ARE FINANCIAL AGREEMENTS WORTH THE PAPER THEY'RE SIGNED ON?

PHILLIP SORENSEN[1]

CONTENTS

[1] LL.B. (QIT), Barrister and Accredited Family Law Specialist, Fifteen Inns of Court, Brisbane. This paper is based on the law as at 8 November 2017. I thank my colleague Amanda Boyce B.A., LL.B. for her excellent work in editing earlier versions of this paper. Any mistakes or errors, are mine.

ABSTRACT

It is critical when parties separate whether they are in a marriage or in a de facto relationship that they document the financial arrangements that they reach. There are three aspects to this, firstly to add certainty to the arrangements, secondly to ensure that the arrangements made are legally binding and final (to the extent possible at law) and finally, to invoke the number of concessions that are available pursuant to revenue laws that may apply including transfer (stamp) duty and capital gains tax.

It is essential for agreements to be final so that once the agreement has been carried in to effect that there can be no revisiting of the arrangement that has been reached.

Perils apply for both the parties involved and their lawyers if the documentation is ineffective.

Financial agreements have been the subject of significant litigation in the family courts, which is ongoing and is unlikely to abate. It will be difficult to predict with certainty for some time the approach the courts will take to these agreements, particularly with differences in approach taken by different members of the Full Court of the Family Court, and now the High Court in *Thorne v Kennedy* [2017] HCA 49.

Topics covered by the paper include:

Part I - A brief history of financial agreements

Part II - What do current law developments say on setting aside financial agreements? What are the common grounds of attack

Part III - Drafting appropriate pleadings to set aside financial agreements

Part IV - Setting aside financial agreements under the ordinary laws of contract: misrepresentation, fraud and mistake

Part V - Setting aside financial agreements in equity: duress, undue influence

Part VI - Impacts on enforceability - third party interests and financial agreements

Part VII - Lifestyle Clauses – Are They In Or Are They Out?

Part I - A BRIEF HISTORY OF FINANCIAL AGREEMENTS

It took a quarter of a century after the commencement of the *Family Law Act 1975* for financial agreements to be introduced formally in to Australian law following amendments to the Act, which commenced in December 2000.[2]

These documents are commonly referred to as 'Binding Financial Agreements' or 'BFAs' for short. These terms are to be avoided. They are 'financial agreements'.[3] It might be thought that given the currency of the 'BFA' acronym that the document was called a 'Binding Financial Agreement' originally. This is not the case. They were financial agreements from the start and remain so.

Why I do not prefer the term 'Binding Financial Agreement' apart from reasons of personal pedantry, is two-fold:[4]

a. Firstly, because it is not the term used in the legislation;

b. Secondly, and more importantly, to paraphrase the Prince of Denmark, whether the agreement is binding – that is the question.[5]

Or as Lethbridge SC said:[6]

> 1.2 The intention of Parliament in passing the Bill and introducing the amendments comprised in Part VIIIA has not been realised. An oxymoron may be defined as:
>
> > "A figure of speech by which a locution produces an incongruous, seemingly self-contradictory effect, as in 'cruel kindness' or 'to make haste slowly'."
>
> or as in "Binding Financial Agreement" having regard to the frequency in which such agreements are being set aside by the Family Court and the Federal Magistrates Court. Despite the best intentions of parties and practitioners, the facility for agreement to avoid subsequent litigation on relationship breakdown has not led in the author's opinion to greater certainty hence simplicity in dealing with such situations. Rather, we remain in an uncertain world of potential conflict.

[2] *Family Law Amendment Act 2000 Act* No. 143, 2000.
[3] Section 4(1) *Family Law Act 1975* and also s 90B(1).
[4] Cf the title of Justice Brereton's paper, 'Binding or Bound to Fail'.
[5] William Shakespeare, 'The Tragedy of Hamlet, Prince of Denmark' (The Folger Shakespeare Library, 1992), Act 3 Sc 1.
[6] Robert Lethbridge SC, 'Binding or Bound to Fail? Remedies and rectification of financial agreements', 1.

Further, as stated by Strickland J in *Senior v Anderson,* [7] Murphy J concurring at [159], the terms 'binding financial agreement' and 'agreement' are not defined in the Family Law Act. His Honour observed that:[8]

> [88] Despite its wide circulation as a term of convenience, the expression "binding financial agreement" is not defined in the Act. Rather, as can be seen, the Act refers to and defines a particular form of agreement called a "financial agreement". Further, as s 4 makes plain, a "financial agreement" has two essential components. It must first be "an agreement", and it must also be an agreement that is made "under section 90B,90C or 90D."
>
> [89] "Agreement" is also not defined and thus carries its ordinary and natural meaning. Accordingly, just as with any agreement, principles of law and equity will apply so as to vitiate the agreement if the relevant circumstances are made out. So it is, in my view, with an agreement that purports on its face, to be a "financial agreement". That interpretation is reinforced by s 90KA, noting that this section refers to "financial agreements" as distinct from "agreements."

[7] *Senior v Anderson* (2011) 250 FLR 444.
[8] As quoted by Young J in *Sullivan & Sullivan* (2011) 268 FLR 328 [47].

Part II - WHAT DO CURRENT LAW DEVELOPMENTS SAY ON SETTING ASIDE FINANCIAL AGREEMENTS? WHAT ARE THE COMMON GROUNDS OF ATTACK

A - Financial agreements

In the early years, the complaint about financial agreements that generally arose in the cases was an allegation that a certificate of legal advice did not comply with the provisions of the 2004 legislation or the 2010 amendments or that the required legal advice had not been given. Later, equitable grounds for setting aside agreements began to feature in the decided cases.

Some examples in the cases include that in *Senior v Anderson*,[9] which was a long running litigation. There were technical faults in the agreement. These included a careless reference to the section of the *Family Law Act 1975* that the certificate was based on. The agreement made incorrect references to s 90C rather than to s 90D, and the annexed legal advice certificates incorrectly named the parties. The parties had been named incorrectly in the agreement because the agreement was a cut and paste job from another matter. The trial judge nevertheless made orders rectifying each of those technical errors, and declared the agreement to be a financial agreement as defined. The effect of the relevant statutory provisions then came into question on appeal.

The Full Court found that rectification is not available to remedy non-compliance with the requirements of s 90G of the Act in relation to the content of the solicitor's certificates. The court held the financial agreement was not binding.[10]

It was no wonder that it became a trend of solicitors in New South Wales not to do financial agreements. They were too hard. There were so many technical aspects with s 90G and the scope to set them aside was large. Also, there is much scope for legal action against legal practitioners who draft the agreements. Although, anecdotal evidence is that financial agreements are alive and well if not flourishing in Toowoomba, Queensland.

As Professor Wade saw it, drafting financial agreements is a very risky business: [11]

> Legal practitioners in Australia who draft financial agreements **before** (s90B; 90UB) or **during** a marriage or relationship (s90C; 90UC) have a high risk of exposure to professional negligence. Vigilance, protocols and expertise only reduce the risk; it is never eliminated. That is why a number of experienced and smart family lawyers in Australia will never draft pre-nuptial (s90B; 90UB) or "during relationship" agreements. They send their clients to more naïve or risk-taking lawyers. In each case, the ineffective agreements and the potential for professional negligence lie dormant and hidden like land mines.

[9] *Senior v Anderson* (2011) 250 FLR 444.
[10] Ibid [37], [138]-[142], [159].
[11] John Wade, 'The Perils of Financial Agreements: Effectiveness and Professional Negligence', 22 (3) *Australian Family Lawyer* 24.

B - What are the common grounds of attack?

In *Saintclaire & Saintclaire* [2013] FamCA 491,[12] Ryan J at first instance suggested that in considering the validity of a financial agreement that answers to the following questions provided the appropriate pathway:

a. Is there a financial agreement?
b. If that question is answered in the affirmative, should the financial agreement be set aside?
c. If that question is answered in the negative, is the financial agreement binding?
d. If in order to answer that question in the affirmative the court is required to exercise its discretion pursuant to s 90G (1A), how do the principles of law and equity apply to it?
e. If there is a binding financial agreement should it be enforced?

For the purpose of this paper, in my view it follows that the common grounds of attack could include:

a. Is the document a financial agreement? – the technical requirements;
b. Can the agreement be set aside under the laws of contract?
c. Can the agreement be set aside on an equitable ground?

Is the document a financial agreement - the technical requirements

Financial agreements are a private ordering of the parties rights.

In contrast to consent orders that require court approval or the old and much beloved (by the author) Section 87 agreement that required a court order to approve it before it came in to force, there is no necessity to have a financial agreement approved (by a court) or registered (anywhere). Ordinary contracts in the commercial world do not require court orders or registration to come in to effect so to that extent, financial agreements are in the same boat.

The reason there are strict requirements for financial agreements to be binding is the consequence that a binding agreement will oust the jurisdiction of the court to make orders under the *Family Law Act 1975* (subject to the power of the court to set the agreement aside).

Section 90G

Critically, of relevance to a financial agreement being binding are the provisions of section 90G, which provides:

[12] *Saintclaire & Saintclaire* [2013] FamCA 491 [3].

90G (1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement **if, and only if**:[13]

(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);

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

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

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the Evidence Act 1995.

90(1A) A financial agreement is binding on the parties to the agreement if:[14]

(a) the agreement is signed by all parties; and

(b) one or more of paragraphs(1)(b), (c) and (ca) are not satisfied in relation to the agreement; and

(c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and

(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and

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

90G(1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a financial agreement is binding on the parties to the agreement, upon application (the *enforcement application*) by a spouse party seeking to enforce the agreement.

[13] Emphasis added.
[14] Section 90G (1A) was introduced in January 2010.

> 90G(1C) To avoid doubt, section 90KA applies in relation to the enforcement application.
>
> (2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

The strict interpretation that the courts have placed on the above section cannot be over-emphasised (and why I have bolded the text in the extract above). The words '…if, and only if' mean what they say. This terminology is significant.[15] Non-compliance with the legislation can be fatal to the agreement.

What is a financial agreement under the Family Law Act 1975?

A financial agreement means any agreement that is a Financial Agreement under Section 90B, 90C or 90D of the *Family Law Act 1975* (see Part VIIIA), but does not include an ante-nuptial or post-nuptial settlement to which Section 85A applies.[16] Financial Agreements can be made: before marriage, during marriage or after separation.[17]

After the commencement of the *Family Law Act Amendment Act 2000* maintenance agreements could no longer be made.[18]

Three types of financial agreements may be made:

1. Firstly, people who are contemplating entering into a marriage with each other may make a financial agreement the so-called 'pre-nup'.[19]

2. Secondly, parties to a marriage may make a financial agreement.[20] This is an agreement made during the marriage.

3. Thirdly, after a divorce order has been made parties to a former marriage may make a financial agreement.[21]

---

[15] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31.

[16] *Family Law Act 1975* (Cth) s 4 Definition **Financial agreement.**

[17] For the types of agreement that can be made in defacto relationships see ss 90UB, UC, UD.

[18] *Family Law Act 1975* ss 86A and 87 (1A) —

86A. Certain maintenance agreements ineffective

A maintenance agreement made after the commencement of this section that is not a financial agreement does not have any effect and is not enforceable in any way.

87 (1A) Subsection (1) does not apply to a maintenance agreement made after the commencement of this subsection.

[19] Ibid s 90B.

[20] Ibid s 90C.

[21] Ibid s 90D.

Summary of s 90G

In summary s 90G requires:[22]

a. a written agreement signed by the parties;
b. independent legal advice;
c. provided by a legal practitioner;
d. the advice to deal with legal rights of the party and advantages and disadvantages of making the agreement;
e. the advice to be provided prior to the party signing;
f. a signed statement evidencing the advice has been given to be provided by the legal practitioner to the spouse party prior to or after signing (it need not be annexed to the agreement but must be provided to the other spouse or his/her legal representative).

The technical attack on an agreement will be to examine the agreement carefully for compliance with s 90 G.

Setting aside a financial agreement

Even if an agreement complies with the technical requirements there may none-the-less be grounds upon which it can be set aside.

Section 90K of the *Family Law Act 1975* sets out the circumstances in which a financial agreement may be set aside:

> [s 90K] Circumstances in which court may set aside a financial agreement or termination agreement
>
> 90K(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

[22] Subject to changes to the legislation by *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015*. That bill lapsed due to the dissolution of the 44th Parliament on 9 May 2016. It is not known if or when that bill will be re-introduced.

> (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.

Vitiating factors

As a result of the reference in para (b) of s 90K of the *Family Law Act 1975* to the agreement being 'void, voidable or unenforceable' the general common law and equitable principles of contract law relating to vitiating factors apply. These include misrepresentation, undue influence, mistake and duress.

90K (1)(e) places a limitation on the remedy for unconscionable conduct to the time of the making of the agreement.

Part III - DRAFTING APPROPRIATE PLEADINGS TO SET ASIDE FINANCIAL AGREEMENTS

A party may seek an order in an application to court, or response to set aside a financial agreement.

A party seeking to set aside a financial agreement bears the onus of proof.[23]

A - Section 90 K - Grounds for Setting Aside the Financial Agreement

Section 90K of the *Family Law Act 1975* (extracted earlier) sets out the circumstances in which a Financial Agreement can be set aside:

Section 90K (3) provides the power to make property settlement orders if a financial agreement is set aside:

> **(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.

B - Procedural aspects of pleadings

In proceedings concerning the setting aside of a financial agreement whether based on the law of contract or in equity there can be many complexities. Because family law courts proceedings whether in the Family Court of Australia or Federal Circuit Court of Australia are conducted by application and affidavit, this procedure can be inadequate to inform an applicant or respondent of the case they are facing.

In order to identify the real issues between the parties, in my view the best approach is to ask the court to make an order for pleadings or points of claim to be delivered. This approach can also lead to significant cost savings for the parties at a trial in terms of shortening the time taken at a final hearing.

There are no specific rules for pleadings in the family courts. The courts have power to regulate their own proceedings and directions can be made for the delivery of points of claim or pleadings. It is a sensible procedure.[24]

Once the directions have been complied with, the matter can come back before the court for a directions hearing or review. That review can be an opportunity for the parties then to consider the points of claim, and indeed whether an application should

[23] *Hoult v Hoult* (2013) 276 FLR 412.
[24] *Parke and Parke* [2015] FCCA 1692 [10].

be made for any parts of that document to be struck out. After those issues are resolved a final hearing can be embarked upon with clarity about the case that each party might face.

1 *Points of claim*

Points of claim are something less than pleadings. This is a less strict procedure.

2 *Statement of claim or pleadings*

In some family law cases orders have been made for the delivery of pleadings in accordance with the *Federal Court Rules 2011*.[25] The *Federal Court Rules 2011* provide that an originating application must be accompanied by a statement of claim or affidavit. Part 16 of the *Federal Court Rules 2011* sets out the rules of pleading including for the content of the statement of claim.[26] Those rules rely on a material facts model. In a case where it is sought to apply strict rules of pleading then it would be appropriate to apply for an order for the delivery of pleadings in accordance with the *Federal Court Rules 2011*.

(a) Reed v Reed (2016) 310 FLR 31

In *Reed v Reed* (2016) 310 FLR 31, a decision of Judge Reithmuller handed down on 3 June 2016, the primary case involved an application to set aside a financial agreement pursuant to section 90K of the *Family Law Act 1975.*

An application was made to join a law firm and solicitors with claims pursuant to the Fair Trading Act (Vic) and the Trade Practices Act (Cth). Those applications for joinder were granted.

