1. INTRODUCTION

1.1 Legislative History

The *Family Law Amendment Act 2000* came into effect on 27 December 2000 and saw the insertion of a new Part VIIIA ("Financial Agreements"). By allowing a couple intending to get married to enter into a Pre-Nuptial Financial Agreement that would be binding in the event of their later separation, this represented the most radical change to the financial provisions of the *Family Law Act 1975* in the 25 years or so since its inception.

There could be no doubt as to the binding effect of a Financial Agreement that complied with the formalities of the new legislation. A new Section 71A(1) provided that Part VIII of the Act, which deals with property adjustment and spouse maintenance, did not apply to:

> *"(a) financial matters to which a Financial Agreement that is binding on the parties to the Agreement applies; or*
>
> *(b) financial resources to which a Financial Agreement that is binding on the parties to the Agreement applies."*

[**Note:** In this paper all references to "the Act" are to the *Family Law Act 1975*.]

1.2 The de facto experience

At the time, binding agreements of this nature had been available to de facto couples, both before and during the commencement of their cohabitation, for more than 15 years. There was then, and still is, a dearth of reported cases where a Cohabitation Agreement or Domestic Relationship Agreement (as it became in NSW), that observed the formalities required by the relevant State legislation, had been successfully varied or set aside. Why should BFA's not prove to be similarly successful in helping married partners to organise their financial affairs in the event of marriage breakdown? The Government no doubt also hoped that BFA's would reduce the number of disputes that came before the Family Court for determination.

1.3 The need for vigilance

In the event, there has been a multiplicity of cases that have come before the Family Court and the Federal Magistrates Court, in which the binding nature of

Financial Agreements has been challenged, chiefly on the basis that there has not been strict adherence with the formal requirements of Section 90G. The Full Court of the Family Court of Australia has twice been called upon to review the law relating to BFAs[1].

And the legislators have been busy, too. In the barely 9 years since the introduction of BFAs, there have been no less than 5 significant legislative amendments to the applicable law, of which practitioners needed to be aware. Most recently, the *Federal Justice System Amendments (Efficiency Measures) Act No. 1) 2009*, which has retrospective effect, has been passed and applies to all BFAs made on or after 4 January, 2010.

The precise wording of the certificate or statement of independent legal advice, which provides the glue that should make a Financial Agreement stick, has been changed on no less than 4 occasions.

Concerns having been raised about the most recent statutory amendments, it may well be that we have not seen the last of them in this constantly changing area of the law. Clearly then, practitioners need to be abreast of those legislative changes, and extremely cautious both in the drafting of BFAs and in advising their clients as to the procedural formalities that require to be observed.

1.4 Types of BFA

The original legislation provided for 4 types of Financial Agreements, being:

- a Financial Agreement made before marriage (Section 90B);
- a Financial Agreement made during marriage, including before divorce (Section 90C);
- a Financial Agreement entered into after divorce (Section 90D); and
- a Termination Agreement (Section 90J).

Since 1 March 2009, when federal jurisdiction for financial matters was extended to de facto couples[2], the relevant statutory references for de facto BFAs have been:

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1 Black & Black (2008) Fam CA FC7; Kostres & Kostres (2009) Fam CA FC 222

2 The Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008

- Financial Agreements before a de facto relationship (Section 90UB);
- Financial Agreements during a de facto relationship (Section 90UC);
- Financial Agreements after breakdown of a de facto relationship (Section 90UD); and
- Termination Agreements (Section 90UA).

1.5 Why use a BFA?

With the introduction of BFA's, concerns were expressed regarding the responsibility placed upon the Solicitor who was required to complete a Certificate of Independent Legal Advice, in order for the Financial Agreement to be binding.

Anecdotally, however, it would seem that this has not significantly curbed the popularity of BFAs. Research by a wedding website[3] found that 14% of engaged couples were now signing pre-nuptials BFAs.

Their popularity might be explained by the following matters in particular:

1.3.1 Like the previous Section 87 Agreements, they may deal not only with property settlement, but also the future claims of the parties for spousal maintenance. Accordingly, even if an Application for Consent Orders is being used, a BFA can conveniently be entered into at the same time, in order to ensure that the parties' rights to spousal maintenance are also crystallised.

