FORTÉ
FAMILY LAWYERS

FINANCIAL AGREEMENTS

Binding Financial Agreements: Drafting with the End in Mind

JACKY CAMPBELL, JANUARY 2021

The reality is that, for some clients, happily ever after will involve the parties going their separate ways. When relationship breakdown occurs, how watertight is a financial agreement under the *Family Law Act 1975 (Cth)* (FLA)? This paper looks at taking a risk averse approach to financial agreements, some of the risky clauses in a financial agreement that may render them liable to be set aside, and lessons from recent cases. There is a particular emphasis on agreements made before or during a relationship or marriage rather than after separation.

References in this paper are largely to sections of the FLA applying to legally married couples under Pt VIIIA FLA, but similar provisions apply to de facto couples under Pt VIIIAB FLA.

The topics covered are:

1. When are financial agreements appropriate? When should they be avoided?
2. Can you quarantine property?
3. Risk factors in financial agreements
4. Undue influence, unconscionable conduct and duress
5. Mistake and rectification
6. Section 90G, evidentiary value of the Statements of Independent Legal Advice and the shifting onus
7. Negligence claims and accrued jurisdiction
8. How to protect oneself as a practitioner if there is scant disclosure and the client insists on doing the deal anyway
9. Litigation funding and interim maintenance orders
10. Financial agreements and COVID-19
11. Key drafting tips and traps
12. Conclusion

1. When are financial agreements appropriate? When should they be avoided?

Financial agreements are most appropriate when they are entered into after separation and simply oust the parties' rights to seek spousal maintenance while at the same time the parties enter into consent orders for the alteration of property interests. Financial agreements are more risky and therefore less appropriate when they are entered into before or early in a de facto relationship or marriage, particularly where there are such factors as a significant difference in the wealth, incomes and earning

capacities of the parties, and the parties may have children together. If the agreement seeks to impose an outcome which is very unfair to the weaker party, there is little or no option or time for negotiations, or both, then the agreement may be at considerable risk of being set aside.

In reality, one party is almost always proposing a financial agreement to protect their own rights as they believe they will be better protected by a financial agreement than under the discretion available to family law courts under s 79 FLA

The appropriateness of a pre-nuptial agreement will depend upon the circumstances of each particular couple. Situations where pre-nuptial agreements may be appropriate include:

1. Second marriages:
    - To protect property brought into the marriage;
    - To ensure that children of previous relationships inherit;
2. Older, never-married people where both have accumulated assets;
3. If the financial affairs of one party involve third parties such as a parent, trust or company who want to protect rights as against the other spouse;
4. If one party has substantial debts at the commencement of the marriage;
5. If some property is "quarantined" for one party but the agreement provides for the other party to definitely receive significant property. This is much less risky than providing for the other party to have only the possibility of receiving property.

In some cases, one party may want an agreement but it might be risky for a legal practitioner to act for the other party. These cases include where the agreement provides that one party may not receive any property at all at the end of the relationship, as the primary purpose of the agreement is:

1. To preserve intact significant property such as family farms or other businesses which have been in a family for generations;
2. To protect the property of one party where there is a significant difference in the wealth of the parties;
3. To completely quarantine inheritances received during the relationship;
4. To give greater weight to contributions made during the marriage by a high income earning spouse than might be recognised under the FLA.

2. Can you quarantine property?

In agreements made prior to or early in a marriage, one party is likely to want to quarantine property, such as a business, a home or all initial contributions. There are usually many variables - such as whether the parties will have children, the length of the relationship, and the incomes, health and earning capacities of the parties in the future – which increase the risk of the agreement being set aside. If an agreement results in a very bad outcome for the weaker party, litigation may be almost inevitable. Even if the litigation is unsuccessful, litigation is not the outcome the stronger party and their legal practitioner wanted. Litigation is time-consuming, costly, stressful and risky. A motivating factor for parties entering into pre-nuptial agreements is that at the end of their relationship litigation is avoided.

Leaving some property to be dealt with under s 79

There is an argument which has not been canvassed in detail by the courts that it is not possible to quarantine some property in a financial agreement and leave the alteration of the parties' interests in the rest of the property to be determined under s 79 FLA. If a court is dealing with the non-quarantined property, how can it make an order which is just and equitable as required by s 79(2) and *Stanford v Stanford* (2012) FLC 93-518 if it is required to ignore significant property quarantined for one of the parties? Significant disparity in the property interests of the parties is a relevant factor under s 75(2)(b). It may be appropriate for the agreement to be drafted so that it allows a s75(2) adjustment to be made in relation to non-quarantined property which takes into account quarantined property.

Judge Altobelli in *Delrio & Jindra (No 2)* FCCA 2234 did not see this as bar. There was significant property in the name of the wife which was not covered by the agreement. Early in his judgment he found that it was just and equitable to make an order although he ultimately did not make an order. The husband's estate unsuccessfully applied for orders in relation to property not covered by the agreement. His acknowledgement in agreement of his lack of contributions to the wife's property was binding upon his deceased estate in relation to s 79 claim to property not covered by the agreement. Judge Altobelli assessed the husband's contributions to the property not covered by the agreement as less than 5% and found that there were no s 75(2) factors in favour of his deceased estate. In these circumstances it was not just and equitable under s 79(2) or s 79(8) to make an order altering the wife's interests in the property not covered by the agreement.

Sunset clause

Instead of completely quarantining initial contributions, it may be preferable to quarantine them for a short period only or until the birth of a child. This is known as a "sunset clause". For a sunset clause to be effective the financial agreement must also include a termination agreement under s 90J and meet the requirements (including for advice) for termination agreements as well as the advice requirements for a financial agreement under s 90G(1).

Stepped entitlements

Alternatively, the agreement can, by stages or steps, reduce the amount of protection given to initial contributions and increase the entitlements of the party who made fewer initial contributions. The main difficulty with staged entitlements is that these agreements are complex, and therefore costly, to negotiate, draft, interpret and implement. It is also difficult to get the staged entitlements "right". Either party may decide later that they were unfair and litigate to have the agreement set aside or found to be not binding. For example, in *Matech & Matech* [2020] FamCA 163 the agreement provided for the wife to receive $100,000 for each year of marriage. After 12 years of marriage she was entitled to $1.2 million. The husband believed that was too much and sought to have the agreement set aside for impracticability and uncertainty and for it to be declared as non-binding. He was unsuccessful.

Spousal maintenance

Another option is to leave open the ability of the parties to apply for spousal maintenance. By not ousting the jurisdiction of the court to make periodic or lump sum spousal maintenance orders, the court is left with the ability to address the different circumstances of parties after separation and take account of their different needs with periodic spousal maintenance orders, lump sum spousal maintenance orders or both. The weaker party may be able to obtain lump sum maintenance based on needs, which is likely to be less than a s 79 property adjustment which takes into account an assessment of both their contributions and needs.

What is being quarantined?

Whether a party is seeking to protect the whole value of an item of property or part of it, definitions are important. The agreement needs to be clear as to the property which is being protected. The options for doing this include quarantining:

1. The dollar value of the item of property at the date of the agreement. This means the dollar value of that property is still protected even if it is converted to another item of property or mixed with other property because the dollar value is traced. However, over a period of time the real value of the protected property will diminish.

2. The item of property itself, such as a farm or a home, on the assumption that it will not be sold or transferred. One problem is that if the item of property is sold or transferred then the protection is lost. If it is a business the protection may be lost – depending upon the wording - by a change in circumstances, change in a corporate or trust structure, a change of name or a change in strategic direction. Another problem is that any contributions by the other party to that item of property, direct or indirect, are ignored. This may result in a particularly unfair outcome to the other party if there is little other property or if significant contributions have been made by the other party to that item of property.

3. The item of property itself, but if it is sold or transferred the property's value is traced into other property as a percentage of the purchase price of the replacement property. This may cause problems of uncertainty of terms and calculation if improvements are made to the property during the relationship, the value fluctuates or the net value differs greatly from the gross value.

4. Another formula.

This aspect of the drafting of the agreement is particularly complex. Uncertainties and inconsistencies in interpreting the terms of the agreement can mean the agreement is at risk of being set aside for uncertainty under s 90K(1)(b). Care must be taken as to how the quarantined property provisions fit in with the rest of the agreement. The parties may not abide by the terms of an agreement and may combine their quarantined property despite a clause that they not do so which might result in the agreement being impracticable to perform under s 90K(1)(c), uncertain under s 90K(1)(b) or the court may exercise its discretion not to enforce it as the parties have abandoned it. For example, what if a

party used an inheritance which was otherwise quarantined for the benefit of that party to significantly increase the value of the other party's quarantined farm or home?

