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Binding Financial Agreements

A paper presented by Phillip Davey of DDCS Lawyers

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P 02 6212 7600 F 02 6212 7699 E mail@ddcslawyers.com.au W ddcslawyers.com.au
18 Kendall Lane, Canberra City | GPO Box 545, Canberra 2601 | DX 5729

Introduction

It has been 14 years since the introduction of Part V111A the Family Law Act enabling parties to enter into a Pre Nuptial Agreement.

In recent years, Financial Agreements and 'Binding Financial Agreements' have occupied a special, not necessarily happy, place in the hearts and minds of family lawyers. Family lawyers either do them or don't do them; love them or hate them. Everyone has a view and it has usually been a negative one.

Prior to the introduction of Part V111A, parties to a marriage could not enter into a Pre-Nuptial or Co-habitation Agreement that would be binding and enforceable and more importantly, oust the jurisdiction of the Family Court in the event of marriage break down.

The Explanatory Memorandum for the 1999 Bill which introduced Part V111A provides:

"All of these criteria will have to be met in order for a Financial Agreement to be binding. If an Agreement is binding, a court will not be able to deal with the matters with which the Agreement deals with. If an agreement is not binding a Court will be able to deal with the matters with which the Agreement deals. A Court will be able to deal with any property or financial resources of the parties that have not been dealt with by a binding financial agreement between them".

By and large the focus of applications to the Court in the first 12-14 years of operation of financial agreements was with compliance with the legislative requirements for a 'financial agreement' and a 'binding' agreement i.e. matters as to form. The legislative requirements for a binding financial agreement are set out in section 90G of the Family Law Act. Section 90G has been amended on two occasions since it's insertion into the Family Law Act 14 years ago. It currently provides as follows:

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

a) *The agreement is signed by all parties; and*

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

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

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

d) The agreement has not been terminated and has not been set aside by a court."

Section 90G (1A) which was inserted into the Family Law Act in 2009 is in the following terms:

"*A financial agreement is binding on the parties to the agreement if:*

> *a) The Agreement is signed by all parties: and*
>
> *b) One or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the Agreement; and*
>
> *c) A court is satisfied that it would be unjust and inequitable if the Agreement were not binding on the spouse parties to the Agreement (disregarding any changes on circumstances from the time the Agreement was made);and*
> *d) The Court makes an order under subsection (1B) declaring that the Agreement is binding on the parties to the Agreement; and*
> *e) The Agreement has not been terminated and has not been set aside by a Court."*

As a general observation family lawyers did not perform very well during the first 12-14 years of operation of part V111A of the Family Law Act and agreements were struck down due to sloppy and careless practices in relation to the form of the agreement. It is not rocket science to comply with the requirements in the Family Law Act but it does require a high level of skill, experience and due care and attention. The reported cases deal with glaring errors by lawyers that could have been avoided. It is evident from a review of the reported cases that the financial agreements were destined to meet the fate the court ultimately determined i.e. finding no agreement or financial agreement or the agreement was not binding, was predictable on the facts.

Many practitioners made the conscious decision to opt out of the preparing financial agreements due to the perceived risks. There was uncertainty, and fear, and a general feeling of the inevitability of an agreement being challenged and set aside or found not to be binding.

Hopefully we've learned our lessons and with a combination of many factors (including the legislative amendments to Parts VIIIA and VIIIAB, better practice, and the attrition of rogue lawyers) we are achieving better compliance with the requirements and by dint stemming the flow of agreements being challenged on the grounds related to form. Of course there will be residual cases prepared during the past 14 years which are time bombs ticking away that may eventually surface on the breakdown of the relationship which may be dealt the fate of their predecessors. Likewise there remain inexperienced practitioners and non family law practitioners preparing financial agreements, oblivious to the traps that may befall them and their clients.

With due care and attention there ought to be less agreements being challenged for lack of compliance with form. However, the real skill and craft in drafting a financial agreement

does not lie in form but in the substance of the agreement and the provision of the legal advice to the client.