1.3.2 BFA's can conveniently be used in this State, to deal with claims under the *Succession Act 2006 (NSW)*, in circumstances where the Family Court can no longer approve a Deed of Release entered by virtue of cross-vesting legislation.

1.3.3 BFA's, to the extent that they are not subject to any form of judicial scrutiny, are quicker, and may be more cost-effective.

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[3] Theknot.com.au

1.3.4 Transfers of property made pursuant to a BFA have now been afforded the same roll-over relief in respect of Capital Gains Tax that was always available to transfers made pursuant to Consent Orders.

2. LEGISLATIVE AMENDMENTS

2.1 "The Rich Amendment"

The Family Court first looked at BFAs in the famous or infamous case of *Australian Securities & Investments Commission v Rich & Rich* [4].

The case concerned the Financial Agreement made between Jodee and Maxine Rich, which was entered into on 31 May 2001. Coincidentally, that was the day after ASIC had begun an investigation into Mr Rich's financial affairs. The Agreement recited that Mr Rich's affairs had "taken a significant turn for the worse". Under the Agreement, Mrs Rich, who already owned assets to the value of more than $13 million, would receive a further $3.5 million worth of assets, whilst the value of Mr Rich's assets would decrease to $3.9 million.

When ASIC discovered the existence of the Agreement, it applied under what was then sub-sections 90K(1)(b) and Section 90KA of the Act to set aside the Agreement. The husband contended that the Family Court had no jurisdiction to hear the claim, whilst the wife sought the summary dismissal of ASIC's Application.

The case came before O'Ryan J. He concluded that he did not have jurisdiction to hear ASIC's claim, because it did not fall within the then definition *of "matrimonial cause"* to be found in Section 4(1)(eaa), which referred only to an Agreement "between parties to a marriage".

His Honour went on to comment on the need for legislative change, whereby third parties, whose interests might be adversely affected by the terms of a BFA, should have standing to apply under the Act to set aside the Agreement.

Interestingly, His Honour also referred in comments made obiter to the then requirement for a Financial Agreement to be binding pursuant to Section 90G of the Act. Interestingly, he said:

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[4] (2003) FamCA 113 and 114 (15 October 2003 and 4 November 2003)

"… I am of the view that the requirements of s.90G are not stringent. All that is required is that the agreement is signed by both parties, include a statement addressing the matters in s.90G(1)(b) and attach a certificate from a legal practitioner." [5]

2.2 Family Law Amendment Act (2003)

The legislative response came in the form of this amending Act, which passed on December, 2003. The effect of the amendments was to:

2.2.1 include third party proceedings to set aside a Financial Agreement within the definition of "matrimonial cause"; and

2.2.2 add a new Section 4A to the Act, to clarify that *"third party proceedings"* meant not only proceedings between the parties to a Financial Agreement, but also creditors.

The amending legislation also amended Section 90K to provide a new ground for setting aside a BFA. Now, by Section 90K(1), a Court may also make an Order setting aside a Financial or Termination Agreement if satisfied that:

> *"(aa) either 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 parties; or*
>
> *(ii) with reckless disregard of the interests of a creditor or creditors of the party …."*

2.3 Separation Declarations

Section 90 was further amended by the *Bankruptcy and Family Law Legislation Amendment Act 2005*, which came into effect on 18 March of that year.

By this amendment, a new Section 90DA was inserted into the Act, making it necessary for a "Separation Declaration" to be included in a Financial Agreement,

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[5] ASIC v Rich & Rich (2003) FamCA 114

in order for certain parts of the Agreement to be effective. This requirement was expressly designed to prevent married partners from effecting property transfers between themselves during the course of a subsisting marriage, as a means of avoiding creditors.