A recent example of the difficulty of drafting such agreement arose in *Daily & Daily* (2020) FLC 93-999. The essence of the agreement was that each party was to retain each party's separately identified assets and liabilities. However, Recital K in the agreement provided:

> Entitlements to assets and gifts or inheritances under this Deed extends to any appreciation in value attributable thereto and whether or not the asset has been sold or dealt with such that it has changed character provided the asset held at separation is clearly traceable to the original asset, gift or inheritance.

The Full Court of the Family Court raised the possibility of very real difficulties with the interpretation of Recital K. For example, there appeared to be significant scope for debate about whether, and to what extent, an asset held at separation "is clearly traceable" within the intended meaning of that clause.

3. Risk factors in financial agreements

Assessing risk and whether you and your client should accept the risk involved in a particular

financial agreement in particular circumstances involves looking at:

- Can you and your client comply with s 90G(1)?
- Do you and your client believe it likely that the other party and their legal practitioner can comply with s 90G(1)?
- On the face of it, is the agreement at risk of being set aside under s 90K because of its terms or the current or future circumstances of the parties?
- The case law with respect to financial agreements continues to develop and change in addition to the significant legislative changes that have occurred, making advice on an agreement which will not be implemented for many years, incorrect.
- When does the agreement come into effect? Will the agreement achieve what it set out to do? Some recent case law is discussed later in this paper.

Section 90G(1) sets out the requirements for making a financial agreement which is binding. The agreement also needs to meet the requirements of s 90B or 90C etc. Legal practitioners should not rely on the possibility that an agreement may be "saved" under s 90G(1A) because it would be unjust and inequitable if the agreement is not found to be binding. The aim is to ensure the s 90G(1) requirements are met by the parties. Further examination of the s 90G(1) requirements is beyond the scope of this paper.

Legal practitioners and their clients need to consider whether an agreement may be at risk of late being set aside under s 90K(1) which states:

"A court may make an order setting aside a financial agreement or a termination 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."

Obviously, it is important to ensure proper disclosure, accurate and precise drafting and that there is no unreasonable pressure on the weaker party. If the parties have children or may later have children then the terms of the agreement, and whether an agreement is entered into at all, are matters which need to be carefully considered.

3. Undue influence, unconscionable conduct and duress

The High Court judgment in *Thorne v Kennedy* has lessons for legal practitioners who are negotiating and drafting financial agreements, which are particularly relevant when looking at whether there is a vitiating factor (undue influence, unconscionable conduct and duress)putting the agreement at risk of being set aside under s 90K(1)(b) because it is void, voidable or unenforceable:

1. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing whether 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:

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

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

   1.3. Whether there was any time for careful reflection;

   1.4. The nature of the parties' relationship;

   1.5. The relative financial positions of the parties; and

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

2. An agreement which is not a “bad bargain”, but is instead fair and reasonable and perhaps close to a party's s 79 entitlements, is more likely to be upheld.

3. 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.

4. Ensure there is mutual disclosure.

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

Whilst *Thorne v Kennedy* considered undue influence in particular, there is likely to be further development of the case law in relation to undue influence, unconscionable conduct and duress.

Johnson v Buttress - Undue influence

One of the most commonly cited Australian cases on undue influence is *Johnson v Buttress* (1936) 56 CLR 113 at 134; [1936] HCA 41. In that case 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 High Court plurality in *Thorne v Kennedy* accepted Dixon J’s 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]

The facts of *Johnson v Buttress* illustrate the characterisation by a court of a lack of free will sufficient to amount to undue influence. Mr Buttress was 67 years old, illiterate, not very intelligent and with little or no experience or capacity in business. His wife had died a few months earlier and he was much affected by her death. He transferred his only property, which was his only means of livelihood, to a relative of his wife upon whom he relied heavily for advice. After his death, his estate's administrator applied to set aside the transfer. The trial judge found that Mr Buttress did not understand the nature of the transaction and that he had parted with the land irrevocably. The trial judge set aside the transfer on the basis of undue influence and this was upheld by the High Court.

The majority in *Johnson v Buttress* found that there was a relationship of undue influence arising from the trust and confidence the deceased put in the defendant. Justice McTiernan said:

> "There can be no doubt that when the transfer was made the relationship in which she stood to Buttress would enable her to acquire great influence over him. It is unreasonable to suppose that very considerable influence was not in fact acquired by her over Buttress. The relationship which was in fact established between the donor and the donee and the immoderate nature of the gift brings the case within the range of the principle upon which equity sets aside a voluntary gift upon the presumption that the gift was obtained by abuse of the relationship, unless the donee can prove that the gift is a free exercise of the donor's will."

The High Court in *Thorne v Kennedy* pointed out that Starke J in *Johnson v Buttress* concluded that it was open on the facts to find that undue influence arose without any presumption. Justice Starke noted that the trial judge had the advantage of hearing the evidence (an advantage which the High Court plurality in *Thorne v Kennedy* also noted the trial judge had over the Full Court of the Family Court). Justice Starke said (at p.126):

> "Now I feel some difficulty in assenting to the learned judge's view that the facts disclose a peculiar relationship of trust and confidence between the deceased and the appellant which brings him within the 'protected class' in respect of which there is a presumption of undue influence. But the age and capacity of the deceased, the improvident and unfair nature of the transaction, the want of proper advice, the retention of the rents of the property transferred, the various testamentary dispositions, and the other circumstances mentioned, afford evidence from which the learned judge might justly infer that the transfer was not the result of the free and deliberate judgment of the deceased, but the result of unfair and undue pressure on the part of the appellant."

A case which makes applying the doctrine of undue influence more confusing is *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 457. Other challenging cases are *Diprose v Louth (No.2)* (1990) 545 SASR 450 and the appeal in *Louth v Diprose* [1992] HCA 61; 175 CLR 621, an unconscionable conduct case. These cases seem to muddy the principles and make them harder to apply.

Requirements for unconscionable conduct

For the sake of clarity and comparison it is useful to include the requirements for unconscionable conduct, which arises under both s 90K(1)(b) and (e) FLA. In general terms, the conduct must be so harsh or unreasonable that it goes against good conscience; no informed person would agree to enter the contract. No submissions were apparently made in *Thorne v Kennedy* 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 consider or determine that issue.

In *Thorne v Kennedy* the parties agreed that the applicable principles of unconscionable conduct in equity were those recently restated by the High Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25. Mr Kakavas was unsuccessful in arguing that Crown Casino took unconscientious advantage of any special disability held by him. His claim was based on statutory unconscionability under s 51AA *Trade Practices Act* 1974 (Cth). The High Court found that being a pathological gambler was not a special disadvantage which made him susceptible to exploitation by Crown Casino. A finding of unconscionable conduct requires that:

1. The innocent party is subject to a special disadvantage (at [38]) "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests".

2. The other party must unconscientiously take advantage of that special disadvantage.

3. The other party must have known or ought to have known of the existence and effect of the special disadvantage.

In *Blomley v Ryan* [1948] HCA 20; (1948) 76 CLR 646, the defendant was found to have taken advantage of the plaintiff's alcoholism to induce him to enter a transfer when his judgement was seriously affected by alcohol. Justice Fullagar, in discussing the circumstances which might be considered in determining whether there had been unconscionable conduct, said (at [405]):

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

Making distinctions

In *Thorne v Kennedy* the judges in the Federal Circuit Court and the Full Court of the Family Court reached different conclusions to the High Court. In all courts, the definitions of duress, undue influence and unconscionable conduct drawn from the case law were similar. Given the same set of facts and statements as to the law, the scorecard is:

Duress	**Undue Influence**	**Unconscionable Conduct**	**None of these**
Judge Demack (Federal Circuit Court)	Judge Demack (except she didn't say this. The High Court plurality said she meant to say it but used the incorrect term)	Chief Justice Kiefel and Justices Bell, Gageler, Keane, Edelman, Nettle and Gordon (High Court: 7 out of 7)	Justices Strickland, Aldridge and Cronin (Full Court of the Family Court: 3 out of 3)
	Chief Justice Kiefel and Justices Bell, Gageler, Keane and Edelman (High Court: 5 out of 7)		

The Full Court of the Family Court decided the case on the basis that the test for duress was incorrectly stated by the trial judge and the test was not met in the circumstances. Unlike the High Court, the Full Court did not re-interpret the trial judge's decision and say that she had simply used the incorrect term and should have described it as undue influence rather than duress. Further, the Full Court found that there was no undue influence because the wife was not concerned with what she would receive if they separated, and for similar reasons found that there was no unconscionable conduct.