Recent Judicial Direction

An analysis of the reported decisions of the Family Court and the Federal Circuit Court indicate that there has been a shift in recent times, with greater attention to the substantive content of the agreement and less attention to form. The Courts are providing both clarity in their judgments and more certainty for practitioners and the parties to agreements as to how the agreements and the substantive content of the agreement will be dealt with.

In short, the message is clear: Get compliance with form correct and absent any vitiating factors which are set out in sections 90K of the Family Law Act (in relation to Agreements between married couples) and section 90SN (in relation to parties to defacto relationships) and or misrepresentation, mistake, duress, undue influence, unconscionable conduct, and void and illegal contracts), the parties will be held to their agreement. It is important in this regard to recognise that the vitiating factors referred to above are all related to the circumstances surrounding the entry into the agreement and do not relate to the substance of the agreement. It is clear from the recent decisions of the Australian Courts that provided the financial agreement is binding and there are no grounds to vitiate the agreement, then it does not matter if the agreement is fair or a bad bargain, the parties will be held to their agreement. Set out below are a number of the statements of the Courts from recent decisions reinforcing this point:

Case	**Statement**
Hoult (1)[20011] FamCA1023 -22 Dec 2011	"*Section 90G's requirements must be seen against a crucial consideration. The legislature has decided that the essence of the regime created by Part V111A of the Act is that parties who are independently advised and receive appropriate advice should, in the absence of fraud, unconscionability or other vitiating factors, be perfectly free to bind themselves to an entirely unjust and inequitable agreement (in section 79 terms) that governs their future rights and operates as a bar to future property (and or maintenance) proceedings. In short, if the relevant pre requisites are met and there is an absence of vitiating factors, the parties are perfectly free to make a 'bad bargain'.*"
Hoult (2)FamCA 367 - 22 May 2012	"*It seems to me that the structure, and the place of Part V111A within the Act, demands that the nature and extent of non compliance with section 90G (1)'s requirements must be given importance just as importance must be given to the plain legislative intent that parties should, absent vitiating knonw to equity and the common law, be held to their bargain....* *By way of contrast, the regime contemplated by part V111A sees parties having the freedom to enter binding agreements without reference to what might be 'just and equitable'*

	within the meaning of section 79 of the Act. That is, binding agreements, might be informed by the parties idiosyncratic notions or perceptions of what is or is not, just and equitable or otherwise appropriate for them. Vitiating elements aside, the parties are perfectly free to make 'a bad bargain' (in section 79 terms). Importantly, any such agreement can be 'binding' within the meaning of section 90G and, by reason of so being, can exclude Part V111 of the Act without reference to a Court and without reference to what a court might consider is a 'just and equitable' settlement within the meaning of section 79'."
Hoult and Hoult [2013] FamCAFC 209 (Full Court decision)	*The point of the legislation is to allow the parties to decide what bargain they will strike, and provided the agreement complies with the requirement of section 90G (1) they are bound by what they agree upon.* *Significantly, in reaching agreement, there is no requirement that they meet any of the considerations contained in section 79 of the Act, and they can literally make the worst bargain possible, but still be bound by it.'*
Logan [2012] FMCAfam 12-10 Jan 2012	*There is no requirement however that the terms of a financial agreement be just and equitable as the Full Court observed in Sanger and Sanger:* *"... the provisions of section 90K are not designed to, and do not facilitate a party escaping from what proves, was perceived to be a 'bad bargain'.* *I cannot be satisfied on the balance of probabilities that these threats were made.* *Even if they were however, the evidence would not support finding that the threats placed the wife under duress or amounted to unconscionable conduct.* *It might well be that the wife would have made a different decision about a property settlement has she considered the matter at a later time and under the influence of different emotions. That is not a sufficient reason however to set aside the agreement'."*
Kostres [2009] CAFC222 (Full Court decision)	*Further, if the agreement is not susceptible to being set aside, the question arises as to whether the court should resist its enforcement because it would operate unconscionably against one party. If the agreement is valid and binding, it should operate according to its terms. Simply because one of the parties made a bad bargain does not mean that it would be unconscionable for the other party to enforce the agreement. The doctrine of unconscionability looks to the conscience of the party whose rights are sought to be affected. Should the wife, because of something she has said or done, be prevented from enforcing the financial agreement according to its terms? Nothing could be pointed to by counsel for the husband that would invoke equity's assistance. In reality the husband (and the wife) made the agreement and entered*

	into the transactions because of the husbands' belief that he was still a bankrupt. Inquiry by the husband would have corrected his erroneous belief. He failed to make any such inquiry'.
Abrum and Abrum [2013] FAMCAFC (10 October 2013)	*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 section 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 commits the parties to deal with their property by agreement and without possible interference from a court'.*

