FINANCIAL AGREEMENTS: MORE LAW, LESS CERTAINTY

The law relating to financial agreements remains unclear, despite legislative amendments. To ensure enforceability, practitioners need to be particularly vigilant when drafting agreements, or use court orders instead. By Jacqueline Campbell

Almost 12 years after financial agreements were introduced on 27 December 2000, the law relating to financial agreements – making them, enforcing them and setting them aside – remains uncertain and ever-changing. The most recent legislative changes to the *Family Law Act* 1975 (*FLA*) were introduced in response to *Black and Black*.[1] The *Federal Justice System Amendment (Efficiency Measures) Act (No 1)* 2009 ("the 2010 changes") commenced on 4 January 2010. The Full Court of the Family Court in *Senior and Anderson*[2] highlighted the uncertainties arising from the 2010 changes. This article looks at the use of rectification and construction principles when there are errors in an agreement.

BLACK AND BLACK: STRICT INTERPRETATION APPROACH

The Full Court in *Black and Black* adopted a very strict interpretation of s90G(1) of the *FLA*. The version of s90G(1) at the time included a requirement that:

"A financial agreement is binding on the parties to the agreement if, and only if:

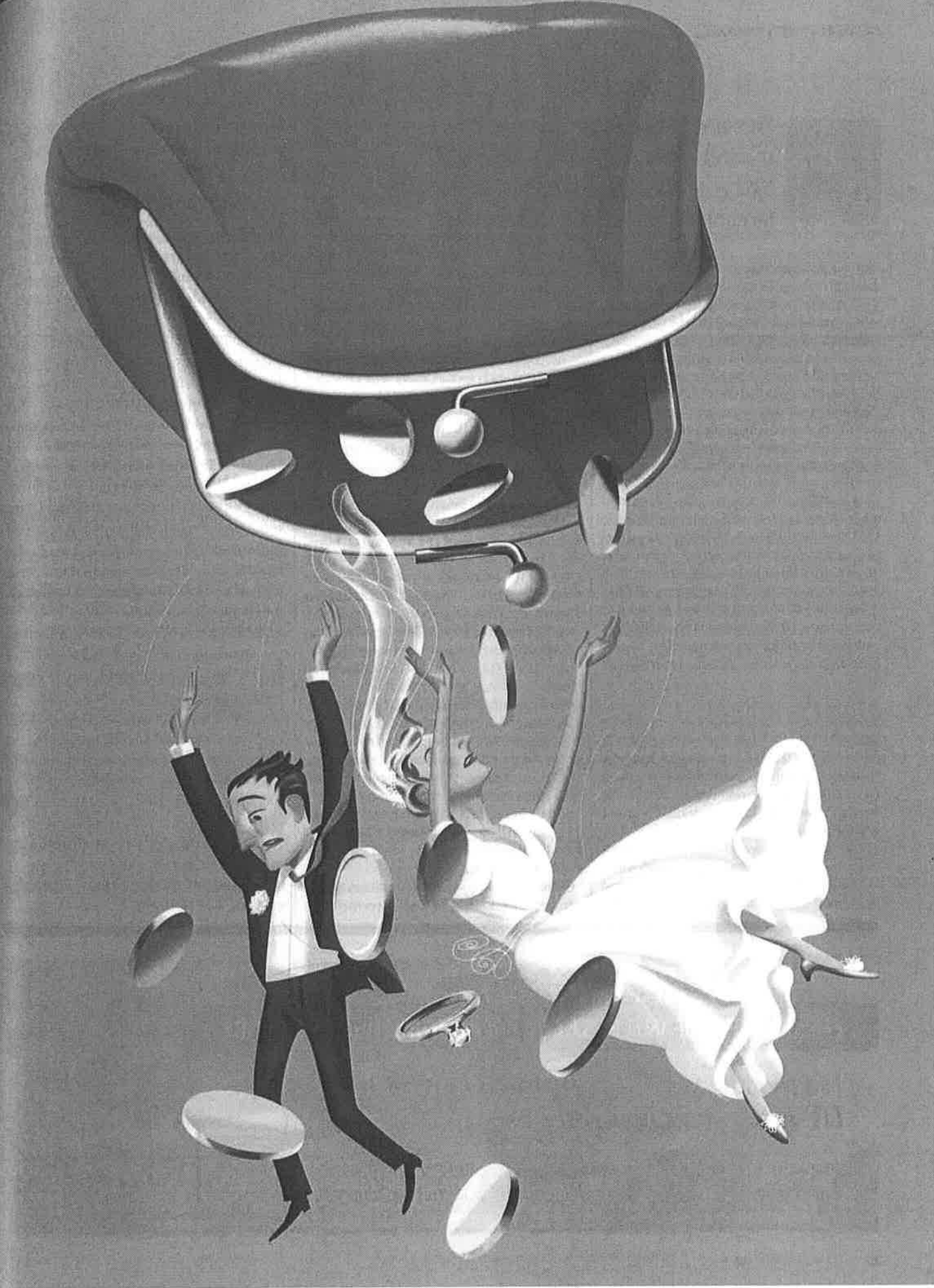
(a) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

