

Binding Financial Agreements: Do the reforms make any difference?

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About the Presenter

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In 2001 he left his then position as a Director of national law firm Gadens Lawyers, and moved to the Blue Mountains where he became Principal Solicitor at Elizabeth Evatt Community Legal Centre, a non-government organisation that predominantly provided family law advice across the Bathurst, Oberon, Mudgee, Greater Lithgow and Blue Mountains regions.

In addition to his strong credentials in family and commercial law, Mark holds a Postgraduate Diploma of Psychology from Charles Sturt University, and has taught interpersonal skills to a variety of groups including lawyers, community welfare students, and special needs teachers.

His recent published journal articles have focussed on Binding Financial Agreements, family dispute resolution and human rights law.

Binding Financial Agreements: Do the reforms make any difference?¹

*Lasciate ogne speranza, voi ch'intrate*²
Dante Alighieri, *La Divina Commedia*, Canto III, 9

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Introduction

Financial agreements as we currently know them have been around since the *Family Law Amendment Act 2000* introduced Part VIIIA into the *Family Law Act 1975* ('FLA') and abolished the old ss 86 and 87 Maintenance Agreements. Since that time there have continued to be significant changes to the law in this area, including the 2009 introduction of Division 4 Part VIIIAB of the FLA, which extended the financial agreement regime to de facto couples.

Whether made under Part VIIIA or Division 4 of Part VIIIAB, the intent of the legislature has been to enable parties to enter into agreements resolving financial and other issues in their relationships such that the adjustive jurisdiction of the Court is displaced (s71A(1) and s90SA(1)). However, if one thing has become clear over the past 9 or so years, it is that there is a significant tension between the desire of Parliament to make available an accessible, enforceable, non-Court dependent avenue for couples to agree on financial issues at all stages of their relationship on the one hand, and on the other hand the firm resolve of the judiciary to preserve, other than in very limited circumstances, those same people's rights to seek orders under the FLA.

Caught between the intention of Parliament, the expectation of the public and the caution of the Family Court is the family law practitioner and his or her insurer.

The purpose of this paper is twofold: to provide an introduction to the current requirements for binding financial agreements, and to examine briefly the Full Court's recent decision in *Kostres & Kostres* [2009] FLC ¶93-420, which casts an unnerving shadow over the reliability of financial agreements under the FLA.

¹ The contents of this paper are not intended to constitute legal advice and are not to be used or relied upon as such. Legal practitioners and parties to agreements should form their own views as to the matters contained in Parts VIIIA and VIIIAB of the *Family Law Act 1975*.

² Loosely translated as 'Abandon all hope, ye who enter here.'

Why a Binding Financial Agreement ('BFA')?

Leaving aside the problems of form, content and enforceability that will be dealt with below, there are several good reasons why parties might be attracted to the idea of using a BFA.

Perhaps the most obvious reason was referred to in the explanatory memorandum to the *Family Law Amendment Bill 1999* (Cth):

Currently, under the Act people can make 'pre-nuptial' and 'post-nuptial' settlements about their properties. In recent years the use of these has been limited because they are not binding and the court is able to exercise its discretion over property with which these settlements deal.

Particularly for people entering into second marriages or de facto relationships, or relationships where one party has significantly greater economic resources than the other, there is often a desire to protect those resources from, say, an order under s79 of the FLA in the event of a breakdown of the relationship, whether to preserve them for the children of a previous relationship or otherwise.

In addition, some parties are keen to find a means of settling their end-of-relationship financial matters entirely outside the supervisory jurisdiction of the Court. BFAs address this need, as they are potentially binding³ without the need to be registered with the Court or contained within Court-approved consent orders.

Requirements

Following is a table setting out the parallel provisions of Part VIIIA (dealing with married couples) and Division 4 Part VIIIAB (dealing with de facto couples), based on a similar table produced by His Honour Justice Garry Watts writing extra-judicially in 2008⁴.

Table 1: Mirror provisions in the FLA relating to Binding Financial Agreements ('BFAs')

Subject Matter	Married	De Facto
BFAs exclude the jurisdiction	s71A(1)	s90SA(1)
BFAs	Pt VIIIA	Div 4 Pt VIIIAB
Financial agreements before marriage/cohabitation	s90B	s90UB

³ Note the reticence suggested by this choice of words.

⁴ *De Facto Property under the Family Law Act*, December 2008.

