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This may, in some circumstances, cause doubt as to whether a particular provision should be enforced, but is unlikely to cause serious problems.³⁶ The provisions which would be of greatest concern to the industry would be the rule, contained in sections 16(1)(a) and 2(1) of the Act, that any attempt to by a party to restrict its liability for death or personal injury resulting from negligence will be ineffectual. At first sight, this prohibition might seem to be triggered by an indemnity and hold harmless clause which pertains to losses associated with personal injury or death and which applies even in the case of negligence on the part of the party so indemnified and held harmless. Such clauses are a central plank of the industry's risk allocation model. It would be little short of a disaster for the industry if such clauses were ruled unenforceable. They have hitherto been seen not as exclusions of liability but background risk allocation clauses, which specify who is to bear ultimate responsibility for paying damages.³⁷ As neither contracting party will have corporeal bodies to injure, claims relative to personal injury cannot be instances of direct exposure to the other contracting party, but will instead invariably be made by persons who are third parties for the purposes of Lord Mance's formulation. As a result, the clause would seem to operate as an indemnity, and sections 16(1)(a) and 2(1) UCTA cannot be engaged. Assuming that this is so, the surprise caused by *Farstad* will quickly be forgotten.

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The Marriage Contract: *Radmacher v Granatino*

No deed, known in practice, plays a more important part in the affairs of modern life than the ante-nuptial contract of marriage.

So wrote David Murray at the end of the 19th century when commenting on the law of matrimonial property in Scotland,¹ but even as he wrote, a revolution, albeit of a slow and piecemeal variety, was taking place. The reforms of the Married Women's Property Acts, in both Scotland and England, together with significant social change, led Clive to comment a century later that "marriage contracts are now rare".² Until recently, in both Scotland and England, an ante-nuptial marriage contract would not have featured on the lists of many couples or their wedding planners. It is relatively

³⁶ Given the widespread use of indemnity and hold harmless clauses within the industry and the economic benefits of the practice, one would not expect such a clause to be struck down by the court other than in unusual circumstances. See e.g. Hewitt (n 2) at 205.

³⁷ *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 WLR 649.

¹ D Murray, *The Law Relating to the Property of Married Persons* (1891) para 111.

² E M Clive, *The Law of Husband and Wife in Scotland*, 4th ed (1997) para 17.005.

rare for family law, and in particular family law relating to a traditional, opposite sex, married couple, to make the headlines, but it certainly did with the decision of the Supreme Court in *Radmacher v Granatino*,³ an appeal which hinted at a change of fortune for the marriage contract.

A. THE FACTS

In 1998, the marriage took place in London of a German woman, of good family and independent means, and a French man, with “excellent prospects”.⁴ She came from an extremely wealthy family, from whom she had already acquired considerable independent assets, providing her with “substantial unearned income”,⁵ and from whom she would receive more in the future. He was a banker, with an annual income of £120,000 and an expectation of higher future rewards. The couple had two daughters but drifted apart and, in 2006, they separated. Divorce was granted in 2007 and, in terms of a shared residence order, the children were to live with their father for approximately one third of the time and with their mother for the remainder.

Several months before the wedding, the parties entered into an ante-nuptial marriage contract at the suggestion of the woman, whose father “insisted” upon it and who herself was “anxious that the husband should show, by entering into the agreement, that he was marrying her for love and not for money”.⁶ Despite this ante-nuptial agreement, in which they had agreed to a mutual waiver of any kind of claims for maintenance on divorce, “to the fullest extent permitted by law” and regardless of whether either party was “in serious difficulties”,⁷ the husband sought ancillary relief, in the form of a lump sum and periodical allowance. In awarding him a total of £5,560,000, Baron J held that factors surrounding the conclusion of the agreement and, in particular the fact that it failed to meet a number of safeguards proposed in an earlier Home Office consultation document on marital agreements,⁸ resulted in reduced weight being given to the agreement.

The wife subsequently appealed to the Court of Appeal, which held that Baron J had erred in finding that the ante-nuptial agreement should be of reduced value in light of the circumstances surrounding it. The sum awarded was significantly reduced to reflect only the husband’s ongoing role as a father and not to make provision for his own needs.⁹ It was the subsequent appeal against that decision which presented the Supreme Court with the opportunity to consider this particular ante-nuptial agreement and to contribute more broadly to the law, and debate, in this area.

3 [2010] UKSC 42, [2010] 3 WLR 1367. All paragraph references are to the majority judgment delivered by Lord Phillips unless indicated otherwise.

4 Para 14.

5 Para 13.

6 Para 13.

7 Para 99.

8 Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23.