On 2 November 2006, the applicant and the first respondent entered into a financial agreement in contemplation of marriage. The financial agreement was drawn by the proposed second and third respondents who were then solicitors for the applicant. The financial agreement relied upon section 90B of the *Family Law Act 1975*, to take effect as a binding financial agreement, precluding the first respondent access to a property settlement order under s 79 of the *Family Law Act 1975*. The parties were married in 2006 and subsequently had two children, the first in 2007 and the second in 2011. In 2013 the parties separated.

In order to identify the real issues between the parties, orders had been made for the respondent to file and serve a statement of claim. In the statement of claim the respondent pleaded the agreement and that the parties intended to be bound by the terms of the

[25] *Reed v Reed* (2016) 310 FLR 31
[26] *Federal Court Rules 2011* Div 16.1.

agreement once it was entered into on the basis that it was made in accordance with the *Family Law Act 1975* and would take effect as a binding financial agreement.

The respondent claimed that the agreement was not a binding financial agreement under the *Family Law Act 1975.* This was on the basis that she did not receive independent advice from the solicitor who advised her prior to the agreement and that she was not advised of the advantages and disadvantages of the agreement at the time, contrary to section 90G (1) (b) of the *Family Law Act 1975.*

The respondent further alleged that since the time of making the agreement there had been a material change in the circumstances of the parties namely the birth of the two children. She also claimed that the applicant's conduct with respect of the making of the financial agreement was unconscionable within the meaning of s 90K (1) (e) of the *Family Law Act 1975*, relying upon the allegations: that the applicant's solicitor drew the agreement; arranged a solicitor for her to attend upon; that she saw the solicitor two days prior to the wedding; that the solicitor did not provide her with any legal advice as to the effect of the agreement or the advantages and disadvantages of it and that the solicitor's advice was not independent.

Orders were made for the delivery of pleadings (or amended pleadings) in accordance with the Federal Court Rules and for directions so that the claims against the solicitors could be considered.

3 *Conclusion*

In *Saintclaire & Saintclaire* (2015) FLC ¶93-684, [27] reference was made by the Full Court to the wife's particulars of claim as a 'manifestly inadequate' document, with the court concluding:

> 24. Her Honour's identification and determination of the issues in the case was not assisted by these ''particulars of claim'' which were anything but. The generalised statements of unparticularised and undated conduct and circumstances are neither an assertion of words and actions connected temporally to the agreement nor do they assert how it is alleged that the relationship between the husband and the wife was attended by the requisite dominion, ascendancy and dependence. Importantly, as a result, the purported particulars never made clear whether the wife's case was founded in actual undue influence or was founded in the existence of a relationship attended by indicia from which influence would be presumed.

It is suggested, that because the Family Court is a federal superior court, that at least in proceedings in that court, that it is more appropriate to apply the *Federal Court Rules 2011* to any order for pleadings.

[27] *Saintclaire & Saintclaire* (2015) FLC ¶93-684.

C - Grounds to attack financial agreements

Some of the possible grounds of attack are considered in the following section.

1 *Is there an agreement under contractual principles? Offer and acceptance*

The traditional approach to the question of whether the parties have concluded negotiations and reached agreement is to enquire whether there had been offer and acceptance.[28] If there was no offer or acceptance between the parties pursuant to contractual principles there is no valid agreement.

An invitation to treat is to be distinguished from an offer. A tender of a document purporting to be a financial agreement by one party to the other may constitute an invitation to treat and not an offer.

A financial agreement cannot be both a s 90B agreement and a s 90C agreement at the same time.

Issues about whether a financial agreement had been made between the parties arose in *Sullivan & Sullivan* (2011) 268 FLR 328. The facts in that case were that the parties married on 13 April 2003. They finally separated in July 2010.

On 11 April 2003, two days before the wedding, the wife signed the agreement in the presence of her then solicitor. The husband consequently executed the agreement in the presence of his then solicitor on 16 April 2003, three days after the parties were married. The agreement was dated in handwriting as having been made, after the husband had signed it, on 16 April 2003.

It is not a mere matter of when a document purporting to be a financial agreement is signed or is dated but a question of when was an agreement, if any, made. This follows from the text of the legislation itself. See for example s 90C which provides:

> 90C(1) If:
> (a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
>
> (aa) **at the time of the making of the agreement**,[29] the parties to the marriage are not the spouse parties to any other binding agreement (whether made under this section or section 90B or 90D) with respect to any of those matters; and
> (b) the agreement is expressed to be made under this section;
>
> the agreement is a ***financial agreement***. The parties to the marriage may make the financial agreement with one or more other people.

[28] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [3.02].
[29] Emphasis added.

It is common for financial agreements not to have the dates each individual signed set out in the jurat.

(b) Communication of offer

An offer is ineffective until it has been communicated to the offeree.[30] 'An offer to sell is nothing until it is received': *Henthorn v Fraser*[31]

It does not follow that an offer, however, is automatically communicated. There must be evidence of that communication.

(c) Counter-offer

In Sullivan *& Sullivan,* there was an offer made during the marriage but it was not accepted. There was no counter-offer.[32] As Young J said in *Sullivan & Sullivan*:[33]

> [76] The wife in her affidavit, filed 5 April 2011, deposed in paras 13–19 that the husband presented the agreement to the wife about 10 days prior to the couple's wedding on 13 April 2003 as a "pre-nuptial agreement", that she consulted a solicitor who would not sign the certificate of advice as he did not consider the agreement to be fair, that she then consulted a second solicitor who signed the certificate of independent legal advice on 11 April 2003, the same day that the wife signed the agreement. The wife deposes that she then gave the signed agreement to the husband on 11 April 2003.
> [77] Counsel for the husband contended that the agreement was executed by the husband's signature on 16 April 2003 and thereafter became binding on the parties.
> [78] In contrast counsel for the wife submitted that there was no valid agreement between the parties pursuant to contractual principles as there was no offer or acceptance. More particularly counsel for the wife submitted that the husband never accepted the wife's offer. It was argued by counsel for the wife (as recorded in the transcript) that:
> … the effect of what happened here was that the Wife made an offer by executing theAgreement she did on 11 April … she made an offer to enter into the Agreement on those terms … as a "prenuptial agreement" … in contemplation of the marriage as is made clear from the terms of the Agreement, the recitals to the Agreement … and that offer was not accepted prior to the marriage …
> [79] **Counsel for the wife contended that as no counter offer was made by the husband to the wife after the marriage** there was no agreement on the terms as set out in the offer made by the wife on 11 April 2003.

Therefore in *Sullivan,*[34] the parties did not get to first base as the court held that there was no agreement existing between the parties. His Honour found that it was not necessary to determine whether ss 90B and 90C were applicable to the agreement as there was no

[30] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [3.17].
[31] *Henthorn v Fraser* [1892] 2 Ch 27
[32] *Sullivan & Sullivan* (2011) 268 FLR 328 [79].
[33] Emphasis added.
[34] *Sullivan & Sullivan* (2011) 268 FLR 328.

agreement existing between the parties. However, even if there was a valid and enforceable agreement between the parties executed by the husband on 16 April 2003, as it stood it could not be financial agreement pursuant to the provisions of Pt VIIIA of the *Family Law Act 1975*.[35]

As Young J said:

> [120] The agreement dated 16 April 2003 is not a financial agreement under s 90B entered into by "people who are contemplating marriage" per s 90B(1)(a)as the husband was a party to a marriage on 16 April 2003 when he signed the agreement and could not then have been a person contemplating marriage, given that the parties had married 3 days prior on 13 April 2003. Conversely, the agreement is not a financial agreement under s 90C entered into by "parties to a marriage" per s 90C(1)(a) as when the wife signed the agreement on 11 April 2003 she was not married to the husband and could not then have been a party to a marriage as the parties were married on 13 April 2003, 3 days later.
>
> [121] Further, in accordance with the reasoning of Murphy J in Fevia (above), the agreement could not be a "financial agreement" under s 90C of the Act as the agreement signed by the wife would constitute a materially different agreement to that signed by the husband.
>
> [122] In my view the s 4 definition of a "financial agreement" is clear and unambiguous, a financial agreement is an "agreement" made under (and that complies with the subsections of) ss 90B or 90C or 90D of the Act. Even if there was a valid and enforceable agreement existing between the parties executed by the husband on 16 April 2003, as it stands it could not be financial agreement pursuant to the provisions of Pt VIIIA of the Act.

2 *Does an agreement have to be fair?*

It is a commonly thought that a financial agreement must be 'fair and reasonable'.[36] Is this actually the case now?

(d) 'The bracketed words' – '(disregarding any changes in circumstances from the time the agreement was made)'

Section 90K is to be read in conjunction with s 90G(1A)(c):[37]

> (1A) A financial agreement is binding on the parties to the agreement if:[38]
> (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

[35] Ibid [118], [122].
[36] James Gerrard, 'Working out a "Prenup" proves a capital idea', *The Weekend Australian* (2-3 April 2016), 33.
[37] Emphasis added. The bracketed words are in bold para (c). They are not in italics or bold in the legislation.
[38] Section 90G(1A) was introduced in January 2010. [subs (1A) insrt Act 122 of 2009 s 3 and Sch 5 [4B] effective 4 January 2010].

> (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement **(disregarding any changes in circumstances from the time the agreement was made)**; and
> …

The issue of whether it is necessary that a financial agreement be fair in the context of the exercise of the s 90G (1A) discretion, was considered in *Hoult v Hoult*.[39] One of the issues in the appeal in *Hoult* was a complaint made in the submissions directed to the view expressed by the Trial Judge at [37], that:[40]

> …the "justice and equity" of the bargain, or perhaps its inherent "fairness" referenced to ordinary notions of that term, cannot be wholly irrelevant to the exercise of the s 90G(1A) discretion.[41]

Considering this point Thackray J said:

> In determining whether the view expressed by Strickland J is to be preferred to the approach adopted by Murphy J, it will be convenient to set out the relevant part of s 90G(1A)(c) again, but with emphasis added: [42]
>
> 90G(1A) A binding [*sic*] financial agreement is binding on the parties to the agreement if:
>
> (a) …
>
> (b) …
>
> (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement **(disregarding any changes in circumstances from the time the agreement was made)**; …

And later continued:[43]

> Having determined the appeal should be allowed for another reason, it is unnecessary to express a concluded view on Murphy J's view that the inherent fairness of an agreement cannot be "wholly irrelevant" to the exercise of the discretion. However, as presently advised, I consider the inference to be drawn from the words in brackets is that although it is impermissible to take account of "circumstances" that have changed after execution of the agreement, it is permissible to take into account "circumstances" at the time of formation of the agreement. However, I cannot see any warrant in the text or in the extrinsic materials to treat "circumstances" as being restricted to matters associated with the negotiation, drafting and execution of the agreement, since these are not "circumstances" that are capable of change after execution. **If those were truly the only relevant "circumstances", then the words in brackets would**

[39] *Hoult v Hoult* (2013) 276 FLR 412.
[40] *Hoult v Hoult* (2012) 48 Fam LR 507.
[41] *Hoult v Hoult* (2013) 276 FLR 412 [189] (Thackray J).
[42] Ibid [191] (Thackray J). His Honour misquoted the legislation referring to 'binding financial agreement'.
[43] Ibid [197] (Thackray J). Emphasis added.

> **appear to be surplus** (rather than words of limitation, as suggested by Strickland and Ainslie-Wallace JJ).

'Just and equitable' / 'unjust and inequitable' the confusing juxtaposition

At trial in *Hoult v Hoult* (2012) 48 Fam LR 507, Murphy J had found that on balance the court should find that it was unjust and inequitable if the financial agreement between the parties was not binding on the parties.

In the course of his judgment, Murphy J considered the terms of the parties' bargain and the relevance of the term 'just and equitable'. The terminology in the *Family Law Act 1975* had led to the issue. As noted by Murphy J, the phrase used within s 90G(1A)(c) is 'unjust and inequitable'. The phrase used in s 79 is 'just and equitable'. As Murphy J noted the similarity is manifest.[44] The juxtaposition of the terms causes confusion.

The Full Court expressed reservations about the way in which the Trial Judge expressed himself in setting a list of criteria for considering Section 90G(1A)(c) which included:[45]

> …
> Whether the terms of the bargain itself offend ordinary notions of fairness or plainly fall markedly outside any reasonable broad assessment of the s 79 discretion;
> …

In his first instance judgment, Murphy J referred to an example His Honour had used during argument of what may be considered to be an unfair agreement, that being of a 40 year marriage with no unusual features and a financial agreement that provides upon the breakdown of the marriage the wife is to receive 4% and the husband is to receive 96%.[46]

The criticism of that aspect of Murphy J's construction of the bracketed words by Senior Counsel for the wife in the appeal to the Full Court in *Hoult* was the claim that it formed part of an impermissibly broad construction of the discretion.[47]

Thackray J said:[48]

> 195. Murphy J's construction has the benefit of giving meaning to the bracketed words, and provides a proper basis for his view that it is appropriate to assess whether the terms of an agreement "offend ordinary notions of fairness" provided, of course, that the assessment is made by reference to circumstances existing at the time the agreement was executed. **This proviso is crucial, since the Act itself prohibits a court from having regard to changes in circumstances.**

[44] *Hoult v Hoult* (2012) 48 Fam LR 507 [33].
[45] Ibid [57].
[46] Ibid [38].
[47] *Hoult v Hoult* (2013) 276 FLR 412 [190].
[48] Ibid. Emphasis added.

Thackray J on this point, having determined that the Appeal should be allowed for another reason, stated that it was unnecessary to express a concluded view of Murphy J's view that the inherent fairness of the agreement cannot be 'wholly irrelevant' to the exercise of the discretion.

His Honour considered that the inference to be drawn from the words in brackets is that although it is impermissible to take account of the 'circumstances' that have changed after the execution of the Agreement, it is permissible to take into account the 'circumstances' at the time of the formation of the Agreement.

The other members of the Full Court part company

The other members of the Full Court in *Hoult* parted company with Thackray J, and considered that the Trial Judge had misdirected himself and applied the wrong test in interpreting the exercise of the discretion.[49]

Strickland and Ainslie-Wallace JJ, said:[50]

> 302. With the greatest of respect to the trial judge, it seems to us that it is here that his Honour has misdirected himself. His Honour has overlooked the plain words of the paragraph and as Justice Strickland pointed out at first instance in [108] of his reasons for judgment in Parker:
>
> > Significantly s 90G(1A)(c) does not refer to whether the terms of the agreement are unjust and inequitable, but whether "it would be unjust and inequitable if the agreement was not binding" …
>
> …
>
> 305. We are firmly of the view that the content of the bargain has no relevance to the exercise of discretion under s 90G(1A)(c) and we base that on the plain words of the paragraph. That is also consistent with what Justice Strickland said at first instance in *Parker* (for example in [108] of his Honour's reasons for judgment), and neither of the judges who formed the majority in the Full Court in *Parker* found otherwise.
>
> 306. We do not accept that because the enquiry in para (c) is as to injustice and inequity, the content of the bargain must have some relevance. The issue of injustice and inequity can far more easily be seen as directed to whether, given the nature and extent of the non-compliance with the s 90G(1) requirements, it would be unjust and inequitable if the agreement was not binding.

As can be seen from the above passage at paragraph 302, s 90G(1A)(c) does not refer to whether the terms of a financial agreement are unjust and inequitable, but rather whether 'it would be unjust and inequitable if the Agreement was not binding'.