Subject Matter	Married	De Facto
Financial agreements during marriage/cohabitation	s90C	s90UC
Financial agreements after divorce/breakdown	s90D	s90UD
Formal requirements of BFAs	s90G(1)	s90UJ(1)
Setting aside BFAs	s90K	s90UM
Validity, enforceability and effect of BFAs	s90KA	s90UN

Broadly speaking, in drafting or categorising such agreements, we need to be particularly aware of the following seven issues:

1. the circumstances under which a financial agreement or an agreement terminating a financial agreement may be set aside;
2. the type of relationship to which the agreement relates (ie, married or de facto);
3. the timing of the agreement (ie, before or after marriage or cohabitation, or before or after divorce or relationship breakdown);
4. the involvement of third parties;
5. matters that must and may be included in financial agreements;
6. the formal aspects of the agreement (ie, is it an agreement not covered by the FLA, a 'financial agreement' and/or a BFA?); and
7. the termination of financial agreements.

We will now deal with each of these issues in turn.

The circumstances under which a financial agreement or an agreement terminating a financial agreement may be set aside

It may seem odd to begin with the circumstances under which financial agreements may be set aside, but ss90K and 90KA (and the de facto mirror provisions ss90UM and 90UN) of the FLA which address this issue (see Appendix 1) refer to a number of circumstances that must be carefully considered at an early stage in advising clients in relation both to financial agreements and to agreements terminating financial agreements.

Firstly, it is important that practitioners drafting these agreements have a solid understanding of the law of contracts, since under both s90KA and the de facto mirror provision s 90UN this

is the starting point for the validity, enforceability and effectiveness of financial agreements under the FLA.

S90K (and the de facto mirror provision s 90UM) sets out a number of circumstances which will trigger the Court's power to set aside a financial agreement. These include (but are not limited to) the Court being satisfied that:

1. the agreement was obtained by fraud;
2. the agreement was entered into by a party for purposes that included defrauding a creditor of the party or with reckless disregard for the interests of creditors (the *Rich & Rich*⁵ amendment);
3. the agreement was entered into by a party for purposes that included defeating the interests of a de facto partner of a spouse party, or with reckless disregard for the interests of that person;
4. the agreement is void, voidable or unenforceable;
5. since the making of the agreement circumstances have arisen that make it impracticable for the agreement or a part of the agreement to be carried out;
6. 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 relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the Court does not set the agreement aside;
7. in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.

The type of relationship

As set out in Table 1 above, couples intending to marry, married couples, and divorced couples are covered by Part VIIIA, whereas de facto couples are covered by Division 4 of Pt VIIIB. If we are dealing with a marriage, the same conflict of laws issues as are relevant to other aspects of the FLA apply to financial agreements.

The situation is somewhat more complicated with de facto parties, as the s4AA definition of 'de facto relationship' applies, and this definition is, for many people, unexpectedly broad. A

⁵ Introduced in response to the decision in *ASIC v Rich & Rich* (2003) FamCA 114.

related issue is that the 2 year minimum relationship requirement set out in s90SB(a) for the making of orders under Division 2 of Part VIIIAB does not apply to financial agreements.

A further complication arises from the fact that the FLA derives its limited jurisdiction from the Australian Constitution, and jurisdictional blackspots are therefore a regular feature of this area of legal practice. Even though most States referred powers to the Commonwealth to enable the de facto amendments to be made to the FLA, Western Australia did not⁶, and so there are still significant geographical constraints around the application of the FLA to certain de facto relationships. It is beyond the scope of this paper to examine these issues in detail, but practitioners should be aware of them.

It is not only the geographical nexus of the relationship, but also the timing of separation that triggers or excludes jurisdiction; if separation was before 1 March 2009 the parties must 'opt in' to the federal system.

Finally, it should be noted that under s90UJ(3), a Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other. Parties will then need to enter into an agreement under Part VIIIA if they want the terms of the Part VIIIAB agreement to be preserved.

The timing of the agreement

Not including termination agreements under s90J(1)(b), the Part VIIIA agreements are as follows (including subsequent agreements terminating such agreements under s90J(1)(a)):

1. s90B: financial agreement **before** marriage;
2. s90C: financial agreement **during** marriage; and
3. s90D: financial agreement **after divorce order** is made.

Note that the critical timing element here is marriage, **not** cohabitation. Accordingly, s90C financial agreements can apply both before and after separation, and s90D agreements can only be made after the making of a divorce order. Also note that in relation to s90B agreements the expression 'pre-nuptial agreement' is not used, although this is a common popular description of these agreements.

Again, not including termination agreements under s90UL(1)(b), the Part VIIIAB agreements are as follows (including subsequent agreements terminating such agreements under s90UL(1)(a)):

⁶ Initially South Australia did not refer its powers, although this has subsequently occurred.

1. s90UB: financial agreement **before** de facto relationship;
2. s90UC financial agreement **during** de facto relationship; and
3. s90UD financial agreement **after breakdown** of a de facto relationship.

