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Ink on the Wedding Dress: Ticking Time Bombs in Financial Agreements

Dividing up the pie in family law property settlements
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Introduction

When drafting and advising on financial agreements it is obviously necessary to refer to the technical requirements for an agreement to be binding (contained in ss 90G(1) or 90UJ *Family Law Act 1975* (Cth) (FLA)) to ensure they are met, rather than rely upon the possibility of the agreement being "saved " under ss 90G(1A) or 90UJ(1A). The grounds for setting aside a financial agreement are extensive and they also need to be considered when advising on, drafting and negotiating a financial agreement. There is extra pressure on a legal practitioner when instructed in relation to a pre-nuptial agreement. As well as ss 90G(1) or 90UJ(1) compliance and avoiding ss 90K(1) or 90UM(1A) grounds there are often demands from the client to finalise the agreement in a short time. However, the legal practitioner knows that there must be sufficient time before the wedding so there is not ink on the wedding dress or the tuxedo. All this as legal practitioners try to predict the future of legislative change (which in relation to financial agreements has sometimes been retrospective), case law developments and possible life changes of the parties. If something is overlooked the agreement might be worthless, or it may even become the focus of major litigation and a professional negligence claim.

This paper is an up-date on some of the tricky issues which arise in relation to financial agreements:

1. Compliance with subject matter requirements
2. Obtaining independent and sound legal advice
3. Compliance with the technical requirements of ss 90G(1) or 90UJ
4. Sections 90K(1) and 90UM(1)
5. The consequences of fraud and failure to disclose
6. The impact of undue influence and unconscionable conduct
7. Essential considerations when drafting financial agreements

1. Compliance with subject matter requirements

A fundamental prerequisite for a financial agreement to be binding is that the agreement covers subject matter which is permissible under the FLA for that particular type of agreement. An agreement can cover other subjects but it won't be binding and enforceable for those aspects. Unless the agreement includes permissible subject matter, it won't be a valid financial agreement under the FLA at all.

Section 71A excludes the operation of Part VIII (property and maintenance orders for married couples) where the agreement deals with:

- financial matters; or
- financial resources.

"Financial matters" is defined in s 4(1) in relation to the parties to a marriage as matters with respect to:

(i) the maintenance of one of the parties; or

(ii) the property of those parties or of either of them; or

(iii) the maintenance of children of the marriage;

Section 90SA, which relates to de facto couples, is worded differently but perhaps to the same effect. It excludes the operation of Pt VIIIAB Div 2 if a financial agreement is binding on the parties regarding any of the following matters dealt with in the agreement:

- maintenance;
- property; or
- financial resources

Furthermore, a financial agreement cannot be a financial agreement unless it deals with matters allowed under the section of the FLA pursuant to which the agreement is made. Sections 90B, 90C, 90D, 90UB, 90UC and 90UD set out the matters which can be covered.

Part VIIIA financial agreements can deal with four types of matters:

1. How property and financial resources are "dealt with" (ss 90B(2)(a), 90C(2)(a), and 90D(2)(a).
    - The phrase "dealt with" in relation to agreements during marriage or after divorce (ss 90C(1) and 90D(1)) does not have a lengthy definition in s 90F(2) but the definition is broad enough to include agreements made during the marriage or after divorce which provide only that assets or financial resources can "continue in the ownership" of a party rather than be transferred or sold.
    - Only property acquired during the marriage can be dealt with, not property acquired after divorce.
    - Although superannuation is "treated as property" (s 90XC), the part of a financial agreement which deals with superannuation is effective under Pt VIIIIB FLA not Pt VIIIA FLA (s 90XH(3)).

2. Spousal maintenance during a marriage and/or after divorce (see ss 90B(2)(b), 90C(2)(b), and 90D(2)(b)).

3. Matters "incidental or ancillary to" the above matters (see ss 90B(3)(a), 90C(3)(a) and s 90D(3)(a)).

4. Other matters (see ss 90B(3)(b), 90C(3)(b) and 90D(3)(b)).

Part VIIIAB financial agreements can only deal with the first three of these types of matters with the extra limitation that only property acquired during a de facto relationship can be distributed, not property acquired after separation.

The phrase "other matters" only applies to agreements entered into after 21 November 2008 under Pt VIIIA and not agreements entered into under Pt VIIIAB. Agreements under Pt VIIIAB cannot cover "other matters", but the effect of this limitation has not been tested and there is little judicial authority on the meaning of "other matters" and "matters ancillary or incidental to". The former appears broader.

The exclusion of property acquired after separation or divorce has not been considered in any detail by the Family Law Courts. Does this mean that everything needs to be valued at that date? What about savings and superannuation accumulated after that date?

The following is a selection of recent cases which deal with the subject matter of a financial agreement or property not covered by a financial agreement.

***Delrio* & *Jindra (No 2)* [2020] FCCA 2234**

The husband's estate unsuccessfully applied for s 79 orders in relation to property not covered by the agreement. The husband had acknowledged in the agreement his lack of contributions to the property listed in a schedule to the agreement and his acknowledgment was binding upon his deceased estate. The trial judge 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 ss 79(2) or 79(8) to make an order altering the wife's interests in the property not covered by the agreement.

Judge Altobelli canvassed a possible argument which might be successfully made in another case. It was raised but not pursued by the estate (at [131]):

> "Indeed, perhaps the more interesting argument is that clauses in a financial agreement are unenforceable when the "c*haracter, nature and value of the property is so radically different...*" to that reasonably contemplated by the parties to be subject to their financial agreement. Hypothetically, it is not beyond the realms of possibility that this could occur. It certainly did not occur on the facts of this case. The "*character, nature and value of the property*" specifically the properties at Street G,

> Suburb H and Street J, Suburb K, did not change in character or nature simply because of substantial redevelopment which included acquisition of a strip of property and consolidation of the titles. Moreover, it could not be the case that a radically different value of property renders that part of the Financial Agreement referring to it unenforceable. One could imagine, perhaps in a flight of fancy, that if a financial agreement referred to property consisting of a lump of coal at the time of the agreement, but by the time of enforcement of the agreement the lump of coal had changed into a diamond, that the "*character, nature and value of the property*" was so radically different, that it was not of the kind reasonably contemplated by the parties to be subject to the financial agreement. This argument in extremis perhaps illustrates the hypothetical outer limits of this interesting argument, but there may be less dramatic cases which provide the foundation for the argument. There is no room for the operation of this interesting concept on the facts of this case."

***Dyne* v *Hasbach* [2014] QCATA 189**

The Queensland Civil & Administration Tribunal found that it had jurisdiction with respect to a debt of $7,500 which Ms Dyne, the secondary card holder on Mr Hasbach's credit card, had incurred. There was no debt on the credit card when the agreement was signed.

Ms Dyne sought leave to appeal from the decision. Leave was refused as it was held that the agreement did not create a bar to the proceedings by Mr Hasbach. The bar to proceedings was limited to matters arising out of the relationship or the agreement. The debt was found to have arisen after the relationship and was not connected with the agreement.