[49] Ibid [286].
[50] Ibid.

The majority found that the point of the legislation is to allow the parties to decide what bargain they will strike and provided the agreement complies with s 90G(1) they are bound by what they have agreed upon. Significantly, the Full Court found, in reaching agreement, there was no requirement that parties to financial agreements meet any of the considerations contained in s 79 of the *Family Law Act 1975.* They can literally make the worst bargain possible, but still be bound by it.[51]

The Court stated that it is not the case that to fail to consider the fairness or injustice of the bargain does not mean that 'the discretion is exercised in a vacuum'.[52]

More recently in *Fewster & Drake* [2016] FamCAFC 214, [53] the Full Court noted subject to compliance with the statutory requirements that people are free to enter into financial agreements as they see fit. There is no statutory provision that enables a financial agreement to be set aside merely because it is unfair: citing *Hoult v Hoult* (2013) 276 FLR 412.

However, in *Thorne v Kennedy* [2017] HCA 49, the High Court took a different approach:

> 55 With one exception, none of the findings of fact by the primary judge was overturned by the Full Court. That exception was the Full Court's rejection of the primary judge's finding that there was no outcome available to Ms Thorne that was fair or reasonable. The Full Court erred in rejecting this finding. It was open to the primary judge to conclude that Mr Kennedy, as Ms Thorne knew, was not prepared to amend the agreement other than in minor respects. Further, the description of the agreements by the primary judge as not being "fair or reasonable" was not merely open to her. It was an understatement. Ms Harrison's unchallenged evidence was that the terms of the agreements were "entirely inappropriate" and wholly inadequate "[i]n relation to everything". She said that the agreements did not show any consideration for Ms Thorne's interests. Even without Ms Harrison's evidence, it is plain that some of the provisions of the agreements could not have operated more adversely to Ms Thorne. For instance, the agreements purported to have the effect that if Ms Thorne and Mr Kennedy separated within three years then Ms Thorne was not entitled to anything at all.
>
> 56 The primary judge was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature. In other words, what the Full Court rightly

[51] Ibid [310].
[52] Ibid [310]. The factors set out in paragraph 307 of the Appeal judgment will be those to be addressed.
[53] *Fewster & Drake* [2016] FamCAFC 214 [65].

> recognised as the significant gap between Ms Thorne's understanding of Ms Harrison's strong advice not to sign the "entirely inappropriate" agreement and Ms Thorne's actions in signing the agreement was capable of being a circumstance relevant to whether an inference should be drawn of undue influence.

On that basis, the fairness or unfairness of a financial agreement may well be a relevant consideration certainly to whether a financial agreement is vitiated.

Statements about values of assets and liabilities in financial agreements

One of the grounds that could be pleaded is that a party has misrepresented their position by understating the value of liabilities or assets in the agreement. It is common for financial agreements to attach a schedule detailing what the parties say their assets and liabilities are.

There is no requirement under the legislation for a schedule of assets and liabilities to be set out in a financial agreement. However, that may not be the end of the matter depending on how the courts view the obligations of parties as will be seen later in this paper in Part VIII the case note discussion on *Parke and Parke* [2015] FCCA 1692.[54]

(e) Disclosure obligations

In the recent decision of *Kennedy & Thorne* [2016] FamCAFC 189,[55] the Full Court said this:

> 104. The wife seeks to transpose the obligation to make full and frank disclosure under Part VIII of the Act to the entering into of financial agreements under Part VIIIA. However, this is erroneous given the clear difference between the two parts. As the trustees say in their written submission:
>
> > 22. …The obligation of disclosure under Part VIII occurs in a context where a court is required to make findings about the assets, liabilities and financial resources of the parties, and where the court is also required to be satisfied that it is just and equitable to make orders.
> > 23. By contrast, a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained; and there is no judicial scrutiny relating to their formation. A party may enter an agreement, and such agreement is capable of being binding, with little or no knowledge of the other party's financial position. That is, consistent with the doctrine of freedom of contract, a party enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence. The fact that a financial agreement results in a difference [*sic*] outcome to that which may have been awarded under s 79 and s 75 is not relevant to whether the agreement should be set aside [(Hoult & Hoult)].
> > (Footnotes omitted)

[54] *Parke and Parke* [2015] FCCA 1692 [73].
[55] The High Court appeal was in relation to different grounds. As a result the Full Court decision on this aspect is still relevant.

> 105. The safeguard, if you like, where financial agreements are entered into, is that if there is thought to be inadequate disclosure, then the legal advice given to the other party can be, for example, not to enter into the agreement, or even, where there is no necessary suggestion of non-disclosure, to only sign after receipt of specific financial information. Further, if it subsequently transpires that the agreement was obtained by fraud, including non-disclosure of a material fact, the Act provides a remedy in the form of s 90K(1)(a).

Need for clear pleadings

Contentions dealing with a lack of disclosure need to be clearly pleaded, and with particularity if it is sought to allege they amount to fraud within s 90K. Practitioners need to be aware of the ethical allegations upon them when pleading fraud.

An expression of opinion cannot constitute a representation of fact.[56] A statement of opinion usually implies that facts are known that could justify the opinion. A common example of an opinion that might be given, is the value of a liability or an asset. A party might represent the value of the house property or business and set out an estimate of that value. This must be done with care. If an estimate is given in a financial agreement it must be clearly marked as such. The understandings of the parties between each other about values and how those values have been arrived at must be set down with particularity. This is quite a different concept to the complete omission of an asset.[57]

Whether an agreement can be set aside on this ground will depend on the intention of the parties about how they reflect their assets and liabilities at the time.[58]

Impracticable to be carried out

An applicant may seek to have a financial agreement set aside based on circumstances that are asserted to have arisen since the agreement was made, which make it impractical to carry out.[59] This does not include a claim that the party does not achieve at the end of the day as much under the agreement as they thought they would.[60]

In *Sanger v Sanger* (2011) 254 FLR 275,[61] the submission of Counsel for the husband, was that, as the financial agreement was predicated on the property of the parties being worth $802,000 net, and that, by virtue of [a company of the party] having gone into liquidation, it was worth $400,000 less than the parties had expected it to be,

[56] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [18.09].
[57] *Manner v Manner* [2015] FCCA 3043.
[58] *Thorne & Kennedy* [2015] FCCA 484 [73].
[59] Section 90K(1)(c).
[60] *Sanger v Sanger* (2011) 254 FLR 275.
[61] Ibid

the agreement between the parties was impracticable.[62] Counsel for the wife submitted that the husband's submissions conflated the concepts of enforceability and impracticability.[63]

The Full Court found that there is a material distinction between an agreement that is unable to be put in practice, and is thus impracticable, and an agreement that, although producing a potentially different outcome to that for which a party hoped, is able to be implemented, or put into practice.[64]

To be successful under this ground it must be demonstrated there is a provision of the financial agreement that is unable to be implemented.

In *Gregory & Gregory* [2014] FCCA 106,[65] it was found that the wife had intercepted a payment from the husband's superannuation fund. She had unbeknown to him at the time banked the cheque into the parties' joint account and immediately upon it being cleared had withdrawn the monies entirely and placed them beyond his reach. [66] This was in circumstances where the wife had separate property that she would retain pursuant to the terms of the agreement. In effect, the superannuation was the only separate property that the husband had. In the course of his judgment, Federal Circuit Court Judge Baumann considered the decision in *Sanger*,[67] noting that the term 'impracticable' is not defined for the purpose of s 90K of the *Family Law Act 1975*,[68] and held:

> [60] In my view, the agreement cannot be "put into practice" as a result of the manner in which the Wife accessed the superannuation funds and in the absence of any other available funds.

Undue influence

By virtue of the statutory restrictions on s 90K, any circumstance of undue influence must be in the lead up to the negotiations for the entering in to the agreement. This aspect will be considered in detail later in this paper.

Duress

A party may wish to assert that their signature to a financial agreement was obtained as a result of coercive behaviour by the other party amounting to duress.

[62] Ibid [72].
[63] Ibid [73].
[64] Ibid [82].
[65] *Gregory & Gregory* [2014] FCCA 106.
[66] Ibid [44].
[67] *Sanger v Sanger* (2011) 254 FLR 275.
[68] *Gregory & Gregory* [2014] FCCA 106 [59].

Duress at common law avoids contracts where fear was induced, so as to deprive a party of free will (in the making of the agreement).

Similarly, any circumstance of duress must be in the lead up to the negotiations for the entering in to the agreement. The 'duress' claimed must relate to the time of the making of the agreement as required by s 90K(1)(e).

> As to causation, the pressure must be at least *a* cause of the decision to contract. A party cannot rely on duress where the pressure complained against is not the sole or at least the principal cause of the decision to contract.[69]

Exclusion of liability clauses

It is common in agreements to attempt to exclude liability by including a clause to the effect that a party is satisfied with disclosure and waives any right to absolute disclosure. A cautionary note is sounded to those who may wish to plead the contents of such a clause in a financial agreement, I n defence of a claim for a misrepresentation.

As a matter of public policy, the right to rescind a contract for fraudulent misrepresentation cannot be excluded by a contractual term.[70] By contrast, the parties to a contract may, by means of a contractual term exclude rescission of the contract in equity for any innocent misrepresentation that induced the contract.[71]

[69] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [22.05] citing *Barton v Armstrong* [1976] AC 104.
[70] *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337.
[71] W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.17].

Part IV - SETTING ASIDE FINANCIAL AGREEMENTS UNDER THE ORDINARY LAWS OF CONTRACT: MISREPRESENTATION, FRAUD AND MISTAKE

Because financial agreements are first and foremost a form of contract and the general principles of setting aside contracts apply under s 90KA of the *Family Law Act 1975*, in my view the law of contract must be the first port of call when considering setting aside a financial agreement and whether it can be rescinded.

Rescission is the reversal of a transaction so that each party is restored to their original position. It is a remedy of both the common law and equity.[72]

The remedy of rescission requires three elements to be satisfied:[73]

a. The presence of a vitiating factor in the formation of the contract;

b. An election to rescind the contract; and,

c. *Restitutio in integrum*, the restoration of both parties to their respective pre-contractual positions.

At common law contracts can be rescinded for fraudulent misrepresentation and duress.[74] This is reinforced by s 90KA of the *Family Law Act 1975,* which provides:

> **90KA**
>
> **Validity, enforceability and effect of financial agreements and termination agreements**
>
> The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:
>
> (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
>
> (b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and

[72] Ibid [5.1].
[73] Ibid [5.3].
[74] Ibid [5.4].

> (c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

A - Misrepresentation

A contract can be voidable for misrepresentation if the representor has made a misrepresentation of fact that induced the representee to enter into the contract.[75]

According to the authors of *Covell Lupton Principles of Remedies,* historically, the remedies for misrepresentation turned upon whether the misrepresentation had been made fraudulently or innocently. The common law only afforded relief for fraudulent misrepresentation, and not innocent misrepresentation.[76]

The first thing to consider is to examine the financial agreement for any representations that might provide a foundation for a setting aside application.

An example of this might be if a party has misrepresented a value of an asset or a liability in the financial agreement. It is common for financial agreements to attach a schedule setting out the parties' assets, liabilities, superannuation or resources at a time before the financial agreement was signed.

If a statement is made by one person, to another, that induces the other to enter into a contract, that statement may take effect as a term of that contract or as a collateral contract. A false statement might still give rights and remedies even though it is not effective as a term of the contract.[77]

According to the learned author of *Contract Law in Australia,* misleading conduct will constitute a misrepresentation if it amounts to a false statement of a material fact made by one person (the *representor*) to another (the *representee*) in order to induce the representee to enter into the contract and which has this effect. [78]

The misleading conduct does not prevent the contract from coming into being: the contract is not void. Instead, the basic response of the law to this misinformation is to say that because the representee's decision to contract had been based on a false understanding the representee is entitled to treat the contract as if it never existed. This entitlement, or right of avoidance, is termed the right of 'rescission'.[79]

As referred to earlier misrepresentations are classified either as *fraudulent* or *innocent*. Following the recognition of a remedy in damages for negligent misstatement, it has become

[75] Ibid [5.5].
[76] Ibid [5.12].
[77] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [18.01].
[78] Ibid [18.02].
[79] Ibid.

usual, at least for the purposes of analysis, to refer to a category of *negligent* misrepresentation, that is, one made in breach of the duty of care.[80]

1 *Elements of misrepresentation*

The elements of misrepresentation include:

- a misrepresentation or false factual statement
- the representation must be false when acted upon
- inducement or reliance on the statement to enter into the contract
- materiality of the representation.

2 *Misrepresentation or false factual statement*

There must be a representation of fact. Representations or statements of facts may be express or implied.[81] Such statements have been distinguished from mere puffery.[82]

A misrepresentation is then a representation that does not accord with the true facts (past or present). Therefore, promises or assurances for the future, statements of intention, expressions of opinion, advertising 'puffs', and representations of law have all on occasions, been distinguished from the representation of a fact essential to an operative misrepresentation.[83]

However, a representation need not be express, since the words and circumstances may imply representation as to a matter of fact, especially as to the state of mind of the maker of the statement.[84]

False when acted upon

Whether a representation is true or false is a question of fact that is judged normally when the representation was made. However, a representation that was true when it was made may subsequently become false before the representee acts upon it. Where the representation is a continuing representation that has become false to the knowledge of the representor, a duty arises to inform the representee of the changed circumstances before the representation is acted upon.[85]

[80] Ibid [18.04].
[81] W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.6].
[82] Ibid [5.7].
[83] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [18.06].
[84] Ibid.
[85] W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.10].

Inducement to enter into contract

Even if the representation is both false and fraudulent, if the representee does not rely on the representation there is no case.[86]

The applicability of this in the family law context is interesting, because in the case of a prenuptial agreement the acting upon the agreement could be considered to be the act of entry into the marriage. There must be reliance on the agreement for entry in to the marriage.

Materiality

The representation must be of a material fact. In the case of a fraudulent misrepresentation, it has always been sufficient to show misrepresentation as to any part of that which induced the party to enter into the contract. A stricter view was taken formerly concerning purely innocent misrepresentation. In *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, Blackburn J said: [87]

> [W]here there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.

The learned author of *Contract Law in Australia* considered that the requirement of a representation in relation to a material fact, which is the usual formulation of the type of misrepresentation that gives rise to a right of rescission, is broader than the common law requirement of a complete difference of substance. Therefore, although a 'substantial' difference will be sufficient, it is no longer necessary, and a misrepresentation need be no more than 'material' in an objective sense.[88]

B - Fraud and Non – disclosure '(a) the agreement was obtained by fraud (including non-disclosure of a material matter)'

In his seminal paper, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements', the Hon Justice Paul Brereton said:[89]

> On the question of what kind of non-disclosure would justify a decision to set aside an agreement under s90K(1)(a), Cronin J said in *Cording v Oster* [2010] FamCA 511 (at [60]) (emphasis added):
>
> > "To reach the standard of a fraud, the non-disclosure must amount to a misrepresentation *whether it is intended or otherwise*. That is because the recipient of the information, is entering into the agreement the basis of the representations. To prove a misrepresentation of a material fact, one

[86] Ibid [5.11] citing the principles governing inducement as restated in *Gould v Vaggelas* (1985) 157 CLR 215.
[87] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [18.23].
[88] Ibid [18.38].
[89] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31, 34.

