SOME QUESTIONS POST RADMACHER

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1. THE QUESTIONS

1.1. Engaged couples who read the newspapers on 21st October 2010 would have been forgiven for thinking that the Supreme Court's decision in *Radmacher v. Granatino* had made pre-nuptial agreements binding in the courts of England and Wales.

1.2. The Daily Mail ran the headline:

> Judges back prenups for Britain: Traditional marriage laws are swept aside in landmark decision by Supreme Court

and the article beneath started with the following:

> Judges yesterday tore up England's marriage laws to offer couples binding prenuptial contracts.

1.3. Those who were sufficiently interested to read the judgments would have appreciated that even the eight judges who made up the majority did **not** presume to take away the court's discretion, let alone rule that henceforth a pre-nuptial agreement could be determinative of the distribution of resources following the breakdown of the marriage. Said Lords Phillips, Hope, Rodger, Walker, Brown, Collins and Kerr[1]

> There can be no question of this court altering the principle that it is the court, and not any prior agreement between the parties, that will

[1] at paragraph 7

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> determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation. **What the court can do is to attempt to give some assistance in relation to the approach that a court considering ancillary relief should adopt** towards an ante-nuptial agreement between the parties.

1.4. For the purpose of providing such assistance it uttered the proposition[2] which should now invariably feature in the advice given to clients before they sign up to a pre-nuptial agreement.

> **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**

1.5. Indeed to make sure that proposition is not overlooked, in agreements which I draft, particularly when there are foreign lawyers involved, I will often expressly refer to it in the Recital, stating:

> H and W are aware that in the judgment in the case of *Radmacher v Granatino*, given on 20 October 2010, the Supreme Court of the United Kingdom advanced the following proposition to be applied in the case of both pre/ante- and post-nuptial agreements …

1.6. In seeking to answer what it conceded was the "difficult" question, "in what circumstances will it not be fair to hold the parties to their agreement?" the Supreme court resorted to a familiar mantra[3]:

> This will necessarily **depend upon the facts of the particular case**, and it would **not** be **desirable to lay down rules** that would fetter the flexibility that the court requires to reach a fair result

1.7. However the Supreme Court then felt itself able to give some "guidance" to apply where there were no tainting circumstances attending the conclusion of the agreement, saying[4]:

> Of the three strands identified in *White v White* [2001] 1 AC 596 and *McFarlane v McFarlane* [2006] 2 AC 618 , it is the first two, **needs and compensation,** which **can most readily render it unfair to hold the parties to an ante-nuptial agreement**

1.8. With respect to needs giving rise to vitiating unfairness their Lordships stated thus[5]:

[2] at paragraph 75
[3] see paragraph 76
[4] at paragraph 81
[5] at paragraph 81

> **The parties are unlikely to have intended** that their ante-nuptial agreement should result, in the event of the marriage breaking up, in **one partner being left in a predicament of real need**, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.

1.9. It was that worthy pronouncement, followed by the Supreme Court's (with the noble exception of Baroness Hale) summary, and unworthy, dismissal of Mr Granatino's post-parenthood needs-based claim[6] that generated the first of today's questions, "What is a predicament of real need?"

1.10. While that question relates to the effect of a pre-nuptial agreement, the other two questions, "Can an agreement apply a marital property regime?" and "Are there any pitfalls if an agreement isn't binding?" are really concerned with drafting matters – with what can or should go into a pre-nuptial agreement in the first place. They are questions that I repeatedly ask myself:

(a) when I am involved in the production of a pre-nuptial agreement for an international couple; and

(b) when I am reviewing the extent of my insurance cover.

2. WHAT IS "A PREDICAMENT OF REAL NEED"?

2.1. In the field of what used to be called 'ancillary relief', now abbreviated to 'financial orders following a decree', it is well understood that 'need' is a relative rather than absolute concept.

2.2. Post divorce, the court's assessment of a party's need has tended to be reflective of at least two factors:

(a) the standard of living or lifestyle enjoyed by the parties during the marriage;

(b) the extent of the resources available to meet the need at the time of its assessment.