***HHP v WHP* [2020] QCAT 524**

A similar but unsuccessful claim was made by the husband to recover a debt from the wife of $4,845.96 being solar rebates or credits which the husband said the wife wrongly benefited from or stole over a 7-year period.

The parties had entered into a s 90C financial agreement at the end of their marriage. Relevant clauses in the agreement were:

- The husband was entitled to the solar power rebates
- Contemporaneously with signing the financial agreement the parties entered into a 10 year lease
- The consideration for the lease was set out in the financial agreement and was that the lessee enter into the financial agreement

The Queensland Civil & Administration Tribunal held that whether it was an application to enforce or to seek payment of a "debt" arising under the terms of the financial agreement, or under the terms of the lease that formed part of the financial agreement expressly and by implication, or under both documents jointly, the Tribunal did not have jurisdiction to hear it.

***Findlay* & *Reynolds* [2020] FCWA 189**

The parties entered into a financial agreement with the intention that it would have the effect

of binding the parties to their commitment to seek proposed consent property settlement orders, and the further effect of excluding any possible future claim for spousal maintenance by either of them.

Justice O'Brien accepted that it was possible for a carefully drafted financial agreement to, for example, apply to a singular item of property without ousting the power of the court to make orders in relation to the balance of the property of the parties. However, for reasons which O'Brien J said should be obvious from the specific clauses of the agreement, the financial agreement executed by the parties applied so broadly to financial matters including the property of the parties or either of them, within the meaning of s 71A, that Pt VIII of the FLA did not apply and the proposed consent orders could not be made. It was common ground that the agreement was binding.

To overcome the problem, the parties agreed to execute a termination agreement and they jointly applied for a review of the decision to refuse to make the consent orders.

***Bloomfield & Grainger* [2018] FamCA 36**

In *Bloomfield & Grainger* [2018] FamCA 36, the parties and their lawyers overlooked the fundamental and preliminary point of the subject matter of the agreement in this long-running litigation which commenced in 2014 and ended in 2018. There had been many previous hearings at which no issue was taken as to whether or not the litigation was about a financial agreement. Justice Hogan eventually determined that the agreement in question was not a financial agreement because, although it purported to be an agreement under s 90C, it did not deal with either of the two required subject matters in s 90C.

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

1. The wife was to transfer, after execution of the agreement, her legal and beneficial interests in the T Street property to the husband to be held for the maintenance of the children during the marriage.

2. In the event of a separation the husband would assume all liability under the mortgage. The court did not consider whether this liability was "property" and therefore brought the agreement within s 90C, so that was considered to be a question for another day.

3. A recital and a substantive clause were the only paragraphs to use the words "breakdown of the marriage". These paragraphs stated that neither party was precluded from further exercising any right available to them under the FLA in relation to how any or all of the "property of the marriage" is dealt with "in the event of the breakdown of the marriage", in circumstances where the property or the needs of the parties' children materially changed.

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

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

Justice Hogan held that the agreement was not a financial agreement as defined by s 90C because it did not deal with either:

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

2. The maintenance of either party.

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

***Piper & Talbot* (2021) FCCA 511**

This case involved a rare example of a financial agreement which was also a Binding Child Support Agreement. There seems to be no doubt that child support is within the definition of matters "incidental or ancillary to" matters which must be the subject of a financial agreement. *Piper* is also an illustration of the application of the strict compliance principle of *Black & Black* (2008) FLC 93-357 discussed later in this paper.

A section 90UD financial agreement was accepted by the Child Support Agency as a Binding Child Support Agreement for the purposes of Part 6 of the *Child Support (Assessment) Act 1989* (Cth) (*Assessment Act*).

The recitals referred to s 90UD and Pt VIIIAB and not the *Assessment Act*. The document was clearly labelled "Section 90UD Financial Agreement" and every page of the document was headed "Section 90UD Financial Agreement" including the pages containing each parties' statements of legal advice.

The Federal Circuit Court overturned the decision of the Administrative Appeals Tribunal and held that the s 90UD agreement was not a Binding Child Support Agreement. In relation to the applicability of the principles of law and equity to Binding Child Support Agreements Judge Bender viewed the ramifications of a Binding Child Support Agreement as similar to financial

agreements under the FLA. She said (at [129] - [131], [133]):

> "The absence of a section in the *Assessment Act* in the same terms as ss 90KA or 90UN of the *Family Law Act* does not in my view lead to the conclusion Parliament intended to oust the contractual principles of law and equity from the *Assessment Act*. In *Senior v Anderson* [(2011) FLC 93-470)] Strickland J noted s 90KA to reinforce his interpretation that a Financial Agreement is firstly an agreement to which the principles of law and equity apply. The existence of s 90KA was not the basis upon which his Honour's finding was formulated.
>
> I am therefore of the view that the principles of law and equity do and must apply when determining whether a Child Support Agreement is binding on the parties.
>
> For these reasons, I am of the view that the Tribunal erred when in paragraph [42] of its decision stated that there is *"no requirement in the legislation or relevant case law requiring that there be a specific and expressed intention that an agreement be a binding child support agreement*"…
>
> As was noted… s 84(5) of the *Assessment Act* states that the same document can be both a Child Support Agreement and a parenting plan, a Child Support Agreement and a Maintenance Agreement or Financial Agreement under the *Family Law Act* or a Child Support Agreement and a Part VIIIAB Financial Agreement. Given my finding that the principles of law and equity are applicable to Binding Child Support Agreements, it will be necessary for the parties to have intended that the component of their joint document which relates to child support be a Binding Child Support Agreement under the *Assessment Act*."

The requirement for legal advice for Binding Child Support Agreements is in s 80C(2)(c) and (d) of the *Assessment Act*:

> *(2)* For the purposes of subsection (1), an agreement is binding on the parties to the agreement if, and only if: …
>
> (c) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
>
> (i) the effect of the agreement on the rights of that party;
>
> (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
>
> (d) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided;

Judge Bender referred to the decision of Scarlett FM in *Garra-Marsh v Garra-Marsh No 3* [2012] FMCAfam 1144. Having considered the provisions of the *Assessment Act* in relation to Binding Child Support Agreements, Scarlett FM said (at [49]):

> "It seems clear that, considering whether or not the agreement between the parties is a Binding Child Support Agreement, the Court should apply the reasoning in

> *Black v Black* and require that there should be strict compliance with the statutory requirements."

Judge Bender agreed with Scarlett FM and concluded (at [153]):

> "Where the jurisdiction of the Court is to be ousted as is the situation in relation to a Financial Agreement or a party's recourse to a legislatively determined formula to the assessment of child support and/or capacity to have variations on that assessment determined by recourse to the legislation is to be ousted, the Parliament clearly set out the requirement in both the *Family Law Act* and the *Assessment Act* that parties obtain independent legal advice before entering into any agreement that has that effect."

In paragraph [33] of its decision the Tribunal noted that the annexure signed by each of the parties' legal advisors contained in the agreement met the requirement of s 80C(2)(d). In *Hoult & Hoult* (2013) FLC 93-546*,* Justice Thackray (at [96]) held that the certificate *when read with Recital N* (Judge Bender's emphasis) should have been treated as prima facie evidence of compliance with the legal advice component of s 90G(1).

