

FOURTEEN

How can you free your client from a pre-nuptial agreement?



1. Introduction

The developments in the law relating to pre-nuptial contracts epitomise the changing societal attitudes to the breakdown of marriage

- contract v protected social institution
- certainty of litigation v flexibility of outcome
- self determination v court as final arbiter

- There has been a rapid and fundamental shift in the approach taken by the Courts to pre-nups. Understanding the reasons for this shift is critical to mounting effective challenges to pre-nuptial contracts
- When looking at the high volume of recent precedents, try to look for the underlying societal justifications for departing from, or upholding, a pre-nup, this may provide the key to unlocking the shackles in the case that you are advising on

Where to begin?

The starting point must be the principles set out in *Radmacher v Granatino* [2009] 1 FLR 1566:

- The court should give effect to a nuptial agreement providing that:
 - a) It is freely entered into
 - b) Each party had a full appreciation of its implications
 - c) It would not be unfair to hold the parties to the agreement

2. The (main) tactics

1. Strict contract law
2. Wider contractual arguments
3. Elapse of time/ change in circumstances
4. Maintenance claims
5. Fairness
6. Schedule one CA 1989 application

Strict contract law

- Radmacher expressly confirmed that the normal laws governing the vitiation of contracts applies to pre-nups
- So a pre-nup that conforms to strict contract law **may** be upheld but one that does not so conform will definitely **not** be upheld in the absence of other factors which point to the terms of the agreement being the fair outcome

- Therefore, look for:
 - duress,
 - undue influence/ exploitation of a dominant position
 - fraud
 - breach of contract
 - variation of contract
- We will probably all be able to recognise where fraud/ duress exists, but where is the line drawn in relation to undue influence?

- There is almost always an imbalance of power between parties to a marriage
- Sometimes a marriage will not take place if one party is unwilling to sign a pre-nup
- In *T v T [2013] EWHC B3* Parker J rejected an argument that undue influence was made out where the 'normal' pressures following the breakdown of the marriage were present

- Has there been a breach of contract?
 - Some pre-nups will require one or both parties to do, or not do, something during the marriage or post separation (eg purchase a property or invest funds against the event of separation)
 - If Party A does not keep to the contract, the Court may not hold Party B to the terms of that contract, if the breach is fundamental to the contract; see AH v PH [2013] EWHC 3873.

- It may be that parties vary a pre-nuptial contract during the course of the marriage. This could be by way of a written amendment, an oral agreement or, possibly, through implication. However, there needs to be very clear evidence of such a variation; Z v Z (No 2) (Marriage Contract) [2012] 1 FLR 1100.

- On any view, the circumstances where strict contract law will avail a party seeking to vitiate a pre-nup will be rare

Wider contractual arguments

- We will all be familiar with the principles set out in Edgar
- Radmacher does not remove these arguments from the arsenal of the would be renouncer. Indeed the need for both parties to have a 'full appreciation of [the agreements] implications' is entirely consistent with Edgar

- Therefore, look for whether or not:
 - the parties both had legal advice prior to signing the contract
 - it was a formal and comprehensive agreement?
- However, beware that there are a number of cases where one of the parties did not have legal advice, but were found to have a full appreciation of the implications of the agreement; *Radmacher, V v V [2012] 1 FLR 1315.*

- Cases where the Court has found that there was not an adequate appreciation of the implications of an agreement include:
 - GS v L [2013] 1 FLR 300 King J found that neither party had a proper understanding of an ambiguous agreement drawn up in Spain
 - AH v PH Moor J concluded that the Wife had not understood the implications of the agreement for a number of reasons including because she had not had all the information she needed to have at the time of the agreement

- Where contracts are drawn up in foreign jurisdictions, be aware that whether or not they were valid in that country was only indicative of the parties' intentions and relevant to fairness, not binding upon this court; Z v Z.
- Conversely, just because a contract is not valid in the country in which it was drafted does not mean that the domestic Courts will not treat it as a magnetic factor; AH v PH.