More will be said in relation to the formal requirements of these agreements below.

The involvement of third parties

The Family Law (De Facto Financial Matters and Other Measures) Act 2008 introduced changes to the Part VIIIA provisions allowing for spouse parties to a financial agreement to make a financial agreement with third parties. Mirror provisions apply to Part VIIIAB financial agreements. While this means, for instance, that de facto partners or parents-as-financiers can be introduced as third parties, the fact that a creditor or trustee in bankruptcy may have standing to seek to set aside a financial agreement as an 'interested person' (ss90K(3) and 90UM(6)) means caution needs to be exercised when extending the pool of parties.

A related matter that has already been referred to above is the need to ensure that the agreement is not a 'sham' entered into to defraud creditors, de facto partners or spouses (ss90K(1)(aa) & (ab) and 90UM(b), (c) & (d)).

Matters that must and may be included in financial agreements

All of the six types of agreement (including subsequent agreements terminating such agreements under ss90J(1)(a) and 90UL(1)(a)) referred to in the section '*the timing of the agreement*' above have as their subject matter certain 'specified matters', one or more of which must be included for the agreement to constitute a 'financial agreement'. Using s 90B(2) as the model for the Part VIIIA agreements, these 'specified matters' are:

- (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:
 - (i) during the marriage; or
 - (ii) after divorce; or
 - (iii) both during the marriage and after divorce.

Sections 90C(2) and 90D(2) are in similar format, amended to reflect their different contexts. Similarly, s90UB(2) can be used as the de facto model. It casts the 'specified matters' in the following terms:

- (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;
- (b) the maintenance of either of the spouse parties.

Sections 90UC(2) and 90UD(2) adapt this wording to their different contexts.

While a financial agreement must contain at least one of the relevant 'specified matters', each of the Part VIIIA agreements may also include 'matters incidental or ancillary' to the ss90B-D(2) matters as well as 'other matters' (ss90B-D(3)).

Part VIIIAB agreements may also include 'matters incidental or ancillary' to the ss90UB-UD(2) matters, but, significantly, do not provide for 'other matters'. This is an artefact of the limitation of the referral of power from the States, which was confined to financial matters arising out of the breakdown of a relationship (other than by reason of death).

Given the above, it is clear that spousal maintenance is covered by both Part VIIIA and Part VIIIAB agreements, and by virtue of sections 90E and 90UH child maintenance issues could be included (this is in fact specifically contemplated by the note to s90UH(1)).

Special care now needs to be taken, however, if it is intended to make the agreement double up as a binding child support agreement under s80D of the *Child Support (Assessment) Act* 1989 ('the Assessment Act'). This is because under s80D(2)(c) of the Assessment Act a binding child support agreement must contain a statement in substantially the same format as the statement that was required to be attached to BFAs prior to the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act* 2009. Since the requirements for BFAs have now been overhauled (see below) and are therefore out of step with the formal requirements for binding child support agreements, there is a risk that attempting to incorporate both types of agreement in the one document could give rise to uncertainty. Given

the Full Court's approach in *Kostres and Kostres*⁷ (this case is dealt with in some detail below), any uncertainty in a BFA is plainly to be avoided.

Also note that, according to s 90E

[a] provision of a financial agreement that relates to the **maintenance of a spouse party to the agreement or a child or children** [emphasis added] is void unless the provision specifies:

- (a) the party, or the child or children, for whose maintenance provision is made; and
- (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be.

As to whether placing a value of nil (as, for example, the Law Society of NSW s90C BFA precedent prompts in its clause 4.6(c)), satisfies the requirement in subsection (b) remains open to debate. This issue was certainly subject to submissions in *Ruane & Bachman-Ruane*⁸, but it was not necessary for Cronin J to decide the issue.

The inclusion of superannuation is not a problem for either Part VIIIA or Part VIIIAB agreements so long as it is not the only subject matter of the agreement. There may be an issue however if the only subject matter of the agreement is superannuation. This is because superannuation has not traditionally been regarded as property for the purposes of s4 of the FLA. While the 'specified matters' applying to the six types of financial agreements (not including termination agreements) referred to above include property or financial resources, the Full Court in *Coghlan and Coghlan*⁹ identified superannuation as 'another species of asset,' rather than as a financial resource, which may or may not cause some problem here.¹⁰

While other matters (such as an unenforceable parenting plan, for example) could certainly be included in a Part VIIIA agreement, this is not the case with a Part VIIIAB agreement, which, for the reasons alluded to above, should be limited to the ss90UB-UD(2) financial matters, and matters incidental or ancillary thereto.

The formal aspects of the agreement

The FLA treats the defining characteristics of 'financial agreements' separately from the steps necessary to render those financial agreements 'binding'. As has already been seen, the

⁷ [2009] FLC ¶93-420.

