

Financial agreements and the law of contract: grounds for setting aside

Jacqueline Campbell
Forte Family Lawyers

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INTRODUCTION

Besides the difficulties encountered by lawyers trying to navigate the complexities of Pt VIII A (and the equivalent, but not precisely the same, provisions for de facto couples in Pt VIII AB) including the retrospective amendments of s 90G(1) and the transitional provisions, family lawyers need knowledge of contract law. They must apply contractual principles when drafting agreements and advising clients whether, and on what grounds, an agreement can be set aside. Family lawyers are often out of their comfort zone when dealing with contractual principles. Unfortunately, the decisions which have been delivered by the Family Law Courts may create further confusion, particularly with respect to duress, undue influence and unconscionable conduct, which all address unfair bargaining power but are distinct principles.

A paper given by the Honourable Justice Paul Brereton of the Supreme Court of New South Wales "Binding or bound to fail? Remedies and rectification of financial agreements" at the 2012 National Conference of the Family Law Section, was useful in the preparation of this paper and is recommended reading.

SETTING ASIDE FINANCIAL AGREEMENTS

A financial agreement may be set aside on one of the grounds in s 90K(1) or 90UM(1). It may also be found not to be binding if it does not meet the requirements of s 90G(1) or 90UJ(1), but failure to meet these requirements is not discussed in this paper.

Setting aside a financial agreement under the *Family Law Act 1975* is a two step process. First, a ground must be established under s 90K(1) or s 90UM(1). Then, the court has the discretion as to whether or not to set the agreement aside. If part of an agreement is found to be void, voidable or unenforceable, the court may decide not to set aside the whole of the agreement under s 90K(1)(b) or s 90UM(1)(e) if that part of the agreement which is void, voidable or unenforceable is severable.

A court may, under s 90K(1), order that a financial agreement be set aside:

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) either party to the agreement entered into the agreement:

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

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

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

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

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

- (e) in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable, or*
- (f) a payment flag is operating under Part VIII B 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 unsplitable interest for the purposes of Part VIII B.*

The grounds for setting aside Pt VIII AB financial agreements are slightly different from those for setting aside Pt VIII A financial agreements. Section 90UM(1) includes:

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

 - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the other de facto relationship) with a spouse party; or*
 - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the other de facto relationship; or*
 - (iii) with reckless disregard of these interests of that other person; or**
- (d) a party (the agreement party) to the agreement entered into the agreement:

 - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or*
 - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 79, or a declaration under s 78, in relation to the marriage (or void marriage); or*
 - (iii) with reckless disregard of those interests of that other person; ...**
- (k) if the agreement is a Part VIII AB financial agreement covered by s 90UE - ss (5).applies [This provision deals with agreements made in non-referring states and territories].*

Validity, enforceability and effect of agreements

Sections 90KA and 90UN confirm and expand the court's opportunities under s 90K(1) and s 90UM(1) to rely on contractual principles, particularly in relation to enforcement. An under-utilised aspect of s 90KA arises when it may not be in one party's interests for the agreement to be set aside. Other remedies available under s 90KA, such as rectification, implied terms or not enforcing part of the agreement, may be more desirable.

Section 90KA provides:

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

- (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have ...;*
- (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement ...;*
- (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.*

Section 90UN is similarly worded to s 90KA and applies to Pt VIII AB financial agreements.

The purpose of s 90KA was described by Murphy J in *Fevia & Carmel-Fevia* (2009) FLC 93-411 (at paras 119, 244-5) as being broad and not limited simply to whether or not a financial agreement should be set aside:

If the parties to a marriage (or parties to a prospective marriage) enter an agreement which otherwise meets the criteria for the formation of a valid and enforceable contract and which purports to determine how, in the event that their marriage breaks down, their financial affairs should be determined, the principles of contract (and equity) will determine the parties' rights with respect to that contract.

...Accordingly, principles of offer and acceptance, and the equitable principles which are also applicable in determining whether a contract has come into existence is also picked up by the Act.

Furthermore, the Court is conferred by s 90KA with the same powers, and power to grant the same remedies, as the High Court in its original jurisdiction in proceedings in connection with contracts or purported contracts. The High Court is conferred with jurisdiction...to grant all remedies whatsoever in respect of legal and equitable claims. Accordingly, this Court has the full armoury of legal and equitable remedies available to it in determining whether the financial agreement is enforceable. [footnote omitted]

Young J in *Senior & Anderson* [2010] FamCA 601 took a narrow view of s 90KA (at para 106):

The purpose and intent of s 90KA is primarily one of enforcement of the terms of the financial agreement. The validity of the agreement is to be determined by reference to the document itself, its compliance with s 90D (on the facts of this case) and its rectification to record [sic] with the common intention and purpose of the parties. Its validity is not to be determined by s 90KA.

On appeal, the Full Court in (2011) FLC 93-470 took a broader, and probably better, view. May J said (at para 34):

His Honour was correct in concluding that the purpose and intent of s 90KA is primarily one of enforcement, however, the section also applies to the general law to determine "the validity, enforceability and effect of contracts." To the extent that it is necessary s 90KA imports the common law into these provisions. It is undoubtedly correct that the validity of an agreement is to be determined by reference to the document itself. To be binding... the provisions of s 90G must be satisfied (albeit through s 90G (1A)).

The practical effect of s 90KA was also considered by the Full Court in *Kostres & Kostres* (2009) FLC 93-420. The Full Court also took a broad view and said (at para 128):

We accept that in determining whether the agreement is valid, enforceable or effective, the general law relating to contracts, as well as principles of equity, are to be applied. That must be done to give effect to the parties' intentions at the time of the making of the agreement, and in the context of the statute...

But how broad is it? Does s 90KA apply to s 90G? On this issue, the trial judge, Murphy J, concluded in *Fevia* (at para 272) that "estoppel cannot operate so as to preclude reliance by a party on s 90G". He said (at paras 273, 275-276):

The plain words of s 90KA point, in my view, to a distinction being drawn between (relevantly) s 90B and s 90G. Nowhere does s 90KA refer to any impact it may have on a financial agreement being 'binding' — the word specifically used in s 90G. The section refers to the question of whether a financial agreement is 'valid, enforceable or effective'...

In my view, the Parliament has, in s 90KA, made it plain that the principles of law and equity shall apply in determining whether, in a particular case, the first of the two prerequisites to the creation of specific statutory agreements is satisfied: namely that there is in fact a valid, effective and enforceable agreement and, thereafter, 'financial agreement'. Equally, the parliament has made it plain that principles of contract and equity are applicable in deciding if the second of the requirements for the creation of those statutory contracts (the 'statute of frauds-type' requirement that it be in writing) are met or can be relieved against.

But, once there is a valid, enforceable and effective form of statutory contract (ie a

'financial agreement') according to the statutory requirements — applied in accordance with the principles of contract and equity — the Act provides for a set of requirements whose purpose is not 'contractual' but, rather, establishing whether s 71A of the Act is invoked or not. If s 90KA was intended by the Parliament to play a role in that (separate) enquiry, s 90KA would have made reference to the question of an agreement being 'binding'.

He concluded that estoppel has no operation to s 90G whether by reference to s 90KA or otherwise by reference to the general law. However, estoppel is discussed in more detail later in this paper. It is possible that Murphy J's view may be challenged in the future.

CONSEQUENCES OF SETTING ASIDE

After a financial agreement is set aside, a court may, on an application by a person who was a party to the financial agreement, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that agreement and any other interested persons (s 90K(3) and 90UM(3)).

With respect to financial agreements under Pt VIII A, s 44(3B)(c)(ii) allows a further 12 months for maintenance or property proceedings to be instituted after a financial agreement is set aside or found to be invalid. Leave may be granted out of time under s 44(3)(d).

The provisions with respect to Pt VIII AB agreements are different. Under s 44(5) a property or spousal maintenance application with respect to a de facto relationship can only be made within two years after the end of the relationship. This is defined as "the standard application period". Unlike for married couples, there is no reference to the time running from the date on which a Pt VIII AB financial agreement is set aside. While s 90UM(6) enables a court which has set aside a Pt VIII AB financial agreement to make orders, there does not appear to be the automatic safety net of a further 12 months for an application to be made. It is unclear whether this means for Pt VIII AB:

1. that the application still needs to meet the standard s 44(5) requirement of the application being made within two years after separation; or
2. that the application cannot be made outside of the two years unless leave is granted under s 44(6); or
3. there is no time limit (an unlikely interpretation); or
4. the application ought to be made promptly.

Leave may be granted to a party to apply after the end of the application period. The wording of s 44(6) is similar to s 44(4) which applies to married couples.

Section 90UM(6) cannot give the court jurisdiction which it otherwise does not have. The circumstances of the parties may have changed or the requirements may never have been met. The threshold tests for making an order under s 90SM or s 90SF include:

1. Geographical requirements under s 90SK (for property) or s 90SD (for maintenance). These are different than for Pt VIII AB financial agreements. Under s 90K the court must be satisfied that either or both of the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application was made and that either or both parties were ordinarily resident in a participating jurisdiction during at least a third of the de facto relationship or that the applicant made substantial contributions or that the parties were ordinarily resident in a participating jurisdiction when the relationship broke down.