Judge Bender concluded (at [165]-[167]):

> "In circumstances where I have found that the principles of law and equity apply to Binding Child Support Agreements and that the manner in which an agreement is accepted as a Binding Child Support Agreement is more than an administrative process, it was incumbent upon the Tribunal on review to look at the agreement as a whole, including the recitals, to satisfy itself that the legal advice given not only related to the effect of the agreement on the rights of the parties and the advantages and disadvantages of the agreement as a Binding Financial Agreement under Part VIIIAB of the *Family Law Act*, but also related to the effect of the agreement on the parties' rights and the advantages and disadvantages of the agreement as a Binding Financial Agreement under Part 6 of the *Assessment Act* as the parties' rights and the advantages and disadvantages of the agreement are clearly very different depending upon which agreement the advice is being given for.
>
> Whilst there is no statutory requirement under the *Assessment Act* that a Binding Child Support Agreement specifically state that it is made pursuant to Part 6 of the *Assessment Act* and that a Binding Child Support Agreement can be part of a Financial Agreement, the Tribunal had an obligation when this matter was raised by the Applicant to read the agreement as a whole to determine if on its face the Tribunal could be satisfied the advice given was the effects of the document as both a Financial Agreement under the *Family Law Act* and a Binding Child Support Agreement under the *Assessment Act.*
>
> As… the Full Court in both *Hoult* [(2013) FLC 93-546)] and *Logan v Logan* [(2013) FLC 93- 555) held that a Certificate is prima facie evidence there has been compliance with the legislative requirements for legal advice under s 90G of the *Family Law Act*. However in both matters the Court specifically stated that this is bolstered/supported by the presence of recitals that support that conclusion."

Judge Bender concluded (at [173]):

> "When the document was read as a whole, and more relevantly when the recitals and the body of the document are read as a whole, I am of the view that there are more than sufficient reasons for the Tribunal to have found that the prima facie inference arising from the Certificates that the requisite legal advice had been given to the document as both a Binding Financial Agreement and a Binding Child Support Agreement had been overturned and that the legal advice given only related to the document as a Financial Agreement under the *Family Law Act."*

Furthermore, Judge Bender rejected (at [190)] the proposition that there was "no requirement under s 80C(2) of the *Assessment Act* for the parties to actually receive legal advice and that all that is needed to comply with s 80(2)(c) is for there to be a Certificate in the correct form for compliance with the *Assessment Act*."

Judge Bender, relying again on *Hoult* and *Logan,* was satisfied that both the *Assessment Act* and the FLA require the provision of legal advice of the type enumerated that specifically relates to the legislation under which the agreement is made. However, while it is inappropriate for a court to make enquiries as to the quality of the advice given, if the matter is raised before the court then the court must satisfy itself that such advice was actually given.

Judge Bender held that the husband quite clearly raised with the AAT that at no time was he given advice in relation to the agreement's effect on his rights or the advantages and disadvantages of the agreement in the context of child support. The AAT had an obligation to hear evidence on that matter and make a finding of fact accordingly. The AAT's failure to do so was an error of law.

Judge Bender rejected the AAT's view that the provisions of the agreement which did not comply with s 84(1) *Assessment Act* could be excised from the agreement (those dealing with non-periodic -payments) and the agreement could be accepted on the basis that it related to periodic payments only. Section 84(1) *Assessment Act* lists seven kinds of provisions which can be included in a Binding Child Support Agreement, of which at least one need to be covered for the agreement to be a Binding Child Support Agreement.

The wife was pursuing the non-periodic payments through other undisclosed avenues available to her. Judge Bender said the AAT failed to understand the mandatory requirements of ss 84(d)(ii) and 84(6) *Assessment Act* and the consequences of non-compliance. If, for example, the husband was found not to be required to make the non-periodic payments set out in the recitals under the other process, then the wife would have no recourse to challenge or have the amount of the periodic payments set aside as being inadequate given the narrow provisions for the termination or the setting aside of a Binding Child Support Agreement under ss 80D or 136 *Assessment Act*. The failure to comply with ss 84(1)(d)(ii) and 84(6) was not remedied by excising the provisions of the agreement which

purported to deal with non-periodic child support but did not comply with those sections and leaving the agreement to deal with periodic payments alone.

Furthermore, it was decided in *Rankin & Rankin* (2017) FLC 93-766 that there is a requirement under s 125 *Assessment Act* for any orders that provide for both periodic and non-periodic payments to clearly set out the interrelationship between the two. That requirement is mandatory and a failure to comply with that provision requires the orders for both periodic and non-periodic payments to be set aside.

Judge Bender held that where a Binding Child Support Agreement makes provision for both periodic payments and non-periodic payments then a failure to comply with ss 84(1)(d)(ii) and 84(6) *Assessment Act* has the effect of rendering not only the paragraphs relating to non-periodic payments inappropriate for inclusion in the agreement but also has the effect of making the provisions for periodic payments unable to be included in the Binding Child Support Agreement.

2. Obtaining independent and sound legal advice

The importance of a client obtaining independent legal advice cannot be ignored and has been emphasised in many decisions. Such advice should have regard to ss 90K(1) or 90UM(1) as well as ss 90G(1) or 90UJ(1). The cases dealing with the adequacy of advice are often also considering whether an agreement should be "saved" under ss 90G(1A) or 90UJ(1A). Although the FLA provides that an agreement can be saved where advice has not been given where it is unjust and inequitable for the agreement not to be binding, there are a number of cases where judges have considered that the legal advice requirement should not be dispensed with.

The technical requirements for a financial agreement to be binding include a requirement that each party have independent legal advice from a legal practitioner about:

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

There is however no express reference to the advice being correct, proper, adequate, accurate or sound. On the face of the section, the advice can be wrong. Recent comments by Chief Justice Alstergren, whilst referring to earlier Full Court of the Family Court judgments, seems to go further than a narrow interpretation of the advice required.

The classic statement as to the advice required was by the Full Court of the Family Court in *Wallace & Stelzer* (2013) FLC 93-566 (at [103]):

> "Although there appeared to be some suggestion in the husband' s case before us that in a case such as the present the court is required to consider the accuracy of the legal advice provided, we did not understand that issue to be ultimately pressed. But in any event we note that in the recent Full Court decision of *Logan & Logan* [2013] FamCAFC 151, and relying on *Hoult*, it was held that the only enquiry necessary is as to whether advice was given, and not as to the content of that advice."

In the same year Justice Le Poer Trench in *Pacot & Pascot* [2013] FamCA 945 held that the advice given to the wife was incorrect. She was told that it could not be a binding agreement. The agreement was not set aside because the husband was unaware of this. He had not taken advantage of the wife's erroneous advice. The incorrect legal advice was not in issue under s 90G(1) but might have been problematic under s 90K(1)(b) and (e) if the husband had known about it.