How can it be that given the same set of facts and definitions of undue influence, two out of seven High Court judges and three out of three judges of the Full Court of the Family Court found that there was no undue influence?

Complexities arise, not only from the above litigation history, but from the following:

- Unconscionable conduct is a third concept or vitiating factor which can overlap with duress and undue influence, and is often pleaded in the alternative;
- The existence of "lawful act duress" remains unresolved, so it is unclear whether "illegitimate" pressure encompasses improper conduct as well as unlawful conduct;
- The concepts of duress, undue influence and unconscionable conduct are developing in differing ways in the common law world. Although the High Court referred to or relied on jurisprudence and commentary in England, New Zealand and the United States, Australian law is not the same and the overseas law needs to be dealt with warily.
- One thing all the authorities seem to agree on is that duress, undue influence and unconscionable conduct are overlapping concepts. They are NOT clear and distinct concepts. More than one may apply to a particular set of facts.
- It is not just in *Thorne v Kennedy* that the trial judge was said by the High Court to misuse the term “duress”, but many other cases in the family law and commercial contexts misuse or confuse the terms. Reading earlier cases may not help the reader's understanding.

Understanding the High Court's approach to duress and undue influence is easier if the decision is looked at in the context of some of the earlier authorities, particularly *Blomley v Ryan*, and if it is understood that unconscionable conduct is developing as a broad concept, a fall-back position, or a vitiating factor of last resort. The extent to which unconscionable conduct is able to catch or encompass duress or undue influence in circumstances where there is an inequality of bargaining power is still being explored by the courts, and not just in family law. The concept of undue influence seems to have been misunderstood by many lawyers and courts in the past. It appears to be a much wider and more useful legal principle which can be relied upon to set aside transactions where duress may have otherwise been argued.

5. Mistake and rectification

Another relevant concept for finding a financial agreement void, voidable or unenforceable under s 90K(1)(b) is mistake. A mistake occurs where one or both parties are under a misapprehension about something which forms the basis of their agreement.

The three types of mistake which can be made are:

1. *Common mistake*. Both parties made the same mistake as to something fundamental.

2. *Mutual mistake*. The parties are at cross-purposes and misunderstand what the other means. Neither party is aware of the other's mistake.
3. *Unilateral mistake*. Only one party is mistaken and the other party knows or ought to know of the other's mistake.

If there is a mistake the contract may be set aside for mistake under s 90K(1)(b) or it may be rectified under s 90KA. Another possibility is that part of the agreement may be void, voidable or unenforceable for uncertainty under s 90K(1)(b). Uncertainty is, however, a separate concept to mistake.

In mutual mistake, both parties were mistaken about what each other meant. The parties were at cross purposes with each other. Agreement was not reached. Due to the mutual mistake the contract never came into existence. A finding of mutual mistake is rare.

In unilateral mistake only one party was mistaken. A party's mistake cannot be relied on to have the contract declared void at common law.

There are rare cases where a mistake is so fundamental that a contract is unenforceable because of *non est factum* (it is not my deed). The classic Australian case is *Petelin* v *Cullen* (1975) 132 CLR 355. Petelin could not read English and signed a document believing it to be a receipt for $50. In fact, it was a contract giving Cullen an option to purchase Petelin's land. Cullen exercised the option, Petelin refused to sign a contract of sale and Cullen sought specific performance.

The High Court said (at p 359-360):

> "The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally, it is accepted that there is a heavy onus on a defendant who seeks to establish the defence."

In relation to financial agreements, it is difficult to see how *non est factum* could arise unless all communications relating to the drafting and negotiating of the terms of the agreement between one party and their lawyer were verbal (so that the legal practitioner was unaware of the party's illiteracy or visual impairment), the advice was in writing and there were little or no discussions between them about the terms of the agreement and their meaning and effect. In any event, the availability of the action is very rare because the party seeking to establish it must show (at p 360) that there was no "failure to take reasonable precautions in ascertaining the character of a document before signing it". *Non est factum* was unsuccessfully argued in relation to a financial agreement in *Corelli & Beroni* [2019] FamCA 911.

The time at which the mistake was made is important. The mistake must have affected the formation of the contract and not have occurred after the contract was made.

In *Kostres & Kostres* [2008] FMCAfam 1124 the husband unsuccessfully applied for the court to exercise its powers under s 79 despite a s 90B financial agreement having been executed by the parties. The parties had been married for 4½ years. The financial agreement was signed two days prior to the marriage but this does not appear to have been an issue in this case.

One of the husband's arguments at trial was that both parties mistakenly believed that the husband was an undischarged bankrupt. Federal Magistrate Wilson (as he then was) said (at [37]–[38]):

> "There was no mistake about the subject matter of the financial agreement. There was a mistake as to the bankrupt status of the husband. The wife did not deliberately set out to ensure that the husband laboured under his mistake, for her own benefit. Both parties laboured under the same mistaken belief. If anything, it was the husband who created the confusion, by failing to make any enquiry as to his bankrupt status, before signing the financial agreement, and before properties were purchased.
>
> Further, the husband's evidence was that if he was aware of his true status as a discharged bankrupt he would still have signed the agreement in the same terms. His complaint is that he allowed subsequent purchases to be put into his wife's sole name because of his mistaken belief. In my view, that is not sufficient to render the agreement voidable or unenforceable. The wife did nothing to contribute to the husband's ignorance of his correct legal status. She did not unconscionably, as that term is properly understood."

The husband did not argue mutual mistake on appeal to the Full Court in *Kostres & Kostres* (2009) FLC 93-420. The interpretation of the agreement contended by both parties required words to be implied into the agreement. The agreement was held to be uncertain and unenforceable. Rectification was refused.

The husband unsuccessfully argued that there was a common mistake by both parties in the negotiations and recitals to the agreement in *Weston & Weston* [2015] FCCA 197. He argued that there were mistakes in the values attributed to the assets and as to the contents of the asset pool. He said that the common intention of the parties was for a 60/40 division of the net property in favour of the husband. He argued that the cash adjustment to the wife of $1.1m (of which he had paid $233,000) did not give effect to that common intention.

Judge McGuire set out the essential features of a finding of common mistake (at [66]):

(a) "There must be a common assumption as to the existence of a state of affairs;
(b) There must be no warranty by either party that the state of affairs existed;
(c) The non-existence of the state of affairs must not be attributed to the fault of either party;
(d) The non-existence of the state of affairs may render performance of the contract impossible; and
(e) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual venture is to be possible."

Judge McGuire found that the husband failed to fulfil the final three of the five criteria. In relation to the third criteria, the "state of affairs" was the list of assets and values. This material was gathered by the husband with the help of his accountant and solicitor. Judge McGuire found that the husband chose to rely on his professional advice and he determined the extent of his voluntary forensic investigations. He could not rely on his own negligence. The wife simply accepted the husband's accountant's materials and therefore the husband's representations. There was no evidence that performance of the contract

was impossible. There was no proper evidence that there was a mistake as to the property pool and the values.

Judge McGuire was not satisfied that the $1.1m payment did not constitute a 60/40 division of the property, although he was not satisfied in any event that a 60/40 division was the common intention of the parties.

Justice Young in *Sullivan & Sullivan* [2011] FamCA 752 found that there was a unilateral mistake on the part of the husband. The wife signed the agreement, which purported to be made under s 90B, prior to the marriage. She was unaware that the husband did not sign it until after the marriage. The mistake arose as a result of the husband's failure to accept the wife's offer prior to the parties' marriage. The wife's offer was contained in the s 90B agreement, but she was not promptly given a copy of the full executed agreement and she was unaware of the mistake. There was no common intention to enter into the s 90B agreement that the wife had signed. The husband mistakenly believed that he had entered into a s 90C agreement and therefore there was no common intention which could give rise to rectification as a remedy. See also Murphy J in *Parker & Parker* (2012) FLC 93-499.

The parties were found to have shared a common mistake as to an investment in *Phak & Xu* [2015] FamCA 939. Both parties believed an investment in suburb E, which the wife was to retain under the financial agreement, was valuable and created valuable legal rights with respect to two home units yet to be built. The home units were never built. Justice Benjamin rejected the husband's argument that the loss was simply a commercial risk which arose subsequent to the execution of the agreement and that the wife should bear the loss. Benjamin J accepted that, although at the time the parties entered the agreement they believed the suburb E transaction had a value of $1m, this was a mirage and the parties were victims of a fraudulent scheme.

