makes its recommendation.

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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