permitted underlease with Mercers. Thus it was argued that NatWest could not have parted with or shared possession under the virtual assignment with New Liberty, and would not have breached the alienation provisions. Whilst it is true that NatWest did not occupy the premises after 2001, it retained its reversionary leasehold estate and continued to receive rent from its subtenant Mercers. As such NatWest continued to fall within the broader technical meaning of "possession" under section 205(1)(xix) LPA 1925. Thus, at the point of entering into the virtual assignment with New Liberty, contrary to Ward L.J.'s suggestion, NatWest could be said to have parted with or shared possession in breach of its leasehold covenants with Clarence House.

So far, so good for Clarence House. However, Ward L.J. noted that the virtual assignment and Power of Attorney were grounded in contractual, agency-like terms. New Liberty collected rents in NatWest's name, not its own. Thus there was no transfer or sharing of the right to receive rents as envisaged by section 205(1)(xix) LPA 1925. Whilst New Liberty held those rents for its own benefit, this was due to the contractual arrangements contained in the virtual assignment, rather than in the sense of sharing or being put into possession of the property.

Whilst this approach may be technically defensible, it underlines the highly pro-tenant bias of the English courts when faced with the interpretation of leasehold covenants. It remains open to landlords to include express prohibitions against virtual assignments, if they know of their existence and wish to do so. However, as in *Clarence House*, the emphasis upon protecting tenants does not always fairly reflect the relative business acumen of the parties to commercial leases.

EMMA WARING

PRE-NUPS, PRIVATE AUTONOMY AND PATERNALISM

MARITAL agreements (i.e. pre-nuptial, post-nuptial and separation agreements) are among the most debated topics in family law and form part of the Law Commission's Tenth Programme of Law Reform. For now, the latest word on pre-nuptial agreements is the decision of the Court of Appeal in *Radmacher* v. *Granatino* [2009] EWCA Civ 649. The decision is important first because it marks a clear departure from previous case law, and secondly because of its open criticism of the approach of the Privy Council in *MacLeod* v. *MacLeod* [2008] UKPC 64, [2009] 3 W.L.R. 437 (noted by Miles [2009] C.L.J. 285) and its clear emphasis on private autonomy over paternalism. The third issue of importance is the international dimension of the case, which cannot be explored here (but see Miles [2009] C.F.L.Q. 513).

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In the case, a wealthy German woman and a Frenchman entered into a pre-nuptial agreement. They were married for eight years and had two children. Upon divorce the husband sought ancillary relief contrary to the pre-nuptial agreement which barred any claims by him. The agreement would have been binding in both Germany and France. By contrast, in England pre-nuptial agreements are generally considered to be contrary to public policy but can be taken into account as part of the court's wide discretion under the Matrimonial Causes Act 1973, s. 25. The husband argued that the agreement should be disregarded completely 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 orthodox approach to pre-nuptial agreements, spelled out in the 1998 Home Office Green Paper *Supporting Families* and followed by Baron J. in the first instance decision *Radmacher* v. *Granatino* [2008] EWHC 1532 (Fam), [2009] 1 F.L.R. 1478, was always to consider an agreement unfair under such circumstances and not give it effect. However, the agreement could have a "moderating" influence when considering the section 25 criteria as a "circumstance" of the case and as "conduct" of the parties.

Overturning the orthodox approach, the Court of Appeal decided that neither full disclosure nor independent legal advice were preconditions to giving such an agreement effect when exercising the section 25 discretion. If, as in the case at hand, the husband knew full well what he was doing, insisting on such formal requirements was unreasonable. Neither disclosure nor legal advice (which he had had the opportunity to take) would have made a difference and thus was not a "causative element" (at [141]). The task of the court was to apply the overarching principle of fairness, which in this case demanded giving effect to an agreement that the parties had entered into freely and knowingly and had expected to be binding. The only provision for the man was therefore to be made in his capacity as a father, not as a husband.

Another important feature of the case is its overt challenge of the distinction that Baroness Hale drew in *MacLeod* between pre-nuptial and post-nuptial agreements, where she confirmed that the former were contrary to public policy but could be taken into account in the section 25 exercise, sometimes even having "magnetic importance" (*Crossley* v. *Crossley* [2007] EWCA Civ 1491, [2008] 1 F.C.R. 323). The latter were held to be binding and enforceable, but since the jurisdiction of the court could not be ousted (*Hyman* v. *Hyman* [1929] A.C. 601) the courts have the power to make different orders for ancillary relief following an application by either party. It seems unlikely that there will be marked differences in the way the courts exercise their discretion for both types of agreement. In addition, as

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their Lordships point out correctly (at [29], [66], [119]), the public policy argument is difficult to accept. It relies on precedents from a different era, set within a different society and indeed applying different law on ancillary relief. Moreover, why should the couple be deprived of all capacity to regulate their affairs before the wedding but each party be considered "able to look after him- or herself" (*MacLeod* at [42]) immediately after? Emotional (and other) pressures can exist both before and after the wedding (*Radmacher* at [126]). The root of the problem with both pre- and post-nuptial agreements is their prospective nature, *i.e.* that they seek to regulate an unknown future. The more time passes, the more likely it is that the original agreement will become unsuited or even unfair. Hence it is the change of circumstance and the effect it should have on the agreement that is the key issue. That is also why separation agreements have long been accepted and are normally given effect (*cf. Edgar* v. *Edgar* [1980] 1 W.L.R. 1410): they are concluded at a point in time when the facts are known, and only extraordinary and unforeseen circumstances will lead the court to deviate from the agreement.

In any event, agreements between spouses and private autonomy will play a greater role in ancillary relief after the Court of Appeal's decision in *Radmacher* – at least until the appeal to the Supreme Court is decided. Also, while independent legal advice and full disclosure remain important (and sometimes decisive) elements when determining the fairness of an agreement, their absence cannot *per se* render an agreement unfair.

Perhaps in future cases two points in time should be considered separately. The first is the time of the conclusion of the agreement: here circumstances can be such that the agreement is unfair, for example, owing to undue influence or causative non-disclosure. If that is the case, then the agreement should be disregarded. The second is the time when the agreement (which was principally fair to begin with) is invoked. Here, however, the decisive factor should be whether the circumstances have changed to such an extent that the agreement now has to be considered unfair. The criteria for this will have to be developed by case law or by legislation. The experiences of other jurisdictions might prove helpful for this (*cf.* Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, forthcoming), but one thing should be obvious: the comparison of what the spouse receives according to the agreement and what he or she would have received without it cannot be decisive. After all, it is the very purpose of a marital agreement to enable the parties to change the outcome of ancillary relief.

JENS M. SCHERPE

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