2.3. It's for that reason that:

[6] see paragraph 119, where H's housing need on the younger child attaining 22 is not addressed

(a) in the days before *White v White*[7] a party's need was commonly categorised as their "reasonable requirements" which took into account not just the standard of living and the resources available, but also factors such as age, health, length of marriage and contributions[8];

(b) in the post *White* era 'need' has been expanded to 'relationship generated need'[9], which must be 'generously interpreted'

2.4. The need for such qualification of the word 'need' is obvious; if fairness is to be achieved as between the parties, provision for the spouse of the multi-millionaire will generally have to be rather greater than provision for the spouse of an individual on benefits, or at least of an individual of more modest means.

2.5. In *Radmacher* at first instance[10], Baron J's evaluation of Mr Ganatino's needs reflected the need for relativity in the assessment. The judge valued Mr Ganatino's claim on a needs basis at £5.56 million, finding that his needs comprised:

(a) a home of his own (i.e. owned by him absolutely) for which he would need £2.5 million to purchase and refurbish;

(b) £700,000 to cover the bulk of his debts;

(c) £25,000 for a suitable car;

(d) £2.335 million for a Duxbury fund which, together with his earnings of £30,000 per annum would mean he would have a net spendable income of £100,000 per annum.

(e) The right to occupy rent-free a property in Germany for weekend stays with his daughters, €630,000

2.6. Baron J's assessment of needs was expressly based on H's needs "as judged against the lifestyle that the parties lived and the fact that the Husband agreed that he did not intend to seek any financial award if the marriage ended[11]." It was also based on Ms Radmacher having liquid assets of approximately £54.3

[7] [2001] 1 AC 596
[8] *Page v. Page* [1981] 2 FLR 198 at page 201 and *Dart v. Dart* [1996] 2 F.L.R. 286, at page 296
[9] *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 - Lord Nicholls, at paragraph 11, Baroness Hale at paragraph 138
[10] [2009] 1 FLR 1478
[11] see paragraph 95

million plus significant shareholdings in family companies, which weren't valued, but which produced for Ms Radmacher an annual income of £2.7 million gross, £1.5 million net.

2.7. The Court of Appeal limited the provision for Mr Granatino to a housing fund and an income fund *for the duration of the parenting years* - i.e. until the younger of the parties' two children attained the age of twenty-two - directing that those funds should be provided to him in his role as father rather than as former husband. In effect the Court of Appeal equated married parenthood with unmarried parenthood. That approach was upheld by the Supreme Court.

2.8. Thus, going by the decision of the Supreme Court, it appears that when there is a pre-nuptial agreement which either precludes or limits a claim, what will constitute 'a predicament of real need' will vary, depending on whether or not there are minor children of the marriage to be taken into account.

2.9. Where there are such minor children, it seems that the financially weaker party will be in 'a predicament of real need' if he or she is unable to afford at least as much as would be provided by a claim brought under Schedule 1 of the Children Act 1989.

(a) where the child's parents are married resort to the Children Act is not commonly made because of the availability of relief under the Matrimonial Causes Act 1973;

(b) however, the fact that the Children Act nonetheless applies is apparent from paragraph 16(2) of Schedule 1; its applicability is confirmed in the Law Commission's Consultation Paper in relation to Marital Property Agreements; [12]

(c) thus, if a claiming parent's 'real need' in a claim made under the Matrimonial Causes Act 1973 were to be assessed any less favourably it would only lead to that parent making a separate claim under the Children Act.

[12] See paragraph 2.24

2.10. In a claim made under the Children Act statute[13] obliges the court to have regard to the financial resources of both parents, but not to their standard of living. However in *J v C (Child: Financial Provision)*[14], Hale J said

> "A child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and the father's present standard of living."

and the Court of Appeal in *Re P (Child: Financial Provision)*[15] said that her statement was "unquestionably sound and should be clearly endorsed".

2.11. Accordingly, where there are minor children, the assessment of "real need" *is* still likely to require at least some consideration to be given to:

(a) the standard of living or lifestyle likely to be enjoyed by the wealthier party seeking to uphold the pre-nuptial agreement;

(b) the extent of the resources of that wealthier party.