> of the parties to the agreement must be able to show that *he or she was contracting about something other than that referred to in the contract and in the circumstances, it would be unconscionable for the agreement to stand*."

The third sentence in that passage seems to contemplate so-called equitable fraud, which is more appropriately addressed under s90K(1)(b) or (e). As to the first sentence, it suggests that an unintentional non-disclosure amounting to a misrepresentation can amount to fraud. Similarly, in *Blackmore & Webber* [2009] FMCAfam 154, Bender FM expressed the view (at [42]) that a lack of disclosure of a material matter, whether by way of a deliberate intent to mislead *or by inadvertent omission*, can ground the setting aside of a Financial Agreement under s90K(1)(a). His Honour referred to Stoddard & Stoddard [2007] FMCAfam 735, in which Altobelli FM observed that "[i]t is possible though that in the context of s90K(1)(a), fraud has a broader meaning in that it may be constituted by non-disclosure of a material matter. Thus, whereas fraud at common law may require a representation, under s90K(1)(a) fraud may be constituted by omission – ie, non-disclosure of a material matter".

While I would accept that an intentional nondisclosure, where there is a duty to disclose, would be within a 90K(1)(a), it is difficult to conceive that it was intended that fraud, for the purposes of s90K(1)(a), should include inadvertent omissions. To be fraud, a misrepresentation must be intentional: negligent or innocent misrepresentation does not make a case of fraud. In *Hoult v Hoult* [2011] FamCA1023, Murphy J said:[90]

> "Fraud for the purposes of s90K(1)(a) can, plainly, include material non-disclosure, but not every material non-disclosure is fraudulent. The inclusion of the phrase in parenthesis in s90K(1)(a) is explained in my view by the desirability of making clear what might otherwise not clearly emerge from the position at common law or in equity. As a general proposition, at common law a finding of fraud in and about an agreement requires (among other things) a misrepresentation. A misrepresentation is, generally speaking, not constituted by silence or non-disclosure (material or otherwise)."

His Honour rejected a submission that innocent or negligent material non-disclosure was sufficient, by itself, to attract s90K(1)(a). I respectfully entirely agree. An intention to deceive is required to establish fraud under s90K(1)(a) – which is to say, it requires proof of common law fraud, with a statutory gloss that non-disclosure is included where the material matter was omitted with the requisite intent.

C - Mistake

'Mistake' is a difficult part of contract law.[91] As described by the author of *Contract Law in Australia*, perhaps in most contracts one party at least is mistaken to some degree as to the extent of the benefit it will provide.

[90] *Hoult v Hoult and Others* (2011) 48 Fam LR 475.
[91] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [20.01].

The two essential questions with which 'mistake is concerned are:[92]

- When will mistake be 'operative' ?; and,
- What effect does the mistake have?

Only a small proportion of mistakes will be cognisable in contract law, that is, to constitute 'operative mistake'.[93] Family law cases involving financial agreements would seem to be fertile ground for this particular doctrine of contract law.

Common mistake as to which section the agreement was made under

In *Sullivan,*[94] counsel for the wife had contended that there was common mistake as to which section the agreement was made under. Young J said (including an explanation of *Senior v Anderson* (2011) 250 FLR 444:

> [132] In relation to the reliance placed Senior v Anderson (above), in that decision the agreement between the parties erroneously referred to s 90C throughout and the agreement itself was headed as a "Section 90C Financial Agreement". The agreement was signed by both parties after they were divorced and at first instance I made orders that the agreement be rectified to correct the erroneous references to s 90C to read s 90D as was consistent with the common intention of the parties. Strickland and Murphy JJ reasoned at [106] that rectification was available in those circumstances to correct the erroneous references to s 90C in the agreement to refer to s 90D and the majority agreed that the power to rectify arose from equity rather than the Act: see [132]–[133]. However, as submitted by counsel for the wife, in that decision there was common mistake between the parties as to which section the agreement was to be made under in order to be a financial agreement pursuant to s 90D, Pt VIIIA and s 4 of the Act. Consequently, there was a common intention to enter into a financial agreement under s 90D that allowed for the rectification of the agreement in that matter.
> **[133] That decision differs in three significant respects to the matter before the court, first there was an agreement pursuant to contractual principles that was executed by the parties, second, there was a common intention to enter into as 90D financial agreement and third, there was a common mistake as to the section of the Act under which the financial agreement was to be made.**

Mistake about value of investment property as a result of a scam

A recent example of consideration of mistake occurred in *Phak & Xu*.[95] Justice Benjamin in the Family Court of Australia considered a case involving an application pursuant to s 90K of the *Family Law Act 1975* to set aside an otherwise binding agreement. His Honour described it as an 'all duck or no dinner' dispute for the parties.

[92] Ibid.
[93] Ibid.
[94] *Sullivan & Sullivan* (2011) 268 FLR 328. Emphasis added.
[95] *Phak & Xu* [2015] FamCA 939.

The parties had a complicated financial history. The wife had executed land transfers of nine parcels of real estate to the husband in accordance with the agreement.[96]

As to disclosure, overall His Honour's conclusion was that the wife had adopted a scattergun approach and asserted various failures to disclose and the like in an effort to have the agreement set aside. All claims about those peripheral matters were dismissed.[97]

However, His Honour was satisfied for the reasons set out in the judgment that the husband and wife were the victims of an elaborate fraud or scam in which they had invested $420,000. The so-called developers, over a period of years, had isolated the parties from the transaction, changed the transaction, so that as at the date of entry in to the financial agreement it was just a mirage.[98]

It was an assertion by both parties and a genuine belief by both parties that the investment was a valuable property and was a mistake shared by each of them to the contract. As a consequence of that common mistake,[99] the agreement entered into between the parties was void *ab initio* at common law and rendered the performance of the contract impossible.[100]

Ultimately, the financial agreement was set aside and the matter sent for trial of the substantive application for property settlement pursuant to s 79 of the *Family Law Act 1975*.

Part V - SETTING ASIDE FINANCIAL AGREEMENTS IN EQUITY: DURESS, UNDUE INFLUENCE

In equity, contracts can be rescinded for innocent and fraudulent misrepresentation, mistake, duress, undue influence, unconscionable dealing and breach of fiduciary duty.[101] It is outside the scope of this paper to deal with all the vitiating factors.

The Honourable Justice Paul Brereton in his paper, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements',[102] already referred to, examined the important equitable vitiating factors that might found proceedings to set aside financial agreements. I commend that paper to anyone who practices in family law and may entertain the notion of deploying a financial agreement for a client.

---

[96] Ibid [77].
[97] Ibid [253].
[98] Ibid [255].
[99] See generally on common mistake JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [20.02], and [20.05] on approaches to mistake.
[100] *Phak & Xu* [2015] FamCA 939 [258].
[101] W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.4].
[102] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31.

The two main equitable vitiating factors of duress and undue influence will be examined now.

D - Duress

The first of the main vitiating factors in equity is duress. In any civilised legal system, contracts entered into as a result of serious threats must be treated as nullities or at least unenforceable.[103] Duress involves an improper threat to do something, which generally will be unlawful. Some forms of duress are also crimes.[104] When considering conduct that may amount to duress the law is concerned with pressure that vitiates consent whereas when considering undue influence this is generally a conclusion because the parties stood in a particular relation to one another. Whereas duress always depends on proof of improper pressure, under the concept of undue influence, pressure is usually presumed.[105] Although as will be seen in the section of this paper dealing with undue influence a husband is not presumed to exercise undue influence over his wife, [106] but a relationship of fiancé and fiancée may well be one of presumed influence.

The application of the law relating to duress in a family law context is presently under the spotlight as can be seen in the discussion about the cases that follows.

1 *Fewster v Drake [2016] FamCAFC 214*

In *Fewster v Drake*,[107] the Full Court of the Family Court considered an appeal against the first instance decision of the Foster J in which the Family Court in which Foster J considered the validity or otherwise of a financial agreement dated 22 December 2006. The evidence of the wife was that she was an active and informed participant in the negotiations leading up to the agreement. She was not inexperienced in the ways of business. She was as at all times represented by a solicitor and the negotiations went to and fro for an extended period of time. By the time of the agreement the parties had married and one child had been born of the marriage.[108]

The wife asserted that she signed the agreement as a consequence of coercive behaviour by the husband amounting to duress.

Foster J at first instance said this:[109]

[103] JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013) [22.01].
[104] JW Carter, *Carters Guide Australian Contract Law* (Lexis Nexis Butterworths, 2nd ed. 2011) [22.05].
[105] Ibid.
[106] *Yerkey v Jones* (1939) 63 CLR 649.
[107] *Fewster & Drake* [2016] FamCAFC 214.
[108] *Fewster v Drake* [2015] FamCA 602 [111].
[109] *Fewster v Drake* [2015] FamCAFC 198.

> [103] The provisions of s 90K(1)(e) import common law and equitable principles as factors vitiating the agreement including duress, undue influence and unconscionability.
>
> [104] Duress at common law avoids contracts where fear was induced so as to deprive a party of free will and can extend to pressure beyond what the law is prepared to countenance as legitimate to the extent that the party's consent was not a voluntary act (Barton v Armstrong [1980] AC 614 at 635, Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40 at 45-6).
>
> [105] In Australia & New Zealand Banking Group v Karam [2005] NSWCA 344 the NSW Court of Appeal expressed that duress ought to be confined to its common law basis of unlawful conduct and that where the pressure was lawful, it ought to be dealt with as undue influence or unconscionable conduct.
>
> [106] The evidence of the wife is not indicative of duress in the entering into of the agreement by her. Indeed, while the wife raised the issue of duress in the particulars provided to the husband on 24 April 2015, duress was not referred to as a ground for setting aside the financial agreement in the wife's final written submissions.

Therefore, at first instance the duress ground was not made out. The appeal, however, proceeded on a number of grounds including whether his Honour had erred in his construction and application of s 90K(1)(d).[110] On appeal, the Full Court determined that the order setting aside the agreement should itself be set aside.[111] The Full Court found that, although the birth of the parties' children could and did constitute a material change of circumstances, the primary judge had failed to establish how the wife had experienced hardship and how that hardship was linked to the material change. That link was essential for the agreement to be set aside under s 90K(1)(d) of the *Family Law Act 1975*,[112] and the Full Court found that the evidence did not establish it. The application of the wife to set aside the financial agreement was dismissed. The matter was sent for rehearing in regard to spousal maintenance. The right to claim spousal maintenance was preserved in the agreement.[113]

Thorne v Kennedy [2017] HCA 49

In *Thorne v Kennedy*,[114] the facts were that the wife, then aged 36 and the husband, then aged 67 met over the internet in mid-2006. At the time that they met, the wife was not living in the country of her birth and her English language skills had been informally acquired. She had no children and no assets of any substance. The husband however was an Australian property

[110] Section 90 K(1):
…
(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

[111] *Fewster & Drake* [2016] FamCAFC 214 [78].

[112] Ibid [79].

[113] Ibid [45].

[114] *Thorne v Kennedy* [2017] HCA 49

developer with assets worth at least $18 million. He was divorced from his first wife, and had adult children.

Following their courtship, the wife travelled to Australia with the husband in February 2007 and moved into his penthouse. On 26 September 2007, with their wedding scheduled for 30 September 2007, the wife and the husband signed a Financial Agreement ("the September Agreement"). It provided that the wife was to receive a total payment of $50,000 plus CPI in the event of a separation after at least 3 years of marriage. There were some other provisions of a testamentary nature which provided for the wife to receive a penthouse worth up to $1.5M, a Mercedes and a continuing income in the event of the husband's death "prior to either party signing a Separation Declaration following separation".

The husband had made it clear to the wife from very early on that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife however did not learn the terms of the September Agreement until days before the wedding, when she attended at an appointment (arranged by the husband) at a solicitor‟s office to sign it. By that stage her parents and sister had travelled to Australia for the wedding and were also staying at the husband‟s home. The husband had also told the wife that if she failed to sign the September Agreement, the wedding would be off. When presented with the draft September Agreement, the wife's only concern was with the testamentary provisions - not about the separation provisions. The wife's solicitor advised her orally and then in writing,[115] not to sign the Agreement for several reasons including that it was all in the husband‟s favour and not in hers. After some minor changes to the September Agreement requested by the wife‟s solicitors were agreed to by the husband‟s, the wife nevertheless signed it and then in November signed the second Agreement, revoking the first but otherwise in the same terms.

On 16 June 2011 the husband signed a Separation Declaration after the couple had been cohabiting for about 4.5 years. The wife then commenced proceedings in the Federal Circuit Court seeking orders that both Agreements be declared not to be binding and/or to be set aside. In their place she sought orders for a property settlement and spousal maintenance. The husband died on 19 May 2014 (part way through the hearing) and the husband's representatives were then substituted for him in the proceedings.

The parties had entered into two agreements, the first a section 90B agreement prior to the marriage, and the second a section 90 C agreement after the marriage. In March 2015 the Federal Circuit Court made orders that neither of the agreements were binding and it set them both aside. Judge Demack in the Federal Circuit Court had found that the first agreement was entered into under duress and that the second agreement was simply a continuation of the first. Her Honour had said: [116]

[115] Ibid [8] for the key features of the solicitor's advice.
[116] *Thorne & Kennedy* [2015] FCCA 484.

> 89. The husband did not negotiate on the terms of the agreement as to matters relating to property adjustment or spousal maintenance. He did not offer to negotiate. He did not create any opportunities to negotiate. The agreement, as it was, was to be signed or there would be no wedding. Without the wedding, there is no evidence to suggest that there would be any further relationship. Indeed, I am satisfied that when Mr Kennedy said there would be no wedding, that meant that the relationship would be at an end.

On appeal, the Full Court of the Family Court comprising Strickland, Aldridge and Cronin JJ, reversed the decision in holding that the trial judge had applied the incorrect test in relation to duress. It was not apparent on the evidence what the 'threatened or actual unlawful conduct' of the husband was. In arriving at its decision the Full Court concluded that the fact that the husband required a financial agreement to be entered into before marriage cannot be seen as the basis for a finding of duress,[117] and nor can the fact that the second agreement was required. The wife's real difficulty in establishing duress was that she had received independent legal advice, and was advised not to sign the agreements but went ahead regardless.[118]

The wife's solicitor had provided advice to the effect that the agreement was terrible and that she should not sign it.[119] The Full Court reasons at [159]-[169] are valuable reading for those further interested in this topic.

The decision of the Full Court was overturned by the High Court in *Thorne v Kennedy* [2017] HCA 49. In regard to the vitiating factor of duress the High Court held:[120]

> It was not necessary for the primary judge to consider common law duress. As will be explained later in these reasons, the sense in which the primary judge in this case described the pressure on Ms Thorne was to focus on Ms Thorne's lack of free choice (in the sense used in undue influence cases) rather than whether Mr Kennedy was the source of all the relevant pressure, or whether the impropriety or illegitimacy of Mr Kennedy's lawful actions might suffice to constitute duress. Nor did this Court receive any substantial submissions concerning when illegitimacy or impropriety might be established for duress at common law including in light of the statutory policy of the Family Law Act and, in that context, how the actions of Mr Kennedy should be characterised. In these circumstances, it is not necessary to address the arguments in favour of or against the conclusion of the New South Wales Court of Appeal that duress at common law requires proof of threatened or actual unlawful conduct. Nor is it necessary to consider whether the recognition of lawful act duress adds anything to the doctrine concerned with unconscionable conduct.

