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TELEVISION EDUCATION NETWORK DRAFTING BINDING FINANCIAL AGREEMENTS THAT WITHSTAND THE TEST OF TIME

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KEY MESSAGES

The key messages that I give about drafting of financial agreements are these:

1. Make sure that it is a binding contract.

2. Don't engage in shortcuts. Slow and steady, with a meticulous approach, wins this race. The case law shows that hares- those who rush the process- tend to lose, not the tortoises. A good comparison is to fly in a plane. A home made plane, built by an amateur, where aside from expertise, the opportunity of taking shortcuts is higher than in a factory, has a much higher crash rate than that of a factory built plane[2].

3. Take scrupulous care as to compliance with the provisions of the Family Law Act 1975 (Cth). For example, if it's a s.90C agreement, call it a s.90C agreement, not a s.90B agreement. Follow through each and every requirement under the Act, and avoid each and every basis for setting aside, and there should not be a difficulty. As I said in point 2, don't take shortcuts.

4. When it is your turn to give advice, do so. Our role as lawyers is not merely to witness a signature, but to positively give advice. It sounds boring to say it again- but do your job properly and don't take shortcuts.

5. Make sure your client understands the advice- and tells you so: and document that, preferably with your client having signed an appropriate acknowledgment. Again, don't take shortcuts.

6. Scrupulously document everything you do so, there is no doubt as to the advice that you have given your client, that your client understands the advice, or as to any representations made to the other side. For the sake of clarity, I'll say it again- don't take shortcuts.

7. If your client is from a CALD background, or has some other disadvantage, have an interpreter (and if necessary have the document translated) or other necessary step that might address that disadvantage.

8. Ensure that the deal is fair – and therefore defensible. If it fails the sniff test, then the greater the prospects that the Court will be seeking to find that the agreement is not binding or that it ought to be set aside.

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[2] See for example: https://en.wikipedia.org/wiki/Homebuilt_aircraft .

9. If your client is being done over badly, make sure you tell your client candidly of this (including documenting it with written advice not to sign, and an acknowledgment by the client) and consider whether it is appropriate for you to act, or whether you should withdraw.

10. Ensure that the process leading up to the execution of the financial agreement is a fair one, with sufficient time for reflection. Slow and steady wins the race- and again, don't take shortcuts.

11. Assume that there is greater risk with a prenup- and act accordingly to reduce that risk.

12. Particularly for a prenup or an agreement which has a long life (such as for the payment of periodic maintenance) don't follow the usual seven year archive rule, archive the documents forever.

13. Ensure that you're signed up to a professional standards scheme, to limit liability.

14. Ensure that you have adequate insurance.

1. THERE MUST BE A CONTRACT

It sounds basic, but it's easy to forget. Family lawyers aren't always focused on contract law. If you draft financial agreements for clients, then you need to focus on whether there is a binding contract. The Act refers to "*agreement*", but it is clear that what it refers to is that there must be a contract.

A particular feature about this contract is that certain aspects of it are governed by legislation, namely, the *Family Law Act*.

But to begin at the beginning, there must be a contract.

The elements of a contract under Australian law are that:

1. There must be offer and acceptance.

2. There must be an intention to create legal relations.

3. There must be certainty of terms. [It seems some lawyers cannot get this right with financial agreements.]

4. There must be consideration. [Don't assume that this exists. It mightn't.]

5. Each of the parties must have legal capacity to enter into the agreement.

6. Consent to enter into the agreement was obtained properly. [This in turn might hinge on advice given- and in this respect you and your client may be trapped by the quality or lack of it of the other lawyer's advice. The best lawyer the other side can get is the best guide to making sure the agreement sticks.]

One of the obvious difficulties with whether or not there is a contract is whether or not there is consideration. This is one of those moments in preparing a financial agreement to stop and pause. It is essential to consider as to whether or not there is consideration with this particular deal. If there is no obvious consideration, then thought must be given as to how to rectify that problem. There are a couple of obvious ways:

- The agreement could provide for an exchange of funds, for example, $10 from one party to the other, receipt of which is acknowledged.

- Alternatively, the agreement could be drafted as a deed. A deed of course is more solemn than an agreement and a deed does not need consideration. Issues with having a deed are to ensure that the document is carefully drafted so that it is a deed. A longer limitation period applies to breach of a deed as opposed to a breach of an agreement (irrespective of the remedies under the Act). The limitation period for breach of an agreement under the general law is typically six years whereas for breach of a deed is 12 years for the ACT, Northern Territory, New South Wales, Queensland, Tasmania and Western Australia and 15 years for South Australia and Victoria.

Considerations as to whether or not the document should be executed as a deed include:

- Whether there are any specific corporate restrictions on the execution of deeds (for example as to delegated authority).

- Tax issues.

- Any obligations imposed on third parties.

- Difficulties in proving consideration.

- Whether a deed can be executed in counterparts (as a deed needs to be delivered in order to be effective).

- Remedies available for breach of a deed.

An example of a case where construction of a document was considered as to whether it was a deed or something else was 400 George Street (Qld) Pty Ltd v BG International Ltd [2010] QCA 245. The case is illuminating as to whether or not a document is considered to be a deed.

Certainty of Terms

There must of course be certainty of terms with a financial agreement. It is common – and one would expect – that the parties will have discussions between themselves outside the direct communications between the lawyers. It is important in my view that there is a clause in the agreement setting out that this is the whole deal and that any other discussions between the parties don't form part of the deal.

While such a clause is not an absolute defence to the nature of the deal between the parties, in my view it is essential to take a belt and braces approach when preparing financial agreements.

It is also essential, as seen in the case law, to thoroughly define the relevant property that is being dealt with in the agreement, typically by a thorough schedule. To be pain staking in the preparation of the schedule is wise.

Signing in Counterparts?

It is common for many commercial agreements to be signed in counterparts. In the past, this was done by paper, then more commonly with a PDF document which is then signed in a paper version, scanned and sent back; and more recently, with an electronic version, such as docusign.

Given the requirements of the *Family Law Act*, I would avoid at all costs having a counterpart clause. In my view, it is essential that this is a paper document physically signed by the parties and witnessed by their lawyers (along with the certificates attached of independent legal advice and separation certificate, and preferably a certificate of the client to acknowledge receipt of advice from their (specified) lawyer. If a deed is chosen, it is clear when the deed takes effect. While there are limitations about when the deed is effective, because of the requirement for a separation declaration, if the document is executed as a deed, is it intended to take effect immediately upon the execution by that party, or by the execution of both parties, or is it contingent upon another event, such as the making of consent orders as to property settlement? These matters should be dealt with very carefully.

It is essential when preparing a financial agreement or acting for a party who has been presented with one, not to approach it in a formulaic manner but to go back to basics. Avoid shortcuts. As soon as you engage in shortcuts you are bound to fall into error.

It is appropriate to charge a proper fee for doing the work. The temptation is to give a discounted fee to the client. The problem for you with that discounted fee is that you may not spend sufficient time to properly consider all these issues and therefore feel tempted to engage in shortcuts. Risk with financial agreements often falls upon us as lawyers. Do everything you can to minimise that risk.

I have set out here some pointers from the cases. The citations are later in the paper, with a discussion of recent cases. I have not covered the facts in Thorne v Kennedy or Hoult, as I am going to assume these are familiar to the audience.

2. WHAT POINTERS CAN WE LEARN FROM THE CASES?

1. If the agreement on its face is so unfair, that might be an indicium of unconscionability. *Thorne v Kennedy* [2017] HCA 49; (2017) 263 CLR 85; *Beroni and Corelli* [2021] FamCAFC 9. Or as I put above, if it fails the sniff test, or to put it more judicially, the more “outrageous” it is, you should expect that the Court will do everything it can to find it not binding or seek to set it aside.

2. Check that the list of assets, liabilities and superannuation is accurate, cf. *Webster and Glover* (No 2) [2018] FCCA 3340.

3. Make sure that the terms are clear. *Kostres v Kostres* [2009] FamCAFC 222; [2009] FLC 93-420; (2009) 42 Fam LR 336.

To be a Tortoise in the Race is Much Better than to be A Hare

Rush the process and it is more likely that the agreement will either be not binding or set aside, for example:

- It will be unfair on its face risking it being set aside: **Thorne v Kennedy**
- Significant errors will be made: *Kaimal*
- You may not be sure who your client is: *Beckstead*
- An agreement imposed by one party and not the subject of genuine, reflective negotiation will have a higher risk of either being not binding or being set aside: *Thorne v Kennedy, Graham and Squibb, Beroni and Corelli, Kaimal, cf. Webster and Glover (No. 2)*
- If a party is a migrant and from a CALD background, typically the wife, and is not proficient in English or has some special disadvantage, beware, for example: *Thorne v Kennedy, Hoult* [2013] FamCAFC 109; (2013) 276 FLR 412; [2013] FLC 93-546; (2013) 50Fam LR 260, *Beroni and Corelli*.
- Don't assume that everything is happiness and light when a prenup has been signed. There may be allegations of bullying or domestic violence, that unless you explore it, you may not be aware: *Thorne v Kennedy, Kaimal, Boroni and Corelli*. We know s family lawyers that many relationships fail, and that they do so because of domestic violence. Why should this relationship be different?

Action by Solicitors

- Assume your file will be seen and that any privilege will be waived, for example: *Thorne v Kennedy, Hoult and Beroni and Corelli.*
- Provide the advice **as you are required to do**, for example: *Thorne v Kennedy, Beckstead, Kaimal and Beroni and Corelli*.
- Document everything. A feature of Hoult was that although the solicitor could remember, seven years before, having given the advice, there was no documentation of the advice which meant that the court could not be satisfied that the advice was given. See at [35], [37], [39], [42], [82], [92].
- Signing shortly before marriage is just too risky: *Thorne v Kennedy, Hoult, Kostres CF, Graham and Squibb* [2019] FamCAFC 33. I just wouldn't do it.

- Certify at the time of signing and provide that certificate, not five years after it was signed and five months after the separation: *Abrum and Abrum* [2013] FamCA 897.

- Just because a solicitor has signed a certificate and provided it to the other side, it is not binding if due process hasn't been followed. For example: *Thorne v Kennedy, Hoult, Kaimal*. That is why having a certificate (attached to the agreement) of each of the parties acknowledging receiving advice is wise and reduces risk. It is also good practice, so that either your client or the other party later on says: "*I didn't know, I wasn't advised*" is to have a schedule to the agreement attaching all relevant sections of the Act, and to refer to that schedule in your long letter of advice to your client. It would be wise to include section 79 and 75(2) (or sections 90SF and 90SM respectively) along with a statement in the recital at least to say (if it is the case in the agreement) that the ability to make an application for property settlement or spousal maintenance under those sections has been specifically excluded. This therefore makes it harder for a party later on to say: "*I didn't know*" as the wife said in *Kaimal*, for example.

- If you believe that your client is unwise to sign, say so and document it as *Suzie Harrison* did in *Thorne v Kennedy*. Consideration should be given as to whether it is ethical to continue acting.

- Make sure your client actually understands the impact of the agreement, for example: *Beroni and Corelli*, including if an interpreter is required, have an interpreter. The telephone interpreter service is an easy service to use.

- As I said with the tortoise and the hare, allow sufficient time in your consultation and advice with your client, not a wholly inadequate 30 minutes as occurred in *Beroni and Corelli*.

- Many years may pass before a challenge is made to the deed during which time memories fade, necessitating keeping your detailed file for many more years than the usual seven, for example, *Hoult* (7 years), *Webster and Glover* (7 years), *Graham and Squibb* (8 years), *Beckstead* (13 years).

All of the cases that I have read that deal with setting aside binding financial agreements seem to relate to what we commonly call pre-nups. These are and have always been a special area of risk. You should ensure that your firm is signed up to the limitation of liability scheme and that you have adequate insurance, just in case.

Of course, taking appropriate measures to protect you and your client should avoid you having to make that claim in the first place. After reading the cases from undertaking this paper, the lesson I absorbed (which is consistent with what I was doing anyway): be absolutely scrupulous in what you do, document everything and protect yourself and your client all the way through – which means that you should be charging an appropriate fee for the work that you do, given the amount of time and risk you take in advising a client about this agreement.

The consistent flavour of cases where agreements have been set aside is that the solicitor did not take sufficient time and, the implication is, did not charge a sufficient fee to deal with this area of risk.

FAMILY LAW ACT 1975 REQUIREMENTS

I have set out below the text of sections. This might seem tedious, especially the duplication of provisions under Part VIIIA (to do with marriage) and Part VIIIAB (to do with de facto relationships), but in my view it is necessary to be across the detail. The devil is in the detail.

When a party comes to you to say that they want to do a financial agreement, the first thing you have to work out is what type of agreement. It is essential to get this absolutely right.

The six types of agreements are:

Section	Description	Comment
90B	Financial agreements before marriage	The parties must be contemplating entering into a marriage, though not parties to any other financial agreement and the agreement "is expressed to be made under this section". With care, this could also be a s.90UB or 90UC agreement. The agreement will need to be expressed to be made under all the sections.
90C	Financial agreements during marriage	The parties are married i.e. before a divorce order is made, are not parties to any other binding agreement and "the agreement is expressed to be made under this section".
90D	Financial agreements after divorce order is made	The parties are divorced and then enter into an agreement, are not parties to any other binding agreement and "the agreement is expressed to be made under this section".
90UB	Financial agreements before de facto relationship	People who are contemplating entering into a de facto relationship make a written agreement, not spouse parties to any other Part VIIIAB financial agreement and "the agreement is expressed to be made under this section"
90UC	Financial agreements after breakdown of a de facto relationship	People who are contemplating entering into a de facto relationship make a written agreement, not spouse parties to any other Part VIIIAB finacial agreement and "after the breakdown of a de facto relationship".
90UD	Financial agreements after breakdown of a de facto relationship	People who are contemplating entering into a de facto relationship make a written agreement, not spouse parties to any other Part VIIIAB financial agreement and "after the breakdown of a de facto relationship".

Super Splitting

Section 90XH concerns a superannuation agreement to be included in the financial agreement if about a marriage. Section 90XHA concerns a superannuation agreement to be included in a Part VIIIAB financial agreement if about a de facto relationship.

As a matter of practice, if you choose to have a super split or flag in a financial agreement, then the agreement should in addition to referencing the other section (sections 90B, 90C, 90D – in respect of 90XH; or sections 90UB, 90UC, 90UD or 90UE for the purposes of section 90XHA) should also refer to sections 90XH or 90XHA respectively.

