

FINANCIAL AGREEMENTS

Binding financial agreements unbound

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The Family Court's decision in *Parker & Parker* has important implications for financial agreements and legal professional privilege.

Parker & Parker, delivered by the Full Court of the Family Court on 7 March 2012, is arguably the most significant decision on financial agreements since *Black & Black*.

The Full Court in *Parker* has confirmed that courts may look behind a Statement of Independent Legal Advice and find that, even if the s 90G(1) requirements are being met on their face, the agreement is not binding.

Understandably, most lawyers assume that, if they are provided with a Statement of Independent Legal Advice in the format required by s 90G(1)(c) of the *Family Law Act 1975* (Cth) ("the Act"), there is no necessity to examine or query whether the advice was actually given by the lawyer who signed the statement and the nature of that advice. Unfortunately, this comfortable assumption has not just been shaken by the Full Court of the Family Court, it has been comprehensively shattered.

Advice requirement

The relevant part of s 90G(1) provides that a financial agreement is binding on the parties if, and only if:

- “(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
- (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement);
- (ca) a copy of the agreement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party.”

Put simply, each spouse is required to obtain independent legal advice about certain matters and their legal practitioners must sign statements verifying that the advice was given. Each statement must be given to the spouse to whom it relates and exchanged with the other spouse or their legal practitioner.

Earlier cases

Reported cases of single judges in which it was found that the requisite advice was not given despite the existence of a signed statement (called a “certificate” until the changes effected by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth)) include the following circumstances:

- Where the advice was given to a party by a lawyer not admitted in an Australian jurisdiction.¹
- Where the husband received advice after marriage on an agreement which was purportedly made before marriage under s90B.²
- Where the wife’s lawyer relied on an interpreter to advise the wife on the agreement without the lawyer being present and the wife was unable to understand the lawyer’s advice due to language difficulties and limited education.³
- Where the wife said she could not recall being given any advice about the law relating to the agreement, her rights under the agreement or the advantages and disadvantages arising to her from the agreement. The wife’s solicitor had no file notes or correspondence to confirm the advice given and could not recall the advice.⁴

However, not all judges have been prepared to look behind the statements. For example, in *Pascot & Pasco*⁵, the court was not prepared to find that inadequate or even incorrect advice was enough to make the agreement not binding. The wife was advised by her solicitor that prenuptial agreements were not binding on the court and did not oust the jurisdiction of the court to make orders under s 79. Judge /# Justice Le Poer Trench considered that it was significant that the husband was unaware of this incorrect advice and the impact on him was relevant. He said that “it was completely unfair to the husband to set the agreement aside for a reason which is completely outside his control. To take that action would . . . potentially make s90G and the whole intention of creating ‘binding financial agreements’ unworkable and give rise to uncertainty (at [341]).” Since the Full Court handed down its decision in *Parker & Parker*⁶. This prediction of unworkability and uncertainty appears to have eventuated.

Parker – the trial judge

In *Parker & Parker*,⁷ the trial judge, Strickland J, found that a s90C agreement was not binding. He was not satisfied that the effect and implications of an amendment to the agreement were explained

to the wife in the same way that the terms of the rest of the agreement were explained to her.

Parker – the Full Court

The husband appealed and a two-to-one majority of the Full Court allowed the appeal. All three judges agreed that the advice given by the wife's solicitor did not comply with s90G(1) and was therefore not binding, but they disagreed on the application of s90G(1A) and whether the agreement could be "saved" or found to be binding despite non-compliance with s90G(1). The matter was remitted for rehearing with respect to this issue.