[117] *Kennedy & Thorne* [2016] FamCAFC 189 [165].
[118] Ibid [167].
[119] Ibid [20].
[120] *Thorne v Kennedy* [2017] HCA 49 [29] (citations omitted).

E - Undue influence

According to Justice Brereton,[121] undue influence is perhaps the single most significant equitable doctrine in this field.

1 *What is undue influence?*

In *Thorne v Kennedy* [2017] HCA 49, the High Court noted:[122]

> In *Allcard v Skinner*, Lindley LJ said that "no Court has ever attempted to define undue influence". One reason for the difficulty of defining undue influence is that the label "undue influence" has been used to mean different things. It has been used to include abuse of confidence, misrepresentation, and the pressure which amounts to common law duress. Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred. One reason why there is no clear distinction is that undue influence can arise from widely different sources**30**, one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper.

Undue influence is a doctrine of equity pursuant to which a court can set aside a transaction that was unconscionably procured in consequence of the relationship of the parties.[123] Some relationships of their nature that raise a presumption of undue influence ('presumed relationships'). There are other relationships where there is no presumption, but proof of particular aspects of the relationships may cause undue influence to be inferred ('proved relationships').

The authors of *Meagher, Gummow & Lehane's*: Equity, Doctrines and Remedies note the phrase 'presumption of undue influence' really refers to the taking of a benefit by or at the suggestion of a person in a position of influence (presumed or proved) who will be taken unless the contrary is proved to have procured the benefit by undue exercise of that influence.[124]

Undue influence in this type of instance has been described as a 'third kind of fraud'.[125]

2 *Relationships and Undue influence*

The cases characterise and examine the relationships as arising between a 'stronger' party and 'weaker' party. The presumption is said to be raised in favour of the weaker party.[126]

---

[121] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31.
[122] *Thorne v Kennedy* [2017] HCA 49 [30] (citations omitted).
[123] JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (LexisNexis Butterworths, 5th ed. 2015) [15-005].
[124] Ibid [15030] p 485.
[125] Originally described in *Earl of Chesterfield and Others v Janssen* (1751) 2 Ves Sen 125, 28 ER 82, 100.
[126] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [15-010].

Undue influence is however, not an all embracing concept as equity does not regard all relationships as being covered by the doctrine, [127] such as between grandson and grandfather,[128] or indeed the relationship between husband and wife — being a particularly clear example. [129]

3 *Not all dispositions are liable to be set aside*

Where a relationship of influence exists, presumed or proved to exist, it appears that not all dispositions by the party subject to it are liable to be set aside.[130] The presumption does not apply to gifts of small value where the gift could be accounted for on the grounds of friendship or other relationships.[131]

4 *Undue exercise*

Influence naturally arises in relationships but when does it become undue in its exercise?

As stated by Issacs J in *Watkins v Combes* (1922) 30 CLR 180,[132] guidance may be found in Privy Council decisions:[133]

> Such influence may be used wisely, judiciously and helpfully. …, more than mere influence must be proved so as to render influence, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

5 *Prenuptial agreements and undue influence*

In the case of a prenuptial agreement, the parties may be said to be in a relationship of being affianced.[134] Does the relationship of man and a woman who are engaged to be married bring the presumption into play?

According to Justice Brereton, parties to financial agreements are not at arm's length, and will often be in relationships of the kind in which trust and confidence may be reposed by one in the other, and influence exercised by the other over the first.[135]

In *Johnson v Buttress* (1936) 56 CLR 113, Dixon J observed:[136]

---

[127] Ibid [15-025].
[128] Ibid [15-080].
[129] *Yerkey v Jones* (1939) 63 CLR 649, 675.
[130] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015).
[131] Ibid [15-030].
[132] *Watkins v Combes* (1922) 30 CLR 180, 193-194.
[133] *Poosa- thurdi v. Kanappa Chettiar* (references omitted) cited in *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [15-030].
[134] See *Yerkey v Jones* (1939) 63 CLR 649 for the use of this interesting term.
[135] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31, 36.
[136] *Johnson v Buttress* (1936) 56 CLR 113, 134. Emphasis added.

> The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. **A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry.**

Only a few years later in *Yerkey v Jones* (1939) 63 CLR 649 Dixon J said:[137]

> In *In re Lloyds Bank Ltd.*; *Bomze and Lederman v. Bomze* the present Lord Chancellor (Lord *Maugham*), speaking of gifts by a wife to her husband, said that it is well settled that the relation is not one of those in which the doctrine of *Huguenin v. Baseley* applies, " but where there is evidence that a husband has taken unfair advantage of his influence over his wife or her confidence in him, it is not difficult for the wife to establish her title to relief." The reason for excluding the relation of husband and wife from the category to which the presumption applies is to be found in the consideration that there is nothing unusual or strange in a wife from motives of affection or even of prudence conferring a large proprietary or pecuniary benefit upon her husband. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over his wife which a husband often possesses. But in the relations comprised within the category to which the presumption of undue influence applies, there is another element besides the mere existence of an opportunity of obtaining ascendancy or confidence and of abusing it. It will be found that in none of those relations is it natural to expect the one party to give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused.
>
> **The distinction drawn between large gifts taken by a man from the woman to whom he is affianced, a case to which the presumption applies, and similar gifts by a wife to her husband, a case to which it does not apply**, a distinction sometimes condemned, is explained by this consideration and also, perhaps, by the consideration that the rule is one of policy and, upon a balance, policy is against applying it to husband and wife. **But while the relation of a husband to his wife is not one of influence, and no presumption exists of undue influence, it has never been divested**

[137] *Yerkey v Jones* (1939) 63 CLR 649, 675. Emphasis added. Reference omitted.

> **completely of what may be called equitable presumptions of an invalidating tendency.**

In *Fewster v Drake* [2015] FAMCA 602,[138] Foster J noted in regard to the question of whether a husband is presumed to exercise influence over his wife referring to a passage which continues that above:

> [108] It is well established that a husband is not presumed to exercise undue influence over his wife (Yerkey v Jones (1939) 63 CLR 649 at 675). However in that decision Dixon J said that although there was no presumption of undue influence, the marital relation had never been divested completely of three 'equitable presumptions of an invalidating tendency'. These his Honour detailed as follows at 675–676:
>
> > In the first place, there is a doctrine, which may now perhaps be regarded as a rule of evidence, that, if a voluntary disposition in favour of the husband is impeached, the burden of establishing that it was not improperly or run fairly procure would may be placed upon him by proof of circumstances raising any doubt or suspicion. In the second place, the position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct. In the third place, it still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she really obtained an adequate understanding of the actual nature and consequences of the transaction.

In *Louth v Diprose* (1992) 175 CLR 621, the High Court considered a case involving a man of comparatively modest means who gave $58,000 to a woman with whom he was infatuated but who was largely indifferent to him, for the purchase of a house for occupation by herself and her children of a former marriage. The woman was registered as proprietor.

The parties fell out, and on the man's action to recover the land the judge found that he had been emotionally dependent on the woman who as a result had great influence on his actions and decisions, that the woman tolerated the man's attentions because of the material advantages which resulted, that she manufactured an atmosphere of crisis about her ability to continue living in her rented accommodation and did so in order to influence him to provide the money for the house, that she played upon his love for her by making suicide threats in relation to the house, and that she was aware of his infatuation (which she manipulated) and of his consequent inability to judge what was in his best interests and that her manufacture of an atmosphere of crisis was dishonest. The woman was ordered to transfer the house to the man.

[138] *Fewster v Drake* [2015] FamCA 602. See above n 94 on the appeal in this case.

Brennan J observed that the case was analogous to one of a man engaged to a woman and that it may no longer be right that (such a) presumption exists in the case of a substantial gift between (engaged couples), observing: [139]

> That finding makes the relationship in the present case analogous to the relationship which Lord Langdale M.R. thought to be subsisting between an engaged couple in Page v. Home. There his Lordship set aside a gift by a woman to her fiance, observing that 'no one can say what may be the extent of the influence of a man over a woman, whose consent to marriage he has obtained'. It may no longer be right to presume that a substantial gift made by a woman to her fiance has been procured by undue influence but the cases in which such a presumption has been made demonstrate that the relationship which places a donor at a special disadvantage may have its origin in an emotional attachment of a donor to a donee.

In a passage that has stood the test of time, Brennan J said: [140]

> But where it is proved that a donor stood in a specially disadvantageous relationship with a donee, that the donee exploited the disadvantage and that the donor thereafter made a **substantial** gift to the donee, an inference may, and often should, be drawn that the exploitation was the effective cause of the gift. The drawing of that inference, however, depends on the whole of the circumstances.

Such a presumption, Justice Brereton thought,[141] may offer significant protection to women of whom advantage may be taken as in a case where an agreement is signed not long before a wedding. This has application as can been seen later in *Raleigh.*[142]

The changes in social conditions since early cases lead to doubts about the presumption in this context: *Zamet v Hymnan* [1961] 3 All ER 933, 938.[143]

However, the High Court in *Thorne v Kennedy* [2017] HCA 49, rejected the submission of Ms Thorne,[144] that the relationship of fiancé and fiancée should be recognised as one to which the presumption attaches. The High Court dealt with this point conclusively to bring the law up to date with the times and held:[145]

> Common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other.

---

[139] *Louth v Diprose* (1992) 175 CLR 621, 630 cf *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [15-080]. Citations omitted.
[140] *Louth v Diprose* (1992) 175 CLR 621, 631 (Brennan J) (emphasis added).
[141] Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31, 36.
[142] *Raleigh & Raleigh* [2015] FamCA 625.
[143] Cited in W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015) [5.42].
[144] *Thorne v Kennedy* [2017] HCA 49 [35].
[145] Ibid [36].

6 *Some cases on undue influence in a family law context*

How then has the doctrine of undue influence been considered in family law cases?

(a) Saintclaire & Saintclaire (2015) FLC ¶93-684

Saintclaire & Saintclaire (2015) FLC ¶93-684,[146] was an appeal by a husband against orders which had set aside a financial agreement entered into by the parties prior to their marriage. The wife opposed the appeal.

The trial judge set aside the financial agreement stating that it was not binding because it was vitiated by undue influence, tainted by unconscionable dealing and it did not meet the requirements of s 90G of the Family Law Act 1975. The husband contended that the trial judge confused actual undue influence in the transaction with undue influence in the relationship itself and also that, on the evidence, the findings made were not open to her Honour.

The Full court set out the relevant principles, and it is worthwhile considering them in full:[147]

> **Relevant Principles**
> 11. Given that the primary thrust of the challenges to her Honour's order involves an assertion that her Honour erred in identifying and/or applying the relevant principles, we consider it important that we set out what we consider the applicable principles to be.
>
> *Undue Influence*
> 12. The law distinguishes between "actual undue influence" and "presumed undue influence". The former arises where "undue influence is proved as a fact". The husband's forensic task is there directed to the words and actions said to infect the agreement or transaction: "facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act".
>
> 13. The suborning of a party's free will is crucial. Negotiations for any form of agreement or transaction, be they commercial or between marriage partners, are frequently attended by a plethora of different pressures and influences. Plainly enough, not all such pressures and influences will attract the intervention of equity; were it otherwise finalised agreements could never be much more than temporary or provisional.
>
> 14. It is unsurprising, then, that equity requires more to be established than that a party was under pressure or subject to influences in entering into the agreement. What is required is proof of "influence over the mind" of the other party such that their actions in executing the agreement or entering the transaction cannot be viewed as their free and independent act: some "importunity and pressure, to the point at which the plaintiff can no longer

[146] *Saintclaire & Saintclaire* (2015) FLC ¶93-684.
[147] Citations omitted.

exercise an independent will …" is required. By way of contrast, it has been said that "the fact that … choices apparently open are unpalatable does not indicate that [the] will was overborne".

15. Presumed undue influence on the other hand does not depend upon proof of facts in respect of the transaction. Rather, its application derives from proof of the nature of the relationship between the parties to the transaction or agreement. In some recognised categories of relationships, all that must be proved is the existence of the relationship itself for undue influence to be presumed, unless rebutted. The relationship of solicitor and client is one such relationship; the relationship of husband and wife is not. Outside of those recognised relationships, including in the case of transactions between husband and wife, more about *the relationship* must be proved.

16. What must be proved has been described in various ways including, for example, that a party "is in a position to exercise dominion over [the other party] by reason of the trust and confidence reposed in [the first party]".[15] In *Tulloch (deceased) v Braybon & Ors (No 2)*,[16] Brereton J undertook an analysis of decisions in which the requisite indicia of the relationship were described,[17] and concluded:

> In my opinion, these authorities show that more than mere confidence and reciprocal influence is required to establish a "special relationship of influence" from the existence of which undue influence will be presumed unless rebutted; for a relationship to be brought within the doctrine, it must go beyond one of mere confidence and influence to one involving dominion or ascendancy by one over the will of the other, and correlatively dependence and subjection on the part of the other…

17. By way of contrast, a presumptive relationship is not raised by "… the mere fact that one party to a transaction who is of full age and apparent competency reposed confidence in, or was subject to the influence of, the other party… [.] Observations which go to that extent are too broad".

18. His Honour also observed:

> A husband and a wife obviously are vis-a-vis each other in positions of trust and confidence and influence, but one does not ordinarily have over the other such authority as to make such relationships a presumed relationship of influence, nor (without more) a special relationship of influence. It is where the relationship is such that one party is seen or supposed to be in some way beholden, obliged, or disadvantaged in relation to the other, that such relationships are presumed or can be proved, and dominion or ascendancy is at least usually an important factor.

19. If "particular aspects of a relationship cause undue influence to be inferred",[21] a presumption is raised which requires rebuttal by the other party. The receipt of independent legal advice is an important consideration in a court assessing if the presumption is rebutted but is not determinative of that issue. What is crucial is establishing that the party is "…'emancipated' from that influence".[22]

Unconscionability

20. Equity might set aside a transaction or agreement:

> …whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience,

> impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

21. Importantly:

> Mason J in *Amadio's* case … was at pains to emphasise that the mere circumstance that there was some difference in the bargaining power of the parties was not enough; "the disabling condition or circumstance [must be] one which seriously affects the ability of the innocent party to make a judgment as to his own best interests".

22. Recently, the principles were reiterated this way:

> The doctrine of unconscionability will intervene to prevent a donee from retaining the benefit of a gift where a person under a special disability has transferred it to them in circumstances where it would not be in good conscience to do so. A special disability is an attribute of the donor, which renders them incapable of making a judgment as to his or her own interests. Equity will intervene when the donee has actual knowledge or knowledge of the facts that would raise a question in the mind of a reasonable person that the donor suffers from a special disadvantage and takes advantage of it.

(b) Piper v Mueller [2014] FCCA 2659

In *Piper v Mueller* [2014] FCCA 2659, a case before Judge Willis in the Federal Circuit Court of Australia the parties were not a young couple when they entered into the agreement. They were mature adults and each had previous relationships and each had been through the family law system.[148] The applicant who had been married twice before, was not in a position of special disadvantage and the court was not satisfied that the respondent had engaged in any unconscionable conduct at all, or any unconscionable conduct that had placed illegitimate means or persuasion on the applicant.

Further, the court was not satisfied that the respondent has engaged in any conduct, which would render the agreement, void voidable or unenforceable.[149] Undue influence was not established.

[148] *Piper v Mueller* [2014] FCCA 2659 [229].
[149] Ibid [234].

