# BINDING THE FINANCIAL AGREEMENT

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## *CONTENTS*



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# ABSTRACT

As a topic, financial agreements are never far from the news.[2] Clients may be wondering whether a financial agreement can be truly binding. While a completely watertight financial agreement may be a pipe dream, there are things you can do to increase their effectiveness. This paper examines the current approach of the family courts to financial agreements and how you can try to draft a financial agreement that sticks.

It is critical when parties separate whether they are in a marriage or in a de facto relationship that they document the financial arrangements that they reach. There are three aspects to this, firstly to add certainty to the arrangements, secondly to ensure that the arrangements made are legally binding and final (to the extent possible at law) and finally, to invoke the number of concessions that are available pursuant to revenue laws that may apply including transfer (stamp) duty and capital gains tax.

It is essential for agreements to be final so that once the agreement has been carried into effect, there can be no revisiting of the arrangement that has been reached. Perils apply for both the parties involved and their lawyers if the documentation is ineffective.

Financial agreements have been the subject of significant litigation in the family courts, both before and after the High Court decision in *Thorne v Kennedy* (2017) 263 CLR 85, which litigation is unlikely to abate.

[2] James Gerrard, 'Working out a "Prenup" proves a capital idea', *The Weekend Australian* (2-3 April 2016), 33, Ellie Dudley, 'What to know about divorce before walking down the aisle', *The Weekend Australian* (22-23 April 2023), 35.

## Part I - A Brief History Of Financial Agreements

It took a quarter of a century after the commencement of the *Family Law Act 1975* for financial agreements to be formally incorporated into Australian law. And that milestone itself is on its way to be a quarter century ago from when this paper is written.

In March 2019, the Australian Law Reform Commission handed down its landmark report, 'Review of the Family Law System' The report briefly considered financial agreements, but the information recorded is nonetheless interesting.

There were a wide range of views in the submissions to the Commission. These ranged from the view that '(financial agreements) are currently of little utility' to the submission that substantive changes to the provisions governing (financial agreements) are needed. These views were expressed, amongst another submission, that some lawyers will simply not prepare (financial agreements) because the legislation is too technical and (financial agreements) can easily fail.[3]

It is against that background that this paper considers the status of financial agreements in the Australian legal landscape.

### A - Financial agreements introduced

Financial agreements were introduced as a result of the amendments to the *Family Law Act 1975* which commenced in December 2000.[4]

They are commonly referred to as 'Binding Financial Agreements' or 'BFAs'. These terms are to be avoided. They are 'financial agreements'.[5] It might be thought that given the currency of the 'BFA' acronym that the document was called a 'Binding Financial Agreement' originally. This is not the case. They were financial agreements from the start and remain so.

Why I do not prefer the term 'Binding Financial Agreement' other than for reasons of pedantry, is two-fold:[6]

a. Firstly, because it is not the term used in the legislation;
b. Secondly, and more importantly, to paraphrase the Prince of Denmark, whether the agreement is binding – that is the question.[7]

[3] Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System*, Report No 135 (2019) p 211.
[4] *Family Law Amendment Act* 2000 Act No. 143, 2000.
[5] Section 4(1) *Family Law Act 1975* and also s 90B(1).
[6] Cf the title of Justice Brereton's paper, 'Binding or Bound to Fail'.
[7] William Shakespeare, 'The Tragedy of Hamlet, Prince of Denmark' (The Folger Shakespeare Library, 1992), Act 3 Sc 1.

Or as Lethbridge SC said:[8]

> 1.2 The intention of Parliament in passing the Bill and introducing the amendments comprised in Part VIIIA has not been realised. An oxymoron may be defined as:
>
> *"A figure of speech by which a locution produces an incongruous, seemingly self-contradictory effect, as in 'cruel kindness' or 'to make haste slowly'."*
>
> or as in "Binding Financial Agreement" having regard to the frequency in which such agreements are being set aside by the Family Court and the Federal Magistrates Court. Despite the best intentions of parties and practitioners, the facility for agreement to avoid subsequent litigation on relationship breakdown has not led in the author's opinion to greater certainty hence simplicity in dealing with such situations. Rather, we remain in an uncertain world of potential conflict.

## B - Financial agreements, the early years

In the early years, the complaint about financial agreements that generally arose in the cases was an allegation that a certificate of legal advice did not comply with the provisions of the 2004 legislation or the 2010 amendments or that the required legal advice had not been given.[9] Later, equitable grounds for setting aside agreements began to feature in the decided cases.

Some examples in the cases include that in *Senior v Anderson*,[10] which was a long running litigation. There were technical faults in the agreement. These included a careless reference to the section of the *Family Law Act 1975* that the certificate was based on. The agreement made incorrect references to s 90C rather than to s 90D, and the annexed legal advice certificates incorrectly named the parties. The parties had been named incorrectly in the agreement because the agreement was a cut and paste job from another matter. The trial judge nevertheless made orders rectifying each of those technical errors and declared the agreement to be a financial agreement as defined. The effect of the relevant statutory provisions then came into question on appeal.

The Full Court found that whilst rectification was available to correct references to the incorrect sections (the agreement was made under),[11] rectification is not available to remedy non-compliance with the requirements of s 90G of the Act in relation to the content of the solicitor's certificates. The court held the financial agreement was not binding.[12] However, the matter was remitted back to the trial judge to consider the exercise of the discretion reposed in the court by s 90G(1A) and (1B) to declare the financial agreement binding notwithstanding non-compliance with s 90G(1) of the Act.

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[8] Robert Lethbridge SC, 'Binding or Bound to Fail? Remedies and rectification of financial agreements', 1. Interestingly, Mr Lethbridge SC later went on to appear as counsel for the respondent in *Thorne & Kennedy* [2015] FCCA 484.
[9] A variation on this is now emerging.
[10] *Senior v Anderson* (2011) 250 FLR 444.
[11] Ibid [36], [105]-[107], [159].
[12] Ibid [37], [138]-[142].

It was no wonder that it became a trend of solicitors in New South Wales not to do financial agreements. They were too hard. There were so many technical aspects with s 90G and the scope to set them aside was large. Not only that, there is much scope for legal action against legal practitioners who draft the agreements.

As Professor Wade saw it, drafting financial agreements is a very risky business: [13]

> Legal practitioners in Australia who draft financial agreements **before** (s90B; 90UB) or **during** a marriage or relationship (s90C; 90UC) have a high risk of exposure to professional negligence. Vigilance, protocols and expertise only reduce the risk; it is never eliminated. That is why a number of experienced and smart family lawyers in Australia will never draft pre-nuptial (s90B; 90UB) or "during relationship" agreements. They send their clients to more naïve or risk-taking lawyers. In each case, the ineffective agreements and the potential for professional negligence lie dormant and hidden like land mines.

This paper will examine whether it has got any easier to make financial agreements stick.

[13] John Wade, 'The Perils of Financial Agreements: Effectiveness and Professional Negligence', 22 (3) *Australian Family Lawyer* 24.

## Part II - THORNE V KENNEDY

The trouble with financial agreements is that people always seem to be trying to set them aside. Ever since *Thorne v Kennedy*, clients may be wondering whether a financial agreement can be truly binding. So, what then was *Thorne v Kennedy* all about and why is it such an important case?

The decision in *Thorne v Kennedy*,[14] was handed down by the High Court on 8 November 2017 and not only has implications for family law but equity.

### A - *Thorne v Kennedy* (2017) in brief

#### 1 *Facts*

An abridged version of the facts is that the wife, then aged 36 and the husband, then aged 67 met over the internet in mid-2006. At the time that they met, the wife was not living in the country of her birth and her English language skills had been informally acquired. She had no children and no assets of any substance. The husband however was an Australian property developer with assets worth at least $18 million. He was divorced from his first wife and had adult children.

The wife's solicitor advised her orally and then in writing,[15] not to sign the agreement for several reasons including that it was all in the husband's favour and not in hers. After some minor changes to the September agreement requested by the wife's solicitors were agreed to by the husband's, the wife nevertheless signed it and then in November signed the second agreement, revoking the first but otherwise in the same terms.

#### 2 *First instance in Federal Circuit Court*

The parties had entered into two agreements, the first a section 90B agreement prior to the marriage and the second a section 90C agreement after the marriage. In March 2015 Judge Demack in the Federal Circuit Court made orders that neither of the agreements were binding and Her Honour set them both aside. Judge Demack found that the first agreement was entered into under duress and that the second agreement was simply a continuation of the first. Her Honour said:[16]

> 89. The husband did not negotiate on the terms of the agreement as to matters relating to property adjustment or spousal maintenance. He did not offer to negotiate. He did not create any opportunities to negotiate. The agreement, as it was, was to be signed or there would be no wedding. Without the wedding, there is no evidence to suggest that there would be any further relationship. Indeed, I am satisfied that when Mr Kennedy said there would be no wedding, that meant that the relationship would be at an end.

[14] (2017) 263 CLR 85.
[15] See ibid [8] for the key features of the solicitor's advice.
[16] *Thorne & Kennedy* [2015] FCCA 484.

### 3 *The Full Court Appeal*

On appeal, the Full Court of the Family Court, reversed the primary judge's decision in holding that the trial judge had applied the incorrect test in relation to duress. It was not apparent on the evidence what the 'threatened or actual unlawful conduct' of the husband was. In arriving at its decision the Full Court concluded that the fact that the husband required a financial agreement to be entered into before marriage cannot be seen as the basis for a finding of duress,[17] and nor can the fact that the second agreement was required. The wife's real difficulty in establishing duress was that she had received independent legal advice and was advised not to sign the agreements but went ahead regardless. [18]

The wife's solicitor had provided advice to the effect that the agreement was terrible and that she should not sign it.[19] The Full Court reasons at [159]-[169] are valuable reading for those further interested in this topic.

### 4 *The High Court Decision*

The decision of the Full Court was overturned by the High Court in *Thorne v Kennedy* (2017) 263 CLR 85. More details of that case will be discussed in Part IV.

## B - Family Law and Equity – Friends, Enemies or Frenemies?'

Justice Michelle Gordon AC, in a recent paper 'Family Law and Equity – Friends, Enemies or Frenemies?', discussed the role of equity in property settlement under section 79 and the way that equitable principles interact with financial agreements entered into before, during or after the breakdown of a relationship:[20]

> One of the clearest examples of modern equity playing a role in "softening", or perhaps "preserving", the effect of s 79 of the *Family Law Act* can be seen in the way that equitable principles interact with financial agreements entered into before, during or after the breakdown of a relationship. Where there is a financial agreement at play, vitiating factors, such as undue influence, unconscionable conduct and duress, have been critical to ensuring that the *existing* property interests of the parties are correctly ascertained for the purposes of s 79(2). Put in different terms, these vitiating factors can provide a basis for financial agreements to be set aside so that s 79 applies to financial matters or financial resources covered by such agreements.
>
> It arises in this way. Section 71A provides that the property settlement provisions will *not* apply to property of the parties covered by a valid and binding financial agreement. Thus, if all the parties' property is covered by a financial agreement affected by vitiating circumstances it must be set aside for s 79 to have any work to do. Further, if a financial agreement *is* set aside, and a property settlement order is subsequently sought, as mentioned earlier, *Stanford* requires that the first step in the analysis is to

[17] *Kennedy & Thorne* [2016] FamCAFC 189 [165].
[18] Ibid [167].
[19] Ibid [20].
[20] Justice Michelle Gordon AC, Family Law and Equity – Friends, Enemies or Frenemies? Hearsay Issue 90; Dec 2022 ('Frenemies')

determine whether it is "just and equitable" to make such an order, identifying the *existing* legal and equitable interests of the parties. Put another way, in setting aside a financial agreement affected by vitiating factors, a court alters the existing legal and equitable interests of the parties and re-establishes the starting point for the s 79 analysis.

