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FINANCIAL AGREEMENTS

Bullet-proof financial agreements—rare as hens' teeth? Looking at financial agreements after Thorne v Kennedy

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There is probably no other aspect of family law which has been subject to such a barrage of legislative changes, prospective legislative changes and contradictory judgments, than financial agreements. The High Court delivered its judgment in *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 on 8 November 2017, apparently changing the law, yet again. There has been a strong reaction, almost panic-stricken, in the media and by lawyers to the first examination of financial agreements by the High Court. Is this reaction justified? Has the High Court put a bullet through financial agreements, or are they still a viable option?

This paper covers:

1. What needs to go into a financial agreement to make it valid?
2. Duress, undue influence, unconscionability and *Thorne v Kennedy*
3. Disclosure
4. Power of the court to declare financial agreements binding
5. Dealing with hybrid agreements
6. Contract law and financial agreements – how do they interact?
7. Equitable and common law right to performance of contract
8. Interpretation of financial agreements – Uncertainty and incompleteness
9. Material change in circumstances in relation to children
10. Checklist

1. What needs to go into a financial agreement to make it valid?

<u>The basics</u>

Before preparing a financial agreement, re-read s 90G(1) and (1A) (or the de facto equivalents of s 90UJ(1) and (1A)), s 90K (or 90UM noting that the de facto equivalent is differently worded) and s 90KA (s 90UN). Sections 90G and 90G(1A) set out when an agreement is binding, s 90K sets out when an agreement can be set aside and s 90KA deals with the enforceability of financial agreements.

The agreement also needs to comply with one of s 90B, 90C, 90D, 90UB, 90UC or 90UD, or be a termination agreement under s 90J or 90UK, so it is important to re-read the relevant section. There are subtle but important differences which are beyond the scope of this paper.

When is an agreement binding?

An agreement is binding if it complies with s 90G(1) (or s 90UJ(1)):

Section 90G(1) "Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:

(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."

Sections 90G(1A)–(1D), which allow certain agreements which do not comply with s 90G(1) to be "saved", are set out later in this paper.

An agreement which is otherwise binding can be set aside on any of the grounds in s 90K (s 90UM). The most relevant for the purposes of this paper are s 90K(1)(a), (b), (d) and (e). Section 90K provides that "a court may set aside a financial agreement 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) a 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 VIIIB 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 unsplittable interest for the purposes of Part VIIIB."

Remember that s 90UM, which applies to agreements between de facto couples, is worded and numbered differently.

2. Duress, undue influence, unconscionability and *Thorne v Kennedy*

In its first examination of financial agreements, the High Court in *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 set aside two financial agreements, casting considerable doubt on the viability of financial agreements which are a bad bargain for one of the parties. Unanimously, the High Court set aside the two agreements for unconscionable conduct. One was executed before the wedding and the second was executed after the wedding. The plurality also set them aside for undue influence, finding it was unnecessary to decide whether there was duress. Helpfully, the High Court explained the distinctions between the three concepts, as the concepts are often confused and used interchangeably. The question is, in clarifying the law, did the High Court set such a low bar that it will be impossible for a financial agreement to withstand an application to set it aside?

The facts of *Thorne v Kennedy*

The wife was aged 36 and the husband was 67 when they met on a bride website in mid-2006. The wife was living overseas, spoke Greek and very little English. She had no children and no assets of any substance, whilst the husband was an Australian property developer with assets worth at least $18 million. He was divorced from his first wife, and had three adult children.

During their courtship the husband promised the wife that he would look after her like "a queen". In February 2007 the wife travelled to Australia with the husband and moved into his penthouse. The husband made it clear to the wife prior to her coming to Australia that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife, however, did not learn the terms of the first agreement until shortly before the wedding. By that stage, the wife's parents and sister had arrived in Australia from Eastern Europe for the wedding. The husband told the wife that if she failed to sign the first agreement, the wedding was off.

The first of the two agreements was given to the wife 10 days before the wedding. The wife only expressed concern about the testamentary provisions - not the separation provisions (of course, despite s 90H, she should have been more concerned about the terms of his Will). She did not believe there was any likelihood either party would initiate a separation. Her solicitor advised the wife orally and in writing not to sign the first agreement, telling her that it was all in the husband's

favour. After some minor changes to the testamentary provisions of the first agreement requested by the wife's solicitors were agreed to by the husband, the wife received further advice on the amended first agreement. Her solicitor again advised her not to sign it. The wife gave evidence that she understood her solicitor's advice to be that it was the worst agreement that the solicitor had ever seen.

Under the separation provisions, the wife was to receive a total payment of $50,000 plus CPI in the event of a separation provided they were married for at least three years, which the wife's solicitor described as "piteously small". In the event of the husband's death, the wife would receive an apartment worth up to $1.5M, a Mercedes and a continuing income. Despite her solicitor's strong advice, the wife nevertheless signed the first agreement 4 days before the wedding. The first agreement contained a recital that within 30 days the parties would sign another agreement in similar terms.

In November 2007 the wife signed the second agreement, revoking the first agreement but otherwise in the same terms. The wife's solicitor urged her not to sign the second agreement. During the meeting with her solicitor the wife received a telephone call from the husband asking her how much longer she would be. The wife's solicitor had the impression that the wife was being pressured to sign the second agreement.

The husband signed a separation declaration after the couple had been married for slightly less than 4 years.

Litigation history

The wife commenced proceedings in the Federal Circuit Court, seeking orders under the *Family Law Act 1975* ("FLA") that both agreements be declared not to be binding and/or to be set aside, and orders for a property settlement and spousal maintenance. The husband died part way through the hearing and the husband's legal personal representatives were substituted for him in the proceedings.

In March 2015 Demack J in *Thorne & Kennedy* [2015] FCCA 484 made orders that neither Agreement was binding and set them both aside. Judge Demack held (at [94]) that the wife had:

> "signed the Agreements under duress borne of inequality of bargaining power where there was no outcome to her that was fair and reasonable."

On 26 September 2016 the Full Court of the Family Court (Strickland, Aldridge and Cronin JJ) in *Kennedy & Thorne* (2016) FLC 90-737 allowed an appeal by the husband's estate. The Full Court found that both agreements were binding on the parties, holding that there had *not* been duress, undue influence or unconscionable conduct by the husband.

On 10 March 2017 the High Court granted special leave to the wife to appeal from the decision of the Full Court of the Family Court. The special leave application is reported as *Thorne v Kennedy* [2017] HCA Trans 54. Further details of the special leave application are in an article by the writer at http://www.wolterskluwercentral.com.au/legal/family-law/high-court-rule-financial-agreements/

The grounds of appeal were that the Full Court erred in law in failing to find the financial agreements were not binding and they should be set aside on the ground of duress, undue influence or unconscionable conduct.

What did the High Court decide?

The plurality consisted of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ. They held that the findings and conclusion of the trial judge should not have been disturbed by the Full Court and both agreements were voidable due to both undue influence and unconscionable conduct.

The plurality said that the trial judge used duress interchangeably with undue influence, and considered that undue influence was (at [2]) “a better characterisation of her findings”. The plurality decided that it was not necessary to consider whether the agreement should be set aside for duress.

In two separate judgments, Nettle and Gordon JJ concurred that the agreements should be set aside for unconscionable conduct, but did not agree that they should be set aside for undue influence.

Requirements of duress

The plurality commenced by considering the requirements of duress, although it held that it was not necessary to decide whether the agreements should be set aside for duress. The plurality described the requirements for duress (at [26]):

> “Duress does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing ‘only too well’ what he or she is doing” [footnotes removed, but relying strongly on *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40]
>
> The focus is upon the effect of a particular type of pressure on the person seeking to set aside the transaction."

The plurality noted (at [27]) the uncertainty as to whether duress should be based on any unlawful threat or conduct or whether lawful threats or conduct might suffice. It said that the question was a “difficult” one, but did not shed any light on the answer to it. Justice Nettle believed that the law of duress in Australia was more settled and that (at [71]) the test of illegitimate pressure was

"whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests".

The plurality's view was that it was not necessary for the trial judge (and therefore the High Court) to determine whether there was common law duress, because the sense in which the trial judge described the pressure on the wife was to focus on the wife's lack of free choice (in the sense used in the undue influence cases) rather than whether the husband was the source of all the relevant pressure, or whether the impropriety or illegitimacy of the husband's lawful actions might suffice to constitute duress.

Requirements of undue influence

The High Court plurality referred (at [30]) to "the difficulty of defining undue influence" and that "the boundaries, particularly between undue influence and duress, are blurred". Undue influence occurred when a party was "deprived … of 'free agency'" [footnotes removed].

One reason why defining undue influence is so difficult is that it can arise from widely different sources, only one of which is excessive pressure. The pressure need not be illegitimate or improper.

The plurality noted (at [14]) that there were different ways to prove the existence of undue influence. One method of proof was by direct evidence of the circumstances of the particular transaction and that was the approach relied upon by the trial judge and the High Court. The other method was where there was a relationship which gave rise to a presumption of undue influence. The plurality rejected the proposition that the wife was entitled to the benefit of a presumption of undue influence because of the relationship of fiancé and fiancée, as that presumption no longer existed.

In *Johnson v Buttress* (1936) 56 CLR 113 at 134; [1936] HCA 41, Dixon J described how undue influence could arise from the "deliberate contrivance" of another (which naturally includes pressure) giving rise to such influence over the mind of the other that the act of the other is not a "free act". The plurality accepted this analysis, and said (at [32]):

> "The question whether a person's act is 'free' requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party … It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a 'mere channel through which the will of the defendant operated'. Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be 'markedly sub-standard' as a result of the effect upon the person's mind of the will of another." [footnotes omitted]

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Requirements for unconscionable conduct

For the sake of clarity it is useful to include the requirements for unconscionable conduct, although this is not considered at length in this paper. Unconscionable conduct is a legal principle which is well developed in Australia, both in its statutory contexts and in equity. The parties agreed that the applicable principles of unconscionable conduct in equity were recently restated by the High Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25. No submissions were made as to whether the statutory concept of unconscionable conduct in s 90K(1)(e) might differ from the equitable concept in s 90K(1)(b) and the High Court did not determine that issue.

A finding of unconscionable conduct requires (at [38]) that the innocent party is subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests". The other party must also unconscientiously take advantage of that special disadvantage, and have known or ought to have known of the existence and effect of the special disadvantage.

The plurality quoted favourably from *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461, where Mason J emphasised the difference between unconscionable conduct and undue influence:

> “In the latter 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’.”

The trial judge’s decision

The plurality found that the trial judge was at a considerable advantage in assessing the parties and their personalities, particularly where issues of undue influence and unconscionable conduct were involved. In *Kakavas* the High Court said that where a transaction is sought to be impugned for vitiating factors, such as duress, undue influence or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts". It was essential for an appellate court to scrutinise the trial judge's findings in light of the advantages enjoyed by the trial judge.

The trial judge posed the hypothetical question of why the wife would sign an agreement when she understood the advice of her solicitor to be that the agreement was the worst that the solicitor had ever seen. The trial judge also asked why, despite the advice of her solicitor, the wife failed to conceive of the notion that the husband might end the marriage.

The trial judge described duress ([2015] FCCA 484 at [68]) as "a form of unconscionable conduct". The plurality said that this did not mean that duress was subsumed within the doctrine of unconscionable transactions, but the trial judge used "unconscionable" in the sense described by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd* [(1998) 194 CLR 395 (at [34])] as "to characterise the result rather than to identify the reasoning that leads to the application of that description".