However, s 90UA is very specific that a Pt VIII AB financial agreement under s 90UB, 90UC or 90UD can only be made if the spouse parties are ordinarily resident in a participating jurisdiction when they make an agreement. If the agreement is set aside, the parties may not meet the geographic conditions for entering into a new agreement or for making a property or maintenance order.

2. The de facto relationship broke down after 1 March 2009 or the couple opted in under s 86A *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.
3. The gateway requirements of s 90SB. A court may make an order under s 90SE, 90SG or 90SM, or a declaration under s 90SL, in relation to a de facto relationship, only if the court

is satisfied that the de facto relationship was for a total period of at least two years, there is a child of the de facto relationship, or the applicant made substantial contributions and failure to make the order or declaration would result in serious injustice to the applicant, or the relationship is or was registered under a prescribed law of a state or territory.

The consequences of a Pt VIIIAB agreement being set aside are potentially more disastrous for one of the parties than for a Pt VIIIA agreement. If a Pt VIIIAB agreement is set aside, the court cannot make orders unless it has jurisdiction to do so. The fact that a financial agreement was made under Pt VIIIAB does not give the Court jurisdiction.

WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

The risk of inadvertently waiving legal professional privilege is high in applications to set aside financial agreements. Although this is a common law privilege, s 122 of the *Evidence Act* is also important. It is beyond the scope of this paper to expand on this topic, but be wary. It may be extremely difficult for a party to retain the benefit of legal professional privilege while also seeking to set aside a financial agreement. Useful cases include *Bell & Bell* [2009] FMCAfam 595, *Pascot & Pascot* [2010] FamCA 644 and *Macquarie Bank Limited v B* [2006] FamCA 1052.

FRAUD

Fraud arises in several contexts under s 90K. It arises in:

s 90K(1)(a) - the agreement was obtained by fraud (including non-disclosure of a material matter)

s 90K(1)(aa) - either party to the agreement entered into the agreement for the purpose, or for purposes that included, defending or defeating a creditor

s 90K(1)(b) - if there was a fraudulent misrepresentation the agreement is voidable in equity.

The s 79A cases are quite relevant so there is a large body of case law to draw upon. Sometimes, as in *Jeeves & Jeeves (No 3)* [2010] FamCA 488 there may be both an application to set aside orders under s 79A and a financial agreement under s 90K.

Adame & Adame

In *Adame & Adame* [2014] FCCA 42 one of the grounds on which the financial agreement was set aside was non-disclosure of material matters by the husband. He failed to disclose real estate in the United States and bank accounts. Jarrett J did not accept that the disclosure requirement extended to providing values of assets, but parties were generally entitled to satisfy themselves about the values of assets and financial resources if they chose to do so.

Jeeves & Jeeves

Jeeves & Jeeves (No 3) [2010] FamCA 488 involved applications to set aside orders under s 79A and a financial agreement under s 90K. Cronin J found there had not been a suppression of evidence on the High Court's test in *Taylor v Taylor* (1977) FLC 90-226:

..the giving by one side of evidence amounting to the wilful concealment of matters which it is the duty of the parties to put before the Court.

In the High Court, Gibbs J (as he then was) said that there was no reason to read "false" in s 79A as meaning "wilfully false". There had to be an element of deceit or irrationality about the action, but not necessarily capriciousness.

Cronin J held that for the purposes of both applications the wife had not established the necessary standard for deceit by the husband. There was no evidence of suppression on the part of the husband in the sense described in *Taylor*. The wife did not act on the husband's assertions. She did not believe the husband's information and did not therefore act upon it. There could therefore be no fraud, duress or unconscionable conduct on the part of the husband either within s 79A or s 90K. Although the words in each section was slightly different, Cronin J said "the underlying concept" was the same.

Cording & Oster

Cronin J also considered the issue in *Cording & Oster* [2010] FamCA 511 and suggested that the non-disclosure did not need to be intentional. He said (at para 60):

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.

Justice Brereton, in the paper referred to above, said that the third sentence of this paragraph seemed to contemplate equitable fraud, which was more appropriately addressed under s 90K(1)(b) or (e). He found it difficult to conceive that the first sentence could be correct. He considered that an inadvertent omission, or a negligent or innocent misrepresentation, is not fraud.

In *Hoult & Hoult* [2011] FamCA 103 the husband admitted that the schedules which were provided to the wife's solicitor, did not mention a boat. He said that the schedules of assets and liabilities were compiled by his accountants and that the focus was on the entities and assets totalling about \$30 million and that the omission of the boat was inadvertent. Murphy J (at paras 125 and 128) said:

But, as it seems to me, the section does not make material non-disclosure fraudulent per se. Fraud for the purposes of s 90K(1)(a) can, plainly, include material non-disclosure, but not every material non-disclosure is fraudulent ... A misrepresentation is, generally speaking, not constituted by silence or non-disclosure (material or otherwise)...

*To the extent that [the husband's] submissions, and his specific reliance upon the decision in *Blackmore & Webber*, constitute an argument that "innocent" or "negligent" material non-disclosure is, of itself, sufficient to invoke s 90K(1)(a), I reject the argument as incorrect.*

VOID, VOIDABLE OR UNENFORCEABLE

Sections 90K(1)(b) and 90UM(1)(e) incorporate all the principles of common law and equity which might render a contract "void, voidable or unenforceable" into the grounds to set aside agreements.

The three concepts are:

- *Void*. If an agreement is void it never effectively existed. Contracts may be void for uncertainty, incompleteness or, in very limited circumstances, mistake. In *Murphy & Murphy* [2009] FMCAfam 270 the certificate to the agreement was signed by a lawyer practising overseas. The agreement was declared to be void on that basis. Probably, rather than being void, the agreement was not binding as it did not meet the requirements of s 90G.
- *Voidable*. A voidable contract can be pronounced void by one of the parties or held to be void by a court. It is not void unless action is taken to void the contract. Grounds on which agreements may be voidable include misrepresentation, mistake, duress, undue influence or unconscionability. The innocent party may choose to rescind or affirm the agreement, which is valid unless and until it is rescinded.
- *Unenforceable*. Unenforceable means that the contract is valid, but cannot be enforced such as for public policy reasons or breach of contract.

The tension between the main objectives of contract law is highlighted by s 90K(1)(b). The objectives are:

- to find a valid contract and promote commercial certainty; and
- to protect parties who are at or are assumed to be at a disadvantage.

One party will often be relying on one principle and the other party on the other principle. As Murphy J in *Hoult & Hoult* [2011] FamCA 1023 said (at para 63):

First, s 90G's requirements must be seen against a crucial consideration. The legislature has decided that the essence of the regime created by Part VIIIA of the Act is that parties who are independently advised and receive appropriate advice should, in the absence of fraud, unconscionability or other vitiating factors, be perfectly free to bind themselves to an entirely unjust and inequitable agreement (in s 79 terms) that governs their future rights and operates as a bar to future property (and/or maintenance) proceedings. In short, if the relevant pre-requisites are met, and there is an absence of vitiating factors, the parties are perfectly free to make a "bad bargain".

The words of Lindley LJ in *Allcard v Skinner* (1887) 36 Ch D 145 (at pp 182-183) seem particularly relevant to the difficulties faced by the Family Law Courts:

Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects.

UNCERTAINTY AND INCOMPLETENESS

A contract may be held void for uncertainty or incompleteness if the intention of the parties cannot be determined objectively. A contract cannot be implemented if its terms are uncertain or incomplete. More specifically, these terms are defined as:

- *Uncertainty.* The agreement, or an essential term of it, is too vague or ambiguous for the court to determine the parties' rights and obligations. The court cannot enforce an agreement or an essential term which is not definite and clear. See *G Scammell & Nephew Ltd v HC & JC Ouston* (1941) AC 251 (at pp 268-269).
- *Incompleteness.* The agreement is incomplete because the parties failed to reach agreement on an essential term. Not everything necessary for the agreement to be implemented has been agreed.

The Full Court of the Family Court, consistently with the main objectives of contract law stated above, said in *Twigg & Twigg v Kung* (1994) FLC 92-456 (at p 80,716):

Courts will endeavour to avoid a construction which leads to invalidity, especially if the contract has in the meantime been acted upon... These cases demonstrate a tendency to uphold contracts despite a lack of clarity in the words employed by the parties.

Kostres & Kostres

Kostres & Kostres (2009) FLC 93-420 is a good illustration of both principles. The Full Court found that an agreement was void for uncertainty. The agreement was entered into two days before the marriage. At the time, both parties mistakenly believed that the husband was an undischarged bankrupt. They did not tell their lawyers this. The parties' belief about the husband's status led to them acquiring assets in the wife's name rather than in the parties' joint names. Both parties sought that words be "read into" clause 6 of the agreement. They argued that different words be inserted which resulted in different meanings.

The Full Court was not satisfied that it could read words into the agreement, saying (at paras 124, 129–131):

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 [footnotes omitted]...

While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned...

The differing arguments of the legal representatives in this case as to how the terms 'acquired', 'assets', 'joint funds' and 'from their own moneys' should be construed brings into sharp focus the ambiguities in those terms found in the drafting of clause 6 of the agreement.

We think it is particularly relevant that this agreement, which the parties entered into with the intention of dealing with their property and financial resources during their marriage and if it broke down, did not reflect the terms of the section (s 79) which it sought to bypass...