2.12. As the Supreme Court put it[16]

> A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

2.13. However, it would appear that the Supreme Court envisaged the position should be very different in the case where either there aren't any minor children, or where there should cease to be any minor children to be taken into account. Seemingly absent minor children the Supreme Court considered that:

(a) whether or not the financially weaker party would be able to establish 'real need' would *not* be dependent on, or linked to factors such as the standard of living during the marriage, the extent of the resources available or any disparity in the parties' respective standards of living going forward;

(b) "a predicament of real need" would be akin to an inability to meet the most basic of needs, an inability to fund life's essentials - what Baron J described as "a situation of want"[17];

(c) "a predicament of real need" would therefore only be made out where the financially weaker party could show that he or she lacked the means to

[13] Paragraph 4(1)(a) of Schedule 1
[14] [1999] 1 FLR 152
[15] [2003] 2 FLR 865
[16] at paragraph 77
[17] at paragraph 137

house and/or maintain him/herself, without the assistance of the State or some other benefactor.

2.14. Moreover to establish "a predicament of real need" it would appear that the Supreme Court envisaged that the financially weaker party would have to show that his or her insufficiency was the result of factors beyond his or her control (such as old age or physical incapacity rendering that party incapable of earning a living[18]). All but Baroness Hale would appear to have considered that 'need' which had been self-created - even by the taking of a step agreed to by the wealthier party - would not justify departure from a pre-nuptial agreement precluding all claims.

2.15. If that interpretation of what the Supreme Court meant by the term "predicament of real need" should seem preposterous, consider the outcome of *Radmacher.*

(a) Mr Granatino's decision to give up a career in banking which was making him 'miserable'[19] was made with his wife's agreement[20];

(b) Mr Granatino had no assets - in fact, after the £700,000 contribution from his wife he still had debts of £100,000;

(c) For the 27 year period from trial until his retirement at the age of 65 Mr Granatino was found to have an earning capacity (per Baron J) of only £30,000 per annum;

(d) On reaching the age of 53 (when the younger of the parties' two daughters attains the age of 22) Mr Granatino will cease to have his needs indirectly provided for by 'the generous relief given to cater for the needs of his daughters' - i.e. by the housing and income provision during the parenting years;

(e) Despite the apparent lack of funds, despite the apparent inability to meet his housing needs once his children have attained their majority – the Supreme Court must have concluded that Mr Granatino could not establish a predicament of real need.

[18] See *Radmacher* paragraph 119
[19] Per Baron J, at paragraphs 49 and 50
[20] See Baroness Hale in *Radmacher,* paragraph 194

2.16. After *Radmacher* a number of commentators predicted that what constituted "a predicament of real need" would be rather different if the financially weaker party happened to be a woman, rather than (in the eyes of the Supreme Court) an undeserving male ex-banker[21], who had the misfortune to be French to boot. And so it has proved to be, as two recent cases demonstrate.

2.17. In *Z v Z (No2)*[22] the parties, both French, had entered into a marriage contract which provided for a regime of separate property (séparation de biens). The husband, aged 53, was earning in excess of €1 million per annum in the field of private equity; the wife, a full-time housewife and mother, was aged 50. There were three children, aged 14, 12 and 9. Of the £15.1 million of assets available for distribution at the end of their 14 year marriage, the husband held £13 million and the wife £1.3 million. All the assets were generated during the marriage. On application by the wife, the husband argued that the contract excluded sharing. However he conceded that the "séparation de biens" regime did not exclude maintenance claims and that maintenance could be interpreted widely in a manner consistent with a pre *White v. White* needs assessment.

2.18. Moor J, having held that but for the marriage contract there would have been equal division:

(a) rejected the assertion that it would not be fair to hold the wife to the agreement in so far as it excluded sharing.

(b) assessed the wife's reasonable needs for both housing and income (provision for which the husband conceded was recoverable) at £6 million.

2.19. What is important with respect to the question, 'what is a predicament of real need' is Moor J's comment[23] that the outcome "might have been very different if the Agreement had also purported to exclude maintenance claims in the widest sense" (which, of course, was the case in *Radmacher*). The judge was clearly implying that even though the wife had assets in her name of £1.3 million, the exclusion of maintenance would have resulted in her having

[21] consider, at paragraph 121, the implicit criticism of Mr Granatino's decision to abandon his career in the City
[22] [2011] EWHC 2878 (Fam) - judgment given on 3/11/11
[23] at paragraph 64

sufficient need to render the agreement unfair – the lack of a maintenance entitlement would have put her in a position of real need.