The trial judge concluded that the wife was powerless to make any decision other than to sign the first agreement, and referred to the inequality of bargaining power and a lack of any outcome for the wife that was "fair or reasonable". However, the trial judge also explained that the wife's situation was "much more than inequality of financial position", setting out six matters which, in combination, led her to the conclusion that the wife had "no choice" or was powerless:

1. Her lack of financial equality with the husband;
2. Her lack of permanent status in Australia at the time;
3. Her reliance on the husband for all things;
4. Her emotional connectedness to their relationship and the prospect of motherhood;
5. Her emotional preparation for marriage; and
6. The "publicness" of her upcoming marriage.

These six matters were the basis for what the plurality described as the "vivid" description by the trial judge (quoted at [47]) of the wife's circumstances:

> "She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions ... She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.
>
> Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear."

As to the second agreement, the High Court plurality noted (at [48]) that the trial judge held that it was "simply a continuation of the first – the marriage would be at an end before it was begun if it wasn't signed". In effect, the trial judge's conclusion was that the same matters which vitiated the

first agreement, with the exception of the time pressure caused by the impending wedding, also vitiated the second agreement.

The Full Court's decision

The Full Court found that the agreements were fair and reasonable because, as summarised by the plurality (at [51]):

1. The husband had told the wife at the outset of their relationship, and she had accepted, that his wealth was intended for his children; and

2. The wife's interest, which was provided for in the agreements, concerned only the provision that would be made for her in the event the husband predeceased her.

The Full Court held that the wife could not have been subject to undue influence because she acquiesced in the husband's desire to protect his assets for his children and because she had no concern about what she would receive on separation. The Full Court also held that the husband's conduct was not unconscionable because he did not take advantage of the wife, referring to:

1. The lack of any misrepresentation by the husband about his financial position (as found by the trial judge and the Full Court). Even if the husband had failed to disclose, it was fatal to this ground that (at [109] by the Full Court):

> "The wife cannot point to any detriment suffered by her as a consequence of her claims of non-disclosure, given that her legal advice was not to sign the agreement, it being described by her lawyer as "the worst agreement I have ever seen". Despite that advice, the wife went ahead and signed the agreement. We also fail to see how that advice would have altered if the husband's worth had indeed not been fully disclosed, and in fact, when the entirety of the advice given is analysed, there is no room to suggest, as the wife does, that the advice as to her rights would have been different."

2. The husband's early statements to the wife that made clear that she would not receive any part of his wealth on separation;

3. The wife's staunch belief that the husband would never leave her and her lack of concern about her financial position while the husband was alive; and

4. The husband's acceptance of handwritten amendments to the agreements that were made by the wife's solicitor.

The High Court plurality, noting (at [54]) the advantages enjoyed by the trial judge in evaluating the evidence, said that with one exception, none of the findings of fact by the trial judge were overturned by the Full Court. That exception was the Full Court's rejection of the trial judge's

finding that there was no outcome available to the wife that was fair or reasonable. The High Court found that the Full Court erred in rejecting this finding. It was open to the trial judge to conclude that the husband, as the wife knew, was not prepared to amend the agreement other than in minor respects. Further, the High Court plurality said (at [55]) that the description of the agreements by the trial judge as not being "fair or reasonable" was not merely open to her, it was “an understatement”. The unchallenged evidence of the wife’s solicitor was that the terms of the agreements were "entirely inappropriate" and wholly inadequate.

As the terms of the agreement were so unfavourable to the wife – a bad bargain – the plurality considered those terms to be relevant to a finding of undue influence. It said (at [56]) that the trial judge:

> “was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature.”

The plurality did not agree with the Full Court that the trial judge’s conclusion was based only upon an inequality of bargaining power. The trial judge carefully set out the 6 specific factors (stated earlier in this paper) which, together with the lack of a fair or reasonable outcome, led her to the conclusion that the wife had no choice but to enter into the two agreements.

In circumstances where the Full Court accepted almost all of the findings of fact, and had erred in not accepting there was no outcome available to the wife which was fair and reasonable, the High Court plurality said that the Full Court ought to have found that the wife was subject to undue influence, albeit mis-described by the trial judge as duress.

The plurality’s conclusion

The plurality set out six general factors which it identified as being relevant to whether a financial agreement should be set aside for undue influence (at [60]):

1. Whether the agreement was offered on a basis that it was not subject to negotiation;
2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
3. Whether there was any time for careful reflection;
4. The nature of the parties' relationship;
5. The relative financial positions of the parties; and

6. The independent advice that was received and whether there was time to reflect on that advice.

These factors were not only important to the determination in this case, but give guidance as to what is relevant in future applications to set aside financial agreements for undue influence.

In relation to unconscionable conduct, the High Court plurality relied on *Amadio* and said (at [64-65]) that the adjective "special" in the requirement for “special disadvantage” is “used to emphasise that the disadvantage is not a mere difference in the bargaining power but requires an inability for a person to make a judgment as to his or her own best interests”.

The trial judge found that the wife’s powerlessness and lack of choice but to enter into the agreements pointed inevitably to the conclusion that she was at a special disadvantage.

The husband was aware of the wife’s special disadvantage and it was, in part, created by him:

1. He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice given about the latter agreement.

2. She had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements, even though she knew in advance that there was to be some type of document.

3. The wife and her family members had been brought to Australia for the wedding by the husband and his ultimatum was not accompanied by any offer to assist them to return home.

The High Court plurality said these matters increased the pressure which contributed to the substantial subordination of the wife’s free will in relation to the agreements. The husband took advantage of the wife’s vulnerability to obtain agreements which, on the uncontested assessment of the wife’s solicitor, were "entirely inappropriate" and wholly inadequate.

Minority judgments

There were two separate minority judgments, being of Justices Nettle and Gordon. Both agreed that the 2 agreements should be set aside for unconscionability, but not for undue influence.

Justice Nettle said that he could not depart from the decision of the Court of Appeal of the Supreme Court of New South Wales in *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149, which decided that the concept of illegitimate pressure should be restricted to the exertion of pressure by "threatened or actual unlawful conduct". He said that had “largely been followed without demur”. Whilst Nettle J preferred a broader view of the requirements for a finding

of duress, he noted that the equitable doctrine of unconscionable conduct did not have the same restrictions as undue influence and was not restricted to unlawful means.

Although Nettle J believed that the concept of illegitimate pressure might be more appropriate for this case, it was also capable of being seen as unconscionable conduct, for reasons similar to those expressed by the plurality. Like the plurality, Nettle J's view (at [76]) was that the circumstances had so affected the wife's state of mind that she was incapable of make a judgement in her own interests. There was no other rational explanation for the wife's decision not to insist upon the substantive changes which her solicitor recommended, and instead to acquiesce to the husband's "extraordinary demands".

The second agreement was dependent for its efficacy upon the first agreement, and so it fell with the earlier agreement, but, if that were not so (at [77]) the wife was "in a position of special disadvantage which rendered her even less capable of making a decision in her own best interests to refuse to sign the second agreement than she had been capable at the time of the first agreement of insisting upon amendments in accordance with [her solicitor's] recommendations". On Nettle J's analysis, the second agreement was more at risk of being set aside than the first agreement.

Justice Nettle held that it was against equity and good conscience for the husband or his successors to be permitted to enforce either agreement.

Justice Gordon held that undue influence did not apply because (at [80]) the wife's "capacity to make an independent judgment was not affected". She "was able to comprehend what she was doing when she signed the agreements, and that she knew and recognised the effect and importance of the advice she was given". Moreover, she wanted the marriage to proceed and to prosper. She knew and understood that it would proceed only if she accepted his terms. Once she decided to go ahead with the marriage, it was right to say, as the trial judge said, that she had "no choice" except to enter into the agreements. No other terms were available. But her capacity to make an independent, informed and voluntary judgment about whether to marry on those terms was unaffected and she chose to proceed. Her will was not overborne.

Justice Gordon said in relation to unconscionability (at [81]) that although the wife's "independent, informed and voluntary will was not impaired, she was unable, in the circumstances, to make a rational judgement to protect her own interests". Those circumstances were evident to, and substantially created, by the husband and it was unconscionable for the husband to procure or accept the wife's assent to the agreements.

Justice Gordon set out the requirements to establish unconscionable conduct (at [113]):

> "A special disadvantage may also be discerned from the relationship between parties to a transaction; for instance, where there is 'a strong emotional dependence or attachment' … Whichever matters are relevant to a given case, it is not sufficient that they give rise to inequality of bargaining power: a special disadvantage is one that "seriously affects" the weaker party's ability to safeguard their interests."

She found that the wife was under a special disadvantage and that the agreements were "grossly improvident" (*Bridgewater v Leahy* (1998) 194 CLR 457 at 493). It was relevant that the wife's entitlements in the event of separation were (at [121]) "extraordinarily and disproportionately small in comparison to what the wife would have been entitled to if she had not entered into the agreements". Unlike the other judges who looked at the general unfairness of the agreements as against an unstated benchmark, Gordon J, expressly compared the wife's entitlements under the agreements to her entitlements under the FLA, if she had not entered into the agreements.

Although the wife was expecting an agreement to protect the husband's wealth for his children, he had brought her to Australia promising to look after her like "a queen" and it was only 10 days before the wedding that she received detailed information about the husband's finances and became aware of the specific contents of the first agreement.

Justice Gordon found (at [123]) that the fact that the wife received independent legal advice about the two agreements and rejected her solicitor's recommendation on each occasion did not contradict a finding that there was not unconscionable conduct. The fact that she was willing to sign both agreements *despite* being advised that they were "terrible" served to underscore the extent of the special disadvantage under which she laboured, and to reinforce the conclusion that it was unconscientious for the husband to procure or accept her assent.

A bad bargain?

Perhaps the most important aspect of the High Court judgment is its attitude to unfair agreements or to "a bad bargain". The Full Court of the Family Court has said, in relation to whether a financial agreement should be found to be binding under s 90G(1A), that parties are free to enter into "a bad bargain". By contrast, the High Court did not agree that in relation to s 90K(1)(b) and (e) "a bad bargain" will always be upheld, and in fact found that a bad bargain may contribute to a finding that it should be set aside. The terms of the agreements were very unfavourable to the wife and the plurality considered their terms to be relevant to a finding of undue influence. It said (at [56]) that the trial judge:

> "was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature."

Interestingly, it was only Gordon J who compared the outcome for the wife under the agreement to the outcome under the FLA. It is unclear by what benchmark the plurality and Nettle J judged the agreements as being “unfair and unreasonable” to the wife.

The Full Court of the Family Court has stated its views about bad bargains in relation to s 90G(1A) rather than in relation to s 90K, but it is arguably now open to the Full Court to reconsider whether a "bad bargain" is relevant under s 90G(1A) to whether it is unjust and inequitable for a financial agreement to be found to be binding.

3. Disclosure

An explicit duty of disclosure is not set out in the FLA in relation to financial agreements. The duty is almost a negative one - if a party does not disclose their financial circumstances, the agreement is at greater risk of being set aside under s 90K(1)(a) or s 90UM(1)(a) or perhaps s 90K(1)(e) or s 90UM(1)(h).