The High Court's decision in *Thorne v Kennedy* has received considerable attention in this respect. In that case, the Court restored an order of the primary judge under s 90K(1) of the *Family Law Act* setting aside a financial agreement entered into between Ms Thorne and Mr Kennedy on the basis that the agreement was voidable. In the High Court, that result was explained on the basis of the equitable doctrine of undue influence (Kiefel, Bell, Gageler, Keane and Edelman JJ) and unconscionable conduct (the whole Court).

## Part III - A PATHWAY TO CONSIDER THE VALIDITY OF A FINANCIAL AGREEMENT

### A - What are the common grounds of attack and how can they be defended?

In order to help defend a financial agreement, it first falls to examine how a financial agreement might be attacked.

A pathway to considering the validity of a purported financial agreement might be the answers to the following questions: [21]

a. Is there generally an agreement at law between the parties?
b. Is there a financial agreement?
c. If that question is answered in the affirmative, should the financial agreement be set aside?
d. If that question is answered in the negative, is the financial agreement binding?
e. If in order to answer that question in the affirmative the court is required to exercise its discretion pursuant to s 90G (1A), how do the principles of law and equity apply to it?
f. If there is a binding financial agreement should it be enforced?

### B - What is a Financial Agreement under the Family Law Act 1975?

A *financial agreement* means an agreement that is a financial agreement under section 90B, 90C or 90D of the *Family Law Act 1975* (see Part VIIIA- Financial agreements) but does not include an ante-nuptial or post-nuptial settlement to which section 85A applies.[22] Financial agreements can be made before marriage, during marriage or after separation.[23]

#### 1 *Three types of financial agreements*

Three types of financial agreements may be made:

a. Firstly, people who are contemplating entering into a marriage with each other may make a financial agreement.[24]

b. Secondly, parties to a marriage may make a financial agreement.[25] This is an agreement made during the marriage.

[21] In *Saintclaire & Saintclaire* [2013] FamCA 491 [3]. Ryan J at first instance, suggested that in considering the validity of a financial agreement the answers to questions (b) to (f) might provide the appropriate pathway. Whilst that case was overturned on appeal in *Saintclaire & Saintclaire* [2015] FamCAFC 245, that pathway still in my view provides some useful guidance. This pathway was adopted in *Zella & Canino* [2022] FedCFamC1F 314.
[22] *Family Law Act 1975* ('FLA') s 4 Interpretation ***financial agreement***.
[23] See also FLA Part VIIIAB - Financial matters relating to de facto relationships, Division 4 – Financial agreements. This division contains the provisions for making Part VIIIAB financial agreements if the spouse parties are ordinarily resident in a participating jurisdiction (s 90UA). This paper will not specifically address Pt VIIIAB financial agreements.
[24] FLA s 90B.
[25] Ibid s 90C.

c. Thirdly, after a divorce order is made parties to a former marriage may make a financial agreement.[26]

## 2 *Is the document a financial agreement - the technical requirements*

Financial agreements are a private ordering of the parties' rights.

In contrast to consent orders that require court approval, or the old and much beloved (by the author) 'Section 87' agreement that required a court order to approve it before it came into force, there is no necessity to have a financial agreement approved (by a court) or registered (anywhere). Ordinary contracts in the commercial world do not require court orders or registration to come into effect so to that extent, financial agreements are in the same boat.

The reason there are strict requirements for financial agreements to be binding is the consequence that a binding agreement will oust the jurisdiction of the court to make orders under the *Family Law Act 1975* (subject to the power of the court to set the agreement aside).[27]

### *(a) 'Expressed to be made under this section', s 90C(1)(b))*

The first of the technical requirements is that section 90C(1)(b) requires that 'the agreement is expressed to be made under this section'. In the absence of an express provision in the document in accordance with s (1)(b), the agreement is not a financial agreement. This is identical to the provisions in ss 90B and 90D.

### *(b) Section 90G When financial agreements are binding*

Critically, of relevance to a financial agreement being binding are the provisions of section 90G, which provides:

> 90G (1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement **if, and only if**:[28]
>
> (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

[26] Ibid s 90D.
[27] Ibid s 71A
[28] Emphasis added.

paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement);

(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.

90G(1A) A financial agreement is binding on the parties to the agreement if:[29]

(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.

90G(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.

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

90G(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.

The strict interpretation that the courts have placed on the above section cannot be over-emphasised (and why I have bolded the text in the extract above). The words '…if, and only if' mean what they say. This terminology is significant.[30] Non-compliance with the legislation can be fatal to the agreement.

[29] Sections 90G (1A) (1B) (1C) commenced in January 2010.
[30] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31 ('Binding or Bound to Fail?').

### *(c) Summary of s 90G(1)*

In summary s 90G(1) requires:[31]

a. a written agreement signed by the parties; and,
b. before signing the agreement independent legal advice must be provided by a legal practitioner; and.
c. the advice must be about the effect of the agreement on the rights of the party and the advantages and disadvantages of making the agreement at the time the advice was provided; and,
d. either before or after signing the agreement a signed statement evidencing the advice has been given is to be provided by the legal practitioner to the spouse party (it need not be annexed to the agreement but must be given to the other spouse or his/her legal representative).

The technical attack on an agreement will be to examine it carefully for compliance with s 90G.[32] Attached in **Appendix 1** is a checklist for the technical requirements for a married couple financial agreement.

## 3 *Setting aside a financial agreement -s 90K*

Even if an agreement complies with the technical requirements none-the-less there may be grounds upon which it can be set aside.

Section 90K of the *Family Law Act 1975* sets out the circumstances in which a court may set aside a financial agreement:

> **[s 90K] Circumstances in which court may set aside a financial agreement or termination agreement**
>
> 90K(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:

[31] Historical note: Changes to the legislation were proposed in the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*. That bill lapsed due to the dissolution of the 44th Federal Parliament on 9 May 2016. It is unlikely that particular bill will be ever re-introduced. However, with a new federal government it will be a matter of watch this space.

[32] This also depends on when the agreement was entered into as the requirements in s 90G and the formats of the certificates changed over time.

(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;

(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.

### *Vitiating factors*

As a result of the reference in para (b) of s 90K of the *Family Law Act 1975* to the agreement being 'void, voidable or unenforceable' the general common law and equitable principles relating to vitiating factors apply. These include misrepresentation, undue influence, mistake and duress.

Section 90C(1)(e) places a temporal limitation on the remedy for unconscionable conduct to the time of the making of the agreement.

## Part IV - HOW TO GET IT OVER THE LINE - DRAFTING STRATEGIES TO PREPARE A COMMON SENSE, FINANCIAL AGREEMENT TO PROTECT AND TRY TO DELIVER CERTAINTY FOR YOUR CLIENT

### A - Don't be a naïve risk-taking lawyer

First and foremost, don't be that naïve or risk-taking lawyer Professor Wade talked about.[33]

In order to prepare a commonsense financial agreement to protect and deliver certainty for your client, the drafter must familiarise themselves with the relevant provisions of the *Family Law Act 1975* that apply. Though they are similar, there are different provisions that apply to marriages and de facto relationships that must be taken into account in each individual case.[34]

It goes without saying that you should have a good precedent agreement. However, that precedent needs to be thoroughly checked against the latest provisions of the *Family Law Act 1975.* Don't just rely on the precedent, particularly if it is an old one which might not have the correct iteration of the legal advice certificates.

As was seen in the previous part of this paper, the law relating to financial agreements is technical and strict compliance is required. Because of the strict requirements any failure to comply can be fatal to the agreement.

Another critical resource are the packs that a professional indemnity insurer such as Lexon might provide. Those packs include checklists and letters which are designed to identify and draw your attention to some key issues which may arise in financial agreement matters. Use them.

### B - Is there a starting point before you put pen to paper (or fingers to the keyboard)? - Does a financial agreement have to be fair?

It is perhaps commonly thought that a financial agreement must be 'fair and reasonable'.[35] Is that actually the case now? [36]

#### *(a) 'The bracketed words' – '(disregarding any changes in circumstances from the time the agreement was made)'*

Section 90K is to be read in conjunction with s90G(1A)(c):[37]

[33] See the quote in Part I, A Brief History Of Financial Agreements, Section B Financial Agreements the early years.
[34] For De facto relationships see FLA Part VIIIAB - Financial matters relating to de facto relationships, Division 4 – Financial agreements, s 90UA ff.
[35] For example see 'Working out a "Prenup"', *The Weekend Australian* (2-3 April 2016), 33.
[36] Minal Vohra, 'All is Fair in Love and War - When and if Fairness Matters for Financial Agreement to be Binding' (Paper presented to Television Education Network, Gold Coast Conference, Broadbeach, 2022).
[37] Emphasis added. The bracketed words are in bold in para (c). They are not in italics or bold in the legislation.

(1A) A financial agreement is binding on the parties to the agreement if:[38]

(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

…

The issue of whether it is necessary that a financial agreement be fair in the context of the exercise of the s 90G (1A) discretion, was considered by the Full Court in *Hoult v Hoult*.[39] One of the issues in the appeal in *Hoult* was a complaint made in the submissions directed to the view expressed by the trial judge at [37], that:[40]

> …the "justice and equity" of the bargain, or perhaps its inherent "fairness" referenced to ordinary notions of that term, cannot be wholly irrelevant to the exercise of the s 90G(1A) discretion.[41]

### *(b) 'Just and equitable' / 'unjust and inequitable' the confusing juxtaposition*

At trial in *Hoult v Hoult* [2012] FamCA 367, at first instance Murphy J had determined that on balance the court should find that it was unjust and inequitable if the financial agreement between the parties was not binding on the parties.

In the course of his judgment, Murphy J considered the terms of the parties' bargain and the relevance of the term 'just and equitable'. That terminology in the *Family Law Act 1975* had led to the issue. As noted by Murphy J, the phrase used within s 90G(1A)(c) is 'unjust and inequitable'. The phrase used in s 79 is 'just and equitable'. As Murphy J noted the similarity is manifest.[42]

The Full Court expressed reservations about the way in which the Trial Judge expressed himself in setting a list of criteria for considering Section 90G(1A)(c) which included:[43]

> …
>
> Whether the terms of the bargain itself offend ordinary notions of fairness or plainly fall markedly outside any reasonable broad assessment of the s 79 discretion;
>
> …

[38] Section 90G(1A) was introduced in January 2010. [subs (1A) insrt Act 122 of 2009 s 3 and Sch 5 [4B] effective 4 January 2010].
[39] *Hoult v Hoult* (2013) 276 FLR 412.
[40] *Hoult v Hoult* [2012] FamCA 367.
[41] *Hoult v Hoult* (2013) 276 FLR 412 [189] (Thackray J).
[42] *Hoult v Hoult* [2012] FamCA 367 [33].
[43] Ibid [57].

In his trial judgment, Murphy J referred to an example His Honour had used during argument of what may be considered to be an unfair agreement, that being of a 40 year marriage with no unusual features and a financial agreement that provides upon the breakdown of the marriage the wife is to receive 4% and the husband is to receive 96%.[44]

The majority in the Full Court found that the point of the legislation is to allow the parties to decide what bargain they will strike and provided the agreement complies with s 90G(1) they are bound by what they have agreed upon. Significantly, the Full Court found, in reaching agreement, there was no requirement that parties to financial agreements meet any of the considerations contained in s 79 of the *Family Law Act 1975.* They can literally make the worst bargain possible, but still be bound by it.[45]

The Court stated that it is not the case that to fail to consider the fairness or injustice of the bargain does not mean that 'the discretion is exercised in a vacuum'.[46]

In *Fewster & Drake*,[47] the Full Court noted subject to compliance with the statutory requirements that people are free to enter into financial agreements as they see fit. There is no statutory provision that enables a financial agreement to be set aside merely because it is unfair: citing *Hoult v Hoult* (2013) 276 FLR 412.

However, in *Thorne v Kennedy*,[48] the High Court took a different approach concluding: [49]

> **Further, the description of the agreements by the primary judge as not being "fair or reasonable" was not merely open to her. It was an understatement.** Ms Harrison's unchallenged evidence was that the terms of the agreements were "entirely inappropriate" and wholly inadequate "[i]n relation to everything".