2.20. In *V v V* [24] the wife, aged 32, was Swedish and the husband, aged 42, was Italian. Shortly before their marriage they had entered into a Swedish "marriage settlement" which expressly provided that the husband's pre-acquired wealth (worth approximately £1 million at the time of marriage, but only £572,000 by the time of its breakdown) should not be regarded as marital property and implicitly provided that there should only be community of acquests. The marital relationship (including some cohabitation) lasted 5 years. There were two children, aged 8 and 5. There was approximately £1.29 million of capital available for distribution, of which £1.16 million was held by the husband and £134,000 by the wife.

2.21. If in the long term the wife had been confined to her share of the marital property, as provided for under the agreement, she would only have been entitled to £358,000.

2.22. Charles J agreed that during children's minority the wife should have the funds to acquire and retain a £750,000 property in an expensive area of West London. But allowing the appeal from the District Judge, Charles J held that £500,000 would be sufficient for the wife's housing need in the long term, and he therefore directed, in order to give due recognition to the marriage settlement, that her home should be subject to a 33.3% charge in the husband's favour, to be enforceable after the children had left home.

2.23. Again, what is important with respect to the question, 'what is a predicament of real need' is that there was no suggestion from the court that the wife's reduced need for housing funds at the end of the years of parenting, could oblige her to move to a less expensive part of London where a property could be bought for £358,000. Nor was there any suggestion that her receipt of an additional £142,000 over and above her entitlement under the agreement could be other than absolute (i.e. there was no suggestion that the additional £142,000 could be provided on trust, to be repayable on the wife's remarriage or death). It is

[24] [2011] EWHC 3230 (Fam) - judgment given on 21/12/11

implicit in Charles J's judgment[25] that to have held the wife to her capital entitlement under the agreement, even though that would probably have covered her 'basic need', would have been unfair.

3. CAN AN AGREEMENT APPLY A MARITAL PROPERTY REGIME?

3.1. In countries which operate marital property regimes, their versions of pre-nuptial agreements - marital contracts or marriage settlements - typically provide a facility to *change* what would otherwise be the applicable regime. This question is directed to whether a pre-nuptial agreement in England and Wales can *apply* a regime where no regime would otherwise apply.

3.2. To understand the limitations of pre-nuptial agreements when it comes to marital property regimes, it is necessary briefly to consider the nature and effect of marital property regimes found in civil law jurisdictions of continental Europe, where there are codified legal systems.

3.3. First, a general definition of what is meant by the term "matrimonial property regime"; it is the systematic organisation, by the law, of property rights that result as an automatic consequence of the marital relationship.

3.4. "All matrimonial regimes, whether prescribed by law or freely chosen by the couples in their marriage contract, are concerned with three issues:

(a) The division of power over property during the marriage (who can dispose of what);

(b) The division of wealth at the end of the marriage (who gets what); and

(c) In both instances, the division of debts (who pays what)."[26]

3.5. The three types of regime most commonly encountered are:

(a) Community of property

(b) Community of acquests

(c) Separation of property

3.6. Community of property

[25] see, in particular, paragraph 101

[26] See E Cooke, A Barlow and T Callus, *Community of Property: A regime for England and Wales?* Nuffield Foundation Report (2006) p3.

(a) Sometimes referred to as "Universal Community", this creates a total merging of the spouse's respective assets, whenever and however they were acquired (so that the community or joint ownership, applies to gifts, inheritances and pre-acquired property) and gives a couple joint entitlement to that property.

(b) The system of community can be immediate or it can be deferred.

(c) If the community is immediate:

(i) there will be automatic joint ownership of the community property from marriage onwards, and an equal sharing on divorce;

(ii) however there will also be what some may perceive as a drawback, namely immediate *community of liability* so that the community property will be immediately available to satisfy the debts of both; that of course means that if one party (say, the husband) were to incur significant debts in connection with his business, the other party could find her share of the community being at risk, even though she hadn't played any part in the business.

(d) If the community of property is deferred, the two spouses will keep their separate ownership of property during marriage, but on death, bankruptcy or divorce their property is pooled and regarded at that point as a community, which is then to be divided equally.

3.7. Community of acquests

(a) This regime might be described as a half-way house between community of property and separate property.

