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# PRENUPTIAL AGREEMENTS, "ALL THAT I HAVE I SHARE WITH YOU - SUBJECT TO CONTRACT"

A Prenuptial Agreement was the subject of the recent English Supreme Court decision in the case of Radmacher v Granatino[1], generating great media interest. What does it mean for couples contemplating marriage in Jersey?

## THE FACTS

The case involved a French wife, a German husband, a Swiss marriage and an English divorce. The wife was said to be worth £100 million. The husband had signed a prenuptial agreement four months before the marriage in 1998 giving up any claim to the wife's fortune in the event that the couple separated. The prenuptial agreement had been signed before a German notary.

The husband had not seen a translation of the document, had not taken independent legal advice and there had been no disclosure of the extent of the wife's wealth.

At the time of marriage the husband was earning substantially himself as an investment banker. By the time of divorce, he was reading for a doctorate at Oxford University with limited income.

There was no dispute that if the divorce had been brought in France or Germany, the prenuptial would have been binding. But the divorce was brought in England.

## THE COURT OF APPEAL DECISION

The Court of Appeal[2] decided that the husband was a man of the world - he had understood he would not be entitled to anything on divorce when he signed the agreement, notwithstanding the lack of translation, legal advice or disclosure.

The Court of Appeal therefore gave 'decisive weight' to the prenuptial agreement when calculating what financial settlement the husband should receive.

However, that was not the end of the matter. The prenuptial agreement did not affect the obligations of the wife to provide financially for the couple's children. There were two young children born during the marriage and the husband and wife were sharing their care. The wife was ordered to pay £2.5 million for a house in London for the benefit of the husband, but only in his capacity as homemaker and child-carer. The house would therefore be held on trust and revert to the wife on the youngest child's 22nd birthday. Further funds for a house in Monaco (where the wife and children lived) were to be provided by the wife on the same terms.

The wife was also ordered to pay £70,000 per year to the husband by way of child maintenance until the youngest child's 22nd birthday, as well as further maintenance to the husband calculated by reference to the youngest child's 22nd birthday. The husband received £700,000 to clear his legal fees and debts and £25,000 for a car.

Although the prenuptial agreement was given decisive weight in respect of the husband qua spouse, he received substantial benefit in his capacity as home-maker and child-carer.

By a majority, the Supreme Court endorsed the Court of Appeal's approach.

The Supreme Court found that there are no public policy grounds on which to refuse to give effect to prenuptial agreements. Divorce courts will therefore be bound to have regard to prenuptial agreements, although such agreements cannot oust the jurisdiction of the Court. The Court will therefore consider how much weight to give a prenuptial agreement, in the circumstances of each case, set against a criterion of fairness.

[1] [2010] UKSC 42
[2] [2009] EWCA Civ 649

The test will be: if each party freely entered into the agreement, intending it to have legal effect and with full appreciation of its implications; in the circumstances, as they are now (ie at the time of divorce), would it be fair to hold the parties to that agreement?

In considering whether it is fair to hold parties to an agreement, the Supreme Court gave guidance as to the sort of factors a Court would take into account. First consideration should be given to the welfare of minor children of the family; the Court would respect the decision of a married couple to regulate their financial affairs by a prenuptial agreement; and in particular a wish to make provision as to what should happen to non-matrimonial property on termination of the marriage (i.e. property belonging to one of the parties prior to the marriage or received by inheritance during the marriage). The Court will bear in mind that it is unlikely that the parties would have intended that, in the event of a breakdown of the marriage, one partner be left in a predicament of real need. However, if each party is in a position to meet his or her needs, fairness may require the agreement to be given effect.

## THE EFFECT IN JERSEY

The effect of prenuptial agreements has not received judicial consideration in the Jersey Courts. This is surprising because, the Courts in England & Wales have been taking prenuptial agreements into account when quantifying ancillary relief claims since at least 1995 (albeit their status was not clear).

Unfortunately, until the matter receives judicial consideration in Jersey, it is difficult to advise clients what the Jersey Courts might decide in relation to prenuptial agreements.