⁸ [2009] FamCA 1101 at para 95.

⁹ [2005] FamCA 429.

¹⁰ For further detail on this issue see Mark MacDiarmid, 'What Species of Asset? Binding Financial Agreements that Deal Only With Superannuation' 47(11) *Law Society Journal* (2009) 71.

different types of financial agreement are dealt with in ss90B-D (for marriages) and ss90UB-UD (for de facto relationships).

The Part VIIIA approach to the definition of 'financial agreement' can be seen from s90B(1) (whose wording is adjusted somewhat across sections 90C(1) and 90D(1)):

- (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.

We have separately considered the 'matters mentioned in subsection (2)' above.

The part VIIIAB approach to the definition of 'financial agreement' can be seen from s90UB(1) (whose wording is adjusted across sections 90UC(1) and 90UD(1)):

- (1) If:
- (a) people who are contemplating entering into a de facto relationship with each other make a written agreement with respect to any of the matters mentioned in subsection (2) in the event of the breakdown of the de facto relationship; and
 - (b) at the time of the making of the agreement, the people are not the spouse parties to any other Part VIIIAB financial agreement that is binding on them with respect to any of those matters; and
 - (c) the agreement is expressed to be made under this section;
- the agreement is a Part VIIIAB financial agreement. The people may make the Part VIIIAB financial agreement with one or more other people.

In summary, the requirements for an agreement to be a 'financial agreement' are that:

1. the agreement is in writing;
2. the parties to the relationship are not spouse parties to other Part VIIIA or Part VIIIAB financial agreements (as appropriate); and

3. the agreement is expressed to be made under the relevant section.

Note also that under both ss90DA and 90UF, **separation declarations** must be made in order to give force to any provision of a BFA

to the extent to which it deals with 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:

- (a) at the time when the agreement is made; or
- (b) at a later time and before the termination of the marriage by divorce;

are to be dealt with,

unless either or both parties die (ss90DA(1A)(b); 90UF(2)), or in the case of a Part VIIIA agreement, the spouse parties divorce (s90DA(1A)(a)).

In a recent paper, Paul Doolan¹¹ points out that changes made to s90DA by the *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, mean that the section as just quoted does not, unlike its predecessor, refer to provisions relating to the maintenance of either of the spouse parties after the termination of the marriage by divorce having no force or effect until a separation declaration is made. Similarly, s90UF (inserted by the same Act) does not refer to maintenance. This appears to leave some uncertainty as to when maintenance provisions take effect, although Doolan's suggested reading of the Act is that they take effect when the Agreement is signed by both parties.

In the same paper, Doolan notes that according to s 90H:

[a] financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

S 90UK (the parallel provision dealing with de facto arrangements) contains the following additional note:

If the parties are still in the de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the financial agreement (see the definition of breakdown in subsection 4(1)).

S 82(1) provides that an order 'with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the party'; s 90SJ(1) has substantially the same effect

¹¹ 'Financial Agreements: Everything You Always Wanted to Know, But Were Too Afraid to Ask', paper delivered at the Family Law Section of the Law Council of Australia's 14th Annual Family Law Intensive in Melbourne, 1 May 2010.

in relation to maintenance orders in the de facto realm. Because of the consequent risk that a maintenance obligation contained in a BFA will survive the death of the payer, Doolan recommends inserting a clause specifically terminating the obligation to pay maintenance in the event of the death of either party, re-marriage of the payee, the payee entering into a de facto relationship for more than 3 months or the payer becoming insolvent, or after the passage of a nominated sunset date¹².

Making financial agreements binding prior to 4 January 2010

From 2004 up to the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act 2009* ('the Amending Act') on 4 January 2010, sections 90G(1), 90J(1), (Part VIIIA agreements) and 90UJ(1) and 90UL(1) (Part VIIIAB agreements) all contained wording substantially in the following terms (the following is taken from the then in force s90G(1)):

- (1) A financial agreement is binding on the parties to the agreement if, and only if:
 - (a) the agreement is signed by both parties; and
 - (b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
 - (i) the effect of the agreement on the rights of that party;
 - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
 - (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
 - (d) the agreement has not been terminated and has not been set aside by a court; and
 - (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

¹² Ibid at 22.

A succession of cases¹³ took varied approaches to the rigour with which this form of wording was expected by the Court to be applied, culminating in *Black & Black*¹⁴ in 2008.

In setting aside a BFA, the Full Court (Faulks DCJ, Kay and Penny JJ) in *Black & Black* applied the requirements of s90G(1) literally and strictly, echoing the emphasis Collier J in *J & J*¹⁵ had placed on the words 'if, and only if' that appear at the beginning of the section.