***Hoult & Hoult* (2011) FLC 93-489 and *Hoult & Hoult* (2013) FLC 93-546**

The trial judge, Justice Murphy, was not persuaded that the absence of a list of assets and liabilities at the time of giving advice necessarily meant that the advice required by s 90G FLA (as it then was) was not given or could not be given because it was the first step of the four-step process under s 79 (this case pre-dating *Stanford* v *Stanford* (2012) FLC 93-495). The wife's legal practitioner did not, to the best of the wife's recollection, give any explanation to her about the law relating to the agreement or ask her any questions about the history of their marriage. The wife said that her legal practitioner did not speak to her about her rights under the agreement, nor the advantages or disadvantages arising from the agreement.

Justice Murphy said (at [66]):

> "A practitioner providing the required advice might, of course, feel more comfortable, or consider it prudent, to have a list of assets and liabilities so as to give the client examples of the permutations that *might* be possible and what may, or may not, be seen as 'advantages' or 'disadvantages' as a result. In addition, it might well be that advice which can be seen to be comprehensive in terms of a solicitor's duties, or that which is desirable in light of s 90G's ramifications, might have many components to which a list of assets and liabilities might pertain. The issue is not what prudence or practice might dictate, but what s 90G *requires* of any advice."

The Full Court of the Family Court upheld both parties' appeals and concluded that the solicitor's certificate, particularly when read in conjunction with the recitals in the agreement, should have been treated by the trial judge at least as prima facie evidence of compliance with the requirement in s 90G to have legal advice.

Justice Thackray took a different approach to the rest of the Full Court to the absence of advice and his views have been quoted favourably in several cases. He considered (at [201]- [212]) that advice was required for free and informed consent:

> "Therefore, while it may be appropriate to make a s 90G(1B) declaration where a party did not receive the prescribed legal advice but where the bargain was fair at the time it was struck, it may be inappropriate to make such a declaration where the advice was not given **and** the bargain was unfair or even punitive. …
>
> However, if there was a complete absence of legal advice I consider it would not be proper to give significant weight to the preservation of the bargain. It is therefore, in my view, an error to proceed on the basis that significant weight is always to be given to this factor."

***Adame & Adame* [2014] FCCA 42**

The wife was given the advice required by s 90G(1) by two legal practitioners who refused to sign the statement of independent legal advice. A third legal practitioner signed the statement. The fact that the wife had received the requisite advice from the first two legal practitioners was held to be irrelevant as neither of them signed the statement. The third legal practitioner gave evidence that the purpose of meeting the husband and the wife was to discuss "the commercial terms of that agreement and make sure they were what they had agreed to". He said that he did not give advice under the FLA, but his instructions were to witness the wife's signature and provide the lawyer's certificate.

Judge Jarrett found that the agreement was not binding and was able to be set aside on several grounds. Finding that the advice required by s 90G(1) had not been given, he said (at [113]):

> "I am not satisfied about the nature or the extent of any advice that was given by Mr F to Mrs Adame at the meeting of … when she signed the financial agreement. I am not persuaded by the generalised statements made by Mr F in his evidence, which merely conformed to the declarations made in the certificate attached to the financial agreement, that he gave Mrs Adame any particular advice at all when she executed the financial agreement. It may well have been the case that both Mr F and Mrs Adame knew that the giving of such advice was unnecessary in circumstances where she had already received advice from two other lawyers about the financial agreement and she had nonetheless resolved to sign the document. Despite the certification attached to the financial agreement, I am not persuaded on the balance of probabilities that Mr F provided the advice set out in the certificate to Mrs Adame when she executed the agreement."

***Renard* & *Geach* [2013] FCCA 617**

Judge Small found that the husband had not been given independent legal advice as required by s 90G(1)(b). His solicitor gave evidence that his role was to "give a certificate". Judge Small disagreed with this description of his role and (at [82]) said that in 2008 (prior to the January 2010 Amendments to the FLA), his role "was to provide the husband with independent legal advice in the terms set out in s 90G(1)(b)".

Judge Small discussed the length of time spent advising the husband and concluded (at [83]):

> "It is difficult to see how that role could be fulfilled in even a 50 minute interview, as it would require detailed instructions being taken as to the assets and liabilities of the marriage, the

husband's current position, and the history of the relationship before even looking at the agreement. I therefore consider that I do not need to make a finding on the exact length of time Mr Young spent alone with the husband … as even on Mr Young's evidence, it was not in my view long enough to take comprehensive instructions and give detailed and comprehensive advice about the agreement."

***Abrum & Abrum* [2013] FamCA 897**

Justice Aldridge found that the wife was not given advice as required by s 90G(1). Like Judge Small he considered that the advice required under s 90G(1) was broad, seemingly broader than the Full Court had indicated in *Hoult*, *Logan* and *Wallace & Stelzer*. He said (at [38] – [52]):

> 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).
>
> In the present case Mr Lodge did not obtain any list of the parties' property and liabilities. He did not seek to ascertain what financial and non-financial contributions the parties had made to that property or to the welfare of the children. He did not explore any of the other s 79(4) matters and the s 75(2) factors with the wife. In those

> circumstances he was entirely ignorant of the rights of the wife and could not give her therefore any advice about her rights. Mr Lodge did not suggest that he did so.
>
> Similarly, advice about the advantages and disadvantages for a party making the agreement must involve a consideration and weighing of what would be their rights but for entering the agreement and those advantages and disadvantages after having entered the agreement. No doubt each would have its advantages and disadvantages and they need to be compared.
>
> It is clear enough that Mr Lodge gave the wife some advice about the advantages of entering into the agreement ….
>
> Otherwise, … Mr Lodge noted the wife's view that she understood the contents and ramifications of signing the agreement that it was to her advantage financially and otherwise and that it was prudent to enter into the agreement.
>
> Noting the wife's opinion is not the same as giving advice.
>
> Even if this was infelicitous language it is clear from the letter and from the evidence of Mr Lodge that no advice was given as to the disadvantages.
>
> For example, it can readily be seen that the 5/44ths share in the waterfront property was calculated by a reference to $250 000. It may be supposed that this was in recognition of one half of the purchase price of the waterfront property of $500 000. There is no recognition in the calculation of that figure of the possibility that the wife may have made a greater financial contribution to the sum of $500 000 paid for the waterfront property (which may have been entirely derived from the sale of the Suburb E property owned by the wife and the husband) than 50 per cent. It is not known whether any non-financial contribution or any contribution to the welfare of the children was represented in that figure.
>
> There was no consideration of whether or not the wife would be entitled to a greater proportion to the Suburb E property by reason to any of the matters set out in s 75(2) of the Act than $250 000, or 50 per cent, whichever way it is looked at. If she was, then the 5/44ths interest to be provided could be significantly less than what she might have been entitled to receive under s 79. There was, similarly, no exploration of whether she was entitled to less than a $250 000 or 50 per cent interest in the Suburb E property.
>
> There was, thus, no consideration of the effect of the agreement on those rights. It could not be determined whether the agreement enhanced or diminished the wife's rights."

Justice Aldridge held that the lack of proper advice to the wife was significant and constituted a very substantial failure to comply with s 90G(1)(b). However, he noted that the lack of advice or the lack of proper advice was not, of itself, determinative. He quoted from Thackray J in *Hoult & Hoult* and agreed with him that the court might be more easily satisfied that it would be unjust and inequitable for the agreement to be binding where there are minor breaches of s 90G(1) as opposed to when there are more serious breaches. This did not reflect a change in the onus but reflected the wide range of weight that can be given to various factors. In the case before him the

non-compliance with s 90G(1)(b) FLA was serious in that appropriate legal advice was not given as was required.