Non Complying Financial Agreements declared binding under sections 90G(1A) and (1B) or 90UJ(1A) and (1B).

Sections 90G(1A) and (1B) and sections 90UJ(1A) and (1B) were introduced into the Act following the decision of the Full Court of the Family Court in *Black and Black* [2008 FLC93.357]. That was a case in which the husband was successful in having a financial agreement set aside on the basis that it did not strictly comply with the requirements of section 90G(1)(b). In that case the Agreement entered into by the parties did not refer to the specific requirements detailed in section 90G, although the Certificate given by each of the solicitors for the parties which was annexed to the Agreement did. The Full Court held that such an omission meant that the Agreement did not comply with the provisions of section 90G and was not binding upon the parties. The Court further held that strict compliance with the statutory requirements is necessary to oust the Court's jurisdiction to make adjusted orders under section 79. The decision of the Full Court was (pardon the pun) very much a black letter law approach to the interpretation of the Family Law Act.

Lawyers were thrown a life raft with the introduction of section 90G(1A) and (1B) and section 90UJ (1A) and (1B) which potentially cure defective agreements by enabling Courts to declare non complying agreements as binding and moving the focus away from compliance with form to the substantive content of the agreement.

Section 90G(1A) provides the Court with the ability to save an agreement which does not strictly comply with section 90G(1) provided that:

1. The agreement is signed by all parties; and

2. The Court is satisfied that it would be unjust and inequitable if the Agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made).

The question of what factors the Court should take into account in determining whether it would be "unjust and inequitable if the Agreement were not binding on the spouse parties" was the subject of judicial consideration in the case of *Hoult and Hoult*. In that case the net

asset pool available for division between the parties was approximately $32 million. Most of the property had been brought into the relationship by the husband. Unsurprisingly, the financial agreement provided that a significant amount of the property would remain with the husband in the event of separation. The trial judge, Justice Murphy, found that the requirements of section 90G(1) had not been complied with and that unless the Agreement could be saved pursuant to section 90G(1A) then the Agreement would not be binding. In relation to section 90G1(A) Justice Murphy held as follows:

"*It seems to me that the enquiry required of section 90G(1A)(c) is a wide ranging one that might include considerations such as:*

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

Justice Murphy ultimately found that it would be unjust and inequitable if the Financial Agreement between the parties was not binding and accordingly found that the Agreement should stand. The wife successfully appealed and the majority of the Full Court in upholding the Appeal held as follows:

"*We have referred to the fact that His Honour (referring to Justice Murphy) in paragraph 57 provided a range of factors that it would be appropriate to consider when exercising the discretion. The only factor that we suggest is not available is the last one".*

Justice Strickland and Ainslie Wallace JJ also held:

"*We are firmly of the view that the content of the bargain has no relevance to the exercise of discretion under section 90G(1A)(c) and we base that on the plain words of the paragraph.*

The issue of injustice and inequity can far more easily be seen as directed to whether, given the nature and extent of the non compliance with section 90G(1) requirements, it would be unjust and inequitable if the agreement was not binding".

Where the Court refuses to make an order for property settlement under sections 79 or 90SM in circumstances where there is a non-binding financial agreement

Following the decision of the High Court of Australia in *Standford [2012] HCA 52*, it is open for a party to argue that it would not be just and equitable to make a property settlement order

between the parties, due to an agreement between the parties, even in circumstances where the Agreement does not comply with the requirements of Parts VIIIA or VIIIAB of the Family Law Act.