The trial judge identified two issues for determination:

- "(1) Was each party, before signing the agreement, provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party, and about the advantages and disadvantages, at the time that the advice was provided to that party, of making the agreement (s 90G(1)(b))?"
- (2) In the event that paragraph (1)(b) is not satisfied, would it be unjust and inequitable if the agreement were not binding on the parties? Is the financial agreement binding on the parties pursuant to s 90G(1A)?"⁸

Coleman J did not deal with the first question at any length. May J quoted favourably from the trial judge, in particular finding:

- The amendment to the agreement by the husband created a new obligation for the provision of further independent legal advice to the wife.
- "It was not enough for the wife to have been provided with advice of a general nature. The effect of the amendment on the wife's rights needed to be addressed."⁹
- The failure by the wife's solicitor to amend the original certificate at the time that she and the wife initialled the amendments was not merely an "inadvertent omission". The certificate could not be rectified. The advice was not given on that date, so rectifying the date on the certificate was meaningless.¹⁰
- The trial judge was able to conclude on the evidence before him that the wife's solicitor had not given the wife advice about the advantages and disadvantages of the wife entering the agreement.¹¹

Justice Murphy said that Strickland J was incorrect in finding that there was an agreement on 5 November 2004 (the day the wife signed the agreement). He did not accept that an agreement was entered into on that day and varied a week later when the wife initialled the husband's amendment. The traditional offer-acceptance analysis of contract law pointed to there being no agreement until the wife accepted the husband's amendments.

Interestingly though, Murphy J accepted that s 90G(1)(b) did not require that all the advice be given after the terms of the agreement were finalised. He said:

"I can see nothing in the terms of s 90G ... which would preclude advice being given . . . cumulatively so as to, ultimately, comprise advice which satisfies the requirements of s 90G(1)(b) by being advice in respect of 'the agreement'. That is, it seems to me entirely possible for compliant advice to be given on one or more occasions in respect of the negotiations, and for there to be further advice given on one or more later occasions, in respect of other parts of the negotiation, so that it can be said the advice in its totality is as s 90G requires (at [206])."

He said further that three matters must be established to satisfy the s 90G(1) requirements:

"First, it must be established that the accumulated advice has been given, ultimately, about the agreement as finally concluded . . . I accept that the particular circumstances might admit of a finding that compliant advice has been given on an occasion or occasions earlier than the occasion on which the agreement is ultimately made. But, it is vital that there be admissible evidence by which a court can conclude that the requisite advice was given about the agreement as ultimately formed.

Secondly, the section makes it clear that it is necessary to establish that the advice *actually given* has the content required by the section (i.e. as to rights and advantages and disadvantages). Thirdly it must be established that the advice was given at the time required by the section (i.e. before the party signs) (at [208–209])."

However, these requirements can only be satisfied if the parties have an agreement.

Justice Murphy agreed with the trial judge that there was insufficient evidence about the compliance of the advice with s 90G(1). Although not discussed by either the trial judge or Murphy J, there are significant implications for legal professional privilege.

Legal professional privilege

Legal professional privilege protects communications between a lawyer and a client. If a financial agreement is challenged for non-compliance with s 90G(1)(b), evidence of the advice given by the legal practitioner is fundamental. In a case where a party seeks to set aside a property order under

s 79 or s 90SN or to set aside a financial agreement under s 90K or s 90UM the legal advice given may be relevant. If it is not relevant it will not need to be divulged for the application to succeed. The effect of *Parker* is that if a party is applying for a declaration that a financial agreement is not binding because of a failure to meet the requirements of s 90G(1)(b), in most cases the legal advice given by the legal practitioner will be relevant and the client will have to waive legal professional privilege to succeed. Arguably, both parties will need to disclose their legal advice, although this was not conclusively decided by the Full Court in *Parker*.

Section 90G(1A)

The amendments to the Act made in 2010¹² enable an agreement which may be found not to be binding because of the failure to comply with s 90G(1)(b), (c) or (ca) to be “saved”. Section 90G(1A), (1B) and (1C) state:

- “(1A) A financial agreement is binding on the parties to the agreement if:
- (a) the agreement is signed by all parties; and
 - (b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and
 - (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and
 - (d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and
 - (e) the agreement has not been terminated and has not been set aside by a court.
- (1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the enforcement application) by a spouse party seeking to enforce the agreement.
- (1C) To avoid doubt, section 90KA applies in relation to the enforcement application.”