A duty of disclosure may arise in relation to financial agreements in various ways:

- the *Family Law Rules 2004*, especially r 13.04(1) and the Pre-Action Procedures and the *Federal Circuit Court Rules 2001*, especially r 24.03
- the meaning of fraud” in s 90K(1)(a), (aa) and (ab), and 90UM(1)(a) - (d)
- the common law and equitable doctrines incorporated by s 90K(1)(b), 90UM(1)(e), 90KA, and 90UN, e.g. misrepresentation, unconscionable conduct.

Rule 13.04(1) requires that in any financial case there be a “full and frank disclosure of the party’s financial circumstances”. This suggests that silence and failure to disclose material facts amount to statutory fraud upon the court or the other party.

However, r 13.04 only applies to “a financial case” which is defined in the Dictionary to the *Family Law Rules* so as not to include the making of a financial agreement, but only proceedings to set one aside under s 90K or s 90UN. Justice Murphy said in *Hoult & Hoult* [2011] FamCA 1023 (at [126]) that there was an argument that financial agreements ought to embrace the fundamental principle in the Court’s Rules, namely the duty of full and frank disclosure, but the position was clarified in the FLA by specifying that fraud for the purposes of s 90K(1)(a) can be constituted by material non-disclosure.

The Full Court of the Family Court in *Kennedy & Thorne* (2016) FLC 93-757 (which was successfully appealed to the High Court on other grounds), adopted the submissions made on

behalf of the husband's deceased estate as to the distinction between disclosure in relation to property settlement orders and financial agreements (at [104]):

> "… The obligation of disclosure under Pt VIII occurs in a context where a court is required to make findings about the assets, liabilities and financial resources of the parties, and where the court is also required to be satisfied that it is just and equitable to make orders.
>
> By contrast, a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained; and there is no judicial scrutiny relating to their formation. A party may enter an agreement, and such agreement is capable of being binding, with little or no knowledge of the other party's financial position. That is, consistent with the doctrine of freedom of contract, a party [sic] enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence. The fact that a financial agreement results in a different outcome to that which may have been awarded under s 79 and s 75 is not relevant to whether the agreement should be set aside." (Footnotes omitted)

The Full Court pointed out that the safeguard was that if there is inadequate disclosure, the legal advice given to the other party can be, for example, not to enter into the agreement or only to enter into it upon receipt of specific financial information. Whilst correct, this presumes that the parties are on relatively equal bargaining terms.

Furthermore, it was fatal to the wife's argument that she could not point to any detriment suffered by her as a consequence of her claims of non-disclosure, given that her legal advice was not to sign it. Her lawyer described the agreement as "the worst agreement I have ever seen". There was no indication that the wife would not have executed the agreement if the husband's wealth had been fully disclosed.

In *Thorne v Kennedy* all members of the High Court found that the fact that the wife entered into "a bad bargain" was relevant to the determination that the agreement should be set aside for unconscionable conduct and by the majority for undue influence. The High Court did not deal with disclosure, but it is at least arguable that where an agreement includes statements to the effect that the parties waived their rights to seek disclosure from each other and there was unequal bargaining power, that the non-disclosure might assist the court to find that there has been a vitiating factor, such as undue influence.

<u>Case examples</u>

In *Grant & Grant-Lovett* [2010] FMCAfam 162 the court found that the fact that the parties had been married for 12 years did not lessen the parties' obligation to disclose prior to entering into the financial agreement.

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. Judge Jarrett did not accept that the disclosure requirement extended to providing values of assets, but he considered that parties were generally entitled to satisfy themselves about the values of assets and financial resources if they chose to do so. The failure to disclose was also found to be a misrepresentation. The agreement was voidable at the wife's option.

In *Jeeves & Jeeves (No 3)* [2010] FamCA 488, although Cronin J found there had been a suppression of evidence, the wife's case did not reach the standard of establishing any deceit on the part of the husband. There was no evidence that the husband concealed any plans that would have objectively made a difference. The wife did not act on the husband's assertions. She did not believe the husband's information and did not act upon it. There could therefore be no fraud, duress or unconscionable conduct on the part of the husband.

The wife's application was under both s 79A and s 90K. In relation to the distinction between the two sections, Cronin J said (at [484], [485]):

> "In respect of the financial agreement executed prior to the orders being made by the Court, the wife's argument was inextricably linked to the material relating to the s 79A application. The words in s 90K are slightly different to those in s 79A but the underlying concept is the same.
>
> The simple use of the word 'fraud' in s 90K must be read widely because of the inclusion of the reference to non-disclosure of a 'material matter'. Thus it encompasses knowledge and intention relating to financial matters that, if known, would create a different picture to that portrayed on the surface. It is hardly distinguishable from the s 90K(1)(e) reference to conduct that was in all of the circumstances unconscionable. Fraud no longer means just the unlawful use of pressure to enter into such an arrangement."

On appeal in *Jeeves & Jeeves* [2011] FamCAFC 94, the Full Court found that although the trial judge had erred in some of his findings as to the husband's disclosure, the wife had not established that the non-disclosure was, or could reasonably have been, material to her consent, as she didn't believe him anyway.

Justice Murphy in *Hoult & Hoult* [2011] FamCA 1023 disagreed with some earlier cases which supported inadvertent non-disclosure as being sufficient to constitute fraud under s 90K(1)(a). He considered that as s 90K(1)(a) refers to "fraud" there must be some proof of an intention to deceive.

In *Parke & Parke* [2015] FCCA 1692 a financial agreement was not 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 self-managed superannuation fund of which both parties were members although the wife did not know of its existence or even that she had a member's account. The finding of the misrepresentation being false, rather than unintentional, was strengthened by the conduct of the applicant in the financial agreement

proceedings where he did not disclose the fund. Its existence was only discovered as a result of a subpoena to the husband's accountant. However, the wife did not rely on the misrepresentations. She did not prove inducement. The agreement was set aside under s 90K(1)(b), (c) and (e).

A Full Court appeal by the husband in *Parke* did not proceed as the husband died and his legal personal representative discontinued the action.

The parties in *Kapsalis & Kapsalis* [2017] FamCA 89 entered into 2 agreements. The court found that the wife chose not to make enquiries of the husband about his financial position before she signed a cohabitation agreement in 2004 under State legislation, although she conceded that she had every opportunity to do so. She understood when she signed the agreement that she would receive nothing if she and the husband separated. She conceded in cross-examination that, had she been told the husband's assets were worth, say $20 million rather than $3 - 4 million, she would still have entered into the agreement. She knew he had a house and corporate assets, but made no enquiry as to the value of them before entering into a second agreement under s 90B FLA one year after entering into the cohabitation agreement. Justice Rees found (at [25]):

> "More relevantly here, it was clear … that nothing in the husband's disclosure of his assets induced her to enter into the Agreement. To use the words of the section, the wife's entering into the Agreement was not 'obtained' by the husband's representations about his asset position. She was determined to enter into the Agreement no matter what his asset position was."

After an eight year marriage and two children, the wife received no property and only modest spousal maintenance. This view of the effect of non-disclosure was consistent with the Full Court's approach in *Kennedy & Thorne* (2016) FLC 93-757; [2016] FamCAFC 189, which was appealed to the High Court on other grounds. Although the Full Court in *Kennedy & Thorne* did not refer to *Jeeves (No. 3),* the trial Judge in *Jeeves (No. 3)* was a member of the Full Court in *Kennedy & Thorne.* The Full Court quoted favourably from the trustees' submission (at [104]) who compared the obligation to make full and frank disclosure under s 79, to the position with financial agreements:

> "By contrast, a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained; and there is no judicial scrutiny relating to their formation. A party may enter an agreement, and such agreement is capable of being binding, with little or no knowledge of the other party's financial position. That is, consistent with the doctrine of freedom of contract, a party enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence. The fact that a financial agreement results in a different outcome to that which may have been awarded under s 79 and s 75 is not relevant to whether the agreement should be set aside [*Hoult & Hoult*)]."

It is difficult to say if the outcome in *Kapsalis* would have been different if it was determined after the High Court delivered its judgment in *Thorne v Kennedy*, because the background facts set out

in *Kapsalis* are insufficient. Almost certainly, though, the case would have been argued differently in relation to whether there was undue influence or unconscionable conduct.

In *Ainsley & Lake* [2016] FCCA 2132, the wife sought enforcement of a post-separation financial agreement and the husband sought that it be set aside pursuant to s 90K(1)(a). The wife did not disclose her superannuation of $35,000 in the agreement although she had told her lawyers of its value and they had confirmed this in a letter. The husband knew that the wife had superannuation but believed it to be about $6,000. There was a blank space left in the schedule next to the words "Ms Ainsley's superannuation". The asset pool was modest, being less than $400,000.

The husband defaulted under the agreement, with his 2 breaches amounting to over $38,000.

Judge Henderson found that the wife failed "to disclose a material fact, albeit without any intention to defraud in the usual meaning of such a phrase" (at [14]).

She accepted that fraud under s 90K(1)(a) had a broader meaning than the general understanding of its meaning and seemed to indicate that s 90K(1)(a) set a high bar said (at [23]–[24]):

> "To find that an agreement was binding when there has been a non-disclose [sic] of a material matter would make a mockery of s 90K(1)(a) and its clear intention. For parties to be able to rely upon this section there must be a full and frank disclosure by each of them of their total financial position as at the date of signing the deed. That is clearly the intention of s 90K(1) and the intention of the certificate so that there is confidence that advice given to a party is as best as it can be because all material facts have been disclosed.
>
> In addition the wife's failure to disclose her current superannuation at the time she signed the deed is in breach of recital K, recital L and recital M of the binding financial agreement."

The agreement was set aside although the husband had knowledge that the wife had some superannuation, he had failed to comply with the terms of the agreement and the pool was modest. These matters were irrelevant to the discrete issue in the case, which was the wife's failure to disclose.

The wife argued that the husband's failure to waive privilege and produce his then solicitor's file was relevant and an adverse inference could be drawn from it. Judge Henderson rejected this argument and concluded (at [27]):

> "It was the wife's obligation to disclose her financial position. It was not the husband's obligation to find it out."

The wife's application for leave to appeal out of time was dismissed in *Ainsley & Lake* [2016] FamCAFC 253.

4. Power of the court to declare financial agreements binding

To mitigate the strict technical interpretation of s 90G and make it more difficult for financial agreements to be set side, the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) introduced remedial sections into Pt VIIIA and Pt VIIIAB relieving against the consequence of an agreement not meeting the requirements of s 90G(1)(b), (c) and (ca) or s 90UJ(1)(b), (c) and (ca).

To put it bluntly, to have a bullet-proof agreement, if you stuff something up under s 90G(1) (s 90UJ(1)), you need to be able to try to "save" it under s 90G(1A) (s 90UJ(1A)).

When can an agreement be saved? The legislative provisions

Section 90G(1A)–(1C) states:

> "(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."

Section 90UJ(1A) - (1C) are the equivalent provisions for Pt VIIIAB financial agreements.

The effect of s 90G(1A) is that an agreement, provided that it is signed by all parties, which does not meet all the other requirements of s 90G may be saved "if a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties". In considering this, any changes in circumstances after the agreement was executed are irrelevant. This summary is subject to the difficulty with the transitional provisions identified in *Hoult* and *Parker,* and of interpreting s 90G(1A)(c), both of which are discussed below.

The *Hoult* and *Parker* appeals

The two main cases on s 90G(1A) - (1C) are *Hoult* and *Parker*. It is useful to look at both the trial judgments and the appeals, as there were strong minority judgments which approved aspects of the trial judgments. Because of the divergent views, it was my view before *Thorne v Kennedy*, that the interpretation of these sections remained unsettled. After *Thorne v Kennedy*, there is, in my view, an even stronger case for reviewing the interpretation of these sections.

