HOW INFLUENTIAL IS A VALID NUPTIAL AGREEMENT IN THE CONTEXT OF S.25(2) MCA 1973?

Introduction

1. The modern law relating to pre and post-nuptial agreements (to which, incidentally, absolutely no reference whatsoever is made in s.25) stems from *Radmacher (formerly Granatino) v Granatino [2010] UKSC 42*, in which the Supreme Court formulated a new test, per Lord Phillips at [75];

   "*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 facts of *Radmacher* in broad outline

2. In *Radmacher*, the German wife and French husband signed a pre-nuptial agreement in Germany in 1998 which provided for strict separation of assets, for the waiver of any claim for maintenance by either party if the marriage ended and for German law to govern the effects of the marriage. During the marriage, which lasted eight years, the husband and wife made their home primarily in England where, having had two

children, they were subsequently divorced. The husband applied for financial relief from the wife who was worth over £50 million (most of which had been inherited) and who also had an interest in family companies which produced income of around £2m per year. Although during the marriage the husband had been a successful banker, he had become disenchanted with this and had given it up in order to study at Oxford; he had no assets of his own. The wife argued that the English court should enforce the pre-nuptial agreement, whereas the husband argued that it should not be enforced; he accepted that he was not entitled to a share of the wife's inherited property, but sought around £7m on the basis of needs. In advance of the hearing, the wife had taken the children to live first in Germany and then subsequently in Monaco, whereas the husband had remained living in England.

3. The trial judge, Baron J, awarded the husband £5.56 million plus the use of a substantial property abroad for contact purposes until the children's majority, together with periodical payments of £35,000 per year, per child. Baron J held that the pre-nuptial agreement was defective under English law because the husband had received no independent legal advice, the agreement deprived the husband of all claims (even in a situation of need), there had been no disclosure of the value of the parties' assets respectively, there had been no negotiations and the agreement had made no provision for the birth of any children.

Nevertheless, Baron J held that the husband's award would be restricted to reflect the fact that he had agreed to the pre-nuptial agreement, not least because when he signed it he had been aware of its effect. The wife appealed successfully to the Court of Appeal which considered that the judge should have given greater weight to the agreement entered into willingly and knowingly by the parties as responsible adults and should, accordingly, have limited the husband's award to his role as father, carer and home maker for the children. Thus, the case was remitted to Baron J on the basis that the housing fund of £2.5 million should not belong absolutely to the husband, but should be held only during his parenting years, and that the income fund should be capitalised to cover the his needs only until the youngest child was 22. The husband then appealed, albeit ultimately unsuccessfully, to the Supreme Court.

<u>"Freely entered in to… with a full appreciation of its implications"</u>

4. Earlier at [68] to [72] Lord Phillips stated;

"[68] If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both husband and wife must enter into it of their free will, without undue influence or pressure, and informed of its implications".

"[69] 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 or the marriage coming to an end".

"[70] It is, of course, important that each party should intend that the agreement should be effective. …. Thus, 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".

"[71] In relation to the circumstances attending the making of the nuptial agreement …… the first question will be whether any of the standard vitiating factors, duress, fraud or misrepresentation, is

present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have, but unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as an exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it".

"[72] The Court may take into account a party's emotional state, and what pressures he or she was under to agree, but that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those would include such matters as their age and maturity, whether either or both of them had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered in to the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way".

5. A very good example of an agreement (post-nuptial in this instance, entered into in Israel 10 years into a 16 year marriage and in circumstances where it was drawn up by a friend of the husband) carrying no weight in the light of a lack of any evidence of the wife having received independent legal advice, a lack of financial disclosure and where the wife had entered the agreement under pressure from the husband is *Kremen v Agrest [2012] EWHC 45 [Fam],* where Mostyn J said at [73];

"*It seems to me that it will only be in an unusual case where it can be said that, absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a* ***full appreciation*** *of its implications…. It would surely have to be shown that the spouse, like Mr Granatino, had a high degree of financial and legal sophistication in order to have a* ***full appreciation*** *of what legal rights he or she is signing away. Equally, it seems to me that there would have to be clear evidence of significant economic capacity on the part of the claimant spouse before the assessment of needs was supressed to that minimum level imposed on Mr Granatino*".