However, Justice Aldridge found that the agreement was binding. He was persuaded by the following factors:

- The gift of a property by the husband's parents would not have occurred but for the wife entering into the Binding Financial Agreement along with the Deed of Family Arrangement and the Contract to Make Mutual Wills. The husband's parents acted to their detriment in reliance on the Binding Financial Agreement.
- The agreement did not oust all of the wife's property rights but only those against the specific property. This carried less weight because the evidence did not suggest that there were other assets of substance, or of the magnitude of the waterfront property, available against which property orders could otherwise be made.

***Daily & Daily* [2020] FamCA 486**

Justice Berman considered whether the wife was given adequate advice as to the effect of the financial agreement in question on her rights and the advantages and disadvantages of entering into the agreement in the context of handwritten amendments having been made to the agreement which fundamentally altered the document so that it was a new agreement. He stated at [154]:

> "I consider that whilst the correctness of the advice may not be a relevant inquiry, if the evidence supported a finding that notwithstanding a certificate, there had either not been any advice given or that it was so cursory or only tangentially related to the agreement, that may well allow a finding that no advice was given."

Justice Berman then considered s 90G(1A) and found that it was unjust and inequitable if the agreement was not binding because:

- The amendments were not a surprise to the wife;
- The wife had the opportunity of obtaining legal advice;
- It was reasonable for the husband to assume that the wife obtained the updated advice;
- The issue as to whether the agreement was binding was only raised 13 years later after the parties separated.

***Kaimal* & *Kaimal* [2020] FamCA 971**

The legal advice given to the wife was found not to meet the requirements of s 90G(1). The wife's legal practitioner readily conceded that he did not give the wife the requisite advice and he saw his role was only to be a witness and explain the terms and conditions, although to do the latter he only read out the agreement to the wife and told her it was binding. He said he didn't have the expertise to advise the wife on the matters required by s 90G(1)(b) and would have required her to go elsewhere for that advice. Chief Justice Alstergren noted (at [16]):

> "The requirement for legal advice is an important legislative safeguard. … Accordingly, the legal advice must be real and meaningful to satisfy s 90G(1)(b)."

The words “real and meaningful” were also used by Justice Aldridge in *Abrum* and suggest that the advice must be of a certain quality, more than required in *Wallace & Stelzer* although the Chief Justice quoted part of the classic passage. Chief Justice Alstergren also quoted favourably from *Daily & Daily* [2020] FamCA 486 which he said was consistent with the Full Court in *Hoult.*

However, the Chief Justice distinguished the facts before him from those in *Hoult.* The solicitor for the wife in *Hoult* testified to having given legal advice in respect to the aspects stated in s 90G(1)(b), notwithstanding her recollection was imperfect and there was no evidence as to the exact content of her advice. By contrast, in *Kaimal* Mr B’s oral testimony clearly demonstrated that he only saw his role as that of someone reading the document out loud to the wife and witnessing her signature. The Chief Justice said that in order to be able to advise a party of the advantages and disadvantages of entering into a financial agreement and of how that financial agreement will affect their rights, it is necessary that those advantages, disadvantages and rights are first identified.

He agreed with the statement of Ryan and Aldridge JJ in *Piper v Mueller* (2015) FLC 93-686 (although that was dealing with an earlier version of s 90G with more extensive legal advice requirements), that:

> “an assessment of whether the provisions of an agreement were fair and reasonable, necessarily involves a consideration of the advantages and disadvantages of those provisions.”

Chief Justice Alstergren said that he was fortified in his finding that the wife did not receive the requisite legal advice by the significant errors and inconsistencies in the agreement. He said (at [48]):

> “In circumstances where the errors in the Financial Agreement relate to the proportions the parties were each to receive under the agreement (and the Financial Agreement itself was internally inconsistent in those proportions), I am not satisfied that Mr B identified these errors such that he could have, in any event, properly explained them to the wife pursuant to the requirements of s 90G(1)(b).”

Chief Justice Alstergren refused to save the agreement under s 90G(1A) because of the importance of the advice requirement and the blatant errors in the agreement.

***Beroni & Corelli* (2020) FLC 94-004**

The Full Court of the Family Court considered the issue of the nature of the advice required in the context of a finding of undue influence and unconscionable conduct. Justice Aldridge was a member of the Full Court and was also the trial judge in *Abrum*.

The trial judge found that a rudimentary explanation of the agreement was given to the wife in English, and although the legal practitioner had identified that an interpreter was required there was no interpreter. The wife had not been given a copy of the agreement previously and in any event was unable to read it. The advice could not therefore have been "fulsome" about a 14 page agreement as the advice was given in a 30 minute discussion. The wife could not in those circumstances have had any real understanding as to the value of the claim she was giving up. The Full Court agreed with the conclusions of the trial judge.

Undue influence was found by the trial judge because:

> "(a) The general position of dominance which the husband had in relation to the wife;
>
> (b) His insistence, over a considerable period of time, that the BFA be signed, and his later insistence it be signed without amendment;
>
> (c) The wife's fear that he may inform immigration authorities that she was in breach of her visa conditions;
>
> (d) The husband and wife's knowledge that, in order to obtain an [sic] permanent visa, the relationship needed to continue, but it could only continue if the BFA was signed;" (quoted at [29] by the Full Court).

The legal advice was inadequate and was insufficient to remedy the special disadvantage of the wife.

The cases suggest that there may be a move by the family law courts towards added emphasis on the advice requirement. The court will look closely at the agreement before saving it under s 90G(1A) in circumstances where the requisite advice has not been given and where one party is at a special disadvantage, inadequate advice may be a factor in an agreement being set aside for undue influence or unconscionable conduct.

3. Compliance with the technical requirements of the Act

The Full Court of the Family Court in *Black & Black* (2008) FLC 93-357 adopted a very strict interpretation of the version of s 90G(1) which applied prior to 14 January 2004 and prior to the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) on 4 January 2010 (the 2010 Amendments).

To mitigate the strict technical interpretation of s 90G following *Black & Black* and to make it more difficult for financial agreements to be found not to be binding, the matters on which advice was required to be given were narrowed and other changes were made to s 90G including remedial sections introduced to relieve against the consequence of an agreement not meeting the requirements of s 90G(1)(b), (c) and (ca) (or s 90UJ(1)(b), (c) and (ca)).

Section 90G(1A)–(1D) allows certain agreements which do not comply with s 90G(1) to be "saved". Section 90UJ is similarly worded.

The question is whether the strict interpretation approach survived the 2010 amendments to the FLA, subject to the retrospectively amended s 90G(1) which aimed to be less burdensome and the introduction of the ability of a court to save an agreement under ss 90G(1A) FLA or 90UJ(1A).