As the High Court reminded legal practitioners and the courts in *Stanford v Stanford* (2012) FLC 93-518, it is important to look at the wording of the Act. The wording of the Act was not reflected in the agreement that the parties had entered into in *Kostres*.

MISTAKE

A mistake occurs where one or both parties are under a misapprehension about something which forms the basis of their agreement. In equity a party will be granted relief because of a mistake if "it is unconscientious for a person to avail himself of the legal advantage which he has obtained" (*Taylor v Johnson* (1983) 151 CLR 422 at p 431). As contracts are upheld wherever possible, finding contracts voidable for mistake is more difficult at common law than in equity (*Solle v Butcher* (1950) 1 KB 671 at p 691; *Taylor v Johnson*).

There are three types of mistake:

1. *Common mistake*. Both parties made the same mistake as to something fundamental;
2. *Mutual mistake*. The parties are at cross-purposes and misunderstand what the other means. Neither party is aware of the other's mistake;
3. *Unilateral mistake*. Only one party is mistaken and the other party knows or ought to know of the other's mistake.

The time at which the mistake was made is important. The mistake must have affected the formation of the contract and not have occurred after the contract was made.

Kostres

In *Kostres & Kostres* [2008] FMCAfam 1124 the husband unsuccessfully applied for s 79 orders despite the existence of a s 90B financial agreement. One of the husband's arguments at trial was that both parties mistakenly believed that the husband was an undischarged bankrupt. Wilson FM rejected this argument, saying (at paras 37–38):

There was no mistake about the subject matter of the financial agreement. There was a mistake as to the bankrupt status of the husband. The wife did not deliberately set out to ensure that the husband laboured under his mistake, for her own benefit. Both parties laboured under the same mistaken belief. If anything, it was the husband who created the confusion, by failing to make any enquiry as to his bankrupt status, before signing the financial agreement, and before properties were purchased.

Further, the husband's evidence was that if he was aware of his true status as a discharged bankrupt he would still have signed the agreement in the same terms. His complaint is that he allowed subsequent purchases to be put into his wife's sole name because of his mistaken belief. In my view, that is not sufficient to render the agreement voidable or unenforceable. The wife did nothing to contribute to the husband's ignorance of his correct legal status. She did not unconscionably, as that term is properly understood.

The husband did not argue mutual mistake on appeal in *Kostres & Kostres* (2009) FLC 93-420.

Stoddard & Stoddard

In *Stoddard & Stoddard* [2007] FMCAfam 735 the husband argued that the agreement should be set aside because of mutual mistake. If, at the time of signing the agreement, both parties assumed that the property purchase would be completed, but it had already been terminated, they were operating under a mistake. However, even if there was a mistake, the court did not accept that such a mistake would vitiate the agreement. The terms of the agreement were clear and both parties knew what they were doing. The mistake affected them equally and did not affect the fundamental nature of the agreement between them.

Sullivan & Sullivan

Young J in *Sullivan & Sullivan* [2011] FamCA 752 found that there was a unilateral mistake on the part of the husband. The wife signed the agreement, which purported to be made under s 90B, prior to the marriage. She was unaware that the husband did not sign it until after the

marriage. Young J found that the mistake arose as a result of the husband's failure to accept the wife's offer (contained in the s 90B agreement she had signed) prior to the parties' marriage. He signed it after the marriage but he still thought it was a s 90B agreement. There was no common intention to enter into a s 90B or a s 90C agreement and therefore no common intention which could give rise to rectification as a remedy. The agreement was set aside.

MISREPRESENTATION

Misrepresentation is often an alternative to fraud as it is usually easier to establish.

A misrepresentation is an untrue statement of fact. More particularly, a misrepresentation is a positive, pre-contractual statement of fact made by one party to a contract which is false and has the effect of inducing the other party to enter into the contract. The statement does not need to be material to the contract but it is not sufficient that it is a "mere representation" or "puff" (*Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256). A fact is distinguishable from both an opinion and from a promise as to what will occur in the future.

The three types of misrepresentation are fraudulent, negligent and innocent.

A fraudulent misrepresentation must be:

- addressed to the party misled;
- made before or at the time of entering the contract;
- made knowing it to be false or with no belief in its truth;
- made with the intention of inducing the contract or had the effect of doing so.

The classic statement on fraudulent misrepresentation was made by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at p 374:

fraud is proved when it is shown that a false representation has been made:

(1) knowingly; or

(2) without belief in its truth; or

(3) recklessly, careless whether it be true or false.

... To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth.

For a negligent misrepresentation it must be established that:

- there is a duty of care in providing information or advice to the other party;
- the duty of care was breached by a negligent failure to ensure that the information or advice was true; and
- the other party suffered loss because of the breach of duty of care.

In *Hedley Byrne & Co Ltd v Heller and Partners* (1964) AC 465 the duty of care arose because of the "special relationship" between the person who made the statement and the person who acted on it. In *Esso Petroleum Co Ltd v Mardon* (1976) 1 QB 801 this duty was extended to precontractual statements.

If a misrepresentation is not made negligently nor fraudulently it is innocent. Where the representation has become a term of the contract the innocent party may be entitled to contractual damages. Alternatively, the innocent party may elect to rescind the contract.

Stoddard & Stoddard

In *Stoddard & Stoddard* [2007] FMCAfam 735 the wife withdrew funds from the mortgage without the husband's knowledge, thus increasing the debts to be borne by the husband and improving her net asset position. Altobelli FM found that there had been non-disclosure of a material matter amounting to fraud within s 90K(1)(a). In addition, he found that there had been a misrepresentation entitling the husband to have the contract voided, or set aside, under s 90K(1)(b). He set aside the agreement.

UNEQUAL BARGAINING POWER

The existence of unequal bargaining power may give rise to a ground on which to set aside the agreement such as duress, undue influence and unconscionability but it is not a ground in itself. The phrase "unequal bargaining power" is however, often used.

Lloyds Bank v Bundy

In *Lloyds Bank v Bundy* [1975] QB 326 a bank pressured an elderly father to mortgage his farm to cover the son's loans. When the bank took steps to sell up the farm, the father sought relief. The court had no difficulty finding that the principle of undue influence applied and the bank could not enforce against the father. However, Lord Denning MR in a minority judgment went further (at p 337):

through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to anyone who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.

Although the majority of the Court instead followed the orthodox view in *Allcard v Skinner* (1887) 36 Ch D 145, unequal bargaining power became a popular concept. Nine years later, Lord Scarman dampened the enthusiasm for a single principle in *National Westminster v Morgan* [1985] AC 686, a decision with which the rest of the Court agreed. Scarman J confirmed that the proper approach was set out by Cotton LJ in *Allcard v Skinner*, saying:

...I would wish to give a warning. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

This passage is still relevant in Australia over 125 years later although unequal bargaining power is not considered to be a ground in itself to set aside an agreement.

DURESS, UNDUE INFLUENCE AND UNCONSCIONABILITY

Duress, undue influence and unconscionable conduct have overlapping characteristics. They may arise under s 90K(1)(b) (and s 90UM(1)(e)). Unconscionability is also a specific ground for setting aside a financial or termination agreement under s 90K(1)(e) (and 90UM(1)(h)). The effect of the belated inclusion of s 90K(1)(e) is unclear. At the very least its inclusion ensures that unconscionability is considered as a possible ground for setting aside a financial or termination agreement. At most, statutory unconscionability overlaps but is distinct from the equitable principle of unconscionability which arises under s 90K(1)(b). This debate is not considered in this paper.

Equitable duress is a form of pressure. It causes a reasonable person to act in a particular way, usually to the benefit of the person applying the pressure. The pressure must be illegitimate. In Australia the will need not be totally overborne. Common law duress requires the compulsion of a person either by bodily restraint or through fear of bodily harm.

As establishing that the pressure was sufficient to constitute duress can be difficult, the equitable doctrines of undue influence and unconscionable conduct developed.

Amadio

The distinction between unconscionable conduct and undue influence was considered by the High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. Mason J said (at p 461):

In the latter [undue influence] the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

Deane J described the difference (at p 474) as:

Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

G & G

In *G and G* (2000) FLC 93-043 the husband appealed against a refusal not to enforce a pre-nuptial agreement [entered into prior to the commencement of Pt VIIIA]. The wife signed the agreement two days before the wedding. She was opposed to any agreement but wanted to formalise their 13-year (non-cohabiting) relationship. The husband would not marry without one. Nicholson CJ said at (p 87,676) that the trial judge "was entitled to take into account her findings as to the unilateral imposition by the husband of his will on the wife".

Hogan & Hogan

In *Hogan and Hogan* [2010] FMCAfam 1255, Neville FM struggled with judicial confusion and the absence of clear guidance in family law cases. He pointed out that many of the simplest and most useful definitions were in dissenting judgments such as *Lynch v DPP for Northern Ireland* [1975] AC 653 per Lord Simon of Glaisdale who said (at p 695) "that duress is not inconsistent with act and will, the will being deflected not destroyed" and of Lords Wilberforce and Simon of Glaisdale in *Barton v Armstrong* [1976] AC 104 at p 121:

In life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law. For this, the pressure must be one of a kind which the law does not regard as legitimate.

Barton v Armstrong involved a threat to murder.