The husband in *Fevia & Carmel-Fevia* (2009) FLC 93-411, inter alia, relied on the equitable principles of rectification and part performance. The court found that the wife signed the agreement without the 18 page annexure listing the husband's property including 20 entities not referred to in the agreement. He argued that the:

> "Annexure did not alter the legal effect of the document but was no more than a record of the disclosure of assets made by the husband to the wife. The disclosure was also recorded albeit in a less detailed fashion in Schedule 1."

Justice Murphy rejected this argument, relying on the High Court authority of *Sindel* v *Georgiou* [1984] HCA 58; (1984) 154 CLR 661 in which Mason, Murphy, Wilson, Brennan and Dawson JJ confirmed (at [13]) that:

> "Rectification … is not a remedy which brings a contract into existence … [the parties must have] a concluded contract."

Justice Murphy said (at [158]):

> "In my judgment 'the annexure', when looked at as a whole, represents — even looking at it '*as liberally and reasonably as possible*' — a material alteration to the document signed by the wife (or, put another way, the agreement which the wife believed she was entering). There was no implied authority for the husband to make such an alteration."

The financial agreement was therefore found to be invalid and unenforceable.

In *Squibb* & *Graham* [2018] FCCA 1906, the parties entered into an agreement which was titled "Pre-Nuptial Agreement" shortly before their marriage. The agreement did not refer to the FLA or that it was made under s 90B of the FLA. Rather, in cl 17 the parties agreed that the agreement was governed by the laws of the State of Victoria.

The husband did not object to the wife's statement made in support of her application to rectify the agreement (at [18]):

> "It was the mutual intention of the Husband and I that the Agreement would be put in place to set out the property that we would each receive in the event of separation and to waive our rights to property settlement or to seek spousal maintenance from each other."

The trial judge held that evidence of the pre-contractual negotiations was admissible to establish the objective background facts known to both parties and was relevant to the claim for rectification in *Euphoric Pty Ltd* v *Rydelar* [2006] NSWSC 2 at [31]–[33].

The wife's principal contention was that read in its totality and in particular by reference its operative terms, the document evinced an intention of the parties to enter into an agreement prior to their marriage in relation to property and spousal maintenance. She submitted that the ordinary principles of construction of a contract and rectification should be applied in order to rectify the agreement to:

- make specific reference to s 90B;
- sever those parts of the agreement which were plainly inapt;
- amend cl 17 to provide that the parties agree that the agreement is governed by the FLA and that any dispute be determined by courts exercising jurisdiction under that Act.

The trial judge held that rectification should be ordered. He said (at [53]):

> "That the rectification is extensive is not a bar to the Court making the orders. The Court has the power to correct errors that go beyond minor verbal infelicities and errors of grammar and spelling: *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101 at [25]:
>
> > 'What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied'."

On appeal in *Graham* & *Squibb* (2019) FLC 93-892 the facts were clearer. The agreement was executed the day before the parties married – the issue of the agreement was raised by the wife only a

few days before the wedding. There were no negotiations. The agreement did not refer to s 90B, although the court found that the parties intended it to be a pre-nuptial agreement. There was no reference to the FLA and, in fact, the agreement stated that the parties intended the laws of the State of Victoria to apply rather than the laws of the Commonwealth.

Justices Kent and Austin (with whom Strickland J agreed on this issue) upheld the decision of the trial judge, and said (at [59]):

> "The parties' common intention to execute a binding financial agreement was evident from: the wife's evidence about their 'mutual intention'; the parties' consistent evidence that they discussed and intended the Agreement to protect the wife's small business against any claim by the husband in the event of their separation; the identification of the assets they each introduced to the marriage in separate schedules to the Agreement; and the terms of the Agreement itself, which purported to protect the assets they each introduced to the marriage against any matrimonial claim made by the other. The wife's senior counsel submitted to the primary judge that the inference of the parties' common intention to create a binding financial agreement was 'inescapable'. Whether the inference was so strong is a moot point, but the inference drawn by the primary judge to that effect was certainly available on the evidence."

The Full Court agreed with the wife that (at [64]):

> "… the parties did not need to have a common intention about the precise words in which the terms of the agreement should be expressed; only that they had a common intention about the substance and detail of its intended effect…."

The lack of specific reference to s 90B was not therefore a bar to rectifying the agreement by inserting a reference to that provision.

The reference to Victorian law was also rectified. The Full Court said (at [66]):

> "State courts may, in certain circumstances, exercise federal jurisdiction under the Act, but it was impossible for any Victorian court to entertain and determine any litigation about the agreement under Victorian contract law. The provisions of clause 17 of the agreement were, therefore, nonsense and had to be rectified or severed to render the Agreement correct and intelligible, for which reason Order 3 was also correctly made."

Whilst rectification is a possible remedy for a mistake, neither a legal practitioner nor a client will want to rely upon litigation to ascertain whether that remedy applies.

6. Section 90G, evidentiary value of the Statement of Advice and the shifting onus

Section 90G(1)(b) (and s 90UJ)(1)(b) is worded similarly) requires that each spouse party to the agreement is given independent legal advice from a legal practitioner about:

- The effect on the rights of that party.
- The advantages and disadvantages, to that party of making the agreement, at the time that the advice was provided.

The advice must be given by an Australian legal practitioner (*Ruane & Bachmann-Ruane and Anor* [2009] FamCA 1101; *Murphy & Murphy* [2009] FMCAfam 270).

The nature and burden of proving independent legal advice was considered by the Full Court of the Family Court in *Hoult & Hoult* (2013) FLC 93-566. Justice Thackray's clear explanation (at [60]-[63]) has been generally accepted:

> "In my view, the onus of establishing that an agreement is binding falls upon the party asserting that fact because the legislation provides that an agreement is binding "if, and only, if" the prescribed matters are established. It follows that the party relying upon the agreement must establish the existence of all those matters, including the giving of the requisite legal advice to both parties.
>
> I recognise the potential forensic difficulty faced by a party who seeks to uphold a Financial Agreement when the other party claims not to have received the prescribed legal advice. However, the fact there is difficulty in proving something within the knowledge of only the other party and their solicitor does not mean the legal burden of proof passes to the party who seeks not to be bound by the agreement.
>
> Importantly, however, I consider that once the party seeking to rely upon the agreement produces in evidence the certificate signed by the other party's solicitor, there is a forensic obligation on the other party to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate (especially when read with the recital in the agreement to the same effect).
>
> This forensic obligation is properly conceptualised as the burden of introducing evidence and should not be confused with the burden of proof as a matter of law and pleading. For a discussion of the difference see *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164 especially at 167-168 per Barwick CJ, Kitto and Taylor JJ and 170-171 per Windeyer J."

7. Negligence claims and accrued jurisdiction

The drafting of pre-nuptial agreements is fairly risky work for a legal practitioner. As with wills, negligence claims may be made years later. Also like wills, there are pressures from clients to do them quickly and cheaply without comprehensive instructions. Clients request "a simple will" or "a simple agreement" when in reality these do not, or only rarely, exist.

It is possible that a legal practitioner acting for one party may have a duty of care to the other party to the agreement. The situation may be analogous to the preparation of a will. This question arose in *Noll & Noll* [2011] FamCA 872. The wife applied to set aside a s 90C agreement on the basis that she did not receive independent legal advice. The husband applied to join the wife's legal practitioners to the proceedings. If the financial agreement was declared not to be binding or set aside, the husband wanted the wife's former law firm to be liable for any loss suffered by him. The trial judge refused the husband's application on the grounds that the case did not fit the guidelines set by the Full Court in *Warby & Warby* (2002) FLC 93-091 in relation to accrued jurisdiction.

An appeal against this decision was reported as *Noll & Noll* (2013) FLC 93-529. The Full Court did not decide whether the claim by the husband against the wife's legal practitioners had merit, but found that accrued jurisdiction was not attached. The Full Court said (at [48]):

> "It appears, at least prima facie, that in this case the determination of the federal claim does not require the determination of the claim sought to be attached. Indeed it might well be said that the attached claim will not even arise until the proceedings relating to the financial agreement are determined, and are determined adversely to the husband, and on a basis which could provide him with a claim against Law Firm A. Furthermore, the measure of damages that could be sought in the attached claim would only be known if and when an order was made for property settlement under s 79 of the Act."

Apparently, subsequent to the Full Court appeal in *Noll*, leave to appeal to the High Court was sought but the parties resolved the dispute by consent.