Black & Black

In *Black & Black* [2006] FamCA 972 Justice Benjamin found that s 90G had been satisfied although a fresh certificate was not signed by the husband's legal practitioner after the terms of the agreement were changed. Benjamin J said that the purpose of the legislation was to enable people to enter into agreements easily, for them to avoid going to court and to avoid spending a lot of money on specialist legal advice. Benjamin J also found that the certificate was part of the agreement and there was no requirement that the wording of s 90G(1)(b) be used again within the body of the agreement.

The Full Court in *Black & Black* (2008) FLC 93-357 allowed the husband's appeal and set the financial agreement aside. Section 90G (as it was prior to the 2004 amendments) expressly required that the agreement contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in s 90G(1)(b)(i) to (iv). The agreement did not refer to the specific requirements detailed in s 90G and the Full Court held that it was not sufficient that the certificate did refer to them. This omission meant that the agreement did not comply with s 90G and was not binding. The Full Court said that strict compliance with the statutory requirements was necessary to oust the court's jurisdiction to make s 79 orders.

Parker

In *Parker & Parker* [2010] FamCA 664, Strickland J dealt with an agreement which had handwritten amendments. The wife was advised by her legal practitioner not to sign the agreement. She decided to sign it and met with her legal practitioner about three weeks later to do so. At that meeting, handwritten changes were made to the agreement by her legal practitioner. The agreement was executed and sent to the husband's legal practitioner. A further handwritten amendment was made requiring the husband to pay $10,000 and the wife to pay $60,000 in reduction of a joint liability if they resumed cohabitation. The agreement was executed by the husband and sent back to the wife's legal practitioner. The wife and her legal practitioner initialled the change but the certificate was not amended.

There was a dispute between the parties as to whether the *Black & Black* "strict compliance" test had survived the January 2010 Amendments. Strickland J said that advice of a general nature was

insufficient and found that the s 90G(1) requirements were not met.

Justice Strickland held that held that the agreement could be "saved" under s 90G(1A). His view of s 90G(1A) was (at [109]):

> "In my view, s 90G(1A)(c) therefore contemplates the court looking at the nature of the non-compliance with s 90G(1), and determining whether, in the circumstances, it would be unjust and inequitable if the agreement was not binding on the parties due to the failure to comply with a 'technical' requirement."

A majority of the Full Court in *Parker & Parker* (2012) FLC 93-499 allowed the appeal primarily on the basis of an inaccurate or overly narrow interpretation of s 90G(1A) and remitted the matter for rehearing. Justice Murphy, dissenting, had some interesting arguments about s 90G(1) including:

- Contract law principles meant that the advice must be given on the final version of the agreement not on offers or counter-offers which are made in negotiations preceding agreement being reached; and
- The requirements of s 90G(1) are "essential" even if "strict compliance" is not required.

Senior & Anderson

The Full Court majority of Strickland and Murphy JJ in *Senior & Anderson* (2011) FLC 93-470 allowed an appeal against the trial judge's finding that the agreement which was entered into before the 2010 Amendments was binding, although each allowed the appeal for different reasons. Justice Murphy considered that the trial judge applied the incorrect wording of s 90G(1). Justice Strickland found that s 90G(1) had not been complied with because strict compliance in accordance with *Black & Black* was required. Justice May held that it was unjust and inequitable for the agreement not to be binding. Strickland J said (at [154]):

> "In *Parker* I expressed the view that s 90G(1A)(c) contemplates the Court looking at the nature of the non-compliance with s 90G(1) and determining whether, in the circumstances, it would be unjust and inequitable if the agreement was not binding on the parties due to the failure to comply with a 'technical requirement'."

4. Sections 90K(1) and 90UM(1)

The grounds for setting aside a financial agreement or a termination agreement are in s 90K(1) and 90UM FLA. A court may**,** under s 90K(1) FLA, order that a financial agreement or a termination agreement be set aside -

> "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

(ab) a party (the *agreement party*) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; 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."

The grounds for setting aside Pt VIIIAB FLA financial agreements (s 90UM FLA) are slightly different from those for setting aside Pt VIIIA financial agreements. Section 90UM(1) FLA includes:

"(c) a party (the *agreement party*) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the *other de facto relationship*) with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the other de facto relationship; or

(iii) with reckless disregard of these interests of that other person; or

(d) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 79, or a declaration under s 78, in relation to the marriage (or void

marriage); or

(iii) with reckless disregard of those interests of that other person;

(k) if the agreement is a Part VIIIAB financial agreement covered by s 90UE — ss (5) applies." (Section 90UE deals with agreements made in non-referring states. This ground arises where the agreement doesn't meet with the advice requirement in s 90UJ are not met and it would be unjust and inequitable if the agreement was not set aside).

If the court finds a ground under ss 90K(1) or 90UM(1) is satisfied the court is not obliged to set the agreement aside as the court has a discretion. The sections read, with emphasis added – "A court **may …** order that a financial agreement or a termination agreement be set aside…"

It is beyond the scope of this paper to deal with all the grounds. The one considered are:

- Fraud - ss 90K(1)(a) or 90UM(1)(a)
- Undue influence - ss 90K(1)(a) or 90UM(1)(e)
- Unconscionable conduct - ss 90K(1)(b) or 90UM(1)(h)

5. The consequences of fraud and failure to disclose

Fraud is a ground to set an agreement under ss 90K(1)(a) or 90UM(1)(a). Interestingly, it appears to be more difficult to set aside a financial agreement than property settlement orders. Sections 79A(1)(a) and 90SN(1)(a) require that the non-disclosure be "relevant' whereas for financial agreements the test is "material". "Material" is a tougher test which makes sense as there is a broader obligation of relevant disclosure in court proceedings under the court rules.

***Acker & Acker* [2014] FamCA 891**

Acker & Acker was an interim hearing of a matter in which the wife alleged that the agreement was obtained by fraud, by reason of non-disclosure by the husband of a material matter.

The husband 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 final 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 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. It is a useful reminder that what may seem to be adequate disclosure when the agreement is entered into at a time when parties are happy and trusting, may not

prevent a matter being litigated when the relationship breaks down.

***Nyles & Nyles* [2011] FamCA 565**

There is very little case law where a ground to establish the setting aside of a financial agreement was established but the court exercised its discretion not to set the agreement aside. *Nyles* is an example, but it is also an example of where the applicant was found not to have relied on the non-disclosure.

Justice Mushin divided the misrepresentations alleged by the husband into three categories as follows:

- misrepresentations about the possibility or probability of a float proceeding and the timeframe in which this would occur together with the financial consequences;
- misrepresentations about the status of the company; and
- misrepresentations about the value of the shares at the time of settlement.

Justice Mushin found that the wife did not make any positive misrepresentation to the husband with regard to the possibility of a company float. He found that the wife knew that the company name in the orders was incorrect and that signing the minutes of consent order was a misrepresentation by her with regard to the progress made by the company towards a float.

The third representation of the wife was the valuation of her shareholding at $278,583. The wife gave evidence that she understood the significance of the valuation in informing the husband and the Court of the value of her shareholding. She further swore that she understood the considerations used to prepare the report and that information such as the limitations on her shareholding were crucial to the value ascribed to the interest. It was conceded by the wife that she did not at any time seek to provide further information to the for the purpose of facilitating an updated valuation of the shareholding. The documents she failed to provide to the valuer, purportedly due to confidentiality, were held to be of a material nature and a misrepresentation.

