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Supreme Court decision in Radmacher v Granatino: Pre-nuptial agreement enforced by English courts

The Supreme Court, the highest court in England and Wales, has handed down its landmark ruling in the case of Radmacher v Granatino. The judgment, which is binding upon all other courts in this country, has given new status to pre-nuptial agreements, potentially changing the way in which the assets of a couple will be divided upon separation where they have previously entered into a pre-nuptial agreement.

The Supreme Court has given the most categorical indication yet that pre-nuptial agreements and matrimonial property regimes will now be upheld by the English courts, as they are in many other countries throughout Europe and the US, and in Scotland. This has allowed Katrin Radmacher, heiress to a £106 million fortune, to protect her wealth from her husband, Nicolas Granatino, following the breakdown of their 8 year marriage.

The facts of the case

- Mr Granatino (H), a French national then age 27, married Ms Radmacher (W), a German national, then age 29, in a ceremony in London in 1998. The couple chose to make London their home, where H continues to reside. W has since relocated to Monaco.

- W came from an extremely wealthy family and some of the family wealth had already been transferred to her prior to the marriage. It was expected that she would inherit further wealth, but only if she and H entered into a matrimonial contract agreement to protect this, which the couple subsequently made in Germany prior to the marriage.

- Under the agreement, H waived his right to any financial claim against W's wealth, including capital assets and maintenance. There was no mention as to what would happen in the event that they had children.

- There was no disclosure within the agreement as to the extent of W's wealth. H was made aware of the basic terms of the agreement in English, but the agreement was in German and H was not provided with a translated copy. H declined the opportunity to take any legal advice upon the effect of the agreement.

- The couple went on to have 2 children but separated after 8 years of marriage.

- At the time of entering into the agreement, H was in the banking industry and earned £120,000 per annum. He later gave this up and went into academia, which reduced his income to in the region of £30,000 per annum.

- Following the breakdown of the marriage, H brought a claim in the English courts for financial relief, including a claim for capital and a claim for maintenance. This was despite the existence of the pre-nuptial agreement, which it was accepted would have been upheld in both France and Germany, and which provided that he should be entitled to neither. It was therefore necessary for the English court to consider what, if any, weight should be given to the pre-nuptial agreement and how the couple's assets should be divided.

The decision at first instance

The High Court, the first court to consider the matter, found that the extent to which H and W had ignored a number of procedural safeguards prior to entering into the pre-nuptial agreement was not satisfactory, and the weight to be attached to the agreement was reduced for that reason. The award to H was nevertheless less than he would otherwise have been entitled to because he had freely signed the agreement.

The court awarded a lump sum of £5.5 million to H, on the basis that this would provide him with an income of £100,000 for life and allow him to purchase a property where the children could visit him. The court also awarded a lump sum sufficient for H to buy a home in German where the children could stay with him although this property was to belong to W, and ordered W to pay child maintenance of £35,000 for each child while they remained in full time education.

The Court of Appeal decision

W appealed to the Court of Appeal, arguing that the court had been wrong to place so much significance upon the circumstances in which the pre-nuptial agreement had been entered into. She asserted that the agreement should be given decisive weight. W accepted that provision should be made for H in his role as a father, but not otherwise for his own long term needs.

The Court of Appeal allowed W's appeal, agreeing that insufficient weight had been given to the existence of the pre-nuptial agreement. H's award was reduced from £5.5 million to £2.5 million which was not to belong to H outright, but should be held by him only during the years of parenting, with maintenance to continue only until the children were 22 years old. H subsequently appealed the decision to the Supreme Court.

The Supreme Court decision

The Supreme Court dismissed the appeal by a majority of 8 to one, finding that the Court of Appeal had been correct to conclude that there were no factors which rendered it unfair to hold H to the agreement. H's needs would be met indirectly by the awards made for the benefit of the children. There was no compensation factor as H's decision to abandon his career in the city was not motivated by the demands of his family but reflected his own preference and fairness did not entitle H to a portion of W's wealth when he had agreed that he should not be entitled to this at the time of the marriage. It was fair in the circumstances for H to be held to the agreement and it would be unfair to depart from it.

The status of pre-nuptial agreements and matrimonial property regimes

It remains the case that under English law a couple cannot agree to oust the jurisdiction of the court to make such order as it considers appropriate in relation to their finances upon separation. This principle is embodied in statute and the Supreme Court took the view that it is for parliament for legislate in this area if this is to be overridden. The court still has the power to make financial awards when a couple divorce which will include an order for:

- A property to be sold or transferred into the other spouse's name;
- A lump sum payment;
- Maintenance;
- A pension sharing order.

Such awards will be made by reference to what the court considers to be fair, taking into account the principles of need, compensation and sharing. However the effect of the Supreme Court ruling in this case is to confirm how much weight the court will give to the existence of a pre-nuptial agreement, when considering whether to make any of the above awards. The existence of an agreement is capable of altering what a court would otherwise consider to be fair.