In *F Firm & Ruane* (2014) FLC 93-611 the Family Court's jurisdiction to deal with the negligence claim was upheld, as the financial agreement had already been found not to be binding in *Ruane & Bachmann-Ruane* [2009] FamCA 1101 (unlike in *Noll*) on the ground that the husband's lawyer was not an Australian legal practitioner.

In *Bolden & Woodruff* [2018] FCCA 1439 the wife's solicitor was joined to the proceedings on the application of the husband. The wife sought to set aside the agreement on the ground *inter alia* that she was not provided with the requisite advice. The husband's claim against the wife's solicitor was for damages under s 82 or s 87 *Competition & Consumer Act 2010* (Cth) in which the Federal Circuit Court has original jurisdiction so accrued jurisdiction was not required. The outcome has not been reported as of January 2021.

8. How to protect oneself as a practitioner if there is scant disclosure and the client insists on doing the deal anyway

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). If you act for the weaker party then the best way to protect yourself where there is scant disclosure but the client insists on signing the agreement is to not act.

There are several ways to deal with disclosure of each party's financial position:

1. If there are proceedings before the court, the parties can rely on their financial statements and affidavits, and their compliance with their duty of disclosure. This is ideal – provided they are accurate and current – as the disclosure is open, transparent, sworn or affirmed and retained on the court record.

2. The parties can provide summaries of their financial positions in the financial agreement, either in the recitals, in schedules to the agreement or both.

3. The parties can annexe sworn financial statements to the agreement. This is rare.

4. The parties can provide full mutual disclosure, even if there are no proceedings before the court. This might include formal valuations of real estate and businesses, or at least market appraisals of real estate and an accountant's estimate of the value of businesses.

5. The parties can provide limited mutual disclosure (such as recent tax returns and assessments, recent financial statements and tax returns of entities and recent superannuation member statements) and not all other possibly relevant financial documents such as bank accounts.

6. The parties can provide no formal disclosure, but include a recital in the agreement that they waive any right to proper disclosure.

7. The parties can include a recital in the agreement that they have full or sufficient knowledge of the other party's affairs to enter into the agreement without formal disclosure.

Whatever approach is taken, it should be clear from the recitals if or how the parties have provided disclosure.

Difficulties can arise when one or both parties have a number of entities which are sought to be quarantined. The entities need to be referred to precisely, and not just as "the husband's entities" or "the Marshall group". These difficulties are exacerbated in agreements entered into before or during a relationship, as the way a business operates may change, particularly where one of the parties is involved in a business with third parties. The operations of the business may be moved from one entity to another, or a trust may be interposed, directorships and shareholdings may change, part of the business sold, a new business acquired or developed, and new entities formed. The disclosing party can't disclose a non-existent entity and it is difficult to draft an agreement to protect an entity which doesn't yet exist. In summary, a party's interest in an entity at the end of the relationship may be different to the interest when the agreement was executed.

In *Acker & Acker* [2014] FamCA 891, the wife alleged that the agreement was obtained by fraud, by reason of non-disclosure by the husband of a material matter. He disclosed "what were described as beneficiary interests in wholly discretionary trusts" whilst the wife foreshadowed that she would contend "at all material times the property of the trusts was actually in the whole or at least partial ownership of the husband" (at [10]). There is no reported decision as to the outcome. Both parties agreed that the FLA dispute could not be determined until a tax dispute was resolved by the Administrative Appeals Tribunal. The husband in this case probably considered that he had provided proper disclosure of his interests in the trusts in the financial agreement, but he still ended up in court after separation with the nature of his interests in dispute.

Superannuation may be a problem in pre-separation agreements, because of the difficulties of identifying the fund, giving procedural fairness, working out a split, naming the fund and ensuring the terms are enforceable. Sections 90XH and 90XJ are hard to reconcile. Section 90XH states that

superannuation interests do not need to be in existence when a financial agreement is made but s 90XJ requires that the superannuation interest be identified.

Tax can also be problematic in pre-separation agreements. It is impossible to predict if parties or entities will have significant liabilities, where those liabilities will fall and what tax consequences there may be in the future if property is to be transferred pursuant to the terms of the agreement, particularly as tax laws, the parties' entities, the ownership pf property and the parties' circumstances may change. Often the best that can be done is to advise the client that it is impossible to predict the future and that possible tax consequences on disposition and transfer should be considered when making decisions about the acquisition of property during the relationship. If the intention of the parties is that the weaker party will not have any tax consequences from the agreement or from their involvement in the stronger party's entities, then this should be clear in the agreement, and appropriate indemnities given.

There are pros and cons for detailed disclosure being provided by parties entering into a financial agreement. On the one hand, if parties provide full details of their financial positions, then if there are any errors it may be easier for a party to successfully apply to set the agreement aside for non-disclosure, misrepresentation or other grounds under s 90K(1). On the other hand, if the parties do not provide full details of their financial positions in the agreement, then it may be more difficult to defend an application for the agreement to be set aside for non-disclosure of a material matter.

The problem of disclosure may also arise in relation to the advice requirement under s 90G. In *Abrum & Abrum* [2013] FamCA 897, Aldridge J was not satisfied that the wife had received the requisite advice because the legal practitioner did not ask for, make or see a list of the parties' assets and liabilities. There were numerous other issues about the advice given to the wife, but the failure to take instructions as to the parties' financial positions led to a concern by Aldridge J that if the advice was given by a legal practitioner where there was inadequate disclosure, the advice might not be "real or meaningful". Justice Aldridge said at [38]-[43]):

> "Nonetheless, when s 90G(1)(b) speaks of "rights" it must be speaking of the entitlement to bring a case under s 79 and the factors that weigh in favour of that person's case under ss 79(4) and 75(2) otherwise it would have limited meaning.
>
> In order to give advice about the effect of an agreement on the rights of a party, that is their rights under the Act in relation to property, a legal practitioner must establish what those rights are at the time the advice is provided. This is because s 90G(1)(b) requires advice to be given on the effects of the agreement upon the rights of that party and the advantages and disadvantages of the agreement. If their rights are not known then it is impossible to advise as to the effect of the agreement on them.
>
> It is unhelpful to advise a person that a financial agreement might adversely affect his or her rights if those rights are not identified. A party must know more than some unknown or undefined right is being given up. He or she must have some idea, at least in general, of his or her present entitlements or rights (to use the words of the section) with which he or she may compare the provisions of the proposed financial agreement. It is only in that way that there can be actual advice about the effect of the agreement on those present rights.

> It is quite clear that a person may choose to enter into an agreement where he or she may very well be much worse off than if he or she were left to rely on their rights under s 79 of the Act. Thus, there is a requirement for specific legal advice to be given. That is the safeguard the legislature imposes when it permits the parties to deal with their property by agreement and without possible interference from a court.
>
> Accordingly, the advice must be real and meaningful. It must be directed to the parties' circumstances and their present rights.
>
> Proper identification of a parties' rights can only be done by identifying the property of the parties then held and a consideration of the parties contributions (financial and non-financial) to the acquisition of that property and to the welfare of the children. Any other relevant factors under s 79(4), including s 75(2), would then need to be considered. Only by doing so can advice be given that complies with the terms of s 90G(1)(b)."

The agreement was not set aside for other reasons. The position taken by Aldridge J in *Abrum* is, however, contrary to the position taken by Murphy J who was the trial judge in *Hoult & Hoult* (2011) FLC 93-489. Justice Murphy considered that whilst it might be prudent for a legal practitioner giving advice about a financial agreement to have a list of assets and liabilities, it was not a requirement of s 90G.

Besides fraud under s 90K(1)(a), there are other possible grounds for an agreement to be set aside where disclosure has been inadequate under s 90K(1)(b), such as unconscionable conduct, misrepresentation and mistake. It is beyond the scope of this paper to discuss these in the context of disclosure.

9. Lessons from recent cases

9.1 Interim and interlocutory orders

The following cases are useful as showing recent problems arising in litigation about financial agreements. In particular, the law has developed in relation to litigation funding and interim maintenance pending the determination of a dispute about a financial agreement.

In *Teh & Muir* (2015) FLC 93-680; *Abati & Cole* [2014] FamCA 60 and *Commissioner of Taxation & Hong* [2016] FamCA 435 the courts were prepared to make orders to preserve certain assets pending the determination of issues concerning the validity of a financial agreement. Justices Finn and Strickland said (at [29]) in *Teh & Muir*:

> "It has long been recognised that while the Family Court is exercising its power (which if not expressly provided for in the Act, must necessarily be implied) to determine whether or not it has jurisdiction in a particular case, it can be appropriate for it to preserve the status quo (in this case the disputed half share of the sale proceeds) by the grant of an interlocutory injunction (see *R* v *Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 202, and *Yunghanns & Yunghanns and Ors*(1999) FLC 92-836)."

