

FINANCIAL AGREEMENTS

Opposing the enforcement of a financial agreement - a second bite of the cherry?

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There have been few reported cases with respect to the enforcement of financial agreements. Recently, the Family Court had to decide whether having previously refused to set aside a financial agreement or make a declaration that it was not binding, it could exercise its discretion not to enforce the agreement.

In *Fan & Lok*¹ the wife's estate sought to enforce a financial agreement. In earlier proceedings, *The Estate of the late Ms Fan & Lok*², the husband was unsuccessful in his applications to either have the agreement set aside or have it found not to be binding. The two decisions raise the question of the distinction between seeking that an agreement be set aside or declared not to be binding and an application opposing its enforcement. This arises particularly where there is a determination in the earlier proceedings that it would be unjust and inequitable for the agreement not to be binding.

Enforcement under the *Family Law Act 1975*

The power of the court to enforce orders is discretionary rather than absolute, and the husband in *Fan & Lok* sought that the court exercise its discretion in his favour. This principle was established by the Full Court of the Family Court in such cases as *Ramsay & Ramsay*.³ Various cases have considered whether it was inequitable to enforce s 79 orders, primarily because of the conduct of the parties in the intervening period. For useful recent discussions on the law see *Yilmaz & Yilmaz*⁴ and *Barrington & Downto*.⁵

In *Yilmaz*, the *res judicata* principle was in issue, as it was in the second *Fan & Lok* case. Le Poer Trench J referred to *Kerr & Kerr*⁶ in which Nygh J confirmed that enforcement will be refused if it is inconsistent with an agreement or estoppel binding on the party seeking enforcement. In *Kerr* the orders provided for a sale of the former matrimonial home and for the proceeds of sale to be divided equally. After the orders were made, the husband proposed that he purchase the wife's interest in the home from the wife. The wife agreed and this informal agreement was implemented. Fresh orders were not made. The wife later sought enforcement of the order for sale. Nygh J held that the wife was estopped from asserting that the orders were still operative and, in addition, by reason of her conduct and her delay in seeking enforcement, that it was inequitable for Nygh J to exercise his discretion to enforce the orders.

¹ [2015] FamCA 816

² [2015] FamCA 300

³ (1983) FLC 91-301

⁴ [2014] FamCA 663

⁵ [2015] FamCA 46

⁶ (1983) FLC 91-329

Le Poer Trench J in *Yilmaz* also referred favourably to Riethmuller FM (as he then was) in *Watson & Watson*.⁷ Riethmuller J said:

"I am satisfied that the discretion needs to be founded on conduct or events that occurred after the orders were made (for conduct prior to the order the appropriate course is to apply under s 79A). As a result, delay may be the basis for the exercise of the discretion, analogous to laches being a basis for not exercising the discretion to grant equitable relief. However, delay, of itself, would rarely be sufficient, particularly if the delay is less than the limitation period for enforcement of judgments generally in the jurisdiction".⁸

The powers of the Family Law Courts with respect to the enforcement of financial agreements are set out in s 90KA *Family Law Act 1975*. The principles of law and equity applicable to determining the enforceability of contracts and purported contracts are relevant. The court:

- (a) 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 in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction.⁹
- (b) Has the power to make an order for the payment of interest;¹⁰
- (c) May order that the agreement or a specified part of the agreement, be enforced as if it were an order of the court.¹¹

Although not discussed in *Fan & Lok*, the court is directed by s 90G(2) and 90UJ(4) that it "may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary", reinforcing the discretionary nature of enforcement.

A party seeking to enforce an agreement in the Family Court must, in accordance with r 20.02 obtain an order under s 90KA(c) or s 90UN(c). Rule 25B.08 of the *Federal Circuit Rules* applies with respect to applications in the Federal Circuit Court and is similarly worded.

***Fan & Lok* - The setting aside proceedings**

In *The Estate of the late Ms Fan & Lok*,¹² a pre-nuptial financial agreement (under s 90B) provided that in the event of separation a property at suburb C was to be sold and the proceeds used to discharge a mortgage for which one of the security properties was a property in the name of the wife. The wife died shortly after separation. The husband arranged for the suburb C property to be transferred into his sole ownership by right of survivorship.