Coleman J in *Parker* seemed inclined to find that the agreement should be binding under s 90G(1B) on the basis that it was unjust or inequitable for the agreement not to be binding. He considered it relevant that the wife signed the agreement despite admitting that her solicitor advised her not to do so. She did not seek to disturb the agreement for some time. He held that the trial judge’s conclusion was “the kind of outcome” which s 90G(1A), (1B) and (1C) were intended to remedy and “involved a narrow interpretation of s 90G(1A)(c) ... which did not promote the objectives of the legislation” ([at 20]).

Judge /# Justice May said that the second question that the trial judge was asked to answer was incorrect. The submissions confused the requirements of s 90G(1A), (1B) and (1C). She concluded

that the matter had to be remitted for re-hearing to enable evidence to be given in relation to an “enforcement application” (although a formal enforcement application may not be necessary) and in relation to s 90KA (brought in by s 90G(1C)).

Justice Murphy considered, at length, the application of the transitional provisions. He held that the trial judge applied the incorrect form of s 90G(1B). The trial took place over a year before judgment was delivered in *Senior & Anderson*, so the parties and the court did not have the benefit of the analysis of the transitional provisions set out there.

Justice Murphy said that s 90G(1A)(c) envisaged “a broad discretion vested in the court (at [231])”. He rejected a limitation on the discretion to “technical” non-compliance (at [232]) but found it relevant that an agreement is only binding “if and only if” s 90G(1)’s requirements are met (at [238]). Failure to comply with s 90G(1) was not decisive in the exercise of the discretion under s 90G(1A), but it was a factor, and a significant factor, in the exercise of the discretion (at [239]).

Murphy J held that on the evidence before him the trial judge was correct in his exercise of the s 90G(1A) discretion, particularly as there was insufficient evidence before him about matters that might inform the s 90G(1A)(c) discretion.

What should lawyers do?

The easiest and safest course for lawyers is to avoid drafting and advising on financial agreements altogether. Any agreement is at risk of being found not to be binding even if it appears that the technical requirements are met. It is difficult to see how a lawyer can minimise the risk of an agreement being found not to be binding under s 90G(1)(b) or 90UJ(1)(b). It may help to exchange letters of advice, check that they comply with s 90G(1)(b) and are accurate, and ensure that the other party speaks the language the advice was given in and has full capacity to understand the advice. However, exchanging letters of advice not only waives privilege and risks a demand that the whole file be disclosed, but may create further disagreement between the parties about the terms of the financial agreement. If there is litigation, the information disclosed in the letter of advice will be able to be used in that litigation. How does one legal practitioner check that the other party understands the advice? Is a psychiatric report required, and confirmation of that party’s ability to understand English? All these matters may need to be addressed before a lawyer signs a Statement of Independent Legal Advice.

Conclusion

A lawyer may have done everything necessary to meet the s 90G(1) requirements but be thwarted by the failure of the other lawyer to meet the standard. There seems no obvious and risk-free way to be assured that the advice given to the other party meets the s 90G(1)(b) requirements.

The comfort of a binding financial agreement seems even more elusive after *Parker* than it did after *Fevia & Carmel-Fevia 13* and *Senior & Anderson*. For separated couples, court orders under s 79 or s 90SM will usually be less risky. For couples seeking the protection of a prenuptial agreement, there may be no alternative. But for lawyers, the safest option is to avoid them altogether.

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1. *Ruane & Bachmann-Ruane* [2009] FamCA 1100.
2. *Sullivan & Sullivan* [2011] FamCA 752.
3. *Omar & Bilal* [2011] FMCAfam 1430.
4. *Hoult & Hoult* (2011) FLC 93-489.
5. [2011] FamCA 945.
6. [2012] FLC 93-499.
7. [2010] FamCA 664.
8. Paragraph 75 of the trial judgment, cited by the Full Court at paragraph 24.
9. Paragraph 88 of the trial judgment, cited by the Full Court at paragraph 64.
10. Paragraph 92 of the trial judgment, cited by the Full Court at paragraph 64.
11. Paragraph 94 of the trial judgment, cited by the Full Court at paragraph 65.
12. *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).
13. (2009) FLC 93-411.