(b) In a community of acquests:

(i) property acquired *during* the marriage by the efforts of one or other, or both of the parties - i.e. by the partnership - falls within the community, to be shared equally, regardless of the parties' respective contributions;

(ii) in contrast, excluded and falling outside the community is property acquired before the marriage, or property acquired during the marriage not by the parties' efforts but by gift or inheritance;

(iii) such excluded property is not for sharing, and instead remains the separate property of the acquirer.

(c) As with Universal Community, community of acquests can be immediate or deferred.

(d) In its deferred form - with property being held separately during marriage and only shared on dissolution - community of acquests is the regime which most closely resembles the application of the sharing principle under the law of England and Wales.

3.8. Separate property

(a) Where a regime of separation of property applies, the marriage, by itself, has no effect on ownership of, or rights to property either during the marriage or at its ending on divorce. Thus the regime, preserving financial independence and precluding sharing, is the antithesis of community property.

(b) Each spouse retains the administration, use and ability to dispose of his or her own assets and just as there is no common property so there is no common liability.

(c) That does not, of course, preclude the parties choosing to own property jointly, but the normal rules of joint ownership will then apply - i.e. the extent of the respective shares in the jointly owned property can reflect respective contributions (which would not be the case if the jointly owned property were community property, which has to be shared equally).

3.9. With respect to whether marital property regimes could be said to apply under the law of England and Wales, there have been conflicting pronouncements.

(a) Sir Mark Potter P. in *Charman*[27] was in no doubt that we do not have marital property regimes.

> Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive

[27] [2007] EWCA Civ 503 at paragraph 124

> powers in prospect upon a decree of judicial separation, nullity or divorce

(b) Observations of Thorpe LJ when the Court of Appeal heard the appeal in *Radmacher*[28] might suggest that he implicitly agreed.

> Whilst the civil law jurisdictions of Europe generally employ notarised marital property regimes to regulate both the property consequences of marriage and divorce, the common law jurisdictions attach no property consequences to marriage and rely on a very wide judicial discretion to fix the property consequences of divorce

(c) On other hand, Baroness Hale in *Miller & McFarlane*[29], seemed to suggest that there is a default regime in England and Wales, namely separation of property.

> **123** English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts
>
> **153** This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them

(d) In *ND v. KP*, concerned with freezing injunctions, Mostyn J said[30]

> Indeed, one must remind oneself that the basic rule in this country is of separate property, and that is bolstered by Article 1 of Protocol 1 of the European Convention on Human Rights which says that every natural person is entitled to the peaceful enjoyment of his possession

3.10. As a matter of strict law, Sir Mark Potter is undoubtedly correct; however it may appear, under the law of England and Wales marital property regimes do *not* operate.

3.11. Given that marital property regimes do not operate it might well be asked "is there any point of seeking to apply a regime, to the extent possible, by a pre-nuptial agreement?" For a number of reasons it is the view of this speaker, that there most certainly is.

(a) A marital property regime can provide a very useful means of explaining what the parties want to achieve; such an explanation can be very helpful when there is family in the background (a parent, or children of a previous

[28] [2009] EWCA Civ 649 at paragraph 5
[29] [2006] 2 ACCOUNT 618
[30] [2011] EWHC 457 (Fam) paragraph 9

marriage) concerned as to what will happen when the marriage ends, whether by divorce or on death.

(b) Where the parties either have or are likely to acquire an international connection (so often the case where there is wealth warranting a pre-nuptial agreement), reference to a marital property regime:

(i) enables there to be consistency where it is felt prudent to have agreements in more than one jurisdiction;

(ii) provides a clear explanation to the lawyers and courts of a foreign jurisdiction, in language which they are more likely to understand, of the way in which the parties expect their property to be dealt with, both during the marriage and at its conclusion.