In *Hoult & Hoult* [2012] FamCA 367 when discussing the exercise of the discretion under s 90G(1A), Murphy J referred to the distinction between the phrase "just and equitable" used in s 79 and the phrase "unjust and inequitable" used in s 90G(1A)(c). He said (at [37], [39]):

> "Yet, it nevertheless seems to me that in the exercise of the s 90G(1A) discretion, the 'justice and equity' of the bargain, or, perhaps, its inherent 'fairness' referenced to ordinary notions of that term, cannot be wholly irrelevant to the exercise of the s 90G(1A) discretion. …
>
> In other words, it seems to me that the content of the bargain reached between the parties, in all of the circumstances of their particular marriage and its breakdown, must have some relevance if the inquiry is into 'injustice and inequity'."

Justice Murphy said (at [57]) that the enquiry required of s 90G(1A)(c) was a wide-ranging one that might include considerations such as:

> "• The facts and circumstances surrounding the particular s 90G requirement not being met;
>
> • What the parties themselves said and did, if anything, so as to render the agreement not binding;
>
> • The circumstances within which the parties' bargain was concluded;
>
> • The length of time between the signing of the agreement and the decision as to whether the parties are to be held to it;
>
> • What the parties said and did in reliance upon the agreement being binding subsequent to the signing of the agreement;
>
> • Whether the terms of the bargain itself offend ordinary notions of fairness or plainly fall markedly outside any reasonable broad assessment of the s 79 discretion;"

Justice Murphy found that it would be unjust and inequitable if the financial agreement was not binding on the spouse parties to the agreement, saying (at [59]):

> "I found in the first hearing that the wife was an active participant in negotiations that led to earlier drafts of the agreement and in discussions by which a bargain was struck. The bargain was satisfactory to both the husband and the wife at the time it was struck. Proper weight should be given to holding the parties to their bargain and to the importance that the legislature attaches thereto evident in the section in addition to, the place of Pt VIIIA in the Act and its role in replacing, relevantly, s 87 agreements. These, too, are important considerations."

Both parties appealed. The husband appealed against the finding that the agreement was not binding within s 90G(1)(b). The wife appealed against the later declaration that within s 90G(1A)(c), it would be “unjust and inequitable” if the agreement was not binding on the parties.

On appeal, two out of the three judges of the Full Court expressly rejected the last of the 6 factors above, the concept of a "bad bargain" being relevant to the exercise of the s 90G(1A) discretion. In the wake of the High Court’s judgment in *Thorne v Kennedy*, perhaps Murphy J was right and the Full Court was wrong?

The Full Court upheld both parties’ appeals in *Hoult & Hoult* (2013) FLC 93-546; [2013] FamCAFC 214. The majority, Strickland and Ainslie-Wallace JJ, found that Murphy J misdirected himself and applied the wrong test in interpreting and exercising the discretion under s 90G(1A) and erred in finding that a relevant enquiry in exercising the discretion under s 90G(1)(c) was whether “the terms of the bargain itself offend ordinary notions of fairness or plainly fall markedly outside any reasonable broad assessment of the s 79 discretion”.

Justices Strickland and Ainslie-Wallace said (at [305]–[306]):

> “We are firmly of the view that the content of the bargain has no relevance to the exercise of discretion under s 90G(1A)(c) and we base that on the plain words of the paragraph. That is also consistent with what Justice Strickland said at first instance in *Parker* … and neither of the judges who formed the majority in the Full Court in *Parker* found otherwise.
>
> We do not accept that because the enquiry in paragraph (c) is as to injustice and inequity, the content of the bargain must have some relevance. The issue of injustice and inequity can far more easily be seen as directed to whether, given the nature and extent of the non-compliance with the s 90G(1) requirements, it would be unjust and inequitable if the agreement was not binding.”

Justices Strickland and Ainslie-Wallace noted that whereas the trial judge claimed not to pass judgment or comment upon how the terms of the agreement might compare to any s 79 order made by the court, he did in fact consider the justice and equity of the bargain “in s 79 terms”, and overlooked the plain words of the paragraph.

Justice Thackray also upheld the appeals, but for slightly different reasons. Importantly, he found the brevity of the consultation was consistent with the wife’s assertion that she had not received the requisite advice. During a 50 minute attendance, the solicitor read the agreement to the wife, whose first language was not English, verbatim. Justice Thackray considered the fairness of the agreement was potentially relevant to s 90G(1A)- (1C) and said (at [197], [200], [201]):

> "Having determined the appeal should be allowed for another reason, it is unnecessary to express a concluded view on Murphy J’s view that the inherent fairness of an agreement cannot be “wholly irrelevant” to the exercise of the discretion. However, as presently advised, I consider the inference to be drawn from the words in brackets is that although it is impermissible to take account of “circumstances” that have changed after execution of the agreement, it is permissible to take into account “circumstances” at the

> time of formation of the agreement. However, I cannot see any warrant in the text or in the extrinsic materials to treat "circumstances" as being restricted to matters associated with the negotiation, drafting and execution of the agreement, since these are not "circumstances" that are capable of change after execution. If those were truly the only relevant "circumstances", then the words in brackets would appear to be surplus (rather than words of limitation, as suggested by Strickland and Ainslie-Wallace JJ) …
>
> Although the Act now undoubtedly allows parties to enter into bad or grossly unfair bargains, it is perfectly consistent for the legislation to permit consideration of the fairness of the bargain (judged at the date of execution) in those cases where the safeguards in s 90G(1) have not been met. The absence of one or more of these safeguards surely means that different public policy considerations apply. Furthermore, failure to consider the potential injustice of the terms of the bargain would mean the discretion is exercised in a vacuum.
>
> Therefore, while it may be appropriate to make a s 90G(1B) declaration where a party did not receive the prescribed legal advice but where the bargain was fair at the time it was struck, it may be inappropriate to make such a declaration where the advice was not given **and** the bargain was unfair or even punitive."

The High Court in *Thorne v Kennedy*, whilst involving a consideration of s 90K, arguably affects the interpretation of s 90G(1) and 90G(1A)–(1C). If the bargain isn't fair, and particularly if advice was not given, should s 90G(1) be more strictly adhered to? Should the court be more reluctant to find the agreement binding under s 90G(1A) than if there is a more minor beach of s 90G(1) and the agreement is a fair one? The High Court in *Thorne v Kennedy* reminded us that financial agreements are contracts, so contract law is relevant.

Justice Strickland pointed out at first instance in *Parker & Parker* [2010] FamCA 664 (at [108]):

> "Significantly s 90G(1A)(c) does not refer to whether the **terms** of the agreement are unjust and inequitable, but whether 'it would be unjust and inequitable if the agreement was not binding'. … (Our emphasis)"

He also noted that the legislature deliberately chose the words "unjust and inequitable" rather than "just and equitable" as in s 79 and considered (at [110]) that he was required:

> "… to determine whether, given the circumstances surrounding the making of the financial agreement in this case, it would be unjust and inequitable for the agreement not to be binding on the parties."

The husband submitted that the wife should not be able to avoid the terms of the agreement being binding on the basis of a technicality and should not be able to rely on her own legal practitioner's omission. Justice Strickland was concerned that the wife did not receive advice as to the amendment to the agreement. Despite this omission being within s 90G(1A), he was not satisfied that it was unjust and inequitable if the agreement was not binding. He said (at [113], [115]):

> "As mentioned above, the intention of the amendments is to avoid financial agreements being found not to bind the parties due to technical difficulties. Although s 90G(1A)(b) includes subsection (1)(b) in the list of relevant subsections, it could be argued that the

> provision of legal advice is not a 'technical' issue but a substantive matter going to the heart of the agreement …
>
> However, the receipt of independent legal advice by all parties to a financial agreement is an essential requirement. Indeed, it could well be unjust and inequitable to the wife if she was bound by the financial agreement in circumstances where I have found she was not fully advised of the implications of the amendment to clause 15."

The husband appealed. A majority of the Full Court in *Parker & Parker* (2012) FLC 93-499; [2012] FamCAFC 33 allowed the appeal and remitted the matter for rehearing. This was decided before the Full Court decided *Hoult*. Justice Coleman said that Strickland J's view of s 90G(1A) was overly narrow. Justice Coleman considered that s 90G(1A), (1B) and (1C) were "remedial" or "beneficial" and statutory interpretation principles required such provisions to be interpreted "generously" to ensure that the "mischief which the legislation sought to address was remedied" (see DC Pearce & R S Geddes, *Statutory Interpretation in Australia, LawNews* Butterworths, 7th ed, 2011 at p 30).

The husband did not need to seek an order to enforce the financial agreement, as the terms of the agreement had already been put into effect. He could only seek an order to dismiss the wife's s 79 application. There was a question as to whether the remedy in s 90G(1B) was available to the husband as s 90G(1B) referred to an "enforcement application being made by the party seeking to enforce the agreement". Justice Coleman allowed the appeal on the basis that a "permissibly generous interpretation of s 90G(1A)" would not have led the trial judge to the conclusion he reached, "albeit other factors may have". He did not specify those factors.

Justice May said Strickland J was hindered in considering s 90G(1A) by the manner in which the case was presented. There was no alternative but for the matter to be remitted for re-hearing so that consideration could be given to:

- The reference to an "enforcement application", noting that no such application was made by the husband. She said, however, that "this may be of little moment";
- Evidence to be adduced directed to an application under s 90G(1A);
- The full weight of s 90KA may need to be considered as s 90G(1C) refers to s 90KA.

Justice Murphy was the only judge to dismiss the appeal. He agreed with the trial judge, Strickland J, that s 90G(1A) could not be used to find the agreement was binding. Justice Murphy agreed though with Coleman J that s 90G(1A), (1B) and (1C) were remedial provisions and should be read broadly so that an "enforcement application" was not required in the narrow sense.

Justice Murphy was also concerned about the legislation which applied to this particular agreement, as a result of the transitional provisions of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1)* (2009) (Cth) ("Efficiency Measures Act"). The trial took place 12 months before judgment was handed down in *Senior & Anderson* [2011] FamCAFC 129; (2011)

FLC 93-470 which dealt with the application of s 90G to an agreement entered into in the same period as the agreement in *Parker*, namely after 14 January 2004 and before 4 January 2010. This meant that the Efficiency Measures Act's retrospective operation applied so as to (at [168] of *Parker*):

"(a) give s 90G(1) the "consolidated form" outlined in *Senior* at [189];

(b) give s 90G(1A) a form which excludes from its operation:

(i) s 90G(1)(c) either in the form in which that sub-paragraph appears in *Senior or* as it appears in the amended s 90G; and

(ii) s 90G(1)(ca).

(c) render s 90G(1A) applicable only to a financial agreement declared to be not binding by reason of non-compliance with s 90G(1)(b). *But* compliance with that paragraph is referenced to the "consolidated form" of that paragraph."

The consolidated form of s 90G which Murphy J said applied in the 2004 to 2010 period was:

"Section 90G(1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:

(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;*

OR

before signing the agreement, the spouse party was provided with independent legal advice from a legal practitioner about:

i. **the effect of the agreement on the rights of that party; and**

ii. **whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement; and**

iii. **whether or not, at that time, it was prudent for that party to make the agreement; and**

iv. **whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.**

(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 **the italicised text or, in the alternative, stating that the advice referred to in the underlined text** in paragraph (b) **above**, was provided to that party (whether or not the statement is annexed to the agreement); and

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

[Note to 90G(1) has been omitted]

(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~~ paragraph~~s~~ (1)(b) **in either of the forms in which it above appears** ~~(c) and (ca) are~~ **is** 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.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary."

