

FINANCIAL AGREEMENTS

Gloomfield - why subject matter is so important in financial agreements

JACKY CAMPBELL, MARCH 2018

The subject matter of a financial agreement is important. The parties and their lawyers overlooked this fundamental and preliminary point in the long-running *Bloomfield & Grainger* litigation which commenced in 2014 and ended in 2018.

There were many hearings at which no issue was taken as to whether or not the litigation was about a financial agreement. In *Bloomfield & Grainger* [2018] FamCA 36, Justice Hogan finally determined that the agreement in question was not a financial agreement, because it did not deal with the subject matter of s 90C *Family Law Act 1975*, although it purported to be an agreement under s 90C.

Background

The litigation started in the Federal Circuit Court. The main issue in dispute throughout was the standing of a creditor to apply to set aside the financial agreement. The Full Court delivered judgment in *Grainger & Bloomfield and Anor* (2015) FLC 93-677 and found that a creditor retains standing, after a party becomes bankrupt, to apply to set a financial agreement aside under s 90K(1)(aa) or to apply for orders under s 90K(3), but cannot rely on other grounds under s 90K(1). A creditor cannot, however, apply to set aside a property settlement order, being barred by s 79(10A) and s 90SM(11). This case is discussed in more detail [here](#)

The High Court dismissed an application by the husband for special leave to appeal in *Grainger & Bloomfield and Anor* [2016] HCA Trans 61.

There were further hearings in the Family Court before the husband filed an Application in a Case in November 2017 seeking a declaration that the agreement was not a financial agreement as defined by s 90C *Family Law Act*.

What was the subject matter of the agreement?

The parties' intention was to transfer the wife's interest in the property to the husband prior to the wife's imminent bankruptcy. In summary the agreement provided:

1. The wife was to transfer, after execution of the agreement, her legal and beneficial interests in the T Street property to the husband to be held for the maintenance of the children during the marriage.
2. In the event of a separation the husband would assume all liability under the mortgage.
3. A recital and a substantive clause were the only paragraphs to use the words "breakdown of the marriage". These paragraphs stated that neither party was precluded from further exercising any right available to them under the *Family Law Act* in relation to how any or all of the "property of the marriage" is dealt with "in the event of the breakdown of the marriage", in

circumstances where the property or the needs of the parties' children have materially changed.

After executing the agreement the transfer of the property was effected and the husband relied on the financial agreement to obtain an exemption from stamp duty. Notably, the agreement did not provide for how the T Street property would be dealt with in the event of a breakdown of the marriage, but only how it would be dealt with immediately upon the execution of the agreement.

What does s 90C require?

Section 90C requires that a financial agreement cover certain "matters". Specifically, s 90C(1)(a) provides that the parties to a marriage can make a written agreement with respect to any of the matters mentioned in s 90c(2). Sections 90C(2) and (3) state:

- "(2) The matters referred to in paragraph (1)(a) are the following:
- (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;
 - (b) the maintenance of either of the spouse parties:
 - (i) during the marriage; or
 - (ii) after divorce; or
 - (iii) both during the marriage and after divorce.
- (3) A financial agreement ... may also contain:
- (a) matters incidental or ancillary to those mentioned in s-s(2); and
 - (b) other matters."

So, whilst a financial agreement under s 90C **may** deal with incidental or ancillary or other matters, it **must** deal with one or both of the matters in s 90C(2).

Why was the agreement not a financial agreement?

Justice Hogan delivered judgment on 31 January 2018 and held that the agreement was not a financial agreement as defined by s 90C of the *Family Law Act* because it did not deal with either:

1. How, in the event of the breakdown of the marriage between the parties, their property or financial resources (or the property of each of them and their respective financial resources) are to be dealt with; or
2. The maintenance of either party.

The effect of this finding was that the transfer of the wife's legal and beneficial interests in the property was not done pursuant to a financial agreement. The agreement did not need to be set aside to attack the transaction. A remedy under the relation back provisions of the *Bankruptcy Act 1966* could have been sought by the trustee in bankruptcy without the agreement being set aside first. It was not clear from the various judgments whether the trustee was prepared to do this.

Although a party to the family law proceedings, the trustee appeared not to take an active part and was prepared to accept the court's determinations at various times without being heard.

What next?

The trustee in bankruptcy may not have the same thirst, or funding, for litigation as the creditor had in the family law proceedings. It remains to be seen whether the trustee will pursue the husband under the *Bankruptcy Act*.

The husband and the trustee in bankruptcy are likely to apply for costs orders against the creditor, as the judge gave any party 14 days to make an application for costs.

The only comfort the creditor received was that she was given 14 days to seek leave to obtain an order that the reasons for judgment be provided to the Office of State Revenue (Qld), to investigate whether or not the exemption from stamp duty was obtained fraudulently.

For lawyers, the case is a useful reminder of the importance of checking the wording of the *Family Law Act*. Sections 90B and 90C are worded differently from s 90D and their effect is different. The equivalent sections for de facto couples in Pt VIIIAB of the Act (s 90UB, 90UC and 90UD) are different again. When drafting a financial agreement, look at the wording of the relevant section. If the agreement does not cover one of the "matters" which must be dealt with in a financial agreement made under that section, it will not be a financial agreement.

© Copyright - Jacqueline Campbell of Forte Family Lawyers and Wolters Kluwer/CCH. This paper uses some material written for publication in Wolters Kluwer/CCH *Australian Family Law and Practice*. The material is used with the kind permission of Wolters Kluwer/CCH.