Section 90DA(1) is now in the following terms:[6]

> ***"90DA(1) [Separation declaration Required]***
>
> *A Financial Agreement that is binding on the parties to the Agreement, 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, is of no force or effect until a separation declaration is made.*
> *Note: Before the Separation Declaration is made, the Financial Agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by Section 90DB)."*

It is important to note that, by Section 90DA(1A),

> *"Subsection 1(1) ceases to apply if:*
>
> *(a) the spouse parties divorce; or*
>
> *(b) either or both of them die.*
>
> *This means the Financial Agreement will be of force and effect in relation to the matters mentioned in sub-section (1) from the time of the divorce or death(s)."*

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6 Following further amendments in the *Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008*

There was then, and still is, no prescribed form of "Separation Declaration", which only requires to be signed by one of the parties to the BFA. A sample Separation Declaration is to be found at the end of this paper (Appendix 6.3).

2.4 CGT Roll-Over Relief

Following the introduction of BFAs in December 2000, a significant disincentive to the use of BFAs was the fact that Capital Gains Tax ("CGT") roll-over relief did not apply to transfers of property entered into pursuant to a BFA, in the same way that it applied to transfers of property made pursuant to Consent Orders.

Finally, the *Tax Laws Amendment (2006 Measures No. 4) Bill 2006* passed through Parliament in December of that year, and received Royal Assent on 12 December 2006.

2.5 Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008

Effective from 1 March, 2009, the Family Law Act 1975 was amended so as to extend the Federal jurisdiction for property settlement and maintenance matters to separating de facto couples.

Further, for the first time a Financial Agreement can be entered into with one or more third parties.

The amendments inserted a new section titled "Part VIIIAB Financial Agreements" which was similar to the Part VIIIA provisions that are in place for married couples.

Section 90UJ deals with when an agreement is binding, and is phrased in the same terms as Section 90G.

It is important to bear in mind, however, that these amendments apply only to de facto couples ordinarily resident in one of the "participating jurisdictions": New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, the Northern Territory or Norfolk Island.

Further, the new amendments also only apply to relationships that ended on or after 1 March, 2009. This means that in relation to Section 90UD Agreements, the old State and Territory laws will continue to apply if the de facto relationship ended before 1 March, 2009. However, parties are given the option of electing to opt into

the new Federal Legislation (in writing and signed by both parties) if they wish to do so.

3. CASE LAW

3.1 J & J

This was a decision of Collier J, which was heard on 29 March, 2006. The case concerned a BFA that contained a statement that each party had been provided with independent legal advice. The Agreement had annexed to it Certificates of Independent Legal Advice, signed by each Lawyer. Unfortunately, they were out of date, having been superseded by amendments to the Act that took effect from January, 2004.

His Honour found that the Agreement was not binding, saying: [7]

> *"To my mind, the words that appear in Section 90G(1) 'if and only if', are words of real significance. They have a meaning. The import a requirement for a level of compliance, if the agreement is to be binding, that is clearly a standard or level above and beyond what might be described as substantial compliance. Those words 'if and only if', make it clear that each of the parties must ensure that that which is required to be contained and dealt with in the agreement, and the annexures to it, is in fact contained, appropriately and completely. Compliance must therefore be a full compliance, satisfying the statutory requirements …."*
> *"…. Clearly, the legislation intended that if this method of parties resolving their differences was to be used without any supervisory power of a Court, in a situation where parties' rights were to be affected, then that which was to be done had to be done fully in compliance with that which the statute set out and required."*

3.2 Stoddard & Stoddard

This is one of only two reported Decisions of which I am aware[8], where a BFA has been successfully challenged on the basis of non-disclosure. FM Altobelli had before him another BFA where, to use his words, *"substance triumphs over form".*

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7 J & J (2006) FamCA 442 at paragraphs 19 and 20

8 Stoddard & Stoddard (2007) FMCAfam 735

In particular, there was annexed to the BFA the form of Certificate then in use under the *Property (Relationships) Act 1984 (NSW)*, and indeed it recited that advice had been given to the parties regarding their rights to apply under that particular Act. However, it was entered into after they were married, and indeed after they had separated.

At the hearing, the wife, who sought to uphold the Agreement, admitted that at about the time of the separation, she had withdrawn approximately $85,000 from a joint loan account. She conceded that the husband was unaware of these transactions, which had the effect of increasing the debt secured on a property, as to which he was entitled to the net proceeds of sale. He argued that the situation amounted to fraud (i.e. non-disclosure of a material matter), or misrepresentation, such that the Agreement should be voided.