(c) Reference to a marital property regime should give the strongest possible steer to a court in England and Wales that when exercising its discretion on an application for financial orders it should endeavour to produce an outcome as close as possible to the outcome provided for by the regime

3.12. As regards the ability of a regime to give the court a steer, it is worth recalling:

(a) what Thorpe LJ said in *Parra v. Parra*[31], eight years before the involvement of the Supreme Court in *Radmacher*:

> The parties had, perhaps unusually, ordered their affairs during the marriage to achieve equality and to eliminate any potential for gender discrimination. They had **in effect elected for a marital regime of community of property.** In such circumstances what is the need for the court's discretionary adjustive powers? The introduction of the 'no order' principle into section 25 of the Matrimonial Causes Act might contribute to the elimination of unnecessary litigation. **As a matter of principle I am of the opinion that judges should give considerable weight to the property arrangements made during marriage** and, in cases where the parties have opted for equality, reserve the exercise of the adjustive powers to those cases where fairness obviously demands some reordering

(b) what Thorpe LJ said nine years later, when *Radmacher v Granatino*[32], was before Court of Appeal:

> Thus, pending the report of the Law Commission in future cases broadly in line with the present case on the facts, the **judge should give due**

[31] [2002] EWCA 1886
[32] [2009] EWCA Civ 649 (at paragraph 53)

> **weight to the marital property regime into which the parties freely entered**. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings

3.13. A couple of scenarios commonly encountered can illustrate how the application (or, at least, attempted application) of a marital property regime can be appropriate.

(a) Consider, first, the situation where one of a young couple about to embark on matrimony for the first time, happens to be the offspring of a very rich and successful parent. Typically that parent will be concerned to ensure that if things don't work out the individual who is marrying his/her son or daughter won't be able to claim a share of family's wealth. Equally the young couple, with romantic idealism, might feel strongly that 'marriage is a partnership', and that therefore what they build together should be shared. In such a scenario at least an attempt to apply a community of acquests regime might be considered worthwhile.

(b) Next, consider the scenario of the couple in late middle age each of whom is about to embark on matrimony for the second time. If each should be independently wealthy and each should have children by their previous marriage, they (or their progeny) may well be concerned to ensure that in the event of death or divorce their wealth should pass to their children rather than to their new spouse. In those circumstances the application of a regime of separation of property would probably fit the bill.

3.14. As regards the limitations of a pre-nuptial agreement when it comes to applying a marital property regime, it is necessary to be mindful of the following:

(a) Whichever regime the parties might chose, they will not be able to exclude the court's distributive power at the end of the marriage, especially if strict adherence to the regime would result in unfairness.

(b) The incorporation of a marital property regime will not, by itself, exclude a claim for maintenance. Given that the income needs to be met by maintenance can be massive, and given that maintenance can be capitalised, the incorporation of a marital property regime, will not, by

itself, necessarily preclude a substantial lump sum order - and therefore in the eyes of many a wealthy spouse will not preclude what might be perceived as a redistribution of capital.

(c) When it comes to legal relations between one or other spouse and a third party, the incorporation of a marital property regime in a pre-nuptial agreement made under the law of England and Wales is unlikely to have any effect. Therefore if the parties should elect for community of property, but fail to make the legal ownership of their property consistent with that, a third party creditor of one spouse will not be able to make a claim against the property of the community on the basis of 'community of liability' (as might be permissible in, say, the Netherlands). Indeed, whether or not the parties may have contracted in or out of community will not typically be discoverable by a creditor or other third party in the same way that it can be on the Continent - where the existence of a marital contract may be recorded on the marriage or land register, so as to warn creditors.

3.15. On a practical note, if the pre-nuptial agreement should seek to apply a marital property regime:

(a) it is important that the agreement should not only identify the regime but also spell out the parties' understanding of the effect of that regime;

(b) it is vital that the parties should be advised to manage their affairs in accordance with the regime; so, for example:

(i) if there is to be a regime of separation of property, they should be advised to avoid any mingling of their assets;

(ii) if there is to be regime of community of acquests, they should be advised to keep a record of any assets derived from sources external to the marriage – i.e. from gift or inheritance.

4. ARE THERE ANY PITFALLS IF AN AGREEMENT ISN'T BINDING?

4.1. Going by the judgments in *Radmacher*, the reader would be forgiven for thinking that a pre-nuptial agreement can never be of binding legal effect. After all:

(a) At first instance Baron J said[33]

> As I find, pre-nuptial agreements remain unenforceable until adopted by the Court and so in that sense the PNC is not a valid legal contract

(b) The majority of 8 in the Supreme Court said[34]

