Pre-nups – where are we now?

HARPREET KHINDA

Trainee, HarcusSinclair

TESSA BRAY

Senior Associate, HarcusSinclair

Harpreet Khinda

Tessa Bray

With the words, "We wholeheartedly endorse the conclusion… that the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away", there has been a shift in the longstanding principle that pre-nuptial agreements are against public policy and not binding in England & Wales.

Family practitioners will be familiar with these words from the landmark judgment of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42. In considering the case law post-*Radmacher*, it is useful to review the factors that the Supreme Court stated would affect the weight given to a pre-nuptial agreement:

1. 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 circumstances where it would not be fair to hold the parties to the agreement.

2. There is no absolute rule for full disclosure or independent legal advice. The question is whether in the individual case there is a material lack of disclosure, information or advice.

3. The presence of any vitiating factors of duress, fraud or misrepresentation will negate any effect the agreement might otherwise have. Numerous factors will be considered, including: any exploitation of a dominant position; a party's emotional state; the parties' ages and maturity; and whether they had been married before.

4. In determining whether it would be fair to hold the parties to their agreement the court will not allow any prejudice to reasonable requirements of any children; will accord respect to the decision of the married couple as to the manner in which their financial affairs should be regulated, particularly with existing circumstances such as where the agreement seeks to protect pre-marital property; and will regard any agreement unfair if it purports to leave one spouse in a predicament of real need while the other enjoys a sufficiency or more. 'Need' may be interpreted as being the minimum amount required to keep a spouse from destitution.

The needs of the parties are of paramount importance in determining whether the court will uphold a pre-nuptial agreement. However, the requirements for legal advice and financial disclosure have been interpreted differently depending on the individual circumstances.

Cases where nuptial agreements were taken into account

***Z v Z* [2011] EWHC 2878 (Fam)**

In this case Moor J had to consider the effectiveness of a French prenuptial agreement in a 14-year marriage. The parties were French and had entered into a *separation des biens* (providing for a regime of separation of goods) in 1994, just days before their marriage. The agreement provided for the wife to surrender her rights to share in the couple's assets in the event of their separation. However, the agreement did not make any provision for maintenance. The couple had three children and their total assets were £15m, the majority in the husband's name.

Although the wife had no independent legal advice and there had been no disclosure of the parties' assets prior to their signing the agreement (drawn up by two notaries), before the hearing the wife accepted that she had understood the meaning of the agreement and that she was aware of the husband's financial position.

"While Radmacher *may have changed the history of English matrimonial law, it is by no means the end. The case law after it is developing and with it the details become refined"*

The husband argued that because the couple had willingly entered into the *separation des biens* agreement, the sharing principle should not apply, and said that 35% of the assets should be paid to the wife, to meet her maintenance needs. Conversely, the wife stated she was entitled to 50% of the assets. It was agreed that if the *separation des biens* agreement had not been in place, equal sharing of the assets would have been the result.

Moor J held that the wife should be bound by the *separation des biens* agreement. The judge rejected her contention that the parties had only entered into the agreement to protect the wife from the husband's business debts. In referring to the first principle in *Radmacher*, Moor J held it was not disputed that both parties had entered into the agreement with a full understanding of its implications. They had arranged their financial affairs throughout their marriage consistently with the agreement.

There was also much discussion about several drafts of a document that the husband had signed in 2008, which attempted to exclude the *separation des biens* agreement. It was found that, in any event, such a letter between the parties would not have the effect of altering the *separation des biens* agreement because, under French law, any amendments to the way that matrimonial property is held must be by a subsequent notarised agreement. Taking account of the wife's needs, the wife was awarded 40% of the assets.

V v V [2011] EWHC 3230 (Fam)

In this case the court again placed more weight on a pre-nuptial agreement than it would have done historically. The parties' marriage was a short one, lasting three years (plus two years of pre-marital cohabitation). Before the marriage, they entered into a pre-nuptial agreement on the husband's request. The agreement was fairly brief in content and the wife was not advised on the terms of it, nor was there detailed disclosure in respect of some of the husband's assets at the time of the agreement.