Following the High Court decision there is now no doubt, in my view, that the fairness or unfairness of a financial agreement is a relevant consideration to whether a financial agreement will be saved under s 90G(1A)(c) or vitiated under s 90K(1)(b). It remains to be seen how the courts will apply this reasoning in individual cases.

Therefore, the days of the one-sided agreement of the type in the example given by Murphy J may be over. It will be a question to be considered in each individual case, for financial agreements are not bound by the statutory requirements in s 79 of justice and equity.

[44] Ibid [38].
[45] *Hoult v Hoult* (2013) 276 FLR 412 [310].
[46] Ibid [310]. The factors are set out in paragraph 307 of the Appeal judgment.
[47] (2016) 316 FLR 274 [65].
[48] 263 CLR 85 [55]-[56].
[49] Emphasis added.

As the High Court said in *Thorne v Kennedy,*[50] the nature of these (financial) agreements is that the terms will be usually more favourable to one party than the other, sometimes much more favourable. In my view, this issue is likely to arise where the terms are *grossly* unfavourable to one of the parties. Care must be taken to avoid grossly unreasonable agreements which may indicate undue influence.[51]

## C - Think about the basics, a financial agreement is a contract

Now we have that out of the way…

Because financial agreements are first and foremost a form of contract and the general principles of setting aside contracts apply under s 90KA of the *Family Law Act 1975*, in my view, the law of contract not equity must be the first port of call when considering the validity of a financial agreement.[52] If you want to have your financial agreement stick then you need a binding contract.

Valid formation of a contract, at the most basic level, requires a coincidence of offer and acceptance, consideration, intent to create legal relations, certainty, the correct formalities and that each party to it has capacity to make the contract.

## D - When does a financial agreement come into effect? Is the date when it is signed important?

The relevant contractual principle is not when each party signed the contract but when did an agreement come into effect.

You cannot have one party sign a pre-nuptial agreement before the marriage and another sign after. In that case no financial agreement could exist between the parties: *Sullivan & Sullivan* (2011) 268 FLR 328. That is an agreement cannot be both a pre-nuptial agreement and a post-nuptial agreement at the same time. An agreement cannot be a financial agreement under ss 90B and 90C of the Act concurrently.[53] You cannot at the once be 'parties contemplating a marriage' and 'parties to a marriage'.[54]

In *Sullivan & Sullivan*,[55] the facts were that the wife had signed prior to the marriage. The husband signed after the marriage. There were no counter offers. The main point to arise from the decision of Young J in *Sullivan & Sullivan* is that the relevant contractual principles apply to whether there is an agreement between the parties capable of constituting a binding financial agreement. The

[50] (2017) 263 CLR 85 [56].
[51] The Hon Matt Foley, 'Equity Strikes Back: The aftermath of Thorne v Kennedy', 28(1) *Australian Family Lawyer* 22 ('Equity Strikes Back'), 23.
[52] See *Zella & Canino* [2022] FedCFamC1F 314 for a recent discussion on the principles of contract applying to finacial agreements.
[53] (2011) 268 FLR 328 [119].
[54] Ibid [120].
[55] Ibid.

date when a party signed an agreement is only one factor relevant to whether there has been an offer and acceptance.

It is common for financial agreements not to have the dates each individual has signed set out in the jurat or signature clause. This should be in your agreement to avoid the issue that arose in *Sullivan & Sullivan*.

## E - Offer and acceptance

It might be possible in some cases for parties to have reached a concluded oral agreement that was simply awaiting documenting and formal execution (i.e., a first category *Masters v Cameron* situation).[56] The written agreement could only be complete upon the signing of the agreement by the last person to sign, although it might be expressed to commence at an earlier date.

An oral agreement though, is insufficient for the purposes of the *Family Law Act 1975* because to be a *financial agreement* for the purposes of the Act, it must be in writing.

In *Sullivan & Sullivan*, there was an offer made before the marriage but it was not accepted. There was no counter-offer, so there was no agreement on the terms as set out in the offer made by the wife on 11 April 2003.[57]

Therefore, in *Sullivan*,[58] the parties did not get to first base as the court held that there was no agreement existing between the parties. Young J concluded as there was no agreement existing between the parties that it was not necessary to determine whether ss 90B and 90C were applicable to the agreement. However, even if there was a valid and enforceable agreement between the parties executed by the husband on 16 April 2003, as it stood it could not be a financial agreement pursuant to the provisions of Pt VIIIA of the *Family Law Act 1975*.[59]

To recap, in order to accept an offer, the other party has to sign the agreement signed by the first party. If any amendments are made to the agreement there may not be coincidence between the terms of the offer and the acceptance. That is the offer made or presented is not accepted. Therefore, there may not be an agreement. It is trite to say that offer and acceptance must coincide.

[56] *Masters v Cameron* (1954) 91 CLR 353.
[57] *Sullivan & Sullivan* (2011) 268 FLR 328 [79].
[58] Ibid.
[59] Ibid [118], [122].

## F - Communication of offer

An offer is ineffective until it has been communicated to the offeree.[60] 'An offer to sell is nothing until it is received.'[61]

It does not follow that an offer, however, is automatically communicated. There must be evidence of that communication.

An example of this might be handing over a signed draft financial agreement in a sealed envelope with words to the effect *take this to your solicitor*. In that circumstance, by proffering a signed agreement to the party for execution, the first party is offering to enter into an agreement in the terms set out in the document. However, it may not be clear given the document is in a sealed envelope that the offer has been communicated.

## G - Counter-offer

If the terms of the agreement are changed that may constitute a counter-offer.

## H - Be alive to the vitiating factors and try and avoid them

If you want your financial agreement to stick you need to be alive to the vitiating factors and try and avoid them. The vitiating factors for contracts include misrepresentation, mistake, duress, undue influence, and unconscionable conduct.

Consider the dynamics of the parties negotiating the agreement. Be wary of a client who is in shock, crying, with whom you are unable to communicate or for whom something is obviously wrong.[62]

### 1 *Misrepresentation*

A contract can be voidable for misrepresentation if the representor has made a misrepresentation of fact that induced the representee to enter into the contract.[63]

According to the authors of *Covell Lupton Principles of Remedies,* historically, the remedies for misrepresentation have turned upon whether the misrepresentation had been made fraudulently or innocently. The common law only afforded relief for fraudulent misrepresentation, and not innocent misrepresentation.[64]

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[60] JW Carter, *Contract Law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [3.17].
[61] *Henthorn v Fraser* [1892] 2 Ch 27.
[62] This example was given by the solicitor in *Frederick & Frederick* [2018] FCCA 1694 [71]. That case has been reversed on another point: *Frederick & Frederick* [2019] FamCAFC 87.
[63] W Covell, K Lupton and J Forder, *Covell and Lupton principles of remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.5].
[64] Ibid [5.12].

A relevant example of this might be if a party has misrepresented a value of an asset or a liability in the financial agreement.

If a statement is made by one person, to another, that induces the other to enter into a contract, that statement may take effect as a term of that contract or as a collateral contract. A false statement might still give rights and remedies even though it is not effective as a term of the contract.[65]

According to the learned author of *Contract Law in Australia,* misleading conduct will constitute a misrepresentation if it amounts to a false statement of a material fact made by one person (the *representor*) to another (the *representee*) in order to induce the representee to enter into the contract and which has this effect.[66]

The misleading conduct does not prevent the contract from coming into being: the contract is not void. Instead, the basic response of the law to this misinformation is to say that because the representee's decision to contract had been based on a false understanding the representee is entitled to treat the contract as if it never existed. This entitlement, or right of avoidance, is termed the right of 'rescission'.[67]

Rescission is the reversal of a transaction so that each party is restored to their original position. It is a remedy of both the common law and equity.[68]

The remedy of rescission requires three elements to be satisfied:[69]

a. The presence of a vitiating factor in the formation of the contract;

b. An election to rescind the contract; and,

c. *Restitutio in integrum*, the restoration of both parties to their respective pre-contractual positions.

At common law contracts can be rescinded for fraudulent misrepresentation and duress.[70] This is reinforced by s 90KA of the *Family Law Act 1975.*

As referred to earlier, misrepresentations are classified either as *fraudulent* or *innocent*. Following the recognition of a remedy in damages for negligent misstatement, it has become usual,

[65] *Contract Law in Australia* (6th ed. 2013) [18.01].
[66] Ibid [18.02].
[67] Ibid.
[68] *Covell and Lupton principles of remedies* (6th ed. 2015) [5.1].
[69] Ibid [5.3].
[70] Ibid [5.4].

at least for the purposes of analysis, to refer to a category of *negligent* misrepresentation, that is, one made in breach of the duty of care.[71]

### *(a) Elements of misrepresentation*

The elements of misrepresentation include:

- a misrepresentation or false factual statement
- the representation must be false when acted upon
- inducement or reliance on the statement to enter into the contract
- materiality of the representation.

#### *(i) Misrepresentation or false factual statement*

There must be a representation of fact. Representations or statements of fact may be express or implied.[72] Such statements have been distinguished from mere puffery.[73]

A misrepresentation is then a representation that does not accord with the true facts (past or present). Therefore, promises or assurances for the future, statements of intention, expressions of opinion, advertising 'puffs', and representations of law have all on occasions, been distinguished from the representation of a fact essential to an operative misrepresentation.[74]

However, a representation need not be express, since the words and circumstances may imply representation as to a matter of fact, especially as to the state of mind of the maker of the statement.[75]

#### *(ii) False when acted upon*

According to the author of *Heydon on Contract,* a representation must be false in order to be a misrepresentation. Not every trivial error however will be sufficient. At common law, substantiality tests have been adopted. A representation is not false if it is substantially correct and the difference between it and the truth would not have induced a reasonable person in a position of the representee to enter into the contract.[76]

Whether a representation is true or false is a question of fact that is judged normally when the representation was made. However, a representation that was true when it was made may subsequently become false before the representee acts upon it. Where the representation is a

[71] *Contract Law in Australia* (6th ed. 2013) [18.04].
[72] *Covell and Lupton principles of remedies* (6th ed. 2015) [5.6].
[73] Ibid [5.7].
[74] *Contract Law in Australia* (6th ed. 2013) [18.06].
[75] Ibid.
[76] JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) [14.510].

continuing representation that has become false to the knowledge of the representor, a duty arises to inform the representee of the changed circumstances before the representation is acted upon.[77]

#### *(iii) Inducement to enter into contract*

Even if the representation is both false and fraudulent, if the representee does not rely on the representation there is no case.[78]

The applicability of this in the family law context is interesting, because in the case of a prenuptial agreement the acting upon the agreement could be considered to be the act of entry into the marriage. There must be reliance on the agreement for entry into the marriage.

#### *(iv) Materiality*

The representation must be of a material fact. In the case of a fraudulent misrepresentation, it has always been sufficient to show misrepresentation as to any part of that which induced the party to enter into the contract. A stricter view was taken formerly concerning purely innocent misrepresentation. In *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, Blackburn J said:[79]

> [W]here there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.

The learned author of *Contract Law in Australia* considered that the requirement of a representation in relation to a material fact, which is the usual formulation of the type of misrepresentation that gives rise to a right of rescission, is broader than the common law requirement of a complete difference in substance. Therefore, although a 'substantial' difference will be sufficient, it is no longer necessary, and a misrepresentation need be no more than 'material' in an objective sense.[80]

### *(b) Some examples of misrepresentation - Statements about values of assets and liabilities in financial agreements*

It is common for financial agreements to attach a schedule detailing what the parties say their assets and liabilities are.

There is no requirement under the legislation for a schedule of assets and liabilities or resources to be set out in a financial agreement. However, that may not be the end of the matter depending on

[77] *Covell and Lupton principles of remedies* (6th ed. 2015) [5.10].
[78] Ibid [5.11] citing the principles governing inducement as restated in *Gould v Vaggelas* (1985) 157 CLR 215.
[79] Cited in *Contract Law in Australia* (6th ed. 2013) [18.23].
[80] Ibid [18.38].

how the courts view the disclosure obligations of parties as will be discussed in Part V -The important question of disclosure for financial agreements.