⁷ [2006] FMCAfam 293

⁸ at para 32

⁹ s 90KA(a)

¹⁰ s 90KA(b)

¹¹ s 90KA(c)

¹² [2015] FamCA 300

The applicant was the executrix of the wife's estate and was one of the wife's children. She sought orders to enforce the agreement. Under the agreement, in the event of a separation, a jointly owned property at suburb F was to be sold and the proceeds used to reduce the mortgage. If the proceeds of the sale of that property were less than \$253,000, the husband and the wife were equally liable for the shortfall up to \$253,000. The husband was liable for the balance of the mortgage debt, if any. The suburb F property was sold, but the proceeds were insufficient to discharge the mortgage debt in full. The bank issued a demand for payment.

The husband sought to set the agreement aside. He unsuccessfully argued that either the agreement was impracticable to be carried out or that there had been a material change in circumstances.

The husband also argued that the agreement was not binding as he had not received the requisite legal advice required by s 90G(1)(b). The certificates of advice set out that the parties received advice in relation to a s 90B agreement when in fact it was a s 90C agreement. Rees J did not deal with the argument that the agreement may have still been valid¹³, but exercised her discretion under s 90G(1A)(c) and made a declaration that it would be unjust and inequitable if the agreement was not binding on the husband.

***Fan & Lok* - The enforcement proceedings**

In *Fan & Lok*,¹⁴ the husband sought that the application for enforcement be dismissed. He submitted that the court should exercise its wide discretion and find that it was not just and equitable to enforce the financial agreement by requiring him to sell his property at suburb C as the agreement envisaged that he would retain that property.

Rees J noted that the contention made by the husband, that it was not just and equitable to enforce the terms of the agreement, was the subject matter of the determination she had made in the earlier proceedings. She found "... that *res judicata* estoppel arises in relation to the submission that it is not just and equitable to enforce the agreement"¹⁵.

¹³ e.g. *Wallace & Stelzer* (2013) FLC 93-566

¹⁴ [2015] FamCA 816

¹⁵ (at para 22)

In case she was wrong about issue estoppel, Rees J dealt with the husband's other arguments, which were:

- There were inconsistencies in the agreement which had the effect that the agreement could not be given the construction for which the wife's estate contended;
- If the agreement were enforced, the husband would be left in a financially precarious position;
- The husband was entitled to rely on the fact that the wife had a life insurance policy, which he said was taken out to discharge the mortgage in the event of her death;
- Amounts drawn from the mortgage during the marriage were used for the benefit of the wife's children;
- Laches; and
- The husband made payments both before and after the wife's death for her benefit and that of her children.

Rees J dismissed these arguments and found that she could enforce the agreement. She considered that an order which provided for the sale of the suburb C property, in the event that the husband failed to comply with his obligation to pay the amount owing under the mortgage, was available to the court in the exercise of its wide powers pursuant to s 90KA. If she was wrong about this, she was also satisfied that the court had an inherent power, as stated by the Full Court of the Family Court in *Molier & Van Wyk*,¹⁶ to impose consequential provisions for the sale of the suburb C property to ensure that the orders made requiring the husband to discharge the mortgage were carried into effect.

In addition, Rees J relied on r 20.05(a) of the *Family Law Rules 2004* which expressly provides that the court may make an enforcement order, in relation to an obligation to pay money, for the seizure and sale of real property.

¹⁶ (1980) FLC 90-911

Conclusion

Under the *Family Law Act* the Family Law Courts have a wide discretion not to enforce orders and this discretion extends to the enforcement of a financial agreement by virtue of s 90KA(c).

The possibility of opposing the enforcement of a financial agreement as an alternative to or in addition to applying to set it aside or have it declared not to be binding was considered in the *Fan & Lok* cases. The husband's application to oppose the enforcement of the agreement was unsuccessful, in part because the trial judge considered herself bound by her earlier decision in which she found that it would be unjust and inequitable if the husband was not held to his agreement.

It may, however, be possible, on a different set of facts, to distinguish between a declaration that it was unjust and inequitable not to hold a party to an agreement and the broad discretion to enforce.