9 Para 16.



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B. THE DECISION

This case is the latest stage in the developing English jurisprudence on the nature and legal status of ante-nuptial and post-nuptial agreements.¹⁰ The specific consideration of ante-nuptial agreements is set against a broader background of the current provisions of English law for ancillary relief. The Matrimonial Causes Act 1973, as amended, gives the court power to make a range of orders, including a lump sum or periodical payments.¹¹ In making such orders the court is directed to take into account all of the circumstances of the case and in particular to have regard to a range of matters set out in section 25. These provisions were considered by the House of Lords in *White v White*¹² and more recently in the high profile and high wealth appeals in *Miller v Miller; McFarlane v McFarlane*,¹³ in which the guiding principles relating to ancillary relief were expressed as fairness, compensation and sharing.

The Supreme Court in *Radmacher* focused on two key issues: the distinction, if any, between different types of marital agreements, in particular between those concluded before and after marriage, and, in the context of a subsequent application for ancillary relief, “the question of the principles to be applied by the court when considering the weight that should be attached to an ante-nuptial agreement”.¹⁴ The majority judgment of the court was presented by Lord Phillips, with a separate short judgment being delivered by Lord Mance and a longer, fully reasoned and partially dissenting judgment from Lady Hale.

In essence, the Supreme Court concluded that there should be no general distinction between ante-nuptial and post-nuptial agreements.¹⁵ Building on previous jurisprudence¹⁶ to the effect that agreements should be taken into account by a court in assessing an application for ancillary relief, they sought to assess the impact in this particular case of factors surrounding the execution of the agreement and, in so doing, set out more general guidance which can be summarised in their conclusion that:¹⁷

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.

C. A PECULIARLY ENGLISH PROBLEM?

At the outset, the Supreme Court acknowledged that English law differs “significantly from the rest of Europe and most other jurisdictions”.¹⁸ English law’s singularity in

10 Early developments are described in *Hyman v Hyman* [1929] AC 601 at 625-626, and more recent history is set out in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at paras 21-23.

11 ss 23-24B.

12 [2001] 1 AC 596.

13 [2006] UKHL 24, [2006] 2 AC 618.

14 *Radmacher* at para 2.

15 A conclusion echoed in the recent sheriff court decision in *Kibble v Kibble* 2010 SLT (Sh Ct) 5.

16 Culminating most recently in the opinion of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

17 Para 75.

18 Para 3.

this substantive area is evident, for example, in the context of the current search by the Commission for European Family Law for common European principles in matrimonial property.¹⁹ The different approach of English law, when compared to its European neighbours, is evident too in its preference for its own law as the applicable law, regardless of domicile of the parties or in this case the parties' choice of law,²⁰ and in the United Kingdom's decision not to be bound by the Hague Protocol.²¹

Differences between Scots and English law in this area abound, both in terms of the legal framework for financial provision on divorce and in the specific context of nuptial agreements. In *Radmacher*, the first obstacle to enforceability of the ante-nuptial agreement was a lingering uncertainty stemming from "the old rule that agreements providing for future separation are contrary to public policy".²² Such agreements, in Scotland, have never been regarded as contrary to public policy and it is clear that spouses may reach agreement in terms of financial provision on divorce, with the court having only very limited power to vary or set aside an agreement where it is regarded as not having been "fair and reasonable at the time it was entered into".²³

Not only are there strong indications in favour of the legality and enforceability of such agreements in Scotland, together with very limited opportunities for judicial interference, but the underlying statutory framework for financial provision on divorce seeks to provide clear principles²⁴ and by so doing to reduce judicial discretion; thus creating an environment which will encourage private agreement safe in the knowledge of the likely outcome of judicial resolution.

To that extent, the particular problems with English law that were encountered in *Radmacher* are alien to Scots family lawyers. It might be argued, however, that it is not in the detailed legal analysis offered by the Supreme Court, but in the allusions to the relationship of marriage and its potential discord with commercial values,²⁵ that the shared concerns of different jurisdictions emerge. As Lady Hale highlights, it should not be forgotten that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled".²⁶

D. CONTRACTS AND AGREEMENTS

Having concluded that there was no need to distinguish between ante-nuptial and post-nuptial agreements, the Supreme Court considered briefly whether they needed to take a step further and address the distinction between an "agreement" and a

19 See K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action Volume IV: Property Relations Between Spouses* (2009).