In *Chatterjee & Woodby-Chatterjee* [2016] FamCA 486, an order for the sale of the former matrimonial home was made in circumstances where the wife conceded that she could not retain it. The sale was made on conditions which the husband's father had an opportunity to consent to or object to, including

the payment of $50,000 to the wife from the net proceeds of sale.

A later order was made in *Chatterjee & Woodby-Chatterjee* [2017] FamCA 537 for $70,000 under s 117(2) FLA for litigation funding “to ensure a level playing field”.

At the trial, reported in *Chatterjee & Woodby-Chatterjee and Anor* [2018] FamCA 930, it was found that the wife’s entitlements were not sufficient for the second order to be enforced. The husband’s father had a cost order against the wife in the Court of Appeal of the Supreme Court of New South Wales, following a successful appeal against an order that was in the wife’s favour. By the time of the trial, the wife had debts which were greater than the balance of her entitlements under the financial agreement. The outcome illustrates the risk of making partial property orders or litigation funding orders which may not be able to be claimed back (*Zschokke & Zschokke*(1996) FLC 92-693).

***Fosse & Salvage* [2019] FamCA 385**

Justice Tree distinguished *Norton & Locke* (2013) FLC 93-567 and *Holden & Wolff* (2014) FLC 93-621 in which the Full Court of the Family Court found that unless and until the fact of a de facto relationship was established, the capacity to make a sole use and occupation injunction or to require the respondent to file current financial evidence was limited.

In *Fosse & Salvage* and *Rakete & Rakete* [2012] FamCA 267 the Family Court made litigation funding orders in favour of parties seeking to impugn a financial agreement. In both cases s 71A was not seen as a bar to a litigation funding order. Section 71A states:

> (1) This Part does not apply to:
> (a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or
> (b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.
>
> (2) Subsection (1) does not apply in relation to proceedings of a kind referred to in paragraph (caa) or (cb) of the definition of ***matrimonial cause*** in s 4(1).

Justice Kent in *Rakete* said (at [32]-[33]):

> It is clear that what s 71A does is to suspend the ability of this Court to otherwise make Orders under Part VIII of the Act. It does not affect the Court’s ability to make Orders under s 117(2) of the Act (which lies outside Part VIII). To contend otherwise would be to defeat the very purpose of s 117(2).
>
> As I raised with Counsel for the Husband, Ms Brasch, during the hearing, if her argument regarding the suspension of s 117(2) by s 71A was accurate, that would result in this Court being unable to make any costs Order, even in her client’s favour, when a binding financial agreement was still on foot. That would include a scenario where the Wife’s application to have the binding financial agreement overturned was rejected. Such a conclusion would undermine the purpose of s 117(2), which is to permit this Court to order one party to pay another party’s costs where that is just in the circumstances. As highlighted in the cases referring to this power, the power is broad and fettered only by the requirement that there be “proceedings” and that the Order made by the Court be “just”.

In *Fosse & Salvage* the husband raised another argument, namely that unless and until the agreement was set aside it must be presumed to be legally binding on the parties bound by it. He relied upon clause 19 of the agreement as being an absolute bar to the wife making a claim. Clause 19 stated:

> "Pleading this Agreement as a Bar
> Mr Salvage and Ms Fosse agree and acknowledge the terms of this deed may be pleaded as an absolute bar and estoppel to further proceedings, commenced now or taken at any time in the future."

Justice Tree stated (at [37]):

> "Turning then to the husband's specific argument, it seems to me that there are at least two responses to it. The first is that clause 15 of the cohabitation agreement expressly preserves rights or remedies conferred on the parties under law. The right to bring these principal proceedings must necessarily therefore contractually survive, including seeking antecedent and ancillary relief. The second is that clause 19 cannot be read so as to preclude proceedings seeking to impugn the cohabitation agreement. In fairness, the husband does not contend the latter, but rather hones his argument that the estoppel and bar is in relation to any claim against significant property or financial resources of the husband. However as to that, I am not satisfied that by invoking her right to seek an order under s 117, the wife is thereby making "any further claim" in relation to property, but rather is seeking an order for costs in relation to proceedings antecedent to making a potential claim against property. She is not thereby asserting a beneficial entitlement to any of the property of the husband arising out of the relationship, but rather only seeking that an order that her costs be met by him."

The ability to make a spousal maintenance order is restricted by s 90F(1), and in relation to de facto relationships, by s 90UI(1).

Section 90F states:

> (1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
>
> (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit.
>
> (2) To avoid doubt, a provision in an agreement made as mentioned in s 90B(1), 90C(1) or 90D(1) that provides for property or financial resources owned by a spouse party to the agreement to continue in the ownership of that party is taken, for the purposes of that section, to be a provision with respect to how the property or financial resources are to be dealt with.

Justice Tree was considering s 90UI(1) and found it to be relevant that s 90F in its original form only applied to financial agreements made after divorce. He summarised (at [59]-[60]):

> "So initially s 90F only operated to post-marriage, agreements, and necessarily the time for determining the capacity of a party to support themselves independently was therefore post-marriage too.
>
> Significantly, the original s 90F(1) referred specifically to the time "when the agreement was made" rather than the time it came into effect. That was the state of the s 90F at the time of the 2003 Amending Act, which introduced s 90F(1) and (1A) in their current form. No specific explanation appears in the explanatory memorandum for the broadening of the operation of the s 90F to cover all BFAs, rather than just those made after dissolution of marriage, or of the

> reason for the change of the point in time in which a party's capacity to support themselves is to be considered, namely, from "when the agreement was made" to "when the agreement came into effect." But plainly, both of those changes flow from the 2005 changes, and there is no reason to doubt that the fundamental purpose of s 90F **-** protection of the social security system – remained." (NB References to s 60F have been changed to s 90F for clarity)

Justice Tree raised a further matter which was not relied upon by the wife, that her arguments were supported by s 90UF which introduced separation declarations in 2008. Justice Tree concluded (at [72]-[73]):

> "Upon balance, I read s 90UF(1) and s 90UG as supporting, and certainly not materially detracting from, an argument that, subject to their terms, BFAs dealing with maintenance generally come into effect at a time after the agreement was made, particularly in light of the guidance given by the explanatory memorandum relating to s 90F.
>
> Moreover, there are sound reasons of common sense supporting such an interpretation. Why would the inability of a party to support themselves without an income tested pension (etc) potentially many years earlier, justify the non-application of the BFA's prohibition on maintenance, if the applicant was now wealthy? Conversely, why should a person's ability to support themselves independently at the time of entry into the BFA, justify the continued prohibition on maintenance if, after separation, their only income then is a means tested pension? The purpose behind s 90F (and s 90UI) it seems clear, is to protect limited social security funds, and the construction contended for by the wife would achieve that, whereas the husband's argument would not necessarily do so."

Justice Tree made an order for litigation funding of $100,000 under s 117(1) FLA and interim spousal maintenance of $516.05 per week.

The husband appealed. As the appeal was against interim orders he needed to seek leave to appeal. The Full Court in *Salvage & Fosse* (2020) FLC 93-966 upheld the ability of the court to make an interim maintenance order pending the determination of the validity of the agreement and a litigation funding order under s 117(2). The Full Court held that a provision that no maintenance be payable did not come into effect until the relationship had broken down. The bar in the agreement to applying for spousal maintenance was of no force and effect if the wife could establish that at the time of the breakdown of the relationship, she was unable to support herself without an income tested pension, allowance or benefit. Her financial circumstances at the time the agreement was entered into was irrelevant. Justice Watts refused leave to appeal both orders. Justices Ryan and Aldridge granted leave to appeal the litigation funding order and allowed the appeal.

The husband argued that the wife had not established that she was unable to support herself adequately without a means tested pension as she had reasonable health and had not put evidence to the court of her attempts to obtain employment. The Full Court referred to relevant matters highlighted by the trial judge:

a. the wife was aged 71;

b. the wife had retired from employment at the age of 65;

c. at the time of the hearing the wife had net assets of approximately $6,800;

d. the wife had commenced receiving an income tested Centrelink pension when she was approximately 64 or 65 years old; and

e. in 2015 the husband commenced paying the wife approximately $1,000 per month to assist in supporting her

The Full Court then held that it was open to the trial judge to conclude at the time the cohabitation agreement came into effect, the wife was unable to support herself without a pension, allowance or benefit and accordingly, s 90UI was enlivened.