While in the case of a self-managed super fund, it might be advisable to have the trustee as a party to the financial agreement, otherwise the superannuation trustee will not be a party to the agreement. The agreement, while binding upon the parties, is not binding upon the superannuation trustee. I would be conferring with commercial lawyers and accountants who specialise in self-managed super funds before making the SMSF trustee a party to the agreement. You don't want unintended consequences that then come to bite your client and you.

Unless you have a self-managed super fund and the self-managed super fund trustee is a party to the financial agreement (and is therefore bound by the agreement), I would be avoiding having a financial agreement dealing with superannuation but instead have orders concerning superannuation. To do otherwise is extremely risky.

We have all experienced family lawyers just drafting terms as to a form of orders for super splitting and then sending them to the trustee of a super fund – only to find out too often that the super fund trustee wants changes to the form of orders before it will split the super. With an agreement, your client is reaching an agreement with the other side as to what is to happen with the super fund, but not checking out with the super fund trustee as to whether the trustee is agreeable to the terms and, critically, not binding the trustee to that agreement.

The Difference between a Part VIIIA Financial Agreement and a Part VIIIAB Division 4 Financial Agreement

There are significant differences between whether you have an agreement under Part VIIIA i.e. to do with marriage and an agreement under VIIIAB, Division 4 – to do with de facto relationships.

There are two key differences between the types of agreements. A financial agreement concerning marriage (whether before, during or after) applies across the country. Therefore, a couple who are not living in a de facto relationship but are contemplating either being in a de facto relationship or a marriage could enter into a section 90B agreement, in contemplation of marriage. They can live anywhere in Australia for that purpose.

However, if the agreement concerns a de facto relationship, it will not automatically apply in Western Australia. WA has never referred its powers concerning super splitting to the Commonwealth. One must

take extreme care when dealing with de facto partners or prospective de facto partners when one of them resides in Western Australia. For those of the in the eastern States, the habit is to assume that entering into an agreement for de facto partners applies across the country. It doesn't.

Although interstate FIFO workers to WA are now a thing of the past, with the barriers of entry to Western Australia, sooner or later they will return. It is always wise to find out where your client lives and what they do for a living. If you find, for example, that you have a client living in Sydney who regularly flies to the Pilbara for work, such that he spends one week on in Pilbara and one week off in Sydney, where is he residing? Can it be said that he is residing in two places, or might it be argued that he is in fact a resident of Western Australia?

While it is a fascinating academic exercise as to whether someone can reside in two places, you will not appreciate that fascination if the risk is yours.

A Part VIIIAB financial agreement ceases to be binding once the parties marry each other: section 90UJ(3).

Can an Agreement be both an Agreement in Contemplation of Marriage (section 90B) and During a De Facto Relationship (section 90UC)?

The simple answer is yes. In *Piper & Mueller* [2015] FamCAFC 241, the parties were living in a de facto relationship and engaged to be married when they entered into an agreement in which it was said to be a section 90B agreement i.e. in contemplation of marriage and asection 90UC agreement i.e. during a de facto relationship and was therefore said to be both a Part VIIIA and Part VIIIAB agreement. Clause 25 of the agreement provided:

> *"The Agreement is a financial agreement made pursuant to section 90B and 90UC of the Family Law Amendment Act 1999 in relation to certain financial matters between the parties in substitution for any rights under Part VIIIA and Part VIIIAB of the Family Law Act 1975, if their relationship shall break down irretrievably during the period, whilst at the same time preserving the jurisdiction of the Family Law Act 1975 in relation to certain other financial matters."*

Marriage only appeared in one recital. There, the parties referred to their desire to contract out of the provisions of Part VIIIA and Part VIIIAB "*if their marriage breaks down irretrievably*" and to enter into an agreement under section 90B and section 90UC which is to apply "*in the event of the breakdown of the relationship*". The operative terms of the agreement only contain the phrase "*breakdown of the relationship*" and do not use the word marriage.

The trial judge, Judge Willis held:

> *"I am not satisfied that the two provisions, s90B and s90UC are mutual exclusive. Section 90B refers to those 'contemplating marriage'. These parties were engaged and therefore contemplating marriage. Section 90UC refers to making a financial agreement whilst in a de facto relationship. These parties were in a de facto relationship. I am not satisfied that by making an agreement under both of these sections of the Act, that this is a fatal technical*

error or fatal to the agreement. The parties in this matter fitted in my view, squarely under each section.

One could imagine the argument if only [1] of those sections was noted in the agreement. The party wishing to be relieved of the obligations under the financial agreement could simply argue a different section should have been identified as the relevant section, rather than the one that was included on the financial agreement. These parties were both simultaneously engaged and living in a de facto relationship. Whilst I accept that upon their ultimate marriage, the agreement would cease to be binding, pursuant to section 90UJ(3), neither of these parties gave any evidence about any impending marriage. The applicant agreed that they had been engaged for years and were in no rush to marry, and the respondent stated that the act of being engaged was a commitment in itself."

Ryan and Aldridge JJ (with whom Murphy J agreed) stated[3]:

"29. In our view, it is unremarkable for a document to contain more than one agreement. An obvious example is a document which contains, as an adjunct to a primary agreement, a guarantee.

30. There is no necessary conflict between people being currently in a de facto relationship and also contemplating marriage. As in this case, couples in a de facto relationship can intend to marry. Subject, of course, to any provisions of the Act, there is no reason why a single agreement could not deal with the distribution of their assets on the breakdown of their de facto relationship or the ending of their subsequent marriage.

31. However, it is quite clear that financial agreements under Parts VIIIA and VIIIAB are quite distinct.

32. Here the parties were in a de facto relationship and thus entitled to enter into a financial agreement under s 90UC. They were also contemplating marriage by reason of which they were entitled to enter into a financial agreement pursuant to s 90B.

33. Section 90B(1)(aa) specifically prevents parties to a s 90B financial agreement from entering into another financial agreement to which s 90C (during a marriage) and s 90D (after divorce) apply. A similar scheme (that is before, during and after a de facto relationship) applies under Part VIIIAB by the application of s 90UB(1)(b). Importantly, however, the Part VIIIA exclusion contained in s 90B(1)(aa) does not preclude a Part VIIIAB financial agreement and vice versa. This is a powerful indication that the two financial agreements can exist concurrently and in the one document.

[3] At [28]-[39].

34. This notion is reinforced by the fact that only one of these financial agreements could have operative effect at any one time. This is because the s 90B financial agreement would only operate in the event of a breakdown of the marriage (s 90B(2)(a)) which, of course, requires a prior marriage. On the other hand an agreement under s 90UC ceases to be binding if the parties to the agreement marry each other (s 90UJ(3)). Thus, it is possible for parties to enter into an agreement under s 90UC which is binding and operates while they continue in a de facto relationship and by operation of law ends immediately upon their marriage. On the other hand, a s 90B financial agreement only comes into operation when the parties marry. The two agreements therefore are complimentary, not exclusionary. Both may be binding on the parties from the time of execution but, as we have explained, only one can have operative effect.

35. As has been noted earlier, the operative terms of the parties' agreement refer to "breakdown of the relationship" and not "breakdown of a marriage". Assuming for a moment that the precise phrase "breakdown of marriage" must appear in an agreement under s 90B for it to be binding, this, at best, would mean that there would be no valid Part VIIIA financial agreement. We do not see how that difficulty would prevent the agreement being a valid Part VIIIAB financial agreement.

36. As the ground is solely concerned with the validity of the Part VIIIAB financial agreement this is sufficient to deal with this aspect of the matter.

37. As to the submission that different types of advice would need to be given so as to ensure the validity of the agreements, it is not readily apparent to us that this would be so. Even if it were so, there is no reason why both types of advice could not be given to a party prior to signing a document containing both agreements.

38. It follows that without more, there is no statutory imperative which requires that these agreements must be contained in separate documents. If the circumstances were such that the two agreements contained within the one document had different formal requirements in order to be binding, it may well be necessary for both sets of formal requirements to be complied with for both agreements to be binding. Failure to do so may have the effect that one or both of the agreements was not binding, but that is not a reason why the two agreements could not be in the one document.

39. Finally it was submitted that having both agreements in the one document renders s 90UJ(3) nugatory because clause 9 of the agreement would continue to have effect regardless of the marriage. This submission, if correct, would prevent the parties from having both these agreements in place at the onetime, whether or not they were in the one document. However, the submission misunderstands the true construction of the document. Properly construed, clause 9 would cease to operate upon the marriage of the parties, as far as it formed part of the Part VIIIAB financial agreement, but would simultaneously spring to life as part of the Part VIIIA financial agreement upon the marriage."

Following the same line of reasoning, it would be possible to have both a s.90B and s.90UB agreement, but such a circumstance would presumably be rarer.

HOW IS AN AGREEMENT BINDING?

Aside from the issue of having a contract or deed, this issue is directly addressed in section 90G for Part VIIIA agreements:

> *"(1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:*
>
> *(a) the agreement is signed by all parties; and*
>
> *(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and*
>
> *(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and*
>
> *(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and*
>
> *(d) the agreement has not been terminated and has not been set aside by a court.*
>
> *Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the Evidence Act 1995.*
>
> *(1A) A financial agreement is binding on the parties to the agreement if:*
>
> *(a) the agreement is signed by all parties; and*
>
> *(b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and*
>
> *(c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and*
>
> *(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and*
>
> *(e) the agreement has not been terminated and has not been set aside by a court*

(1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the enforcement application) by a spouse party seeking to enforce the agreement.

(1C) To avoid doubt, section 90KA applies in relation to the enforcement application.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary."

In respect of Part VIIIAB, agreements are binding under section 90UJ:

"(1) Subject to subsection (1A), a Part VIIIAB financial agreement (other than an agreement covered by section 90UE) is binding on the parties to the agreement if, and only if:

(a) the agreement is signed by all parties; and

(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and

(d) the agreement has not been terminated and has not been set aside by a court.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the Evidence Act 1995.

(1A) A Part VIIIAB financial agreement (other than an agreement covered by section 90UE) is binding on the parties to the agreement if:

(a) the agreement is signed by all parties; and

(b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and

(c) a court is satisfied that it would be unjust and inequitable if the agreement

were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and

(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and

(e) the agreement has not been terminated and has not been set aside by a court.

(1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a Part VIIIAB financial agreement is binding on the parties to the agreement, upon application (the enforcement application) by a spouse party seeking to enforce the agreement.

(1C) To avoid doubt, section 90UN applies in relation to the enforcement application.

(2) A Part VIIIAB financial agreement covered by section 90UE is binding on the parties to the agreement if, and only if, the agreement has not been terminated and has not been set aside by a court.

(3) A Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other.

(4) A court may make such orders for the enforcement of a Part VIIIAB financial agreement that is binding on the parties to the agreement as it thinks necessary."

For both types of agreements there is a need for a separation declaration, respectively section 90DA:

"(1) A financial agreement that is binding on the parties to the agreement, to the extent to which it deals with how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties:

(a) at the time when the agreement is made; or

(b) at a later time and before the termination of the marriage by divorce; are to be dealt with, is of no force or effect until a separation declaration is made.

Note: Before the separation declaration is made, the financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by section 90DB).

(1A) Subsection (1) ceases to apply if:

(a) the spouse parties divorce; or

(b) either or both of them die.

Note: This means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the divorce or death(s).

(2) A separation declaration is a written declaration that complies with subsections (3) and (4), and may be included in the financial agreement to which it relates.

(3) The declaration must be signed by at least one of the spouse parties to the financial agreement.

(4) The declaration must state that:

(a) the spouse parties have separated and are living separately and apart at the declaration time; and

(b) in the opinion of the spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

(5) In this section:

"declaration time" means the time when the declaration was signed by a spouse party to the financial agreement. "separated" has the same meaning as in section 48 (as affected by section 49)."

And section 90UF:

"(1) A Part VIIIAB financial agreement that is binding on the parties to the agreement, to the extent to which it deals with how, in the event of the breakdown of the de facto relationship, all or any of the property or financial resources of either or both of the spouse parties:

(a) at the time when the agreement is made; or

(b) at a later time and during the de facto relationship;

are to be dealt with, is of no force or effect until a separation declaration is made.

Note: Before the separation declaration is made, the financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by section 90UG).

(2) Subsection (1) ceases to apply if either or both of the spouse parties die.

Note: This means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the death(s).

Requirements for a valid separation declaration

(3) A separation declaration is a written declaration that complies with subsections (4) and (5), and may be included in the Part VIIIAB financial agreement to which it relates.

(4) The declaration must be signed by at least one of the spouse parties to the Part VIIIAB financial agreement.

(5) The declaration must state that:

(a) the spouse parties lived in a de facto relationship; and

(b) the spouse parties have separated and are living separately and apart at the declaration time; and

(c) in the opinion of the spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

*Meaning of **declaration time***

(6) In this section:

*"**declaration time**" means the time when the declaration was signed by a spouse party to the Part VIIIAB financial agreement."*

See also section 90DB(2) as to section 90B or 90C agreement.

Both financial agreements remain binding despite the death of a party: sections 90H and 90UK.

Great care should be taken concerning spousal maintenance given the effect of sections 90E and 90F, 90UG and 90UH.

Section 90F provides:

"(1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.

(1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.

(2) To avoid doubt, a provision in an agreement made as mentioned in subsection 90B(1), 90C(1) or 90D(1) that provides for property or financial resources owned by a spouse party to the agreement to continue in the ownership of that party is taken, for the purposes of that section, to be a provision with respect to how the property or financial resources are to be dealt with."

Section 90UI provides:

> *"(1) No provision of a Part VIIIAB financial agreement excludes or limits the power of a court to make an order under Division 2 in relation to the maintenance of a party to the agreement if subsection (2) applies.*
>
> *(2) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.*
>
> *(3) To avoid doubt, a provision in a Part VIIIAB financial agreement:*
>
> > *(a) made as mentioned in subsection 90UB(1), 90UC(1) or 90UD(1); or*
> >
> > *(b) covered by section 90UE;*
> >
> > *that provides for property or financial resources owned by a spouse party to the agreement to continue in the ownership of that party is taken, for the purposes of that subsection or section, to be a provision with respect to how the property or financial resources are to be distributed."*

Financial agreements need to be determined only by another financial agreement or a written agreement to that effect: section 90J and section 90UL. However, as the courts have made plain, they can be terminated by other means: rescission, repudiation and frustration. These are illustrated in the cases discussed below.

