

Financial Agreements

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Overview: What will we discuss

- ▶ The decision of *Orwin v Rickards* [2019] VSC 375 (Osborn JA)
 - ▶ *Note: Appeal to the Court of Appeal pending*
- ▶ Considerations arising from *Orwin*:
 - ▶ Risk and negligence claims
 - ▶ The approach to drafting financial agreements
- ▶ Drafting Financial Agreements:
 - ▶ Suggested Approach
 - ▶ Illustrative Hypothetical
- ▶ The decision of *Jess & Garvey* [2018] FamCAFC 44 (Thackray, Strickland and Murphy JJ)
- ▶ Considerations arising from *Jess & Garvey* regarding:
 - ▶ Litigating applications to set aside financial agreements
 - ▶ Estoppel and Res Judicata

Key Decisions

- ▶ For the purposes of today's seminar an understanding of the relevant provisions of the *Family Law Act 1975* (Cth) and following decisions is presumed (noting this is not an exhaustive list):

Decision	Relevance
<i>Australian Securities and Investment Commission & Rich</i> (2003) FLC 93-171	Financial Agreements may be contracts and enforced in accordance with the law of contract
<i>Black & Black</i> (2008) FLC 93-357	Strict interpretation of Section 90G, resulted in amendments to Section 90G
<i>Ruane & Bachman-Ruane & Ors</i> (2009) FamCA 1101	Requirement for the statement of independent legal advice to be executed by an Australian Legal Practitioner, and reasoning about requirements for advice pursuant to section 90G
<i>Fevia & Carmel-Fevia</i> (2009) FLC 93-411	Discussion of what is a financial agreement and effect of section 90G, equity and s 90KA and estoppel
<i>Senior & Anderson</i> (2011) FLC 93-470 (see also <i>Parker & Parker</i> (2012) FLC 93-499, <i>Wallace & Stelzer</i> (2013) FLC 93-566, <i>Weldon & Asher</i> (2014) FLC 93-579)	Discussed the definition of what is a financial agreement and when is a financial agreement is binding, discussed section 90G and its transitional forms

Key Decisions (cont.)

Decision	Relevance
<i>Sullivan & Sullivan</i> [2011] FamCA 752	Mistake, intention and rectification
<i>Piper & Mueller</i> [2015] FamCAFC 241 (see also <i>Cording & Oster</i> [2010] FamCA 511)	A document may contain more than one agreement, a financial agreement may be made under Part VIIIA and Part VIIIAB
<i>Parker & Parker</i> (2012) FLC 93-499	Considered the correct interpretation of sub-section 90G(1A)(c)
<i>Hoult & Hoult</i> (2013) FLC 93-546	Discussion onus of proof regarding legal advice and evidentiary status of statements of legal advice (see the dissenting judgment of Thackray J)
<i>Wallace & Stelzer</i> (2013) FLC 93-566 (followed on from <i>Senior & Anderson</i> re: the interpretation of the transitional provisions)	Advice per section 90G must be provided, statement can be relied upon as evidence each party received legal advice
<i>Bilal & Omar</i> (2015) FLC 93-566	Full Court upheld <i>Wallace & Stelzer</i>

Key Decision (cont.)

Decision	Relevance
<i>Ruane & Bachman-Ruane</i> [2012] FamCA 369	Accrued jurisdiction attracted and claim for negligence / breach of duty in relation to the wife's solicitors to be heard and determined with property settlement proceedings
<i>Noll & Noll</i> (2013) FLC 93-529	Accrued jurisdiction not attracted to hear the claim for negligence / breach of duty against the wife's solicitors
<i>F Firm & Ruane & Ors</i> (2014) FLC 93-611	Dismissal of wife's solicitors' application to join as a party to the property proceedings after the financial agreement was set aside
<i>Thorne v Kennedy</i> (2017) 350 ALR 1	The High Court determined that the wife was deprived of the ability to freely choose to execute the agreements, as her will was subordinated to the will of her fiancé / husband, due to undue influence (as opposed to duress which requires a positive finding that the pressure exerted was improper or illegitimate and was exerted by the fiancé/ husband)

Orwin v Rickards

- ▶ Claim against solicitor arising out of a defective financial agreement
- ▶ Key issues arising from the decision:
 - ▶ Degree of protection provided by engaging counsel to draft and settle agreements
 - ▶ Drafting and negotiating agreements and clarification of client's instructions
 - ▶ Limitation periods (negligence & contract claims, breach of duty of care & breach of contract)
 - ▶ Wording of Section 90UC and the limits to exclusion of property and financial resources
 - ▶ Application of *Thorne & Kennedy* by Osborn JA

