FORTÉ
FAMILY LAWYERS

FINANCIAL AGREEMENTS

Two recent cases on setting aside financial agreements

JACKY CAMPBELL, JUNE 2016

Two recent cases on setting aside financial agreements

Jacky Campbell
Forte Family Lawyers

Introduction

There are complex legal principles involved in drafting a financial agreement which will stand up to court scrutiny. There are two main risks:

1. The agreement is found not to be binding because it does not meet the technical requirements; and
2. The agreement is set aside.

Two recent cases illustrate the problems. In *Saintclaire & Saintclaire*[1] the Full Court over-turned the trial judge's decision that the agreement was not binding for technical deficiencies and should also be set aside for undue influence and unconscionable conduct . In *Parke & Parke*[2] provisions in an agreement were void for uncertainty, the agreement was set aside for non-disclosure and because the husband had breached essential terms of the contract. The latter case, although only a decision of the Federal Circuit Court, is under appeal and the hearing of the appeal has been expedited due to the husband's ill-health.

Legal basics

Financial agreements can be made before, during or after a marriage or before, during or after a de facto relationship. The traditional view has been that an agreement cannot be both a pre-nuptial agreement and an agreement entered in not during a de facto relationship. The main problem is ensuring compliance with the advice requirements of each (which are different), but there is also the problem that an agreement made during a de facto relationship terminates on marriage. In a recent case, *Piper & Mueller*[3] however, the Full Court suggested that it is possible to have a combined agreement, although it only needed to find that the agreement was binding during a de facto relationship, not that it was binding after the parties were married. It is, therefore, probably safer to have two separate agreements until there is greater clarity about this.

There are two broad grounds on which agreements can be found by a court not to be binding, valid or enforceable:

---

[1] (2015) FLC 93-684
[2] [2015] FCCA 1692
[3] (2015) FLC 93-686

1. Not binding because of a failure to comply with technical requirements, which for agreements before, during or after a marriage are:

   (a) the agreement is signed by all parties; and

   (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

   (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

   (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and

   (d) the agreement has not been terminated and has not been set aside by a court[4].

   An agreement which is found not to meet the above requirements may, in some circumstances, be "saved" if the court is satisfied, "that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement[5].

2. Set aside on such grounds as:
   (a) fraud (including non-disclosure of a material matter);
   (b) the agreement was entered into for the purpose of, or for purposes which included, defrauding or defeating a creditor or creditors or with reckless disregard of the interests of a creditor or creditors;
   (c) common law and equitable principles such as duress, undue influence, unconscionable conduct, uncertainty, incompleteness, breach, mistake and misrepresentation;
   (d) material change in circumstances relating to the care, welfare and development of a child;
   (e) impracticability[6].

[4] s 90G(1) and 90UJ(1)
[5] (s 90G(1A) and 90(UJ(1A)
[6] (s 90K(1) and 90UM(1)

Saintclaire

On appeal, in *Saintclaire & Saintclaire*[7], the husband was successful in arguing that the agreement was binding and also that it should not be set aside for undue influence and unconscionable conduct. The trial Judge had found against him.

There were errors in the certificates of independent legal advice which the trial judge said meant that the agreement was not binding. The Full Court found the errors were a mutual mistake and that the true intention of the parties was plainly evident. The agreement was intended to be a s 90C agreement - which is made during a marriage - but instead it was described in the certificates and the recitals as a s 90B agreement – which is made before a marriage. The Full Court distinguished other cases where the Full Court had found that this type of error in a certificate could not be rectified, so there is inconsistency in the case law in this area.

The Full Court was also satisfied that the intention of the parties was plainly evident and that the reference to s 90B in the recitals should be read as a reference to s 90C.

The wife's postnatal depression had resolved about 11 months prior to the agreement being executed and so it was no longer an issue relevant to the wife's argument that there had been undue influence. In addition, the Full Court found that the husband had an intimate knowledge of the stresses under which the wife laboured but those "stresses" (such as her indebtedness) did not amount to a "special disadvantage" and nothing about his negotiating with knowledge of them amounted to unconscionable conduct.

The Full Court found that the trial judge was in error in not distinguishing between "actual undue influence" and "unconscionable conduct".