(i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement."

At trial,[3] Benjamin J refused the husband's application to set aside the agreement made by the parties in September 2002 during their 18-month marriage. He found that s90G(1) was satisfied because the husband had proper legal advice, although a fresh certificate was not signed by the husband after the terms of the agreement were changed. Benjamin J found that the purpose of the legislation was to enable people to enter into agreements easily.

ILLUSTRATION NIGEL BUCHANAN



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without going to court and without spending a lot of money on specialist legal advice. The certificate was part of the agreement. A separate sentence stating that the agreement was made under s90G(1)(b) was not required to be within the body of the agreement.

The Full Court allowed the appeal and set the financial agreement aside. It found that s90G(1)(b) (as it was before the changes which commenced on 14 January 2004 as a result of the *Family Law Amendment Act* 2003) expressly required that the agreement contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in that section. The agreement did not refer to the specific requirements of s90G(1), although the certificate did. This omission meant that the agreement did not comply with s90G(1) and was not binding upon the parties. Strict compliance with the statutory requirements was necessary to oust the court's jurisdiction to make orders under s79.

2010 CHANGES

The aim of the 2010 changes was to make it more difficult for financial agreements to be found not to be binding on technical grounds. In summary, the amendments:

- repealed s90G(1)(b) and (c) and substituted the requirements that:
  "(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
  (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
  (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party;"
- inserted a new s90G(1A) to make an agreement binding on the parties in circumstances where it was not binding under s90G(1) because one or more of paragraphs (1)(b), (c) and (ca) are not satisfied 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."

Similar provisions apply to termination agreements and Part VIIIAB agreements.

Decisions that have considered the effects of the changes include *Senior and Anderson*[4] and *Parker and Parker*.[5]

RECTIFICATION

Rectification is an equitable remedy that enables a written agreement to be amended to reflect the common intention of the parties. It is the document, rather than the underlying agreement, that is rectified.

The husband in *Fevia* and *Carmel-Fevia*,[6] inter alia, relied on rectification in a dispute as to whether a financial agreement existed and was binding. Murphy J found that s90KA could be used to invoke equitable principles and determine whether a financial agreement is "valid, enforceable or effective" but not to determine whether it is binding under s90G(1). The agreement signed by the wife was materially different to that signed by the husband as no schedule of assets was attached when the wife signed. His Honour refused to rectify the agreement to include the schedule of assets. He said:

"Whilst it may be true that the parties each had an intention to enter an agreement that was intended to operate in the manner envisaged by s90G and s71A, that is not the end of the necessary inquiry as to the mutuality of their intention" (at [153]) and "Here, the inclusion, or exclusion, of specified property must be central to the intention of the parties. If the core intention of the parties is to exclude matters the subject of agreement from the operation of Part VIII, mutuality of intention about (relevantly) the specific property to be excluded is central to the true intention of the parties" (at [155]).