Justice Murphy considered that the trial judge made two errors:

1. There was not an "agreement" and an "amended agreement". A document was signed by the wife on 5 November 2004, and submitted to the husband's solicitors on 8 November 2004. The document proffered by the husband on 11 November 2004 which included the addition of a substantive term by him constituted a counter-offer to the offer made by the wife. On the traditional analysis of offer and acceptance, there was only an agreement on 12 November 2004 when the wife accepted the husband's counter-offer. The analysis of compliance with s 90G at trial concentrated on what took place before and after 5 November 2004, when it should have concentrated on what took place before and after 12 November 2004.

   Justice Murphy agreed with the trial judge that there was insufficient evidence by which he could be satisfied that there was compliance with s 90G(1)(b) in its correct "consolidated form", leading to Murphy J's conclusion that the trial judge's declaration that the agreement was not binding by reason of non-compliance with s 90G(1)(b) was plainly right.

2. The application of the transitional provisions of the Efficiency Measures Act.

When can an agreement be saved? The case law

A review of the cases which have considered s 90G(1A)–(1C) reveals a dearth of cases which actually show how these provisions apply. This is unfortunate, as ensuring a bullet-proof agreement is assisted by knowing when the courts won't save an agreement under these sections. Due to lack of evidence to consider the s 90G(1A) question, cases which reach the Full Court are usually remitted for re-hearing as to whether the agreement should be saved.

The manner in which s 90G(1A)–(1C) should be applied was considered, with some disagreement, in the following cases which were remitted for a re-hearing:

- *Hoult & Hoult* [2012] FamCA 367
- *Hoult & Hoult* [2013] FamCAFC 109; (2013) FLC 93-546
- *Parker & Parker* [2010] FamCA 664
- *Parker & Parker* [2012] FamCAFC 33; (2012) FLC 93-499
- *Senior & Anderson* [2011] FamCA 192; (2011) FLC 93-470

Other cases in which the result was that they were remitted for re-hearing, and are not particularly helpful to the question here are:

- *Bilal & Omar* [2015] FamCAFC 30; (2015) FLC 93-636 because the judge incorrectly found that the wife had not waived legal professional privilege.

- *Logan & Logan* [2013] FamCAFC 151; (2013) FLC 93-535 because it was not apparent how the trial judge found that the wife's evidence was insufficient for the trial judge to be reasonably satisfied that s 90G(1)(b) had not been complied with.

- *Campbell & Peters* [2014] FamCAFC 76 because the issues of s 90G and 90G(1A) were not adequately dealt with.

The cases we are left with are:

- *Manner & Manner* [2015] FCCA 3043
- *Piper & Mueller* [2015] FamCAFC 241; (2015) FLC 93-686
- *The Estate of Ms Fan & Lok* [2015] FamCA 300
- *Senior & Anderson* [2011] FamCA 802
- *Abrum & Abrum* [2013] FamCA 897
- *Warner & Cummings* [2015] FCCA 3043

Manner & Manner [2015] FCCA 3043

The wife argued unsuccessfully that she did not receive the requisite advice. However, Jarrett J accepted that the husband who did not receive the requisite advice and concluded (at [142]):

> "Again, leaving aside the certificate signed by [his lawyer] and recital J in the agreement, there is no evidence from [his lawyer] that he gave advice to Mr Manner about the matters specified in s 90G(1)(b) of the Act, or the matters provided for in item 8A(2) of the Efficiency Measures Act. The only evidence I have about those matters is in the certificate that is attached to the agreement and recital J in the agreement. At no time in the course of his evidence did [his lawyer]:
>
> a. swear that what he certified in the certificate of advice annexed to the agreement was true;
> b. give any particularity about the occasion or occasions upon which he gave the requisite advice to Mr Manner; or
> c. give any particularity about the advice that he gave to Mr Manner."

There was no question that s 90G(1A)(a), (b), (d) and (e) were satisfied. The issue was whether s 90G(1A)(c) was satisfied. After rejecting the wife's application that the agreement be set aside under s 90K for fraud, Jarrett J found that in the making of the agreement the husband engaged in unconscionable conduct. The circumstances which led to this finding were (at [183]):

> "a. Mr Manner was in a much stronger financial position and Ms Manner as each of them well knew;
>
> b. Ms Manner asked three times in writing (2 and 9 February and 30 April 2007) for details of Mr Manner's financial position;
>
> c. Mr Manner gave instructions to his solicitor not to disclose his assets and liabilities and not to answer the correspondence from Ms Manner's solicitor in any meaningful way;
>
> d. Mr Manner then told his solicitor not to negotiate on his behalf, that he would do that directly with Ms Manner, thereby cutting out Mr Davies in the process;
>
> e. Mr Manner knew that Ms Manner was very keen to marry him and had been for a long time;
>
> f. Ms Manner knew that Mr Manner would not marry her unless she entered into a “pre-nup” before the wedding;
>
> g. arrangements for their wedding had been made and guests were attending.
>
> Mr Manner, I am satisfied, either by design or by accident, created an atmosphere of crisis when he had his own solicitor deliver the first draft of the agreement to Ms Manner's solicitor (omitted) hours before the wedding and apparently without warning. It was at that point, for the first time, that Ms Manner was given a list of Mr Manner's assets and liabilities. In my view, there was insufficient time for her to form any view about the accuracy of that list let alone make her own inquiries about the value of his assets if that is what she wished to do."

Judge Jarrett declined to set the agreement aside under s 90K because the significant delay between the parties' separation and the commencement of the proceedings (nearly 2¾ years) was unexplained and in the meantime the wife had insisted that the agreement be performed.

For the same reasons, Jarrett J was satisfied that it would be unjust and inequitable if the agreement were not binding. The agreement was "saved" because the wife had sought to enjoy the benefits of the financial agreement. Having made the decision to call on performance of the agreement, and accepted its performance, there was a very strong argument that she should not later be heard to assert rights which were inconsistent with that choice. The wife's own conduct in affirming the financial agreement through her insistence on its performance was, the wife said, nothing more than a sham because she did not consider the agreement binding and she always intended to pursue a property settlement with the husband. For Jarrett J those matters weighed heavily against exercising the s 90K(1) discretion in the wife's favour. In addition, it was the husband who had not received legal advice, not the wife, and the husband sought to maintain the agreement. It is likely that this case would not be decided differently post *Thorne v Kennedy*. Although not expressly stated by Jarrett J, equity relies on clean hands. The wife did not have clean hands.

If the agreement was set aside, s 79 proceedings could not be commenced as the wife had passed away. This was not considered to be a relevant factor by the court as other courts could deal with the parties' disputes.

Piper & Mueller [2015] FamCAFC 241; (2015) FLC 93-686

The husband argued that the agreement was not binding because the certificate used words not used in s 90UJ(1) by referring to:

> "whether or not, at the time the advice was provided, it was to the advantage financially or otherwise, of that party to make the Agreement."

Justices Ryan and Aldridge summarised the evidence given by the husband (at [19]) to which objection was not taken, that instead of the advice he should have received, he:

> "received advice as to the effect of the agreement on the parties' rights, whether or not it was to the appellant's advantage, financially or otherwise, to make the agreement, whether or not it was prudent for him to make the agreement and whether or not at the time, and in the light of such circumstances as were at that time reasonably foreseeable, the provisions were fair and reasonable."

After looking at cases not under the FLA about giving advice, the judges concluded (at [52] - [53]):

> "The significance of these cases is that, in determining what is "prudent", the court looks to the future and the interests of the person in taking, or not taking, the proposed course. In other words, whether a particular course is prudent involves consideration of the advantages and disadvantages of the proposed course. Similarly, an assessment of

> whether the provisions of an agreement were fair and reasonable, necessarily involves a consideration of the advantages and disadvantages of those provisions.
>
> … That evidence [as to the advice that the husband was given] gives rise to the inference that the appellant had been given advice as to the advantages and disadvantages of making the agreement. Advice as to whether making the agreement was prudent, or whether its provisions were fair and reasonable must have involved such consideration and advice. How else could advice be given that the proposed course was prudent, or the terms fair and reasonable?"

They said that the matters considered by the trial judge under s 90UJ(1A) were "relevant considerations that carried considerable and appropriate weight. The reference to the word 'disadvantage' in her Honour's reasons … is clearly a reference to the disadvantages of an agreement not being in place as opposed to the disadvantage of losing the benefit of the particular terms of this agreement" (at [58]). The factors the trial judge took into account were:

- It would be to the disadvantage of the respondent if the agreement that the parties entered into was not upheld;
- The parties got advice;
- They each saw solicitors;
- The documents made it abundantly clear that each party wanted to keep their own assets;
- Both parties were adults;
- They had each been advised that they knew what they were doing;
- It was the intention of both parties that the agreement would deal with their financial arrangements and that neither of them would have resort to the FLA;

Justices Ryan and Aldridge referred to the Full Court in *Hoult & Hoult* [2013] FamCAFC 109; (2013) FLC 93-546 where Strickland and Ainslie-Wallace JJ (at [307]) stated the range of factors that were appropriate to consider when exercising the discretion (being factors relied upon by the trial Judge with one deletion):

- The terms of the section, the nature of a financial agreement as a creature of the Act, and the place of Part VIIIA within the overall scheme of the Act;
- The nature and extent of the non-compliance with the requirements of s 90G(1);
- The facts and circumstances surrounding the making of the agreement including, in particular, if one of the parties has complied with all of the mandatory requirements necessary to render the agreement binding.

Justices Ryan and Aldridge concluded (at [60], [62]) that the nature of the non-compliance was not substantial. The agreement was drawn up by the husband's own solicitors on his instructions and

he had the benefit of legal advice before signing the agreement and before it was sent to the wife for her to sign. The evidence did not establish that there was a failure to give the requisite legal advice to the husband.

Justice Murphy agreed with the conclusions of Ryan and Aldridge JJ.

The agreement in *Senior & Anderson* [2011] FamCA 802 was entered into when the transitional provisions of s 90G applied, so the advice requirement was not a requirement which could be dispensed with. This was a re-hearing before Young J as to whether the agreement was binding under s 90G(1) or 90G(1A) and (1B) after the Full Court had upheld the husband's appeal.

The husband disagreed with the finding by the Full Court that the remedies in s 90G(1A), (1B) and (1C) were not available if there was not an application to enforce a financial agreement. He sought leave to amend his response. The wife agreed with the husband's interpretation and did not oppose the granting of leave. The husband also argued for a narrow interpretation of s 90G(1A)(c) as detailed in *Parker & Parker* [2013] FamCA 664.

Justice Young disagreed with the husband and agreed with the wife with respect to the different reasoning of Strickland and Murphy JJ in *Senior & Anderson*. He considered that Murphy J (who repeated his views in *Parker* above) was most likely correct and found that as the agreement between the parties satisfied s 90G(1)(b) but did not satisfy s 90G(1)(c), the consolidated s 90G(1A)(b) was not satisfied as each party was not provided with signed statements by their legal practitioners stating that the advice had been provided as the certificates referred to incorrect names. The form of s 90G(1A) at the relevant time did not give this as a ground on which an agreement could be found to be binding.