The Importance of the Principle of Personal Autonomy

6. The Supreme Court in Radmacher approved the dicta of Rix LJ in the Court of Appeal in which he said at [73];

"If the parties to a perspective marriage have something important to agree with one another, then it is often much better, and more honest, for that agreement to be made at the outset, before the marriage, rather than left to become a source of disappointment or acrimony within the marriage".

7. Later, Mostyn J also stressed the importance of personal autonomy in *BN v MA [2013] EWHC 4250 (Fam) at [28];*

"*The principle of autonomy is, in my view, extremely relevant. In many cases … the parties entering into the agreement are sophisticated, highly intelligent and had the benefit of the best legal advice that money can buy. When in those circumstances they have thrashed out an agreement, which they have both then freely signed, in my view, heavy respect should be accorded to that decision. The question of autonomy is particularly relevant when the agreement seeks to protect pre-marital property. This is clear from paragraph 79 of Granatino v*

Radmacher, and in this case that is exactly what the agreement was intended to achieve".

8. As experience and the relevant authorities clearly demonstrate, personal autonomy is particularly likely to attract weight, as illustrated by the citation above, and very likely decisive weight, in the context of agreements reached in relation to the treatment of the parties' pre-acquired or "*non-matrimonial*" property.

Fairness

9. The over arching consideration of fairness was considered in *Radmacher*, and some general guidance given, summarised in the headnote at (5);

"*The question of fairness would depend upon the facts of the particular case, but some general guidance could be given; a nuptial agreement could not 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, particularly where the parties' agreement addressed existing circumstances, not merely the contingencies of an uncertain future; the distinction between matrimonial and non-matrimonial property was particularly significant where the parties*

made express agreement as to the disposal of such property in the event of the termination of the marriage, and there was nothing inherently unfair in such an agreement; the longer the marriage had lasted, the more likely it was that the couple's circumstances would have changed over time in ways or to an extent that either could not be or simply was not envisaged, giving more scope for what had happened over the years to make it unfair to hold them to the agreement. Of the three strands identified in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, needs and compensation were the strands that could most readily render it unfair to hold the parties to an ante-nuptial agreement, but where these considerations did not apply, and each party was in a position to meet his or her needs, fairness might well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that had come to pass. Thus, it was in relation to the third strand, sharing, that the court would be most likely to make an order in the terms of the nuptial settlement in place of the order that it would otherwise have made".

10. In circumstances where there is nothing vitiating in terms of the circumstances surrounding the entering into of the agreement, the focus tends to be on an assessment of needs. Needs is however, in this

specific context as elsewhere, something of an elastic concept. Thus, awards range from the decidedly ungenerous (and resembling Schedule 1 provision) such as in Radmacher itself (which spoke of "a predicament of real need") and *Luckwell v Limata [2014] EWHC 502 (Fam),* per Holman J, to much more generous levels such as in *Z v Z [2011] EWHC 2878 (Fam),* per Moor J, (where W achieved an award assessed on a needs basis of just over £6,000,000, and representing 40% of the overall assets, the departure from equality being justified so as to reflect the existence of the pre-nuptial agreement) and *MA v KA [2018] EWHC 499 (Fam)*, in which (in the context of what was in effect a 10 year second marriage where both parties were now in their mid-fifties but where the wife had given up work upon the parties having a child and where the husband's wealth and the parties' levels of expenditure had increased considerably across the marriage) Roberts J substituted a Duxbury fund of £1.6m for the £24,000 p.a. provided for in the pre-nuptial agreement.

11. Interestingly, in *Kremen v Agrest,* Mostyn J suggested at [72] that on one interpretation of *Radmacher* "predicament of real need" meant limiting provision to that which would "keep a spouse from destitution", though in *WW v HW [2015] EWHC 1844 (Fam)* Nicholas Cusworth QC expressed disagreement with that formulation and, whilst ungenerous, the writer observes that the provision in *Radmacher* hardly came into that category anyway.