A statement of opinion (or belief) considered by itself is not characterised as a statement of fact. Hence it is not a representation. A statement of opinion (or belief) which turns out to be unfounded is not for that reason alone a misrepresentation.[81]

A common example of an opinion that might be given in the context of a financial agreement is the value of a liability or an asset. A party might represent the value of the house property or business and set out an estimate of that value. This must be done with care.

If an estimate is given in a financial agreement it must be clearly marked as such. The understandings of the parties between each other about values and how those values have been arrived at must be set down with particularity. This is quite a different concept to the complete omission of an asset, which may not amount to fraud depending on the circumstances of the case.[82]

An issue may arise in respect of a financial agreement because assets might be sold later for a much lower value than they were stated in the agreement. The expression of a value for an asset or liability is the expression of an opinion. It is only an expression that the representor holds the opinion and has reasonable grounds for holding that opinion. To falsify the representation, the representee must prove that the representor either did not hold the opinion or there were no reasonable grounds for holding that opinion.[83]

Caution must be exercised when describing assets and liabilities and any value ascribed to a particular item in a financial agreement.

### 2 *Mistake*

Mistake is a difficult part of contract law.[84] As described by the author of *Contract Law in Australia*, perhaps in most contracts one party at least is mistaken to some degree as to the extent of the benefit it will provide.

The two essential questions with which 'mistake' is concerned are:[85]

- When will the mistake be 'operative'?
- What effect does the mistake have?

[81] JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) [14.240].
[82] *Manner v Manner* [2015] FCCA 3043 [158], [166].
[83] *Lake Koala Pty Ltd v Walker* [1991] 2 Qd R 49, 54-55.
[84] *Contract Law in Australia* (6th ed. 2013) [20.01].
[85] Ibid.

Only a small proportion of mistakes will be cognisable in contract law, that is, constitute an 'operative mistake'.[86] Family law cases involving financial agreements would seem to be fertile ground for this particular doctrine of contract law. However, according to the author of *Heydon on Contract*, there are very few mistake decisions in Australia.[87]

Some examples of mistake in a family law context follow.

### *(a) Common mistake as to which section the agreement was made under*

A common mistake arises where both parties are mistaken and they share that mistake.[88]

In *Sullivan & Sullivan*,[89] counsel for the wife had contended that there was common mistake as to which section of the Act the agreement was made under. Young J said (including an explanation of *Senior v Anderson* (2011) 250 FLR 444):

> [133] That decision differs in three significant respects to the matter before the court, first there was an agreement pursuant to contractual principles that was executed by the parties, second, there was a common intention to enter into a 90D financial agreement and third, there was a common mistake as to the section of the Act under which the financial agreement was to be made.

### *(b) Mistake about value of investment property as a result of a scam*

An example of a case in which the doctrine of common mistake was considered was *Phak & Xu*.[90] Justice Benjamin in the Family Court of Australia considered a case involving an application pursuant to s 90K of the *Family Law Act 1975* to set aside an otherwise binding agreement. His Honour described it as an 'all duck or no dinner' dispute for the parties.

The parties had a complicated financial history. The wife had executed land transfers of nine parcels of real estate to the husband in accordance with the agreement.[91]

As to disclosure, overall His Honour's conclusion was that the wife had adopted a scattergun approach and asserted various failures to disclose and the like in an effort to have the agreement set aside. All claims about those peripheral matters were dismissed.[92]

However, His Honour was satisfied for the reasons set out in the judgment that the husband and wife were the victims of an elaborate fraud or scam in which they had invested $420,000. The so-

[86] Ibid.
[87] JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) [15.10].
[88] Ibid [15.40].
[89] (2011) 268 FLR 328.
[90].[2015] FamCA 939.
[91] Ibid [77].
[92] Ibid [253].

called developers, over a period of years, had isolated the parties from the transaction, changed the transaction, so that as at the date of entry into the financial agreement it was just a mirage.[93]

It was an assertion by both parties, and a genuine belief by both parties, that the investment was a valuable property and this was a mistake shared by each of them to the contract. As a consequence of that common mistake,[94] the agreement entered into between the parties was void *ab initio* at common law and rendered the performance of the contract impossible.[95]

Ultimately, the financial agreement was set aside and the matter sent for trial of the substantive application for property settlement pursuant to s 79 of the *Family Law Act 1975*.

### 3 *Undue influence*

By virtue of the statutory restrictions provided in s 90K, any circumstance of undue influence must occur in the lead up to entering into the agreement.

In Thorne v Kennedy,[96] the High Court set out six factors which the court considered *may have prominence* in the context of pre-nuptial and post-nuptial agreements for the purposes of undue influence:

a. whether the agreement was offered on a basis that it was not subject to negotiation;

b. the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;

c. whether there was any time for careful reflection;

d. the nature of the parties' relationship;

e. the relative financial positions of the parties; and

f. the independent advice that was received and whether there was time to reflect on that advice.

### 4 *Duress*

A party may wish to assert that their signature to a financial agreement was obtained as a result of coercive behaviour by the other party amounting to duress.

[93] Ibid [255].
[94] See generally on common mistake *Contract Law in Australia* (6th ed. 2013) [20.02], and [20.05] on approaches to mistake.
[95] *Phak & Xu* [2015] FamCA 939 [258].
[96] (2017) 263 CLR 85 [60].

Duress at common law avoids contracts where fear was induced, so as to deprive a party of free will (in the making of the agreement).

According to the High Court in *Thorne v Kennedy*,[97] the vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction. It does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing 'only too well' what he or she is doing.

The question whether a person's act is 'free' requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party.[98]

Any circumstance of duress must be in the lead up to the entering into the agreement. The 'duress' claimed must relate to the time of the making of the agreement as required by s 90K(1)(e).

As to causation, the pressure must be at least *a* cause of the decision to contract. It is not necessary that the duress be the sole cause. It can be a significant cause.[99] It is sufficient for the misrepresentation, mistake or duress to be an *inducement* to enter into the contract.[100]

## I - Keep good notes

One of the most critical aspects to upholding a financial agreement might end up being the evidence of the solicitor who prepared the agreement and signed the legal advice certificate. Of course, it is such a basic aspect of legal practice, but you have to keep good file notes.

A chicken scratch on a single sheet of paper just won't cut it. In many of the cases involving financial agreements, the evidence of the solicitor's notes was scant or non-existent. There is no question that a solicitor's practice is always busy, but this is a vital aspect of record keeping. The gold standard is for diary notes be written in hand at the time of any conference and a file note of the conference dictated or typed up straight afterward. That file note should be reviewed, corrected if necessary and signed off by the practitioner as part of the file keeping process. Best practice would require those notes and your file in relation to a financial agreement to be retained permanently. You just never know when you might need it.

[97] Ibid [26].
[98] Ibid [32].
[99] *Australia & New Zealand Banking Group v Karam and Others* (2005) 64 NSWLR 149 ('Karam') [56].
[100] *Contract Law in Australia* (6th ed. 2013) [22.05].

It is impossible to predict if, or when the relationship of parties to a financial agreement might break down. A breakdown could occur a day, a week, a month, a year, a decade or even two decades after the agreement was signed. No practitioner if called to give evidence can possibly hope to accurately recall (without the benefit of file notes) the circumstances and advice given at the time of preparation of a financial agreement. That is why the whole file must be retained permanently and secured from any file destruction program.

## J - Charge properly

It goes without saying that in order to do a proper job and discharge your professional obligations you must charge proper fees. Financial agreements are bespoke, not boilerplate. They take time to prepare. Not only is there the drafting of the agreement itself, but the process of due diligence and disclosure (if that is undertaken). The client may, if not likely will, be in an emotional state and may require additional attendances for instructions to be obtained and advice explained.

All this takes time. Unless you are charging properly there is a temptation to cut corners and get the agreement out quickly. This is especially so where the client is placing you under pressure to complete the agreement 'urgently' because the wedding is imminent.

## K - Actually give real and meaningful advice, then do an actual letter of advice, and then actually give it to your client. They should sign and return it.

The certificate of advice the legal practitioner must sign to make a financial agreement binding requires you to advise your client about the effect of the agreement on their rights and the advantages and disadvantages at the time the advice was given of entering into the agreement. That advice must be **actually** given. Further, the legal advice must be real and meaningful to satisfy s 90G(1)(b**)**.[101]

### 1 *Some tips on the advice*

It should go without saying that advice should be in writing and not just in the form of some notes on the back of an envelope. In my view you cannot discharge your duty without the advice being in writing. The advice should be as comprehensive as possible and include, if a post-nuptial agreement, a comparison of your client's outcome under the agreement, to the outcome if the matter were litigated under s 79 or s 90SM.

According to the Hon Matt Foley, the barrister who appeared in *Thorne v Kennedy*, lawyers giving advice to a party contemplating a financial agreement can be confident that their advice matters and it may be considered by a court in considering setting aside an agreement.[102] The High Court in that case placed considerable weight on the independent legal advice of the solicitor who

[101] *Kaimal & Kaimal* [2020] FamCA 971 [16] (Alstergren CJ).
[102] Equity Strikes Back 28(1) *Australian Family Lawyer* 22, 24.

provided the advice to Ms Thorne. If it was not clear already, the Chief Justice of the Federal Circuit and Family Court has recently emphasised the point in a case to be discussed shortly.[103]

### 2 *The footnote to Chaffin & Chaffin*

In *Chaffin & Chaffin* [2019] FamCA 260, the wife sought an order setting aside a financial agreement between her husband and herself. The agreement was signed on 13 August 2010, only one week before their proposed wedding.

#### *A footnote*

What is of special significance in this case are the comments made by Foster J under the heading 'A footnote', at the end of the decision. These comments are of course obiter.

Observations were made about the special role solicitors have in the formulation of property agreements that seek to oust the jurisdiction of the court otherwise to make orders that are just and equitable. They provide a certificate of independent advice that must comply with the relevant statutory obligations. Such a certificate can be seen as a safeguard in the making of such an agreement.[104]

Justice Foster, it is noted from his biography on appointment, practised as a solicitor for 27 years. 10 of those years were as an accredited specialist in family law. It may be inferred that the observations in *Chaffin & Chaffin* come from His Honour's extensive experience at the coalface in family law.

In what must be seen as fairly pointed comments, His Honour noted that it must be said that the practice of solicitors in providing independent advice on such agreements to their clients, and notwithstanding their strong advice not to enter into an agreement proceed to sign the requisite certificate, seems an abdication of their professional responsibility overall to the client. Such conduct in signing the certificate mostly will shut the gate on any application to set an agreement aside.[105]

The existence of the certificate cannot be relied on as an answer to the grounds available under section 90K to set the agreement aside.[106]

The advice from the court was that it is imperative that any misgivings a solicitor has about the agreement should be set out clearly in the accompanying letter of advice if a client insists on signing

[103] *Kaimal & Kaimal* [2020] FamCA 971.
[104] *Chaffin & Chaffin* [2019] FamCA 260 [192].
[105] Ibid [194].
[106] Quoting Nettle J in *Thorne v Kennedy* (2017) 263 CLR 85 [123].

the agreement notwithstanding the solicitor's advice.[107] Such fulsome advice may well be a relevant consideration in seeking to set the agreement aside.[108]

Finally, Foster J concluded that in appropriate circumstances the solicitor should be prepared to say to the client that the certificate will not be provided.[109]

### 3 *Kaimal & Kaimal [2020]*

More recently, the Chief Justice in *Kaimal & Kaimal* [2020] FamCA 971 in relation to the obligations of legal advice noted the following:[110]

> 16. 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).
>
> 17. 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'.
>
> 18.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.
>
> 19. 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).
>
> 20. 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."