Orwin v Rickards (cont.) - Facts

- ▶ October 2009 - de facto wife (Ms Orwin (“Orwin”) a barrister) engaged a solicitor (Mr Rickards (“Rickards”)) to prepare a de facto financial agreement with the de facto husband (Mr Sarah (“Sarah”))
- ▶ Orwin’s instructions were the parties were living in the same residence but not in a de facto relationship
- ▶ December 2009 - Rickards briefed a barrister to draft and advise Orwin in relation to the agreement
- ▶ 12 March 2010 - the final version of the agreement was executed by Orwin and Rickards
- ▶ Sarah required the final version to record that he and Orwin were in a de facto relationship at the time of the execution of the agreement, Orwin agreed to this
- ▶ The parties separated - there was / is a dispute about the date of separation
- ▶ March 2015 - Sarah issued financial proceedings in the Federal Circuit Court, he sought to set aside the agreement
- ▶ Orwin initially opposed this application, however, her counsel conceded the agreement was invalid as it was made pursuant to the *Relationships Act 2008* (Vic)
- ▶ Orwin paid Sarah \$550,000 and forgave a small debt by way of property settlement

Orwin v Rickards (cont.) - Facts

- ▶ Orwin filed a claim against Rickards for breach of duty and breach of contract in the Supreme Court in 2017
- ▶ Osborn JA determined:
 - ▶ Orwin's claim was statute barred
 - ▶ Orwin's claim failed as she had not established she and Sarah were in a de facto relationship on 12 March 2010 (i.e. she could not establish s 90UC applied to her situation)
 - ▶ If incorrect on the two points above, then His Honour would uphold the claim in relation to breach of duty and award Orwin 30.7% of the amount paid to Sarah (i.e. 30.7% of the \$555,000)

Orwin v Rickards - Reasoning

- ▶ The Agreement:
 - ▶ Was made pursuant to *Relationships Act 2008* (Vic)
 - ▶ Provided for Orwin to retain all of the real properties and assets other than one real property to be retained by Sarah
 - ▶ Did not identify the property Orwin anticipated she would inherit from her mother
- ▶ Osborn JA concluded the agreement was incomplete and not capable of rectification (at [38] and [39])
- ▶ Regarding the application of *Limitation of Actions Act 1958* (Vic):
 - ▶ Osborn JA at [53] to [60] applied the reasoning in *Burton v Thom* [2009] 1 NZLR 437 which held that the “*actual damage or harm... was suffered by the plaintiff from the moment the defective prenuptial agreement came into existence*”
 - ▶ Osborn JA held that Orwin’s loss crystallised in 2010, stating “*...it is plain the loss in issue was suffered in 2010. It follows that the plaintiff’s claim as a whole is statute barred.*”

Orwin v Rickards - Reasoning

- ▶ Osborn JA concluded:
 - ▶ At [162] that he was not persuaded that the parties were in a de facto relationship as at 12 March 2010
 - ▶ At [169] that Rickards had a duty of care to take reasonable steps to ensure that the amendments to the agreement, which asserted a continuation of the de facto relationship, did not affect its validity, and there was a breach of that duty due to his failure to address this issue
- ▶ At [170] to [176] Osborn JA detailed his conclusions on this point:

“Once the terms of the financial agreement were amended on instructions to record a continuing relationship at the time of the financial agreement, however, then the financial agreement was not in an appropriate form and had to be substantially amended to comply with s 90UC.

Mr Rickards cannot rely upon the fact that he sought the advice of counsel to discharge his duty of care because the draft financial agreement settled by counsel recited and the instructions otherwise given to counsel were, that the de facto relationship had ended. Hence s 90UC had no application. Counsel who was briefed to advise emphasised the significance of the termination of the relationship by advising that the financial agreement must recite the date on which the relationship ended.”

Orwin v Rickards - Reasoning

- ▶ Orwin's mother died in December 2011. She inherited property.
- ▶ At [230] Osborn JA stated the “*agreement could not have prevented a claim with respect to property inherited from Ms Orwin's mother after the de facto relationship terminated.*”
- ▶ The reasoning above refers to the wording of Section 90UC(2)(a) which states:
 - (2) *The matters referred to in paragraph (1)(a) are the following:*
 - (a) *how all or any of the:*
 - (i) *property; or*
 - (ii) *financial resources;*
 - of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;*

Orwin v Rickards - Reasoning

- ▶ At [221] to [228] Osborn JA discussed the decision of *Thorne v Kennedy* (2017) 350 ALR 1
- ▶ Osborn JA concluded:
 - ▶ Orwin was in a position of financial dominance compared to Sarah
 - ▶ Orwin was not a reliable witness
 - ▶ The terms of the Agreement, and the evidence as a whole, inferred the benefit to Sarah was grossly inadequate “*that fact may itself be regarded as an indicator of undue influence*”
 - ▶ On the basis of the above His Honour concluded there was a 20% risk the hypothetical section 90UC financial agreement would be set aside for undue influence