FM Altobelli had no hesitation in finding that the wife's actions amounted to a non-disclosure pursuant to Section 90k of the Act, and therefore set the BFA aside. He did not make any finding as to the validity of the Agreement.

3.3 Black & Black

3.3.1 Background

This was the first occasion in more than 7 years that the Full Court of the Family Court of Australia had come to consider the enacting legislation that gave rise to BFA's. In particular, it was concerned with the formalities, compliance with which under the Act is a requirement for a Financial Agreement to become "binding".

The case involved a short marriage of just 18 months' duration, precisely the sort of circumstances against which an affluent fiancé might wish to guard.

Mr & Mrs Black married in April 2002, and separated after just 18 months' cohabitation. At the time of the trial, he was 43, the wife 42. There were no children of the marriage. The husband owned a house in South Australia, which later sold for a net sum of approximately $180,000. The wife meanwhile had a personal injuries claim pending. In the first flush of romance, they were proposing to sell the house in South Australia and relocate to Tasmania.

The Financial Agreement was dated 3 September, 2002, and in summary provided:

- for the proceeds of the wife's damages claim, and the net proceeds of sale of the husband's house, to go into a joint account;

- for them to purchase a new house in Tasmania with the combined funds; and

- in the event of marriage breakdown, the new house would be deemed joint property.

The parties ended up buying the new house before the wife received her personal injuries award. Further, when it crystallised, the amount of the wife's award was only $41,000. The husband maintained that she had told him that she was expecting to receive about $200,000, which the wife denied. The husband saw this outcome as unfair, and sought to set aside the BFA.

At the time of the trial, the net assets were found to be in the order of $350,000, of which approximately $280,000 was represented by the equity in the Tasmanian property.

3.3.2 The Agreement

At the time the Agreement was entered into, Section 90G(1) of the Act was in the following terms:

> ***"90G***
>
> *(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 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) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the agreement;

(iii) whether or not, at that time, it was prudent for that party to make the agreement;

(iv) whether or not, at that time and in the light or such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable; 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."

There was no dispute that each of the parties had obtained independent legal advice prior to signing the Agreement. Further, there were annexed to the Agreement Lawyers' Certificates stating that each of the parties had received advice about the matters set out in Section 90G(1)(b) of the Act, as it then was.

However – and, fatally from the wife's point of view – the body of the Agreement did not contain a statement to the effect that before the Agreement was signed, each of the parties had received independent legal advice as to the matters set out in Section 90G(1)(b).

Instead, there was a Recital in the Agreement that contained the following general acknowledgement:

> *"Each of the parties acknowledges that they have received independent legal advice as to the legal effect of this Agreement prior to the execution of this Agreement as evidenced by the Lawyer's Certificate appended hereto."*

There was a further Clause in the following terms:

> *"(The husband) acknowledges that prior to entering into this Agreement he received from a lawyer acting independently of (the wife) and in the absence of ("the wife") advice explaining the legal implications of this agreement and including but not limited to his rights and obligations pursuant to the Act and that this Agreement excludes those rights and/or obligations."*

The matter came before Benjamin J on 15 September 2006. He dismissed the Application to set aside the Financial Agreement. His Honour said:

> *"If Courts require a strict interpretation of legislation, then this would have the effect of making such agreements less available to the broader community. It would positively discourage the use of financial agreements and it would limit the pool of legal practitioners who are equipped and willing to draft and/or advise in relation to such agreements. Such strict and inevitably narrow construction would add to the cost of such agreements and may put the cost to prepare and advise them outside the financial means of the general community. That is not the legislative intent."*

He added:

> *"Courts should not make the legal practitioners and the parties cross all of the "t's" and dot all of the 'i's" to enter into and give effect to financial agreements. The form should not defeat the substance. The Act does not create a regime of strict compliance and there is a requirement on Courts to give purpose to legislation … I will adopt the objective approach."*

3.3.3 The Full Court's Decision

A Full Court comprising of their Honours Faulks DCJ, Kay & Penny JJ. Heard the husband's Appeal on 4 June, 2007. In their Judgment delivered on 24 January 2008, their Honours allowed the husband's Appeal and set aside the Financial Agreement.