The Supreme Court have confirmed that the English courts will be ready to attribute appropriate (and in the right case decisive) weight to a pre or post-nuptial agreement or matrimonial property regime when having regard to all of the circumstances of the case. The existence of such an agreement will be one of the factors, perhaps the most compelling factor, in deciding how to divide a couple's assets upon divorce.

The procedural safeguards

The Supreme Court held that:

"The court should give effect to a nuptial agreement which 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."

If an agreement is to carry weight both parties must enter into it:

- Of their own free will
- Without undue influence or pressure
- Informed of its implications

It is also important that each party should:

- Have all of the information that is material to a decision about whether to enter into the agreement
- Enter into it with the intention that the agreement should govern what will happen to the assets in the event that the marriage breaks down

However the Supreme Court did not, as many expected, set out a comprehensive set of procedural safeguards the absence of which would lead to an agreement being disregarded.

Whereas in the Radmacher case, H had argued that the agreement should be set aside on the grounds that there had been no financial disclosure and he had not taken independent legal advice, the Supreme Court concluded that the Court of Appeal was right to ask in this

case whether there was any **material** lack of disclosure, information or advice which should reduce the weight to be attached to the agreement. The Court stated that whilst it is desirable that both parties have independent legal advice, to ensure that they understand the implications of the agreement, and that there has been full financial disclosure, if it is clear that one spouse is fully aware of the implications of the agreement and indifferent to the details of the other spouse's assets, then the weight to be afforded to the agreement need not be reduced just because they were unaware of the particulars.

In considering the question of fairness, the Supreme Court held that this can often be addressed in looking at whether the agreement would operate unfairly in the circumstances prevailing at the breakdown of the marriage, rather than at the time that the agreement was entered in to. It follows that it will still be open to the court to disregard any pre-nuptial agreement on a case by case basis, especially if it is deemed unfair to any children of the marriage.

How might an agreement be undermined? The court will look at whether there has been duress, fraud or mistake. Undue pressure or exploitation of a dominant position may also reduce the weight which the court is likely to attach to the agreement. If the terms of the agreement are unfair from the start, this will also reduce the weight afforded to it. Factors which may affect the fairness, and consequently the weight which the court will attach to a pre-nuptial agreement are likely to include:

- Whether the agreement prejudices the reasonable requirements of any children of the family;
- Whether the agreement addresses the couple's existing circumstances, or whether it looks to provide for contingencies of an uncertain or unforeseen future;
- Whether the agreement provides for what should happen to existing property owned by one of the parties or which one party anticipates receiving, or whether it seeks to provide for what will happen to matrimonial property accumulated during the course of the marriage;

Where a couple have entered into a pre-nuptial agreement before the judgment of the Supreme court in this case, consideration will need to be given to whether they intended this agreement to be effective since the position was unclear as to the impact of such agreements in English law. However couples who enter into an agreement after this judgment will be likely to be regarded as having intended it to be given effect.

Post-nuptial agreements

A post nuptial agreement is one made after the parties have married and can be done while a couple remain together, when they are on the point of separating or even after separation.

The status and effect of post-nuptial agreements was considered recently by the Privy Council in the case of *MacLeod v Macleod.* In that case, the Court distinguished post-nuptial agreements from pre-nuptial agreements, on the basis that a couple entering into a post-nuptial agreement had accepted obligations and responsibilities to one another and should not be stopped from entering into contractual financial arrangements governing their lives together, including upon separation. On this basis, post-nuptial agreements were found to be capable of being upheld by the English courts as valid and enforceable agreements, although remaining subject to the court's power of variation.

The Supreme Court have now endorsed the decision of the Privy Council in MacLeod, such that parties who have made a post-nuptial agreement should be entitled to enforce that

agreement if they separate and the same principles will apply to post-nuptial agreements as have been outlined above.

The future

The Law Commission is currently considering reform to this area of law and a report is expected in 2012. Following this, it is possible that a change to the law will be proposed by way of legislation. The EU is also proposing a Regulation to harmonise the law that applies to matrimonial property regimes.

Until such time, the position now stands that a couple who freely enter into an agreement, in contemplation of or during the course of their marriage, and with a full understanding of the implications of that agreement can expect it to be given decisive or compelling weight by the court in deciding how their assets should be divided upon separation, providing that the effect of the agreement remains fair. With nearly 45% of marriages now ending in divorce there can be considerable benefit, both from an emotional and a cost perspective, of having such certainty.

If you are contemplating entering into a pre or post-nuptial agreement or choosing a matrimonial property regime or wish to discuss the effect of an agreement that you have already entered into, please contact any of the family lawyers here at Russell-Cooke to arrange an appointment.

A link to the full judgment in Radmacher v Granatino can be found below.
http://www.supremecourt.gov.uk/docs/UKSC_2009_0031_Judgment.pdf

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