Neville FM was surprised at the absence of jurisprudence in family law cases, saying (at para 27):

The Act requires that the ultimate result in property cases be "just and equitable.". Given this statutory requirement, it is somewhat curious, therefore, that Courts of equity, for more than a century, have set aside transactions induced by illegitimate pressure which falls short of common law duress, while courts exercising jurisdiction in family law proceedings, so it would appear, have not addressed or addressed sufficiently or thoroughly, the significant jurisprudence from courts of equity.

Blomley v Ryan

In the High Court decision of *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362, Fullagar J said (at para 30):

The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty, or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one part at a serious disadvantage vis-à-vis the other.

Kitto J, in *Blomley v Ryan*, said (at p 415, para 8) as to unconscionability:

This is a well known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

DURESS

The requirements of duress are:

- the pressure is used by, or on behalf of, one person in relation to a transaction;
- the pressure is illegitimate. The meaning of "illegitimate" is discussed further below;
- the pressure causes, or contributes to, the innocent party's consent to the transaction. The pressure amounts to compulsion of the will; and
- the consent is reasonable in the circumstances, i.e. there is no reasonable alternative but to submit.

A common scenario in financial agreements is where the court must determine whether one party was under duress when executing a financial agreement close to the wedding date. The law in Australia has not progressed, if it ever will, to a position where there is a "magic" date by which an agreement can be safely signed prior to a marriage without there being a risk of it being set aside for duress. Every case is decided on its unique facts. How long before the wedding were the invitations sent out? What were the overall circumstances such as immigration status, pregnancy, financial and family pressures? More complex agreements with larger pools may require more time than simple agreements but, on the other hand, the education of the weaker party may be more important than the size of the pool.

Crescendo Management Pty Ltd v Westpac

An often quoted case which supports the broadening of duress to economic duress and unconscionable (rather than illegitimate) pressure is *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40. McHugh J said (at p46):

In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.

Both undue influence and duress are concerned with the quality of consent of the weaker party. Duress involves an unwillingness to meet a demand. Undue influence requires the weaker party to be influenced into willing acceptance.

Blackmore & Webber

In *Blackmore & Webber* [2009] FMCAfam 154, Bender FM set aside a financial agreement as she found that the pressure placed on the wife by the husband to sign the agreement was "illegitimate" in accordance with the test in *Crescendo Management Pty Ltd*. The husband produced the agreement for the wife's signature less than five days before the marriage and threatened her that the marriage would not take place unless she signed it. At the time, the wife was pregnant, about to return to Thailand in circumstances where her family expected her to return as a married woman, and she was faced with the risk of not being able to return to Australia as her visa was about to expire.

Moreno & Moreno

In *Moreno & Moreno* [2009] FMCAfam 1109, Demack FM set aside the agreement on the grounds of both duress and unconscionable conduct, saying (at paras 38, 43):

I accept that the wife feared for her visa status if her marriage did not continue and that issue was a motivator for her in signing the agreement. She did not want to return to Russia as a failure, with a failed marriage ...

I am satisfied that the wife left the marriage on those many occasions because her husband's behaviour to her was intolerable arising from his aggression, violence and a general lack of respect. I am satisfied that she understood that the agreement was unfavourable to her but that she considered she had no present option but to sign as the threat of leaving Australia loomed heavily. Her past experience was that the husband would continue to behave aggressively and that if she left him he would

likely advise the authorities and her visa would be cancelled, forcing her to return to Russia.

Tsarouhi & Tsarouhi

In *Tsarouhi and Tsarouhi* [2009] FMCAfam 126, Riley FM set aside a financial agreement. She found that the wife had been under duress and the husband had taken unconscionable advantage of the wife's special disadvantage by threatening to refer her to the police and have her charged. This was similar to *Kaufman v Gerson* discussed below. The wife had taken \$21,480 from the parties' joint home loan account by forging the husband's signature. If these funds were notionally added back to the pool and treated as received by her, the financial agreement resulted in the wife receiving 21% of a pool of \$311,500 after 23 years of marriage. Two children aged 10 and 17 lived with the husband and the 22-year-old lived with the wife. Riley FM found that the wife signed the agreement based on a desire to prevent prosecution. Riley FM applied the rule stated by Porter J in *Mutual Finance v John Whetton & Sons Ltd* [1937] 2 KB 389 (at p 395):

Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking was given owing to a desire to prevent prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place ...

Parkes & Parkes

Parkes & Parkes [2014] FCCA 102 is a good example of an argument about "ink on the wedding dress". The wife said that the husband first raised the issue of a pre-nuptial agreement three days before the wedding. The husband said if she did not sign the agreement that the wedding was off.

Phipps J found that the wife's consent was not independent and voluntary because it was overborne and she was therefore subject to duress and undue influence, not distinguishing between the two concepts. He also found that that the requirements of unconscionable conduct were satisfied. The special circumstances arose from the particular situation. He said (at paras 67-68):

... the wife had been in a relationship with the husband for 6 years. She had been engaged to be married for 11 months and was to be married in three days. All the arrangements were made, all the guests had been invited, and the wedding reception had been paid for by the wife's parents. The wife is then told by the husband that if she does not sign the prenuptial agreement the wedding is off. The wife was in the position of "special disadvantage". If she did not sign the prenuptial agreement not only was the wedding cancelled but the likely result of such a traumatic event would be that the wife's relationship with the husband would be over. This after six years and an 11 month engagement.

The wife says she considered that she had no choice. She was clearly in a position of special disadvantage and the husband knew so. The prenuptial agreement was not to the wife's advantage. It gave her no rights at all in the future to any of the husband's property. She knew that it was to her disadvantage because Mr C told her so. Nevertheless, she signed it because she considered she had no choice.

Omar & Bilal

In *Omar and Bilal* [2011] FMCAfam 1430 an agreement entered into by the parties during the marriage was set aside as the Federal Magistrate was not satisfied that the wife had been properly advised. However, it is also a good illustration of the concept of unequal bargaining power. The wife had left school at age seven and was illiterate in her native language, Arabic, which she spoke with a Lebanese accent. Her solicitor spoke Arabic with an Egyptian accent. The wife said she had difficulty understanding her solicitor. The Federal Magistrate found this to be unsurprising given her limited education. Her solicitor referred her to an interpreter to translate and explain the agreement.

Hay & Hay

In *Hay & Hay* [2014] FCCA 775 Baker J found that there was not duress by the wife. Whilst the wife conceded that her actions placed the husband in a difficult situation Baker J was not

persuaded that the wife placed illegitimate pressure on him. For example, she withdrew funds from the joint account but only after he withdrew funds. She was convinced that he might withdraw more. She returned the funds after he signed a joint authority to the bank.

Kostres & Kostres

Kostres & Kostres [2008] FMCAfam 1124 was potentially an “ink on the tuxedo” case. The agreement was signed by the parties two days before the wedding but this was not a ground on which the husband sought to set aside the agreement. On appeal, the Full Court (reported at (2009) FLC 93-420) found the agreement was void for uncertainty.

Vance & Vance

In *Vance & Vance* [2012] FMCAfam 599, Baumann FM said that the time available between the purchase of the ring and the date of marriage was short, being only 3 months, but the parties were a mature aged couple who shared a similar faith and both were under some pressure because of the short time available before the agreed wedding date.

He found that the husband did not say words to the effect “If you don’t sign there will be no wedding” and it was unclear what the husband’s position would have been if the wife decided not to sign the agreement. The wife was found to have signed the agreement because of her strong wish to marry, not because of alleged pressure by the husband. The wife unsuccessfully argued unconscionable conduct by the husband and that he exerted pressure and duress on her.

Wallace & Stelzer

Benjamin J did not accept in *Wallace & Stelzer* [2011] FamCA 54 that the wife’s representations about children and love were, as the husband argued, representations which could amount to fraud, duress, undue influence or unconscionable conduct. The husband, who was the financially stronger party, did not want to be bound by the agreement. Benjamin J found that:

- the husband instigated the discussions about a financial agreement;
- the amount to be paid to the wife was the amount that the husband first offered;
- the agreement was discussed over at least 6 months including 2 months of arm’s length negotiations;
- the husband was fully aware of the terms;
- the husband received advice in accordance with s 90G;
- the wedding was small and, on the husband’s evidence, the date could have been changed;
- the husband was capable of independent thought. Although the agreement was signed shortly before the wedding, it was not signed in an atmosphere of crisis or threat. He was not so infatuated by the wife that he was emotionally or pathologically dependent upon her;
- the husband had the ability to form a judgment that the agreement was in his best interests;
- the husband was not at any special disadvantage and was trying to protect his own financial position;
- the husband indicated to the wife that he would not marry her unless she signed an agreement;
- the parties had been in a de facto relationship for over seven years prior to the date of the agreement and their marriage. It was not an “ink on the tuxedo” agreement.

Benjamin J found (at para 169) that at the time the agreement was executed its terms and provisions were well known to the husband and in his conscious thought. He believed he was bound by it. After separation he was advised that the certificate attached to the agreement was incorrect in form and he decided to challenge the agreement although previously he had accepted that he was bound by it. His Honour found that the agreement was binding.

On appeal to the Full Court in (2013) FLC 93-566 the husband pursued arguments related to the transitional provisions of the 2009 amendments to the FLA and fraud or unconscionable conduct. His appeal was dismissed. Leave to appeal to the High Court was refused.