The Full Court stated that care must be taken in interpreting any provision of the Act that had the effect of ousting the jurisdiction of the Family Court. It said as follows[9]:

> *"Recital R and Clause 29 of the agreement … 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 sub-section 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 & 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."*

3.4 Cole & Cole

This was a first instance decision of the Federal Magistrates Court, that was delivered by Wilson FM on 27 June 2008.[10] It involved an application to set aside a BFA pursuant to Section 90K(1)(b) of the Act *("Agreement is void, voidable or unenforceable")*.

An issue arose as to the Applicant's mental state when he executed a BFA. When he saw his treating Psychiatrist on 19 October and again on 2 November, 2005, the Applicant was expressing grandiose ideas, such that the Psychiatrist formed the view that he was *"hypomanic"*. However, the same Psychiatrist had not recorded any manic behaviour when he saw the Applicant on 19 August 2005, which was just 6 days before the Applicant signed the BFA.

The wife called a Psychiatrist who gave evidence that if the Applicant had been in a manic phase at the time he saw his Solicitor, he would have been unable to sit still, and would have been *"garrulous and irritable"*. Fortuitously, the Applicant's former Solicitor had made a file note, in which he recorded that the Applicant

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9 Black & Black (2008) FamCA FC7 at paragraph 45

10 Cole & Cole (2008) FMCAfam 664

"seemed quite aware and lucid and seemed to have given the matter some considerable thought".

FM Wilson found that the Applicant had not discharged the onus of establishing, on the balance of probabilities, that he lacked mental capacity on the date he signed the BFA. At the same time, she commented obiter that if the Applicant had been under incapacity at the time he made the BFA, then the Agreement was voidable by him. She accepted the submission that in that event, the Applicant was obliged to void the contract within a reasonable time of regaining capacity. In circumstances where the Application to set aside the BFA was not filed until 9 May, 2007, she found that the delay would have been sufficient to defeat a claim to avoid the BFA.

3.5 Kostres & Kostres

This case[11] involved a challenge to a BFA on the grounds that one party had engaged in unconscionable conduct.

A BFA was entered into 2 days before the parties were married. Under the terms of the BFA:

- each party was to retain the assets that each owned at the time of marriage (that were not by all accounts substantial, in the case of either party);
- assets acquired during the relationship from joint funds would be divided equally, in the event of marriage breakdown; and
- assets acquired by either party from their own moneys would remain the property of that party.

It was common ground that at the time of the BFA, both parties were under the mistaken belief that the husband was still an undischarged bankrupt. Neither party shared this belief with their independent Solicitor. The husband argued that if he had known that he was not in fact bankrupt, he would have insisted that property purchases made during the marriage should have been registered in his name, as well as that of the wife. He sought to argue that the wife, in those circumstances, had engaged in unconscionable conduct by seeking to rely on the agreement.

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[11] Kostres & Kostres (2008) FMCAfam 1124

He also argued that a business and business property acquired during the marriage had been acquired using joint funds, because:

- he had worked in the business and thereby contributed to the generation of its goodwill; and
- he had contributed to the repayments that were made under the mortgage that was taken out to purchase the unit in the wife's name.

FM Wilson dismissed the husband's argument that there had been unconscionable conduct pursuant to Section 90K(1)(e), noting that such conduct must specifically relate to the "making" of the BFA. However, no such conduct could be shown: the wife's state of mind as to the husband's bankrupt status was purely as a result of what she was told by him.

The husband appealed. A Full Court (comprising their Honours Bryant CJ, Boland and Jordan JJ) agreed with the conclusion that the husband could not make out that there had been unconscionable conduct. However, it allowed the Appeal, finding that the operative terms of the Financial Agreement were ambiguous, particularly when applied to the party's right to seek Orders in relation to the business, a discretionary trust that was established during the marriage and 2 units that were purchased in the wife's sole name.