Setting Aside

Setting aside a financial agreement is provided in section 90K and section 90UM. Section 90K provides:

> *"(1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:*
>
> > *(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or*
> >
> > *(aa) a party to the agreement entered into the agreement:*
> >
> > > *(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or*
> > >
> > > *(ii) with reckless disregard of the interests of a creditor or creditors of the party; or*

(ab) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement--a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

(1A) For the purposes of paragraph (1)(aa), ***creditor****, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.*

(2) For the purposes of paragraph (1)(d), a person has ***caring responsibility*** *for a child if:*

(a) the person is a parent of the child with whom the child lives; or

(b) a parenting order provides that:

(i) the child is to live with the person; or

(ii) the person has parental responsibility for the child.

(3) A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

(4) An order under subsection (1) or (3) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(5) If a party to proceedings under this section dies before the proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and

(ii) that it is still appropriate to exercise those powers;

the court make any order that it could have made under subsection (1) or (3); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(6) The court must not make an order under this section if the order would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, acquisition of property and just terms have the same meanings as in paragraph 51(xxxi) of the Constitution."

Section 90UM provides:

"(1) A court may make an order setting aside, for the purposes of this Act, a Part VIIIAB financial agreement or a Part VIIIAB termination agreement if, and only if, the court is satisfied that:

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or

(b) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(c) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the other de facto relationship) with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the other de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(d) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 79, or a declaration under section 78, in relation to the marriage (or void marriage); or

(iii) with reckless disregard of those interests of that other person; or

(e) the agreement is void, voidable or unenforceable; or

(f) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(g) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (4)), a

party to the agreement will suffer hardship if the court does not set the agreement aside; or

(h) in respect of the making of a Part VIIIAB financial agreement--a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(i) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(j) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB; or

(k) if the agreement is a Part VIIIAB financial agreement covered by section 90UE--subsection (5) applies.

Note: For child of a de facto relationship, see section 90RB.

(2) For the purposes of paragraph (1)(b), creditor, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

(3) For the purposes of the application of subparagraph (1)(c)(ii) to a Part VIIIAB financial agreement covered by section 90UE:

(a) the reference in that subparagraph to an order under section 90SM is taken to include a reference to an order (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned; and

(b) the reference in that subparagraph to a declaration under section 90SL is taken to include a reference to a declaration (however described) under a corresponding provision (if any) of the non-referring State de facto financial law concerned.

(4) For the purposes of paragraph (1)(g), a person has caring responsibility for a child if:

(a) the person is a parent of the child with whom the child lives; or

(b) a parenting order provides that:

(i) the child is to live with the person; or

(ii) the person has parental responsibility for the child.

(5) This subsection applies if:

(a) at least one of the spouse parties to the agreement was not provided, before signing the agreement, with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages to that party of making the agreement; or

(b) if this advice was provided to at least one of the spouse parties to the agreement--that party was not provided with a signed statement by the legal practitioner stating that this advice was given to that party;

and it would be unjust and inequitable, having regard to the eligible agreed matters (within the meaning of section 90UE) for the agreement, if the court does not set the agreement aside.

(6) A court may, on an application by a person who was a party to the Part VIIIAB financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

(7) An order under subsection (1) or (6) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(8) If a party to proceedings under this section dies before the proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and

(ii) that it is still appropriate to exercise those powers; the court may make any order that it could have made under subsection (1) or (6); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(9) The court must not make an order under this section if the order would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, acquisition of property and just terms have the same meanings as in paragraph 51(xxxi) of the Constitution."

Enforcement of financial agreements is contained respectively in sections 90KA and 90UN. Section 90KA provides:

"(1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:

(a) the agreement was obtained by fraud (including non-disclosure of a material matter); or

(aa) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(ab) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the

agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement--a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

(1A) For the purposes of paragraph (1)(aa), creditor , in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.

(2) For the purposes of paragraph (1)(d), a person has caring responsibility for a child if:

(a) the person is a parent of the child with whom the child lives; or

(b) a parenting order provides that:

(i) the child is to live with the person; or

(ii) the person has parental responsibility for the child.

(3) A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

(4) An order under subsection (1) or (3) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(5) If a party to proceedings under this section dies before the proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and

(ii) that it is still appropriate to exercise those powers;

the court may make any order that it could have made under subsection (1) or (3); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party

(6) The court must not make an order under this section if the order would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution

For this purpose, acquisition of property and just terms have the same meanings as in paragraph 51(xxxi) of the Constitution."

Section 90UN provides:

"The question whether a Part VIIIAB financial agreement or a Part VIIIAB termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

(a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and

(b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and

(c) in addition to, or instead of, making an order or orders under paragraph (a) or

(b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court."

FOUR RECENT CASES

I discuss below four recent cases in which financial agreements were challenged, which illustrate the points I have summarised at the beginning of this paper:

- *Beckstead and Beckstead* [2021] FedCFamC2F 136
- *Kaimal and Kaimal* [2020] FamCA 971
- *Webster and Glover* (No 2) [2018] FCCA 3340
- *Beroni and Corelli* [2021] FamCAFC 9

Only in *Webster and Glover* did the agreement survive. All involved pre-nups.

Beckstead and Beckstead [2021] FedCFamC2F 136

It seems that the driving force in having an agreement was that the husband early on in their relationship was starting off in business. He and his business partner wanted to protect that business from any property settlement claim by the wife. The business then was worth very little. The business grew mightily. When they separated, the wife did not want to be bound by the agreement.

The husband sought a declaration that the agreement entered into between the parties was a binding financial agreement. The wife sought to set aside the agreement on a number of grounds, being:

> (a) She did not receive the requisite independent legal advice under section 90G(1)(b) of the Act. She challenged both its independence and that she received the required advice.
>
> (b) The agreement contained several errors which cannot be cured by rectification.
>
> (c) The agreement is void for uncertainty under section 90K(1)(b) of the Act. She identified several clauses which she said were vague and uncertain.
>
> (d) The agreement should be set aside due to fraud or material non-disclosure by the husband under section 90KA(1)(a).
>
> (e) The agreement should be set aside due to the husband's unconscionable conduct under section 90KA(1)(e).

The court was not satisfied that any case of fraud, material non-material disclosure or unconscionability had been made out. Judge Harland said[4]:

> *"The evidence does not support the wife's contention that the dynamic of the relationship between the husband and wife was such that she was meek and mild and the husband was a dominant, sophisticated businessman."*

Her Honour took the view that the evidence was not sufficient to meet the threshold to satisfy the court that the agreement should be set aside under sections 90KA(1)(a) and 90KA(1)(e).

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[4] At [17].

The parties signed a cohabitation agreement in 2002 with her husband's business partner Ms B as the witness. The agreement was prepared by Ms B after she had suggested to the husband that the parties enter into an agreement for the purpose of agreeing to not make aclaim against the other parties' pre-existing assets, which included the husband's interest in the business, if they were to separate. The husband said he showed the cohabitation agreement to the wife and she was happy to sign.

The agreement outlines that the parties have agreed to live in a de facto relationship and they both agree that all assets owned by each party as of the relevant date together with all assets accumulated by either party by whatever means after that date shall remain the assets of the party concerned. Further, it states that all income derived by either party shall remain the income of the property who earns the income and that parties as agreed shall pay day to day living expenses incurred collectively by the parties. The agreement says that in the event bothparties acquire an asset jointly, then both parties have agreed to either liquidate the asset or offer each other the option to buy out the other. Further, if a dispute arises, they agreed to appoint an independent arbitrator.

The parties agreed that the agreement was not enforceable. The husband relied on it to refute any suggestion that the wife was pressured into entering the subsequent binding financial agreement.

In 2006, they entered into a binding financial agreement. It provided for each of the parties to retain property they owned individually prior to the marriage. The husband's business and corporate entities were specifically mentioned. They would also keep any property they acquire individually during the relationship. The BFA identifies the real estate each party owns at the date of signing the financial agreement. The BFA records the fact that the parties have an interest in a property owned by the wife. They intend to continue living at that property and the wife will be solely responsible for the mortgage, rates and repair. They agree to otherwise equally share their living expenses. The parties may buy a property together in the future. If they do purchase property together, upon the breakdown of the marriage, the agreement provides then to divide their property equally.

The certificates of independent legal advice were signed by Ms B for the wife and by Mr C for the husband. The certificates were annexed to the agreement and the parties acknowledged receiving that advice in the recitals. The wife conceded that the certificate of advice by the husband's lawyer was prima facie evidence that the husband received the requisite legal advice.

Her Honour stated[5]:

> *"The wording at s90G(1) … clearly refers to an agreement being binding 'if and only if' the requirements of that section have been complied with. Accordingly, as the husband seeks to establish the financial agreement as binding he has the onus of establishing those matters. However, as the inference drawn from the certificates of independent legal advice is that the requisite advice was given, the wife bears the forensic obligation to 'disprove, or at least throw into doubt the inference or conclusion to be drawn from the certificate'. The wife submits she has met this criteria."*

[5] At [13].

The husband submitted that the wife was given independent legal advice or alternatively if she had not, the BFA should still be declared binding pursuant to section 90G(1A)(c).

The case was largely based on whom Ms B acted for. Whilst it was Ms B's signature on the certificate of independent legal advice on behalf of *the wife*, the evidence suggested that *the husband* engaged Ms B after selecting her firm from a list of practitioners, the husband had the initial meeting with Ms B and that his own evidence suggests he believed she was acting on *his* behalf. Upon production of the documents from Ms B's files, there was evidence that lists the husband's contact details and not the wife's and also that any communication Ms B had in relation to the financial agreement was with the husband and not the wife. Counsel for the wife suggested it is not clear from reading the file note that the advice given was real and meaningful as discussed by Alstergren CJ in *Kaimal and Kaimal* [2020] FamCA 971 – discussed below.

The husband said that the agreement was binding. He said they both received independent legal advice as evidenced by the certificates. He said the BFA was not vague and uncertain and the errors could be rectified. He argued that in the event the court is satisfied that section 90G(1)(b) has not been complied with, the court should find that it would be unjust and inequitable if the agreement were not binding and relies on section 90G(1A). He argues that both parties acted consistently with the terms of the BFA.

The husband's case that whilst the cohabitation agreement was not binding, in the context of his evidence, it demonstrated evidence of intention to enter into such agreement by both parties. It was submitted that the main issue was whether independent legal advice regarding the requisite matters was given and if the court finds it was not, then the agreement should still be in force. This would require rectification of the reference to the sections being section 90B to section 90C of the Act. The husband's case is he contacted Ms B to enquire as to whether she could provide the services required, being Wills, Powers of Attorney and a financial agreement. There was an issue with Bartercard and it was described as not being the most lucrative file for a lawyer. Ultimately, the file was open in the name "*Ms Beckstead*" being the wife and that whilst correspondence was sent to the wife via the husband, this was done so in circumstances where they were in the "*happy stage*" of their relationship. Senior Counsel submitted that the intention of Parliament is that a BFA can be saved and the court can uphold it despite non-compliance with the independent legal advice. It was submitted that, looking at the wife's case, there was a lack of evidence regarding time pressure for her to enter into such agreement. Further, what this case presented was the wife "*having buyer's remorse over the financial agreement*" because the husband's business ultimately succeeded. At the time of the parties entering into the cohabitation agreement and the financial agreement, the husband's business was still in its relative infancy. Her Honour said there was merit in this submission.

The wife's counsel referred to a clause in the agreement that they relied on their personal knowledge of the financial affairs of each other in making the agreement. It was submitted that the wife's case was that, although she was unaware of her husband's financial circumstances at the time of signing, the parties were open and transparent about their financial affairs. The husband's case was that the wife was disinterested as to his financial affairs, rather than his lack of disclosure. On that basis however, counsel submitted that the financial agreement was prepared based on instructions given by the husband in front of the wife.

Ms B was found by the husband as he sought to engage a lawyer who would accept Bartercard payments for their legal services.

Ms B had no recollection of speaking to the husband prior to their initial appointment with both parties. She said that if a potential client telephoned her enquiring about a BFA, she would not have both parties attend the meeting and this would have been communicated during the call. With respect to matters paid through Bartercard, she said that usually a client would contact the firm to enquire as to whether or not the firm accepts fees being paid using Bartercard.

She had some independent recollection of the initial meeting with the husband and wife because of it being an enquiry through Bartercard and recalls becoming aware that the parties were seeking a BFA at that first appointment. She also recalls her concerns about the husband and wife attending the first appointment together. She said it was very unusual for two clients to attend a first appointment seeking a BFA. She commented that she could not recall it occurring previously.

It really is unclear on reading the judgment about who Ms B was acting for. Her file records were not clear at all. Furthermore[6]:

> *"Unsurprisingly, given it was some 15 years ago, Ms B does not have any personal recollection of meeting with the wife to advise her about the BFA and signing the certificate of advice. She gave evidence as to her usual practice. Her usual practice being that she signed and dated the certificate of independent legal advice before the client signed the agreement. Ms B produced a handwritten file note which she had the wife sign. The file note is a one page, undated and does not refer to the length of the conference. The file note refers to Ms B advising the wife, as her client, that if the marriage was to break down, the wife will have to claim future needs against the husband. It further includes reference to the agreement being set aside for misrepresentation, undue influence, duress or mistake. Also apparent from the file note is Ms B writing that she cannot advise on the financial benefit and disadvantage of the agreement. Further, that Ms B believes the wife is making the agreement freely and understands its terms."*

Her Honour stated[7]:

> *"Ms B was reluctant to concede the fact that all communication of the wife was via the husband and attempted to justify this by referring back to the details provided to her on the initial instruction sheet. She said she did not know if the parties had access to each other's emails. She conceded that the email address was clearly the husband's work email address. Ms B's comment that she did not know if she had access to each other's emails underscores the whole problem where it is evident that Ms B did not clearly identify her client and how she could communicate and advise the wife separately and independently. There is nothing on the file to indicate that she made any attempt to communicate with the wife separately and independently of the husband about the BFA or her Will. Where communication was formally addressed to the wife care of the*

[6] At [56].
[7] At [71]

> *husband, in the circumstances, one would expect a family lawyer to be particularly cognisant of the need to ensure that the client is clearly identified and that the appropriate authorities are in place for who can give instructions. On that note, family lawyers should also be mindful given the particular nature of family law. In family law matters it is not unusual for parties to be living under the one roof and as such it is important to ask questions, clarify who has access to information such as postal addresses, email addresses and so forth. The lawyer must ensure they have direct contact details for the client that the other party is not privy to. This is so even if the client is content for the material to go through the other party as they would not necessarily appreciate the importance of legal professional privilege. Whilst Ms B was keen to stress that the emails and letters were addressed to the wife that does not assist her, because in practical terms, all the reliance is on the husband and on him passing that information onto the wife."*

In addition to giving the wife advice about the BFA, there was the obvious conflict in also acting for both parties for their Wills and Power of Attorney.