12. *Luckwell*, referred to above, contains a helpful summary of the law (both as to fairness/needs, and generally), at [130] and [132];

"(1) It is the court, and not the parties, that decides the ultimate question of what provision is to be made;

(2) The overarching criterion remains the search for "fairness", in accordance with section 25 of the MCA 1973 as explained by the House of Lords in Miller v Miller; McFarlane v McFarlane [2006] UKHL24, (i.e. needs, sharing and compensation), but an agreement is capable of altering what is fair, including in relation to "need";

(3) an agreement (assuming it is not "impugned" for procedural unfairness, such as duress) should be given weight in that process, although what weight may be anything from slight to decisive in an appropriate case;

(4) the weight to be attached to an agreement may be enhanced or reduced by a variety of factors;

(5) Effect should be given to an agreement that is entered in to freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement.

That is, there is at least a burden on the [Claimant] to show that the agreement should not prevail;

(6) Whether it will "not be fair to hold the parties to the agreement" will necessarily depend on the facts, but some guidance can be given:

> *(i) A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;*
>
> *(ii) Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;*
>
> *(iii) There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it such as obligations towards family members;*
>
> *(iv) The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the*

time of the making of the agreement unfair now, particularly if the position is not as envisaged;

(v) It is unlikely to be fair that one party is left "in a predicament of real need" while the other has "a sufficiency or more";

(vi) Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement".

13. The above summary was adopted by Roberts J in *KA v MA [2018] EWHC 499 (Fam)* which was an interesting case on its facts in which, as so often seems to happen, the terms of the pre-nuptial agreement, whilst not strictly governing the award, nevertheless significantly influenced its overall level.

<u>What are the ramifications of a finding to the effect that the terms of an otherwise valid nuptial agreement fall short of meeting needs?</u>

14. What is the breadth of the court's discretion if it considers that the terms of an otherwise valid nuptial agreement fall, for one reason or another, short of meeting needs? This was one of the issues arising on appeal in Brack v Brack [2018] EWCA Civ 2862, in which Francis J had in

such a situation considered himself constrained to make an order limited to bridging the gap between the provision made under the agreement, on the one hand, and the meeting of the relevant party's needs, on the other.

15. In holding that Francis J had erred in considering himself so constrained, the Court of Appeal emphasised the width of the court's discretion in such circumstances, which is in principle unlimited. The upshot therefore is that whilst it is open to a court, if finding that a nuptial agreement is unfair because it fails adequately to meet needs, to limit its award to bridging the gap, if it considers that in all the circumstances, and perhaps taking particular account of the agreement, to be fair - but it is not bound or required to do so.

Cases with an international element

16. As in *Radmacher* itself, the English courts (and London is, after all, considered by many both within and beyond these shores to be the "divorce capital of the world") are often presented with applications to enforce nuptial agreements made in foreign jurisdictions. The question therefore arises as to whether the potentially unforeseen or unanticipated application of English law to the agreement should affect the court's finding as to whether or not the parties entered into it with a

full appreciation of its implications. As to this, in *B v S [2002] 2 FLR 502*, Mostyn J said this at [20]:

"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. It must surely mean that the parties intended the agreement to have effect wherever they might be divorced* ***and most particularly*** *were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution. I have respectfully suggested in Kremen v Agrest that usually the parties will need to have received legal advice to this effect, and will usually need to have made mutual disclosure".*

17. However, this appraisal was considered by the Court of Appeal in Versteegh v Versteegh [2018] EWCA Civ 1050, to represent an overstatement, setting the bar *"too high"*. King LJ said this at [65];

"In my judgment, when an English court is presented with a PMA such as the present one, signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to Radmacher to the effect that such a spouse will be regarded as having lacked the necessary

appreciation of the consequences absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system".

18. In *Radmacher* itself, the international aspect operated to enhance the weight attached to the agreement, because it was clear that it would have been held to have been binding in both France and Germany; this enabled the court to find with greater certainty that the parties had intended the agreement to be effective.

19. Clearly, the importance or otherwise of the international element will be very fact dependent in any particular case, and a good example of one cutting the other way is the recent decision of Mostyn J in *Ipekci v McConnell [2019] EWFC 19*, in which the agreement under consideration had been entered into in New York. However, Mostyn J's finding (based on SJE evidence in the case) was that the agreement had a fatal flaw under New York law, such that it would have attracted even there *"minimal, if any, weight".*

ROGER BICKERDIKE

Zenith Chambers

10 Park Square
Leeds
LS1 2LH
3rd June 2019