In its Judgment, the Full Court referred to the proposed amendments to Section 90G, that were due to come into force on 4 January, 2010, commenting that, with the perceived relaxation of the procedural requirements relating to the making of the agreement,

> *"…… this makes it even more essential that the substantive clauses of such agreements are drafted with precision to ensure effectiveness, especially as they may be dealing with future acquired property or other interests in property."*

3.6 Charney

This was a decision of JR Loughnan[12] where the Court found that a Financial Agreement was not binding in circumstances where the Certificates of Independent Legal Advice referred to advice having been given as to:

> *"(a) the effect of the agreement on the rights of the parties to apply for an Order under Pt VIII of the Family Law Act 1975."*

The Agreement was also expressed to be an agreement under Section 90D of the Act – which relates to agreements entered into after divorce – when the parties were not in fact yet divorced.

3.7 Suffolk & Suffolk

The most recent amending legislation preserves the requirement that each party must be provided with a signed certificate or statement by that party's legal practitioner, although, in the case of BFAs made on or after 4 January, 2010, this signed statement can be provided before signing the agreement, as well as afterwards.

In Suffolk & Suffolk,[13], O'Reilly J held:

> *"The use of the term "after it is signed" imports that there is some immediacy in the giving. The particular wording contemplates that the "giving" occurs at or about the time that the agreement is signed, otherwise the inclusion of the words "after it is signed" in S.90G(1)(e) makes no sense."*

The issue was also considered by Justice Murphy in Fevia & Carmel - Fevia[14], where he commented as follows:

> *"I consider the implication of the expression "within a reasonable time" is necessary in determining whether the S.90G requirement for the provision of an original and copy is complied with and that the implication*

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12 Charney & Charney (2009) FamCA751

13 Suffolk & Suffolk (2009) (No 2) Fam CA 907

14 Fevia & Carmel – Vevia (2009) Fam CA 816

of such an expression is consistent with the overall purpose of the section and Part VIIIA earlier outlined.

"What is reasonable will, of course, depend upon the particular circumstances of the contracting parties (including, it might be said, whether the agreement is made pursuant to S.90B, S.90C or S.90D)."

3.8 Ruane & Bachman – Ruane & Anor

Not uncommonly, a client will want to enter into a pre-nuptial BFA in circumstances where the other party is overseas, and the client requests that a BFA be drawn up so that the other party can sign up whilst still overseas, before they return together to start their married life in Australia. How then does one ensure that the other spouse receives independent legal advice from a legal practitioner?

In this Decision[15], Justice Cronin considered a Financial Agreement where the Certificate of Independent Legal Advice had been signed by a practitioner who had no Australian law qualification, and possibly even no knowledge of Australian law. He observed:

"Section 4 of the Act provides that unless the contrary intention appears in the Act, "lawyer" but not "legal practitioner" is defined to mean a person enrolled as a legal practitioner of:

(a) a Federal Court; or

(b) the Supreme Court of a State or Territory.

To argue the plain meaning of "legal practitioner" in the context of this Act and in particular Part VIIIA in its widened generic sense does not sit comfortably with the seriousness of the object of the provision which is to oust jurisdiction."

The fact that the Certificate was not signed by an Australian legal practitioner was fatal to the Financial Agreement, which was found not to be valid.

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15 Ruane & Bachmann – Ruane & Anor (2009) FamCA 110

3.9 Blackmore & Webber

This is an extremely interesting Decision by Federal Magistrate Bender, that was delivered on 6 April, 2009.[16]. Essentially, the wife argued that a Pre-Nuptial BFA should be set aside:

3.8.1 because there was not strict compliance with the formal requirements of Section 90G;

3.8.2 because of the husband's non-disclosure; and

3.8.3 because the husband engaged in unconscionable conduct, and subjected her to duress.

One of her arguments was that if strict technical compliance with Section 90G was required, then there should be an analysis not only of the form of the Certificate of Independent Legal Advice, but also of the advice itself. FM Bender rejected this argument, observing:

> *"It is the accepted law in Australia in relation to contract, that a party is entitled to rely on the certificate of the independent legal advisor (see Ribchenkov v Suncorp-Metway Limited & Others (2000) 175 ALR 650 and Bridgewater v Leahy (1998) 158 ALR 66)."*

The Recitals in the BFA incorporated by reference a Schedule, in which the husband described his net worth as having an *"agreed value"* of $540,000. There was also a Recital that *"he receives am (sic) Emergency Services Pension".*

However, under cross-examination it emerged that one of his 2 properties was subject to a mortgage of $145,000 – that was not disclosed in the BFA – and also that he had cash savings of some $26,900.