Her Honour cited the recent decision by the Chief Justice in Kaimal and Kaimal which in turn cited the longstanding decision in Hoult and Hoult [2013] FamCAFC 109.

His Honour stated[8]:

> *"The requirement for legal advice is an important legislative safeguard. An effective binding financial agreement ousts the Court's jurisdiction to make orders under Part VIII of the Act, allowing parties to deal with their assets without interference from the Court. Accordingly, the legal advice must be real and meaningful to satisfy s 90G(1)(b).*
>
> *Section 90G(1)(b) evinces an unambiguous legislative requirement that, in order for an executed agreement to be binding, each party to a financial agreement must be given clear, independent legal advice specifically in respect to each of the matters mentioned therein. This is evidenced from its wording "the effect of the agreement on the rights of the party and the advantages and disadvantages to the party of entering into the agreement at the time the advice was provided".*
>
> *Importantly, s 90G(1)(b) contains a requirement for independent legal advice separately to the requirement of a signed statement of legal advice, which is found in s 90G(1)(c). Accordingly, evidence of the latter cannot have been intended to constitute determinative evidence of the former. If that were the case, the inclusion of a separate provision for each would be redundant.*
>
> *The Court's task in this case is to determine whether the wife received legal advice and, if so, whether it meets the requirements of s 90G(1)(b). It is clear that, in order to be able to advise a party of the advantages and disadvantages of entering into a financial agreement and of how that financial agreement will affect their rights, it is necessary that those advantages, disadvantages and rights are first identified[3].*

[8] At [16]

> *Dr Barnett, counsel for the wife, referred to the statement of Ryan and Aldridge JJ in Piper v Mueller that "an assessment of whether the provisions of an agreement were fair and reasonable, necessarily involves a consideration of the advantages and disadvantages of those provisions". I concur with that statement.*
>
> *In the decision of Wallace & Stelzer and Anor [2013] FamCAFC 199, the Full Court at [103] cited with approval the earlier decisions of Logan & Logan [2013] FamCAFC 151 and Hoult & Hoult [2013] FamCAFC 109 ("Hoult") in which the Full Court held that "the only enquiry necessary is as to whether advice was given, and not as to the content of that advice."*
>
> *In the recent decision of this Court Daily & Daily [2020] FamCA 486, Berman J considered whether the wife, in that case, was given adequate advice as to the effect of the financial agreement in question on her rights and the advantages and disadvantages of entering into the agreement in the context of handwritten amendments having been made to the agreement. His Honour stated at [154]:*
>
> *I consider that whilst the correctness of the advice may not be a relevant inquiry, if the evidence supported a finding that notwithstanding a certificate, there had either not been any advice given or that it was so cursory or only tangentially related to the agreement, that may well allow a finding that no advice was given.*
>
> *These statements are consistent with the authority of Hoult which both parties relied upon in the case before me. As explained below, I disagree with the interpretation of Hoult advanced by the husband."*

Judge Harland said[9]:

> *"There is a fundamental conflict in acting for both parties to draft their wills, whilst at the same time purporting to act for one of them with respect to the BFA. I do not think the conflict could have been cured by opening separate files for both clients for the wills and the financial agreement. However, it may have triggered some consideration as to who the clients were and whether or not there was any conflict.*

It appears that at times Ms B was mindful of the wife being her client but other times was treating them as joint clients at best. Solicitors have a fiduciary duty of loyalty. The importance of being alert to concurrent conflicts of duty is set out in rule 11 of the Conduct Rules. Dal Pont observes at [7.20] to [7.40] that a concurrent conflict can result in potentially extensive legal liability for a lawyer for breach of fiduciary duty and/or negligence not exercising the expected standard of skill and care. A solicitor cannot rely on client perceptions and assume that the client is in a position to be aware of the existence or the prospect of conflict. The harm is not limited to misuse of confidentil information. Rule 11 of the Conduct Rules explicitly acknowledges that there are instances where there will be no conflict in acting for both clients. That is not the situation here. It is also not the situation where the clients have given informed consent for the solicitor to act for both of them in spite of this conflict. Dal Pont observes that the rules with respect to concurrent conflict of duties applies to both contentious and non-contentious matters."

[9] At [84]-[85]

Her Honour said[10]:

> *"The provision of independent legal advice is a fundamental protection provided to those entering into financial agreements which ousts the Court's jurisdiction. The lack of independence causes one to wonder whether Ms B turned her mind to where the parties' interests differed. This would impact on whether or not the requisite advice was given. It is clear from the authorities that in order to provide the requisite advice about the financial agreement more must be done than simply explaining the terms of the agreement. In the written contentions of fact and law, Senior Counsel for the husband argues that the terms of the agreement are clear and that "the advantage of a financial agreement is to avoid litigation. The disadvantage is that the Court might award more than the financial agreement provides for a period. These rather obvious advantages and disadvantages would have been clear to both parties; it is inevitable that Ms B conveyed them to the wife." This comment vastly oversimplifies the task of providing advice with respect to a BFA. The advice required to be given by s 90G(1) of the Act is not limited to explaining the meaning of the terms of the agreement. In order to advise the client about the advantages and disadvantages of entering into the agreement, it is necessary to take instructions and consider the client's individual circumstances. Drafting and advising cohabitation pre-nuptial agreements which deal with all the parties' properties are particularly challenging for lawyers because there are so many unknowns. For example, whether or not the parties have children of the relationship, if one of them were to become seriously unwell or disabled, a business may be unsuccessful or become very successful. Some advantages and disadvantages are less tangible than others, particularly agreements that are in the nature of prenuptial agreements and agreements made during cohabitation whilst the relationship is intact. Necessarily, part of the advice about the advantages and disadvantages of entering into such an agreement would be to address the fact that the BFA provides certainty based on the factual situation at the time of entering into the agreement. Of course, there are many vicissitudes of life that can occur which could impact the entitlements that would otherwise be provided for under the Act, including for example, English being their second language or one of them being severely disabled. I do accept Ms Costello QC's submissions that the enquiry is only as to whether or not the advice was given and not the content or quality of that advice. I note the comments of Aldridge J in Abrum & Abrum [2013] FamCA 897, particularly with respect to legal advice at paragraphs [36]-[43].*
>
> > *A binding financial agreement deals with the parties' rights in relation to the property or financial resources of the parties in a way that ousts the jurisdiction of the court to make orders in relation to that property or financial resource. Those rights thus ousted must be the rights that the parties had under s 79 of the Act to seek an order for the adjustment of the parties' property rights. When making such an order the court takes into account the matters set out in s 79(4) of the Act (the parties financial and non-financial contributions to the property of the parties and their contributions to the welfare of the family) and the various matters set out in s 75(2) of the Act. The parties' rights to obtain a property settlement thus depend on those factors. It is true to say that a party does not have a "right" to a property settlement,*

[10] At [91].

or a "right" to a particular property settlement, because under s 79 the court is not giving effect to existing rights but rather is altering property interests in a manner that it considers is just and equitable and thus creates new rights. In doing so it evaluates and weighs many factors. It is necessarily an imprecise exercise.

Nonetheless, when s 90G(1)(b) speaks of "rights" it must be speaking of the entitlement to bring a case under s 79 and the factors that weigh in favour of that person's case under ss 79(4) and 75(2) otherwise it would have limited meaning.

In order to give advice about the effect of an agreement on the rights of a party, that is their rights under the Act in relation to property, a legal practitioner must establish what those rights are at the time the advice is provided. This is because s 90G(1)(b) requires advice to be given on the effects of the agreement upon the rights of that party and the advantages and disadvantages of the agreement. If their rights are not known then it is impossible to advise as to the effect of the agreement on them.

It is unhelpful to advise a person that a financial agreement might adversely affect his or her rights if those rights are not identified. A party must know more than some unknown or undefined right is being given up. He or she must have some idea, at least in general, of his or her present entitlements or rights (to use the words of the section) with which he or she may compare the provisions of the proposed financial agreement. It is only in that way that there can be actual advice about the effect of the agreement on those present rights.

It is quite clear that a person may choose to enter into an agreement where he or she may very well be much worse off than if he or she were left to rely on their rights under s 79 of the Act. Thus, there is a requirement for specific legal advice to be given. That is the safeguard the legislature imposes when it permits the parties to deal with their property by agreement and without possible interference from a court.

Accordingly, the advice must be real and meaningful. It must be directed to the parties' circumstances and their present rights.

Proper identification of a parties' rights can only be done by identifying the property of the parties then held and a consideration of the parties contributions (financial and non-financial) to the acquisition of that property and to the welfare of the children. Any other relevant factors under s 79(4), including s 75(2), would then need to be considered. Only by doing so can advice be given that complies with the terms of s 90G(1)(b)."

Her Honour stated[11]:

"Entering into a BFA provides certainty and avoids the costs and stress of litigation in the future. The ability of parties to contract out of Part VIII, Part VIIIA and Part VIIAB of the Act is a significant departure from the position at common law. Provided s 90G is complied with, binding financial agreements do not need to be just and equitable."

[11] At [93]

Her Honour referred to submissions made by counsel for the wife[12]:

> *"Ms Fisken referred to the case authorities in her closing submissions, particularly Kaimal & Kaimal and stated that the Court does need to be satisfied that the advice given was meaningful. Ms Fisken made reference to the legislative safeguards as intended by Parliament and that it in essence allows parties to contract out of the Act but only if certain requirements are met. The legislative amendments following Black v Black [2008] FamCAFC 7; (2008) FLC 93-357 provides a pathway for how binding financial agreements can be saved. The amendments to the Act made by the Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009 (Cth) are discussed in Senior & Anderson [2011] FamCAFC 129; (2011) FLC 93-470 and Senior & Anderson [2011] FamCA 802. It is also useful to refer to the Supplementary Explanatory Memorandum to the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008. In particular I draw attention to the comments made in the general outline which includes the following statement:*
>
> > *The Government amendments proposed to the Bill will address issues that have arisen in submissions to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the provisions of the Bill and following consultation with key stakeholders.*
> >
> > *The proposed Government amendments will:*
> >
> > *• amend the Family Law Act 1975 to enable legal practitioners to provide signed statements about the giving of prior independent legal advice to spouse parties to financial and termination agreements either before or after the spouse party signs the agreement*
> >
> > *• amend the Family Law Act 1975 to provide that copies of those statement must also be provided either to the other spouse party or to a legal practitioner of the other spouse party*
> >
> > *• amend the Family Law Act 1975 to provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding in spite of a failure to meet the procedural*
> > *requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made)*
> >
> > *• provide that the amendments to the Family Law Act 1975 in Schedule 5 to the Bill will not affect any court orders that have been made on matters covered by a financial agreement or a termination agreement*

[12] At [103]-[104].

> *• provide that the amendments to the Family Law Act 1975 in Schedule 5 to the Bill will not affect any court orders that have been made on matters covered by a financial agreement or a termination agreement*
>
> *• ensure that the amendments to the Family Law Act 1975 in Part 1 of Schedule 5 to the Bill will not inadvertently render invalid financial and termination agreements made between 27 December 2000 and 14 January 2004*
>
> *• provide that a financial agreement or a termination agreement made before the amendments to Schedule 5 to the Bill commence will bind the parties who have signed the agreement if the spouse parties obtained independent legal advice prior to signing the agreement…*
>
> *It is clear that the Parliamentary intention was to avoid the problems of agreements being declared non-binding because of technical deficiencies. However the substantive requirement that the parties each receive independent legal advice before entering into BFAs remains an important safeguard. In the circumstances of this case I am satisfied that the wife did not receive independent legal advice and that the wife has established that there is doubt that she was given the requisite advice as this is linked to the failure to properly identify the wife's interests. Whilst it is clear the advice does not need to be correct it does need to go beyond the legal interpretation of the terms of the agreement and address the practical implications for entering into the agreement."*

In addition, not surprisingly given the conduct in the way in which the agreement was signed, the financial agreement erroneously referred to section 90B, instead of section 90C. The husband argued that the reference to the incorrect section could be rectified as it was clearly the parties' common intention to contract out of the Act and the reference to the wrong section does not reflect their common intention, relying on the Full Court's decisions in Graham and Squibb [2019] FamCAFC 33 and Senior and Anderson [2011] FamCAFC 129.

The wife complained that she was referred to as Ms Beackstead when she adopted her husband's surname when they married and that the reference to her as Ms Beackstead than Ms Beckstead is consistent with section 90B agreement rather than a section 90C agreement and that this cannot be rectified because the content of the required advice is different under each section.

Her Honour then commented about unexpected changes in the law from when an agreement was signed[13]:

> *"As the law stands currently, many of the provisions governing property entitlements of parties to a de facto relationship and to a marriage are largely the same. Therefore, when considering the nature of the advice that is required to be given, under ss 90B and 90C of the Act, there may be little difference. However, at the time the parties entered into the agreement in 2006, the parties' entitlements based on whether they were in a de facto relationship or married were significantly different, as de facto relationships were governed by state legislation. The de facto*

[13] At [109].

powers were not referred to the Commonwealth until 2009, and the Family Law Act was then amended to include to financial provisions for de facto relationships, pursuant to Schedule 5 of the Federal Justice System Amendment (Efficiency Measures) Act (No.1) 2009 (Cth). Therefore, at that time, the advice required to be provided differed under state law for de facto relationships and federal law for marriages. This was not specifically raised before me during the proceedings."

The husband urged that if the court was satisfied that section 90G(1)(b) of the Act had not been complied with, then the court in its discretion should find it would be unjust and inequitable not to uphold the agreement. The reasons included[14]:

"In the event of my being satisfied that s 90G(1)(b) of the Act has not been complied with, the husband urges me to exercise my discretion and find that it would be unjust and inequitable not to uphold the agreement. Ms Costello QC advances a number of reasons as to why it would be unjust and inequitable to declare the agreement nonbinding, including:

(a) That both parties had been previously married, each owning property and having adult children.

(b) There was no pressure or rush to enter into the BFA.

(c) The BFA was consistent with the intentions of the parties as set out in the cohabitation agreement they signed in 2002.

(d) At the beginning of the relationship, the husband's business was a fledging one.

(e) The unchallenged evidence of Ms L supports the husband's contention that the wife was aware of the terms of the BFA and in particular, was aware she would have no claim on the husband's business. She provided an example about the period Ms L stayed with the parties, she paid rent to the wife as the property is the wife's solely.

(f) The parties acted consistently with the terms of the BFA during their relationship as evidenced by the wife reimbursing the husband with respect to the air-conditioner for the Suburb T property (purchased in the wife's sole name after she sold the Suburb I property).

(g) The wife paid the husband $12,000 for the purchase of his car.