In *Standford* the High Court held that in determining whether or not a property settlement order should be made, it is necessary for the Court to begin consideration of whether it is "just and equitable" to make an order. In the course of their judgment the High Court said: "*The fundamental propositions that have been identified require that a Court have a principled reason for interfering with the existing legal and equitable interest of the parties to the marriage and whatever may have been the stated or unstated assumptions and agreements about property interests during the continuance of the marriage*".

The Family Court has applied this line of reasoning in refusing to make an order for property settlement in the face of an agreement between the parties which did not comply with Part VIIIA. In *Bevan [2013] FamCAFC 116 (8 August 2013) and [2014] FamCAFC 19 (19 February 2014)* the Full Court dismissed the husband's application for a property settlement when the parties had largely lived apart for 18 years and the husband had told the wife she could retain the assets owned by the parties as at the date of separation. Finding that "the extent of the representations made by husband, the circumstances in which they were made, and the husband's substantial delay in instituting proceedings are such that it would not be just and equitable to make an order interfering with existing interests in property. The husband gave the wife Power of Attorney in 1995 to deal with their property. He told her and others that she could retain all their Australian property for herself and the children, saying he "would build a life elsewhere".

The Full Court was at pains to ensure that its decision did not create a precedent and at paragraph 92 of the Judgment in 2014, the Full Court stated as follows:

"*This decision should not be seen as supporting a similar outcome in cases where there is delay, even long delay, in instituting proceedings, particularly given that the Act has its own limitation period. Nor should it be seen as setting a precedent for all cases where a party makes a statement of future intention concerning ownership of property. As we have been at pains to stress, section 79(2) confers a wide discretion, and therefore each case will turn entirely on the view taken by the judicial officer of the facts and merits of that case".*

Failure by a judge to consider an agreement in light of section 79(2) may give rise to a successful appeal as occurred in *Campbell and Peters [2014] FamCAFC 76*. In that case the trial judge found a financial agreement entered into between the parties was not binding. The judge proceeded to make property settlement orders. On appeal, the Full Court held:

"*Even assuming that the Agreement was properly held to be not binding, His Honour still needed when considering under section 79(2) of the Act whether an order for property settlement should be made at all, to have had regard to the existence of that Agreement (even if not binding)."*

Such decisions must further strengthen the view that there is merit for parties to enter into relationship agreements comforted by the fact that provided there is no vitiating factor present the Court will give effect to their agreement even where the agreement is unfair to one of the parties.

Section 90K– Setting agreements aside and Section 90UM of the Family Law Act

Section 90K of the Family Law Act provides as follows:

FAMILY LAW ACT 1975 - SECT 90K

Circumstances in which court may set aside a financial agreement or termination agreement

(1) 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

(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.

(1A) For the purposes of paragraph (1)(aa), ***creditor*** *, in relation to a party to the agreement, includes a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of the party.*

(2) For the purposes of paragraph (1)(d), a person has ***caring responsibility*** *for a child if:*

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

(b) a parenting order provides that:

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

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

(3) A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons.

(4) An order under subsection (1) or (3) may, after the death of a party to the proceedings in which the order was made, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(5) If a party to proceedings under this section dies before the proceedings are completed:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings; and

(b) if the court is of the opinion:

(i) that it would have exercised its powers under this section if the deceased party had not died; and

(ii) that it is still appropriate to exercise those powers;

the court may make any order that it could have made under subsection (1) or (3); and

(c) an order under paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(6) The court must not make an order under this section if the order would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

For this purpose, ***acquisition of property*** *and* ***just terms*** *have the same meanings as in paragraph 51(xxxi) of the Constitution.*

Section 90UM of the Act, which applies to financial agreements between de-facto parties is for all intents and purposes in similar terms to 90K.

Apart from Section 90K(1)(d) which relates to a material change in circumstances in relation to a child, all of the balance of the provisions of Section 90K and Section 90UM deal with circumstances surrounding the entry into the agreement rather to the substantive provisions of the agreement. In a sense the provisions of Section 90K at least partially codify the common law and equitable principles which govern the circumstances in which a court will set aside any agreement as a result of vitiating circumstances.