Of course, it must be remembered that *Senior & Anderson* is only relevant to agreements entered into in the 2004-2010 period.

Abrum & Abrum [2013] FamCA 897

Justice Aldridge found that the agreement did not meet the s 90G(1) requirements because:

(a) The wife was not given the advice required by s 90G(1)(b);

(b) The certificates did not comply with s 90G(1)(b). The certificates stated that the advice given was:

> "1. the effect of the Deed on the rights of the parties to apply for an order for property adjustment under the *Family Law Act 1975* (Cth);
>
> 2. whether or not at that time it was to the advantage, financially or otherwise, of my client to enter into the Deed;

3. whether or not at that time it was prudent for my client to enter into the Deed; and

4. whether or not at that time and in the light of such circumstances as were at that time reasonably foreseeable the provisions of the Deed were fair."

Paragraphs 3 and 4 were no longer required by s 90G(1) when the agreement was entered into, but Aldridge J found that their presence did not render the certificate non-compliant. However, paragraphs 1 and 2 presented more serious problems, as (at [56]):

> "Section 90G(1)(b) requires advice to be given about "the effect of agreement on the rights of that party". That is different to the "rights of the parties to apply for an order for property adjustment". Similarly, the Act requires advice to be given about "the advantages and disadvantages" and not merely the "advantage, financially or otherwise" of entry into the agreement."

(c) A copy of the agreement was not given to the wife until five years after it was signed and five months after separation.

(d) A copy of the statement required to be given by s 90G(1)(ca) was not given until the copy of the agreement was given. Although the FLA does not give a time-frame, Aldridge J considered that the better view, but not a concluded view, was that a prompt exchange was necessary.

The wife's solicitor didn't give the advice in accordance with s 90G(1), as it was at the time (in 2007), but also didn't give advice which complied with any other version of s 90G(1). There was no history taken of the marriage, no instructions taken on contributions and s 75(2) factors, and no advice given on the wife's rights under s 79. There was no suggestion or recommendation that the parties could negotiate about the terms of the agreement. The wife's entitlements under the agreement were limited to 5/44ths of the value of a waterfront property transferred by the husband's parents to the husband at under-value.

Justice Aldridge said that the lack of proper advice to the wife was significant and constituted a very substantial failure to comply with s 90G(1)(b). However, he noted that the lack of advice or the lack of proper advice was not, of itself, determinative. He quoted from Thackray J (the minority judge on this point) in *Hoult & Hoult* and agreed with him that where there are minor breaches of s 90G(1) the court might be more easily satisfied that it would be unjust and inequitable if the agreement was not found to be binding, than where there are more serious breaches. It did not reflect a change in the onus but reflected the wide range of weight that can be given to various factors. In the case before him the non-compliance with s 90G(1)(b) was serious in that appropriate legal advice was not given as was required. However, he found that the agreement was binding, persuaded by the following factors (at [103]–[104]):

> "On the other hand, it is clear that the gift of the property would not have occurred but for the wife entering into the Binding Financial Agreement along with the Deed of Family Arrangement and the Contract to Make Mutual Wills. These agreements not only involved

> the parties to the marriage but the paternal grandparents. It is more likely than not that the gift would not have taken place without those agreements being entered into. The husband's parents acted to their detriment in reliance on the Binding Financial Agreement.
>
> Also to be taken into account is the fact that the agreement does not oust all of the wife's property rights but only those against this specific property. This carries less weight in this case because the evidence does not suggest that there were other assets of substance, or of the magnitude of the waterfront property, available against which property orders could otherwise be made. The only asset to which the evidence referred as being owned in February 2007 was the Suburb E property."

Justice Aldridge did not look at the unfairness of the bargain for the wife (which a court might have felt justified in doing post *Thorne v Kennedy* despite the majority in *Hoult* saying it was irrelevant), but was persuaded by the fact that the parties acted in reliance on the agreement and in accordance with its terms and that the husband's father had also complied with the agreement by transferring a waterfront property at gross undervalue, thereby effecting a gift of 39/44ths of a waterfront property of $1.7 million to the husband and the husband's parents moved out of that property. The husband's parents acted to their detriment in reliance on the financial agreement. It was unjust and inequitable for the agreement not to be binding.

Estate of Ms Fan & Lok [2015] FamCA 300

A pre-nuptial 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. 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.

The husband sought to set the agreement aside. He unsuccessfully argued that either the agreement was impracticable to be carried out (s 90K(1)(d)) or that there had been a material change in circumstances (s 90K(1)(c)). The former argument was rejected as the husband did not have evidence to support his assertion, and the latter as there were no children of the marriage.

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. Justice Rees did not deal with the argument that the agreement may have still been valid (e.g. under *Wallace & Stelzer* (2013) FLC 93-566), 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. Her Honour concluded (at [124]) without giving a detailed explanation as to her reasons:

> "I do not find that the nature and extent of the non-compliance with the requirements of s 90G(1)(b)-(ca), which follows from the Court's inability to rectify the certificates of legal

advice, is sufficient to prevent the exercise of my discretion pursuant to s 90G(1A)(c)."

Other remedies were available to the deceased estate if the agreement was found not to be binding, so this was not a relevant issue.

Warner & Cummings [2017] FCCA 432

The husband did not raise his discontent with the agreement until the primary asset (a property known as Property E) did not sell for the amount that he anticipated and expected. Likewise, his expectations regarding an insurance recovery was not as much as he expected. It was not until 2 years after the agreement was entered into that he sought to re-visit the terms of the agreement.

Judge Neville considered the timing of the husband's complaint about the financial agreement to be relevant to s 90UJ(1A)(c) and said (at [125]):

> "In all of the circumstances, not least the Court's assessment of the opportunism of the Applicant in bringing the Application, the "technical" nature of any omissions or deficiencies in the Agreement and or advice in relation to it, it would be utterly unjust and inequitable if the Agreement were not to be binding on the parties. The Applicant has sought, long after the event, to renege on the Agreement he had struck with the Respondent, which was properly recorded in that Agreement. He did so only after there was a change in his financial circumstances. And prior to the filing of the Application, for some two years or thereabouts there was no issue raised by the Applicant in relation to the nature, quality or extent of the advice provided to him by his former solicitor."

Although Neville J seemed satisfied on the totality of the evidence that the relevant advice was given to the husband, he nevertheless declared the agreement binding under s 90UJ(1B).

5. Dealing with hybrid agreements

It has been the usual practice for parties to enter into two separate agreements if they want an agreement as de facto partners (under s 90UB or s 90UC of Pt VIIIAB) and as a couple contemplating marriage (under s 90B of Pt VIIIA). This appeared to be the best practice, as it ensured:

- that the advice is given in relation to each type of agreement, and
- that if one agreement is found not to be binding or set aside, the other agreement may still stand.

However, the Full Court in *Piper & Mueller* (2015) FLC 93-686; [2015] FamCAFC 241 in two separate judgments determined that one agreement could be under both Pts VIIIA and VIIIAB FLA. The parties were in a de facto relationship and also engaged to marry. As they had not married, whether the agreement would still be valid if they were married did not need to be determined.

Justices Ryan and Aldridge said (at [33]) that it was “a powerful indication that the two financial agreements can exist concurrently and in the one document” that s 90B(1)(aa) specifically prevents parties to a s 90B financial agreement from entering into another financial agreement to which s 90C and 90D apply, and that a similar scheme applied under Pt VIIIAB by the application of s 90UB(1)(b)(b). However, the Pt VIIIA exclusion in s 90B(1)(aa) did not preclude a Pt VIIIAB agreement and the Pt VIIIAB exclusion in s 90UB(1)(b) did not preclude a Pt VIIIA agreement.

The notion that two financial agreements can exist concurrently and in the one document was, the judges said, reinforced by the fact that only one can have operative effect at any one time. Both may be binding on the parties at the time of execution, but only one can have operative effect.

The operative terms of the agreement only referred to the “breakdown of the relationship” and not the “breakdown of a marriage”. Arguably, the precise phrase “breakdown of marriage” must appear in an agreement under s 90B for it to be binding. If that was true, there may have been no valid Pt VIIIA financial agreement (s 90B), but the validity of the Pt VIIIAB financial agreement (s 90UC) would be unaffected.

The Full Court did not believe that different types of advice were required to ensure the validity of the agreement under Pts VIIIA and VIIIAB, but even if this is correct, the Full Court considered that both types of advice could be given in relation to the one agreement. If the formal requirements for one agreement were met, but not for the other one, the valid agreement would still stand.

While the Full Court did not believe that different advice was required under each section, one of the main areas of difference is addressed in the *Civil Law & Justice Legislation Amendment Bill 2017*. Currently, there is no provision in the FLA for a de facto couple whose financial agreement has been set aside or found to be invalid to apply for orders under s 90SE, 90SG or 90SM or a declaration under s 90SL, unless the application is made within two years of the end of the de facto relationship. The proposed amendment to s 44 FLA will allow an application to be made within 12 months after the day a financial agreement is set aside or found to be invalid.

Another change was proposed by the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*, which lapsed upon the calling of the 2016 Federal election and is not in the 2017 Bill. This change would have ended maintenance obligations in Pt VIIIAB financial agreements in the event of the recipient remarrying or entering into a de facto relationship with another person. Currently, only maintenance for married couples ends upon re-marriage (s 82(4)), although not upon entering into a de facto relationship with another person.

Other distinctions include that "other matters" cannot be dealt with in a Pt VIIAB agreement and a Pt VIIIAB agreement terminates upon marriage.

So, even if I am wrong (and the Full Court says I am), care is required with hybrid agreements, and the advice given separately in relation to hybrid agreements or agreements entered into under Pt VIIIA and Pt VIIIAB.

6. Contract law and financial agreements – how do they interact?

It is beyond the scope of this paper to consider all the grounds in s 90K and 90UM for setting aside a financial agreement. Sections 90K(1)(b) and 90UM(1)(e) allow a court to set aside a financial agreement or a termination agreement if, and only if, the court is satisfied that "the agreement is void, voidable or unenforceable". These sections 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.
- *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 to void the contract is taken. Agreements may be voidable due to misrepresentation, mistake, duress, undue influence or unconscionability. A 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 for some reason cannot be enforced. An agreement may be unenforceable for public policy reasons or breach of contract.

An aggrieved party cannot unilaterally set aside a financial agreement. Setting aside requires a court order. Even where an applicant satisfies common law principles and establishes that the agreement is "void, voidable or unenforceable", the court still has a discretion whether to set it aside.

Section 90K(1)(b) highlights the tension between the two main objectives of contract law:

1. to find a valid contract and promote commercial certainty, and
2. to protect parties who are at, or are assumed to be at, a disadvantage.

Grounds for finding a contract void or voidable which are particularly relevant to financial agreements are:

- Uncertainty. If an essential term is too vague the agreement will be void.
- Incompleteness. If the parties have failed to reach agreement on an essential term the agreement will be void.
- Duress.
- Undue influence.

- Unconscionability.
- Misrepresentation.
- Mistake.
- Fraud.

7. Equitable and common law rights to performance of contracts

Sections 90KA and 90UN deal with the validity, enforceability and effect of financial agreements and termination agreements. Section 90KA states:

> "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 in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
>
> (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, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and
>
> (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."

The meaning and effect of s 90KA and its interaction with s 90K are still being explored by the courts and there is disagreement. Recent examples of its use are discussed below.