The cohabitation agreement included a clause that "[n]either will be required to pay maintenance to the other". Although the challenge to the approach to s 90UI FLA was abandoned, all three judges felt obliged to be satisfied that s 90UI did not operate to bar the wife's claim for interim spousal maintenance.

The agreement was drafted as a cohabitation agreement under s 274 and s 266 *Property Law Act 1974* (Qld) but operated as a financial agreement under the FLA because of Item 86 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 (Cth). The agreement stated that it operated from three months after the parties ceased to cohabit, but this clause had to give way if it was inconsistent with the FLA which determined when the Pt VIIIAB agreement and its specific clauses came into effect.

Under the FLA, the provisions of a financial agreement in relation to the breakdown of a de facto relationship can only come into effect on the breakdown of a de facto relationship. They cannot take effect from an earlier date even if the agreement states this. Justices Aldridge and Ryan said (at [42]-[44]):

> "By …s 90UF of the Act, those clauses of a financial agreement which deal with the property or financial resources of the spouse parties, have no force or effect until the breakdown of the relationship and a separation declaration is made (s 90UF(1)). Any ancillary clauses as defined by ss 90UB(3), 90UC(3) or 90UD(3) are of no force and effect until the de facto relationship breaks down but there is no need for a separation declaration (s 90UG). A note to s 90UF explains that this means that before the separation declaration is made, the financial agreement will be of force and effect in relation to matters other than property or financial resources, or matters ancillary thereto (including ancillary to the maintenance of either member of the couple). If matters ancillary to a maintenance provision have no force or effect until the breakdown of the relationship, it is logical that maintenance clauses operate in the same manner.
>
> There are no similar provisions in relation to maintenance clauses per se, albeit in the circumstances set out in s 90UH of the Act (which does not in any event apply to this agreement), certain clauses as to maintenance may be void. Section 90UI restricts the ability of spouse parties to exclude or limit the power of the Court to make a maintenance order pursuant to s 90SE and s 90SG in favour of a party in the circumstances addressed by s 90UI(2). Section 90UI(2) examines the circumstances of the applicant spouse at the time "when the agreement came into effect" and if at that time the applicant party is unable to support themselves in the manner described in that subsection, the exclusion or limitation clause is rendered inoperative. This subsection requires that the applicant party's circumstances are to be examined "taking into account the terms and effect of the agreement". Reference to s 90UI(3) makes it clear that where the financial agreement provides that the property or financial resources of a de facto spouse are to continue in the ownership of that party, that property or financial resource is to be taken into

account in determining the circumstances of the party. If the applicant's circumstances were to be considered when the agreement was signed rather than on the breakdown of the relationship, this provision is otiose. The work it does is to ensure that the applicant's circumstances include property and financial resources which the applicant already has (and will retain) are taken into account as well as any property or financial resource that the applicant is to receive at the breakdown of the relationship. This lends strong support for the proposition that s 90UI is to be considered at the breakdown of the de facto relationship. Any disquiet is dispelled by asking how could the fact that when a party signs an agreement, which means that at some distant time the party will receive property, mean that at that earlier point in time, the party is unable to support himself or herself without an income tested pension etc.? Plainly it could not.

We are bolstered in this view because, interpreted in this fashion, it means that in this respect, financial agreements entered into between married spouses and those entered into between de facto spouses operate harmoniously (see s 90F of the Act …)."

Justice Watts (with Ryan and Aldridge JJ agreeing on this point) said (at [138]):

"The purpose of s 90UI (and s 90F(1A) in respect of married persons) is the protection of the social security system. As counsel for the appellant conceded, as a matter of public policy, parties cannot contract out of these provisions."

Justice Watts, again with whom Ryan and Aldridge JJ agreed, said (at [145] – [147]):

"Section 90SE of the Act provides that a court may make such order as it considers proper for the maintenance of one of the parties to a de facto relationship "after the breakdown of the de facto relationship". This is important because, as indicated, s 90UI is designed to protect the revenue by not allowing a cohabitation agreement to limit a de facto spouse's ability to make a maintenance application if she/he otherwise requires an income tested pension, allowance or benefit to support themselves. It follows that it would defeat the purpose of s 90UI to interpret the words "when the agreement came into effect" as meaning the date of the signing of the s 90UC agreement, when no application for spousal maintenance could be made at that time.

For the sake of completeness, I note:

a) section 90UG provides that provisions in a Pt VIIIAB financial agreement that are incidental or ancillary to, inter alia, maintenance are of no force or effect unless and until the de facto relationship breaks down; and

b) that s 90UF(1) of the Act provides that a provision in a Part VIIIAB financial agreement (which the Cohabitation Agreement in this case is taken to be), so far as it relates to property or financial resources but not maintenance are of no force and effect until a separation declaration is made. A declaration must state the parties have separated and are living separately and apart at the time the declaration is made.

The primary judge was clearly correct in finding that s 90UI of the Act was engaged and that the respondent could rely upon it, if she could establish at the time of the breakdown of the relationship, she was unable to support herself without an income tested pension, allowance or benefit."

All three judges found that the financial agreement was not a bar to the making of a litigation funding order under s 117(2) but it was a bar if the order had been made under s 90SM as an interim property order. The husband argued that the order was in reality a s 90SM order despite the fact that it was not described as one, but this was rejected by the Full Court.

Justices Ryan and Aldridge found that the trial judge failed to take into account a relevant consideration in determining the litigation funding application, namely (at [24] – [27]):

> "It was not suggested to his Honour that an evaluation should be undertaken of: the quality and nature of the claim to set aside the Cohabitation Agreement; the likely result that would ensue if a subsequent property division was undertaken; and the likely costs of such a course. No authority directly suggests such a course. We consider, however, that such a consideration is essential in a case such as the present.
>
> How else can it be determined that an interim costs order is justified in all of the circumstances? In other words, what is missing is an assessment of the nature and quality of any property claim – what is the likely division that would follow, and are such proceedings justified by the nature and quality of the claim to set aside the Cohabitation Agreement and the likely costs involved?
>
> It must be realised that the property available for division at any hearing is likely to be very different to that presently held. In this case, not only will it be diminished by the interim costs orders but also by the costs of the appellant defending the initial proceedings and by the parties' costs of the property settlement proceedings.
>
> In this matter, the effect on the appellant of the respondent's proposed orders is significant as he lives on the income generated by the shares and cash held by him as well as the capital. There would be no point in interim costs orders if the ultimate likely orders in the property settlement proceedings did not justify the level of expenditure."

In relation to the "irreversibility" which occupied much of the hearing time of the appeal, Justices Ryan and Aldridge said (at [31] - [37]):

> "First, as we have tried to explain, that concept is more apt to an order for the transfer of an asset or payment of money during the course of the property settlement proceedings, although in our opinion, it is an unfortunate and not entirely accurate shorthand expression of the applicable principle. Rather, the Court must take into account whether, and if so how, such an order could be taken into account, adjusted or possibly reversed at the final hearing.
>
> It is as plain as a pikestaff that if the respondent failed to set aside the Cohabitation Agreement, the funds obtained by her could never be repaid. Thus, the order was incapable of being reversed, although if she succeeded, it was capable of being taken into account at a subsequent property settlement hearing. Another possibility is that the order might simply stand as appropriate if the Cohabitation Agreement was set aside.
>
> As Kent J has persuasively reasoned, the fact that an interim costs order may never be repaid is not a bar to one being made. As the history of such orders demonstrates, it is not a determinative matter (*Rakete v Rakete* [2012] FamCA 267 at [55]).
>
> It is, however, a consideration which justifies the particular evaluation we have described earlier.
>
> We were referred to *Norton & Wilkins* [2017] FamCA 992 and *Wall & Mitchell* [2010] FamCA 1194, which it was said established a principle that interim costs orders are not normally made in cases such as these. We do not consider that they do. Those cases are applications of the requirement to do justice between the parties, which turned on the findings that the nature of the claims to be made in those proceedings did not justify requiring the respondent to pay the applicant's costs in advance.
>
> Secondly, his Honour did have regard to this consideration at [45] which is set out above.
>
> We consider that in this paragraph the primary judge was doing no more than stating that the so-called "irreversibility" principle has little application to interim cost orders. For the reasons that we have given, we agree. If however, the primary judge was intending greatly to discount his earlier finding at [44], that there was no prospect of the respondent being able to refund any costs unless she was successful in both proceedings, then we would respectfully disagree."