### 4 *Brannon & Brannon [2022]*

*Brannon & Brannon*,[111] was another case in which it was decided that the wife had not received the requisite legal advice.

This case was a decision of Judge Boyle in the Federal Circuit and Family Court of Australia (Division 2). It is notable because Mr Schonell SC appeared as counsel for the applicant in that matter. Later, Justice Schonell was then the judge in the Division 1 case of *Zella & Canino* [2022] FedCFamC1F 314 (11 May 2022), which is dealt with later in this paper under Part VII - Authorities update: New cases and papers. The last hearing date in *Brannon & Brannon* was 6 October 2021.

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[107] *Chaffin & Chaffin* [2019] FamCA 260 [194].
[108] Ibid [197].
[109] Ibid [198].
[110] *Kaimal & Kaimal* [2020] FamCA 971 cited in *Zella & Canino* [2022] FedCFamC1F 314 [159] on the legal advice aspect.
[111] [2022] FedCFamC2F 1116.

There was some delay and the decision was handed down and orders made by Judge Boyle on 23 August 2022.

### *(a) Background*

The parties met in 2004, became engaged and commenced cohabitation in 2005. Each of the husband and wife was divorced and each had a child from their prior marriage. The parties married in 2005 and separated on 10 July 2019. There were two children born to the relationship, aged 14 and 13.[112]

The wife applied to set aside a financial agreement arguing firstly, that it was not binding because the wife was not given requisite legal advice under s 90G(1)(b),[113] or in the alternative it should be set aside under s 90K. Because of the court's findings regarding the legal advice challenge it was not necessary to consider the application under s 90K.

On 17 June 2005 the parties attended a law firm for the purpose of preparing wills. An opportunity was taken to discuss with the wife a financial agreement prepared by the husband's solicitors.[114] The wife was taken through some of the agreement, not the whole agreement. No copy of the agreement was given to the wife to read. The wife claimed, Mr. B, (a solicitor) saw both husband and wife. The husband denied this. The solicitor, Mr. B had since died and his practice had been taken over by other solicitors. Solicitor B's file was incomplete.

There were no file notes of any advice given by a solicitor. According to the trial judge there was no letter of advice as one would ordinarily recognise it on the solicitor's file.[115]

### *(b) Steps in lead up to agreement*

The wife attended to sign the will on 28 June 2005 and had a further private discussion with solicitor, Mr. B regarding the financial agreement.

There was a letter on the solicitor's file dated 27 June 2005 addressed to the wife regarding the agreement noting:

- 'You give away your entitlement to claim spousal maintenance'.[116]
- There were to be further discussions between husband and wife regarding possibility of a claim for spousal maintenance for a limited period of time.
- Husband's business remains the husband's exclusive property and wife was warned about making contributions to it for which she would seek no financial compensation.

[112] Ibid [4].
[113] Ibid [9].
[114] Ibid [15].
[115] Ibid [21].
[116] Ibid [18], The wife's evidence was that she was verbally advised to the same effect at a meeting with the solicitor on 28 June 2005 [44].

- Discussion about possibility of expansion of the husband's business to acquire a new branch which may be acquired jointly.[117]

The letter did not contain:

- A detailed advice (instead it recommended amendments)
- Advice regarding any advantages and disadvantages.[118]

On 29 June 2005 the wife signed the financial agreement. Mr B issued a tax invoice for $880 plus GST for the entirety of Mr B's involvement in the matter. [119] This included perusal of the agreement and for personal attendance on wife and letter to the other side in drafting solicitor's certificate.

*(c) Discussion regarding waiver of legal privilege*

The wife applied for production of the husband's solicitors file on the basis that he had waived legal professional privilege by forwarding to the wife a copy of the letter from his solicitors giving advice about the weaknesses in the wife's case and urging her to settle (i.e., it was forwarded to her deliberately to unsettle and intimidate her).

The wife's application was successful, and the court accepted that privilege was waived as the husband's conduct was inconsistent with the maintenance of the confidentiality.[120]

*(d) Wife's legal advice*

The wife's complaint was that:

a. She and the husband discussed entering a financial agreement to quarantine assets which they each brought into the relationship and distinguishing such assets from those subsequently acquired (but the agreement did not reflect this);

b. At the initial meeting on 17 June 2005 the husband was present;

c. The wife did not receive a copy of the draft Agreement to read herself before the meeting;

d. Solicitor Mr B. took her through only parts of the Agreement;

[117] Ibid [19].
[118] Ibid [57].
[119] Ibid [17].
[120] Ibid [28].

e. After a meeting with Mr B. on 28 June 2005, when they went through the schedule to the agreement, Mr B. again did not take the wife through the whole Agreement and did not give her a copy of it;[121]

f. Mr B. did not explain what happened to assets subsequently acquired by either of the parties (i.e., that they would be precluded from a property adjustment application);

g. The consultation on 26 June 2005 was for only 10 minutes;

h. The wife later discussed her solicitor's advice with the husband that she should not sign the agreement. The husband responded with *don't you trust me* and *don't ruin our wedding* and *don't be creepy*. The wedding was imminent. The wife took the husband's comments to mean that the wedding would not go ahead if she did not sign the agreement. The court accepted this evidence;[122]

i. On 29 June 2005 the wife skim read the agreement for the first time before signing it;

j. The wife loaned the husband $85,000 which she did by increasing her mortgage. Nowhere in the financial agreement was that referred to, neither as an asset of the wife nor as a debt of the husband. The wife feared that if the wedding were cancelled, the husband would not repay that loan;[123]

k. The husband held a leasehold interest in a property which he kept secret from the wife and was not included in the schedule to the agreement. The husband subsequently purchased that property for $715,000, which included funds that he contributed of $390,000 with no explanation of where he got those funds from.[124]

### *(e) The Court decided*

The court was not satisfied that the wife was given advice as to the advantages and disadvantages of entering the agreement.[125]

The wife had discharged the onus on her to disprove or to cast doubt on the provision of legal advice that arose by virtue of the solicitor's certificate because of the following:

a. The failure to record the loan and leasehold interest in the Agreement;

b. The letter of advice failed to mention any advantages or disadvantages;

[121] Ibid [45].
[122] Ibid [47]
[123] Ibid [49].
[124] Ibid [50].
[125] Ibid [52].

c. There was no evidence the letter of advice was sent to the wife;[126]

d. The initial interview (supposedly for preparation of wills, but the financial agreement was sprung on the wife) was held together with the husband and was not independent.

e. The inconsistency between the recitals and the solicitor's certificate. Recital J only referred to the *advantages financially or otherwise* of entering the agreement.[127] The recital J did not refer to the disadvantages. The certificate and recital should be consistent and were not: *Logan & Logan*;[128]

f. It was not possible in 10 minutes to provide the wife with proper advice;

g. The wife was not provided with a copy of the agreement to read.

The agreement did not conform with the requirements of s 90E with respect to spousal maintenance because it failed to specify the amount provided for or the value of the portion of the relevant property attributed to the maintenance of the party.[129]

The legal advice must be real and meaningful to satisfy s90G(1)(b).[130]

In addressing the question of whether or not it would nonetheless be unjust or inequitable if the Agreement were not binding, the court was not satisfied that it would not be unjust or inequitable because:

a. Legal advice about the effect of the agreement was not provided to the wife (as confirmed in the case of *Hoult v Hoult* this is not an enquiry as to the content of the advice, but whether it was given);[131]

b. It is not possible to give advice in only 10 minutes;

c. The husband had not discharged the burden of establishing legal advice was given.[132]

## L - Future reconciliation of the parties

Where the parties to a financial agreement remain married at the date that a financial agreement is entered into, it might be prudent for the terms of the agreement to make provision for how their property and financial resources are to be dealt with in the event of a future reconciliation of the

[126] Ibid [60].
[127] Ibid [55].
[128] [2013] FAMCAFC 151.
[129] *Brannon & Brannon* [2022] FedCFamC2F 1116 [58].
[130] Ibid [63] citing *Kaimal & Kaimal* [2020] FamCA 971.
[131] *Brannon & Brannon* [2022] FedCFamC2F 1116 [64].
[132] Ibid [64].

parties. Even though the parties might sign a separation declaration to bring the agreement to affect, it is not outside the realms of possibility that parties may reconcile. Principles applying to circumstances where the parties have entered into a consent order, or section 87 agreement and then reconciled may have application. I express no view on how this might affect a financial agreement.

## M - Mission impossible clauses

Including a self-destruct or sunset clause might be a useful tool in some circumstances. That is to provide for the agreement to terminate at a set date or upon a particular event occurring. The parties could provide that on the happening of the event or a particular date that the agreement is to no longer to apply and thereafter the provisions of the *Family Law Act* are to apply to how their property and financial resources are to be dealt with.

In that circumstance, the provisions of section 90 J would need to be taken into account. That section provides that the parties to a financial agreement may terminate the agreement only by including a provision to that effect in another financial agreement or, making a written agreement (a termination agreement) to that effect),

# Part V - THE IMPORTANT QUESTION OF DISCLOSURE FOR FINANCIAL AGREEMENTS

## A - What kind of non-disclosure would justify a decision to set aside an agreement?

### 1 *'Binding or Bound to Fail?'*

In his seminal paper, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements', the Hon Justice Paul Brereton said:[133]

> On the question of what kind of non-disclosure would justify a decision to set aside an agreement under s90K(1)(a), Cronin J said in *Cording v Oster* [2010] FamCA 511 (at [60]) (emphasis added):
>
> > "To reach the standard of a fraud, the non-disclosure must amount to a misrepresentation *whether it is intended or otherwise*. That is because the recipient of the information, is entering into the agreement on the basis of the representations. To prove a misrepresentation of a material fact, one of the parties to the agreement must be able to show that *he or she was contracting about something other than that referred to in the contract and in the circumstances, it would be unconscionable for the agreement to stand*."
>
> … An intention to deceive is required to establish fraud under s90K(1)(a) – which is to say, it requires proof of common law fraud, with a statutory gloss that non-disclosure is included where the material matter was omitted with the requisite intent.

I thoroughly recommend this paper to those interested in an in-depth exploration of this topic.

### 2 *Disclosure obligations for financial agreements in comparison with Part VIII – It's not the same thing*

The disclosure obligations for entry into a financial agreement are not the same thing as for a property settlement under Part VIII of the *Family Law Act 1975*. In the Full Court decision in the case of *Kennedy & Thorne* [2016] FamCAFC 189,[134] the court said this:

> 104. The wife seeks to transpose the obligation to make full and frank disclosure under Part VIII of the Act to the entering into of financial agreements under Part VIIIA. However, this is erroneous given the clear difference between the two parts. As the trustees say in their written submission:
>
> > 22. …The obligation of disclosure under Part VIII occurs in a context where a court is required to make findings about the assets, liabilities and financial resources of the parties, and where the court is also required to be satisfied that it is just and equitable to make orders.
> >
> > 23. By contrast, a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained; and there is no judicial scrutiny relating to their formation. A party may enter an agreement, and such agreement is capable of being binding, with little or no knowledge of the other party's financial position. That is,

[133] 'Binding or Bound to Fail?' (2013) 23(2) *Australian Family Lawyer* 31, 34.
[134] The High Court appeal was in relation to different grounds. As a result, the Full Court decision on this aspect is still relevant.

> consistent with the doctrine of freedom of contract, a party [*sic*] enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence. The fact that a financial agreement results in a difference [*sic*] outcome to that which may have been awarded under s 79 and s 75 is not relevant to whether the agreement should be set aside [(Hoult & Hoult)].
>
> (Footnotes omitted)

> 105. The safeguard, if you like, where financial agreements are entered into, is that if there is thought to be inadequate disclosure, then the legal advice given to the other party can be, for example, not to enter into the agreement, or even, where there is no necessary suggestion of non-disclosure, to only sign after receipt of specific financial information. Further, if it subsequently transpires that the agreement was obtained by fraud, including non-disclosure of a material fact, the Act provides a remedy in the form of s 90K(1)(a).