FM Bender found that the Financial Agreement had been drawn by the husband's Solicitors, and that there had been no *"discussion or negotiation between the husband's Solicitors and the wife, or any Solicitors acting on the wife's behalf".* FM Bender then went onto observe:

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16 Blackmore & Webber (2009) FMCAfam154

> *"However, what this did mean is that the only knowledge the wife's Solicitors had of the financial circumstances of the husband were those as set out in the Agreement. They had no knowledge of the fact that the matrimonial home was unencumbered, that there was cash assets and that there were motor vehicles and other chattels."*

More significantly,

> *"The Binding Financial Agreement entered into by the parties contains no information as to the periodic amount being received by the husband, nor its capitalised value as calculated in accordance with the regulations."*

In his Judgment, FM Bender found:

> *"I am satisfied that in the circumstances of this case that because the Binding Financial Agreement did not fully disclose the husband's financial circumstances, the Solicitor who was advising the wife, was not in a position to properly advise the wife on the effect of the Agreement on her rights or the advantages and disadvantages of making that particular Agreement."*

He therefore found that the Agreement should be set aside on the basis of fraud, arising from the non-disclosure of material information. Although this was not the basis on which he set aside the Financial Agreement, FM Bender also observed that had he not set aside the Agreement under Section 90K(1)(A), he would have set it aside on the basis of duress and unconscionability.

4. FEDERAL JUSTICE SYSTEM AMENDMENT (EFFICIENCY MEASURES) ACT (NO. 1) 2009

4.1 New Rules for BFAs

Just under 2 years after the Full Court decision in *Black* was handed down, the Government's response arrived in this efficiently-titled piece of legislation. The changes became effective on 4 January, 2010. In the words of the Attorney-General[17] , the amendments *"will restore confidence in the binding nature and enforceability of financial and termination agreements under the Family Law Act"*.

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[17] McClelland R, Second Reading Speech, House of Representatives, 5 February, 2009.

Section 90G(1) [*Requirements for binding agreement*] has been pared down, and will apply to all BFAs made on or after 4 January, 2010[18]. It is reproduced in full at Appendix 6.1 to this paper, from which it will be seen:

4.1.1 there is no longer a requirement for a BFA to contain a statement or certificate *"to the effect that"*, before the Agreement was signed, both parties receive legal advice about certain matters. Nor, strictly, does that statement have to be annexed to the BFA (although this will clearly still be advisable);

4.1.2 it is still necessary for that advice to be given to a party before he or she signs the Agreement. Further, that party must be given a signed statement, stating that such advice was given. However, the signed statement can be given to the party at any time after the Agreement is signed, and even before;

4.1.3 for the financial agreement to be binding, a copy of the signed statement needs to be given to the other spouse party or to their legal practitioner; and

4.1.4 it is no longer necessary for the original of a BFA to be given to one of the parties after it has been signed, and a copy to be given to the other party.

Further protection for parties who enter into BFAs is provided by a new Section 90G(1A) of the Act[19]. By that Section, the Court now has the power to make an Order declaring that a BFA is binding on the parties, even if one or more of the procedural requirements in Section 90G(1)(b), (c) and (ca) are not complied with. However, such a declaration can only be made if:

- the Agreement is signed by all parties; and
- *"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 that the agreement was made) ...*"

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[18] See also Section 90 UJ(1) for de facto couples

[19] See also Section 90UJ(1A) for de facto couples

4.2 Agreements made between 14.01.04 and 03.01.10

What is particularly significant about the amendments is that they apply retrospectively to all financial and termination agreements entered into since BFAs were introduced, provided that they have not already been set aside by a Court. However, it is important to note that different requirements apply, depending on whether or not the BFA was entered into before or after 14 January, 2004.