Elapse of time/ change of circumstances

- Radmacher does contain some authority for the proposition that a change in circumstances or the elapse of time may lead to a pre-nup not being upheld:

“...[there] will be the marriage of young persons..for whom the future is an entirely open book. If in such a case a pre-nuptial agreement should provide for no recovery by each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse from the other in the event of divorce, and the marriage should see the formation of a fortune which each spouse had played an equal role in their different ways of creating, but the fortune was in the hands for the most part of one spouse rather than the other, would it be right to give the same weight to their early agreement...?”

- That being said, it will be a rare case where the elapse of time or a change in circumstances will enable a spouse to persuade a Court that a pre-nup should be ignored

Maintenance claims

- Remember to be imaginative with your maintenance claims
- Maintenance does not have to be restricted to living costs, it can include housing and capital for school fees; *Kremen v Agrest (financial remedy: non-disclosure: postnuptial agreement) [2012] 2 FLR 414*
- However this is really a way of mitigating the effects of a pre-nup, not a way of avoiding the impact of a pre-nup altogether

It's not fair!



- Remember that, where there is a valid pre-nup, fairness is very different to fairness in a case where there is no such agreement
- In V v V, Charles J said '*The new respect to be given to individual autonomy means the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made*'

- However, the Court will not uphold a pre-nuptial agreement where it is fundamentally unfair
- The clearest example is perhaps found in *Luckwell v Limata* [2014] EWHC 502 a very recent case with the following facts:
 - Properly drafted pre-nup
 - Pre-nup was renewed and reaffirmed during the marriage
 - Husband had clearly understood the terms and implications
 - No undue influence or fraud
 - Husband had no claim based on contribution, compensation or sharing
 - Yet still a substantial award was made, contrary to the terms of the pre-nup because to do otherwise would have been unfair

Sch1 of the Children Act 1989

- A pre-nup will rarely prevent the possibility of an application being made under sch1 of the CA 1989
- When the court considers an application under sch 1, it will usually bear in mind the principle that a child should be brought up by the (applicant) resident parent having regard to the standard of living enjoyed by the (paying) non-resident parent; *Re P (Child: Financial Provision) [2003] 2 FLR 865*

3 Evidence gathering

- Remember to ensure that you have gathered all possible sources of evidence to evaluate all the issues that you need to evaluate
- This should include:
 - the solicitor files where parties have had legal advice
 - Inter partes correspondence at relevant times
 - Accounts from third parties involved in, or aware of, the negotiations
 - Evidence of professional, non legal, advice that may have been taken at the time, for example from an accountant or tax advisor
 - Where relevant, evidence of the validity of the agreement in the jurisdiction in which it was entered into

4 The Future

- The law commission report has been completed and published on 26 February 2014. It can be downloaded as a pdf from this page [http://
lawcommission.justice.gov.uk/areas/
marital-property-agreements.htm](http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm)

- The recommendations are:
 - Pre-nups should be given contractual status
 - The concept of ‘qualifying nuptial agreements’ should be introduced by primary legislation
 - Features of a ‘qualifying nuptial agreement’ should be:
 - That they are made after both parties have made full disclosure
 - Both parties have had legal advice
 - Neither party can contract out of their obligation to meet the needs of the other party
 - Such agreements would not be subject to the oversight of the Courts save in circumstances where needs have not been met
 - The Law Commission anticipates that ‘qualifying nuptial agreements’ can only be used in cases where assets substantially outstrip needs
 - However, given the elastic concept of needs in financial remedy cases how will this type of pre-nup be approached by the Court?

- In *Z v A [2012] 2 FLR 667* the Court found that there was no pre-nuptial agreement, but there had been a course of conduct throughout the marriage which was highly relevant to the determination of the application (though NB this was a claim under the MFPA 1984 not the MCA 1973)
- Does this case have any applicability to MCA 1973 cases?