20 Para 98.

21 Paras 103-108.

22 Para 52.

23 Family Law (Scotland) Act 1985 s 16; *Thomson v Thomson* 1982 SLT 521.

24 Family Law (Scotland) Act 1985 s 9.

25 In particular in the judgment of Lady Hale: paras 132-137.

26 Para 137.

“contract”. They quickly concluded that such a distinction was a “red herring”²⁷ and, with relief, moved on. Having decided that nuptial agreements, of whatever type, were enforceable, subject always to fairness, they were not required to enter into detailed consideration of their contractual status. The issue of intention to create legal relations was important but it was the intention to create an enforceable obligation, rather than specifically to establish a contract, that was required.²⁸

While respecting the principle of autonomy, the court acknowledged the uncomfortable juxtaposition of commercial minds and personal emotion. In the account of how the parties approached the conclusion of the agreement in *Radmacher*, the complexities of personal and financial relationships are clear:²⁹

Although the judge was sure that the wife wanted her husband to love her for herself, the wife emphasised her father’s insistence, because she felt it made her seem less insensitive to her future spouse, given that the terms excluded all his potential rights . . . The judge found that the husband was eager to comply because he did not want the wife to be disinherited, he wanted to marry her.

“Family relationships are not like straightforward commercial relationships”³⁰ and in deciding what weight should be given to an agreement, in the context of an application for ancillary relief, the court should take into account not only the formal vitiating factors associated with contracts, such as undue influence and misrepresentation but the lesser albeit more complex problems which may stem from the personal relationship between the parties.³¹

As an isolated case, *Radmacher* would be easy to dismiss as having more to do with the preservation of family business and wealth than the relationship of marriage, but the decision comes at a time of review and proposed reform on a much wider scale. The research of the English Law Commission into matrimonial agreements, together with the Family Justice Review and the anticipated reforms resulting from it, place greater emphasis on mediation and consensus and suggest that there is under way in England a significant shift away from the family courts and in favour of private ordering. While there is much to be welcomed in a system that encourages and supports individual negotiation and settlement, Lady Hale’s reservations and concerns, merit careful consideration. There is a simplicity and clarity in developing rules and principles which apply to all marital agreements and in moving towards a presumption of enforceability, but the diversity in terms of intention, circumstance, bargaining power and need should not be overlooked.

E. HISTORICAL PRECEDENT

When ante-nuptial marriage contracts were last in vogue, in the days prior to the reforms of the Married Women’s Property Acts, they were a means of avoiding

²⁷ Para 63.

²⁸ Para 70.

²⁹ Para 86.

³⁰ *Edgar v Edgar* [1980] 1 WLR 1410 at 1417 per Ormrod LJ, cited in *Radmacher* at para 42.

³¹ Paras 71-72.

the impact of what had become an unpopular and inappropriate legal regime of matrimonial property. That the default regime, which affected the majority of ordinary married couples, remained in place for so long was, to some extent, due to the ability of the rich and the propertied to contract out of it. There is a similar risk of bias in recent developments that, “[b]y concentrating our analysis on the ‘big money’ cases we are masking what actually happens in everyday practice”.³² Individual modification of the rules of matrimonial property will always be appropriate for some, and all couples should certainly be encouraged to consider and provide for the economic, and not simply the romantic, implications of marriage but, if the demand to opt-out continues to grow, it may be time to revisit the underlying rules.

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Progress Towards Principles on the Breakdown of Cohabitation: *Selkirk v Chisholm*

In *Selkirk v Chisholm*,¹ Sheriff Hammond considers the body of reported jurisprudence to date on section 28 of the Family Law (Scotland) Act 2006, which allows for financial provision on the breakdown of cohabitation.² “The decided cases are instructive as examples of the application of the section 28 considerations,” he advises. “However the cases do not as yet reveal any authoritative underlying principles of general application in interpreting the provisions.”³ With this case the sheriff has taken clear steps towards remedying this uncertainty. The question of whether the underlying principles he extrapolates are correct within the scheme of the legislation remains, however, in doubt.

³² E Hitchings, “The impact of recent ancillary relief jurisprudence in the ‘everyday’ ancillary relief case” (2010) 22 CFLQ 93. For a comment on the significance, or otherwise, of this decision, see C Barton, “‘In Stoke-On-Trent, my Lord, they speak of little else’: *Radmacher v Granatino*” [2011] Fam Law 67.

¹ Duns Sheriff Court, 25 Nov 2010. The decision is available at http://www.scotcourts.gov.uk/opinions/A15_08.html.

² There have been five substantive decision to date on section 28, aside from the instant case: *Jamieson v Rodhouse* 2009 Fam LR 34; *CM v STS* 2008 SLT 871; *F v D* 2009 Fam LR 11; *Gow v Grant* 2010 Fam LR 21 and *Lindsay v Murphy* 2010 Fam LR 156. *Cameron v Leal* 2010 SLT (Sh Ct) 164 is also of assistance.

³ Para 100.