(c) Raleigh & Raleigh [2015] FamCA 625

Undue influence was also considered in *Raleigh & Raleigh*,[150] which was a first instance decision of the Family Court of Australia where the husband sought an order that a 2003 financial agreement was binding and the wife sought an order that the agreement was not binding or that it be set aside. The wife's lawyer's certificate contained an error and the wife was not provided with independent legal advice.

The wife sought to set aside the financial agreement on the basis that the husband had exercised undue influence over her and his conduct had been unconscionable.

The length of the consultation in *Raleigh* was for less than 15 minutes.[151]

The relationship was one where the husband had influence over the wife. Watts J discussed this aspect:

> *Did the husband, in respect of the making of the 2003 financial agreement, engage in conduct that was, in all the circumstances, unconscionable (s90K(1)(e))?*
>
> **[173]** In *Hoult& Hoult* (2011) FLC 93-489, Murphy J discusses s 90K(1)(e) of the Act at [140]:
>
> > 140. 'Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so' (Deane J, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447). It has been said that the applicability of the doctrine is comprised of a number of elements:
> >
> > a the weaker party must, at the time of entering into the transaction, suffer from a special disadvantage vis-à-vis the stronger party;
> >
> > b the special disadvantage must seriously affect the weaker party's capacity to judge or protect his or her own interests;
> >
> > c the stronger party must know of the special disadvantage (or know of facts which would raise the possibility in the mind of any reasonable person);
> >
> > d that party must take advantage of the opportunity presented by the disadvantage; and
> >
> > (e) the taking of advantage must have been unconscientious.
> >
> > (*Turner v Windever* [2003] NSWSC 1147 at [105], relying upon earlier decisions of the High Court in *Amadio*, above; *Louth v Diprose*(1992) 175 CLR 621; and *Bridgewater v Leahy* (1998) 194 CLR 457).

[150] *Raleigh & Raleigh* [2015] FamCA 625.
[151] Ibid [1].

> **[174]** The **expression** 'unconscionable' in s 90K(1)(e) of the Act has a wider import than it has in ordinary commercial contracts.

Continuing Watts J found that the wife was at special disadvantage because of the imminent birth of the parties' first child:

> [177] I find that at the time the wife entered into the 2003 financial agreement she suffered from a special disadvantage when dealing with the husband, because:
>
> 177.1. She was about to give birth to the first child of the parties and was particularly vulnerable at that time;
>
> 177.2. After the birth of the child in particular, she reasonably believed she would be financially dependent upon the husband, including being dependent upon the husband to provide accommodation for herself and the unborn child;
>
> 177.3. She had no substantial assets and owed a large debt to the husband which was bearing interest at 8 per cent;
>
> 177.4. The wife was not in a position to bargain any significant variation to the terms of the 2003 financial agreement as presented by the husband;
>
> 177.5. The husband misrepresented to the wife what the 2003 financial agreement actually said in relation to her rights to property that was acquired by the parties in the future.
>
> **[178]** I am satisfied that the wife's special disadvantage seriously affected her capacity to judge or protect her own interests. This was encapsulated in her oral evidence to the effect that it did not matter what advice she was given by the solicitor, she felt obliged to sign the document she had been provided.
>
> **[179]** I find the husband knew of the special disadvantage the wife was under or knew of facts that would raise that possibility in the mind of a reasonable person. The husband knew the wife was about to give birth and indeed he was insisting the 2003 financial agreement be completed prior to the birth of the child. The husband knew the wife's financial circumstances and it was his view that she owed him $38,000 with interest accruing. The husband knew of the limited terms of the wife's fee agreement with her solicitors because he had received it between 15 October 2003 and 17 October 2003. He knew that that retainer provided that the wife's solicitor was not to attempt to negotiate any change to the agreement.
>
> **[180]** The husband took advantage of the opportunity provided by the wife's disadvantage by reason of insisting upon and facilitating the making of an agreement prior to the birth of the first child of the parties. The husband obtained a benefit from the 2003 financial agreement because, as the wife's solicitor advised her, the agreement was not fair and reasonable and it was not to her advantage or prudent for her to enter into it. The husband has procured the agreement without the wife having any real opportunity to negotiate its terms with the aid of legal assistance. The agreement either excluded or severely limited the wife's ability to seek relief from the court under s 79 of

> the Act. The husband ignored the warning that he had been given by the solicitor who he had engaged in 2001 against not providing in the agreement proper provision for alteration of property in circumstances where the parties subsequently had children. I find that the taking of advantage of the wife by the husband in the way described was unconscionable.

(d) Wood v Grover [2015] FCCA 951

Wood v Grover [2015] FCCA 951, was another recent case where undue influence was not established. In the Federal Circuit Court of Australia Judge Neville found:[152]

> [68] In my view, there is insufficient evidence provided by Mr Wood upon which the court could form any relevant view that there was anything unconscionable in the terms and signing of the BFA. He may well have felt some degree of pressure to sign the Agreement. But he had more than ample opportunity to seek further legal advice, in addition to that given to him orally and in writing by Mr O'Brien. There is nothing on the evidence, in my view, that would transform the relationship and the circumstances of the signing of the BFA into either some relevant form of undue influence, or unconscionable conduct on the Wife's part. No such case has been made out by Mr Wood.
>
> …
>
> [76] Finally, I note the following comments by Gleeson CJ in *ACCC v Berbatis*, where, at [14], his Honour said:
>
> > Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.
>
> [77] The distinction made by Gleeson CJ would seem to be particularly apt in the current matter. It seems to me to have been a situation in relation to entering the BFA where the Wife, by virtue of her superior asset position and her desire to protect it, was in a stronger or superior bargaining position to that of the Husband. There is no legal consequence for that superior position, particularly where, as here, there is otherwise due compliance with the statutory regime provided by Pt VIIIA of the Act.

(e) Thorne v Kennedy [2017] HCA 49

Some of the facts of *Thorne v Kennedy* [2017] HCA 49, have been referred to above. The High Court considered, in the particular context of pre-nuptial and post-nuptial agreements,[153] some of the factors which may have prominence include the following:

[152] *Wood v Grover* [2015] FCCA 951.
[153] *Thorne v Kennedy* [2017] HCA 49 [60].

(i) whether the agreement was offered on a basis that it was not subject to negotiation;
(ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
(iii) whether there was any time for careful reflection;
(iv) the nature of the parties' relationship;
(v) the relative financial positions of the parties; and
(vi) the independent advice that was received and whether there was time to reflect on that advice.

7 *Remedies for undue influence*

(a) Equitable compensation

If a party is found to have practiced undue influence, can the victim be compensated and, if so, under what principles? Is equitable compensation available to the victim?

If a breach of fiduciary duty causes loss to a principal it is well established that compensation is available in the exclusive jurisdiction of equity to make good the loss.[154] Heydon QC suggested that equitable compensation is also available to a victim of undue influence in his paper analysing *Mahoney v. Purnell* [1996] 3 All E.R. 61, [155] which asked the question – Is the remedy of equitable compensation available to the victim of undue influence? According to Heydon QC, May J answered this question affirmatively.[156]

Orders can be made for equitable compensation in a wide variety of cases for equitable misbehaviour not involving breach of fiduciary duty such as breaches of trust.[157]

The fact that in truth the parties cannot be restored to their former position, does not prevent the award of equitable compensation.[158]

In *Smith v Glegg,*[159] Mc Murdo J discussed remedies of undue influence and referred to *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies,*[160] affirming that equitable compensation is available to a victim of undue influence. According to the authors of *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies,* equitable compensation is

[154] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [5-260].
[155] J D Heydon, 'Equitable compensation for undue influence' (1997) 113 *Law Quarterly Review* 8
[156] *Mahoney v Purnell* [1996] 3 All ER 31.
[157] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [23-015].
[158] Ibid [23-015], p 833 citing *Mahoney v Purnell* [1996] 3 All ER 31.
[159] *Smith v Glegg* [2005] 1 Qd R 561.
[160] RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's* Equity, Doctrines and Remedies (Butterworths LexisNexis 4th ed. 2002) [23-010]. (This was a reference in the judgment to an earlier edition of this text.)

available where a breach of duty by a fiduciary causes loss to a principal,[161] or other equitable misbehaviour.[162] The remedy for this breach – equitable compensation may be computed by reference to the profit made by the fiduciary.[163]

(b) Remedies in Family Law Act 1975 proceedings

In a family law case, the appropriate remedy is to seek an order that the financial agreement be set aside and depending on the stage matters are at, an application for orders under Part VIII of the *Family Law Act 1975* for property settlement could proceed in the ordinary way.[164]

However, s 90K (3) provides the power if a financial agreement is set aside to make such order or orders (including an order for the transfer of property) as the court 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.

It remains to be seen whether in the future a claim might be made for equitable compensation in a family law proceeding using this power.

One of the proposed amendments to the *Family Law Act 1975* by the *Family Law Amendment (Financial Agreements and Other Measures) Bill 2015* was to insert a new clause after s 21(2):

> (2A) The Court is, and is taken always to have been, a court of law and equity.

There can be no doubt that the legislature intends the full range of equitable remedies to be available for orders made under the *Family Law Act 1975.*

F - Catching Bargains – Something to consider for the future

There is a well-developed jurisdiction in equity independent of the principles as to undue influence, to set aside catching and unconscientious bargains.[165]

In the English cases, the Privy Council seems to have required something amounting to victimisation or the taking advantage of another's weakness. In *Bridgewater v Leahy*,[166] it was noted that such a victimisation could consist either of the active extortion of a benefit or the specific acceptance of a benefit in unconscionable circumstances.

[161] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [5-285].
[162] Ibid [23-010]
[163] Ibid [23-020].
[164] Sections 78 and 79 of the *Family Law Act 1975*.
[165] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [16-005].
[166] (1998) 194 CLR 457.

The jurisdiction is a branch of the general equitable jurisdiction in fraud. It is raised 'whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired facilities, financial need or other circumstance affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands': *Blomley v Ryan*.[167] According to the authors of Equity Doctrines & Remedies,[168] it will be seen that the essence of these situations is:

a. parties who meet on unequal terms;
b. the stronger party takes advantage of this;
c. to obtain a beneficial bargain.

When this is shown by the weaker party, the onus will pass to the stronger party to show that the conduct was fair, just and reasonable. An example was given in *Creswell v. Potter* [1978] 1WLR 255, where Megarry J. emphasised that these were relative terms, so that while the plaintiff no doubt had her wits about her to earn her living as a telephonist, she was ignorant when it came to property transactions.

Some expansion of these principles occurred in *Amadios* case,[169] where the majority of the High Court (Mason, Wilson and Dean JJ) held that it was sufficient to attract their operation that instead of actual knowledge of the Plaintiff's special disadvantage in relation to an intended transaction, the Defendant was merely aware of the possibility that the situation might exist or of facts that would raise the possibility in the mind of any reasonable person; in either case equity will intervene if the Defendant takes unfair advantage of the superior bargaining power or position by entering into that transaction.

It will be interesting to see whether this concept is applied in a family law context to financial agreements in the future.

[167] (1956) 99 CLR 362, 415.
[168] *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (5th ed. 2015) [16-010].
[169] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

Part VI - IMPACTS ON ENFORCEABILITY -THIRD PARTY INTERESTS AND FINANCIAL AGREEMENTS

A - Third parties

8 *Grainger v Bloomfield and Another (2015) 304 FLR 351*

Grainger v Bloomfield,[170] involved the interests of a judgment creditor. In 2007, Mrs Grainger purchased an unencumbered property in Queensland with funds provided by her husband. Later she borrowed significant funds from a bank, secured by a mortgage on the property. Some years later in late 2007 Mrs Grainger had become a judgment debtor to Ms Bloomfield with whom she had had a business relationship. A bankruptcy notice was served in 2012 on Mrs Grainger in respect of that judgment debt. A creditor's petition was filed in the Federal Circuit Court and served on Mrs Grainger. After the bankruptcy notice but before the creditor's petition was filed in the Federal Circuit Court Mr and Mrs Grainger entered into a financial agreement under section 90 C of the *Family Law Act 1975*, the effect of which was to transfer Mrs Grainger's interest in the property to Mr Grainger subject to the mortgage.

On 7 January 2014, Ms Bloomfield filed an initiating application in the Federal Circuit Court naming Mr Grainger and Mrs Grainger as respondents and seeking orders under section 90 K of *Family Law Act 1975*. On 1 May 2014 Mr Grainger filed an application in a case seeking the striking out of all, or part of the statement of claim (which Ms Bloomfield had filed in support of her initiating application), or alternatively that the proceedings be dismissed (in whole or in part).

At first instance, Judge Cassidy of the Federal Circuit Court made orders striking out certain paragraphs of the statement of claim. Those were the parts in support of the claim for the declaration that the financial agreement was not binding pursuant to section 90 G of the *Family Law Act 1975*) and also the paragraph of the initiating application in which that declaration was sought. Otherwise, Mr Grainger's application in a case was dismissed.

Mr Grainger sought leave to appeal the primary judge's orders and Ms Bloomfield sought leave to cross-appeal Her Honour's orders.

The appeal and cross-appeal raised a number of issues:

- whether a creditor has standing to apply to set aside a financial agreement or seek relief under section 90 K (3) when a party to a financial agreement has become bankrupt
- whether the power in section 90 K (3) extends to adjustments other than for the

[170] *Grainger v Bloomfield and Another* (2015) 304 FLR 351.

purpose of substantially restoring the position existing before the financial agreement

- whether a creditor in seeking to set aside a financial agreement under section 90 K could rely on any grounds other than that specified in section 90 K (1) (aa).

In dismissing the appeal and cross-appeal the Full Court consisting of Finn, Strickland and Hogan JJ held that a person who has standing as a creditor to apply to set aside a financial agreement under s 90K(1)(aa) is also an 'interested person' entitled to apply for orders under s 90K(3). Unlike the position of a creditor in relation to property settlement proceedings, the entitlement of a creditor to apply to set aside a financial agreement under s 90K(1)(aa) or s 90UM(1)(b) of the Act does not cease on the bankruptcy of the debtor, who is a party to the agreement. Ms Bloomfield therefore had standing as a creditor to apply under s 90K(1)(aa) to set aside the financial agreement, and also under s 90K(3) to seek ancillary orders.[171]

However, there are limitations on the rights of a creditor. A creditor in seeking to set aside a financial agreement under s 90K cannot rely on any grounds other than that specified in s 90K(1)(aa). The Full Court held that the primary judge did not err in concluding that Ms Bloomfield was only entitled to rely on the ground in s 90K(1)(aa) as the basis for her application to set aside the financial agreement, and in accordingly striking out the relevant parts of the initiating application and supporting statement of claim.[172]

B - Enforceability

1 *Gibbs & Gibbs [2015] FamCA 630*

In *Gibbs & Gibbs*,[173] Ms Gibbs had sought an order that a financial agreement dated 14 March 2005 and signed by the parties be set aside. This was a very short judgment of only 13 paragraphs given ex tempore in setting aside the agreement.