Jacobs & Vale

In *Jacobs & Vale* [2008] FMCAfam 641, the husband sought to set aside a financial agreement made five days before the marriage on the grounds that the wife's conduct:

- leading to the making of the financial agreement was unconscionable under s 90K(1)(e) and in equity under s 90K(1)(b).
- in denying the husband an interest in the property beyond that in the financial agreement would lead to her being unjustly enriched from his contributions.

The husband alleged that he signed the agreement in a 30-minute conference with a lawyer without having seen the agreement previously. He also said that it was not contemplated by the agreement that the husband would supervise construction of the home and give up his full-time employment as he did. The parties disagreed about whether the wife refused to marry without the agreement, although the wife conceded that she told the husband that without the agreement, her parents would not provide them with any financial assistance.

The wife sought summary dismissal of the husband's application or, in the alternative, an order for security for her costs of \$30,000. Jarrett FM refused the application for summary dismissal and did not need to decide the issue of unconscionable conduct.

Must the pressure be illegitimate?

Justice Brereton, in the paper referred to above, said that *Moreno* and *Tsarouhi* were better seen as cases of undue influence rather than duress as although there was a threat, it was not unlawful. The difficulty for legal practitioners is that duress has been held to apply where the pressure was not illegitimate in its strict sense under the *Crescendo Management* test, and unconscionable pressure has been considered to be sufficient.

There is a debate about the existence of "lawful act duress" which is beyond the scope of this paper. For example, in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASC 36 (although this aspect was not considered by the High Court on appeal), McLure P (with whom Newnes JA agreed) gave a broad interpretation to "illegitimate" (at para 25):

If the pressure involved an actual or threatened unlawful act, it is prima facie illegitimate. If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports.

A threat may be lawful, but if it is backed by an unlawful demand it may be duress. A threat to report a person's criminal activity to the police amounted to duress as a payment was demanded to avoid the report being made. This was found to be blackmail and therefore there was duress in *Kaufman v Gerson* [1904] KB 591. Economic duress covers, for example, a threat to refuse to pay money to which the other party is legally entitled.

UNDUE INFLUENCE

Pressure which is more subtle than duress may be undue influence. Where a presumption of undue influence arises from a particular relationship or circumstances, the onus falls on the stronger party to rebut the presumption.

A person unduly influences another to enter into a contract if they make "an unconscientious use of any special capacity or opportunity that may exist or arise affecting the alienor's will or freedom of judgment" (*Johnson v Buttress* (1936) 56 CLR 113 at p 134 per Dixon J).

Undue influence requires:

- the improper use of the superior position of one person over another;
- a benefit accruing to the stronger party or a third party;
- the acts of the weaker party are not completely free and voluntary;
- transactions which are not, simply, with the benefit of hindsight, unhappy, undesired, unfortunate, imprudent or foolish;
- transactions which are not merely harsh or unfair, or based on inadequate consideration;
- influence which is "undue". Influence is not always "undue". Influence may be used properly, wisely, helpfully and to the benefit and advantage of the person receiving the

advice or subject to the influence.

There may be actual undue influence, presumption of undue influence because of the legal relationship (such as a parent and child, spiritual advisor and follower or trustee and beneficiary), or a presumed undue influence which may involve a relationship where one party is dominant.

The threat need not be the sole reason for agreeing to the contract. It need only "contribute" to the decision to proceed with the transaction. Jacobs JA indicated in *Barton v Armstrong* (1973) 2 NSWLR 598 (at p 610) that proof of causation in undue influence may be stricter than for duress. This issue remains unclear.

In *Williams v Bayley* (1866) LR 1 HL 200, a son forged his father's signature. The father agreed to charge his colliery business for the amounts advanced by the bank to his son. Lord Cranworth LC found that he did so because he believed that his son would probably be prosecuted for forgery and transported for life. Lord Westbury concluded that the father was not a free and voluntary agent. It was relevant that he was without independent advice.

In *Cameron and Cameron* (1988) FLC 91-946 a wife sought revocation of the approval of a s 87 maintenance agreement. One of her arguments was that the agreement was void as unfair pressure was placed on her by her husband using the children of the marriage as a weapon. Kay J rejected this argument. He said (at p 76-843):

the undue pressure the wife felt came from living in a house with a man she did not want to live with, the threat of having her children taken away, and the threat of a messy divorce. All these things might be true, but there is no evidence that the husband took unfair advantage of them.

Saintclair & Saintclair

Ryan J in *Saintclair & Saintclair* [2013] FamCA 491 found an agreement was voidable under s 90G(1)(b) for undue influence and unconscionable conduct. The agreement was signed during the marriage at a time when the wife was suffering from post-natal depression, she had credit card debts of over \$100,000 (which the husband paid on execution of the agreement), there had been incidents of physical violence, the wife underwent a significant surgical procedure approximately 4 weeks before the agreement was signed and she was only released from hospital a few days before the round table conference. The agreement advantaged the husband and disadvantaged the wife.

Ryan J found that the wife was emotionally vulnerable and, having undergone major surgery, she was also physically stressed, more vulnerable and more dependant upon the husband. This vulnerability was not neutralised by her having legal advice. There was no evidence that her solicitor was aware of the wife's full circumstances. The wife was very worried about the future of her marriage and the future for herself and the children if she refused to sign a financial agreement.

Even though the wife was able to negotiate better terms than the husband originally proposed, Justice Ryan was strongly satisfied that a relationship of undue influence existed and that this was why the wife signed the financial agreement.

Ryan J also found the agreement was voidable for unconscionable conduct and set it aside.

UNCONSCIONABILITY

Unconscionability is a ground for setting aside a financial agreement which arises under both s 90K(1)(b) and (e) and both s 90UM(1)(e) and (h).

A person acts unconscionably if the person knows, or ought to know, of the existence of the disabling condition or circumstance, and its effect on the innocent party, and takes advantage of that disabling condition or circumstance.

Mason J said (at p 461):

In...[undue influence] the will of the innocent party is not independent and voluntary because it is overborne. In [unconscionable conduct] the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

Deane J described the difference (at p 474) as:

Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

Amadio etc

In the leading case of *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447, Deane J held (at pp 474–5) that the requirements of unconscionable conduct are:

- “a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them”;
- “that the disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ that he procure, or accept the weaker party’s assent to the impugned transaction in the circumstances”;
- usually, but not necessarily, there is inadequate consideration moving from the stronger party; and
- once “such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable”.

The situations which may constitute a special disadvantage or disability include poverty, sickness, age, sex, infirmity of body or mind, drunkenness and illiteracy or lack of education.

Special disadvantage or disability has traditionally been important to a finding of unconscionable conduct, although since *Bridgewater v Leahy* (1998) 194 CLR 457, it may not be essential or the definition of what constitutes special disability may have been expanded. Mason J in *Amadio* said (at p 461) that unconscionable conduct usually refers to a party making:

unconscientious use of his superior position or bargaining power to the detriment of the party who suffers from some special disability or is placed in some special situation of disadvantage.

Kitto J, in *Blomley v Ryan* (1956) 99 CLR 362 (at p 415), described the doctrine as:

a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

In *Louth v Diprose* (1992) 175 CLR 621 the High Court upheld the trial Judge’s finding that a male, although a solicitor, was under a special disadvantage or disability dealing with a woman with whom he was infatuated. His emotional dependence was a special disability. Deane J said (at p 638):

That special disability arose not merely from the respondent’s infatuation. It extended to the extraordinary vulnerability of the respondent in the false ‘atmosphere of crisis’ in which he believed that the woman with whom he was ‘completely in love’ and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of a house. The appellant was aware of that special disability. Indeed, to a significant extent, she had deliberately created it. She manipulated it to her advantage to influence the respondent to make the gift of the money to purchase the house.

There has been much criticism of this case and although it is often quoted from, and sought to be relied on, it is rarely followed. The husband was unsuccessful in relying on a similar argument in *Wallace & Stelzer* [2011] FamCA 54.

The difficulty in applying the principle is well illustrated by *Bridgewater v Leahy* the High Court, in a 3:2 judgment, found unconscionability where the sale of land by an uncle to his nephew was improvident, he did not have the benefit of independent legal advice, he was 84 years old, had a “tendency ... to fall in with the wishes” of his nephew and had good and bad days as his condition waxed and waned. The minority, in a strong dissent, upheld the trial judge’s finding that there

was no special disability. The transaction gave effect to the uncle's long standing and firmly held wishes to prevent the property being broken up after his death.

Knowledge of the special disadvantage is important e.g. *Kakaras v Crown Melbourne Ltd* (2013) 250 CLR 392.

Tsarouhi & Tsarouhi

Riley FM in *Tsarouhi and Tsarouhi* [2009] FMCAfam 126 found that the wife entered into the agreement under duress and it should be set aside, but also found that it should be set aside for unconscionability. She said (at para 50):

I consider that the wife's fear of prosecution, combined with her limited education, caused her to be at a special disadvantage vis-à-vis the husband.

Riley FM found that the husband took unconscionable advantage of the wife's special disadvantage.

Mardones & Mardones

In *Mardones & Mardones* [2012] FMCAfam 323, Buchardt FM set aside a financial agreement on the ground of unconscionable conduct by the husband. He found (at paras 80, 83–84):

The financial agreement was generally to the wife's disadvantage ...