Mr Justice Charles found that, in adopting a pre-*Radmacher* approach to such agreements, the district judge at first instance had accorded too little weight to the agreement and failed to properly recognise the weight to be given to the autonomy of the parties. The court felt there was clearly a common understanding as to the purpose of the agreement when the parties entered into it, and the court should not interfere with the autonomy of the parties. Although the needs of the wife and the children had to be met, the pre-nuptial agreement provided a good and powerful reason for departing from an equal division of the assets. The wife's eventual share was less than 50% as a result.

Cases where nuptial agreements were not upheld

Kremen v Agrest [2012] EWHC 45 (Fam)

Both husband and wife were wealthy Russians, married for 16 years. They had three children, aged 19, 14, and 7 at the hearing. The wife argued that the husband was extremely wealthy – and manipulative, as he was hiding a fortune of around £100m.

In 2001, when the marriage was faltering, the parties entered into an Israeli post-nuptial agreement, later made into a court order in Israel. The husband argued this agreement prevented the wife from making the instant claims against him.

Mostyn J found there was no full appreciation by the parties of the implications of the post-nuptial agreement and it seriously prejudiced the reasonable needs of their children. He accorded no weight to it and conducted the usual section 25 sharing exercise. The agreement was highly disadvantageous to the wife from both a needs and a sharing perspective. She had not had any independent legal advice and therefore had no appreciation of its implications. She would not have known what rights she was foregoing under English law. It would have been grossly unfair to hold the wife to an agreement that deprived her of a fair share of a fortune to which she had, in her own way, equally contributed.

The wife was awarded a lump sum of £12.5m, which included a needs component of £8.3m. The total award comprised housing needs of £2m, annual income for the wife of £200,000, maintenance for the younger two children at £20,000pa each, and payment of school fees of £365,000.

B v S [2012] EWHC 265 (Fam)

The parties were married in Catalonia and were married for 14 years. They entered into a Catalonian agreement, which provided that the default rules of Catalonia and separation of property would apply to specific property that was bought in

the wife's name. The parties received advice on signing, but the wife contended this property was to remain a family asset.

At final hearing it was held by Mostyn J that the agreement would be given 'absolutely no weight.' It was noteworthy that neither party was from Catalonia. There had been no discussions between spouses and neither had taken independent legal advice as to whether the agreement would be binding in England. Mostyn J said the court may depart from the default position where it is unjust and injustice is likely to exist if the parties are left with a major economic imbalance. Neither party entered into the agreement with 'a full appreciation of its implications' as described in *Radmacher*. The wife received approximately 50% of the assets and maintenance of £10,000pcm.

Although the agreement in *B v S* was not upheld, Mostyn J gave some useful guidance. At paragraph 12(ii) he summarises *Radmacher* and says:

"In determining whether an agreement has been 'freely entered into by each party with a full appreciation of its implications, there is no absolute black and white rule for full disclosure or independent legal advice."

Furthermore, at paragraph 20 he says:

"In my judgement the requirement of 'a full appreciation of its implications' does not carry with it a requirement to have received specific advice as to the operation of English law on the agreement in question… But in order to have influence here it must mean more than having a mere understanding that the agreement would just govern in the country in which it was made the distribution of property in the event of death, bankruptcy or divorce."

This is good guidance for the international client, as if husband and wife intend the agreement to have effect wherever they might be, then this gives them a good chance of fulfilling this test.

It is clear the cases since *Radmacher* are fact-specific. Fairness and needs are a consistent theme, and *Z v Z* shows needs are interpreted generously. This is most relevant where the wealth has been acquired during the marriage and is not pre-owned by one party. Independent legal advice and financial disclosure are essential. While *Radmacher* may have changed the history of English matrimonial law, it is by no means the end. The case law after it is developing and with it the details become refined. While pre-nuptial agreements are useful in helping to protect wealth, the case law is fact-specific and legal advice should be tailored to clients' individual circumstances.