The provisions of Section 90K(1)(d) and Section 90UM (1)(g) are more problematic in that they impact on the substantive provisions of the agreement where children are involved. This is particularly the case where a financial agreement is being entered into by a couple who do not have children and who then have children during the course of the marriage or the de-facto relationship. The very fact of having a child will in most circumstances constitute a material change in circumstance and accordingly 'open the gate' in relation to a possible ground for setting the agreement aside. In order for the agreement to be set aside, the applicant will need to show that as a result of the change in circumstance the child or the person with caring responsibility for the child will suffer hardship if the agreement is not set aside. The difficulty for lawyers drafting financial agreements in such circumstances is that at the time that the agreement is prepared it is not possible (without the assistance of a crystal ball) to predict what the circumstances in relation to the care of children might be at the time of separation which might not occur for many years after the date that the agreement is prepared.

Whilst it is possible to include provisions in the agreement which provide for what will happen in the event that there are children of the relationship there can never be any certainty that such provisions will be adequate. Whilst it is not suggested that agreements should not be prepared by lawyers in such circumstances, particular care needs to be taken to address the issue.

Issues for lawyers in preparing financial agreements

Perhaps the most challenging aspect for lawyers preparing financial agreements, at a practical level, is the balance between cost and time and dealing with the client's expectations about costs, how long it will take and what is involved. In this regard it is critical that in the first interview the client receives clear and unequivocal advice from the lawyer which includes dispelling any unrealistic expectations held by the client in relation to cost, time and the complexity of the task.

The Best Practice Guidelines prepared by the Family Law Section of the Law Council of Australia in relation to financial agreements include:

1. When advising a client in relation to entering into a financial agreement the laws should ensure that the relevant provisions of the Act are explained to the client in all necessary detail.
2. The laws should also advise the client of the potential consequences of the client failing to make full and frank disclosure of their financial position.
3. It is good practice to record the advice in writing and have the client sign and acknowledgment of having received that advice.
4. The laws should ensure that the provisions of the Family Law Act have been complied with to ensure enforceability of the agreement.
5. The lawyer should explain to the client options available for the recording and storage of the agreement in particular and whether the client requires a copy of that agreement to be retained.

Tips for unsuccessful agreement

It is suggested that there are eight critical issues to preparing a successful financial agreement. They are as follows:

1. Strict compliance with the legislation; read and adhere faithfully to the requirements of the Family Law Act.
2. Full and frank disclosure (including valuations and an appreciation of the wider family interests). It is best practice to undertake disclosure through the following:
   a) Recitals
   b) Disclosure clause
   c) Disclosure documents
   d) Valuations and source documents
   e) Schedule of net property and resources
3. Fairness and equity in the provisions including:
   a. Focus on making provision covering children and the primary carer
   b. Provision of the home
   c. Motor vehicle
   d. Insurance
   e. Cash settlement [structured by fixed payment, graduating payments, percentage of pool etc].

   f. If maintenance is provided then fix a reasonable amount – if child or no child, by reference to the payees income etc.
   g. Cover living expenses
   h. One sided awful agreements look good on paper but are horrible in court when challenged: there is nothing to lose in challenging such agreements
   i. Use review or sunset clauses (in conjunction with appropriate provision for a termination agreement).
4. Tailor drafting the agreement to the specific circumstances of the parties. Don't cut and paste!
5. Advice. Reality-check your client. Provide thorough advice orally and in writing and keep a detailed record of all attendances and work on the file. Ensure there is independent legal advice from an Australian legal practitioner and preferably also from legal practitioners in any intersecting foreign jurisdictions. Independent legal advice is another universal cornerstone of agreements. Under the Act it is a mandatory requirement. Evidence of such advice is essential to withstanding a challenge. The absence of a file may be fatal to the agreement.
6. Good file management and risk management systems.
7. Permitting reasonable time. Timing is of the essence.
8. Proper fee structure and insurance. There is quite a bit of risk for lawyers. Charge appropriately (for risk) and review insurance coverage. Understand that the risk exposure could be for the rest of your career based on one transaction.

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