Justice Mushin found that the wife's conduct amounted to fraud for the purposes of ss 79A(1)(a) and 90K(1)(a) but the more relevant question was whether the husband relied on any misrepresentation or lack of full and frank disclosure when he consented to the consent orders. He referred to the comprehensive advice letter to the husband regarding the discussions which took place in court including the imminent float and that the wife could be

entitled to a large sum. The husband signed the agreement the following day. Mushin J concluded (at [194]-[197]:

> "The wife failed to make a full and frank disclosure in accordance with the requirements of the law. Further, in some instances she has acted fraudulently within the meaning of that word in the relevant legislation. Accordingly, the husband has established a *prima facie* ground for the setting aside of both the consent orders and the BFA.
>
> However, the husband did not rely on either the wife's failure to make a full and frank disclosure or any misrepresentation, whether fraudulent or otherwise, made by her. At all relevant times, he had competent and experienced family law solicitors acting for him and was also represented by senior counsel with a highly specialised practice in family law. The ultimate advice received by the husband was the letter dated 9 March 2004 which was extremely detailed, articulate and most competently written. The husband chose to ignore that advice.
>
> The husband was also present in Court on the making of the consent orders on the following day and heard the discussion between Young J and his senior counsel. Despite the warning from his Honour, the husband chose to proceed with the formalisation of the settlement.
>
> As a result of his actions, particularly on 9 and 10 March 2004, the husband made a totally informed and considered choice which now has the result, regrettably for him, of denying him the relief which he seeks. Accordingly, his application will be dismissed."

***Luna & Luna* [2021] FedCFamC1F 343**

The husband sought to set aside a financial agreement. He alleged that that the wife failed to disclose relevant documents prior to the parties signing the financial agreement, and that this asserted failure resulted in him accepting that, at that time, the entity through which a legal practice was operated by the wife and the Luna Family Trust (both of which were retained by the wife as a consequence of the terms of the financial agreement) had a value that was "nominal".

It was also part of the husband's case that, in late 2016, shortly before the financial agreement was signed, the wife caused transfers from various accounts to occur, and that these transfers affected, to his detriment, the balances of:

(a) the mortgage secured over the formal matrimonial home which the wife was to retain as a consequence of the terms of the financial agreement, and in respect of which she was to indemnify him in relation to any liability in relation to the same; and

(b) an account in the name of the parties as trustees for the trust which the wife was also to retain; and

(c) accounts in the name of the entity which were to be retained by the wife.

The husband filed subpoenas directed to the entity, C Bank and the National Australia Bank. The wife objected to the subpoenas on several grounds including that there was no legitimate forensic purpose in the husband seeking documents that extend, in a temporal sense, far after the financial agreement was executed.

The registrar unpheld the objection and the husband sought a review of that decision. Justice Hogan held (at [21]):

> "that the legitimate forensic purpose could be satisfied if the husband were able to seek the production of documents for the period that ends on 30 June 2017; that is, the conclusion of the financial year in which the parties entered into the Financial Agreement."

The husband appealed and sought a stay pending the appeal the say was granted in *Luna & Luna (No 2)* [2022] FedCFamC1F 17. The outcome of the appeal had not been reported as of the date of this paper.

6. The impact of undue influence and unconscionable conduct

Much has been written about undue influence and unconscionable conduct as discussed by the High Court in *Thorne v Kennedy* (2017) FLC 93-807 but it is useful to look at other cases which followed it such as *Teh & Muir, Cotsis & Cotsis* and *Gongsun & Paling.*

In *Thorne v Kennedy*, the High Court listed six factors (which were not intended to be exclusive) which are prominent in assessing whether there has been undue influence in the particular context of pre-nuptial and post-nuptial agreements. When taking instructions, negotiating, drafting and advising on financial agreements, the following matters need to be considered:

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

***Gongsun & Paling* (2020) FLC 93-987**

A judge of the Supreme Court of New South Wales made orders declaring that the wife held 50% of her interest in the Suburb B property on trust for the husband. There were also orders made appointing trustees for sale of the Suburb B property, and the distribution of its net proceeds of sale. The wife challenged those orders.

The facts were:

- At the time of the appeal the husband was turning 84 and the wife was 60
- The parties met when the husband was 72. He had never been married. The wife was 49
- At the time they entered into a s 90UB financial agreement the wife had $2,000 cash and the husband had the suburb C property

Pursuant to the financial agreement, the wife became increasingly entitled to an interest in the Suburb C property, the percentage being dependent upon the length of time of the parties' de facto relationship. If the relationship lasted one year (or part thereof), she would be entitled to a 15% interest in the Suburb C property; if two years (or part thereof), 25%; three years (or part thereof), 35%; four years (or part thereof), 45%; and five years (or part thereof), 50%. There was no provision for any further increase, and indeed the agreement provided that the appellant "shall not be entitled to claim any amount exceeding 50 [per cent] of interest in the [Suburb C property] regardless of the period of the relationship."

The wife moved into the Suburb C property. However, less than six weeks after the financial agreement was signed the husband resolved to sell the Suburb C property, and did so for $895,000. The Suburb B property was purchased for $660,000 in the wife's sole name.

The husband left the Suburb B property and entered a nursing home in April 2017. The parties agreed that, whatever was the nature of their relationship, it thereupon terminated, having "endured" for a little less than seven and a half years.

The husband asserted that his gift of the Suburb B property to the wife was only of the bare legal title, and not of any beneficial interest, in consequence of which the wife held the property pursuant to a resulting and/or constructive trust in the husband's favour, albeit only to the extent of 50%. In the alternative, the husband contended that if there had been a transfer of the beneficial interest, that transfer was the product of undue influence or unconscionability and therefore the gift should be set aside. Again, he did not contend that there should be a complete setting aside of the gift, but rather it should be set aside only to the extent of 50%.

The husband claimed in the alternative that if his primary case failed, then there should be a property settlement pursuant to s 90SM given the breakdown of the parties' de facto relationship. He contended that under that provision, a just and equitable settlement would see him entitled to a 50% interest in the Suburb B property, but otherwise each party ought retain the property in their possession or under their control.

The trial judge found that the gift of the Suburb B property was not restricted solely to the legal interest, but determined that it was the product of both undue influence and unconscionability. He made findings in relation to the husband's claim for a property

settlement and concluded that, had he not found that the husband was entitled to 50% of the Suburb B property on the basis of equitable principles, he would have arrived at the same outcome under s 90SM.

The trial judge found that if the husband intended in December 2009 to make a gift of his entire interest in the Suburb B Property, then he did so:

1. Because he was elderly and lonely, and infatuated with the wife. He was unable to appreciate that his decision to do so when they had spent very little time living together in a de facto relationship (on his case) and no time living together (on the wife' case) was a very imprudent decision, and entirely disregarded his own interests.
2. Either unaware that the wife intended to maintain her relationship with her boyfriend (on his evidence) or aware that she did (on her evidence), making the gift even more unwise.
3. In circumstances where, not three months before, he had entered into a Financial Agreement that protected him to a degree that the gift did not.
4. In circumstances where, on the wife's] evidence, she had no real interest in any relationship with him and no affection for him whatsoever but regarded him as a lonely and desperate old man who she could not imagine wanting to live with and, on his evidence, because he hoped for a normal romantic and physical relationship.

