

## **A Porsche, a cemetery plot, \$900,000 and the Sergeant Schultz defence: Lawyers sued for failure of cohabitation agreement**

**Jacky Campbell**  
**Forte Family Lawyers**

A husband is suing his lawyers because his cohabitation agreement was not validly executed<sup>1</sup>. The Family Court ordered that his former de facto wife was entitled to retain the husband's Porsche with a personalised number plate, his cemetery plot and \$900,000 cash. His lawyers' defence is reminiscent of Sergeant Schultz famous words from the television show *Hogan's Heroes* - "I know nothing".

In Supreme Court proceedings which have not yet been determined, the husband claims that his lawyers and his wife's lawyers - who both deny the allegations - failed in their duty of care to him and were responsible for the cohabitation agreement being thrown out by the Family Court, which ultimately caused him financial losses.

In August 2005, the agreement was signed and witnessed by the parties' cleaning lady, not a justice of the peace or a qualified solicitor as required by the legislation which governed cohabitation agreements in Queensland at the time. The husband also claimed his lawyers were liable for his losses because they failed to inform him of the need to make "full and frank disclosure of current assets" and the need to obtain legal advice before the agreement was signed.

The husband said that the couple separated in early 2010. In September 2011 a court declined to recognise the cohabitation agreement as a binding, legal document. The court ordered the husband to pay the wife \$900,000 and transfer the cemetery plot and his Porsche 911 to her. He suffered the loss of the payout, \$69,000 for the Porsche, a further \$12,000 for its personalised number plates, \$10,067 for the cemetery plot and almost \$400,000 in legal fees.

In their Defence, the husband's lawyers said they did not practise in family law and the onus was on the wife's lawyers - who had family law expertise - to provide sound advice in connection with the agreement. They said that both the husband and the wife's lawyers knew that the husband's lawyers did not practise in family law and had no relevant expertise. The husband's lawyers asserted that they exercised all "skill and reasonable care" they possibly could, given their lack of family law expertise. In the alternative, they said it was not reasonable for the husband to rely on his lawyers' advice because he knew that they lacked the relevant expertise. They also said the

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<sup>1</sup> *The Australian*, 18 November 2015

husband ignored their requests for a meeting to discuss the agreement and that he also failed to have it witnessed by a justice of the peace or a qualified solicitor when the requirement later became known to him.

The wife's lawyers also denied any liability for the husband's loss, claiming they owed no duty of care to him whatsoever.

### **The Family Court case**

The family law proceedings were reported as *Kevin & Trembath*<sup>2</sup>. In those proceedings the agreement between the parties was declared to be:

1. Not a recognised agreement within the meaning of s 266 of the *Property Law Act 1974 (Qld)*;
2. Not taken to be a Pt VIIIAB *Family Law Act 1975* financial agreement within the meaning of item 88(1)(d) of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)*; and
3. Not a binding financial agreement under Pt VIIIAB *Family Law Act*.

### **The legislation**

Section 266 of the *Property Law Act 1974 (Qld)* states that a cohabitation agreement or separation agreement between de facto partners is a recognised agreement if it:

- "(a) is a written agreement; and
- (b) is signed by the de facto partners and witnessed by a justice of the peace (qualified) or solicitor; and
- (c) contains a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner signs the agreement".

Queensland referred its powers with respect to property division on the breakdown of de facto relationships from 1 March 2009. The *Family Law Act* recognises certain agreements made by the parties under the laws of certain States and Territories prior to that date as financial agreements under the *Family Law Act*.

Item 88 of the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008* applies to pre-commencement agreements made during de facto relationships. Under item 88(2), an agreement made under a prescribed law, which includes the *Property Law Act 1974 (Qld)* is taken to be an agreement within s 90UC *Family Law Act*.

