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Pre-Nuptial Agreements – The Law, Agreements Entered into Prior to October 2010 and Post-Nuptial Agreements

The Supreme Court decision in *Radmacher v Granatino [2010]*

On 20 October 2010, the Supreme Court, the highest court in England and Wales handed down the long awaited judgment in the appeal from the Court of Appeal of the case of *Radmacher v Granatino,* which involved a German wife and a French husband who had entered into a pre-nuptial agreement in Germany prior to their marriage in 1998. The terms of the agreement were that the husband was to receive no financial provision from the heiress wife in the event of their divorce.

The judgment, which received much publicity in the press at the time, held that a

> *"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"*

and concluded that Mr Granatino should be bound by the terms of the pre-nuptial agreement even though he was not fully appraised of the means of the wife at the time he entered into the agreement and nor did he have the benefit of independent legal advice.

This case is extremely significant and the biggest indication yet that even though it is for Parliament alone to change the law so as to give pre-nuptial agreements legal and binding status, pre-nuptial agreements are no longer contrary to public policy (because they undermine the institution of marriage) and the courts should uphold a pre-nuptial agreement unless to do so would be unfair and/or would prejudice the interests of any minor children of the family.

What factors should a court consider when being asked to enforce a pre-nuptial agreement?

The Supreme Court did not provide a check list of matters to be considered by a court when determining whether or not to uphold a pre-nuptial agreement. However, it addressed a number of principles as follows:

1. *"If an ante-nuptial agreement ... is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications".*

In 1998, the Home Office published a consultation document "Supporting Families" in which it proposed that a pre-nuptial agreement should be subject to a number of safeguards, which if not complied with would result in the agreement not being binding. These safeguards included a requirement for each party to have:

- the benefit of independent legal advice; and
- full disclosure of the assets and property of the other party.

The consultation document also recommended that the agreement be entered into at least 21 days before the intended marriage, so as to prevent a pre-nuptial agreement being forced on an unwilling party shortly before their wedding day.

The consultation document was never made law but as a matter of practice, the legal profession have endeavoured to ensure that the above procedural recommendations have been complied with before advising a future husband or wife to sign a pre-nuptial agreement.

However, in *Radmacher v Granatino,* the husband did not take independent legal advice prior to entering into the pre-nuptial agreement and nor did he seek, or receive any information from the wife about her financial circumstances and yet this was held by the Supreme Court not to be a reason for the court to refuse to uphold the terms of the pre-nuptial agreement.

"Sound legal advice is obviously desirable, for this will ensure that a party understands the implications of the agreement, and full disclosure of any assets owned by the other party may be necessary to ensure this. But if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end".

2. "*It is, of course, important that <u>each party should intend that the agreement should be effective</u>*".

The Supreme Court recognised that it might be wrong to infer that parties who entered into pre-nuptial agreements prior to the Supreme Court judgment in *Radmacher* intended their agreement to be binding because they would have been advised at the time that such agreements were void under English Law and unlikely to be binding. However it went on to say that:

"in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it".

3. *"In relation to the circumstances attending the making of the nuptial agreement ... <u>all the circumstances must be considered</u> ..."*

The Supreme Court listed a number of situations which might eliminate or reduce the weight to be attached to a pre-nuptial agreement, to include:

- Duress (unreasonable pressure), fraud or misrepresentation

- *"Unconscionable conduct such as undue pressure (falling short of duress)"*
- *"Exploitation of a dominant position to secure an unfair advantage"*
- *"A party's emotional state, and what pressures he or she was under to agree"*
- *"Whether the marriage would have gone ahead without an agreement"*

The overriding requirement of *"Fairness"*

Where a court is asked to consider what would be an appropriate settlement upon divorce, its overriding requirement is to achieve fairness bearing in mind the statutory factors and the principles of need, compensation and sharing which are relevant to determining what is fair.

Of course, the aim of a pre-nuptial agreement is to limit the financially weaker party's claims on divorce to those provided for in the pre-nuptial agreement and thus a tension arises where a pre-nuptial agreement makes provision which does not accord with what the court considers to be fair.