(h) The fact that the husband was generous at times and placed money in the wife's offset account to reduce the interest she had to pay on her mortgage does not detract from the parties acting consistently with the agreement. Further, that the husband shared his income with the wife by paying the vast majority of living expenses also not being a departure from the agreement as the agreement provides for the assets to remain separate.

[14] At [111].

> *(i) On the point of there being no material non-disclosure, the fact that the wife was present at the time the husband described his finances to Ms B demonstrates the husband did not hide his finances. Further, that the husband copied the wife into emails regarding the potential sale of his business in 2016 and also that the wife has been unable to prove any material non-disclosure.*
>
> *(j) Any deficiencies in the independence and adequacy of the advice given is not due to any misconduct by the husband and was outside his control.*
>
> *(k) The husband has suffered significant detriment due to the wife failing to raise any concern about the financial agreement until 11 and a half years later (which is one and a half years after they separated).”*

Her Honour said there was considerable merit in these submissions that really the wife seeks to have the agreement declared non-binding as because of bias remorse noting that the husband’s business which was a fledgling one when they were first together has now become a substantial one. Her Honour also accepted that any deficiencies in the independence and adequacy of the advice given were not due to any misconduct by the husband and was outside his control.

Her Honour accepted that the discretion in favour of saving the agreement is not limited to matters where the breaches are only technical. It is a matter of fact and degree. Her Honour followed the approach in Hoult and Hoult by Strickland and Ainsley-Wallace JJ[15]:

> *“We are firmly of the view that the content of the bargain has no relevance to the exercise of discretion under s 90G(1A)(c) and we base that on the plain words of the paragraph. That is also consistent with what Strickland J said at first instance in Parker (for example, in [108] of his Honour’s reasons for judgment), and neither of the judges who formed the majority in the Full Court in Parker found otherwise.*
>
> *We do not accept that because the inquiry in para (c) is as to injustice and inequity, the content of the bargain must have some relevance. The issue of injustice and inequity can far more easily be seen as directed to whether, given the nature and extent of the noncompliance with the s 90G(1) requirements, it would be unjust and inequitable if the agreement was not binding.*
>
> *We have referred to the fact that his Honour in [57] provided a range of factors that it would be appropriate to consider when exercising the discretion. The only factor that we suggest is not available is the last one, but if there is to be a list of factors identified we would prefer the following, all of which are to be found in his Honour’s reasons:*
>
> *• The terms of the section, the nature of a financial agreement as a creature of the Act, and the place of Pt VIIIA within the overall scheme of the Act.*

[15] At [305]-[307].

> *• The nature and extent of the non-compliance with the requirements of s90G(1).*
>
> *• The facts and circumstances surrounding the making of the agreement including, in particular, if one of the parties has complied with all of the mandatory requirements necessary to render the agreement binding.*
>
> *• How the parties have acted subsequently in relation to the agreement (bearing in mind that changes of circumstances cannot be considered)."*

In light of her Honour's findings about the lack of independent legal advice, the court was not satisfied that the wife was given a real opportunity to consider whether or not to ask for financial disclosure.

The wife argued that in reality after signing the BFA they merged their lives and did not act consistently with it. She sold her property in which they lived and bought another property at which they lived until the husband moved out after they separated. There was a home office in the second property so the husband could work from home. The husband was heavily involved in practical aspects of the sale and purchase, including dealing with the bank, conveyancers and movers. The husband paid sums of money into the wife's offset account which was secured over the title to the first property and now the husband wanted that money back. The wife's counsel noted there was evidence that the parties were acting and intermingling their finances.

Her Honour stated[16]:

> *"The case comes down to fundamental propositions that being satisfied the wife did not receive independent legal advice, should the Court nonetheless, save the agreement? My concern with respect to Ms B's lack of independence is not based on the husband paying for her services and nor is it based on the husband having made the initial enquiry. The lack of independence and consequent failure to clearly identify the parties' separate interests also raises doubt that Ms B gave the wife the requisite advice. In my view, the parties receiving independent legal advice before contracting out of the Act is so fundamental to the legislation and the protections and safeguards put in place that it would not be appropriate to exercise my discretion to declare it inequitable and unjust for the agreement to be non-binding. For these reasons I will declare the binding financial agreement signed by the parties on 24 June 2006 as not binding within the meaning of s 90G of the Act."*

KAIMAL AND KAIMAL [2020] FamCA 971

The Chief Justice declared that the financial agreement signed by the parties in 2018 was not binding within the meaning of section 90G. The financial agreement contained two pages which are both entitled "Statement under Section 90G of the Family Law Act 1975" certifying that each party was provided with legal advice as required by section 90G(1)(b). Each was signed by the respective solicitors for the husband and wife and dated the same day, the day that the financial agreement was signed.

[16] At [130].

At the time the financial agreement was signed, the parties were living under the same roof of the former matrimonial home. The husband owned another property and a one-third interest in a third property.

In early 2018 the parties had discussions about the wife and the youngest daughter obtaining a loan from Westpac to purchase the husband's property in equal shares. The wife and the daughter signed the Westpac loan documents in June 2018. In early July 2018 the husband's solicitor prepared the financial agreement. Both parties met that solicitor on the Friday, with the financial agreement being signed after that weekend on the Monday. The wife met her solicitor on the same day i.e. three days before the financial agreement was signed. The husband was not present in the office with the wife and her solicitor on that day, but he was waiting in a nearby car park outside.

The wife described that that meeting on the Friday with the husband's lawyer was the first time she had met with the lawyer in relation to the financial agreement. The wife described the events as:

> *"It was a last minute appointment I was forced to attend by [the husband]. I was given no prior notice. No one explained what was happening to me. I felt very intimidated and confused. I sat in the office and [the husband's] lawyer spoke about assets and liabilities. [Mr C] then escorted me out of [his] office and walked me down the street to another office."*

The husband said that he attended the meeting with the wife and his solicitor and he recalled his solicitor handing the wife a copy of the draft financial agreement. His solicitor then informed the wife that she required independent legal advice and there were a number of family lawyers in the area, after which the wife went by herself to her solicitor's office and the husband did not attend with her in the meeting with her solicitor.

The only issue in question in that case was whether the wife received the required legal advice pursuant to section 90G(1)(b). Following the passage referred to above by Harland J in Beckstead and Beckstead, his Honour said:

> *"The statements are consistent with the authority of Hoult which both parties relied upon in the case before me. As explained below, I disagree with the interpretation of Hoult advanced by the husband."*

The only people present in the meeting between the wife and her solicitor on the Friday were her and the solicitor. The only people present in the meeting on the Monday were the wife, the daughter and her solicitor. According to the wife, at the Friday meeting, her solicitor read through the financial agreement out loud, including the list of assets and liabilities. According to her solicitor, the meeting on the Friday lasted approximately 10 minutes and she did not show him the financial agreement, however, she indicated that she agreed with its terms and conditions and made a further appointment. The solicitor's file note from the Friday stated:

> *"[the wife] approached to our office and request us to sign a financial agreement which she has already agreed and drafted with a solicitor. We advise that we can do this.* ***If you agree the terms and conditions of the agreement****. She agreed & make an appointment on following Monday."*

Therefore, there was no legal advice given on the Friday. In the words of his Honour, the meeting on the Monday was critical. The wife's evidence was that the Monday meeting lasted approximately 30 minutes, her solicitor read out the financial agreement to her and stated that the date of separation was September 2013 and the parties have no intention of reconciling. The wife then signed the document in her solicitor's presence. The daughter, who was present said that prior to entering the office: "*I observed my mother to look so scared*." The wife's solicitor said that the meeting took approximately 30-40 minutes. His file note made that day said: "*[the wife] attended to our office with financial agreement to sign. We sit together and discuss as follows*:

1. Each & every contents of agreement including assets and liability.

2. Ask [the wife] if she understands & agreed the terms and conditions.

3. She replied happy with terms & already agreed.

4. Advise [the wife] the effectiveness of the agreement & her right.

5. Also advise the advantages & disadvantages of the agreement.

6. [the wife] is happy & request me to sign. Then we execute the agreement."

The husband said that the inference that could be drawn from the signed statement of legal advice was that the wife received the appropriate legal advice as per section 90G(1)(b). The husband further submitted that:

• The wife had the capacity to understand the legal documents which she was signing and the implications of signing them in the presence of a solicitor, and

• The wife had two days over the weekend between the first and second appointment with the solicitor to read and consider the terms of the financial agreement.

The husband's counsel submitted that section 90G(1)(b) was satisfied by:

(a) The wife's solicitor having read out loud to the wife the terms of the agreement during a meeting that lasted between 20 and 40 minutes.

(b) The wife indicating to him that she agreed to the terms and conditions.

(c) His witnessing the signature.

(d) That such a finding was in line with the majority decision in Hoult

(e) That for the court to "*go behind*" the statement of legal advice and enquire whether the wife was advised in relation to her rights and advantages and disadvantages of entering into the financial agreement is to read into the legislation "things that are not there" as a legislative requirement for "*discussion of the advantages and disadvantages*" is "not there".

His Honour stated that the husband's reliance on *Hoult* was misplaced and the evidence of the solicitor was distinguishable from that in *Hoult* in an important respect. The solicitor for the wife in *Hoult* testified to having given legal advice in respect to the aspects stated in section 90G(1)(b), notwithstanding her recollection was imperfect and there was no evidence as to the exact content of her advice. By contrast, Mr B's evidence regarding his meeting with the wife on the Monday was a meeting of approximately 30-40 minutes with the agreement in front of him and then regarding recital G a recital regarding the separation "*Okay, in fact, this agreement she told me she already had read and she just came to me to sign the agreement. And then I read it to her that is the agreement and that is the terms and conditions she agreed and she told me yes, she agreed that is the terms and conditions. And then I asked her if you are happy I can be a witness. And she said, yes, she's happy and she …*". Then when he was asked in cross-examination, "*You didn't ask her any questions about the detail, like what date they separated?*" Wife's solicitor: "No. No, because she hasn't come to me for that. She just came to me to be a witness of the agreement that she had read." *He repeated several times that the wife did not come to him for advice "she just came to me to be a witness of this agreement*." He was then asked: "*So did you just say, again, that you did not give any advice regarding her entitlement? Did I hear that correctly." The solicitor. "Really no, because she came to me and she said that is the agreement she already have it, terms and conditions she is happy and I'm not doing the family law in fact and I will just be a witness and explain the terms and conditions what is written on there.*"

His Honour: "*So I understand then that you were there as a witness and you simply read out the agreement to her and then you witnessed her signature?*"

Solicitor: "*Yes, that's right. Yes, that's what she came to me for.*"

His Honour: "*And at that stage you weren't – you didn't have expertise to advise her about the various clauses of the agreement?*"

Solicitor: "*No. If she came to me for that I would refuse her because I don't do that kind of work*."

He then went on to say that he didn't give her any advice about property settlement entitlements.

His Honour found:

> *"[the solicitor]'s testimony clearly demonstrated that he only saw his role as that of someone reading the document out loud to the wife and witnessing her signature."*

The court was further fortified in finding that the wife did not receive the required legal advice by reference to the number of errors in the financial agreement. Those related to one of the properties, life insurance policies and the parties' respective net positions under the agreement. These errors were significant.

Counsel for the husband advanced a number of submissions in relation to the errors. He stated that it is the "*substance*" of the transfers between the parties that is important, and that these are clearly set out in the financial agreement by reference to what item of the asset pool each party is to retain. It was

submitted that the value stated in annexure A in any errors in relation to his values are "immaterial". His Honour held[17]:

> *"In circumstances where the errors in the Financial Agreements relate to the proportion if the parties were each to receive under the agreement, and the Financial Agreement itself was internally inconsistent in those proportions, I am not satisfied that [the wife's solicitor] identified these errors such that he could have, in any event, properly explained them to the wife pursuant to the requirements of section 90G(1)(b).*
>
> *Accordingly, I conclude that the Financial Agreement is not binding within the meaning of section 90G(1)."*

His Honour then considered that even though the requirement for legal advice hadn't been satisfied, he could find that the agreement was still binding on the basis that that would be unjust and inequitable if the agreement were not binding on the parties.

His Honour held[18]:

> *"Given the inadequate legal advice provided to the wife under section 90G(1)(b), the importance that is placed on such legal advice by the legislation, and the blatant errors in the Financial Agreement, I consider that it would be unjust and inequitable if I were to declare that the Financial Agreement was binding on the parties. Accordingly, the Financial Agreement is not binding."*

Although unnecessary to do so, his Honour then considered whether the financial agreement should be set aside, for the sake of completeness. The first issue his Honour considered was that in section 90K(1)(a) – fraud and non-disclosure in material matters.

The wife alleged that the husband did not disclose his interests at the time of entering into the financial agreement in three properties. The husband denied having any interest in any of those properties throughout the marriage and at the time of execution of the financial agreement other than as set out in his affidavit material. There were then transfers executed in favour of the husband some months after the execution of the financial agreement, one of which from the husband's parents was for consideration of $1.00. The court found that the wife had not discharged her onus as the court was not satisfied the husband had an undisclosed interest in any of the properties. The wife then sought to contend that the husband was not a credible witness and was a person who was willing to engage in fraud and therefore engage in fraud in procuring her signature on the financial agreement:

> (a) His misrepresentation of the purchase price of one of the properties on the transfer documents which he claimed was on the advice of the solicitor, in order to reduce stamp duty; and

[17] At [48]-[49].
[18] At [51].

(b) His acceptance that their instances of physical violence between the parties, despite denying all allegations of family violence in his material.

His Honour rejected the argument of fraud as there was not clear, cogent, unequivocal evidence[19]:

> *"The fact that the husband may have made representations in the past in relation to his purchase of the H street property including, potentially on the advice of his solicitor, or that made false statements in his affidavit material in these proceedings, does not necessarily imply that he knowingly manipulated or misrepresented the values of assets in the asset pool in the financial agreement."*

The wife then relied on section 90K(1)(b): void for uncertainty. This was because there were inconsistencies she said between operative parts 1, 2, 3 and annexure A so that the common intention and true meaning of the financial agreement cannot be discerned. She said the contradiction was:

- On the one hand, the wife received more assets than the husband and the entirety of one property as set out in operative part 1 and annexure A, and

- On the other hand, the husband receives most of the assets and the parties divest themselves of an interest in the F street property to the daughter, as set out in operative parts 2 and 3.