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<sup>2</sup> [2012] FamCA 807

### **The trial judge's decision**

Murphy J said that the cohabitation agreement did not fall within the *Family Law Act* and did not stop the Family Court from exercising its powers under s 79. He said:

"The agreement, by its terms and by reference to the stated intention of each of the parties, was intended to be a 'recognised agreement' within the meaning of that legislation. The legislation distinguishes between agreements of that type and 'cohabitation agreements'. It is only agreements of the former type that preclude property adjustment orders pursuant to that legislation being made"<sup>3</sup>

However, contrary to the requirements of the Queensland legislation the agreement was not witnessed by a solicitor or justice of the peace; rather it was witnessed by the parties' cleaning lady at the time. The parties agreed that, despite their intentions and the terms of the agreement, the agreement made between them was not a "recognised agreement" within the meaning of the *Property Law Act*.

The relationship met the jurisdictional hurdles for de facto relationships under the *Family Law Act* in relation to the length of the relationship, separation date and geography.

The Family Court cannot make orders for the alteration of property interests in a de facto financial cause, if there is a Pt VIIIAB financial agreement that is binding upon the parties<sup>4</sup>. As the agreement was not a Pt VIIIAB financial agreement or taken to be one, the Family Court was not prohibited by s 90SA from making orders. The orders for adjustment of property interests between the parties were made by consent.

Of particular interest to the Supreme Court proceedings is that the wife consented to an order in the Family Court that she make herself available as a witness in any proceedings brought by the husband against the law firms who acted for each of the parties, with the husband to pay her reasonable travel and accommodation expenses and legal advice.

### **The defences of the law firms**

The defences of the husband's lawyers are relatively novel and contrary to the usual view that lawyers should practise in areas in which they have expertise. The Legal Practitioners' Liability Committee of Victoria states on its website<sup>5</sup> that:

"Financial agreements are an ongoing problem when it comes to claims; it is certainly not an area in which to dabble!"

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<sup>3</sup> at para 6

<sup>4</sup> s 90SA

<sup>5</sup> <http://plc.com.au/risk-management/family-law/>

The defences of the husband's law firm are primarily based on their lack of family law expertise. They say that the husband knew they lacked expertise and the wife's lawyers knew this too. Their view is that both they and the husband relied on the expertise of the wife's lawyers, who were experienced in family law matters.

This sounds like a defence based on Sergeant Schultz's famous phrase in *Hogan's Heroes* - "I hear nothing, I see nothing, I know nothing". In the United States this is also known as the "dummy defence" or the "ostrich defence". It has been used with little or no success in criminal cases in the United States.

Whether or not the wife's lawyers will succeed in their defence will depend upon how far the Supreme Court is prepared to extend the duty of care owed by a lawyer to a third party. This question has been considered in such cases as *Hill v Van Erp*<sup>6</sup>. There are reported cases where one party has sought to claim against the other party's lawyer in negligence in relation to financial agreements under the *Family Law Act*<sup>7</sup>, but there are no reported decisions of a successful claim.

### **What next?**

Although the agreement purported to be a "State" agreement entered into before Queensland referred its powers to the Commonwealth, the outcome will be relevant to lawyers acting for parties in negotiations for, the drafting of and the execution of, financial agreements under the *Family Law Act*.

Will the Sergeant Schultz defence succeed? If it does succeed, experienced family lawyers should refer their clients who want financial agreements to non-family lawyers. This is contrary to the usual view that lawyers should be wary about working in areas in which they do not have the relevant skills and experience.

For non-family lawyers who advise on financial agreements, if the husband is successful in his claim against his lawyers, the case demonstrates the significant risks of practising outside areas in which they have expertise. At the very least, they should read and follow the requirements of the relevant legislation.

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<sup>6</sup> [1997] HCA 9

<sup>7</sup> e.g. *Noll & Noll* [2011] FamCA 87, *Noll & Noll* (2013) FLC 93-529, *Ruane & Bachmann-Ruane* [2012] FamCA 369 and *F Firm & Ruane* (2014) FLC 93-611)