Jacob L.J. briefly dissented. Although he acknowledged that Judge Dedman had referred to deciding what was "fair and just", Jacob L.J. observed that the remark was made amongst repeated references to the importance of discerning the parties' intentions. Since the judge had therefore applied the correct test and reached a conclusion that was not perverse, Jacob L.J. found no basis for interference.

All of the judges deciding *Jones* could be criticised for referring too often to *Oxley* given the House of Lords' apparent attempt to refine its approach. But the differing conclusions they reached to an extent reflect contradictions inherent in *Stack*. While the County Court and High Court judges were content to consider the myriad factors that might be relevant in discerning the parties' true common intention and the possibility of imputing to them an intention based on what is fair, the majority of the Court of Appeal were conclusively influenced by the strong presumption that equity follows the law and the rejection of an approach based on fairness alone.

Wall L.J. issued a familiar and justifiable plea to cohabitants and their legal advisors to "address the unthinkable", *i.e.* to "address their minds to the size and fate of the respective beneficial interests on acquisition, separation and thereafter" (at [61]). Nevertheless, it is equally appropriate to plead that the Supreme Court, when it hears *Jones*, clarifies the correct approach where evidence of a common intention is equivocal at best.

BRIAN SLOAN

MARITAL AGREEMENTS, PRIVATE AUTONOMY AND FAIRNESS

ON 20 October 2010 the Supreme Court handed down the long-awaited judgment in *Radmacher* v. *Granatino* [2010] UKSC 42, [2010] 3 W.L.R. 1367 with only Lady Hale dissenting. Marital agreements have been a controversial subject in recent times, both in England and beyond, and the decision coincides with an ongoing project on marital agreements by the Law Commission of England and Wales whose Consultation Paper No. 198, "Marital Property Agreements" was published on 11 January 2011. While the judgment leaves untouched the principle laid down in *Hyman* v. *Hyman* [1929] A.C. 601 that the parties cannot oust the jurisdiction for ancillary relief through private agreement, in confirming the Court of Appeal's decision [2009] EWCA Civ 649, noted [2010] C.L.J. 35 it significantly altered the role of marital agreements and particularly pre-nuptial (or ante-nuptial, as the Supreme Court now calls them) agreements in ancillary relief proceedings, giving them much greater weight.

The facts of the case can be explained briefly: a wealthy German woman and a French man entered into a pre-nuptial agreement. The

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agreement, which would have been binding and enforceable under German and French law, stipulated a separation of property and excluded any maintenance provision "to the fullest extent permitted by law", meaning that upon divorce neither of them could claim a share of the other's property. They were married for eight years and had two children. Upon divorce the husband sought ancillary relief contrary to the pre-nuptial agreement, arguing that the agreement should be disregarded as he had not had independent legal advice, there had not been full disclosure and no provision had been made for the advent of children or for the husband's needs.

The most striking feature of the decision of the Supreme Court is its wholehearted endorsement of the Court of Appeal's criticism of the distinction made between pre- and post-nuptial agreements by the Privy Council in *MacLeod* v. *MacLeod* [2008] UKPC 64, [2010] 1 A.C. 298 (at [54]–[63]), noted [2009] C.L.J. 285. It brought to an end the discussion as to whether pre- and/or post-nuptial agreements are binding contracts, rightly calling it a "red herring", since following *Hyman* the parties could seek ancillary relief in any event. The Court also rejected the Privy Council's finding that sections 34 and 35 of the Matrimonial Causes Act 1973 on "maintenance agreements" applied to all post-nuptial agreements, and held that Parliament can only have intended that they apply solely to so-called separation agreements, *i.e.* agreements concluded by the parties to regulate an existing or imminent separation (at [54]–[56]). Furthermore, *Radmacher* establishes that in principle the same approach should apply to pre-nuptial and post-nuptial agreements and that in this day and age neither should be regarded as contrary to public policy (at [63], [66]). According to the Court (at [75]) the approach to marital (or "nuptial" agreements) is to be as follows:

> 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.

In the case at hand this meant that the lack of (full) disclosure of the wife's wealth did not make a difference, and indeed it is difficult to see how it should: there is little room for an intellectual distinction between being entitled to nothing of "a lot" or nothing of a very specific sum. Only a "material" lack of disclosure should have an effect (at [69]).

The same applied to the (apparent) lack of legal advice. The husband, after all a former investment banker, clearly knew that he would not receive a share of the wife's wealth if he signed the agreement; the only function legal advice could perform here is to inform him about what he was (potentially) giving up – which he apparently was happy to

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do anyway. This left the final argument of the husband, namely that inadequate provision was made for his or the children's needs. It is here that a further exploration of the "foreign element" of the case would have been helpful, as in most continental European jurisdictions matrimonial property is seen as distinct from maintenance, and only the latter is relevant for needs and, to a lesser extent, compensation. Contracting out of maintenance obligations is much more difficult or even impossible in these jurisdictions and therefore marital agreements, and particularly pre-nuptial agreements, will usually not address maintenance (and thus needs and compensation, although the agreement in this case did), leaving this to be decided by the courts upon divorce. Unfortunately the Court chose not to pursue the "foreign element" in greater depth in its endeavour to find a fair outcome.

Be that as it may, with the approach to marital agreements set out in *Radmacher* the emphasis shifts back to what after all is the overarching principle of ancillary relief: fairness. Here the Court seemed to distinguish factors present at the time the agreement was entered into and factors relating to the circumstances prevailing at the time the agreement is invoked. While the former factors, such as material lack of disclosure, undue influence *etc*. leave little room for discussion, it is the latter factors that will be the legal battleground of the future as the outcome will depend on the facts of the individual case. The Court of course realised this and offered some guidance, namely that the reasonable requirements of the children of the family must not be prejudiced but that the autonomy of the parties and particularly their desire to protect non-matrimonial property should generally be respected (at [77]–[79]). The greatest challenge undoubtedly looms in the category of "future circumstances", namely when the marriage has generated needs or reasons for compensation of one partner. As the Court quite rightly held (at [81-82]) it is these two strands of fairness identified in *Miller* v. *Miller*; *McFarlane* v. *McFarlane* [2006] UKHL 24, [2006] 2 A.C. 618 that are most likely to lead to a departure from the agreements, and that the third strand, sharing, is the one most susceptible to being excluded or limited by an agreement of the parties. Perhaps surprisingly to some, the English law on marital agreements is therefore in effect now rather similar to the laws on the continent.

JENS M. SCHERPE

FAMILY ABUSE, PRIVACY AND STATE INTERVENTION

THE President of the Family Division's short reserved judgment granting an injunction barring unlawful conduct by a family member,

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