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,
DL, on the local authority’s *ex parte* application in *A Local Authority v. DL, RL and ML* [2010] EWHC 2675 (Fam) raises important issues regarding the roles of state and individuals in managing abusive relationships. What power does the state have to intervene against the wishes of victims of alleged abuse, and what rights do victims have to resist such intervention in their family life? The matters discussed here fall to be reconsidered by the court hearing the *inter partes* application expected in spring 2011.

At the relevant time DL lived with his elderly parents, the Ls, in their home. Mrs L was physically disabled and received daily visits from a carer. The local authority was concerned about DL’s alleged behaviour in recent years (on which no findings were made): aggressive and physically violent behaviour, attempts to control the Ls’ activities and carers’ visits, attempts to procure the transfer of ownership of the home into his name and to move Mrs L to a care home against her wishes. Mrs L opposed any legal action against DL for fear of losing contact with him or even of his possible suicide, and Mr L was thought unlikely to support action taken against her wishes. Mr and Mrs L were mentally competent to manage their own affairs and, in particular, to determine how their relationship with their son should progress and whether he should continue to live with them. That being so, could the local authority seek injunctive relief against DL to protect them?

The judgment stated, without explanation, (at [6]) that use of the criminal law had been considered and rejected. There were grounds for prosecution of harassment at least (Protection from Harassment Act 1997) which, like any criminal proceedings, may be prosecuted without victim consent; it was unclear why state-initiated civil proceedings should be thought more appropriate in such cases (*cf.* remarks at [28]). Resort to the Court of Protection was also rejected, presumably because of the Ls’ mental capacity (Mental Capacity Act 2005, s. 2). So too was use of anti-social behaviour orders: this requires that the respondent’s conduct cause or be likely to cause harassment, alarm or distress to persons not of his household (Crime and Disorder Act 1998, s. 1).

Could the local authority instead apply for non-molestation or occupation orders under the Family Law Act 1996, Part IV? No. Parliament enacted a power for such applications to be permitted by secondary legislation (section 60), but no such legislation has been made, following research into the pros and cons of such applications (Burton (2003) 25 J.S.W.F.L. 137). Third parties have been empowered to proceed in cases of suspected forced marriage (1996 Act, s. 63C). But outside that special area, it was thought that third party applications would not solve the problems faced by victims taking legal action (Ministry of Justice, CP 31/07, p. 20). Instead breach of
non-molestation orders has been made a criminal offence (1996 Act, s. 42A), as well as a contempt of the civil court which made the order.

This Family Law Act scheme thus achieves a particular balance of public and private power which it is important to appreciate in considering the Ls’ situation. Non-molestation orders are made on some private initiative – either a direct application by the victim or by the court’s own motion when other “family proceedings” were properly before it (1996 Act, ss. 42 and 63). But once made, whilst the victim may bring less draconian contempt proceedings, enforcement potentially becomes a matter of public concern vindicated through the criminal justice system instead. This in theory ensures that victims control whether and when legal proceedings for injunctive relief should be brought. But potential criminal enforcement may have contributed to the sudden sharp decline (to some extent recovered) in applications for non-molestation orders. While it is difficult yet to discern the reasons for that decline, there is concern that the loss of victim control over enforcement may deter some from seeking protection at all (Hester et al. Early evaluation of the Domestic Violence, Crime and Victims Act 2004. MOJ Research Series 14/08). Meanwhile, Crime and Security Act 2010 provisions empowering police to issue so-called “go orders” and then seek a follow-up court order await piloting; they may or may not be implemented.

Absent legislation explicitly empowering third party action, the President’s injunction was made under the inherent jurisdiction (or, as a subsidiary argument, pursuant to the Local Government Act 1988, s. 222). The President found a lacuna which the inherent jurisdiction may properly fill: in short, because the Ls required protection and the only mechanism to achieve it is action by the local authority (at [14]). But local authority and court frustration at being unable to intervene does not necessarily mean that there is a gap in the law. The lack of statutory third party power to act on behalf of competent adults opposed to the proposed action and where no minors require protection may reflect a proper determination that the balance of rights and interests at stake here weighs in favour of victims’ rights to respect for family and private life. While the President noted the relevance of Article 8 ECHR, he did not analyse the Ls’ situation in those terms, nor did he expressly consider how far the state’s positive Convention obligations might reach: Opuz v. Turkey (2010) 50 E.H.R.R. 28. He considered that jurisdiction could be taken following a forced marriage case pre-dating the recent statutory reform in that area: Re SA (Vulnerable adult with capacity: mariage) [2005] EWHC 2942, [2006] 1 F.L.R. 867. But the subject of those proceedings was incapable of taking proceedings herself. The President acknowledged that Re SA could accordingly be distinguished but, without explanation,
concluded that the injunction could nevertheless be made (at [20]), relying on inconclusive dicta from another decision in which the subject lacked capacity (*Local Authority X v. MM* [2007] EWHC 2003, [2009] 1 F.L.R. 443).

The situation of the Ls clearly demanded anxious attention from several agencies. But the strategy adopted here is not necessarily the right one. That the injunction issued against DL barred only unlawful behaviour – and so did not to that extent interfere unduly with his liberty (at [31]) – does not lessen the interference in the Ls’ family life inherent in the state bringing civil legal proceedings against the wishes of all the individuals concerned in relation to issues which, on the face of it, are matters for the family members to litigate themselves, or not, as they wish. If it is thought that local authorities and others should have power to intervene in these cases, which may or may not be appropriate, Parliament should reconsider the Family Law Act 1996, s. 60, and create a statutory framework within which the rights and interests of the relevant parties can be balanced. These complex cases raise questions of principle which should ideally be resolved after full consultation with key stakeholders, not by a court at the instance of one local authority in one difficult case. For the time being, we await the *inter partes* hearing in which these issues will be more fully ventilated than the *ex parte* proceedings could inevitably allow.

**JO MILES**

**MARGIN SQUEEZE: FROM BROKEN REGULATION TO LEGAL UNCERTAINTY**

It is not infrequent for an undertaking to offer not only end-user products to consumers at the retail level but also access to an essential input for its downstream competitors at the wholesale level. This raises the possibility of market foreclosure by manipulation of the margin between wholesale and retail prices. In C-280/08 *Deutsche Telekom v. European Commission* (judgment of 14 October 2010, not yet reported), the Court of Justice of the EU has confirmed that a dominant undertaking might have abused its market position by such a margin squeeze, in breach of Article 102 TFEU. The case shows that an abusive margin squeeze may occur even where the undertaking is subject to sector-specific economic regulation at the wholesale or retail levels. While this important decision clarifies a number of technical points regarding this abuse, the extension of its application to regulated sectors raises worrying questions in terms of legal certainty for regulated firms. More generally, the judgment contains a strong policy statement supporting the concurrent application of EU competition law in areas already...