## B - Some cases on disclosure

### 1 *Chen & Chen* [2018]

The fascinating case of *Chen & Chen and Ors*,[135] involved an application by the wife to set aside a financial agreement made by the husband and a third party who, unknown to the wife, had lived in a de facto relationship with the husband.

There were over eight respondents to these proceedings including a number of companies and three adult children. The trial judge characterised the husband and his activities with the adjective 'nefarious', referring to this several times in the course of the judgment.[136]

Not only the wife, but also the husband sought orders for the financial agreement to be set aside. One of the many surprises in the case was that the husband had made claims of non-disclosure against the de facto. The husband asserted that the de facto had not disclosed to him before the financial agreement was executed that she had purchased a property but also that she had misrepresented the balance of her bank account.

The issue of non-disclosure was readily disposed of by the court finding that whilst there was no doubt the details had not been provided by the de facto, the husband was not interested in the details of what the de facto owned because he just wanted money. No fraud was found to be perpetrated on him even if the de facto had not told the husband what she had.[137]

### 2 *Chatterjee & Woodby-Chatterjee* [2018]

*Chatterjee & Woodby-Chatterjee and Anor*,[138] was a case that came before Stevenson J in the Family Court of Australia at Sydney for 11 days in 2018. The decision was handed down on 15

[135] [2018] FamCA 828.
[136] Ibid, 47, 74, 210.
[137] Ibid [167].
[138] [2018] FamCA 930.

November 2018. The wife in that case sought to set aside a financial agreement alleging non-disclosure of material financial matters by the husband at the time the wife signed the agreement. The wife had alleged that the husband had failed to disclose certain shareholdings and omitted details of the mortgage on a title to a property.[139]

There were other grounds claimed including undue influence and fraudulent misrepresentation which are not relevant to this discussion.

The court held that the wife did not establish that the husband had failed to disclose the shareholdings.[140] Further the court did not regard the omission of the mortgage on the title as 'material' non-disclosure on the part of the husband.[141]

### 3 *Kaimal & Kaimal [2020]*

The issue of non-disclosure of assets also featured in *Kaimal & Kaimal* [2020].[142] In that case the wife alleged that the husband did not disclose his interests in a number of properties. Ultimately on that issue the Chief Justice was not satisfied on the evidence that the husband had an undisclosed interest in any of the three properties as alleged by the wife.[143]

### 4 *Whitford v Whitford [2023]*

In *Whitford v Whitford*,[144] the wife successfully argued that the financial agreement should be set aside under s 90K(1) (a) due to the husband's non-disclosure of material matters. The marriage subsisted for 11 years 7 months to which 3 children were born.

The agreement was made on the 17 December 2014 under which the net assets were ascribed a value of $1,358,973 of which the wife retained 5%.[145]

The agreement arose in the context of past discussions (recorded in a recital to the agreement) that their children had expressed an interest in preserving the farming property for them and that the agreement would capture this intention permitting the farming property and farming business to be retained by either of them and not be sold.[146]

Based upon a real estate agent's appraisal, obtained about 4 months prior, the value of the farm property was described in the agreement at $2.217 million.[147]

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[139] Ibid [38], [60].
[140] Ibid [61].
[141] Ibid [62].
[142] [2020] FamCA 971 [63].
[143] Ibid [67]-[68].
[144] [2023] FCWA 15
[145] Ibid [38]
[146] Ibid [105].
[147] Ibid [83].

However, two and one-half months before signing the agreement, the husband received two separate written offers to purchase the farm. The higher offer, accepted by the husband, was for $2.6 million.[148]

Also, the husband had, prior to the execution of the financial agreement, entered a contract to purchase another farm property, intending to use the sale proceeds of the family farm to complete the purchase. The settlement date for this new property was 27 February 2015. The husband did not disclose the existence of this contract.[149]

The husband also failed to disclose to the wife that he owned a Freightliner truck and a tipper truck with a combined value of $75,000. In total, the wife claimed the husband understated his gross assets by $929,183.[150]

The court was satisfied that:

a. Details of neither offer to purchase the family farm were disclosed to the wife before the financial agreement was signed. At the time the financial agreement was signed, the wife was unaware of these offers or that the husband was intending to sell the farm property;[151]

b. The husband knew the value attributed to the farm property of $2.217 million was materially inaccurate,[152] as was the value attributed to the farming business (plant and equipment, and sheep);[153]

c. When he signed the financial agreement, the husband knew or ought to have known that the value ascribed to the farming business was materially inaccurate.[154]

In the agreement the husband ascribed a value of $90,000 to the farming business (which covered the plant and equipment, and sheep). However, the plant and equipment was sold by the husband at a clearing sale two months later for $457,782 and the livestock was sold for $47,172 (in total about five times greater than the value ascribed in the Agreement).[155]

The court discussed relevant terms of the financial agreement including a recital which read:[156]

> *Ms and Ms Whitford each acknowledge that each is fully aware of the property, financial resources and financial circumstances of the other.*

[148] Ibid [73].
[149] Ibid [71].
[150] Ibid [4].
[151] Ibid [74].
[152] Ibid [75].
[153] Ibid [77].
[154] Ibid [77].
[155] Ibid [76].
[156] Ibid [78]. Emphasis in original.

The wife could not have been *fully aware,* in the sense required by this provision given the husband's deliberate non-disclosure of material matters.[157] In fact, the court also found that the husband had misled both his lawyers and the wife in respect of his intentions regarding the ownership of the farm property and associated farming equipment.[158]

The court found that wife had established the ground that the agreement should be set aside because of the husband's non-disclosure of material matters.[159]

Other grounds were considered which will only briefly discussed. The Court was satisfied that its findings about the husband's non-disclosure of material matters were relevant to the wife's claims pursuant to s 90K(1)(b) and 90K(1)(e), furthermore, the court was satisfied that the husband had engaged in unconscionable conduct in the making of the agreement.[160]

## C - What should be covered on the face of a financial agreement when it comes to disclosure? Schedules or lists?

As stated above,[161] there is no requirement under the legislation for a schedule of assets and liabilities or resources to be set out in a financial agreement. There is no requirement under the legislation for disclosure to take place in the making of an agreement, only a remedy for fraud including non-disclosure of a material matter as discussed above.[162]

### 1 *'… all or any of the property or financial resources…' The contrary intention, obligation to provide a full list of assets and resources*

*Parke and Parke* [2015] FCCA 1692, came before Judge Howard,[163] in the Federal Circuit Court and considered whether a financial agreement was a binding agreement and whether it should be set aside. His Honour noted that the Act allows the parties to make an agreement under s 90B with respect to *all or any* of their property.[164] The agreement in its operative part did not indicate whether or not the parties were dealing with 'all' of their property or only 'some' of their property.[165]

His Honour suggested that to avoid that ambiguity or uncertainty part of the agreement could have included the following clauses — that the parties agreed:[166]

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[157] Ibid [80].
[158] Ibid [110].
[159] Ibid [69], [75], [77], [80], [86].
[160] Ibid [90].
[161] Part III, Section H (1)(b) Some examples of misrepresentation - Statements about values of assets and liabilities in financial agreements
[162] Section 90K(1)(a), see section above 'Disclosure obligations for financial agreements in comparison with Part VIII – It's not the same thing'.
[163] Now Justice Howard of the Federal Circuit and Family Court (Division 1).
[164] *Parke and Parke* [2015] FCCA 1692 [63]. See FLA s 90B(2)(a).
[165] *Parke & Parke* [2015] FCCA 1692 [63].
[166] Ibid [64].

> (i) That pursuant to section 90B(2)(a) of the Family Law Act 1975 the parties agree that this agreement shall only operate with respect to such of Mr Parke's assets and resources as are listed in the first schedule;
>
> (ii) That Mr Parke is not obliged to list all of his assets and resources in Schedule 1.

As a result of that uncertainty His Honour considered it was necessary to have regard to the recitals in order to determine the true construction of the agreement.[167]

His Honour took the view that the parties did agree by recital to do a certain act namely as far as possible to contract out of the provisions of Part VIII of the *Family Law Act 1975.* This obligated them to include in the schedules a full list of all their assets and resources. If the parties had wanted to indicate a contrary intention they could have done so and could have indicated by including a clause in the operative part of the agreement which stated:[168]

> The parties agree that this financial agreement shall only be operative in relation to some (not all) of the party's assets and the only assets affected by this agreement are those assets listed in schedules 1 and 2.

The agreement according to His Honour did not indicate a contrary intention.[169]

His Honour referred to the objective approach in relation to the construction of contracts that permitted the court to have regard to the words in the recitals.[170]

Therefore, the court concluded that the parties in that case were obligated to provide a full list of assets and financial resources. His Honour's view being that—that is what a reasonable person in the position of the parties would have intended or assumed.[171]

### 2 *Schedules of assets and liabilities*

A practical consequence that flows from the decision in *Parke and Parke* [2015] FCCA 1692 is considering how the parties might provide a full list of assets, liabilities and financial resources in accordance with their obligations. First, the parties would need to agree on what is covered by the agreement, that is does the agreement cover *all or any* of the property or financial resources of the parties. The question becomes what is included and what is excluded.

The parties might make it clear in a recital what of their property and financial resources are not covered by the financial agreement and are subject to being dealt with by the provisions of the *Family Law Act 1975.*

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[167] Ibid [65].
[168] Ibid [70].
[169] Ibid [71].
[170] Ibid [72] citing *Cheshire and Fifoot Law of Contract* and *Byrnes and Another v Kendle* (2011) 243 CLR 253 [100].
[171] *Parke & Parke* [2015] FCCA 1692 [73].

Prior to entry into the agreement, depending on what property and financial resources the agreement covers, there might be an exchange of information about the parties' property and financial resources that are covered.

On the exchange of information schedules might be prepared which are then referred to and form part of the agreement.

### 3 *Should there be schedules setting out the steps taken by both or either party to make disclosure available or give disclosure? Should lists of documents be annexed? Is it enough to say the parties exchanged disclosure directly and leave it at that?*

As to the steps taken to provide disclosure, the obligations regarding disclosure for financial agreements above are not the same as for a proceeding under s 79 or s 90SM: *Kennedy & Thorne* [2016] FamCAFC 189. Whether or not disclosure is adequate will be ultimately governed by section 90 K(1)(a) of the *Family Law Act 1975,*[172] bearing in mind the considerations referred to by Justice Brereton in, 'Binding or Bound to Fail?' discussed at the commencement of this Part.[173]

If disclosure has been made, the circumstances of that disclosure could be reflected in the recitals to the agreement. Those recitals could record the exchange of disclosure between the parties. It would be of assistance if that recital was written in a meaningful way rather than using some boilerplate terminology.

In my view it is unnecessary to set out in schedules to a financial agreement the steps taken by both or either of the parties to make disclosure available or give disclosure or for example to annex lists of documents. What is relevant is the actual fact of disclosure and whether any qualitative issues arise later will be a matter for each individual case.

### 4 *Exclusion of liability for disclosure clauses*

As a corollary to making disclosure parties will commonly when drafting agreements attempt to exclude liability for non-disclosure by including a clause to the effect that a party is satisfied with disclosure and waives any right to absolute disclosure. The clause might read something like this:

> 1. George and Catherine mutually covenant and acknowledge that they have given full financial disclosure and are satisfied with the financial disclosure that they have each received from the other.
>
> 2. George and Catherine mutually covenant and agree to voluntarily waive any right to absolute disclosure of the assets, liabilities or financial resources of the other party save as required by the *Family Law Act 1975.*

[172] Non-disclosure of a material matter.
[173] 'Binding or Bound to Fail?' (2013) 23(2) *Australian Family Lawyer* 31, 34.

A cautionary note is sounded to those who may wish to plead the contents of such a clause in a financial agreement, in defence of a claim for a misrepresentation. The relevant issue will be to what extent the representation was relied on for the purposes of inducing entry into the agreement.