Under the legislation current at the time, post-13.01.04 financial and termination agreements were required to contain a statement to the effect that each party had received advice from a legal practitioner as to:

> *"(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 …"*

The new legislation provides that this requirement will be taken to have been satisfied if it can be shown that the spouse party received independent legal advice from a legal practitioner about:

"(a) the effect of the Agreement on the rights of that party; and

(b) whether or not, at the time when the advice was provided, it was to the advantage, financially or otherwise, of that party to make the Agreement; and

(c) whether or not, at that time, it was prudent for that party to make the Agreement; and

(d) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the Agreement were fair and reasonable."

In other words, parties will still be bound by post-13.01.04 financial and termination agreements, if the pre-14.01.04 Certificate of Independent Legal Advice is attached to the Agreement.

4.3 Agreements made between 27.12.00 and 14.01.04

A financial or termination agreement made during this period will bind the parties if:

"Before signing the Agreement, each spouse party was provided with independent legal advice from a legal practitioner about:

(i) the effect of the Agreement on the rights of that party; and

(ii) whether or not, at the time when the advice as provided, it was to the advantage, financially or otherwise, of that party to make the Agreement; and

(iii) whether or not, at that time, it was prudent for that party to make the Agreement; and

(iv) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the Agreement were fair and reasonable ..."

In other words, the parties will be bound by a pre-14.01.04 financial or termination agreement, even if it does not contain a Statement to the effect that they were given independent legal advice about the matters listed above.

However, even if this requirement is not met, a Court still has the power to make an Order declaring that the Financial Agreement is binding on the parties, pursuant to Section 90G(1A).

5. CONCLUSION

One might expect that for every Application seeking to set aside a Financial Agreement on the ground that there has not been strict adherence with the formal requirements of Section 90G, a Response will now be filed, seeking a declaration that the Financial Agreement is nonetheless binding, pursuant to the new Section 90G(1A).

The recent amendments do not give any guidance as to how, or in what circumstances, a Court may be satisfied that it would be *"unjust and inequitable"*, for a financial agreement to be upheld, even though one or more of the procedural requirements have not been satisfied.

If the average length of a marriage in this country is 12 years, then it may well be that we can also expect a spate of cases involving pre-nuptial agreements, where one party challenges the level of disclosure made by the other party, prior to the Agreement being entered into.

Anecdotally, however, it would appear that pre-nuptial BFAs will increase in popularity, especially as public awareness of their binding effect increases.

In spite of the redeeming provisions of Section 90G(1A), it is essential that practitioners continue to take care to ensure that the requirements for a BFA are carefully adhered to. Further, if they have not already done so, it would be sensible for practitioners to check the Financial Agreements that they might be holding in their deed safe, in order to ensure that the correct form of Certificate was used. Beware using that handy precedent which, although it might contain all your favourite clauses, still has annexed to it the old form of Certificate. And where advice has been given in writing by a Solicitor to his or her client as to the advantages and disadvantages of entering into a BFA, take care to ensure that any such letters of advice are also retained, along with a copy of the Agreement.

Chris Dimock

6. APPENDICES

6.1 SECTION 90G WHEN FINANCIAL AGREEMENTS ARE BINDING

90G(1) [Requirements for binding agreement]

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*.

6.2 Sample Statement of Independent Legal Advice

STATEMENT UNDER SECTION 90G (1)(b)
FAMILY LAW ACT, 1975

I, , of in the State of New South Wales, Solicitor, hereby certify that, in relation to an agreement in writing proposed to be entered into between **JOHN DOE** and **MEGAN DOE** (hereinafter called "the parties"), I advised **MEGAN DOE** (hereinafter called "my client"), independently of the other party and before the time at which my client signed the agreement, as to the following matters:-

(i) the effect of this Financial Agreement on the rights of my client; and

(ii) the advantages and disadvantages, at the time that the advice was provided, to my client of making the Agreement.

DATED: this day of 2010.

……..

Solicitor

6.3 Sample Separation Declaration

SEPARATION DECLARATION

I, **MEGAN DOE**, of 13 Greenacre Place, Greenacre in the State of New South Wales, hereby declare:

1. That on the date referred to below ("the declaration time"), which is the date on which I have signed this Declaration, I am separated from my husband, and we are living separately and apart.

2. That in my opinion, there is no reasonable likelihood of cohabitation with my husband being resumed.

DATED this day of 2010.

…….

Megan Doe