Cole & Abati [2015] FamCA 185

The trial judge, Macmillan J, made an anti-suit injunction restraining the husband from taking legal proceedings in Indonesia relating to property owned by the wife. The parties separated after 8 months and had 1 child. The husband had assets in Australia, New Zealand and Indonesia of $63 million. The wife had assets in Indonesia of $3 million which she had acquired prior to the marriage with money given to her by the husband.

The financial agreement was executed on the parties' wedding day as a s 90B agreement. The husband's statement of independent legal advice was signed that day, but before they were married. The wife's statement had been signed three days earlier. She was pregnant at the time of the marriage and had moved from Indonesia to Australia earlier that year. The parties had been in a de facto relationship for between 2 and 2½ years.

Although the Family Court is arguably not a court of equity, Macmillan J accepted that an injunction could be granted in the exercise of the power conferred by s 90KA. This approach was not challenged on appeal and the Full Court proceeded on the basis that this was correct.

The wife relied on s 90KA and s 34 FLA. Justice Macmillan did not find it necessary to consider whether s 34 (which gives the court power to issue writs), gave her the power to grant the injunction, although she noted that the Family Court had previously relied upon that section to make injunctions of the kind sought by the wife. Justice Macmillan accepted that there was no basis for construing the opening words of s 90KA as confining the operation of the words “in proceedings relating to such an agreement” to proceedings in which there was question as to whether the agreement was “valid, enforceable, or effective” (at [68] of *Abati & Cole* [2015] FamCA 185).

Justice Macmillan’s approach was upheld by the Full Court of the Family Court in *Cole & Abati* (2016) FLC 93-705; [2016] FamCAFC 78, in the absence of any challenge to that approach.

A narrower approach was adopted by Carew J in *Lincoln (deceased) & Miller* [2016] FamCA 457. Justice Carew’s judgment was delivered after the Full Court’s judgment in *Abati & Cole*, but the hearing of *Lincoln* was prior. Justice Carew refused to make declarations as to the validity of the financial agreement, as she said there was doubt as to whether there was a question as to the validity, enforceability or effectiveness of the financial agreement as required by s 90UN (the Pt VIIIAB equivalent of s 90KA for de facto couples).

Cai & Hsueh [2017] FamCA 671

Justice Foster gave effect to the common intention of the parties as to the meaning of the agreement, taking into account s 90KA which enabled the Court to rely on the breadth of s 32 *Judiciary Act 1903 (Cth)* to "quell" disputes about financial agreements. Whilst this case is perhaps not the best exposition of the law of unenforceability of contracts where there is lack of clarity, the reference to s 32 is a useful reminder of the potential breadth of s 90KA. Section 32 provides:

> "The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

An appeal to the Full Court in *Hsueh & Cai* [2017] FamCAFC 172 was not relevant to this issue.

Donald & Forsyth (2015) FLC 93-650; [2015] FamCAFC 72

The principles applied in determining whether a party to a contract has repudiated the contract such that the other party can terminate it were set out by Strickland and Ryan JJ (at [67]):

> "a. there must be either a breach or an anticipatory breach of an essential term of the contract, or a sufficiently serious breach of a non-essential term (*Koompahtoo Local Aboriginal Land Council and Anor* v *Sanpine Pty Limited and Anor* [2007] HCA 61; (2007) 233 CLR 115), and
>
> b. the other party must be ready and willing to complete the contract (*Foran* v *Wight* [1989] HCA 51; (1989) 168 CLR 385)."

The trial judge found that the husband's position that he would not participate in paying his share of the cost of repairs to a property amounted to a repudiation of the contract.

The Full Court, in two separate judgments, found that the husband's anticipatory breach of the agreement related to a non-essential term and that his anticipatory breach was not sufficient grounds to justify the wife rescinding the agreement.

Justices Strickland and Ryan found that the essential term was that the house be marketed in good repair. The husband did not seek to breach that term. If the husband had maintained his resistance to having his half-share of the costs of repair deducted from the proceeds of sale, then the obvious remedy for the wife was in damages. It was also apparent that at the time of the purported termination of the agreement by the husband, the wife was not ready and willing to complete the agreement as she did not want to sell the property. Therefore, she was not able to rescind the agreement.

The husband was entitled to seek orders for enforcement of the agreement. May J, but not Strickland and Ryan JJ referred expressly to s 90KA as being relevant.

8. Interpretation of financial agreements – Uncertainty and incompleteness

A contract may be held void for uncertainty or incompleteness if the intention of the parties cannot be determined objectively. The terms "uncertainty" and "incompleteness" 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.
- *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.

Uncertainty

Points to note about uncertainty include:

- Courts are reluctant to strike down an agreement which parties intend to be binding. They endeavour to uphold contracts wherever possible.
- Courts try to objectively ascertain the parties' intentions.

Clauses and agreements otherwise void for uncertainty may be saved by:

- applying an external standard such as the standard of reasonableness
- if the parties have acted on the agreement, their actions may clarify the uncertainty
- severing the uncertain part from the contract if it is not important.

Kostres & Kostres (2009) FLC 93-420

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' mistaken 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.

The Full Court was not satisfied that it could read words into the agreement. The agreement was particularly difficult to interpret as it used terms which were ambiguous or did not reflect the wording of the FLA, such as "acquired", "assets", "'joint funds" and "from their own moneys".

Parke & Parke [2015] FCCA 1692

This case involved two clauses in a financial 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 the wife was required to transfer her 50% share to the parties' son X within 60 days of a separation. A complicating factor which was not foreseen, at least by the husband when the agreement was entered into, was that 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, Howard J, 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 and the clauses could not be severed from the agreement. He set the agreement aside. The husband's appeal was discontinued by the husband's legal personal representative after the husband's death.

Gibbs & Gibbs [2015] FamCA 630

Justice Hogan, in setting aside the financial agreement for uncertainty, said (at [8]):

> "I think, instead, that essential terms (for example: matters such as "matrimonial property"; what happens to property acquired after marriage but before dissolution - to use only two examples) of the Agreement are vague."

Incompleteness

An agreement is void for incompleteness if the parties failed to reach agreement on an essential term. Important points to note about incompleteness are:

- If it is clear that the parties intended to form a binding contract, the courts may imply an omitted term into the contract to save it.
- If an agreement provides the formula or machinery necessary to clarify an essential term, the agreement is not void.
- Tools which are helpful to save contracts from voidness for incompleteness may also be useful to save contracts from voidness for uncertainty (eg if only part of the agreement is incomplete, it may be severable).

Incompleteness and the limitations of the doctrine of rectification were discussed in *Fevia & Carmel-Fevia* (2009) FLC 93-411; [2009] FamCAFC 816. In *Fevia*, Murphy J quoted from *Sindel* v *Georgiou* [1984] HCA 58; (1984) 154 CLR 661 where the High Court said (at [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.”

Garvey & Jess [2016] FamCA 445

Justice Carew rejected the argument of the wife that the financial agreement was void for uncertainty as the parties only had an "agreement to agree". The agreement provided that in the event of a breakdown of the relationship, the parties would "equally divide the joint assets".

Justice Carew said (at [340) in relation to financial agreements generally:

> "It is important, in my view, to have regard to the context in which agreements of this kind are entered into. They are not commercial agreements but arise as a result of a personal relationship which at the time of making is presumably a happy one. Parties to such agreements aim to avoid dispute as to how their assets should be divided if their relationship breaks down at some future time which may be decades away. The future circumstances of the parties cannot possibly be known at the time of entering into such an agreement."

She concluded (at [41], [44):

"In my view, the deed is not void for uncertainty because:

a. The deed evinces an intention:

   i) to be legally bound;

   ii) to oust the jurisdiction of the court pursuant to Part VIII;

   iii) to divide the assets in the proportion provided for in the deed.

   It is not an 'agreement to agree'.

b. While the term 'joint assets shall be equally divided' is an essential term, it is not uncertain nor is it incomplete because on the application of the objective test of a reasonable bystander, the term would be construed to mean that whatever assets they own jointly when the marriage breaks down are to be divided equally whether *in specie* or upon sale;

c. At the time of making the agreement the parties could not possibly have known what assets they may own at the relevant time and therefore it could not be said that the failure to allocate a mechanism for implementing the essential term of equally dividing the joint assets would have caused the husband or the wife to have refused to have entered into the deed because at that time they could not have known what mechanism would have been appropriate e.g. it was argued on behalf of the wife that the agreement should have stated who was to retain which asset or class of asset – in my view, such a suggestion would prove an impossible task when the nature and value of assets in the future could not be known at the time of entering into the agreement…

   Applying the principles identified above, the term I would imply is to the effect that the parties will do all things necessary to give effect to the terms of the deed and in the event of dispute, a court may determine the method of implementing the terms of the deed. Such a term would be reasonable, would give business efficacy to the deed, "goes without saying", is capable of clear expression and does not contradict any express term of the deed."

9. Material change in circumstances in relation to children

Under s 90K(1)(d) and 90UM(1)(g) changed circumstances in relation to a child may be a ground to set aside a financial or termination agreement. Section 90K(1)(d) requires that:

> "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..."

Section 90K(2) sets out that a person has ***caring responsibility*** for a child if:

"(a) the person is a parent of the child with whom the child lives; or

(b) a parenting order provides that:

   (i) the child is to live with the person; or

   (ii) the person has parental responsibility for the child."

For an agreement to be set aside under this ground it must be established:

1. that there has been a change in circumstances relating to the care, welfare and development of a child;

2. that the change in circumstances is "material";

3. the change will cause either the child or the person with caring responsibility for the child to suffer hardship if the agreement is not set aside;

4. the court then has a discretion as to whether or not to set the agreement aside.

The term "material" occurs in s 90K(1)(a) and (d) and 90UM(1)(a) and (g). It appears to be a less stringent test than the term "exceptional" used in s 79A(1)(d) and 90SN(1)(d) and in s 136(2)*Child Support (Assessment) Act 1989* which are similar provisions.

Parkes & Parkes [2014] FCCA 102

The financial agreement was set aside on the grounds of duress, but was also set aside under s 90K(1)(d). The financial agreement was signed by the wife three days before the wedding and gave the wife no entitlement to any of the property of the husband. After five years of marriage, the parties had two children for which the wife had the major responsibility for care, including the major financial responsibility. She had been employed full time when the agreement was entered into, but at the time of trial, she was a full time carer of the children and dependent upon Centrelink payments and child support. The only property listed in the financial agreement as belonging to her were a car which had been sold and the proceeds used for the family, and her superannuation. Under the agreement she had no claim on the matrimonial home, another real property and a business.

Judge Phipps found that there had been a material change in circumstances of the type required under s 90K(1)(d) and that if the agreement was not set aside, the wife would suffer hardship.

Pascot & Pascot [2011] FamCA 945

The financial agreement was entered into when the parties were the parents of one child and the prospective parents of a second child. There was no consideration in the agreement to the possibility of a third child and no evidence that this was discussed during the parties' negotiations. As there is no definition of "material" in the FLA, Le Poer Trench J looked at the definition in the *Butterworths Legal Dictionary* where "material" is defined as "important, essential or relevant" and "material alteration" is defined as being "a substantial or significant alteration". Adopting these definitions, Le Poer Trench J said (at [359]):

> "The birth of a third child cannot be dismissed as an insignificant or unsubstantial change in circumstances. There are significant costs associated with an additional child in terms of time and emotional investment as well as the financial cost that would most certainly

> affect the care, welfare and development of the children of the relationship. The change is certainly relevant to the agreement, as there is specific provision that the wife is to be primarily responsible for the children and she is not permitted by the Agreement to claim any compensation from the husband for that effort."