SENIOR AND ANDERSON – TRIAL JUDGE

In *Senior and Anderson*[7] the trial judge, Young J, found there were errors in the agreement and the certificates. These included:

1. On the coversheet, in the heading of the first page and in the first substantive clause of the agreement (but not in the recitals), it was expressed to be an agreement pursuant to s90C. As the parties divorced before the execution of the agreement it ought to have been made under s90D.
2. The wife's certificate correctly identified her as the client to whom the advice was given but she was later identified, not by her correct name, but by the name "Patricia" in clauses 2 and 3 of that certificate.
3. The husband's certificate had a similar problem to the wife's certificate.

Young J distinguished the facts from *Balzia and Covich*,[8] where Collier J had rectified an agreement that incorrectly referred to s90B rather than s90C. Collier J said he could not rectify the incorrect reference to s90B in the certificates. Young J said:

"I have reached a firm conclusion that the errors upon the Certificate(s) can and should be corrected, that they were unintended errors and they should not and do not negate the professional legal advice given to each of the parties. They are not errors that are fatal to the binding nature of the agreement and in their reflect and circumstances they are different to the facts of *Balzia and Covich*" (at [55]).

Young J changed the three references to s90C to s90D and inserted the correct names of the parties in clauses 2 and 3 of the two certificates. He said that rectification was possible because:

"On the facts of this case the parties negotiated and concluded an agreed contract for a division of their property. They were in complete agreement at the time of execution of that contract as to its terms. The mistakes were of a legal or identification issue unknown to the parties and of a kind that should have been known to their solicitors... The subjective and common intention of the parties was properly expressed within the agreement" (at [94]).

After rectification, the agreement was binding.

SENIOR AND ANDERSON – FULL COURT

The Full Court in *Senior and Anderson*[9] left the law uncertain as to the effect of s90G(1). This article focuses on agreements entered into after the 2010 changes. The effect of the 2010 changes on agreements made between 14 January 2004 and 4 January 2010 is also confusing and unclear but is beyond the scope of this article. The majority, Murphy and Strickland JJ, upheld the appeal against the trial judge's finding that the agreement was binding, but for different reasons. May J, in a strong dissenting judgment, found the agreement to be binding.

Strickland J held that the agreement did not comply with s90G(1), but he refused to apply a strict compliance test to s90G(1), saying:

"To attribute to the legislative requirements a 'strict compliance test' or to qualify the necessary mandatory compliance, is to add a gloss to the requirements that is not required or justified by the legislation" (at [122]).

He distinguished between agreements that comply with s4 and ss90B, 90C or 90D and those that are binding under s90G. He said:

"I consider that there is a distinction between, on one hand, the formation, validity and enforceability of an agreement that is a financial agreement, to which contractual and equitable principles apply, and, on the other hand, the statutory precondition for making an agreement 'binding' within the meaning of the Act" (at [103]).

The 2010 changes did not affect that distinction. Like Murphy J in *Fevia*, Strickland J considered s90KA (and therefore the doctrine of rectification) applied when deciding whether there is an agreement and the application of ss90B, 90C and 90D to the agreement. Section 90G is irrelevant to the contractual rights and remedies of the parties to the agreement (at [95]), and therefore s90KA cannot be used to make a financial agreement binding under s90G.

With respect to rectification, Strickland J said:

"I do not consider that rectification is available to a court so as to 'correct' non-compliance with any or all of the requirements of s90G. Those requirements do not pertain to matters of agreement as between the parties in respect of which clear intention can sound in rectification" (at [138])).

May J, dissenting, particularly disagreed with Strickland J's view that:

"It is clear to me that the certification must, on its face, comply with the terms of the section. A court could not be satisfied of that requirement in circumstances where, as here, the certificate refers to the provision of advice to a person named as 'A' but, thereafter, refers to advice being provided to a person named 'B'." (at [142]).

May J said that the careless reference to s90C rather than s90D could be rectified but that the erroneous names were in a different category. They were a failure to observe the requirements of s90G and so could not be rectified under s90KA. As the facts pointed to

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the incorrect names being a careless error by the solicitors with no impact on the parties, it was appropriate to correct the error using principles of construction. These principles were explained by the *High Court in Fitzgerald v Masters*:[10]

"It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words."