The wife relied on the Full Court decision of Costres and Costres [2009] FamCAFC 222[20]:

> *"We are of the view that, while common law principles of construction undoubtedly applying can be used to avoid absurdity, the terms of the agreement must accurately reflect the intention of the parties at the time of the making of the agreement, and be unambiguous. In other words, the meaning to be given to expressions used in the agreement must be clear and their meaning certain.*
>
> *We accept that in determining whether the agreement is valid, enforceable or effective, the general law relating to contracts, as well as principles of equity, are to be applied. That must be done to give effect to the parties' intentions at the time of the making of the agreement, and in the context of the statutes. The legislature has been careful to include strict requirements if a financial agreement is to be binding, including the requirement of independent legal advice. In those circumstances it is clear that legislature envisaged, because of the nature of these agreements and the removal of the Court's supervisory role, that parties would receive legal advice about the necessity for the intentions to be accurately and clearly reflected in the actual terms of the agreement.*
>
> *While, for the purpose of construing the agreement a Court should, as in the context of a commercial agreement, and apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. This is particularly so when regard is had to provisions of Part VIIIA in the overall context of the Act."*

[19] At [70].
[20] At [127]-[129].

The court was satisfied that the errors in the financial agreement are[21] "*material, manifest and infect the entirety of the agreement as to what assets and percentage of the property pool each party was to receive. Given the inconsistencies in the terms of the Financial Agreement, it is impossible for the Court to identify the correct intended meaning on the face of the Financial Agreement. There is also no offending provision of the agreement that can be severed to give certainty to the terms.*"

Accordingly, the court found that the wife was entitled to have the agreement set aside on the ground of uncertainty under section 90K(1)(b).

Section 90K(1)(e) unconscionable conduct

The court noted that in determining whether this section is satisfied, ordinary principles of law and equity relating to unconscionable conduct apply. His Honour said[22]:

> *"There was no controversy in this case as to the equitable principles unconscionable conduct was annunciated by the High Court of Australia and Commercial Bank of Australia Ltd v Amadio[23] and more recently Ann Kakavas v Crown Melbourne Ltd[24]. These principles have been reiterated by courts on numerous occasions and are succinctly summarised by the plurality in Thorne v Kennedy[25] as involving two elements*:
>
> > *'A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which serious affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage."*

As the court held, it must be the case that at the time of signing the financial agreement, the wife was subject to a special disadvantage which seriously affected her ability to make a judgment as to her own best interests and the husband knowingly and unconscientiously took advantage of that special disadvantage.

The wife contended that she was pressured to sign the Westpac loan agreement and the financial agreement at the request of her husband and was at all times under the impression that she was signing documents to secure financial investment for the daughter. She relied on evidence of a history of family violence and dominant controlling behaviour by the husband, as well as evidence of the daughter to the same effect – that she signed the financial agreement out of fear of her husband. She said that she was "*pressured*" and "*forced*" by the husband to sign the Westpac loan agreement although she

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[21] At [78].
[22] At [81].
[23] [1983] HCA 14; (1983) 151CLR447.
[24] [2013] HCA 25; (2013) 250CLR392. 25 [2017] HCA 49; (2017) 263CLR85.

knew she was signing documentsin order to obtain title to a property as she was "*confused and lost*". She said in relation to he financial agreement that she thought there would be "*verbal abuse, physical abuse*" if she did not sign it. She said that her special disadvantages were:

• The husband had greater financial and business acumen particularly given his experience of assisting in his parents' shop in the past and that he controlled the parties' finances throughout the relationship. The daughter's evidence was that she complied with the request from her father to provide her pay slips and bank statements to him and to transfer savings to him in the month before the signing of the financial agreement because she "felt afraid of him".

• The husband's concession that he sign a bank authorisation for the direct debit of $480 per week in rent demonstrated the husband would "take things into his own hands".

• At the time of entering into the financial agreement, the wife had no properties in her name and was therefore in an inferior bargaining position to the husband.

• At the time of entering into the financial agreement, the wife had limited understanding of the effects and implications of the financial agreement, and was under the impression that the sole purpose of signing the document was to secure the property for their daughter.

• The financial agreement was poorly drafted by the solicitor for the husband and contained a number of material errors that were never brought to her attention prior to signing it.

• Following her first appointment with the solicitor, the wife was berated by the husband for not having signed the financial agreement on that date and was pressured by the husband to return to the solicitor and sign the document.

• The wife was fearful of the husband. The wife had previously called the police in an alleged instance of physical violence 21 years before, being admitted to hospital four years before to seek protection from the husband and consulting a psychologist four years before in relation to the alleged abuse.

The wife asserted the husband would have been well aware of these circumstances and conscientiously took advantage of her and their daughter in order to obtain a better financial position by way of the financial agreement.

Not surprisingly, the husband said that the wife was not under special disability and that he did not unconscientiously procure her signature on the financial agreement:

• There is no evidence of a consistent pattern of family violence perpetrated by him.

• At the time of signing the financial agreement, the wife had been residing in Australia for 30 years, worked as an educator, was competent in the English language which indicated she had the capacity to understand the legal documents she was signing and the implications of signing.

• The wife understood the effect of the Westpac loan documents was that she and her daughter would both receive an interest in the property.

• The wife's solicitor stated the wife did not appear at all afraid or nervous during the meeting on the Monday when the wife signed the agreement.

• There was at least one month between the date upon which the wife signed the Westpac loan agreement and when she signed the financial agreement and she had had at least two days over the weekend between her first and second appointment with the solicitor to read and consider the terms of the agreement.

• The evidence of the daughter is biased.

His Honour found that the wife's execution of the financial agreement was not procured by unconscionable conduct on the part of the husband as a threshold for unconscionable conduct is a high one. The court accepted that the wife was fearful of arguments ensuring if she questioned the husband in relation to the financial agreement or refused to sign it, however the court considered there to be a key link of coercion missing between that conduct and her signing. There was no ultimatum with severe consequences if the agreement was not signed.

Whilst the wife was at pains to show there was pressure on her to sign the agreement, the only evidence of pressure imminently close to the event of signing the agreement was the husband's admission that he was waiting in the nearby car park on the Friday and the conversation between the husband and wife following that matter. Relevantly, there was no evidence that the husband was in any close proximity when the second and more critical meeting took place. Whilst the wife may have felt disempowered, the court wasn't satisfied that she was so fearful and submissive that she was labouring under a special disadvantage at the time the agreement was signed. Although the financial agreement was drafted by his solicitor, any assertion that the husband may have sought a better bargain for himself rises no higher than speculation. Speculation is not sufficient to establish unconscionable conduct.

On Christmas Eve, 2020, the wife received a special Christmas present from the Court: a costs order against the husband: *Kaimal & Kaimal* (No 2) [2020] FamCA 1119. As we all know, when there is a significant costs order made against a party, there is a real risk that the party will then seek to sheet those costs back on to their solicitors.

WEBSTER AND GLOVER (NO 2) [2018] FCCA 3340

The question in the case was whether the agreement was a binding Part VIIIAB financial agreement. Judge Jarrett (as he then was) said[26]:

> *"An agreement will be a Part VIIAB (sic) financial agreement if it is concerned with how relevant property or financial resources are to be distributed in the event of the breakdown of the de facto relationship. It is not necessarily concerned with altering the interests of the parties to the de facto relationship in the property of the parties or either of them as is section 90SM of*

[26] At [13]

> *the Act. Arguably, the concept of distributing the property or financial resources of the parties is a broader concept than altering their interests in their property because the property and financial resources of the parties or each of them might be distributed between them without their interests in their property having to be altered at all." (His Honour's emphasis)*

Except for some minor respects, the agreement did not propose any alteration of their interests in property. The agreement was signed in November 2010 as his Honour stated[27]:

> *"It purports to have been made on 1 July 2010 and to have affect from that date. However, no significance attaches to that. The parties might agree to the document having effect from a specified date which predates their signatures to the document. Although no authority decided for this proposition, its correctness did not seem to be disputed by Ms Glover."*

The first recital said that the parties intended to live together in domestic partnership arrangement to commence from 1 July 2010. However, they had already been living together as a couple since April that year and by 1 July 2010 they were in a romantic exclusive association. The court was satisfied that they were in a de facto relationship by the time the agreement is expressed to have commenced. His Honour then set out the terms of the agreement[28]:

> *"Clause 3 of the agreement records that the parties shall contribute to their everyday living expenses as they agree from time to time. It also provides that any property acquired or borrowing undertaken by the parties shall be recorded in writing to be the asset or liability of one or other or both of them. According to clause 3 both parties are free to dispose of their separate property by deed, will or otherwise as they see fit.*
>
> *Clauses 4 and 5 contain acknowledgements by the parties that they have made "no contribution of a financial nature to the acquisition conservation and improvement of the assets" of the other party and that they are not entitled to any benefit from any of those assets set out by each of the parties in their schedules of assets to the agreement. They also agree by those clauses that they have "no entitlement to any gifts or inheritances that are received from time to time" by the other party and that they will make "no claim at law or in equity in relation to such gifts or inheritances".*
>
> *Clauses 6 and 7 provide that each party "shall make no claim at law or in equity in relation to any further property that" the other party acquires in their sole navme with money accumulated from their sole earnings or other income received during the relationship.*
>
> *Clause 8 deals with jointly acquired property. It provides that any jointly acquired property is to be acquired as tenants-in-common in equal shares. Clause 8 requires the parties to contribute equally towards any loan repayments if they are required to borrow money, either in relation to the acquisition of the property or in relation to the subsequent improvement of the property. The clause provides that they should be jointly liable for the repayment of any loan. It further*

[27] At [7].
[28] At [15]-[26]

provides that following separation the jointly acquired property should be sold and the net proceeds of sale equally divided between them.

Clause 9 provides for the equal division of all furniture and home contents acquired by the parties if they separate. It provides a mechanism to resolve any disputes that might arise as to the division of the furniture and home contents.

Clause 10 makes provision for what is to occur if the parties separate and at the time of separation they are residing in a residence owned by one or other of the parties. If the residence is owned by the applicant, the respondent agrees to vacate the residence within 30 days of receiving a written demand to do so. Similarly if the residence is owned by the respondent, the applicant agrees to vacate the residence within 30 days of receiving a written demand from the respondent that he do so. If the property is jointly owned, the applicant must vacate the property within 30 days of receiving a written demand from the respondent that he do so.

Clause 11 provides for the party leaving the residence to remove his or her personal property including furniture and home contents which the parties might have divided between them pursuant to clause 9. The clause also requires the sharing equally between the parties of "reasonable removal expenses to relocate within New South Wales"

Clause 12 provides:

> *12. Except as provided above, the parties are entitled to be the sole legal and beneficial owners of all other items of property, both real and personal, including superannuation entitlements, which are registered in each of their names or in their current possession or control.*

Clauses 13 and 14 deal with spousal maintenance. They contain acknowledgements by each party that the agreement makes no provision for the payment of spousal maintenance by one to the other should they separate and that no funds or property will be paid or made available by either party to the other for that other's maintenance should they separate. The clauses purport to contain an agreement that neither party will make, at any time in the future, any application for the payment of spousal maintenance.

Schedule 1 of the subject agreement is a financial statement of the respondent.
Schedule 2 of the subject agreement is a financial statement of the applicant.

I find that the agreement deals with how the property and financial resources of the parties at the time when the agreement was made, or at a later time and during the de facto relationship, is to be distributed in the event of the breakdown of their relationship. Further I find that at the time of the making of the agreement, Mr Webster and Ms Glover were not spouse parties to any other Part VIIIAB financial agreement that was binding on them with respect to any of those matters. I find that the agreement meets the requirements of s.90UC of the Family Law Act. I find that the agreement signed by the parties in November, 2010 is a Part VIIIAB financial agreement for the purposes of the Family Law Act."

The question then was whether the agreement was binding. Ms Glover initially agitated a case that the certificate given by the solicitor was given in respect of a different agreement than that which the parties ultimately signed. She said that she had provided the draft agreement given to her by Mr Webster to the solicitor who had suggested some changes. Even on her evidence, the changes were not substantial and were more in the nature of formatting changes. Nevertheless, she seemed to wish to argue that the certificate given by the solicitor did not relate to the agreement that had been executed and therefore one of the elements necessary to be present for the agreement to be binding was missing.

Ultimately, she did not press that point, however, she said that she did not receive the legal advice because Mr Webster misrepresented his assets and financial resources in the schedule and by reason of that misrepresentation, she was unable to be provided with a requisite advice. She also said that she did not receive the requisite legal advice on a broader basis.

First, she argued that because he did not accurately set out his financial position in the schedule, she could not obtain the legal advice required by section 90UJ(1)(b).

Secondly, she agued that what legal advice she did get, was not legal advice for the purposes of section 90UJ(1)(b) because the advice could not have been accurate by reason it is failure to properly disclose his financial position.

Thirdly, she argued that the failure to accurately set out his financial position engaged section 90UM(1)(a) and the agreement is liable to be set aside on that basis. Mr Webster set out a statement of wealth in schedule 2 to the agreement that was two pages in length. The first page was the form of a spreadsheet which had 16 columns, eight of which relate to discrete entities, either corporate, personal or described as a trust. Five of those columns deal with what is described as net worth for the 2006-2010 years. Page 2 of the statement of wealth comprised three graphs – a vertical bar graph and two pie charts which purport to illustrate his assets, liabilities and net assets, the distribution of wealth by entity and the distribution of wealth by asset type. His Honour said it is fair to say that the statement of wealth demonstrates a complicated structure through which Mr Webster either holds or is entitled to the benefit of the assets and financial resources described. However, nowhere in there was a reference to The Mr Webster Education Discretionary Trust.

The beneficiaries of that trust were Mr Webster, any child or grandchild of his born before the termination date, his spouse or any university in Australia. Mr Webster was the appointor. He said that the purpose of the trust was a vehicle for distributing his residuary estate upon his death. He said, "*the trust has never operated, it's what I think is called a testamentary trust. When I die my funds flow into that and from there they flow to various charitable causes … it is only submitted one tax form which was zero. It doesn't have a bank account. It has never traded… Both myself and I – I think my – my accountant, given that he didn't report on it either, thought that that wasn't something that was necessary to disclose*."

The most recent Will of Mr Webster showed that certain legacies were to be held by the education trust. All of the property and financial resources held by certain companies in his statement of wealth had been set out. What hadn't been disclosed was the existence of Mr Webster as a potential beneficiary.

However, as his Honour noted, schedule 2 was intended to deal with Mr Webster's assets and financial resources, not those of Ms Glover[29] "in those circumstances it is very difficult to understand an argument that because Mr Webster made no mention of the education trust, the trustee of which held no assets other than the shares that I have already described and in respect of which the underlining assets had been properly disclosed, he had somehow misrepresented his assets and financial resources."