Orwin v Rickards - Considerations

- ▶ Ensure financial agreements are drafted in accordance with the Act and with accuracy considering your client's instructions (i.e. disputes about the date of separation are of significance and should be accurately recorded)
- ▶ If agreements are to be made pursuant to section 90UB, 90UC, 90B or 90C ensure that you advise on what property and financial resources are able to be encompassed by the agreement and the limitation of agreements in that context as an asset protection mechanism
- ▶ If the agreement is materially unfair to the other party, ensure your client understands that even if the agreement is executed it may be set aside by a Court if it does not meet the *Thorne v Kennedy* test
- ▶ If counsel is engaged to draft or settle a financial agreement, ensure that counsel's advice is adopted and that it extends to the finalised version of the agreement
- ▶ In relation to limitation periods, if acting for a client who elects to bring a claim against the solicitor who drafted the agreement, ensure that claim is filed as a matter of urgency in the appropriate forum

Drafting Financial Agreements

- ▶ Consider:
 - ▶ Who are you acting for?
 - ▶ What is your client attempting to achieve with the agreement?
 - ▶ Is a financial agreement the best option?
 - ▶ Are there limitations or difficulties which will arise in drafting, negotiation and finalisation of the agreement?
 - ▶ How do you propose to address those limitations / difficulties?
- ▶ If a Financial Agreement is the best option then consider:
 - ▶ Your instructions - to define the terms of the agreement
 - ▶ The Act - to ensure that each statutory requirement is complied with
 - ▶ Does the finalised agreement do what it is intended to do? (i.e. ensure there is no uncertainty or matters which are not addressed)

Drafting Financial Agreements - the Act

- ▶ Approach drafting by considering the framework of the Act:
 - ▶ Sections 71A and 90SA only preclude the application of the Act to the subject matter of binding financial agreements
 - ▶ Ensure the Agreement encompasses what your client intends to be excluded from the jurisdiction of the Courts
 - ▶ Consider the requirements of either Part VIIIA or Part VIIIAB

Part VIIIA	Part VIIIAB
ss 90B, 90C, 90D and requirements	ss 90UB, 90UC, 90UD (& 90UA residency) requirements
s 90DA - separation declarations	s 90UF - separation declarations
s 90E - maintenance, amount and value attributable	s 90UH - maintenance, amount and value attributable
s 90F - income tested pension	s 90UI - income tested pension

Advice on Financial Agreements

- ▶ Sections 90G and 90UJ set out the advice required to be given before parties enter into financial agreements
- ▶ The authorities establish that the advice given need not be accurate or accepted (however, that will not prevent a future negligence or contractual claim as is clear in *Orwin v Rickards*)
- ▶ As the case law is ever changing it would be prudent to:
 - ▶ Properly advise your client as required by the Act about the required matters, including the risks and limitations of the particular agreement; and
 - ▶ Then consider if your advice meets the minimum requirement that equity requires of “independent legal advice”, which is:
 - ▶ Advice that explains the real effect of any document on the party’s rights and position: *Wills v Baron* [1902] AC 271;
 - ▶ A requirement that the client understands the nature and consequences of the act and the consequences of that act: *Re: Coomber* (1911) 1 Ch 723

Terms of Financial Agreements & Non-Disclosure

- ▶ Terms must be sufficiently certain, and able to be implemented, to avoid being set aside under section 90K and 90UM
- ▶ Agreements must not defeat the claims of creditors or the interest of a third party with a claim under section 79 or 90SM
- ▶ Agreements must not be obtained by unconscionable conduct, undue influence or fraud
- ▶ Consider sections 90K / 90UM and 90KA / 90UN:
 - ▶ Statutory Fraud is broader than common law fraud (see *Green & Kwiatek* (1982) FLC 91-259)
 - ▶ Equitable fraud, unlike statutory and common law fraud, does not require an intention to deceive, negligent or reckless non-disclosure is sufficient (see *Bromley v Ryan* (1956) 99 CLR 362 at 415)