A differently constituted Full Court in *Kostres and Kostres*,[11] in holding that an agreement was void for uncertainty, also referred to *Fitzgerald and Masters* and said:

"The principle that words 'may generally be supplied, omitted or corrected, in an instrument, when it is clearly necessary to avoid absurdity or inconsistency' is a well recognised principle in the law of contract . . . We are of the view that, while common law principles of construction undoubtedly apply and can be used to avoid absurdity, the terms of the agreement must accurately reflect the intention of the parties at the time of the making of the agreement, and be unambiguous. In other words, the meaning to be given to expressions used in the agreement must be clear and their meaning certain" (at [124], [126]).

Using principles of construction it is possible to correct errors in an agreement; however, there must be proceedings relating to the validity, enforceability or effectiveness of a financial agreement under s90KA.

All three judges in *Senior and Anderson* said that the body of the agreement could be rectified under s90KA to refer to s90D rather than s90C. However, although not dealt with by the Full Court, it is arguable that the advice required before marriage (under s90B) and prior to separation (under s90C) is different to that required after separation (under s90C) and after divorce (s90D). For example, s90D(2)(a) refers to "how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with", thus excluding the ability of the agreement to deal with assets acquired post-divorce.

INTERPRETATION OF S90G(1A)(C)

Interpreting s90G(1A)(c), the judges in *Senior and Anderson* again took different approaches. May J said that if she was wrong, and rectification of the agreement was not possible, it was unjust and inequitable for the agreement not to be binding.

Strickland J said the remedy under s90G(1A) was not rectification but a statutory remedy. The agreement becomes "binding" despite its deficiencies because the requirements of s90G(1A) are met. He considered that there had been insufficient argument as to whether the Court could be "satisfied that it would be unjust and inequitable if the agreement were not binding". He remitted the matter to Young J for determination of that issue. He repeated his view as the trial judge in *Parker and Parker*[12] that it was unclear precisely what s90G(1A)(c) meant, and then gave two alternatives:

"In other words, does s90G(1A)(c) require the Court to consider the efficacy of the settlement and the entitlements that the parties are to receive pursuant to the agreement or does it simply invite the Court to refer back to the nature of the complaint" (at [154]).

Murphy J agreed that there was uncertainty about the meaning of s90G(1A)(c).

At the rehearing,[13] Young J applied the transitional provisions (applicable to agreements entered into on or after 14 January 2004 and before 4 January 2010) as set out in Murphy J's judgment, finding that the option of declaring the agreement binding under s90G(1A)(c) was unavailable as the agreement was compliant with s90G(1)(b) but not with s90G(1)(c).

In *Parker* Strickland J declared that the agreement was not binding. He was not satisfied that the effect and implications of an amendment were explained to the wife in the same way that the terms of the agreement were explained to her when she signed the original agreement. Advice of a general nature was insufficient. An appeal was heard in *Parker* by a differently constituted Full Court than in *Senior and Anderson*.[14] The appeal was allowed by a 2:1 majority and remitted for re-hearing on whether s90G(1A) could be used to "save" the agreement.

CONCLUSION

Financial agreements were intended to provide spouses with certainty when sorting out their property and spousal maintenance disputes after separation or in the event of a future separation. It appears that despite the 2010 changes the area continues to be a complex area of family law. Due to the uncertainties and risks of professional negligence claims, it is prudent to avoid them altogether and, where possible, obtain court orders rather than use financial agreements. ●

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The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. (2008) FLC 93-357.
2. (2011) FLC 93-470.
3. [2006] FamCA 972.
4. (2011) FLC 93-470.
5. [2010] FamCA 664.
6. (2009) FLC 93-411.
7. [2010] FamCA 601.
8. [2009] FamCA 1357.
9. Note 2 above.
10. (1956) 95 CLR 420, per McTiernan, Webb and Taylor JJ at [3].
11. (2009) FLC 93-420.
12. [2010] FamCA 664.
13. *Senior and Anderson* [2011] FamCA 802.
14. (2012) FLC 93-499.