

# Family law news: Hong Kong's top court follows Radmacher and Charman

24 OCTOBER 2014

**CATEGORY:**  
[ARTICLE](#)

The Withers family law team in Hong Kong continues to be at the forefront of developing family law in Hong Kong. Very few cases go to Hong Kong's most senior court, the Court of Final Appeal (CFA), but in the past few months our team has been involved in two prominent cases before the CFA – one involving a pre-nuptial agreement and the other addressing the issue of trusts as a resource of the husband.

SPH v SA [2014] HKEC 957, in which [Sharon Ser](#) and [Sindy Wong](#) the wife, primarily dealt with forum. However, as the parties (who were both German nationals living in Hong Kong) had signed a pre-nuptial agreement (PNA) and, subsequently, when the marriage deteriorated, a separation agreement in Germany, the treatment of the PNA was also addressed. The wife contested the validity of the agreements, alleging that they were made under undue influence. At first instance, the Hong Kong Court was persuaded that the matter should be heard in Germany, as the majority of the assets were located there and the agreements were formalised there. The Court of Appeal (CA) and the CFA disagreed with the trial judge, finding that the wife's connection to Hong Kong was overwhelming and she could issue there as of right. The CFA also found that the existence of a PNA was a factor in the exercise of discretion, that the old rule that agreements providing for future separation were contrary to public policy was obsolete and, further, that there should be no distinction between pre-nuptial agreements and separation agreements.

Following the principle of the English Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, the CFA held that parties could not oust the jurisdiction of the court, but the court must give due weight to an agreement which had been entered into freely, unless in the circumstances it would not be fair to hold the parties to the agreement. An agreement could carry full weight only if each party had entered into it out of his or her own free will, without undue influence or pressure, having all the information material to his or her decision and intending that it should be effective to govern the financial consequences of the marriage coming to an end.

As forum cases are common in Hong Kong and are often hotly contested, the clarification in respect of the treatment of nuptial agreements on the impact of choice of jurisdiction has been a welcome development. The treatment of marital agreements will also be welcome by many wealthy families who wish to protect assets, particularly as the Hong Kong Court has followed English case law on the approach to asset division.

The treatment of marital agreements will also be more important in the light of the second CFA case Withers was involved in this year. In the case of *Kan Lai Kwan v Poon Lok To Otto (KLK v PLTO)* [2014] HKEC 1174, Marcus Dearle and Patrick Hamlin represented the trustee. In this case, the CFA found that neither the trial judge nor the CA had applied the correct test when considering the extent to which trust assets could be regarded as a resource of one of the parties. It applied the 'likelihood test' from *Charman v Charman* [2006] 1 WLR 1053 (CA, Eng) and *Charman v Charman (No 4)* [2007] 1 FLR 1246 (CA, Eng) (in which Withers' London team acted for the husband) which required the court to assess whether, 'if the husband were to request it to advance the whole (or part) of the capital in the trust to him, the trustee would be likely to do so'. In the circumstances of this case, where the husband was the settlor, the protector and a potential beneficiary under the trust, the CFA found that the trustees would exercise their discretion to benefit the husband. The CFA found that it was clear from the evidence that historically the husband had been able to access funds from the trust as and when he wished, and that the terms of the trust and the letters of wishes indicated that the husband always intended to occupy a dominant position in relation to the trust.

The trial judge and the CA had found that the trustees would not countenance a division of the trust funds which would result in the reduction of the parties' daughter's 'one third interest'. The CFA disagreed and found that in accordance with section 7(1)(a) Matrimonial Proceedings Ordinance (the Hong Kong equivalent to section 25(2)(a) Matrimonial Causes Act 1973), the whole of the trust was a financial resource to which the husband had, or was likely to have, in the foreseeable future.

The CFA further decided that this was a long marriage and that there was no justification for a departure from equality, including the 84.63% of the shares in the husband's highly successful construction and engineering business which were held in this discretionary family trust. In addition to real property owned by the parties, the wife received an award in the region of HK\$840 million (almost GB£65 million). The court further commented that, should the husband decide that the daughter's third interest should remain intact, he was free to secure this out of his half share.

This article forms part of our October issue of Family Law News. Click below to access a [PDF of the complete newsletter](#):

[Family Law News | October 2014](#)

Scroll down to the insight region below to view other articles in this newsletter.