I have no doubt that the husband nagged and bullied the wife remorselessly to seek to achieve her signature to the financial agreement which he well-knew was greatly to his advantage. As he would have it, this was the price she had to pay for her affair. This outcome speaks very heavily against the proposition the husband advances, namely that the wife wore the trousers at all times in the relationship. While she is plainly a forceful woman, and one who wants her own way, the husband was by no means devoid of resources and influence.

I find that his conduct to the wife would have been extremely unpleasant and unremitting in the period leading up to her finally signing the document.. The delay from...when the advice had been given not to sign it and the wife apparently rejecting such advice suggests, as indeed she asserts, that she held out for a long time against unremitting pressure. In the ultimate, her will was overborne.

Baumann FM concluded (at para 97):

Likewise, the wife's will was overborne because although she wanted a divorce, she was prevailed upon to write the code of conduct document. That document was not one she would have wished to write or sign. Although of course it did enable her, on its face, to continue her affair, it has about it overall a demeaning and offensive quality and I have no doubt it came, in the main part, from the husband.

Adame & Adame

In *Adame & Adame* [2014] FCCA 42 the wife finally signed a financial agreement after seeing a third lawyer. Two previous lawyers had advised her not to sign it. Jarrett J found that the third lawyer did not properly advise her but the wife understood what she was doing. The wife was found to be in a position of special disadvantage because the husband knew the real facts about his assets and concealed them from her. Moreover, he knew she was unwilling to sign, but insisted upon her doing so and organised lawyers for her to see until one was willing to sign the certificate of independent legal advice.

The husband created a false sense of necessity by reason of his assertions that execution of the agreement was required to properly protect the family home from creditors. The wife's evidence was that these matters weighed upon her until she simply "gave up". This evidence was accepted by the trial Judge. Jarrett J concluded (at para 147):

I find that Mr Adame's conduct in all the circumstances amounted to unconscionable conduct and that the pressure that he brought to bear on her to sign the financial agreement was in that sense illegitimate.

Hoult & Hoult

Murphy J in *Hoult & Hoult* [2011] Fam CA 1023 found that the wife was at a special disadvantage but there was not unconscionable conduct by the husband. He said (at para 158):

It is not sufficient, in attempting to prove that a bargain is unconscionable, that the parties had unequal bargaining power and nor is relief available where the circumstances can be described as indicative of mere imprudence. That said, if it can be said that a bargain is plainly and manifestly unjust and inequitable (in a s 79 sense) that may be relevant to a consideration of whether it is unconscientious for a party to rely upon the agreement. I make no such finding here.

Murphy J was satisfied that the wife was a "weaker party" and the husband a "stronger party". Relevant factors and circumstances included:

- The intimate relationship of the parties as partners and soon to be marriage partners;
- The economic dependence of the wife upon the husband for her and her daughters' futures;
- The wife's lack of business acumen and commercial knowledge generally and the husband's financial affairs specifically;
- The disparity in the parties' knowledge as to commercial and business matters;
- The fact that English was not the wife's first language;
- The husband had accountants well familiar with his business and asset position acting for him and the wife did not;
- The wife had a very short time in which to consider an agreement which purported to remove significant rights;
- A wedding was arranged in an overseas country and was to take place within nine days of the wife receiving the agreement in its final (and purportedly binding) form and she was to leave Australia the day after;
- The wife felt under very considerable pressure to sign the agreement as a result.

There was a limited time for the wife to ruminate upon the terms of the agreement in its final form. Those matters rendered the wife in a position of "special disadvantage" and the husband knew, or plainly ought to have known, of that special disadvantage.

However, Murphy J did not find that the husband took advantage of the wife's special disadvantage.

BREACH

Default in the performance of obligations in a financial agreement may mean that the innocent party can terminate the contract for breach. The two kinds of breach are:

- Actual breach occurs where one party either:
 - refuses to or cannot perform acts which are due to be performed; or
 - does not exactly perform the acts required under the contract.
- Anticipatory breach occurs where, before the time when performance is due either:
 - one party states that the major obligations will not be performed; or
 - one party acts in a way which precludes the possibility of major obligations being performed.

Breach of an implied term was found to have occurred in *Bryson & Bryson* [2012] FMCAfam 197 which is discussed below.

WAIVER, ELECTION, LACHES AND ESTOPPEL

A contract may be unenforceable due to the operation of waiver, election, laches or estoppel. These concepts may arise under s 90K(1)(b) and 90UM(1)(e) or 90KA and 90UN. They are more likely to be argued under s 90KA and 90UN in answer to an enforcement application.

1. *Waiver* — Where the contract has not been varied but one party does not insist on their strict legal rights. Writing or consideration are not required. A waiver may be withdrawn upon reasonable notice. There is no certain definition of waiver (*Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570).
2. *Election* — Affirming a contract after a serious breach results in the loss of the right to terminate. The "electing" must be by unequivocal words or conduct by a party with full knowledge of the facts.
3. *Laches* — Where a party loses the right to insist on performance of the contract or on

damages for non-performance due to unreasonable delay or negligence. It is an equitable defence rather than the basis of a claim. By delaying the institution of proceedings the party has either acquiesced in the conduct of the party at fault or caused the party at fault to alter position relying reasonably on the other party's acceptance of the status quo.

4. *Acquiescence* — Involves delay or refraining from proceedings for a sufficient time that those rights have been abandoned.
5. *Estoppel* — The requirements of estoppel are:
 - An unequivocal statement or assurance (although it can be implied) that the innocent party will not insist on their strict legal rights to terminate for the existing breach.
 - Actual reliance by the party in default on the statement or assurance.
 - An element of detriment. The defaulting party, by acting in reliance on the statement or assurance, must be in a worse position than if the statement or assurance had not been made.

The distinction between these concepts can be very difficult. It may be possible and advisable to plead some in the alternative. The recent and useful High Court case of *Sidhu & Van Dyke* [2014] HCA 19 dealt with estoppel and the principle of reliance.

The distinction between laches and acquiescence was discussed by Fogarty J in *Weiss v Barker Gosling* (1993) FLC 92-399 in the context of costs agreements. He pointed out that the doctrine of laches overlaps with other doctrines of equitable relief such as equitable release implied by conduct, equitable waiver and acquiescence. He referred favourably (at p 80,100) to *Allcard v Skinner* (1887) 36 Ch D 145 where the plaintiff made generous gifts to an Anglican convent whilst under the influence of her religious adviser. Although the gifts were procured by undue influence, a defence of laches was successful. More than six years had elapsed since the plaintiff left the sisterhood and she commenced proceedings.

In *Fevia & Carmel-Fevia* (2009) FLC 93-411 Murphy J, considered and rejected an estoppel argument by the husband. Murphy's views are discussed above regarding s 90KA.

Woodcock v Woodcock

In *Woodcock v Woodcock* (1997) FLC 92-739 the parties intended to formalise their agreement with consent orders. They did not do so but acted on the informal agreement. An estoppel defence was raised to an application for a property settlement and spousal maintenance.

The Full Court in *Woodcock* quoted at length from *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387. Brennan J said in *Waltons Stores* (at p 413):

A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to.

See also *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ (p 413) and Deane J (pp 444-5).

In *Woodcock* the Full Court concluded (at p 83,968) that:

it is untenable that an agreement, whether oral or in writing executory or executed, should have a more binding effect than a written agreement which is registered or remains unapproved pursuant to the provisions of the Family Law Act.

Ruane & Bachman-Ruane

Cronin J in *Ruane & Bachman-Ruane* [2009] FamCA 1101 which considered a financial agreement, followed *Woodcock*, a s 79A case. He considered that the application of estoppel to financial agreements was a vexed question saying (at paras 54-55):

In contract law, principles of estoppel arise in relation to the creation of rights where non-contractual promises and representations are made. Those matters are unlikely to arise in an agreement under Pt VIIIA because there needs to be a written agreement in the first place. Representations as to what the parties were offering and intending are also catered for in Pt VIIIA because of s 90K. That provision presupposes at least an agreement which can then be set aside on all of the bases well-known in contract law such as mistake, misrepresentation, deceptive conduct, duress, undue influence and unconscionability.

Estoppel is a concept known to the law and s 90KA provides that equity principles are to be applied in determining the enforceability of the agreement. Whether estoppel principles can override the statutory requirements in Pt VIIIA is a vexed question. In this case, if there is a failure to strictly comply with a statutory requirement, does estoppel apply to preclude the party asserting the deficiency thereby abandoning the private arrangement? Does s 90KA extend to the principle of rectification so that the deficiency can be rectified? The principle of strict compliance with the statutory provisions does not sit comfortably with the equitable principle that parties to a contract cannot avoid their contractual obligations by claiming they entered the contract under the influence of a mistake. How much more so should they be able to avoid their contractual obligations only because of a statutory condition precedent particularly one which is not been completed, albeit not known to the parties at that time?

Simply, Cronin J said that if estoppel cannot oust the jurisdiction with respect to Pt VIII, then it cannot do so with respect to Pt VIIIA.

Ruane was decided when the 2009 Amendments had not yet passed through Parliament. Strict compliance with s 90G(1) in accordance with *Black & Black* (2008) FLC 93-357 was still required. The case may be decided differently if heard now. Also, it was decided by the Full Court in *Bevan & Bevan* (2014) FLC 93-572 that the wife, in opposing the husband's s 79 application, was able to rely on the husband's representations made 18 years previously that she be able to keep all the property in Australia. The husband signed a power of attorney to facilitate her doing this. These were no s 79 orders and the husband issued proceedings shortly prior to the expiration of the 12 month period after their divorce was final. The Full Court relied on *Stanford v Stanford* (2012) FLC 93-518 rather than a finding of estoppel in dismissing the husband's claim but the distinction is not completely clear.