Paragraphs 43 – 45 of the *Black & Black* judgement provide a succinct summary of the relevant facts and reasoning:

43. Subsection 90G(1)(b) (as it was prior to the 2004 amendments) expressly required that the agreement must contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in (i) to (iv). The section went on to provide that the agreement must also annexe a certificate executed by that legal practitioner stating that the advice in relation to the matters referred in (i) to (iv) was provided to that party.
44. ***The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did.*** [emphasis added]
45. Recital R and clause 29 of the agreement, set out at paragraphs 23 and 24 above, dealt predominantly with advice in relation to the legal implications of the agreement and each party's rights and obligations. These statements did not meet all the requirements set out in subsection 90G(1)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties. It follows that we prefer the approach taken by Collier J in *J and J* (above) to that taken by the trial judge in this case. ***We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders under s 79.*** [emphasis added]

Federal Justice System Amendment (Efficiency Measures) Act 2009

In response to the *Black and Black* decision, as of 4 January 2010, sections 90G, 90J, 90UJ and 90UL now contain wording substantially in the following terms (taken from the current s90G):

¹³ Notably *J & J* [2006] FamCA 442; *Millington & Millington* (2007) FamCA 687; and *Ruzic & Ruzic* [2007] FamCA 473.

¹⁴ [2008] FLC ¶93-357.

¹⁵ [2006] FamCA 442.

- (1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:
- (a) the agreement is signed by all parties; and
 - (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
 - (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
 - (ca) a copy of the statement referred to 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*.

- (1A) A financial agreement is binding on the parties to the agreement if:
- (a) the agreement is signed by all parties; and
 - (b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and
 - (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes 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.
- (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.
- (1C) To avoid doubt, section 90KA applies in relation to the enforcement application.

In addition, the new provisions operate retrospectively to validate financial agreements and termination agreements made on or after 27 December 2000 and before the commencement of the new provisions. Significantly, s90G(1)(c) and (ca) do not apply to the pre-4 January 2010 agreements, and the agreement in question must not have been set aside by a Court.

After *Black and Black*, but prior to the above amendments, practitioners could draw some comfort from the fact that although the formal requirements were applied strictly, those requirements could be expressed with some certainty, and compliance could be determined from an examination of the document itself. One effect of these changes is that we can now no longer rely on the face of the document to ascertain formality: whether or not the advice required to be given under s 90G(1)(b) has in fact been given cannot be ascertained from the agreement if there is no solicitor statement attached. Even if such a statement is attached, it may be difficult to ascertain whether the advice purportedly given was accurate, or, for that matter, even given at all. Recall that under the old s 90G(1) the obligation was simply to include a statement that certain advice had been given and to attach a certificate from the person giving the advice stating that the advice had been given; now, independently of what is said in the agreement or in any statement given to the other party there is an obligation for certain advice to have been given. Further, the words 'if, and only if' still appear at the head of the section, so there can be little doubt that these requirements will be applied strictly.

In addition, the relief contemplated by 90G(1A) rides on the Court forming the view that the outcome dictated by the agreement is 'just and equitable'; it may be that without fully exploring the first three steps¹⁶ of a normal s79 property settlement application, the Court will be reluctant to come to a final view on the justice and equity of an arrangement contained in a financial agreement that does not comply with s90G(1). If that step becomes necessary, is there really anything to be gained from having a BFA in the first place?

The current position

In summary, the following requirements must be met by financial agreements and termination agreements entered into after 4 January 2010:

1. the agreement must be in writing;
2. the agreement should not fall foul of the prohibitions contained in ss90K or 90UM;
3. the parties to the relationship must not be spouse parties to other Part VIIIA or Part VIIIB financial agreements (as appropriate);

¹⁶ For the Court's preferred approach to a s79 application see, eg, *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395.

4. the agreement must be expressed to be made under the relevant section of Part VIIIA or Part VIIIAB (that is, the appropriate section from ss90B-D (for marriages) and ss90UB-UD (for de facto relationships));
5. the agreement must not have been set aside by a Court;
6. in the case of a Part VIIIAB financial agreement, the parties must not have subsequently married; and
7. subject to the issues referred to on page 10 above, separation declarations must be made in order to give force to provisions relating to 'all or any of the property or financial resources of either or both of the spouse parties' that take effect after the breakdown of the relevant relationship (ss90DA and 90UF), unless either or both parties die, or in the case of a Part VIIIA agreement, the spouse parties divorce.

