

Z v Z (No 2) – THE FIRST POST-RADMACHER DECISION

Introduction

1. I attach the approved and anonymised judgement of Moor J in a case which is to be reported as *Z v Z (No 2)* [2011] EWHC 2878 Fam. It has just been released for distribution. So far as anyone concerned in it is aware, this is the first case contested in front of a High Court Judge in which the application and the limits of *Radmacher* have been tested.

The facts

2. H and W are both French and were educated in Paris. They began to live together in 1990 and married in 1994 after entering into a *separation de biens* agreement in standard form. Throughout the marriage H pursued a career in a well-known private equity group which is anonymised in the judgement as VCF. They have three children who are now 14, 12 and 9.
3. In 2007 H was offered a promotion to Managing Partner, based in London. By this time W had learned that H had a mistress. She was anxious for the marriage to continue. In August 2007 the family moved to a flat in South Kensington which was provided as part of H's relocation package.
4. H's relationship continued and separation was discussed. In February 2008 he moved out of the family home in order to have time to make a decision. This was concealed from the children who were told he was travelling a lot. He continued to return at weekends and in April the family went on holiday together. In early July the children were told that their parents were separating. W filed divorce proceedings in London the next day.
5. H then started competing proceedings in Paris and challenged the habitual residence basis of the London jurisdiction. In October 2009 this issue came before Ryder J, who found in favour of W: see *Z v Z* [2010] 1 FLR 694.
6. By the time of the trial before Moor J in October 2011 a number of important issues were agreed:-
 - There was a fully agreed schedule of assets amounting to £15m.; over 90% were in H's name.

- It was agreed that but for the *separation de biens* an equal division would be inevitable.
 - It was agreed that the *separation de biens* was valid as a matter of French law and that it would be binding in France.
 - Although she had had no independent legal advice and there had been no formal disclosure, W accepted that she had understood the meaning of the *separation de biens* and that she had had adequate knowledge of the financial position.
 - It was agreed that W's maintenance-based award would have been lower in France than the English court was likely to award; but that the English court must apply English law.
7. The trial had originally been set down for ten days, which was shortened to seven at the FDR in May 2011. In the event it took less than four days, subject to judgement. W and H were the only witnesses.

The arguments

8. H contended that the effect of the *separation de biens* should be that the sharing principle was excluded and that W's award should be made on a needs basis: he proposed £5.2m. W's primary contention was that the *separation de biens* should be ignored and that she should receive 50%; in the alternative she said that if her claim was to be met on a needs basis she should receive 50% - £7.5m. – in any event.
9. Moor J was thus confronted with two principal issues:-
- Did the sharing principle apply or was it excluded?
 - If it was excluded, how was W's claim to be quantified on a needs basis?
10. W's case was that on the *Radmacher* test it was not fair for two separate reasons that she should be held to the *separation de biens* agreement. The first was that she said she had been induced to enter into the agreement because H was at the time of the marriage thinking that he might go into business. If they had married under the French default *communité de biens* regime, and H went into business but was unsuccessful, she would have been liable for half his debts.
11. Her evidence was that the sole reason for the agreement was to protect her from third party creditors and that divorce was not in contemplation at all. H disputed her account. He accepted that protection from creditors had been discussed but said that this had not been the primary reason for the agreement, at least in his mind.

12. The second reason arose out of a letter which H had written before he left the family home in February 2008, in which he had promised not to rely on the *separation de biens* “if I start legal proceedings”. However, there was also a draft version of the letter which did not have this qualification. W had taken part in preparing the first draft, whereas the final version with the qualification had been written out by H and left for her.
13. Her case was that H had slipped this qualification into the final version without her knowledge or agreement and that it would not be fair for H to be allowed to rely on it. There was a bargain and she had played her part by maintaining the facade of family life continuing as normal. H’s case was that the letter would only have come into play if he had started divorce proceedings, and that it was not he but W who started them. It was common ground that the letter would not have had the effect in any event of changing the *separation de biens* as a matter of French law: a matrimonial property regime can only be altered by a further notarised agreement.

The judgement

14. The Judge found for H on the major evidential issues. He did not accept that protection from third party creditors was the overriding reason for the *separation de biens*. He accepted H’s evidence that he would not have married W if she had not entered into the agreement. He also broadly accepted H’s evidence in relation to the February 2008 letter and rejected the argument that the draft version (which W had participated in drafting) should be treated as more important than the final version (which she had not). He therefore found that W should be held to the *separation de biens*.
15. The case is highly fact-specific as such cases always are. However, some points of wider interest emerge from it. The first is the way in which H relied on the agreement. In France it is not possible for a *separation de biens* agreement to regulate maintenance obligations in the event of divorce. This is in contrast to the position in Germany: see *Radmacher*. If the divorce had proceeded in France W would have been entitled to the equivalent of periodical payments for a period of years and also to lump sum compensation known as *prestation compensatoire*. It was common ground that the overall value of this to W would have been less than she would receive in England though neither party adduced evidence about how W’s award would have been quantified in France.
16. This was therefore not a case where H was claiming that the pre-marital agreement quantified W’s entitlement: only that it established that sharing was excluded so that

W's claims were to be addressed on a needs basis. This is a natural corollary of the principle set out in *Radmacher* that it will be easier to exclude the sharing principle than to exclude claims based on needs or compensation. Anyone who is drafting a prenuptial agreement in England may wish to bear this in mind. There are some situations where it is wise to limit the ambit of an agreement to an exclusion of the sharing principle rather than to attempt to quantify provision in the event of divorce.

17. The second point is that the level of maintenance was firmly decided according to English law. In their opening written submissions counsel for H had argued that when assessing capitalised maintenance the English court should take into account what would have happened in France and thus make an award at the lower end of the spectrum. Reliance was placed on the well-known passage at #57 in the judgement of Thorpe LJ in *Otobo v Otobo* [2003] 1 FLR 192 which seems to support that approach.
18. However, this argument was abandoned in closing submissions and was rejected by the Judge (#40). It is now quite clear from both the majority judgement in *Radmacher* and from the minority judgement of Baroness Hale that there is no scope for taking into account what might have happened if the divorce had taken place elsewhere. In contrast to the position in many European countries, English family law applies the *lex fori*.
19. The third and perhaps the most problematic point to emerge from the judgement arises out of the Judge's treatment of H's February 2008 letter. It was argued on H's behalf that an earlier agreement which the court is otherwise inclined to uphold should only be treated as varied by a later agreement if the later agreement is itself one to which the parties would be held on *Edgar* principles. Reference was even made to aspects of the law of contract including the parol evidence rule.
20. The Judge did not accept this argument in its entirety: see #51 and #57. However, there are references at #56 and #60 which seem to show that he was paying some heed to the contractual aspects of the letter and/or to its status in *Edgar* terms. This door has not been closed and in other cases efforts might be made to open it wider.
21. But as the Judge recognised (#51) the test in *Radmacher* of whether parties should be held to an agreement is simply fairness. A subsequent agreement is only one way in which it might become unfair to uphold the original agreement. There are many other ways in which one or both parties might conduct themselves so as to make it unfair to hold them to the original agreement. The evaluation of what is or is not unfair is fact-

specific but potentially wide-ranging: it is wrong in principle that it should be encumbered with the jurisprudence surrounding *Edgar* agreements – let alone the technicalities of contract law.

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