A Fourth Further Amended Response filed on behalf of Ms Gibbs contained a full particularisation of the many bases asserted to provide a basis for such a conclusion: included within which was that the agreement was void, voidable or unenforceable because of an uncertainty in its terms.[174]

Justice Hogan concluded it was clear from the terms of section 90K that the agreement may be set aside if, and only if, the court is satisfied of the relevant prerequisite, that is that the agreement is void, voidable or unenforceable.[175] In considering the agreement, Her Honour was not persuaded that the uncertainty of terms as expressed in the agreement

[171] Ibid [31], [46] and [57].
[172] Ibid [84]–[87].
[173] *Gibbs & Gibbs* [2015] FamCA 630.
[174] Ibid [2].
[175] Ibid [4].

touched only upon aspects or claims that could be severed so as to preserve the existence of the agreement.[176]

Her Honour was satisfied that other clauses which she referred to, were essential terms which were uncertain and that, in assessing them objectively, the language was so imprecise and incapable of definite or precise meaning that a court was unable to attribute to the parties any particular contractual intention in relation to them.[177]

An example was:

> [9] I think, instead, that essential terms (for example: matters such as "matrimonial property"; what happens to property acquired after marriage but before dissolution - to use only two examples) of the Agreement are vague.

2 *Garvey & Jess [2016] FamCA 445*

In *Garvey & Jess*,[178] a case that came before Carew J in the Family Court of Australia at Brisbane, the wife had filed a response to the husband's application in a case for enforcement of a financial agreement, in which she sought to dismiss the husband's application for enforcement.

The husband and wife married in 2006. On 3 August 2006, the parties entered into a deed signed by the wife on 27 July 2006 and by the husband on 3 August 2006. Each of the parties was legally represented at the time. The deed purported to be a financial agreement pursuant to section 90 B of the Act.

The husband had contended that the deed signed by the parties on 3 August 2006 was a financial agreement that is binding on the parties.

The wife had contended that the deed was void for uncertainty, and accordingly, the husband's application for enforcement should be dismissed.

The wife resisted enforcement of the agreement on the basis that there was never an agreement because the essential terms of the deed were uncertain. The wife argued that the deed at its best was an agreement to agree. Some of the arguments included that the definitions for each of the parties' assets do not allow the court to determine which assets form part of each defined group.

Carew J made some interesting observations about the powers of the court to order that a financial agreement is void for uncertainty:

> 15. Dr Brasch QC for the wife eschewed the need to rely upon s 90K or for an order that the deed is void for uncertainty pursuant to that section. Rather,

[176] Ibid [8].
[177] Ibid [11].
[178] *Garvey & Jess* [2016] FamCA 445.

it was argued that there never was a concluded agreement because the essential terms were uncertain or absent. Relying upon the comments made by Murphy J in *Fevia & Carmel-Fevia* (2009) FLC 93-411:

> 121. … That there must be an agreement before there can be a "financial agreement" is made clear by the definition of "financial agreement" in s 4 of the Act. The ordinary and natural meaning of "agreement" is, in my view, an agreement which is otherwise effective and enforceable at law. That this meaning of "agreement" is contemplated by the Act is, in my view, underscored by s 90K(1)(b) and s 90KA.

it is argued that the Application for enforcement should be dismissed, presumably by reference to general contractual principles applicable by virtue of s 90KA or more generally, rather than by making an order that the agreement is void pursuant to s 90K(1)(b).

16. Interestingly, the introductory part of s 90K(1) provides:

> A court may make an order setting aside a **financial agreement** … if, and only if, the court is satisfied that:
> (b) the agreement is void, ...
> [emphasis added]

which seems to presuppose the existence of a financial agreement because if there is no agreement, there is no financial agreement to set aside. (see *Ruane & Backman-Ruane and Anor* [2009] FamCA 1101 at [54])

17. The same could be said of s 90KA which provides:

> The question whether a **financial agreement** … is valid … is to be determined by the court according to the principles of law and equity that are applicable in determining the validity … of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:
>
> (a) Subject to paragraph (b), has the same powers, may grant the same remedies … as the High Court has, … in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdictions; and
>
> (b) Has power to make an order for the payment, … of interest … ; and
>
> (c) In addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

18. It is perhaps curious that the term '<u>purported</u> financial agreement' is not used in both ss 90K and 90KA in the same way the adjective is used in the first paragraph of ss 90KA and 90KA(a) where reference is made to 'purported contracts'.

Ultimately, Her Honour did not find it necessary to decide whether the wife's application should have been brought by reference to sections 90 K and/or 90 KA.

The wife argued that the alleged agreement and in particular 'the agreement to equally divide the joint assets is nothing more than an agreement to agree. The wife submitted that

what was needed to make the agreement binding was for there to be a 'meeting of minds' about how to give effect to the 'equal division'. The wife submitted that this could have been done by making provision for sale if agreement could not be reached, who was to keep which assets or class of assets and other things including how and what date to value the assets if agreement could not be reached as to their value.

Her Honour considered that the context financial agreements are entered into is important:

> 35. It is important, in my view, to have regard to the context in which agreements of this kind are entered into. They are not commercial agreements but arise as a result of a personal relationship which at the time of making is presumably a happy one. Parties to such agreements aim to avoid dispute as to how their assets should be divided if their relationship breaks down at some future time which may be decades away. The future circumstances of the parties cannot possibly be known at the time of entering into such an agreement.
>
> 36. In the circumstances of this case what is clear from the deed is that there was an intention by the parties *inter alia*:
>
> a) To create legal relations;
>
> b) To enter into a financial agreement that was binding within the meaning of the Act;
>
> c) To avoid all future dispute about the division of property upon the breakdown of their relationship;
>
> d) To each keep their own assets as defined in the deed;
>
> e) To share equally the joint assets as defined in the deed;
>
> f) To share equally any debt encumbering or incurred in acquiring the joint assets;
>
> g) That each be precluded from dealing with the joint assets upon the breakdown of the relationship pending division;
>
> h) That if they had children the deed would not prevent an application for spouse maintenance.

Ultimately, Her Honour concluded the deed was not void for uncertainty because it evinced an intention to be legally bound, oust the jurisdiction of the court under Part VIII, and to divide the assets in the proportion provided for in the deed. It was not 'an agreement to agree'.

Part VII - LIFESTYLE CLAUSES – ARE THEY IN OR ARE THEY OUT?

It is said that the biggest trend in prenuptial agreements are 'lifestyle' clauses that can put a restriction on everything from social media use to how often in-laws can visit. Apparently, they are on the rise.[179]

Some examples of this could include things as innocent as putting restriction on how much television you can watch, or what type. Seriously, you could be restricted from watching MasterChef. What couple does not have some disagreement about time spent on watching television?

Other examples of clauses might include:[180]

- *Sport watching*—This could be around how much a spouse could watch sport on TV.
- *Social media and other electronic amusements* — This could restrict how much time you spend on Facebook or whatever the latest social media fad might be. Texting, emailing and swiping can be very addictive. What about Pokemon Go?! It is more popular than Tinder apparently, whatever that is.
- *Infidelity* — What happens if you are unfaithful.
- *Baby payout* — How much money a spouse may collect for each child the parties have together. Could there be a penalty if a spouse party has a baby with someone else other than the spouse party to the agreement?
- *Sex frequency* — Once a week, twice a week or not at all? Would a jellybean jar be an appropriate accountability mechanism.
- *Children's education* — Now for something serious. Sometimes parties litigate about the choice of school for their children. Those public versus private debates in this type of dispute can be very damaging for the parties and the children. It would be of assistance that the parties discuss their expectations for their children. If there is one thing our judges hate and that is deciding choice of private school cases for middle-class parents.
- *Non-smoking* —One party smokes and the other does not. What are the grounds rules for smoking inside or outside the house.
- *Drugs* —About use of illicit drugs or non-prescription drugs

[179]Heather McKinnon, 'Locking in the terms of your love with lifestyle clauses' on *Slater + Gordon Lawyers Family Law* (13 May 2015) <https://www.slatergordon.com.au/blog/locking-terms-your-love-lifestyle-clauses> .

[180] Markham Heid, *The 10 Weirdest Prenuptial Agreements* (5 June 2014) <http://www.menshealth.com/sex-women/prenup-clauses>.

- *Weight* — Some couples might seek to put a limit on how much spouse weight a spouse can gain. Some might find such a concept offensive.

  It is suggested that a lifestyle agreement might be an addendum to a financial agreement.[181] That may re-enliven Lethbridge SC's concern about the inclusion of the word 'binding' as in Binding Financial Agreement.

Now for some law

In my view the issue that will arise in respect of lifestyle clauses will be that which arose in *Gibbs & Gibbs* [2015] FAMCA 630, that is the enforceability of so-called lifestyle clauses. That was the case referred to earlier where clauses in the agreement were found to be so vague as to not be enforceable. After all what would be the purpose of having lifestyle clauses in the agreement if they could not be enforced. There might be a legal risk that such clauses could not be severed from the agreement which might place at risk the whole of the agreement.

For the purpose of considering this issue as it might relate to a prenuptial agreement it is worthwhile considering the s 90B in full:

> **90B(1)** If:
>
> (a) people who are contemplating entering into a marriage with each other make a written agreement with respect to any of the matters mentioned in subsection (2); and
>
> (aa) at the time of the making of the agreement, the people are not the spouse parties to any other binding agreement (whether made under this section or section 90C or 90D) with respect to any of those matters; and
>
> (b) the agreement is expressed to be made under this section;
>
> the agreement is a ***financial agreement***. The people may make the financial agreement with one or more other people.
>
> (2) The matters referred to in paragraph (1)(a) are the following:
>
> (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with;
>
> (b) the maintenance of either of the spouse parties:

[181] Heather McKinnon, 'Locking in the terms of your love with lifestyle clauses' on *Slater + Gordon Lawyers Family Law* (13 May 2015) <https://www.slatergordon.com.au/blog/locking-terms-your-love-lifestyle-clauses> .

(i) during the marriage; or

(ii) after divorce; or

(iii) both during the marriage and after divorce.

(3) A financial agreement made as mentioned in subsection (1) may also contain:

(a) matters incidental or ancillary to those mentioned in subsection (2); and

(b) other matters.

The essence of a prenuptial agreement is to deal with the property of the parties and how that might be dealt with on the breakdown of their relationship and for maintenance. The section,[182] allows a financial agreement to deal with 'matters incidental or ancillary' to those matters. However, there is also the scope for 'other matters' to be dealt with. It will be a matter to wait and see whether a lifestyle clause may come within that section.

In my view based on the way the legislation is structured financial agreements are to deal with property and maintenance matters and not lifestyle.

It will be a matter for a court to determine whether such a clause in the nature of the lifestyle clause was intended to create legally binding relations and therefore be enforceable. In my view they are not. It boggles the mind to think how some of the lifestyle clauses referred to above might be enforced.

Overseas experience

I am indebted to Joleena Louis, Esq of Joleena Louis Law for her insights into the lifestyle clauses in New York.[183] Joleena advises that these clauses are rising in popularity and there has been an increase in clients asking for them. In New York where she practices, they are generally unenforceable. The most common clause requested is an infidelity clause. The problem with these clauses is the difficulty in proving infidelity and to define what it means. Is, for example, chatting with an old boyfriend on Facebook considered cheating?

However, lifestyle clauses could be good for clients. A couple may like to have 'the rules' in writing, even though they know it may not be enforceable in court.

[182] Section 90B(3).
[183] www.joleenalouislaw.com.

Part VIII - CASE REPORT - *PARKE & PARKE* [2015] FCCA 1692

Parke and Parke [2015] FCCA 1692, is a very interesting case that came before Judge Howard in the Federal Circuit Court and considered whether a financial agreement was a binding agreement and should be set aside. The grounds included:

- fraud
- unconscionable conduct
- undue influence
- uncertainty
- repudiation
- rescission

A - Background facts

The applicant husband was born in 1942 and the wife Ms Parke was born in 1948.

The parties had lived in a de facto relationship from 1974 until 1999. They separated in 1999. The parties had one adult child.

In 2001, the parties reconciled and later that year married.

The parties' marriage broke down irretrievably in 2013. The parties entered into a written agreement in 2001. In 2014, the applicant filed an initiating application seeking a declaration that the financial agreement was binding on the parties.

The court had been informed in September 2014 that the applicant was diagnosed with cancer and the parties sought a priority listing.

B - Points of claim

As part of the orders ahead of the trial consent orders had been made for the delivery of points of claim. The respondent was required to supply to the applicant full particulars in the form of points of claim of the matters she said should cause the agreement to be set aside.[184]

[184] *Parke and Parke* [2015] FCCA 1692 [8].

C - Wife's earlier property adjustment proceedings

In May 2001, the respondent wife had filed an application for adjustment of interests with respect to property under the *Property (Relationships) Act 1984* (NSW).[185]

Approximately one month after the respondent wife commenced the de facto property settlement proceedings the applicant approached the respondent to ask her if she would agree to reconciliation.[186]

The respondent gave evidence about the discussions in the lead up to the reconciliation saying that she would only reconcile if the parties were to be married. The applicant had asked if they were to separate after the marriage would she still agree to accept a furnished unit and a new car. She said that she would.

D - Put that in writing

The respondent recalled the applicant asking her if she was prepared to put that in writing. She said, 'You mean an agreement?' He replied, 'Yes'.[187] His Honour accepted that evidence. Later solicitors drafted an agreement. His Honour also accepted that the respondent's evidence was that she had no money and was worn out.[188]

Two days after the agreement was signed the parties married in 2001.[189] In the course of his decision His Honour set out the text of the agreement.[190]

His Honour then considered s 90G and when financial agreements are binding.[191] The formal requirements of s 90G of the Act appeared to have been met and the financial agreement was binding upon the parties unless the court concluded that the financial agreement should be set aside.[192]

E - Section 90K (1) (a) fraud alleged

His Honour then considered the circumstances in which the Court may set aside a financial agreement and sections 90K and 90 KA.[193]

[185] Ibid [18].
[186] Ibid [23].
[187] Ibid [24].
[188] Ibid [29].
[189] Ibid [33].
[190] Ibid [34]-[35].
[191] Ibid [40].
[192] Ibid[43].
[193] Ibid [44]-[45].

The respondent pleaded in paragraphs 22 and 23 of her points of claim that at the date of entering into the financial agreement the applicant had failed to disclose relevant property in which he had an interest. This included:[194]

- Interests of both the applicant and respondent in the Parke Superannuation Fund
- Shareholdings Assets of (business omitted) Pty Ltd
- Applicant's Personal Assets including Bank Cash Management Account and Shareholdings.

The elements of fraud were discussed and reference made to the comments of Murphy J in *Hoult v Hoult and Others* (2011) 48 Fam LR 475 (referred to earlier in Part IV, Section B).[195]

F - All or part of the property

His Honour noted that the Act allows the parties to make an agreement under s 90B with respect to all or any of their property. The agreement in its operative part did not indicate whether or not the parties were dealing with all of their property or some of their property.

His Honour suggested that to avoid that ambiguity or uncertainty part of the agreement could have included the clauses:[196]

> …that the parties agreed:
>
> (i) That pursuant to section 90B(2)(a) of the Family Law Act 1975 the parties agree that this agreement shall only operate with respect to such of Mr Parke's assets and resources as are listed in the first schedule;
>
> (ii) That Mr Parke is not obliged to list all of his assets and resources in Schedule 1.

As a result of that uncertainty His Honour considered it was necessary to have regard to the recitals in order to determine the true construction of the agreement.[197]

Interestingly, His Honour took the view that the parties did agree by recital to do a certain act namely as far as possible to contract out of the provisions of Part VIII of the *Family Law Act 1975.* If the parties had wanted to indicate a contrary intention they could have done so and could have indicated by including a clause in the operative part of the agreement which stated:[198]

[194] Ibid [47].
[195] Ibid [50]-[53].
[196] Ibid [64].
[197] Ibid [65].
[198] Ibid [70].