The agreement assumed that the wife would be able to support herself and the children with an unspecified appropriate level of child support paid by the husband. This created hardship for the wife, thus satisfying the second leg of s 90K(1)(d).

Fewster & Drake [2015] FamCA 602

Justice Foster set aside the agreement under s 90K(1)(d). At the time of entering into the agreement the wife was pregnant, and there had been two miscarriages. A second child was born two years after the agreement.

The agreement provided in substance for the parties to retain their respective assets as at the date of the agreement and for any after-acquired joint property to be divided, after reimbursement of contributions with interest calculated at a daily rate, in the same proportions as the contributions. During the negotiations, at the request of the wife, the right of the wife to apply for spousal maintenance was re-instated.

Justice Foster said that it was not difficult to see that the wife would have little expectancy to any interest in after-acquired joint property when, at the time of the agreement, she had no prospective capacity to make any contribution. He relied heavily on *Pascot*. Some of the wife's other grounds for setting aside the agreement which were unsuccessful - duress, undue influence and unconscionable conduct – might be decided differently since *Thorne v Kennedy*.

Fewster & Drake (2016) FLC 93-745; [2016] FamCAFC 214

On appeal, Aldridge and Kent JJ (with whom Strickland J agreed), noted that few cases have examined s 90K(1)(d). They referred unfavourably to the test for s 90K(1)(d) as proposed by Le Poer Trench J in *Pascot*. That test (at [354] of *Pascot*) was:

> "a. There must be circumstances that have arisen since the making of the Binding Financial Agreement, being circumstances of a material nature relating to the care, welfare and development of a child of the marriage;
>
> b. It must be demonstrated that the child or the applicant, if she has caring responsibility for the child, will suffer hardship if the court does not set the agreement aside;
>
> c. The court may set the agreement aside if it considers it appropriate and make such orders under sec 90K(3) as it deems appropriate."

Justices Aldridge and Kent were critical of this analysis of the test (at [50]):

> "Essentially, the analysis in *Pascot* separates the words of the subsection into three steps. However, this test omits the critical words 'as a result of that change'. Those words provide a necessary link between the changing circumstances and the hardship. According to the clear terms of the subsection, the hardship must result from the material change in circumstances, and not from some other cause."

In relation to the meaning of "material", Aldridge and Kent JJ said (at [52]) that the words "substantial, significant and relevant" used by the trial Judge were not an inapt way of describing the word; however, "for our part we do not see the benefit of substituting other words for those used in the Act itself, as in some cases that can mislead".

Justices Aldridge and Kent found (at [63]) that the trial Judge had not erred in finding that the birth of the second child and the mother having the overwhelming care of the children physically and financially after separation constituted a material change in circumstances that had arisen since the parties entered into the agreement.

However, in relation to "hardship", they said (at [65]) that it was "the changed circumstances which must give rise to the hardship, and not the agreement itself".

The Full Court referred to *Hoult & Hoult* (2013) FLC 93-546; [2013] FamCAFC 214 and confirmed that there is no statutory provision which enables a financial agreement to be set aside "merely because it is unfair". The hardship required was something more than unfairness. The Full Court quoted favourably from *Whitford & Whitford* (1979) FLC 90-612 at pp 78,144–78,145 where the Full Court said that "hardship" in relation to s 44(4) is:

> "… akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment …
>
> In ordinary parlance, hardship means something more burdensome than 'any appreciable detriment'. We consider that in s 44(4) the word should have its usual, though not necessarily its most stringent, connotations."

Although *Whitford* dealt with applications for leave to institute property proceedings the Full Court in *Hoult* found that these passages were relevant to the ordinary meaning of "hardship". The Full Court rejected the approach taken by the trial judge in *Pascot* (and adopted by the trial judge in *Fewster & Drake*) (at [378], [379]):

> "If the Agreement is set aside, the wife would be able to make an application for orders under s 72 and 79 of the Act. It is safe to say that the outcome of such an application is likely to be very different to that brought about by the Agreement.
>
> In light of this, I would find that hardship on the part of the wife is established, and that setting the Agreement aside is the only remedy."

The Full Court concluded (at [71]) that "those findings do not establish hardship as it is correctly understood". The husband's appeal against the order setting aside the agreement was allowed as:

- The evidence did not establish how the wife's circumstances had changed as a result of birth of or the care, development and welfare of the second child.
- The order did not permit a comparison to be undertaken between the financial position of the child, or the wife, under the agreement and the position that would exist if the agreement was set aside.
- There could be no determination that hardship would ensue if the agreement was not set aside.

An order for interim spousal maintenance had been made pending the determination of property proceedings. It was set aside and the application for spousal maintenance remitted for rehearing.

Post *Thorne v Kennedy,* it is possible that the test for the hardship required might be less stringent and closer to that used in *Parkes* and *Pascot* than that set out in *Fewster & Drake* but the Full Court has currently set a very high bar.

Kapsalis & Kapsalis [2017] FamCA 89

Justice Rees followed *Fewster & Drake*, saying (at [42]):

> "The wife does not assert that she suffered any hardship after the birth of the children and up to the date of separation. The hardship which she now asserts arises out of the fact that she no longer lives in the house owned by the husband, that she has to pay rent, and that she no longer has the use of the husband's income. Those are not matters arising out of changed circumstances relating to the children but rather out of changed circumstances relating to the marriage and separation."

Justice Rees rejected the wife's submission that the mere circumstance of the birth of children was sufficient to amount to a change in circumstances. The agreement itself contemplated that the parties would have children and that the agreement would still be binding. Justice Rees agreed with the Full Court in *Fewster* that the birth of a child is within the ordinary realms of expectation of a marriage and so is the care, welfare and development of a child.

The wife's weekly income consisted of Centrelink benefits, child support and spousal maintenance. Her income totalled $1,224 per week, or $63,648 per annum, tax-free. She paid rent of $540 per week and, although her financial position was poor, it did not equate with the test of "hardness, severity, privation, that which is hard to bear, or a substantial detriment" as adopted in *Fewster*. The wife conceded that she had a good work history and that she was capable of seeking employment of some kind when the children were not in her care (which was every weekend). The wife conceded that she had the capacity to improve her financial position.

Milavic & Banks (No 2) [2016] FamCA 884

Justice Macmillan held that there was a "material change in circumstances" within s 90UM(1)(g). A child was born with autism after the signing of the financial agreement. It was found by Macmillan J (at [94]) that "the fact that since the parties entered into the Agreement the younger child has been diagnosed with autism, adding significantly to what is required of the parties for his care physically and emotionally and to some extent financially, is a material change relating to his care welfare and development".

However, Macmillan J declined to set aside the agreement on that ground, stating (at [110]):

> "Insofar as there is hardship caused to the husband, and directly or indirectly to the younger child, because he is in a financially disadvantageous position compared to the wife, that is in my view not a consequence of the fact that the child is autistic and in fact arguably his position would be exactly the same even if the child had not been autistic."

The child spent limited time with the husband and the wife paid the husband child support. Insofar as there were additional costs arising from the child's autism, the wife was meeting the lion's share of those expenses, there was no dispute that the wife had the capacity to meet the child's expenditure or that she would not do so. There was also evidence of government funding to meet the child's needs.

10. Checklist

The following checklist is not intended to be comprehensive, but lists a few tips to make sure that that things don't go wrong:

1. Check the names of the parties are correct.

2. Check the section of the FLA under which the agreement is made is correct, e.g. s 90B or s 90C. The parties' circumstances may have changed since the first draft.

3. Read that section of the FLA and check that the matters covered by the agreement can be.

4. Is it necessary to update disclosure or lists of assets & liabilities since the first draft?

5. Have detailed and contemporaneous file notes of conferences, including the time the conferences started and ended and who was present.

6. Give the client a letter of advice about the final version of the agreement a few days before the agreement is signed.

7. Update the advice if amendments are made to the agreement, making sure that the advice is given in relation to the final version of the agreement, not just the amendments.

8. Don't include general statements in the agreement which are not true – e.g. mutual disclosure has occurred, party able to support themselves without Centrelink.

9. Follow s 90G(1) (s 90UJ(1)). Look at the wording of this section before your client comes into the office to sign the agreement, when you write to the other lawyer and before you close the file. Create a checklist and keep it on the file.

10. Avoid, if possible, provisions relating to superannuation in agreements entered into before separation, as the s 90MJ(1) requirements may not be met.

11. Post-separation, finalising a property settlement in court orders is almost always preferable. A financial agreement ousting the jurisdiction of the court to deal with spousal maintenance may be a useful adjunct. The proviso to this is that the impact of *Thorne v Kennedy*, if any, on s 79A is unknown. Will it be easier to set aside orders for undue influence or unconscionable conduct than it has been for duress? Are they "any other circumstance" in s 79(1)(a)?

12. Property acquired after the end of a de facto relationship or after a divorce cannot be dealt with in a financial agreement.

13. If there are spousal maintenance provisions, ensure you have complied with s 90E or 90UH and s 90F or 90UI.

14. If it is a Pt VIIIAB financial agreement, make sure there is a de facto relationship in existence or that one will exist. If it is a s 90B agreement, there needs to be a marriage before the agreement can be effective.

15. Check for uncertainties and inconsistencies in drafting. Use terms which are in the FLA.

16. Have another senior lawyer read the agreement.

17. Have you covered all the assets and potential assets?

18. Have you read the most recent cases on financial agreements, particularly of the Full Court and the High Court?

19. Are there potential claims in overseas jurisdictions now or later?

20. Don't forget the kids. If the parties may have children, then provide for this.

Following the High Court judgment in *Thorne v Kennedy*, whilst there are many uncertainties, some further matters can be added to the above checklist:

21. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing where there has been undue influence in the particular context of pre-nuptial and post-nuptial agreements. They need to be considered when taking instructions, negotiating, drafting and advising on financial agreements. They are repeated here because of their importance:

    21.1. Whether the agreement was offered on a basis that it was not subject to negotiation;

    21.2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;

    21.3. Whether there was any time for careful reflection;

    21.4. The nature of the parties' relationship;

    21.5. The relative financial positions of the parties; and

    21.6. The independent advice that was received and whether there was time to reflect on that advice.

22. An agreement which is fair and reasonable, perhaps close to a party's s 79 entitlements, is more likely to be upheld.

23. Ensure there is mutual disclosure

24. Accept that the advice requirement in s 90G(1) is important and if there is a "bad bargain", the absence of advice may mean that it cannot be "saved" under s 90G(1A).

Conclusion

An earlier version of this paper was substantially written before *Thorne v Kennedy* was handed down, but following *Thorne v Kennedy* had to be substantially re-written to place provisos and question marks over cases already decided in relation to financial agreements, and not just those dealing with duress, undue influence and unconscionable conduct. As it was never intended that this paper deal with these vitiating factors, the fact that so much had to be reviewed and re-written was a surprise. It is likely there will be other surprises as the courts, lawyers and clients make sense of and apply the High Court's first look at financial agreements.

It is possible to have a "bullet-proof" financial agreement, but the High Court has made it harder. Following *Thorne v Kennedy*, it is even more important than it was before to meet the

requirements of s 90G(1) (or S 90UM(1)) and not just rely on the "saving" provisions as an escape clause. Having a fair bargain has always been my recommendation but it is even more important now, as it gives fewer opportunities for a party, lawyers and the courts to find that an agreement is not binding or have it set aside.

amended slightly on 13 November 2018