His Honour found that the omission by Mr Webster to disclose the education trust in schedule 2 to the financial agreement did not misrepresent his assets or financial resources in the way contended by Ms Glover because:

- Mr Webster's interest (and Ms Glover's interest if she has one) is a beneficiary under the education trust gives nothing more than an expectancy.

- No rights of a proprietary nature exist in Mr Webster's hands in respect of the assets, if any, of the education trust.

- Nor can it be seen as a financial resource because the trust has no assets and no income at the time the representation was made. The trust exists only to receive the residuary of his estate in the event of his death.

- To the extent that it might be said that the shares held by in the company representan asset of the trust, the underlining assets that give value to those shares were disclosed.

The second matter said to constitute a misrepresentation by Ms Glover was the failure to identify that the assets held by a company referred to in the statement of wealth was superannuation interests. This was essentially Mr Webster's self-managed super fund. The company was specifically disclosed in schedule 2 to the agreement. Ms Glover's complaint was that the assets were not identified as superannuation assets.

His Honour stated[30]:

> *In my view, there was no obligation to identify them as such. The purpose of the schedule was to set out Mr Webster's 'assets and financial resources' … In the event that Ms Glover found the way in which Mr Webster disclosed his assets and financial resources in the schedule to be confusing or unclear, it was open to her, or those advising her, to seek clarification. There is no evidence that any clarification was sought.*
>
> *It is of some moment to note that in her statement of wealth (schedule 1) … Ms Glover does not identify the items listed therein as assets or financial resources."*

Not surprisingly his Honour found that the failure to describe the assets of superannuation was not a misrepresentation by Mr Webster. Therefore, there was no operative misrepresentation by Mr Webster arising out of the content of schedule 2.

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[29] At [52].
[30] At [58]-[59].

His Honour then cited the summary of the relevant principles by Judge Neville in *Warner and Cummings* (2017) 319 FLR 10:

> *"The relevant principles that bear on this issue were conveniently summarised by Judge Neville in Warner & Cummings (2017) 319 FLR 10 where his Honour said*:
>
> > *• 112. First, in Wallace & Stelzer, the Full Court (Finn, Strickland & Ryan JJ) said, at [101] – [103] (emphasis added):[FN67: Wallace & Stelzer [2013] FamCAFC 199; (2013) 283 FLR 126; (2013) FLC 93-566. See also the general discussion by the Full Court (Ryan, Murphy and Aldridge JJ) in Piper & Mueller [2015] FamCAFC 241; (2015) FLC 93-686 regarding, inter alia, the sufficiency of the certificate. There was no mention or discussion of Piper & Mueller in submissions filed on behalf of the Applicant in the current matter; the Respondent's submissions did refer to both of these Full Court decisions.]*:
> >
> > > *• [101] The person who seeks to establish that a financial agreement is binding carries the onus of proof (Hoult & Hoult [2013] FamCAFC 109; (2013) FLC 93-546. Applied to the facts in this case, this means that it fell to the wife to establish that the parties received legal advice in accordance with s 90G(1)(b). As a consequence of recital W and by tendering the signed agreement and the certificates, prima facie the wife was able to discharge her legal onus.*
> > >
> > > *• [102] However, once the husband put in issue whether the required legal advice had been provided, there was an onus on him to adduce evidence which would disprove or at least throw into doubt the inference or conclusion to be drawn from recital W and the certificates (being that legal advice had been given) (Hoult at [62] and [261]). Therefore, it was necessary for the parties to give evidence about the provision of advice, and evidence was also adduced from their respective solicitors.*
> > >
> > > *• [103] Although there appeared to be some suggestion in the husband's case before us that in a case such as the present the court is required to consider the accuracy of the legal advice provided, we did not understand that issue to be ultimately pressed. But in any event we note that in the recent Full Court decision of Logan & Logan [2013] FamCAFC 151, and relying on Hoult, it was held that the only enquiry necessary is as to whether advice was given, and not as to the content of that advice.*
> >
> > *• 113. Secondly, in Hoult v Hoult, the Full Court (Thackray, Strickland and AinslieWallace JJ) noted the following in relation to the issues of, inter alia, the burden of proof, the operation and effect of "the certificate", and the discretion of the Court under s.90G(1A) (the correlative provision to s.90UJ(1A) in Part VIIIAB of the Act).*
> >
> > *• 114. At [62], Thackray J said (Strickland and Ainslie-Wallace JJ agreeing)*:
> >
> > > *• … once the party seeking to rely upon the agreement produces in evidence the*

certificate signed by the other party's solicitor, there is a forensic obligation on the other party to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate (especially when read with the recital in the agreement to the same effect).

• 115. At [96] - [98], his Honour said (emphasis added particularly in relation to the accepted use made of recitals):

• [96] … I am unable to accept the view his Honour expressed at [88] that "the certificate is, without more, insufficient to satisfy the onus of establishing that the relevant s.90G requirements have been met". The certificate, when read with Recital N, should have been treated as prima facie evidence of compliance with the legal advice component of s.90G(1).

• [97] Put another way, employing Windeyer J's formulation in Purkess v Crittenden (supra at 171), the production of the certificate, read together with the recital, should have given rise to "an inference, a presumption of fact or a presumptio hominis" that the requisite advice had been given.

• [98] … the production of the certificate (especially when read with the recital) had caused the evidentiary burden to pass to the wife. The inference properly to be drawn from the certificate (read with the recital) is that the advice required by s.90G had been given, even though there was no evidence of the content of that advice….

• 116. Then in relation to the specifics of "advice", Thackray J said, at [100] – [101] (emphasis added):

• [100] … the trial Judge did not pose the correct question. He set out to ascertain the content of the legal advice, whereas he needed only to be satisfied that the advice referred to in s.90G(1)(b) had been given. Thus, when his Honour found that the certificate provided "an insufficient evidentiary foundation", it seems his Honour was requiring the husband to provide a foundation for something that did not have to be proved.

• [101] The certificate, read with the recital, provided a sufficient evidentiary foundation for finding there had been compliance with the requirements of the Act. The question whether that foundation had been undermined by other evidence became confused with the question of the precise content of the advice. It is possible, if the questions had not been confused, that the answer would have been the same, but it would be unsafe to make that assumption

• 117. In a similar vein, at [279], the joint judgment of Strickland and Ainslie-Wallace JJ recorded that:[FN 68: At [288], their Honours also confirmed, by reference to the Full Court's decision in Parker that s.90G(1A)(c) "is not confined to "technical" breaches."]

> *• It also must not be forgotten that, as Justice Thackray has correctly pointed out in paragraph 100 above, it was only necessary for the trial judge to be satisfied that the advice referred to in s 90G(1)(b) had been given, and the certificate can be a sufficient evidentiary foundation for that finding; it was unnecessary for the trial judge to ascertain the "content of the legal advice", and that was the error his Honour made."*

Jarrett J said[31]:

> *"The case before me was conducted, correctly in my view, on the basis that the certificate signed by Ms Il, read with recital J, provides a sufficient evidentiary foundation for a finding that Ms Glover had received the legal advice required by s.90UJ(1)(b) of the Act. There is a forensic obligation on Ms Glover to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate, read with recital J. in the parties' financial agreement. To the extent that Ms Glover sought to do that by demonstrating that whatever advice she did receive, it could not have been advice for the purposes of s.90UJ(1)(b) of the Act, she does not discharge the obligation upon her. That is because I am not satisfied that Mr Webster misrepresented his assets and financial resources in schedule 2 to the parties' financial agreement as Ms Glover alleges. Nor am I satisfied that his failure to identify some of the items in schedule 2 as superannuation interests meant that Ms Glover was unable to receive the requisite advice for the purposes of s.90UJ(1)(b) of the Act. All of the assets and financial resources at Mr Webster's disposal were specified in the schedule. It was not demonstrated in the evidence or in argument that the additional information Ms Glover argues ought to have been disclosed by Mr Webster would have changed the advice that she received in any way or that it had any significance. All of the assets and financial resources and the values and scribed to them were fully disclosed.*
>
> *It seems, although this was not put explicitly in submissions made on behalf of Ms Glover, Ms Glover's case is that leaving aside the question of Mr Webster's asserted misrepresentation in schedule 2, she nonetheless did not receive the advice she was required to receive by s.90UJ(1)(b) of the Act. In paragraph 35 of her affidavit filed on 25 January, 2017 she asserts that Ms Il did not advise her that by signing the agreement she was forgoing her rights under the Family Law Act to a property adjustment arising out of a future breakdown of the de facto relationship. There are difficulties in accepting that assertion. First, Ms Glover does not say what advice she did receive from Ms Il. Second, she did not call Ms Il to give evidence about what advice she did give to Ms Glover. Third, in cross-examination the following exchange took place between senior counsel for Mr Webster and Ms Glover:*
>
> > *• Counsel: All right. You knew, didn't you, that you were foregoing rights at law, and at equity in respect of – sorry, we will go back one step. You knew that you were requiring him to forego all rights at law, and in equity in any – in respect of any property that you owned?*

[31] At [65]-[71].

> *• Glover: In my personal name, yes.*
>
> *• …*
>
> *• Counsel: And you knew that you were foregoing any rights at law, and in equity in respect of any property that was in his name?*
>
> *• Glover: Correct.*
>
> *• Counsel: All right. So you say that she failed to advise you that you would be foregoing your rights under the Family Law Act to a property adjustment arising out of a future breakdown of the de facto relationship, but she had told you, you were foregoing all your rights at law, and equity?*
>
> *• Glover: Well, the agreement does not deal with*
>
> *• Counsel: Madam?*
>
> *• Glover: what happened in the future so therefore how could she possibly advise me?*

I do not accept the assertion in Ms Glover's affidavit of paragraph 35 (a) that she was not advised that she was forgoing her rights under the Family Law Act to a property adjustment arising out of a future breakdown of the de facto relationship with Mr Webster. Her answer to counsel in respect of this issue is argument designed to support the assertion in her affidavit. In the absence of evidence from Ms Il that she did not give the requisite advice, I am not prepared to infer that the certificate she signed to the effect that she gave Ms Glover advice about her rights, entitlements and responsibilities in the absence of the deed of agreement between the parties and the manner in which those rights, entitlements and responsibilities were or might be affected by the deed was incorrect. In effect, Ms Glover is asking me to find that Ms Il, a legal practitioner, signed a certificate that was not correct. That is a serious allegation. "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences": Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 at 361–362.

I am satisfied, and I find, that before signing the agreement, each party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.

I am satisfied, and I find, that each party has been provided with a signed statement by their respective legal practitioners about that advice as required by the Act.

I am also satisfied, and I find, that a copy of the statement given to each party by their legal adviser has been given to the other party."

Terminated?

Ms Glover submitted that the agreement had been terminated as it had been terminated by Mr Webster. His Honour rejected this on the facts. He also said[32]:

> *"On its face, s.90UL prescribes the only way the parties to a Part VIIIAB financial agreement may terminate it. There has been no attempt to terminate the parties' financial agreement the subject of these proceedings in a way consistent with s.90UL. This matter, and the interaction between s.90UL and s.90UN was not the subject of any argument before me and so I do not decide this aspect of the case on the basis that the agreement between the parties could not be terminated by one or other of them except in accordance with s.90UL."*

Set aside?

Ms Glover argued that the agreement should be set aside by the court pursuant to section 90UM because it was obtained by fraud as there was non-disclosure material matter. His Honour this ground could not succeed. The second ground was that the agreement ought to be found to be void, voidable and unenforceable because:

- It is uncertain, or

- Enforcement of the agreement or reliance upon its terms by Mr Webster is unconscionable.

His Honour noted that there is no doubt that ordinary contractual principles applied to the determination of whether a contract is void, enforceable or effective: section 90UN. She argued that Mr Webster had not accurately set out his wealth. His Honour rejected that. Schedule 2 specified Mr Webster's assets and financial resources with considerable precision and the absence of any reference to the education trust or one of the companies is immaterial. She also argued that the misdescribed and undescribed assetsin schedule 2 were such that it did not permit her, nor her legal adviser, to understand the true extent and nature of the holdings and interest that ought to have been on the schedule. Again, that was rejected by his Honour.

She also argued that it was now unconscionable for Mr Webster to insist on the performance of the agreement when it is uncertain, but as his Honour said, the agreement was not uncertain in the way in which she contended.

Finally, she argued that a contribution to after acquired property is so extensive that it must be concluded that the parties have abandoned the agreement or that in any case it is unconscionable for Mr Webster now to insist upon the complete exclusion of Ms Glover from the pool of assets under his control. This was again rejected. The financial agreement dealt with two types of property acquired by the parties after the agreement was entered into. Thefirst was property that either of them acquired in their sole name with money accumulated from their sole earnings or other income received by them during the relationship. The other is property by clause 8 being acquired by them jointly.

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[32] At [75].

Evidently Mr Webster had a business in Queensland which was doing well and Ms Glover sought to have an interest in it. However, his Honour noted that the relevant properties were purchased not by him "*in his sole name with money accumulated from sole earnings or other income received by him*" but by other legal entities. He may have supplied the purchase price of some of it through borrowings, but that does not necessarily mean that he'd used money accumulated from sole earnings or other income received by him.

His Honour said that thus accepting Ms Glover's argument that the Queensland businesses are not properly dealt with by the agreement, that agreement is no bar to the court making property adjustment orders in respect of it. This was because of a Part VIIIAB financial agreement does not have to deal with all of the parties' property to be valid but only any of the property: section 90UC(2)(a). His Honour therefore viewed the unconscionability argument to fail.

Ms Glover argued that the agreement had been frustrated because the parties conducted themselves and acquired property otherwise than in accordance with the terms of the agreement and by doing so and in particular by entering into the shareholders agreement, Mr Webster repudiated the agreement.

Frustrated?

His Honour was of the view that Mr Webster had not repudiated the agreement and in any event, Ms Glover could not succeed in argument that the agreement had been frustrated.

The doctrine of frustration was recently collected in Berkley and Stanfield [2018] FCWA 119 where O'Brien J summarised the position in respect of section 90KA of the Act[33]:

> • *"66. Section 90KA provides that the question whether a financial agreement is "valid, enforceable or effective is to be determined… according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".*
>
> • *"Frustration may be defined 67. Subsection 90K(1)(c) provides that if the Court is satisfied that in the circumstances that have arisen since the agreement was made, it is impracticable for the agreement or a part of the agreement to be carried out, the Court may make an order setting the agreement aside.*
>
> • *68. The word "impracticable" is not defined in the Act and must be given its ordinary meaning. It does not mean "impossible". By the same token, the proposition that an agreement is "impracticable to be carried out" is not the same as the proposition that it is impracticable to enforce the terms of the agreement.*

[33] At [99].