Hypothetical

- ▶ Bonnie Inheritress, comes to see you, she asks that you prepare a de facto cohabitation agreement with her de facto, Barry Penniless
- ▶ Bonnie's instructions:
 - ▶ She has significant assets, property and financial resources;
 - ▶ She has no siblings;
 - ▶ She earns about \$100,000 per annum as an interior designer and is 28 years old;
 - ▶ Her parents also have substantial assets, property and financial resources which she will receive when her parents pass away;
 - ▶ She has been living with her de facto, Barry Penniless, for 5 months;
 - ▶ Barry moved into her property in South Yarra, he does not contribute to the outgoings on the property but pays for half of the groceries;
 - ▶ Bonnie and Barry do not have any joint bank accounts;
 - ▶ Barry has no assets and some personal credit card debts;
 - ▶ Barry is a student studying business management. He works as a personal trainer earning \$20,000 per annum. He is 25 years old;
 - ▶ Bonnie says she and Barry might marry but have not really discussed marriage or children;
 - ▶ Bonnie's parents (and their family accountant) are insisting she have a financial agreement prepared for Barry to sign, but they don't want Barry to be provided with the various trust deeds of which Bonnie is a beneficiary; and
 - ▶ Bonnie wants the agreement to provide for her to retain her assets, property, financial resources and any thing she will be gifted or inherit in the future to the exclusion of Barry, and for Barry to retain what he has (mostly debt) and she does not want to pay him anything if they break up.

Hypothetical

- ▶ How would you advise Bonnie?
- ▶ How would you approach the preparation of the financial agreement?
- ▶ Consider:
 - ▶ Appropriate section?
 - ▶ What assets, property and financial resources can be dealt with by the agreement?
 - ▶ Maintenance?
 - ▶ Disclosure?
 - ▶ Other considerations?

Jess & Garvey [2018] FamCAFC 44

- ▶ Carew J summarily dismissed the Wife's second application to set aside a financial agreement
- ▶ On Appeal the Full Court upheld the decision of Carew J
- ▶ Special Leave to the High Court of Australia has been refused
- ▶ Facts:
 - ▶ 9 year marriage, two children, s 90B Financial Agreement dated 3 August 2006
 - ▶ The Husband filed an application in March 2016 seeking to enforce the agreement
 - ▶ The Wife filed a response in April 2016 seeking Orders based on the agreement being uncertain but otherwise the enforcement of the agreement and an equal division of any assets not encompassed by the agreement
 - ▶ Carew J determined the agreement was enforceable in May 2016
 - ▶ The Wife filed a second application seeking to set aside the financial agreement based on "*a material change in circumstances resulting in hardship, unconscionability, material non-disclosure, no agreement at law as it was abandoned, and was a sham*"
 - ▶ Carew J summarily dismissed the second application

Jess & Garvey

- ▶ Carew J relied on and applied the principle in *Henderson v Henderson* (1843) 67 ER 313 at 319, and approved by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 to dismiss the Wife's second application, which states:

“... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Jess & Garvey

- ▶ The Wife's appeal contended Carew J's approach was in error as an Anshun estoppel could not apply in interlocutory proceedings, and there was a "real question to be tried" in the Wife's second application, on different grounds not pressed in her first application
- ▶ The Full Court determined that the Wife's Appeal had no merit (see paragraphs [120] to [133] and discussed cause of action estoppel, issue estoppel, and Anshun estoppel)

123. *Thus, it was not open to the wife to subsequently pursue a claim to set aside the agreement for reasons that could, and should have been put before the court previously, in the context of determining the issue of enforceability.*

Jess & Garvey

124. In other words, although the proceedings may not have been finalised by her Honour's order of 7 June 2016 because it was then a matter of how the agreement would be enforced, the question of the enforceability of the agreement was finally determined by her Honour's order dismissing the wife's response, and the wife was estopped from subsequently bringing proceedings which challenged that enforceability via claims based on s 90K (and/or s 90KA) of the Act. Indeed, her Honour was correct in applying the Anshun principle here, and we are not persuaded that her Honour erred in finding that the wife was estopped from bringing the further proceedings.

125. Although there were distinct causes of action, that masks what in fact was the outcome of the first action. To repeat, the issue before the court was whether the agreement should be enforced, and the wife had been put on notice by the husband that she should bring forward all arguments that went to that issue, and plainly that would include any claim to set aside the agreement pursuant to s 90K (and/or s 90KA). The court had also ordered that the wife respond to the application for enforcement, and the wife clearly had the opportunity to present all arguments as to why the agreement should not be enforced. Nevertheless, she chose to limit her challenge to a claim that the agreement was void for uncertainty, and to repeat, she went further and set out how the agreement should be enforced if it was not void for uncertainty. Moreover, as referred to above, shortly after filing her response the wife filed an Initiating Application predicated upon the financial agreement being enforceable and seeking an adjustment of any property of the parties not caught by the financial agreement.

Jess & Garvey - Considerations

- ▶ If acting for a party seeking to set aside a financial agreement:
 - ▶ Set out all possible grounds in the application clearly and press those grounds from the outset
 - ▶ Obtain all necessary evidence to support the application (i.e. the former solicitors file)
 - ▶ Remember to file any necessary claim or application in relation to the solicitor who drafted the initial agreement for breach of duty and / or breach of contract
- ▶ Useful discussion of estoppel (see paragraphs [125] to [129])

Questions?