Prenuptial agreements

‘‘Prenuptial agreements: they aren’t worth the paper they’re written on in Cayman.” This is the sort of expression which matrimonial lawyers often hear casually drop from the mouths of clients or their clients’ amateur, unqualified legal advisors. Until recently it was of extremely dubious merit. Now it is simply wrong.

Last month the newly-formed Supreme Court of the United Kingdom gave a landmark judgment that is likely to change the way people decide to marry in the UK and in this jurisdiction. More particularly, the decision is likely to bring the UK and other common law jurisdictions like the Cayman Islands, which follow the UK courts’ legal philosophy, into line with the vast majority of the legal world in their treatment of prenuptial agreements. The UK and hence the Cayman Islands (where English authority is persuasive) have long been decades behind Northern America, Europe and other parts of the world in their attitude to prenuptial agreements. Until the case of Radmacher -v- Granatino came before the Supreme Court last month, the position was that prenuptial agreements are a factor for a Court to consider when deciding what is fair between the parties, but are not binding in the sense that many other jurisdictions would consider them to be. This has come as a surprise to couples wishing to make prenuptial agreements here and has been an unpleasant shock to husbands and wives who wish to rely on those agreements upon divorce.

The case of Radmacher -v- Granatino has elevated the status of pre- and post-nuptial agreements to binding deeds, which is likely to bring many more couples to seek advice on whether they should enter into agreements before or during their marriage. In many European countries, “prenups” are the norm rather than the exception. This could be the start of such an approach in the UK and associated jurisdictions like the Cayman Islands.

Ms. Radmacher and Mr. Granatino married in 1998. She was a German heiress to a paper and industrial empire and he although he was successfully employed in finances in the City of London, his financial wealth was significantly less compared to his fiancé. Prenuptial agreements are often viewed as “unromantic” but in this case, Ms. Radmacher, and her father in particular, insisted that her less wealthy husband-to-be sign a prenuptial agreement as “a way of proving you are marrying only for love”. She said that by signing away his financial claims against her considerable fortune if they were to divorce, he was showing that he was interested in her, rather than her money.

Move forward to 2006 and the marriage had hit difficult times. The couple had separated and Mr. Granatino had chosen to return to university to study. His earning capacity was significantly more limited than at the date of the marriage. There were also 2 children of the marriage who were living one third of the time with Mr. Granatino and two thirds of their time with Ms. Radmacher.

Mr. Granatino applied to the High Court in London for a divorce and orders for redistribution of assets by the Court. The question for the Judges at the hearings and subsequent appeals was whether the

Court should give effect to the prenuptial agreement entered into by the parties, which stated that Mr. Granatino had no claims against Ms. Radmacher's assets.

Until the 1990's the English courts were robustly opposed to any agreement made between husband and wife which sought to set out the division of assets on divorce. The traditional rationale was that these agreements would "undermine the institution of marriage" and were contrary to public policy. In later years, the reasons given were primarily related to fairness between the parties and the preference for the Court to exercise an independent judgment on what is the fairest way to divide assets having regard to all the circumstances of the marriage, rather than leaving it to the spouses, one of whom may have significantly more bargaining power than the other.

Periodically, couples who had married in different jurisdictions and had prenuptial or ante-nuptial agreements would come to the English courts to divorce and find that they were bound not by those terms that they entered into at the start of the marriage, but rather by the court's powers to divide assets on the broad terms of what was considered fair having regard to all the circumstances of the marriage. This was the situation Ms. Radmacher found herself in when Mr. Granatino petitioned for divorce in England. Her legal team had been arguing throughout that when two competent adults make an agreement intending it to be binding, the Court should respect their wish to do so and give effect to that agreement.

The Family Division of the High Court disagreed with Ms. Radmacher and ordered her to pay her husband millions of pounds over and above that provided for in the agreement. On appeal by the wife both the Court of Appeal and then the new Supreme Court decided that Mr. Granatino should not be entitled to any more for himself than he agreed to in the prenuptial agreement (although he was provided with large sums to assist him in providing for the children of the marriage). In short the court gave effect to the terms of the agreement freely entered into by the parties.

This decision can be seen as a response to the pressure for reform on prenuptial agreements in the UK that has been growing for nearly 2 decades. This pressure increased in 2000 when the House of Lords decided that the Courts should start from the position that both parties have made an equal contribution to the assets in the marriage, whether by working or by staying at home, and that distribution of marital assets should be equal unless there was reason to depart from equality of division. This has led to two major fields of battle on divorce, namely what are the marital assets for division and are there reasons to give one party more than the other.

Prenuptial agreements can allow spouses to decide between themselves what are and are not matrimonial assets at the earliest possible stage, rather than having to battle out this issue before the Court many years later, when the passage of time has muddied the waters. They also allow parties to determine between themselves how those assets may be split. Sometimes it is obvious to both parties that their marriage will not be an equal economic partnership and both are happy to agree that one individual will be given credit for his or her hard work if there is a divorce, rather than that party having to establish his or her case before a Judge after the divorce petition has been filed; this is normally when daggers are drawn.

The institution of marriage has changed immeasurably requiring the law to adapt in order to reflect

the changing and developing attitudes of society to marriage and divorce. The rise in the divorce rate generally, the increase in the number of second and even third marriages, the likelihood that couples will come to a marriage in vastly different financial positions mean that prenuptial agreements may make good economic and legal sense for both parties.

The reasons for prenuptial and other nuptial agreements are infinitely diverse. Each agreement can be tailored to the individual couple and must be prepared with care and with solid advice, to ensure that the agreement cannot be attacked by a disgruntled or bitter spouse at the point of divorce. The decision in Radmacher means that these agreements are likely to become increasingly common and possibly the norm, bringing the Cayman Islands and the UK into line with most other jurisdictions. Care should be taken to ensure that the agreement is drawn up by a specialist attorney with experience in family law as a badly-drawn agreement can lead to more expense and uncertainty than no agreement at all.

Making the decision to ask for a prenuptial agreement may be “unromantic” (despite what Ms.Radmacher may say), but following the decision in Radmacher it is now the best route to security from the uncertainty and cost of future legal proceedings should the marriage end in divorce. Contrary to popular misconception, prenuptial agreements are very much worth the paper they are written on and for better or worse are likely to become more common in the Cayman Islands.