• 69. The concept of impracticability of carrying out an order (and, by analogy, the terms of an agreement) has been described as being "akin to the application of the doctrine of frustration in contractual matters": In the Marriage of La Rocca [1991] FamCA 97; (1991) FLC 92-222. It is not, however, identical to that doctrine.

• 70. The most frequently cited definition of the doctrine of frustration is that by Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] UKHL 3; [1956] AC 696, at p 729:

> *• "...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract".*

• 71. Along similar lines, Viscount Simon LC said in Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd [1945] AC 221 at p 228:

> *• as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement".*

• 72. In Sanger & Sanger [2011] FamCAFC 210; (2011) FLC 93-484, the Full Court reviewed the authorities and academic writings on the doctrine of frustration, noting with approval the following observations by the learned author of JW Carter, Carter on Contract, Lexis-Nexis Australia:

> *• "It is not possible to define, except in general terms, what constitutes a frustrating event since, ultimately, this must depend on the terms of the contract and the circumstances of the particular case. However, it is clear that the event must have severe consequences, and not merely alter the circumstances in which performance is called for..... there must be a 'radical' change".*

• 73. And later:

> *• "Most cases of frustration involve an element of impossibility. Indeed, the scope of the doctrine has largely depended on the legal conception of 'impossibility'. Apart from the obvious cases where performance by either (or both) of the parties is physically impossible, for example, because the subject matter of the contract has been destroyed, the legal concept of impossibility encompasses situation where performance is not literally impossible, but is 'impracticable in a commercial sense'".*

- *74. And further, in relation to foresight and contractual terms dealing with frustration*:

    - *"Whether or not a contractual provision deals with the event relied upon as frustrating the contract in such a way as to prevent the parties being discharged under the doctrine of frustration depends on the construction of the contract.*

    - *If the contract contains express provisions which indicates sufficiently the consequences which are to result from the occurrence of the event, the parties' rights will be regulated by the express terms, and there will be no room for the operation of the doctrine"."*

His Honour therefore found that the agreement had not been frustrated and therefore found that the agreement was a Part VIIIAB financial agreement as defined in section 90UC and that there had been no basis established for setting it aside and it has not been otherwise terminated.

BERONI AND CORELLI [2021] FamCAFC 9

This was a decision by Strickland, Aldridge and Kent JJ.

The husband appealed a decision of a judge of the Family Court setting aside a binding financial agreement. Both the parties were migrants. The BFA was in English. It was not translated in either countries' language and any explanation of its terms to the wife was in English.

The agreement provided that if the relationship between the husband and wife came to an end, the wife would not be entitled to make any claim on the assets which the husband brought into the relationship or vice versa, no matter for how long the relationship between them continued, or what contributions either of them made during it – but assets built up during the relationship would remain capable of division in accordance with their respective contributions.

An interesting feature of the case are the number of claims brought by the wife concerning the agreement:

- Non est factum.
- Duress.
- Unconscionability.
- Undue influence.
- Misrepresentation.
- Unilateral mistake.
- Estoppel.
- Repudiation/renunciation.
- Statutory claims under section 90UN and section 90UJ.

The husband told the wife, who was then not proficient in English, that it was "*just a bit of paper*". When the wife went to sign the agreement, the husband attended with her, following the husband's solicitor

sending the wife's solicitor the draft. No interpreter accompanied the wife to that meeting, despite her solicitor's request that she bring one. The trial judge concluded that the husband had refused an interpreter to attend even though the court was satisfied that the wife intended to sign the BFA without having read it as the court was satisfied the husband was insisting that she do.

That day following that meeting, the wife's solicitor, on his own initiative and without instructions from the wife, wrote to the husband's solicitor expressing his concerns about the terms of the draft and suggesting amendments. The major concern was that the agreement provided that no matter how long the parties' relationship continued, the wife had no financial recourse if it came to an end. The wife's solicitor put a counter proposal which would allow payments to be made to the wife on a varying scale, depending on the length of the cohabitation, but the husband rejected this. The wife's solicitor caused the husband to become annoyed. The husband told the wife very early in the relationship that she would need to sign a financial agreement and that he would not have contemplated the wife living with him for more than three years had she refused. The husband emphasised to the wife that it was "*practically compulsory*" for her to sign the agreement. The husband knew that the wife was dependent upon him in order to obtain permanent residence in Australia and that she was aware that she could potentially be deported because she was not living with her son as per the student guardian visa requirements.

Two weeks after the first attendance by the wife and the solicitor, she attended again and this time signed the agreement. The solicitor's file note said:

> *"DM attending you re agreement. You now want to sign. I explained my problems with this. I go through my correspondence with [the other side] and the reason for it. I do not think the agreement is fair. I go through the agreement with you. I explain that it does not matter how long you and [the husband] live together, you'll get nothing at the end of the relationship. You are completely at his financial mercy. You understand but still want to sign.*
>
> *I suspect you do this because [the husband] is unhappy and thinks you don't trust him. You tell me as much. However, we sign the agreement.*
>
> *You tell me the divorce has been served. I have not heard from Z company [the courier service] yet. I'll do what I can to bring the date forward but there are rules about how much time he has to respond.*
>
> *(30 minutes)."*

The court found "*that there had been some very rudimentary explanation of the BFA given to the wife in English, some of which she probably understood. However, it was inconceivable that within the 30 minutes duration of that consultation there was anything approaching fulsome advice given or even a proper explanation of the BFA itself. The BFA runs to 14 pages and has some aspects of complexity to it which would make it very difficult to be even basically – much less comprehensively – explained in a language in which the client is not fluent. I am satisfied that, cognisant of the husband's opposition to my amendment, the wife's determination to sign the BFA in its then form, there was some limited*

explanation given, perhaps with an expectation that the document would be found to be unenforceable in any event."

The court was not persuaded that the execution of the agreement was the product of her freewill: "*particularly, the stark in providence of the transaction is unlikely to be the product of her freewill, in the face of advice not to enter it.*" The husband asserted that the signing of the BFA was just a part of the wife's scheme to get permanent residency in Australia and in signing it, she knowingly took a chance that things would go well for her. He claimed that in reality, he was the victim of her plot. The trial judge held:

> *"I reject that claim. It is fanciful to claim that the husband was emotionally vulnerable to the wife's manipulation. If that was so, why insist on the BFA at all? Why become angry at the suggested changes? Why reject them and insist on it being signed unaltered? The answer to all those questions, I am well satisfied, is that the husband uses his money to manipulate and control others, and if it were at any risk, he would have terminated the relationship prior to three years."*

The wife said that she was in a position of special disadvantage in dealing with the husband because:

> *(a) She could not speak, read or understand English well, and was dependent upon the husband to assist her to do so.*
>
> *(b) She had no understanding of the law of property division upon the breakdown of a de facto relationship, whereas the husband did.*
>
> *(c) She could not read the BFA, whereas the husband could.*
>
> *(d) She was dependent upon the husband not informing immigration authorities of her breach of her guardian visa terms.*
>
> *(e) She was dependent upon the husband for a financial security in Australia in that at the date of signing she was unable to work in Australia and her only form of income was an allowance of $2,000 per month which her husband was paying her.*
>
> *(f) She was dependent upon the husband for her accommodation, and she had no residence of her own in Australia, or the means to acquire one, albeit perhaps she could have rented.*
>
> *(g) She likely did not know that the BFA was manifestly unfair until she was told that by the solicitor on the day of signing, by which time she had already determined to sign it.*
>
> *(h) The only way that she could acquire permanent residence in Australia was by remaining in a relationship with her husband and obtaining a permanent visa, however the wife knew that if she did not sign the BFA, the relationship would not continue, at least past three years.*
>
> *(i) The wife was fearful of returning to her country because of her ex-husband which the husband was aware of.*

In addition to those, the trial judge was satisfied the husband was generally controlling of the wife and that she was somewhat fearful of him. All of these combined to establish that she was indeed in a position of special disadvantage visa v the husband at the time she signed. The trial judge was not satisfied that the advice which the solicitor gave, or at least tried to impart to the wife on the day of signing, was sufficient to remedy that special disadvantage.

Leaving aside the inevitable language difficulties, which necessitated an interpreter, the wife was never given a copy of the BFA – as it would have been pointless, because she could not read it, much less understand it. The court was not satisfied that the wife had any real understanding as a result of her discussion of 30 minutes with the solicitor as to the sort of value of claim which she would be giving up. The advice must have been, necessarily, given the language barrier and the 30 minute duration of the conference, wholly inadequate to remedy the position of special disadvantage.

In the words of the trial judge:

> *"The question then is whether the husband unconscientiously victimised, exploited, otherwise conducted himself towards the wife by, firstly, insisting that she sign the BFA, and secondly insisting via her solicitors that it be in the proffered form, without variation. In my view he did. The husband must have known, even without [the wife's solicitors] letter, that* ***the terms of the BFA were simply outrageous****. In my view the husband's insistence that it be signed, and signed in an unamended form, given his knowledge of the wife's circumstances of special disadvantage, means that his conduct in having the agreement signed, and insisting upon it being complied with, are unconscionable. It is a form of exploitation of the wife. It is, both legal and morally, inequitable." (emphasis added)*

The husband, having been unsuccessful at trial, sought on appeal to distinguish the circumstance the wife in this case from the circumstances that of the wife in *Thorne v Kennedy*, on the basis that the wife in that case had "far more acute pressure" on her by receiving the BFA to sign only 10 days prior to her wedding, and that if the agreement was not signed, the relationship was at an end. The husband says that no such alternate modem was made in this case, the wife knew of the agreement for some time prior to signing it. The Full Court rejected this argument, given the primary judge's finding that the wife likely did not know the BFA was manifestly unfair until she was told by her solicitor on the day of signing, thereby having less than 30 minutes to absorb the advice. The trial judge had found that there was actual undue influence because:

> (a) The general position of dominance which the husband had in relation to the wife.
>
> (b) His insistence, over a considerable period of time, that the BFA be signed, and is later insistence it be signed without amendment.
>
> (c) The wife's fear that he may inform immigration authorities that she was in breach of her visa conditions.

(d) The husband and wife's knowledge in order to obtain a permanent visa, the relationship needed to continue, but it could only continue if the BFA was signed.

(e) The wife's dependence upon the husband for accommodation and income in Australia.

The husband submitted on appeal:

• The trial judge rejected the wife's evidence that the husband had threatened to report her to immigration authorities and the husband was not aware of the wife's visa condition until months after the agreement was signed.
• The husband would not allow the relationship continue past three years if the wife refused to sign the BFA. It was not the case that the wife's refusal to sign it threatened to bring the relationship to an immediate or near end.

• While it was correct that the wife was dependent on the husband for accommodation and income, if the relationship ended, the wife could have sought alternative rental accommodation.

The wife responded:

• The first two factors were clearly not challenged and that thrust the onus of proving the BFA was not affected by undue influence onto the husband.

• The finding as to immigration related to the wife's fear of being reported to authorities and not with the husband had in fact done. The wife says that there was ample evidence to find the husband was aware of the terms of the wife's visa and that the divorce, BFA and visa went together.

• The parties were under the misapprehension that the wife's student guardian visa was to expire some months after the BFA was signed and the only way it could continue was to apply for a spouse visa, but that could only occur if the BFA was signed.

• The fact that the wife could have rented does not detract from the fact that the wife had nil assets and was reliant upon the husband for her income and accommodation which was of a very high standard.

What is curious about this case is the wife did not call her solicitor at the trial upon appeal. The husband relied on that failure and said it was not open to the trial judge to find:

(a) That the wife had suffered undue influence.

(b) That the wife was under a special disadvantage.

(c) That the solicitor's explanation of the BFA was very rudimentary and the wife probably only understood some of it.

(d) The solicitor's explanation was limited, perhaps with an expectation on the part of the solicitor that the document would be found unenforceable.

The husband submitted that absent evidence from the wife's solicitor which disavowed what was in his certificate and file note, the evidence did not support the wife being overborne in signing the agreement. Absent the solicitor's evidence there was no basis for the findings about the solicitor's rudimentary explanation and that the wife probably only understood some of it. The husband similarly makes the same argument in respect to unconscionability, namely, that the wife's solicitor could not have completed the certificate and file note in good conscience if this had presented to him as a case where the wife was in the position of special disadvantage. As a result, the husband contended that in the absence of a finding that the wife's solicitor failed in his duties, and that the certificate he signed as to the advice he gave was false, it was not open for the primary judge to make the findings he did.

The wife contended that despite her solicitor not giving evidence, there was ample evidence to support the findings:

- *The BFA was a significant legal document of some length and written in legal language.*
- *At the time of signing, the wife could not read English.*
- *The wife could only converse on simple matters and in broken English.*
- *The wife's solicitor assessed that the wife required an interpreter, but no interpreter attended at the time the wife signed the BFA.*

The court concluded it was plainly open to the trial judge to accept that, as he did, the evidence of the wife as to the circumstances in which she executed the BFA and the absence of evidence from the solicitor could not prevent that outcome.

The wife submitted that she was not obliged to call a particular witness and further that the husband could have called her solicitor:

> *"The wife expressly waived privilege in her communications with the solicitor, and invited the husband to call him instead. However, if this ground is about making the findings adverse to the wife's solicitor without him being called upon to answer, the point is plainly wrong. There is no authority which says that a court cannot make adverse findings about the conduct of a solicitor, when that solicitor fails to give evidence. In any event, it cannot be overlooked that the solicitor here refused to cooperate with the wife. The wife issued a subpoena to the solicitor to give evidence, but he refused to cooperate. He must clearly have been on notice of the nature of the issue to which his evidence was relevant, yet he declined the opportunity to be heard before adverse findings were made. Finally, it cannot be held against the wife that she failed to call a witness in circumstances where she could not proof them or know their evidence (Payne v Parker [1976] 1 NSWLR 191 at 197). A party is not obliged to call a witness who will not cooperate."*

The trial judge noted that although the solicitor did not give evidence:

> *"In a sense [he] nonetheless did give evidence. The entirety of his file was tendered. It contains not merely his file notes, but also file copy and original correspondence, and other primary documents. There is no reason to think that his file notes are not substantially accurate, or this file is otherwise incomplete. Much of his evidence in that form is unhelpful to the wife, for instance, his certificate of advice on the BFA, and his file notes which record him having given her certain advice. Therefore even if I had been prepared to draw an adverse inference against the wife, I am far from persuaded that it would have been of a kind significantly more adverse to her that is evidence inthe form of his file."*

The court found that there was no merit in Jones v Dunkel submission by the husband concerning the wife's solicitor.

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