In *Wollams & Backen* [2020] FamCA 259 the court ordered the parties to provide further submissions regarding the wife's application for interim maintenance and litigation funding under s 117(2) FLA despite the existence of a financial agreement preventing maintenance applications.

9.2 Termination agreements

Westacott & Dunwoody (No 2) [2019] FamCA 719 is one of the few cases which deals with termination agreements. The termination agreement sought to set aside a financial agreement the parties entered in 2005 but made no reference to any proposal for further property settlement arrangements between the parties. Justice Foster held that although there were no statements of independent legal advice it was unjust and inequitable if the agreement was not held to be binding. After signing the termination agreement, the parties lodged an Application for Consent Orders, including an order that the termination be declared binding and enforceable. Attached to the application was a certificate of independent legal advice by the wife, and a statement by the husband acknowledging that although he did not obtain independent legal advice he was aware of his right to do so. Justice Foster found that as both parties acted consistently with the 2005 financial agreement the termination agreement should be declared to be binding.

9.3 Non-compliance with s 90E

The usual outcome of non-compliance with s 90E is any spousal maintenance provision will be considered void and severed. The rest of the agreement will stand (e.g. *Leung & Fan* [2020] FCCA 764) but if a transfer of property is found to be both by way of settlement of a property claim under s 79 FLA and of a spousal maintenance claim under s 74 FLA. the transfer will be void. This occurred in *Cooper v Fernihough & Anor* [2019] FCA 727.

The transfer was void so the claim of the trustee in bankruptcy under s 120 and 121 *Bankruptcy Act 1966 (Cth)* did not need to be determined.

10. Financial agreements and COVID-19

Given the ongoing COVID-19 crisis when this paper was written in January 2021, something must be said about acting for clients in the midst of the crisis or shortly afterwards. Some things to think about include:

1. The impact of pandemic has been felt differently across Australia and even within states or particular cities. There has been no impact or almost no impact for some people and it may seem irrelevant to consider possibly future impacts. However, given the volatile nature of the pandemic and the possibility of ongoing lockdowns and working from home requirements it is naïve to ignore the issue.

2. There are practical matters to consider. For example, if the legal practitioner's offices are closed how will the agreement and any annexures be collated and how will the original be sent between parties and legal practitioners? How do you ensure that the client signs the complete version?

3. Although it is not a requirement of the FLA, the Statements of Independent Legal Advice are usually annexed to the Agreement. It may be faster and more practical to keep them separate.

4. It is usual for clients to have their signatures witnessed by their legal practitioner. This is not a requirement in s 90G(1) but it is best practice. It means that the legal practitioner can check the client's understanding of the agreement and their state of mind, and there is certainty about the

identity and independence of the witness. With many lawyers now working from their homes and not having face to face interviews, new ways need to be worked out to ensure the client's understanding and state of mind, both when taking instructions and when the agreement is executed. If the legal practitioner does not see the client face-to-face when the agreement is executed, how can the legal practitioner be confident that it was executed by the client and not someone else? How can the legal practitioners ensure that there is no pressure on either party which may be a vitiating factor at the time the agreement was signed?

5. The s 90G(1) requirements still need to be met and the procedures for this to occur may need to be re-considered. For example, both parties must sign the same version of an original agreement, the signature cannot be electronic, and the witness must be physically present and therefore cannot witness a signature by video-link.

6. Valuations of property may need to be updated as they may have fallen or fluctuated. The dates of the values should be given to ensure the disclosure is as accurate as possible.

7. Consideration should be given to how a property is to be quarantined if its value may fall.

8. Many weddings are being delayed so there may be less urgency to enter into a s 90B financial agreement. A s 90UC agreement may be considered more worthwhile.

9. Unemployment is expected to continue to rise and those who keep their jobs may have reduced incomes. How does the agreement address this uncertainty?

10. Values of many businesses, shares and superannuation have dropped but others have increased. Real property values may have fallen or will fall as the effects of unemployment and under-employment filter through. In some areas property prices have increased. Is it fair to use current values if the parties each have a property which had similar values before the pandemic? How do you take account in the agreement that some asset values may not yet be affected but others already have?

11. The rate at which the economy will recover is unknown. Different sectors are likely to recover at different rates. This means, for example, that if the agreement quarantines assets at their values as at the date of the agreement, putting in the values of shares owned by one party and a business owned by the other party at either their pre-COVID-19 value or their mid-COVID-19 value is likely to result in unfairness to one of the parties.

12. Are the more junior legal practitioners being supervised and mentored to the same extent as they were when everyone was working in the office?

13. COVID-19 has brought unusual stresses and anxieties to people in their everyday lives, which means that it may not be the best time for people to make big decisions about complex legal matters. Agreements executed at this time may be at even greater risk of being set aside under s 90K(1)(a) or (b) under such rounds as non-disclosure, undue influence, unconscionable conduct or mistake.

11. Key drafting tips and traps

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, s 90UB or s 90C.

3. Read that section of the FLA and check that the agreement covers matters which can be covered in that type of agreement.

4. Consider carefully how the parties will provide disclosure and how this will be documented in the agreement.

5. Taking a long time to draft, negotiate and settle the terms of a financial agreement can be beneficial in that it will be more difficult for the weaker party to argue that they were subject to undue influence or unconscionable conduct, On the other hand, it means that careful review if the final version is necessary to check that there are no changed circumstances. In particular, check:

    5.1. That the relationship status of the parties has not changed i.e. from s 90B to s 90UC or from s 90UB to s 90UC;

    5.2. The property, liabilities and financial resources of the parties may have changed, their values changed or the parties' knowledge of their values changed:

    5.3. Other changes such as to address, occupations, incomes and the birth of children.

6. Mistakes can be made by clients when giving instructions as to their financial positions. Post-separation, lawyers are likely to do title searches and ASIC searches, but they are also important to do pre-separation. It is sensible to protect your client by:

    - Obtaining ASIC searches of both parties and of any entities;
    - Obtaining title searches (including index searches) of real estate of both parties;
    - Having the client's accountant check that the financial position of the client is accurately described in the financial agreement.

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

8. Give the client a letter of advice about the final version of the agreement a few days before the agreement is signed. You may pick up drafting errors and inconsistencies as you write the letter.

9. Update the verbal and written advice if amendments are made to the agreement, making sure that the advice is given in relation to the final version of the agreement as a whole, not just the amendments.

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

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

12. Property acquired after the end of a de facto relationship or after a divorce cannot be dealt with in a financial agreement. This is particularly relevant to post-separation agreements but may also be an issue with agreements entered into earlier.

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

14. Check the current status of the parties' relationship. Whilst a client will normally know if they are validly married, they may not know the legal requirements for a finding of a de facto relationship. If it is a Pt VIIIAB financial agreement, make sure there is a de facto relationship in existence or that one will exist or the agreement will not be binding. If it is a s 90B agreement, there needs to be a marriage before the agreement can be effective.

15. Check your client's intentions as to the future of the relationship. Do they need both a s 90B and s 90UC agreement? Will you do a combined agreement or separate ones? See *Piper & Mueller* (2015) FLC 93-686.

16. Check for uncertainties, inconsistencies and incompleteness in drafting. Where possible, use terms which are in the FLA. Make sure that other terms are carefully defined.

17. Have another senior lawyer read the agreement.

18. If your client wants the agreement to deal with all the property and potential property does it do this? Any gaps may mean that an application can be made under s 79 or s 90SM to deal with the omitted property and/or the agreement or part of it is void for uncertainty or incompleteness.

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

20. Are there potential claims in overseas jurisdictions now or later? The parties may need an agreement in another jurisdiction as well or a combined agreement covering both jurisdictions.

21. If the parties may have children, provide for this possibility and state that the parties have considered the possibility. If not, the agreement is more likely to be able to be set aside under s 90K(1)(d).

22. Before your client executes the agreement ensure it is complete with any annexures are attached, and that you have given the requisite legal advice on the whole agreement.

12. Conclusion

Financial agreements are a fertile ground for litigation. The proposed terms of the agreement or the circumstances of the parties may put a legal practitioner on notice that it is too risky to act unless the terms are re-negotiated and less pressure placed on the weaker party to sign. There are steps a legal practitioner can follow to ensure as much as possible that an agreement is binding and to reduce the risk of it being set aside under s 90K(1) FLA.

A major issue to consider is that the law of financial agreements is still changing and developing. Recent developments in the understanding of the law as to the ability of a party to apply for interim maintenance and litigation funding pending the determination of a financial agreement dispute is a timely illustration of the risks for lawyers and parties.