Further, for such agreements to be binding:

1. each party must have received independent legal advice about:
 - a. the effect of the agreement on the rights of that party; and
 - b. the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
2. each party's legal practitioner must have signed a statement to the effect that the party has been provided with independent legal advice about the specified matters, **and** a copy of that statement must have been provided to the other party or the other party's legal practitioner **although** that statement need not have been attached to the agreement **and** the statement may have been provided either before or after the agreement was signed.

Finally, even if the s90G(1)(b), (c) and (ca) requirements (or their equivalents) are not met, the agreement may still be binding if:

- a. 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
- b. the court makes an appropriate order declaring that the agreement is binding on the parties to the agreement; and
- c. the agreement has not been terminated and has not been set aside by a court.

In the teeth of the above complexities, it should also be born in mind that even if an agreement does not amount to a financial agreement (binding or otherwise) under the FLA, it may still amount to a contract at common law or equity and may still therefore have consequences for the parties entering it.

The termination of financial agreements.

According to ss90J (for marriages) and 90UJ (for de facto relationships), financial agreements may only be terminated in one of the following two ways:

1. including a provision to that effect in another Part VIIIA (for marriages) or Part VIIIAB (for de facto relationships) financial agreement; or
2. making a written agreement (a 'Part VIIIA termination agreement' (for marriages) or a 'Part VIIIAB termination agreement' (for de facto relationships)).

In relation to the first option, the same requirements that apply to all other BFAs (see above for details) apply to BFAs that include a provision terminating an earlier BFA.

In relation to the second option, ss90J(2) and following (for marriages) and 90UJ(2) and following (for de facto relationships) mirror the requirements of s90G(1) and following, and s90UJ(1) and following.

Kostres & Kostres [2009] FLC ¶193-420

This case was an appeal against orders made by Federal Magistrate Wilson on 17 October 2008. The Full Court (Bryant CJ, Boland & Jordan JJ) delivered its judgment on 15 December 2009.

According to paragraphs 1 – 3 of the judgment:

1. Two days before their marriage in January 2002 Mr Kostres and Ms Kostres executed a financial agreement in order to regulate their financial affairs during their marriage, and to govern such affairs in the event the marriage did 'not work out'.
2. This appeal by the husband, and cross-appeal by the wife, raise for determination how terms of a financial agreement made under Part VIIIA of the Family Law Act 1975 (Cth) ('the Act') should be construed, and the circumstances which may lead to such an agreement not being enforced.

3. It was not in dispute at the time the parties entered into the financial agreement they both mistakenly thought the husband was a bankrupt. But they did not reveal this fact to the solicitors who drafted and gave advice about the financial agreement. The parties' mistaken belief about the husband's status led to them acquiring assets which were not purchased in the parties' joint names.

Notwithstanding the common mistake, the validity of the agreement was not in dispute by the parties; the primary disagreement was around its proper construction. In submissions both before the Federal Magistrate at first instance and then before the Full Court the parties contended for different interpretations of a number of words and phrases appearing in the agreement, notably 'acquired', 'assets', 'joint funds' and 'from their own moneys'. It became necessary, then, for the Court to consider the appropriate construction of the agreement pursuant to s90KA.

In discussing the principles of contract law to be applied to the construction of the agreement, the Full Court referred to the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, with particular emphasis being placed on the High Court's affirmation of 'the principle of objectivity by which the rights and liabilities of the parties to a contract are determined'¹⁷. It appears from the judgment that the references to this case were derived from a secondary source, namely 'the learned authors of Cheshire and Fifoot's Law of Contract (9th edition)¹⁸.'

According to the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, the 'principle of objectivity' amounts to the following:

[i]t is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221)¹⁹.

¹⁷ (2004) 219 CLR 165 at para 40.

¹⁸ [2009] FLC ¶93-420 at para 113

¹⁹ (2004) 219 CLR 165 at para 40.

Significantly, the first two sentences of the above passage were not extracted by the Full Court in the *Kostres and Kostres* judgment; given that the source quoted by their Honours was a textbook, they may not have been aware of those sentences.

The above extracted discussion in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* was prompted by a factual situation in which a company officer who signed a document had not read the conditions on the reverse of the signed page:

Mr Gardiner-Garden signed a document which invited him to read the terms and conditions on the reverse before signing. He was not rushed or tricked into signing the document. He chose to sign it without reading it. He could have read it had he wished. Finemores did not set out to conceal from him the terms and conditions on the document, or to encourage him not to read them. Finemores had no way of knowing that he did not read the document. No case of mistake or *non est factum* is advanced²⁰.

The High Court proceeded to refer to a number of authorities before concluding that they all accorded

with the well-known principle stated by Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403 (*L'Estrange v Graucob*) that '[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.'²¹

It seems clear, therefore, that when the High Court was referring to 'objectivity' as a technique of construction it was *not* referring to what the respective parties *actually* had in mind, since in the *L'Estrange v Graucob* lineage of cases it was immaterial that the party seeking to avoid the contract had not even read the conditions.