As a matter of public policy, the right to rescind a contract for fraudulent misrepresentation cannot be excluded by a contractual term.[174] By contrast, the parties to a contract may, by means of a contractual term exclude rescission of the contract in equity for any innocent misrepresentation that induced the contract.[175]

[174] *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337.
[175] *Covell and Lupton principles of remedies* (6th ed. 2015) [5.17].

## Part VI - SOME PRACTICAL STEPS IN PREPARING TO DEFEND A FINANCIAL AGREEMENT

Cases are won or lost at trial based on the facts as found by the trial judge – it's all about the evidence some people say! You need to keep in sharp focus that the courts are in the facts business and the currency of that business is evidence.[176] The trial judge is in a privileged position to assess that evidence. Success in defending a financial agreement then primarily rests on marshalling all of that evidence to your client's best advantage.

If you get wind that an attack on the financial agreement might be coming, the first thing to do is to make sure that the solicitor who prepared the agreement, and/or the solicitor who gave advice on the agreement, if they are not the same person, retains their file in full. That file should include all correspondence and original file notes. I highly recommend that the original file should be retained in the firm's safe custody or at least in secure storage and not destroyed so it can be used as evidence. An electronic copy of the file should also be created which is backed up and stored in the cloud.[177]

### A - Proofs of Evidence

I recommend that a proof of evidence be prepared by the client and the solicitor who drafted the agreement and or signed the certificate of advice.

Bear in mind the comments that equitable principles, 'Calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of [the other party].'[178]

#### 1 *Statement by the client*

The comprehensive proof of evidence or statement of instructions by the client should be prepared in the form of a narrative statement in ascending chronological order to be signed by the client to a standard (in admissible form) that may be readily converted into an affidavit in support of an application to court.

That statement could be initially compiled from all the instructions already received and then combined into one document and augmented with the following additional facts and circumstances setting out:

a. details of family background and relationship history;

[176] This is an alleged comment of a judge. It is likely apocryphal. But it is a good comment.
[177] Whatever that means.
[178] *Thorne v Kennedy* (2017) 263 CLR 85 [43].

b. the full circumstances surrounding the entry into the financial agreement including all discussions between the parties whether in person or not, and any correspondence in writing, electronically by e-mail or SMS text message;

c. obtain instructions whether there are any particular examples of behaviours that have any application to the case. They may assist to negative any allegations of unconscionable conduct or undue influence;

d. details to illustrate the extent to which the client's will was not subordinated to that of the other party during the marriage and in the process of preparation of the financial agreement.

### 2 *Statement by the solicitor*

The solicitor who prepared the agreement must be requested to prepare a statement detailing all the steps taken in respect to the financial agreement and its preparation. That statement should reference all advice given whether orally or in writing and each of the attendances for which there is a file note. Copies of those file notes should be attached to the statement.

That statement should also cover details of the client's emotional state at the time of signing the agreement to rebut suggestions the client was in shock, crying, or unable to communicate or for whom something was obviously wrong.

The failure to call a witness expected to support one's case invokes the well settled principles in *Jones v Dunkel*.[179] If the solicitor is not called when it might be expected that their evidence may assist, damage may be caused to your client's case and an inference drawn against them.

## B - What defensive weapons are available when the threat of attack is pending?

Financial agreements are a shield, not a sword. That is, they are defensive weapons much like body armour is.[180]

A party may seek an order to set aside a financial agreement. A party seeking to set aside a financial agreement bears the onus of proof.[181] There are however, some forensic tools that can be deployed to your client's advantage in defending an agreement.

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[179] (1959) 101 CLR 298.

[180] *Weapons Categories Regulation 1997* (Qld), section 6:
*Category E weapons*
A bulletproof vest or protective body vest or body armour designed to prevent the penetration of small arms projectiles is a category E weapon.

[181] *Hoult v Hoult* (2013) 276 FLR 412.

### 1 *Identify the case to be faced*

In proceedings concerning the setting aside of a financial agreement whether based on the law of contract or in equity there can be many complexities. Because in the Federal Circuit and Family Court of Australia matters are conducted by application and affidavit, this procedure can be inadequate to inform an applicant or respondent of the case they are facing. It is critical that the exact details of the case are determined with particularity.

### 2 *Pleadings*

In order to identify the real issues between the parties, in my view the best approach is to ask the court to make an order for pleadings or points of claim to be delivered. This approach can also lead to significant cost savings for the parties at a trial in terms of shortening the time taken at a final hearing.

There are no specific rules for pleadings in the family courts. The courts have power to regulate their own proceedings and directions can be made for the delivery of points of claim or pleadings. It is a sensible procedure.[182]

### 3 *Points of claim*

Points of claim are something less than pleadings. This is a less strict procedure. It will be a matter in each case to determine which procedure suits best.

### 4 *Review*

Once the directions have been complied with, the matter can come back before the court for a directions hearing or review. That review can be an opportunity for the parties then to consider the points of claim, and indeed whether an application should be made for any parts of that document to be struck out. After those issues are resolved a final hearing can be embarked upon with clarity about the case that each party might face.

### 5 *Rules of court*

In some family law cases orders have been made for the delivery of pleadings in accordance with the *Federal Court Rules 2011*.[183] The *Federal Court Rules 2011* provide that an originating application must be accompanied by a statement of claim or affidavit. Part 16 of the *Federal Court Rules 2011* sets out the rules of pleading including for the content of the statement of claim.[184] Those rules rely on a material facts model. In a case where it is sought to

[182] *Parke & Parke* [2015] FCCA 1692 [10].
[183] *Reed v Reed* (2016) 310 FLR 31.
[184] *Federal Court Rules 2011* Ch 2 Pt 16 Div 16.1.

apply strict rules of pleading then it would be appropriate to apply for an order for the delivery of pleadings in accordance with the *Federal Court Rules 2011.*

It is suggested, that because Division 1 of Federal Circuit and Family Court of Australia is a federal superior court, that at least in proceedings in that court, it is more appropriate to apply the *Federal Court Rules 2011* to any order for pleadings.

## 6 *Conclusion*

It is best to draw pleadings with particularity and avoid the fate of the wife in *Saintclaire & Saintclaire*.[185] There reference was made by the Full Court to the wife's particulars of claim as a 'manifestly inadequate' document, with the court concluding:

> 24. Her Honour's identification and determination of the issues in the case was not assisted by these ''particulars of claim'' which were anything but. The generalised statements of unparticularised and undated conduct and circumstances are neither an assertion of words and actions connected temporally to the agreement nor do they assert how it is alleged that the relationship between the husband and the wife was attended by the requisite dominion, ascendancy and dependence. Importantly, as a result, the purported particulars never made clear whether the wife's case was founded in actual undue influence or was founded in the existence of a relationship attended by indicia from which influence would be presumed.

[185] [2015] FamCAFC 245.

## Part VII - AUTHORITIES UPDATE: NEW CASES AND PAPERS

Yet again this area of law has been fertile ground for judgments about financial agreements. In addition to the other recent cases mentioned elsewhere in this paper there is one case which deserves an in-depth discussion which follows.

### A - Zella & Canino [2022]

This case has it all.

*Zella & Canino* is a decision of Schonell J,[186] and provides an excellent discussion of the technical requirements and the grounds to set aside financial agreements.

The agreement under consideration was made less than 2 weeks prior to the marriage of the parties, which took place in 2007 (they were engaged mid-March 2007). The wife sought advice from a solicitor and expressed her concerns to her husband. The husband assured her that the family law would protect her and they would change the agreement when they are further along in the marriage.[187]

The wife went back to her solicitor and signed the agreement.[188] Oddly, a few days later, the wife received a letter from the solicitor who advised her stating that despite his advice that she should not be a party to the agreement, the wife had executed the agreement.[189]

The parties separated in July 2020 and in December 2020 the wife commenced proceedings in the Family Court of Australia. Later, in February 2022, the wife filed an Amended Initiating Application seeking financial orders related to the agreement.

#### *The wife's challenge*

The wife contended that the section 90B agreement was not an agreement in accordance with the principles of contract and ought to be set aside. The husband contended that the agreement was binding. The wife sought various orders and/or declarations broadly contending that she should not be bound.[190] The court dealt with the wife's challenge by answering a series of questions.

[186] *Zella & Canino* [2022] FedCFamC1F 314.
[187] Ibid [10].
[188] Ibid [11].
[189] Ibid [12].
[190] Ibid [2], [62] The wife brought her claim within s 90K(1)(b) and s 90K(1)(e) alleging duress, undue influence and unconscionable conduct on the part of the husband as well as hardship in the terms of s 90K(1)(d).

### *(a) Question 1: Was the Agreement in question an agreement according to the principles of contract?*

The wife had submitted that as one of the parties was mistaken about the nature of the document they signed, the principle of non est factum can render the contract void. The foundation for that submission was that the wife felt overwhelmed in signing the agreement and did not read it, and that there was no evidence that the husband (who claimed he was illiterate) had the document read to him before he signed it. From this foundation it was said that as neither party read the document there is no Agreement.[191] Ultimately this challenge was not successful on the basis that the foundation that underpinned the submission was erroneous.[192] The court found that the parties entered into an Agreement in October 2007.[193]

### *(b) Question 2: if the Agreement is an agreement, is it a financial agreement pursuant to s 90B of the Act?*

The agreement was silent as to any reference to the agreement being made under section 90B of the *Family Law Act 1975*.[194] That is there was a failure to comply with the technical requirements referred to earlier. On this point the court Schonnell J said:[195]

> … nowhere in the Agreement is there language capable of being interpreted that the Agreement is 'expressed' to be made under s 90B. I note that the certificate attached to the Agreement says "[u]nder section 90B (Financial Agreements before Marriage) of the Family Law Act". However, the certificate does not form part of the Agreement between the parties.

The agreement was not in compliance with the legislation,[196] and therefore the agreement could not be a financial agreement within the meaning of the *Family Law Act 1975* without express reference to s 90B.[197] Whilst it is an available remedy to rectify the agreement,[198] and the agreement was amenable to rectification, the husband did not seek and had never sought rectification despite it being alluded to at the hearing.[199] Therefore, there was no rectification of the failure to reference s 90B of the *Family Law Act 1975,* and the agreement did not comply with s 90B and consequentially was not a financial agreement within the meaning of the Act.[200]

[191] Ibid [42].
[192] Ibid [43]. Under cross-examination the wife admitted she had in fact read the agreement although not properly.
[193] Ibid [49].
[194] Ibid [50].
[195] Ibid [52].
[196] Ibid [53].
[197] Ibid [54].
[198] Ibid [55] – [56].
[199] Ibid [57].
[200] Ibid [58].

### *(c) Question 3: Can an agreement that is not a financial agreement nonetheless be binding pursuant to s 90G of the Act?*

Both parties submitted and the court accepted that if the agreement was not a financial agreement within the meaning of the Act that it cannot be binding within the meaning of section 90G.[201] Schonell J found that the agreement was not a financial agreement and section 90G had no application as it only applies to financial agreements.[202]

### *(d) Question 4: If the agreement is a financial agreement ought it be set aside pursuant to section 90 K of the Act?*

The wife challenged the agreement under s 90K(1)(b) and s 90K(1)(e) alleging duress, undue influence and unconscionable conduct on the part of the husband as well as hardship in the terms of s 90K(1)(d).[203] His Honour noted that the relief sought under section 90K is dependent in large measure on factual findings,[204] which the court then proceeded to set out in detail.[205]

The court then discussed the equitable vitiating concepts in turn.