Fairness is always subjective and dependent upon the circumstance prevailing at the time and thus the Supreme Court refused to lay down any rules to help determine what is fair concluding that fairness:

"will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result".

However, the court did give the following guidance:

- *"A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family."*
- *"The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best."*
- *"There is nothing inherently unfair in"* agreements in relation to, for example, inherited property *"and there may be good objective justification for it, such as obligations towards existing family members".*
- *"Where the ante-nuptial agreement attempts to address the contingencies unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement, ... the longer the marriage has lasted, the more likely it is that this will be the case".*
- *"It is ...needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement"* for example where the pre-nuptial agreement results in *"one party being left in a financial predicament"* or *"if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth".*

Are pre-nuptial agreements now legally binding?

The answer is no, because only Parliament can make them legally binding. However, the case of *Radmacher v Granatino* means that they will be given far more weight by a court and in some cases, decisive weight. Indeed, although the Supreme Court did not expressly say so, it would appear that there is now a presumption that the terms of a pre-nuptial agreement will be approved by a court, which means that the burden will be on the party who does not want to be bound by the agreement to argue why its terms should not be followed.

Pre-nuptial agreements entered into prior to 20 October 2010

The Supreme Court acknowledged that it might be wrong to approach a pre-nuptial agreement entered into prior to 20 October 2010 in the same way as one entered into post its judgment in *Radmacher v* Granatino by reason of the fact that it could not be presumed that the couple intended to be bound by their agreement.

However, regardless of this, it is foreseeable that the courts will pay far more attention and give far greater weight to the terms of a pre-nuptial agreement entered into prior to 20 October 2010 than it would have done previously and that it will follow those terms unless it would be unfair to do so, both in terms of outcome and also the manner in which the agreement was entered into.

Can I review the terms of my pre-nuptial agreement and/or enter into a post nuptial agreement?

It is inevitable that a couple's circumstances will change during their marriage. Events will happen which may, or may not have been foreseen at the time of the marriage and thus by a pre-nuptial agreement. A pre-nuptial agreement can be reviewed by a couple at any time during their marriage and any revised terms can be incorporated into a post-nuptial agreement. Such a review might be provided for by the pre-nuptial agreement, for example upon the birth of a child, but other circumstances might arise which make it reasonable, or fair to review the agreement's terms: one party receiving an inheritance, or changing their career, or a couple relocating, or illness.

In addition, a married couple can enter into a post-nuptial agreement at any stage, for example where they have reconciled after a period of separation and wish to agree what will happen should their reconciliation fail.

Whatever the reason for the review of the pre-nuptial agreement and/or the drawing up of a post-nuptial agreement, a court, when asked to consider the post-nuptial agreement will approach the agreement in the same way as it would approach a pre-nuptial agreement. In *Radmacher* the Supreme Court concluded that *"the ... court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements"* which means that when asked to consider the terms of a post-nuptial agreement, the court will look at the fairness of the agreement and the other matters referred to above and the burden will be upon the party who does not want to be held to the agreement to show why its terms should not be followed.

I entered into a pre-nuptial agreement before October 2010. Should I now enter into a post-nuptial agreement?

If you are concerned about the circumstances leading up to the signing of your pre-nuptial agreement, or that there is a risk that a court will consider your agreement to fall foul of any of the criteria laid down by the Supreme Court in *Radmacher*, or your circumstances have changed so as to make your pre-nuptial agreement unfair, then you may like to consider seeking legal advice on whether it would be appropriate for your pre-nuptial agreement to be reviewed and any revised terms incorporated into post-nuptial agreement.

Law Commission consultation paper

The Law Commission has been asked to consider whether there should be a change to the current legislation governing pre-nuptial agreements and on 11 January 2011, it published a consultation paper on the future of pre-nuptial agreements. This was followed by a three month consultation period, which has now expired and we are currently awaiting the Law Commission's conclusions. See Russell-Cooke's briefing paper dated 11 January 2011 entitled "Pre-nuptial Agreements and the Law Commission" for further information.

If you require further information, or advice on pre-nuptial, or post-nuptial agreements, please contact Camilla Thornton, or any of Russell-Cooke's family departments.

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