*Pacific Carriers Ltd v BNP Paribas*²² clarifies this further:

What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing. The letters of indemnity were, and were intended by NEAT and BNP to be, furnished to Pacific. Pacific did not know what was going on in Ms Dhiri's mind, or what she might have communicated to NEAT as to her understanding or intention. The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific²³. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them

²⁰ (2004) 219 CLR 165 at para 39.

²¹ (2004) 219 CLR 165 at para 46.

²² (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221.

²³ *Wilson v Anderson* (2002) 76 ALJR 1306 at 1308-1309 [7]-[10]; 190 ALR 313 at 316-317.

to mean²⁴. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction²⁵.

The Full Court in *Kostres and Kostres* noted with evident displeasure that it had not been directed to any authorities on the interpretation of contractual terms²⁶. Had the Full Court been directed in submissions to the above High Court cases as *primary texts*, it is unlikely that the following critical phrases employed by the High Court would have been overlooked by the Full Court:

What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing²⁷.

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations²⁸.

Instead, the Full Court proceeded with the task of construction by substituting and augmenting what it saw as unclear wording with wording contended for by both parties in submissions.

This process proceeded as follows:

120. Clause 6 of the agreement provides as follows:

'[Ms Kostres] and [Mr Kostres] agree that in the event that the marriage should end that the assets of each of them either alone or jointly shall be dealt with as follows:

....

(c) Any assets of whatsoever kind or nature acquired during the relationship from joint funds shall be divided equally between [Ms Kostres] and [Mr Kostres].

(d) Any assets acquired by either party from their own moneys shall remain the property of that person.'

121. The interpretation for which both parties contend (albeit with differing effect) would require the agreement to be read as follows:

'[Ms Kostres] and [Mr Kostres] agree that in the event that the marriage should end that **any interest, either legal or equitable, in property held by or on behalf of either** of them **(including any interest held personally, or in a company, trust or in any other entity)** either

²⁴ *Gissing v Gissing* [1971] AC 886 at 906; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 at 502; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

²⁵ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98.

²⁶ (2009) FLC ¶93-420 at para 108.

²⁷ *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221.

²⁸ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at para 40.

alone or jointly shall be dealt with as follows:

(c) any **financial contribution to the purchase price of any interest, either legal or equitable, in property held by them or on behalf of them (including any interest held personally in a company, on trust or in any other entity on their behalf) made during the relationship from funds derived from their joint endeavours, [or in the case of the wife from jointly held funds] although not necessarily contributed equally**, shall be divided equally between [Ms Kostres] and [Mr Kostres];

(d) any **financial contribution to the purchase price of any interest, either legal or equitable, in property held personally, or by or on behalf of either party in a company, trust or any other entity by or on behalf of one party exclusively** from their own moneys or borrowings shall remain the property of that person.’ (our emphasis)²⁹

It is surprising that in an exercise that was directed toward the objective ascertainment of what a reasonable person would have understood the relevant words to mean at the time the agreement was made, the Full Court actually embarked on a process that simply combined the submissions of the parties’ lawyers before the Courts years after the agreement was made. The parties’ submissions may have been relevant to the Court in its deliberations aimed at discovering the notional reasonable person’s understanding, but it seems contrary to authority to combine those (unsurprisingly subjective and tendentious) submissions and suggest that the resulting mish-mash demonstrates that the contractual terms were incapable of being ascertained with certainty.

If this were the correct approach, one would expect that in all proceedings where the parties contend for different contractual constructions, courts would by virtue of that fact alone find fatal uncertainty in the terms. In fact, the correct approach seems to be somewhat different to that employed by the Full Court. In *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd*³⁰ Barwick CJ noted that

a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. **As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application** [emphasis added]. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words

²⁹ [2009] FLC ¶93-420 at paras 120-121.

³⁰ [1968] HCA 8; (1968) 118 CLR 429; (1968) 41 ALJR 348

in this connexion in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, at p 512 ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G) & Nephew Ltd v Ouston* (1941) AC 251 is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved³¹.