Cronin J considered that estoppel arguments under Pt VIIIA were unlikely for other reasons, saying (at paras 57-58):

...issues of estoppel can arise in contract cases particularly in circumstances where there are non-contractual promises and representations. However, in most conceivable situations of parties signing a financial agreement for the purposes of Pt VIIIA, those situations will not arise. Even if they did, the provisions of s 90K would then arise.

In this case, there is one document and it was signed by both parties. It represents not so much evidence of their respective obligations but rather the obligations themselves in the shadow of an endeavour to exclude the jurisdiction of the Court.

He concluded (at paras 90-94):

... Both parties referred to Kok Hoong v Leong Cheong Kweng Mines Limited [1964] 1 All ER 300. This was a case about the question of a statute overriding or precluding reliance upon principles of estoppel...

Applying the direct test of whether the Family Law Act confronts estoppel, the question depends on whether Pt VIIIA is viewed as intended to permit parties to privately contract amongst themselves to finalise their financial relationships with certainty or rather, to specifically oust the jurisdiction of the courts in particular circumstances.

Applying the direct test referred to, the provisions of Pt VIIIA do represent a social policy in which the law has required the court to tread carefully and requires strict compliance with its provisions. Nothing that was urged upon me seems to have altered the position outlined by the Full Court in Woodcock...However, in contemplating the case stated in Woodcock, the Full Court said that the doctrine did not oust the jurisdiction of the court to make orders under Pt VIII of the Act but noted that equitable concepts might operate when determining the various statutory components of Pt VIII. Having contemplated the High Court's decision in Waltons Stores (supra), the decision in Woodcock is a binding authority.

Thus, it may be that in the exercise of the jurisdiction created by Pt VIII of the Act, a court would take into account that which the parties agreed in October 2008. However, for the purposes of Pt VIIIA, estoppel as a principle cannot apply notwithstanding s 90KA. That is because in respect of Pt VIII, the Full Court said that estoppel could not oust the jurisdiction of the court and the same principle must apply in respect of Pt VIIIA as it also is a statutory provision which if strictly followed, would oust the jurisdiction of the court.

Accordingly, the wife's argument that estoppel should deny the husband the right to rely upon the statutory imperfections of the agreement, cannot succeed.

Murphy J, in *Fevia* took a similar approach. See earlier in this paper in relation to s 90KA.

Ryan & Joyce

In *Ryan & Joyce* [2011] FMCAfam 225 Neville FM referred to criticism of *Waltons Stores* and preferred to rely on Dixon J's judgment in *Grundt v Great Boulder Proprietary Gold Mines Ltd* [1937] HCA 58, (1938) 59 CLR 641 (as he earlier did in *Vickery & Drew*), referred to by Brennan J in *Waltons Stores*. Dixon J said (at p 674–6):

That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting.

It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.

... because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so.

His Honour found that it was unnecessary to make a formal finding as to the actual knowledge of either Mr Ryan or his then solicitor that the agreement was invalid or unenforceable when Mr Ryan signed it although he considered it to be curious that a solicitor would execute a certificate to an agreement which that solicitor allegedly considered to be invalid or otherwise ineffectual.

Neville FM found the elements of estoppel described by Dixon J in *Grundt* were sufficiently established. It would be unjust and inequitable for the husband to avoid his responsibilities under the agreement. Neville FM made orders to rectify the agreement by substituting s 90C for s 90B wherever it appeared, declared the agreement to be valid and enforceable, and restrained the husband from continuing his s 79 proceedings.

INTENTION TO RESCIND

An intention to rescind an agreement can be implied from conduct. The cases were mostly decided with respect to s 79A prior to Pt VIIIA commencing. If the parties do not abide by the agreement, the court may refuse to enforce it. In *Sykes & Sykes* (1979) FLC 90-652, the Family Court considered that the parties themselves had intended to revoke a pre-nuptial agreement because they acted contrary to its terms. In *Drew & Drew* (1985) FLC 91-601, the parties reconciled and the court found that their conduct amounted to an implied agreement to rescind the agreement.

There is authority that s 87 agreements are not rescinded by reconciliation (*Borzak & Borzak* (1979) FLC 90-688; *Banhidy & Banhidy* (1983) FLC 91-302). By contrast, in *Turner & Turner* (1987) FLC 91-820 the parties agreed to substantially change a number of terms of the s 87 agreement. The court found that the parties did not consider themselves bound by the agreement.

A court looking at whether or not an intention to rescind a financial agreement can be implied from conduct will probably examine the case law on s 79A. Section 79A(1A) which allows parties to consent to the setting aside of s 79 orders has been interpreted to allow an intention to set aside s 79 orders to be implied. There is no similar provision with respect to financial agreements. Termination of a financial agreement by consent must be in accordance with s 90J.

In *Sommerville & Sommerville* (2000) FLC 93-042, Nicholson CJ set aside the orders because the parties by their conduct had impliedly consented to setting them aside. He relied primarily on the Full Court in *McCabe & McCabe* (1995) FLC 92-634. He said (at paras 116-7):

The principles to be applied in considering this question are conveniently set out in the decision of the Full Court in McCabe and McCabe... That was a case where the parties married in 1982 and separated in early 1989. In July 1989 consent property orders were made, the effect of which the husband would transfer his interest in the former matrimonial home to the wife and the wife would pay to the husband \$50,000. Unlike the present case, on the 9th July 1989 the parties reconciled but did not carry out the orders in question. They notified the Court by letter of their reconciliation. They finally separated in September 1993

by which time they had intermingled their financial affairs. The Full Court commented at 82,369:

The recent decision of the Full Court in Bourke v Bourke No. 2 (1994) FLC 92-479 establishes that the "consent" referred to in that provision is not confined to a consent given at the time of the hearing of the application in question; the consent may be established by evidence of the prior consent of the parties which remains binding upon them.

The Full Court continued subsequently:

In cases of this nature conclusions about intention which should be attributed to the parties will depend upon the particular circumstances of each case. That material would not necessarily be confined to the initial decision to reconcile or, as in this case, to write to the Court. Their intention may crystallize into a more precise form as time progresses and as the parties' reconciliation continues, and they conduct their lives together, including their financial affairs, so that it becomes inconsistent with any other conclusion.

There is no reason to doubt that parties can expressly or by their conduct consent to the discharge of prior orders, so as to enable the Court to make a fresh property order. Indeed, this would be a more likely conclusion in most cases of this type. The conclusion contended for by Mr Sofronoff would produce a situation where the previous orders were unenforceable but neither party could seek new orders (other than orders under s 78) and would be inhibited from taking proceedings in another court because such proceedings would inevitably constitute a "matrimonial cause" (at 82,369-70).

The original orders in *Sommerville* were made in 1991, the parties reconciled by June 1992 and finally separated in October 1996. During the period in which the parties were reconciled their asset positions changed completely. Both parties at separate times sold their respective homes. They jointly bought vacant land on which they built a new home. The wife's business suffered a significant downturn. She transferred her interest in the new home to the husband to protect it from her creditors. The husband later transferred the home to a company. The wife's business failed and she voluntarily declared herself bankrupt. At the time of final separation the main asset was the new home, in the company name, valued at about \$200,000.

The husband argued that the original orders were a final determination and the court had no jurisdiction to re-open the settlement. The court disagreed. Alternatively, the husband contended that the wife's contributions since reconciliation should be seen in the context of a short marriage. The wife should receive no more than 15% on the basis of contributions and there should be no further adjustment for s 75(2) factors. Again, the court disagreed. The court took into account the whole of the relationship and split the net assets equally between the parties.

In *Drew and Vickery* [2010] FMCAfam 1307, the parties entered into an agreement after separation under the *Property (Relationships) Act 1984* (NSW). They separated for about two years and then reconciled for about four months.

Neville FM quoted from the High Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* [1986] HCA 14; (1986) 160 CLR 226 at p244 which also relied on Dixon J in *Grundt v Great Boulder Pty Ltd Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641. Dixon J said (at para 674):

*The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. ... **This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.** (Emphasis added.)*

Later, Dixon J noted (at p 676):

... belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs.

Neville FM preferred to say that the parties were estopped from relying on the NSW agreement rather than that by their conduct they had set it aside. He said (at paras 74 and 80):

However, in my view, what is clear on the evidence is that, at the initiative of Mr Vickery, the de facto relationship was revived or resumed. In doing so and inviting the relationship (and the co-habitation) to resume, by that deliberate conduct he must be taken as having waived his ability to rely on the earlier termination agreement. Indeed, by resuming their cohabitation, in my view both parties must be taken as having waived whatever rights they had under that agreement. Their conduct in resuming cohabitation could, and in my view, should be taken as setting aside the ... agreement ...