> The parties agree that this financial agreement shall only be operative in relation to some (not all) of the party's assets and the only assets affected by this agreement are those assets listed in schedules 1 and 2.

The agreement according to His Honour did not indicate a contrary intention.[199]

His Honour referred to the objective approach in relation to construction of contracts that permitted the court to have regard to the words in the recitals.[200]

His Honour therefore concluded that the parties in this case were obligated to provide a full list of assets and financial resources. His Honour's view being that—that is what a reasonable person in the position of the parties would have intended or assumed.[201]

G - Schedule one not complete

The list of property stated by the applicant in schedule one was not complete. The notice to admit facts and the applicant's response when read together confirmed that the parties were members of the Parke Superannuation Fund. The assets of that fund at 2001 had a total value of $253,537. The respondent was not able to list her interest in that fund because she was not aware that she had any entitlements until after the commencement of the proceedings.[202]

Furthermore, the applicant had some $14,380 in his bank account and shareholdings in his personal name. None of those assets were listed by the applicant in schedule one of the agreement.[203]

In addition, both the applicant and respondent held shares in Parke Pty Ltd. The assets of that company totalled approximately $170,400.[204]

His Honour took the view that non-disclosure or suppression of facts amounted to a misrepresentation. His Honour came to the conclusion that the applicant, in submitting a draft financial agreement to the respondent for her consideration that contained schedule one (a list of his assets) made a false representation to the respondent. He was representing that schedule one contained a list of all of his assets. That was untrue.[205]

His Honour then said:

> [81] In my view this non-disclosure or suppression of facts by the applicant amounts in this case to a misrepresentation (note per Gibbs CJ in Amadio's case at p 458 and per Strauss J in Suter's case at p 78,458 and note Cheshire

[199] Ibid[71].
[200] Ibid [72] citing *Byrnes and Another v Kendle* (2011) 243 CLR 253 [100].
[201] *Parke and Parke* [2015] FCCA 1692 [73].
[202] Ibid [74].
[203] Ibid [76].
[204] Ibid [77].
[205] Ibid [80].

> and Fifoot Law of Contract at para 1.80). I note what Murphy J had to say in Hoult & Hoult [2011] FamCA 1023. His Honour noted:--
>
> > It might be argued ... that agreements that satisfy a definition within the Act ought to embrace a fundamental principle enshrined in this Court's Rules made pursuant to the same Act, namely the duty of full and frank disclosure. But, rather than leave that issue for argument, the Act has made the position clear by the specifying that fraud for the purposes of section 90K(1)(a) can be constituted by material non-disclosure.
>
> [82] That is not to say that material non-disclosure is fraudulent "per se" (note Murphy J in para 125 of Hoult & Hoult [2011] FamCA 1023). But, in this case, I have also come to the conclusion that the applicant knew that the representation that he made was false. He knew that he had not provided a full list of his assets. At the very least he was reckless as to the truth or falsity of the list. That is, he was recklessly careless as to whether or not the list was a full list of his assets.

His Honour concluded that there was an inevitable inference that the applicant had failed to make full and frank disclosure of relevant documentation during the course of the litigation. It led to the additional inference, namely that the applicant failed to make full and frank disclosure of the documents relating to the superannuation fund because he did not want those documents to be brought out into the light of day and examined by the court. All these findings led weight to the conclusion which His Honour reached, namely that the applicant knowingly failed to disclose a full list of his own assets. Further, he knowingly failed to disclose to the respondent the extent of his entitlement in the superannuation fund and also the extent of entitlements in the company known as Parke Pty Ltd.[206]

The evidence also led to an inference the applicant knowingly withheld information concerning the superannuation fund because he saw no need to make the respondent aware of the existence of the fund. His Honour found that the applicant did intend to deceive the respondent. His view was, all along, that any of the assets he had built up during the 25 year de facto relationship were his assets alone and the respondent was not entitled to anything. He stated as much to the respondent.[207]

Other matters for consideration were the evidence of a document examiner called in the case, Mr J. There were serious allegations against the applicant. The respondent alleged that the applicant forged her signature and essentially asked the court to infer that the applicant took for himself or in some other way utilised (without permission) the respondent's financial entitlement as a member of the superannuation fund.[208] After considering the evidence, His Honour came to the conclusion on the balance of probabilities (noting section 140 of the *Evidence Act* (Cth)) that the applicant did indeed forge the respondents signature.[209]

[206] Ibid [88].
[207] Ibid [89].
[208] Ibid [92].
[209] Ibid [108].

The parties were given an opportunity to consider making a submission to the court in relation to whether those issues should be referred to the appropriate authorities.[210]

Inducement

His Honour then considered the aspect of inducement.

There were no written submissions provided on behalf of the respondent in relation to the question of inducement. Neither inducement nor reliance had been pleaded. His Honour was not taken to any evidence of the respondent from which it could be inferred that, the respondent would not have entered into the contract if she had been told with certainty that the applicant had failed to disclose all of his assets or the value of his undisclosed assets was significant. Notwithstanding the absence of a specific pleading or specific submission, His Honour was compelled to consider those matters in any event. This was a similar approach to the approach taken by Murphy J *Hoult v Hoult and Others* (2011) 48 Fam LR 475 [115].[211]

H - Unconscionable Conduct

His Honour then dealt with unconscionable conduct pursuant to section 90K (1) (b) and section 90K (1) (e). The wife set out her pleading in her points of claim after noting that the parties had lived together in a de facto relationship approximately 25 years and then separated before entering into the financial agreement and subsequently marrying.

The respondent's points of claim and her written submissions outlined a case based on unconscionable dealing by the applicant husband.[212]

His Honour then dealt with the authority of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and considered whether the respondent was at a special disadvantage in dealing with the applicant at the time of the transaction. And further whether by virtue of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affected (her) ability to conserve (her) interests and whether the applicant took advantage of the opportunity that was placed in to his hands.[213]

His Honour found:

> [135] The evidence in this case establishes that, during the course of the 25 year de facto relationship the respondent had been subjected to many years of verbal and physical abuse at the hands of the applicant. The party's son, X, witnessed both the verbal and physical abuse by the applicant (husband) towards the respondent (wife). I accept the evidence of the respondent and of X in relation to all of these issues. The applicant denied physical abuse. I reject the applicant's evidence in that regard. The applicant is lying to the court in

[210] Ibid[109].
[211] Ibid[114]-[115].
[212] Ibid[128].
[213] Ibid [132].

> relation to that issue. I have come to that conclusion because I was particularly impressed with the evidence of X. X gave his evidence in a clear, unequivocal and confident manner. Further, the respondent has provided a significant amount of detail in relation to the physical abuse perpetrated against her by the applicant. I note para 24 of the respondent's trial affidavit filed 27 February 2015. The respondent states:--
>
> > The first time the Husband was physically abusive towards me was when I was pregnant with X. Up until that time, the Husband had been verbally abusive towards me if I upset him in any way. He always managed to convince me that it was my fault, because I had either talked over the top of him or had not done something the way he liked. He would then say he was sorry and be affectionate towards me after the event, and I would forgive him and try hard not to upset him. There were numerous episodes of abuse after that time, with the Husband at various times slapping me across the face; pushing me up against the wall; grabbing me by the throat; and, on one occasion, tipping a carton of milk over my head just prior to me leaving for work. I did not previously report these acts to the Police and would not have reported the incident which was the subject of the Apprehended Personal Violence Order in February 1999 had not my friend, Ms M, been a witness to that act when she, too, was assaulted by the Husband
>
> I accept the evidence of the respondent contained in para 24 of her affidavit. I also accept that she decided to make a complaint at the police station at the insistence of her friend Ms M. Further, I accept the respondent's evidence that after the making of the Domestic Violence Order the respondent became involved in a support group for victims of domestic violence and attended several courses to assist her in understanding domestic violence.

The applicant had conceded that he verbally abused the respondent and the court accepted the evidence of the respondent that she was subjected to years of repeated derogatory taunts at the hands of the applicant. These derogatory taunts occurred both in private and in front of third parties. The applicant would tell the respondent that she was 'fat' , or 'useless', or 'ugly', or 'lazy'.[214]

As referred to earlier when the applicant became aware that the respondent was intending to file court proceedings and seek a property settlement he sought reconciliation with the respondent. The respondent was at the time she entered into the financial agreement focusing very much on securing her financial future and securing protection from the physical emotional and financial abuse that had been perpetrated by the applicant.

There was no explanation from the applicant how it could possibly be the case, that on the one hand, he had sworn on oath and evidence before the court that he did not physically abuse the respondent but on the other hand offered no explanation as to why he signed a financial agreement which included a recital D, a specific phrase to the effect that the respondent was seeking an end to physical, emotional and financial abuse. His Honour found

[214] Ibid [136].

that the applicant lied to the court in relation to physical abuse perpetrated by him against the respondent.[215]

His Honour concluded that at the time of entry into the financial agreement the respondent was 53 years old, with no qualifications, no job, and no access to any financial resources other than minimal savings. She had lived for two and a half years with no financial security and very little income and had been, over a long period of time, a victim of significant domestic violence at the hands of the applicant. His Honour found that it was crucial to note that the person who held the immediate key to the respondent's financial security for the future was the same person (namely the applicant) who had perpetrated over a very long period of time the physical, emotional and financial abuse against the respondent.[216]

His Honour found that his conclusion that the applicant engaged in unconscionable conduct at the time the transaction was entered into was reinforced by earlier findings that he made to the effect that the applicant by concealing the respondent's interest in the Parke Superannuation Fund, deprived her of the knowledge that she has significant entitlements sitting in that superannuation fund. If the respondent had that knowledge at the time it is possible she may not have felt that she was in such a vulnerable financial position. The applicant by his conduct deprived the respondent of that knowledge.[217]

The court concluded the respondent was in a position of special disadvantage that did seriously affect her ability to make a judgement as to her own interests [Per Mason J in *Amadio's Case* (1983) 151 CLR 447, 462]. The respondent in this case was at a special disadvantage in dealing with the applicant because of her financial needs. This affected her ability to conserve her own interests and the applicant, unconscientiously took advantage of the opportunity thus placed in his hands.

The applicant knew of the respondent's financial vulnerability and insecurity. The applicant is the person who was responsible for placing the respondent in the position of special disadvantage. His Honour found the financial agreement should be set aside either under section 90 K (1)(b) and/or section 90 K(1)(e), because the applicant engaged in unconscionable conduct in respect of the making of the financial agreement.[218]

[215] Ibid [143].
[216] Ibid [144].
[217] Ibid [147].
[218] Ibid [148].

I - Undue influence

The respondent did not plead a case based on undue influence or make any submissions based on undue influence

Because the Federal Circuit Court is not a pleadings court, His Honour also felt compelled to give consideration to the possibility, given the absence of a pleading or submission on the point that the transaction could be found to be void, voidable and/or set aside on the basis that one party (namely the applicant) exerted undue influence over the other party at the time the transaction was entered into.[219] His Honour reviewed the authorities including: *Johnson v Buttress* (1936) 56 CLR 113*; Yerkey v Jones* (1939) 63 CLR 649; *Hoult v Hoult and Others* (2011) 48 Fam LR 475 and *Saintclaire & Saintclaire* [2013] FAMCA 491.

However, because the respondent did not plead undue influence nor were any submissions made, and the applicant was not given an opportunity to meet a case based on undue influence His Honour concluded that it would be wrong for the court to come to a conclusion that undue influence existed. This is on the basis that the applicant had not been heard on undue influence.[220]

[219] Ibid [150].
[220] Ibid [164].

Part IX - BIBLIOGRAPHY

A - Articles/Books/Reports

Heather McKinnon, 'Locking in the terms of your love with lifestyle clauses' on *Slater + Gordon Lawyers Family Law* (13 May 2015) <https://www.slatergordon.com.au/blog/locking-terms-your-love-lifestyle-clauses>

Hon Justice Paul Brereton, 'Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements' (2013) 23(2) *Australian Family Lawyer* 31

J D Heydon, 'Equitable compensation for undue influence' (1997) 113 *Law Quarterly Review* 8

James Gerrard, 'Working out a "Prenup" proves a capital idea', *The Weekend Australian* (2-3 April 2016), 33

JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's* Equity: Doctrines & Remedies (LexisNexis Butterworths, 5th ed. 2015)

John Wade, 'The Perils of Financial Agreements: Effectiveness and Professional Negligence', 22 (3) *Australian Family Lawyer* 24

JW Carter, *Carters Guide Australian Contract Law* (Lexis Nexis Butterworths, 2nd ed. 2011)

JW Carter, *Contract law in Australia* (Lexis Nexis Butterworths, 6th ed. 2013)

Markham Heid, *The 10 Weirdest Prenuptial Agreements* (5 June 2014) <http://www.menshealth.com/sex-women/prenup-clauses>

Robert Lethbridge SC, 'Binding or Bound to Fail? Remedies and rectification of financial agreements'

RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's* Equity, Doctrines and Remedies (Butterworths LexisNexis 4th ed. 2002)

W Covell, K Lupton and J Forder, *Covell Lupton Principles of Remedies* (Lexis Nexis Butterworths, 6th ed. 2015)

William Shakespeare, 'The Tragedy of Hamlet, Prince of Denmark' (The Folger Shakespeare Library, 1992), Act 3 Sc 1

B - Cases

Byrnes and Another v Kendle (2011) 243 CLR 253

Commercial Banking Co of Sydney Ltd v RH Brown & Co (1972) 126 CLR 337

Earl of Chesterfield and Others v Janssen (1751) 2 Ves Sen 125, 28 ER 82

Fewster & Drake [2016] FamCAFC 214

Fewster v Drake [2015] FamCA 602

Garvey & Jess [2016] FamCA 445

Gibbs & Gibbs [2015] FamCA 630

Gould v Vaggelas (1985) 157 CLR 215

Grainger v Bloomfield and Another (2015) 304 FLR 351

Gregory & Gregory [2014] FCCA 106

Henthorn v Fraser [1892] 2 Ch 27

Hoult v Hoult (2012) 48 Fam LR 507

Hoult v Hoult (2013) 276 FLR 412

Hoult v Hoult and Others (2011) 48 Fam LR 475

Johnson v Buttress (1936) 56 CLR 113

Kennedy & Thorne [2016] FamCAFC 189

Louth v Diprose (1992) 175 CLR 621

Mahoney v Purnell [1996] 3 All ER 31

Manner v Manner [2015] FCCA 3043

Parke and Parke [2015] FCCA 1692

Phak & Xu [2015] FamCA 939

Piper v Mueller [2014] FCCA 2659

Raleigh & Raleigh [2015] FamCA 625

Reed v Reed (2016) 310 FLR 31

Saintclaire & Saintclaire [2013] FamCA 491

Sanger v Sanger (2011) 254 FLR 275

Senior v Anderson (2011) 250 FLR 444

Smith v Glegg [2005] 1 Qd R 561

Sullivan & Sullivan (2011) 268 FLR 328

Thorne & Kennedy [2015] FCCA 484

Thorne v Kennedy [2017] HCA 49

Watkins v Combes (1922) 30 CLR 180

Wood v Grover [2015] FCCA 951

Yerkey v Jones (1939) 63 CLR 649

Fewster v Drake [2015] FamCAFC 198

Saintclaire & Saintclaire (2015) FLC ¶93-684

C - Legislation

Family Law Act 1975 (Cth)

Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

Federal Court Rules 2011