#### *(i) Duress*

Schonell J accepted the wife's evidence that the husband represented that if she did not sign the agreement, the marriage would not go ahead, but considered that he was bound by the decision in *Australia and New Zealand Banking Group and Karam*,[206] that to establish duress what is required is threatened or actual unlawful conduct. There was no evidence of such conduct by the husband,[207] and ultimately, duress was not established.[208]

#### *(ii) Undue influence and unconscionable conduct*

The wife urged the court to find that the agreement was vitiated by undue influence and unconscionable conduct.[209] Undue influence was not established.[210]

However unconscionable conduct was found.[211] Contrary to counsel for the husband's eloquent submissions, the court found that the husband created the special disadvantage that the wife operated under by the pressure exerted on her through repeated statements to the effect

[201] Ibid [59].
[202] Ibid [61].
[203] Ibid [62].
[204] Ibid [63].
[205] Ibid [97].
[206] (2005) 64 NSWLR 149 cited in *Zella & Canino* [2022] FedCFamC1F 314 [100].
[207] *Zella & Canino* [2022] FedCFamC1F 314 [102].
[208] Ibid [107].
[209] Ibid [108].
[210] Ibid [118], [120].
[211] Ibid [122]-[128].

that the marriage would not go ahead, presenting the Agreement to her well after marriage plans were underway and a wedding was imminent and thereafter suggesting to her that the Agreement would later be changed, as well as making statements to her that could only have been designed to undermine her confidence in her independent legal advice while maintaining that it was generous to her.[212]

On the equitable aspects Schonell J observed that undue influence focuses upon the mind of the party who is in a weaker position. Unconscionable conduct focuses attention on the actions of the stronger party.[213]

Interestingly on special disadvantage,[214] Schonell J held that there was no carve out exception that only those with secondary education or less can be the subject of unconscionable conduct.[215]

### *(iii) Hardship*

The agreement made no provision in the event they had a child, something they clearly contemplated. The wife contended that there had been a material change in circumstances since the making of the agreement and that she or the child would suffer hardship if the agreement was not set aside.[216] The court was satisfied the agreement should be set aside under section 90K(1)(d).[217]

### *(iv) Section 90K(1)(b) set aside as void, voidable or unenforceable - uncertainty*

The wife also brought a claim within the terms of section 90K(1)(b) on the ground that there was an uncertainty as to the terms of the agreement.[218] It was contended that the words in the agreement would lead to a conclusion that it was not possible to attribute to the parties any particular contractual intention.[219] The court did not accept that the agreement was void or voidable for uncertainty. The agreement was clear that there was no provision for an adjustment.[220]

[212] Ibid [123].
[213] Ibid [111].
[214] Ibid [124].
[215] Ibid [125].
[216] Ibid[129].
[217] Ibid [135]-[136], [146].
[218] Ibid [147].
[219] Ibid [148].
[220] Ibid [149].

### *(e) Question 5: If the agreement is not set aside pursuant to section 90K but is also not a financial agreement pursuant to s 90B, is it binding pursuant to section 90G(1) of the Act?*

His Honour then went on, in case he was wrong in relation to his earlier findings, to consider the effect of s 90G and determine whether the agreement is binding on the parties.[221]

After reciting the terms of s 90G, Schonnel J noted that the person who asserts an agreement is binding, in this case the husband, bears the onus of proof to establish that the agreement complies with the provisions of section 90G(1).[222] He went on to set out the terms of the solicitor's certificate in the agreement.

The solicitor's certificate recorded all sorts of things the parties had been advised about, but relevantly, not what s 90G(1)(b) requires, namely advice of the effect of the agreement on the rights of that party or the advantages and disadvantages to that party of making the agreement.[223]

Schonell J followed the decision of *Kaimal & Kaimal* , [224] discussed earlier, in relation to the obligations of legal advice. His Honour cited the decision of *Abrum & Abrum* [2013] Fam CA 897 noting the observations of Alridge J:[225]

> 1. The advice must give the party some idea, at least in general, of their present entitlements or rights as compared to what is provided for them under the proposed financial agreement.[226]
>
> 2. [As to the provision of legal advice] 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 [legal] advice must be real and meaningful. It must be directed to the parties' circumstances and their present rights.[227]
>
> 3. 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) and to the welfare of the family. Only by doing so can advice be given that complies with the terms of section 90G(1)(b).[228]

Schonell J held that the Solicitor's Certificates for both parties were not in compliance with Section 90G,[229] neither strictly nor in substance. The husband had failed to discharge the onus on him, and no forensic onus shifted to the wife.[230] The wife's Affidavit addressed the

[221] Ibid [153].
[222] Ibid [155].
[223] Ibid [158].
[224] Ibid [159].
[225] *Kaimal & Kaimal* [2020] FamCA 971 [161].
[226] *Abrum & Abrum* [2013] FamCA 897 [40].
[227] Ibid [41]-[42].
[228] Ibid [43].
[229] *Zella & Canino* [2022] FedCFamC1F 314 [171].
[230] Ibid [169].

extent of her legal advice which made it clear it failed to address the requisite issues. The wife was not cross examined about what legal advice she had received about her rights.[231]

The Trial Judge was left in no doubt that no legal advice was ever given as to the advantages to the wife of her entering the agreement and concluded the agreement was not binding within the meaning of Section 90G(1).[232]

### *(f) Question 6: If the agreement is not binding pursuant to s 90G(1) ought it nonetheless be declared binding pursuant to s 90G(1A) of the Act?*

The husband contended that the court should find it would be unjust and inequitable if the agreement were not binding on the parties. Schonnel J referred to the decision in *Hoult v Hoult* in which the Full Court recorded the factors to be considered in such a determination.[233] These factors have been discussed above.[234] Ultimately, on balance, His Honour concluded that the failure to comply with section 90G was substantial and that it would not be unjust and inequitable if the agreement were not binding on the parties.[235]

### *(g) Question 7: If the agreement is not set aside and is either binding or declared to be binding, are the parts of the agreement which relate to spousal maintenance void pursuant to s 90E of the Act?*

The answer to that question was yes, the provision was void,[236] because the Agreement failed to specify the party whose maintenance is under consideration or the amount or value of the property attributable to maintenance.[237] The clause simply said:[238]

> …this Deed is intended to operate in substitution for all rights of either party to claim spousal maintenance … other than as specified in this Deed.

Schonell J referred to a decision of Strickland J in *Ellerton & Jennings*,[239] the clause relevantly stated, 'No provision for spousal maintenance is necessary or desirable because each is capable of supporting themselves.' Strickland J held that this clause met the requirements of Section 90E and was not void and that no provision means nil, zero or none.

Strickland J sitting as the Full Court observed, there was a clear difference between a clause which provides for no claim for spousal maintenance to be made versus a clause which

[231] Ibid [171].
[232] Ibid [176].
[233] (2013) 276 FLR 412 [307] – [310].
[234] See Part IV, B (b)'Just and equitable' / 'unjust and inequitable' the confusing juxtaposition.
[235] *Zella & Canino* [2022] FedCFamC1F 314 [185].
[236] Ibid [187].
[237] Ibid [190].
[238] Ibid [189].
[239] [2021] FedCFamC1A 39.

specifies there is no provision for spousal maintenance (no provision being an identifiable quantum being the same as nil, zero and none).[240]

Schonnel J found that *Ellerton* was not supportive of the husband's argument because the clause did not specify the party for whose provision maintenance is to be made in order to reference in any way an amount or value. It only referred to a substitution of rights.[241] Therefore the spouse maintenance clause was void.[242]

### *(h) Conclusion*

In the end, Schonnel J concluded that the agreement made on 26 October 2007 should be set aside.[243]

## B - Latest Articles/Books/Reports

I recommend the following papers to expend your reading on this topic:

Minal Vohra, 'All is Fair in Love and War - When and if Fairness Matters for Financial Agreement to be Binding' (Paper presented to Television Education Network, Gold Coast Conference, Broadbeach, 2022).

Justice Michelle Gordon AC, Family Law and Equity – Friends, Enemies or Frenemies? Hearsay Issue 90; Dec 2022.

[240] Cited in *Zella & Canino* [2022] FedCFamC1F 314 [194].
[241] Ibid [197].
[242] Ibid [198].
[243] Ibid [199].

## Part VIII - OVERALL CONCLUSION

I conclude this paper by reprising the sentiments at the start of the paper that litigation over financial agreements is unlikely to abate.

Don't be naive in your approach to financial agreements. The best you can do is to prepare financial agreements cautiously and ensure that you comply with the technical requirements of the *Family Law Act 1975*.

Independently, and actually, give your client real and meaningful written advice of their rights and of the advantages and disadvantages of the financial agreement and keep good records of the advice that you give.

Ensure that there is a sound basis for the division agreed in the agreement and that the end result is not grossly unfavourable to one of the parties.

# Part IX - BIBLIOGRAPHY

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W Covell, K Lupton and J Forder, *Covell and Lupton principles of remedies* (Lexis Nexis Butterworths, 6th ed. 2015)

Ellie Dudley, 'What to know about divorce before walking down the aisle', *The Weekend Australian* (22-23 April 2023), 35

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John Wade, 'The Perils of Financial Agreements: Effectiveness and Professional Negligence', 22 (3) *Australian Family Lawyer* 24

## B - Cases

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*Australia & New Zealand Banking Group v Karam and Others* (2005) 64 NSWLR 149

*Brannon & Brannon* [2022] FedCFamC2F 1116

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*Chaffin & Chaffin* [2019] FamCA 260

*Chatterjee & Woodby-Chatterjee and Anor* [2018] FamCA 930

*Chen & Chen and Ors* [2018] FamCA 828

*Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337

*Ellerton & Jennings* [2021] FedCFamC1A 39

*Fewster v Drake* (2016) 316 FLR 274

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*Lake Koala Pty Ltd v Walker* [1991] 2 Qd R 49

## C - Legislation

*Family Law Act 1975* ('FLA')

*Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*

*Federal Court Rules 2011*

*Weapons Categories Regulation 1997* (Qld)

# Part X - APPENDIX 1

**CHECKLIST OF THE TECHNICAL REQUIREMENTS FOR MARRIED COUPLE FINANCIAL AGREEMENTS[244]**

| Requirement | Tick If satisfied |
|---|---|
| It is a written agreement – ss 90B(1)(a), 90C(1)(a), 90D(1)(a)? | ☐ |
| Is the agreement, in the operative part, expressed to be made under s 90B, or 90C, or 90D? | ☐ |
| It is between parties:<br>(a) contemplating entering into a marriage with each other - s 90B(1)(a);<br>(b) to a marriage - s 90C(1)(a);<br>(c) after a divorce? To a former marriage? - s 90D(1)(a). | ☐ |
| At the time of making the agreement, the people are not the spouse parties to any other financial agreement binding on them – s 90B(1)(aa); 90C(1)(aa), 90D(1)(aa). | ☐ |
| Does it not cover matters dealt with in a previous agreement between the parties which is still in effect – s 90B(1)(aa); 90C(1)(aa); 90D(1)(aa). | ☐ |
| Does the agreement make provision for how, in the event the breakdown of the marriage, *all* or *any* of the property or financial resources of either or both of the spouse parties, at the time when the agreement is made, (or at a later time)[245] is to be dealt with, or maintenance of the parties and/or matters incidental or ancillary to those matters? - s 90B(2),(3); 90C(2),(3); 90D(2), (3)? | ☐ |
| Is the agreement signed by all parties – s 90G(1)(a)? | ☐ |
| Before the agreement was signed by a party, was each spouse party provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement – s 90G(1)(b)? | ☐ |
| Either before or after the agreement was signed was each spouse party provided with a signed statement from the legal practitioner that the required advice was given – s 90G(1)(c)? | ☐ |
| Was a copy of the above statement that was provided to a spouse party given to the other spouse party or to a legal practitioner for the other spouse party – section 90G(1)(ca)? | ☐ |
| The financial agreement has not been terminated or set aside by a court – s 90G(1)(e)? | ☐ |

[244] FLA ss 90B, 90C, 90D, 90G.

[245] FLA ss 90B(2)(a) refers to how property is to be dealt with '… or at a later time and *before divorce*' while section 90C(2)(a) refers to how property is to be dealt with '… or at a later time and *during the marriage*'. FLA s 90D (2)(a) is slightly different in that it refers to the property or financial resources the spouse parties had or acquired during the former marriage.