*I appreciate that, to speak formally, there is a distinction between parties being estopped from relying upon an agreement, on the one hand, and on the other, setting aside the agreement. For my part, I should be taken as preferring the view that the parties, by their conduct, should be estopped from relying on the earlier termination agreement. However, in the event that that view were to be held erroneous, in the alternative and on the authority of the decision in *Sommerville* and the cases cited therein, I would also take the view that, by their conduct, the parties should be taken to have set aside the earlier agreement.*

On appeal, the Full Court in *Vickery & Drew* [2012] FamCAFC 221 found that the Federal Magistrate had jurisdiction to determine whether the agreement was enforceable and remitted the matter for rehearing on the issue of whether the agreement should be set aside. Neither party was aware that the Federal Magistrates intended to make a determination on this issue.

IMPLIED TERMS

Despite the requirement that a financial agreement be in writing, it may be possible for terms to be implied into the agreement.

The pre-requisites for an implied term are:

1. It must be reasonable and equitable;
2. It must be necessary to give business efficiency to the contract, so that no term will be implied if the contract is effective without it;
3. It must not be so obvious that "it goes without saying";
4. It must be capable of clean expression;
5. It must not contradict any express term of the contract.

This summary is from para 40 of the Privy Council's judgment in *BP Refinery (Western Port) Pty Ltd v Hastings Shire* [1977] UKPCHCA 1; (1994) 180 CLR 266.

The alternative legal construction was set out by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 345. Mason J distinguished between an "implied term necessary to give business efficacy to a particular contract, not of the implied term which is a legal incident of a particular class of contract." He distinguished the implication of a term from rectification of a contract (at p 346):

The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it.

Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention.

In *Bryson & Bryson* [2012] FMCAfam 197, Brewster FM (as he then was), relied on the *BP Refinery* analysis of implied terms and found that the conditions were satisfied. He implied a term into the agreement that the husband not encumber the property. The husband breached this implied term and was unable to rectify the breach. Brewster FM was prepared to set the agreement aside under s 90UM(1)(e) as being voidable or under s 90UM(1)(f) as circumstances had arisen making it impracticable to carry out.

Brewster FM said that the agreement was unusual and not one which a court of its own volition would have ordered. The wife had made substantial contributions but if she insisted on a settlement, the house might have had to be sold. In return for transferring her interest in the house to the husband she received a licence to live in the house as long as she wanted to do so, rent-free and if she out-lived the husband she would inherit the property.

Brewster FM said (at para 12) with respect to the pre-requisites for an implied term:

It appears to me that all these conditions are satisfied. As I have indicated the benefits the wife was to receive under the agreement were first a right (although not an exclusive right) to occupy the property and secondly the right to ownership of the property if she outlived the husband. It would seem to me to be a reasonable expectation on her part that the property which she would, in those circumstances, end up owning would be a property in the same position as it was at the date of the agreement, that is an unencumbered property. This is especially so in light of the fact that she applied monies from the sale of her [Suburb B] property to discharge the mortgage on that property.

RECTIFICATION AND PART PERFORMANCE

Fevia & Carmel-Fevia

The husband in *Fevia & Carmel-Fevia* (2009) FLC 93-411, *inter alia*, relied on the equitable principles of rectification and part performance. He submitted that the contract could be rectified if his primary arguments were not accepted. He argued that the Annexure was no more than a record of the disclosure of assets made by the husband to the wife. The disclosure was recorded, albeit in a less detailed fashion, in Schedule 1.

Murphy J rejected this argument and quoted from *Sindel v Georgiou* [1984] HCA 58; (1984) 154 CLR 661 where the High Court said (at para 13):

Rectification is a remedy which cures the erroneous expressions of the parties' true intentions in a contract which is already binding. It is not a remedy which brings a contract into existence in a situation in which the parties have not by their own acts arrived at the concluded contract.

The husband also relied on part performance. Murphy J found that the husband could not do so as (at para 303) "there was no failure of formality in an agreement otherwise formed; there was in my judgment, no agreement."

Kostres & Kostres

In *Kostres & Kostres* (2009) FLC 93-420, the Full Court found that an agreement was void for uncertainty. Rectification was refused. Other cases which have discussed rectification include *Ruane & Bachman-Ruane and Ors* (2009) FamCA 1101, *Balzia & Covich* (2009) FamCA 1357 and *Senior & Anderson* [2010] FamCA 601.

Wallace & Stelzer

In *Wallace & Stelzer* [2011] FamCA 54, Benjamin J rejected the proposition that it was not possible to rectify a certificate because it was not a document of the parties (as it was a document signed by the solicitor) and a document cannot be rectified for a third party. He said (at 278):

The rectification was not changing a document between third parties it was simply reflecting what the parties and their solicitors had clearly intended the document to read that is, the 2004 certificate.

On appeal, rectification was not in issue. The certificates certified to the provision of advice in accordance with the original wording of s 90G(1)(b) but not in accordance with the 2003 amendments which governed the agreement when it was signed. Recital W asserted that the parties received advice in accordance with the 2003 amendments. By relying on Recital W, the solicitors' certificates and the signed agreement, the wife was able to discharge her onus of proof that the parties received legal advice. The certificates provided contemporaneous evidence that bolstered her case. The husband did not establish to the contrary.

Senior & Anderson

Young J in *Senior & Anderson* [2010] FamCA 601 relied on *Ruane* and *Fevia* and said (at paras 98–100):

Consistent with the approach adopted by each of their Honours in these two reported cases from this Court the issue before me of the remedy sought does not bring a contract into existence but cures the unintended legal and technical errors inserted by solicitors without the knowledge or understanding of the parties. I turn now to conclude my findings on the rectification issue ...

I intend to order that the agreement ... should properly be rectified in a manner consistent with the true intentions of the parties and the financial outcome that they intended to conclude. I find that the words used within the document do convey a very clear, unambiguous and unmistakable meaning and legal effect as to the division of assets and property of the parties. It is that subjective intention which I have concentrated upon and which highlights what each of the parties intended and instructed their respective solicitors to achieve by the agreement. The parties were in complete agreement on the terms of their contract as to the division of their property and assets but by error the solicitors, and without the legal knowledge and understanding of the parties, prepared and endorsed the agreement as being prepared pursuant to the incorrect section of the Act. I am able to discern from the document that this was an error not intended by the parties and which can and should be the subject of correction and rectification.

However, the Full Court in *Senior & Anderson* (2011) FLC 93-470 upheld the appeal and remitted the matter for rehearing. The plurality held (May J dissenting), that the certificates could be rectified. In relation to the reference in the agreement to the incorrect section, (ie s 90C rather than s 90D), all three judges considered this could be rectified.

With respect to the erroneous and inconsistent names in the certificates, May J considered these were in a different category to the careless reference to the incorrect section. She held that a failure to observe s 90G(1) cannot be rectified by s 90KA but can be rectified under construction principles or, if she was wrong, the agreement was binding under s 90G(1A)(c). She particularly disagreed with Strickland J's view (at para 142):

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'.

Murphy J agreed with Strickland J.

In *Sullivan & Sullivan* [2011] FamCA 752 Young J conceded that he was wrong in *Senior & Anderson* [2010] FamCA 601 and the Full Court was correct on appeal (2011) FLC 93-470 in following *Balzia & Covich* [2009] FamCA 1357. He said (at paras 146, 152):

I now accept...that the correct approach is that certificates cannot be rectified and that regard must be had to the provisions of s 90G in relation to erroneous certificates. In circumstances where an agreement is rectified to reflect the common intention of the parties, the advice provided to each spouse, and the certificates evidencing that advice, cannot be amended to reflect the rectification. Hence if the agreement in this matter were able to be rectified to be a s 90C financial agreement then the advice provided to the wife on the Agreement as a s 90B agreement would be deficient pursuant to s 90G(1)(b) as amended.

It is quite clear from the Act that advice in relation to a financial agreement under s 90B,

and the effect of such an agreement on the rights of a party contemplating entering into a marriage, is distinct from the effect of a s 90C financial agreement on the rights of a party to a marriage.

He declined to find the agreement binding under s 90G(1A) even if it could be rectified as he could not be satisfied that it would be unjust and inequitable if the agreement were not binding.

Consistently with *Senior & Anderson*, although there was no express reference to rectification, in *Bryson & Bryson* [2012] FMCAfam 197 Brewster FM was prepared to imply a term into the financial agreement. The agreement was unusual. The effect of it was that the wife transferred her interest in a property to the husband, the wife had a licence to occupy one of the two houses on the property for her lifetime, and in the event that she survived, the husband would leave the property to her in his will.

The husband mortgaged the property. The wife applied to set aside the financial agreement and for orders to be made under s 79. Brewster FM decided that a term should be implied in their agreement to the effect that the husband not encumber the property.

Brewster FM found that the husband was in breach of the implied term and, as he was unable to rectify the agreement, the agreement should be set aside under s 90UM(1)(e) or (f).

In *Saintclaire & Saintclaire* [2013] FamCA 491, the husband argued that the agreement should be rectified. Recital A stated that the agreement was under s 90C and recital B stated that it was under s 90B. Ryan J found that there was a mutual mistake by the parties (and not as in *Senior & Anderson* a mistake in the solicitors' certificates), so it could be rectified. However the agreement was voidable under s 90G(1)(b) for undue influence and was set aside.

CONCLUSION

The above covers some of the options for finding that a financial agreement should be set aside on contractual principles. The courts have been largely concentrating on whether agreements are binding under s 90G(1) but s 90K and s 90KA offer many opportunities to assist parties not to be bound by agreement where they have entered into agreements in folly, recklessness, or extravagance.