Parke

Howard J found in *Parke & Parke*,[8] that the husband had breached the financial agreement and by his actions (in particular by dissipating the wife's superannuation entitlements), he had repudiated the contract. He evinced *"an intention no longer to be bound by the contract"*. He showed that he intended *"to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way"*. The wife, who was the innocent party, was entitled to accept the repudiation thereby discharging herself from further performance.

The husband had breached an essential term of the contract which entitled the wife to rescind the contract. This was the dissipation of the wife's entitlements in a self-managed

[7] (2015) FLC 93-684
[8] [2015] FCCA 1692

superannuation fund. Although the wife did not know that she had the entitlements and they were dissipated before separation, the wording of the agreement was such that she was entitled to retain them.

With respect to other breaches the wife had waived her right to rescind the agreement on the basis of the applicant's non-compliance. These were:

- The applicant was required to pay to the wife the sum of $25,000 prior to the marriage. The sum was not paid in full but the wife proceeded with the marriage. She could not rely on that breach 14 years later;
- The husband stopped paying the sum of $200 per week to the wife about one year after the marriage. She sought legal advice during the marriage but decided not to pursue the matter;
- The husband was obliged not to engage in physical, emotional and financial abuse of the wife but did so. It was too late for the wife to rescind the agreement on this basis after the end of the marriage.

Howard J was satisfied that the wife would not have entered into the agreement unless she had been assured of strict performance by the husband with the clause regarding abuse. Substantial performance was insufficient. This clause is arguably a lifestyle clause which are rarely, if ever, enforced in Australia.

In 2008 the wife had $120,000 in a self-managed superannuation fund. In 2011, her entitlements were reduced to nil. The parties separated in 2013. The agreement was entered into in 2001.

The financial agreement was set aside for non-disclosure or suppression of facts amounting to a misrepresentation. The husband represented that Schedule 1 contained a list of all of his assets. That was untrue. He omitted the Parke Super Fund of which both parties were members although the wife did not know of the existence of the fund or even that she had a member's account.

The misrepresentation was false, rather than unintentional, and this finding was strengthened by the husband’s conduct in the financial agreement proceedings where he had provided no disclosure of the fund and its existence was only discovered by the wife as a result of a subpoena to the husband's accountant.

However, there was not an actionable misrepresentation or fraud. The trial Judge found that it was more likely than not, that even if the wife had been told with certainty that the husband had failed to provide a full list of his own assets, she would nonetheless, have still gone ahead and entered into the contract. The wife knew that she and the husband were shareholders of a company with assets of approximately $170,000 but failed to insist that

these assets be included in the schedules to the agreement. She was also warned by her lawyers that there was a "high likelihood" that the husband had not made complete disclosure of his assets but she gave "adamant instructions" that she wanted to proceed with the marriage and with the agreement. She was not induced by the misrepresentations.

There were two clauses in the agreement which created ambiguity and uncertainty. Pursuant to one clause, the wife's half interest in a real property was excluded property which she retained in the event of a separation. However, pursuant to another clause she was required to transfer her 50% share to the parties' son X within 60 days of a separation. In addition, X refused to accept a transfer of the wife's half interest in the property and the agreement did not have a default provision setting out what was to occur in the event that X refused to accept the transfer. The trial Judge found that the clauses were essential terms of the agreement because they dealt with what was to happen in the event that the parties separated. They could not be severed from the agreement.

Very few reported cases deal with impracticability in relation to financial agreements. The impracticability in this case arose in relation to two matters:

1. The wife was required by the agreement to transfer her interest in three properties to the parties' adult son, X. X refused to accept the transfers and the agreement was silent as to a default provision.
2. The husband had dissipated the wife's superannuation. The agreement was silent about the wife's superannuation entitlements. The wife did not know that she had superannuation entitlements. The agreement which was entered into by the parties in 2001 purported to deal with the parties' "property and financial resources" at the date of this agreement, or at a later time.

Conclusion

The case law on financial agreements is continuing to develop. At the time of writing, a Federal election had been called while the *Family Law Amendment (Fincaial Agreements and Other Measures) Bill 2015*, about which there were hopes that many of the technical problems with agreements could be rectified, still languished in the Senate at the Committee stage.

The next stage in the development of law in this area is likely to be further case law, such as the Full Court decision in *Parke*.

June 2016