It is tempting to say a Jersey Court would be likely to follow the Supreme Court decision. However, the Privy Council decision of MacLoed v MacLoed[3] cannot be ignored. Decided a few months before the Court of Appeal decision in Radmacher, on appeal from the Isle of Man, the Privy Council gave effect to a postnuptial agreement, finding it binding and enforceable. Significantly, the Privy Council drew a distinction between prenuptial and postnuptial agreements; finding that it was not open to them to reverse the long standing rule that prenuptial agreements are contrary to public policy and thus not valid and binding. Any change to that policy consideration would require legislative intervention.

The Jersey Courts ordinarily have the highest regard to Privy Council decisions. Therefore it would be open to the Jersey Courts to follow either the Privy Council decision or the Supreme Court decision (or indeed neither).

## SO IS MAKING A PRENUPTIAL AGREEMENT IN JERSEY A WASTE OF TIME?

No, most likely not.

There are powerful arguments for the Jersey Courts following the Supreme Court decision. Arguably, the Jersey Courts are culturally better placed than the English Courts to give effect to prenuptial agreements.

- First the Jersey Courts have traditionally placed primary importance on the concept of la convention fait la loi des parties – literally the agreement forms the 'law' of the parties. Where an agreement is entered into between responsible persons, good cause must be shown why it should not be enforced.[4] If an agreement is contrary to public policy, that is a 'good cause' not to enforce it. However, that does not mean the Court cannot take it account when exercising its statutory discretion as part of 'the circumstances of the case.'

- Secondly, in Jersey, a wife has always been able to disclaim her right of dower (a life interest in a third of her husband's immoveable property on his death) and a husband his right of viduité (life interest in all his wife's immoveable property on her death if children were born to the marriage). Ordinarily this is done by deed before the Royal Court.[5] Why should a spouse be bound by an agreement to waive a future interest in immoveable property which arises on death, but not on separation?

[3] [2008] UKPC 64
[4] Wallis v Taylor (1965) JJ 455
[5] Although note Ferchal v Ferchal [1990 JLR 117] – where widow held to have abandoned her usufruit orally (although she already had use of it at time of abandonment).

- Thirdly Jersey looks to the civil law and on occasion to the French Code Civile for its principles of contract law.[6] In France and indeed in many European jurisdictions, prenuptial agreements are common place and binding. Why then shouldn't Jersey consider a similar system? In France prenuptial agreements are witnessed by a notary public. One can envisage a system whereby pe-nuptial agreements might be passed as deeds before the Royal Court, although this would most likely require legislative intervention.

- Foreign nationals frequently settle in Jersey who may have entered into prenuptial agreements binding in the civil law regimes of matrimonial property in which they married. It seems unfair that the parties should lose the benefit such agreements may bring because they choose to reside in Jersey (although these were the circumstances in Radmacher) and it may lead to a race to bring divorce proceedings in a different forum that would recognise a prenuptial agreement, including of course now, England & Wales.

## PRACTICALITIES

To maximise the prospects of a Court giving weight to a prenuptial agreement, following Radmacher, it is clear that you should be able to demonstrate to the Court that each party entered into the agreement of their own free will, free from undue influence or pressure and that the agreement was intended to be effective. This can be best demonstrated by:

- both parties receiving independent legal advice before entering into the agreement;

- both parties giving full disclosure of assets and property;

- signing it free from external pressures – so the longer before the wedding, the better.

The Court may well find it is unfair to enforce the prenuptial agreement if there has been a change in circumstances since it was signed. It is impossible to cover all future contingencies of married life, so update the agreement periodically.

As Radmacher demonstrated, the birth of children will almost certainly constitute a change in circumstance. If for example there has been an accident affecting a spouse's health or ability to work or an unexpected inheritance, consider signing an updated postnuptial agreement.

## CONCLUSION

The Jersey Courts have yet to consider the enforceability or weight to be given either to prenuptial or postnuptial agreements. At present a client cannot therefore be sure that a Jersey Court would have regard to such agreements.

However, as long as the safeguards set out in Radmacher are followed before and after signature, there will be good arguments to be made for the Jersey Courts to follow the Supreme Court.

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[6] Selby v Romeril [1996 JLR 210]