The Full Court's conclusion on the issue is as follows:

129. While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. This is particularly so when regard is had to provisions of Part VIIIA in the overall context of the Act.
130. The differing arguments of the legal representatives in this case as to how the terms 'acquired', 'assets', 'joint funds' and 'from their own moneys' should be construed brings into sharp focus the ambiguities in those terms found in the drafting of clause 6 of the agreement.
131. We think it is particularly relevant that this agreement, which the parties entered into with the intention of dealing with their property and financial resources during their marriage and if it broke down, did not reflect the terms of the section (s 79) which it sought to bypass. Clause 6 does not refer to 'contributions', either financial or non-financial, nor does it, except in clause 6(d), refer to 'property' or 'financial resources'. These terms are ones which are well known and the subject of a considerable body of case law as to their interpretation.
132. We are satisfied that the construction each party asserts should be given to the terms of clauses 6(c) and (d) goes beyond that which can be objectively construed or implied to give effect to the parties' intentions at the time the agreement was made. This is readily apparent from our re-construction of the agreement inserting the words which the parties' respective legal representatives assert must be read into clause 6 to give efficacy to it. The differing interpretation of the expressions 'joint funds' and 'from their own moneys' starkly illustrates our concern.

³¹ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8 at paragraph 9.

133. It is clear to us that the terms of the agreement are ineffective, particularly insofar as it is asserted they deal with the right to seek division of the business, the trust and the two units. It follows from that conclusion that the Federal Magistrate's decision to enforce the terms of the agreement as he did constitutes appealable error³².

While the Full Court noted at paragraph 129 in the above extract that 'it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned,' the conclusion that this was the case in the *Kostres* agreement appeared to have been based on an analysis of the parties' rival submissions, rather than on the Court's own independent analysis, which was what the High Court laid down as the correct approach in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd*. Accordingly, the Full Court appears to have conflated 'uncertainty of meaning' and 'absence of meaning or of intention'³³.

With great respect, the Full Court in *Kostres and Kostres* demonstrated a surprising willingness to limit its own ability to construe the terms of the agreement by placing what appears to have been an over-emphasis on the parties' dispute over those terms. This is further illustrated by its preference for the words 'contributions', 'property' and 'financial resources' over the words 'acquired', 'assets', 'joint funds' and 'from their own moneys'³⁴. It is novel to suggest that words in ordinary English usage that have not been the subject of intense judicial scrutiny in the family jurisdiction are somehow incapable of being given clear meaning. After all, section 71A (and the de facto mirror provision s90SA) simply provides that a BFA displaces jurisdiction under Part VIII, and the formal requirements for a BFA nowhere include a requirement that the language of s79 and its de facto equivalent be mirrored in the agreement.

The consequences of this decision for BFAs are dire indeed. Not only is the wording used in the *Kostres and Kostres* agreement relatively common coinage in the precedents used by the legal profession, but it seems clear that if in subsequent Family Court litigation one party contends for a construction of contractual terms that radically differs from that suggested by the other, this disagreement might cast a shadow backwards in time to the making of the agreement and retrospectively generate fatal uncertainty.

³² *Kostres & Kostres* [2009] FLC ¶93-420 at paras 129-133.

³³ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8 at paragraph 9.

³⁴ *Kostres & Kostres* [2009] FLC ¶93-420 at para 131.

For parties seeking to set aside BFAs there now seems to be a relatively simple and foolproof forensic tool available to ensure success: whatever construction the other party is contending for, contend for its opposite!

Conclusion

On the face of it, BFAs do provide a means for parties to arrange their financial affairs without the Family Court's supervision or intervention. The *Federal Justice System Amendment (Efficiency Measures) Act 2009* has in some ways made the task of formal compliance easier, but in other respects muddied the waters. By the same token, the Full Court decision in *Kostres & Kostres* makes it clear that even in the teeth of formal compliance with the terms of the FLA, the Full Court takes an approach to contractual construction that seems narrower and more pedantic than that which applies in other civil courts.

At bottom, there are two significant issues that must be considered by any practitioner advising a client on the desirability of entering into one of these agreements:

1. the formal requirements for BFAs are technical, complex and potentially confusing, notwithstanding the recent amendments; and
2. there is now an unquantifiable risk that an agreement that otherwise complies with the requirements set out in Parts VIIIA or VIIIAB (as appropriate) of the FLA may be set aside for uncertainty if there is a dispute about the correct construction of the agreement.

It seems clear that BFAs present the practitioner with intimidating professional liability issues. The watchword and countersign here must surely be: proceed with extreme caution, if at all.

Appendix 1: Sections 90K(1) & 90KA FLA

90K Circumstances in which court may set aside a financial agreement or termination agreement

- (1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:
- (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
 - (aa) a party to the agreement entered into the agreement:
 - (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
 - (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
 - (ab) a party (the **agreement party**) to the agreement entered into the agreement:
 - (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or
 - (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or
 - (iii) with reckless disregard of those interests of that other person; or
 - (b) the agreement is void, voidable or unenforceable; or
 - (c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or
 - (d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or
 - (e) in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or
 - (f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

- (g) the agreement covers at least one superannuation interest that is an unsplitable interest for the purposes of Part VIIIB.

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
- (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.