> Is it important whether or not post-nuptial or ante-nuptial agreements have contractual status? The value of a contract is that the court will enforce it. But in ancillary relief proceedings the court is not bound to give effect to nuptial agreements, and is bound to have regard to them, whether or not they are contracts. Should they be given greater weight because in some other context they would be enforceable? Or is the question of whether or not they are contracts an irrelevance? … We cannot see why it mattered whether or not the agreement in MacLeod v MacLeod was a contract
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> …we consider that the Board in *MacLeod v MacLeod* was wrong to hold that post-nuptial agreements were contracts but that ante-nuptial agreements were not. That question did not arise for decision in that case any more than in this and does not matter anyway. It is a red herring. Regardless of whether one or both are contracts, the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.
>
> …We have already explained why we do not consider it material in English ancillary relief proceedings whether the nuptial agreement under consideration is or is not a contract. The court can overrule the agreement of the parties, whether contractual or not

4.2. That a pre-nuptial agreement under the law of England and Wales does not constitute a binding, enforceable contract in ancillary relief proceedings can give advisers worried about their insurance cover a false sense of security. Such advisers might think that if, perchance, something has been overlooked, there is no need to worry, because the court can step in and remedy any resulting unfairness. If that should be their mindset, they had better watch out.

4.3. Although unenforceable in proceedings for ancillary relief, the fact is that certain provisions found in a pre-nuptial agreement *can have contractual*

[33] at paragraph 129
[34] at paragraphs 62, 63 and 74

validity in other contexts. Two types of provision, which have featured in agreements that I have drafted or advised on, serve to illustrate the point.

(a) An agreement might provide that within three months of the marriage the wealthier party will cause a property intended to be used as the matrimonial home to be transferred from his/her sole name into the spouses' joint names. Alternatively the agreement might provide that the wealthier will pay the financially weaker party a specific sum of money by a certain date. If the wealthier party should fail to honour his/her commitment the weaker can sue for specific performance or bring an action for the agreed sum[35].

(b) Alternatively the agreement might seek to cover the eventuality of the wealthier party predeceasing the financially weaker party during the subsistence of the marriage; it might specify that to cater for that eventuality the wealthier will always maintain a Will which will provide for the weaker to inherit specified property. Should the wealthier fail to maintain such a Will his/her estate could face a claim for damages for breach of contract to leave by will[36].

4.4. In the examples just given, woe betide the adviser of the weaker party who fails to ensure that the obligation of the wealthier party is sufficiently certain.

4.5. Similarly, leaving aside the question of contractual enforceability, in terms of pitfalls:

(a) Woe betide the adviser of the wealthier party who proposes that in the event of the breakdown of the marriage there should be a tariff-based provision (so much per year of marriage), but fails to stipulate that his/her client should never be left with less than 50% of the assets; if the wealthier party should suffer a reversal in his/her fortune he won't thank his adviser for failing to cap his liability.

(b) Woe betide the adviser of the weaker party who fails to ensure that tariff-based provision intended to provide a fund for housing purposes is index-linked to a suitable *house-price* index (and ideally an area specific one);

[35] See the Law Commission's Consultation Paper in relation to Marital Property Agreements, paragraph 3.70

[36] See *Soulsbury v. Soulsbury* [2008] Fam 1 for discussion about such contracts

(c) Woe betide the adviser of either party who puts his or her name to a Certificate at the end of an agreement stating that he/she has provided the client with independent advice not only as to the meaning and effect of the agreement, but also as to:

(i) "whether it was to his advantage, financially or otherwise to enter into the agreement"; or

(ii) "whether it was prudent for him to enter into the agreement".

Any solicitor who should sign such a certificate, unless qualified and insured to give financial recommendations, will be exposing him/herself to unacceptable and avoidable risk.[37]

5. THE ANSWERS

5.1. Q. What is a predicament of real need?

A. It is not what the Supreme Court would appear to have suggested in *Radmacher* - unless the applicant should happen to be male, an ex-banker and French.

5.2. Q. Can a pre-nuptial agreement apply a marital property regime?

A. Sort of …

5.3. Q. Are there any pitfalls if an agreement is not binding?

A. The question is flawed - an agreement *can* have contractual effect in certain contexts; but in any event

A. There are pitfalls aplenty.

1 CROWN OFFICE ROW

The matters set out above are simply the author's views on current topics, and should not be regarded as advice for any individual case

[37] The problems with such certification have been highlighted in the Law Commission's Consultation Paper, "Marital Property Agreements" (see, in particular, paragraphs 6.88 onwards)