



Varying Agreements in Matrimonial Proceedings

Produced in partnership with Alfred Ip of Hugill & Ip



Parties engaged in divorce proceedings often try to settle matters as amicably as possible, particularly if children are involved. However, one party may attempt to vary or even renege an agreement for matters such as maintenance if they discover that a misunderstanding has occurred or that the agreement is unfair. Whether orders to vary an agreement will be granted by the court was recently revisited in the case *V, RHM v V, ES* [2019] HKFC 279.

Background to the case

The couple in the case were married for 13 years, and had 3 children, one of whom (“H”) suffered from Global Developmental Delay due to medical complications. The family have lived in several countries, including Switzerland and Hong Kong in the past several years, the moves being driven by the health of H; during the course of marriage, the family had a very high standard of living.

Following the Husband’s petition for divorce in 2017, the parties agreed to a Consent Summons in May 2017 and subsequently an Amended Consent Summons in October 2017, which provided for “*a financial settlement*” to be paid by lump sum of CHF 3 million (approx. HK\$23.5 million) for maintenance of the Wife and children. However, following the Husband’s transfer of CHF 3 million, the Wife sought to resile from the summonses, and claimed that they were in fact “*fundamentally unfair*” and that she should not be bound by the terms, and asked for both the consent summonses to be set aside.

Applicable Law

The leading case on variation of marital agreements is the landmark English case, *Radmacher v Granatino* (2010) – endorsed by the Hong Kong Court of Final Appeal’s decision in *SPH v SA (Forum and Marital Agreements)* [2014] HKFLR 286.

The Judge Melloy in *SPH v SA* quoted the Supreme Court’s judgement in *Radmacher*, which considers several elements:

1. the presence of “*standard vitiating factors: duress, fraud or misrepresentation*”;
2. “*a party’s emotional state, and what pressures he or she was under to agree*”;
3. however, the party’s emotional state and pressures of the circumstance “*cannot be considered in isolation from what would have happened had he or she not been under those pressures [as] the circumstances of the parties at the time of the agreement will be relevant*”; and

4. “If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.”

In essence, the Court will give full weight to an agreement if the parties “had entered into it of his or her own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement”, and the parties will be seen as having “full appreciation of its implications” with the exception that “the circumstances prevailing it would not be fair to hold the parties to the agreement.” From the judgements of *Radmacher* and *SPH v SA*, it is clear that the Courts’ prerogative in assessing whether marital agreements should be varied is fairness for both parties, bringing into consideration the circumstances surrounding the agreement(s).

Applying the law to the present case

Based on the aforementioned judgements, the Court in *V, RHM* formulated the following guiding questions to determine whether the summonses could be set aside:

1. “Were the consent summonses entered into freely and with a full appreciation of their implications? In particular was there a material lack of disclosure? Did the wife receive independent legal advice?”
2. Was there any duress, or undue influence or pressure or any other form of unconscionable conduct undertaken by the husband or the husband’s lawyer against the wife? What was the wife’s emotional state at the time? Was she under any other form of pressure to agree to the consent summonses?
3. Would the circumstances prevailing at the time make it unfair to hold the parties to the consent summonses in any event? In particular, would the consent summonses potentially prejudice the reasonable requirements of the children, particularly H? Do the consent summonses potentially leave the wife in a predicament of “real need”?
4. Did the parties appreciate the implications of the consent summonses? Were some of the clauses enforceable as drafted in any event?
5. Are there grounds for concluding that an injustice would be done by holding the wife to the terms of the consent summonses?”

The Court in *V, RHM* ordered for both the original Consent Summons and Amended Consent Summons to be set aside. The major reasons for the order was that the Wife had a limited understanding of the parties’ financial situation, as the Husband did not fully disclose their position prior to the negotiations. Additionally, it was found that the Wife did not receive independent legal advice concerning the terms of the Amended Consent Summons, which resulted in a lack of full appreciation of implications of the terms of the contract. The conduct of the Husbands’ lawyers was also found to have put the wife under extraordinary levels of stress and pressure, which only added to the stress she had from taking care of the children. Lastly, the Court was concerned that the summonses would have left the Wife “in a situation of real need”.

Conclusion: can you renege?

While the Court will give effect to marital agreements freely entered into by parties, the Court will also give consideration to the prevailing circumstances to make a decision as to whether it would be fair to allow a party to renege or vary. The case of *V, RHM v V, ES* provides insight into the renege of seemingly binding divorce settlements, even though the questions posed by the Court only serve as a guideline, rather than determining factors.

While it is ideal to obtain legal advice before signing any marital agreements, if you are a party to a divorce settlement that you feel has had unjust consequences and has been entered into under unfair circumstances, you may have grounds on which you may renege. Legal advice should be sought as soon as practicably possible assess whether you have a case to renege, but generally speaking you will likely have a good argument to make if: the other party has not fully disclosed all information; you were put under some sort of pressure; you can prove that at the time of settlement you

were under great stress or had an ill mental state; you were in a position to be taken advantage of; you had not received adequate legal advice; the agreement reached was unclear and poorly drafted; and you are left in “*a predicament of real need*”, particularly relating to the support of children.

These situations are never easy or clear, but one thing is for sure, expert legal advice from trusted lawyers will substantially help in avoiding future complications and risks.



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A qualified solicitor in Hong Kong since 2000, Alfred's speciality is dispute resolution, an area in which he is ranked by Chambers & Partners Asia Pacific as a 'Leading Individual'. Until recently he was partner in the Dispute Resolutions team and head of Private Client at a leading Hong Kong law firm.

Alfred is skilled in helping individuals and their families manage personal and wealth-related matters, including trust and probate (both contentious and non-contentious), family office, and mental capacity issues.

He is vastly experienced in all areas of probate and can help clients with estate planning, ranging from the proper drafting of a will to constructing complicated trusts, airtight from any potential perils.

Alfred is appointed by court as an administrator in estate disputes, and advises professional administrators on legal aspects of estate administration, both in Hong Kong and internationally.

In contentious cases, he acts for clients in probate actions, ranging from propounding the Will to having an executor removed. For clients requiring help in estate administration problems such as declaratory relief or disclosure of account, Alfred will apply to Court for the necessary directions and orders.

Alfred's professional skills are enhanced by his membership of the Society of Trust and Estate Practitioners ("TEP"), and of the Chartered Institute of Arbitrators. He is a CEDR accredited Mediator and a Notary Public.

In 2012, he won the Law Society of Hong Kong's Gold Award for services to the community for his pro bono initiative, "FreeWill", and he has received several pro bono service awards since.

In addition to his Private Client practice, Alfred has 20 years of experience in commercial litigation and dispute resolution. Moreover, he helps clients with issues regarding family law.

In March 2017, Alfred was appointed to sit as a Deputy District Judge.

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