The Full Court said that whilst the trial judge did not articulate an actual finding in relation to the claim of undue influence, he said later (reported at [29] by the Full Court):

> "Whilst I have dealt with the matter as an undue influence case, it can also be framed as unconscionable conduct on the part of the [appellant] in attempting to retain the benefit that she has obtained by reason of the [respondent's] infatuation with her and his vulnerability. The transition from the substance of the Financial Agreement to complete ownership by her of the [Suburb B] Property was a dramatic shift and has not been explained in any convincing way as in the interests of the [respondent]. It was very imprudent and I reject the submission … that it reflects "mature financial planning". The [appellant] knew that the [respondent] had a fixation about her (…), that he was an "old, lonely, desperate man" (…) and the transfer was not in his financial interests…"

The Full Court was "well satisfied" that the evidence supported the trial judge's findings that the husband's infatuation rendered him vulnerable, in the sense that he was unable to appreciate the stark improvidence of the acquisition of the Suburb B property in the wife's sole name. Indeed, given that the Suburb B Property, and the proceeds of sale of the Suburb C property (which the wife assumed control) were the husband's only assets of significance, the statement by Mason CJ in *Louth* v *Diprose* (1992) 175 CLR 621 at 626 is apt, namely:

> "It was so improvident, judged in the light of the respondent's financial position, that it is explicable only on the footing that he was so emotionally dependent upon, and influenced by, the appellant as to disregard entirely his own interests."

There was no other sensible explanation for why, in September 2009, the respondent only

intended to gradually give the appellant an interest in the Suburb C property, capped at 50%, and yet just a short time later gave her ownership and effective control of all his assets.

As to whether the retention by the wife of the Suburb B property remained unconscionable at trial, it was well open to the trial judge to so conclude, particularly as the husband was otherwise without assets of any substance, that the wife had effective control over all the husband's assets and the financial agreement remained operative and it provided for a maximum entitlement of the wife of 50% of the Suburb C property.

The Full Court said (at [47]-[48]) in relation to whether there had been unconscionability:

> "Finally, whilst we acknowledge that improvidence or hardship alone does not establish unconscionability (*Kakavas* v *Crown Melbourne Ltd* (2013) 250 CLR 392 at 401), that is not the situation here. Rather, here, the respondent's vulnerability arising from his infatuation with the appellant is front and centre stage.
>
> It is educative to compare the facts of this case with the facts in *Bridgewater* v *Leahy* (1998) 194 CLR 457. There, the majority of the High Court recognised that the emotional vulnerability of an uncle to his nephew meant that the relevant dealings between them saw them "meeting on unequal terms" which resulted in "a grossly improvident transaction" (at [123]). The passive acceptance of the benefit thereby obtained enlivened equity to set it aside as unconscionable (at [122]). That is precisely the situation here, save that here, the improvidence of the transaction is even greater than that which prevailed in that case."

***Cotsis & Cotsis* [2021] FCCA 673**

A reminder that illegitimate pressure may be felt by clients in circumstances not related to a wedding as in *Thorne v Kennedy* and many other "ink on the wedding dress cases" arose in *Cotsis & Cotsis*. The financial agreement was set aside for unconscionable conduct under s 90K(1)(b) or (e). The financial agreement was signed by the wife seven weeks after the stillbirth of the parties' child. The fact that she had agreed to sign it before the stillbirth was held to be irrelevant.

The wife was held to be under a special disadvantage at the time she signed and the husband took advantage of this and his acceptance of her assent to the agreement was exploitative and unconscientious.

***Teh & Muir* [2017] FamCA 138**

The financial agreement was initiated by the applicant who was entitled under the agreement to 50% despite her contributions of .3%. The respondent received advice that the agreement was not fair, but still signed. At the time of trial the applicant was 37 and the respondent was 86. The respondent's case guardian said the applicant and her son were boarders in the respondent's home.

The respondent was found to have been suffering from a significant disadvantage or

disability at the time of entering into the financial agreement, namely dementia and demonstrable symptoms of Alzheimer's disease. The applicant was aware of the respondent's impediment and his susceptibility to her demands. The applicant knew that the respondent had little or no idea of what he was signing.

Justice Berman found that the agreement was not binding pursuant to s 90UJ(1) as the parties were never in a de facto relationship, but further or in the alternative it was set aside under s 90UM for unconscionable conduct.

***Chaffin* & *Chaffin* [2019] FamCA 260**

A financial agreement entered into one week before the wedding when the wife was pregnant with the parties' first child was set aside for hardship under s 90K(1)(d) and unconscionability but not for undue influence. The wife signed the agreement in the face of strong legal advice that she should not do so. The husband discouraged the wife from telling her lawyer that she was pregnant.

In rejecting the ground of undue influence, Foster J adopted the words of Nettle J in *Thorne* v *Kennedy* (at [96])*:*

> "The bare fact of deep emotional commitment to securing a prospect of shared life together is not of itself a loss of will. Describing commitment as 'infatuation' is rhetorically powerful but conclusory".

7. Essential considerations when drafting financial agreements

1. Make sure you have enough time.

2. Check the type of agreement. Is it:
   - A combination of a financial agreement and a termination agreement?
   - A Pt VIIIA and Pt VIIIAB agreement?
   - A financial agreement and a Binding Child Support Agreement?

   If there are two agreements in the document then the agreement needs to be clear that it is both and advice needs to be given with respect to both agreements. Check both of the relevant sections.
3. Check the subject matter:
   - 3.1. Is it within a section of the FLA?
   - 3.2. Does it deal with at least one of:
   - Property and financial resources?
   - Maintenance?
   - 3.3. If dealing with property, does it deal with all property?
   - 3.4. Does it purport to deal with property acquired after separation or divorce?

4. Draft a letter of advice at the same time as the agreement is drafted or, if it is drafted by the other legal practitioner, once the first draft is received. It is helpful to do this to pick up errors and omissions.

5. Provide the client with a detailed letter of advice in relation to the final version of the agreement which covers:
   - The parties' property settlement and maintenance rights if the agreement did not exist
   - The specific matters on which advice is required to be given under ss 90G(1)(b) or 90UJ(1)(b)
   - The requirements of ss 90G(1)(b) or 90UJ(1)(b)
   - The grounds on which an agreement can be set aside under ss 90K(1) or 90UM(1)

6. Ensure that the parties sign the whole concluded agreement including any annexures and that advice is given on the whole agreement.

Conclusion

Acting for a party in regards to a financial agreement, particularly a pre-nuptial agreement, requires time, care, and full instructions. Whilst one or both of the parties may be keen to have you draft and advise on their "simple" agreement quickly, a failure to properly consider the parties' circumstances and give sound and comprehensive advice can mean that there are ticking time-bombs in your deeds safe.