BINDING OR BOUND TO FAIL?

Equitable Remedies and Rectification of Financial Agreements

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In this paper I will first review the role of equity in the context of financial agreements under the (CTH) *Family Law Act 1975*, then examine some of the more important equitable vitiating factors which might found proceedings to set aside a financial agreement under s 90K(1), and then how the equitable remedy of rectification may be available in respect of financial agreements. Finally, I will comment on one of the issues raised in Mr Lethbridge's paper, namely the prospect that a solicitor for one party to a financial agreement may be held to owe a duty to the other party. In the course of this paper I will express some views which may be inconsistent with opinions espoused by Federal Magistrates and Judges of the Family Court, even including the Full Court. I do so partly to be provocative, in order to continue as best I can to contribute to the development of the law in an important field in which I still take great interest, even if from afar. And I do so with utmost respect, and conscious of the circumstances that my views are expressed without the assistance of the arguments of counsel, and without the discipline of being subject to appellate scrutiny. The reader should bear in mind those significant limitations.

The role of equity in financial agreements

(CTH) *Family Law Act,* s 90K, sets out the various circumstances in which a court may set aside a financial agreement or termination agreement.[1] For the

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purposes of this paper, it relevantly provides that 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) ...
> (ab) ...
> (b) the agreement is void, voidable or unenforceable; or
> (c) …
> (d) …
> (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
> …

Section 90KA provides that "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 further that in proceedings relating to such an agreement the Court has the same powers and may grant the same remedies as the High Court has and may grant in proceedings in respect of contracts in its original jurisdiction.[2] This has two significant consequences. First, notably, the terminology "valid, enforceable or effective" in s 90KA is in substance the counterpart of "void, voidable or unenforceable" in s 90K(1)(b). This means that the question of whether a financial agreement is "void, voidable or unenforceable" is to be determined according to the principles of law and equity applicable in determining the validity, enforceability and effect of contracts. Secondly, in proceedings to set aside, salvage or enforce a financial agreement, the Court's armoury includes the full range of remedies available to a court of law or equity.

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[1] S 90UM, relating to agreements in respect of *de facto* relationships, is in the same terms.

[2] (CTH) *Judiciary Act 1903*, s 32, provides that the High Court "shall have power to grant… all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim".

It is in that context that equitable principles and remedies are chiefly of relevance in the law relating to financial agreements. Principles of equity may be invoked to set aside, salvage or enforce, a financial agreement.

Non-binding financial agreements?

In a number of recent cases it has been suggested that s 90KA also has a role to play in respect of the enforceability of financial agreements that are not binding on the parties, by reason of a failure to comply with the requirements of s 90G.[3] This depends on, first, drawing a distinction between "financial agreements" (referred to in s 4, s 90B, s 90C and s 90D), and those financial agreements which are binding (s 90G); secondly, on holding that parties to an agreement that satisfies the definition of "financial agreement" are bound by its terms (or not) according to the general law, even if there is a non-compliance with s 90G; and thirdly, that compliance (and non-compliance) with s 90G is irrelevant to contractual rights and remedies, and relevant only for the specific statutory purpose of ousting the jurisdiction of the court pursuant to s 71A.[4]

While I acknowledge that that opinion is an available one – and one that represents the current state of the law, given the judgment of the Full Court in *Senior & Anderson* – I respectfully incline to a different view. Essentially, I am inclined to think that s 90G – in providing that a financial agreement is *binding on the parties to the agreement if and only if* its requirements are satisfied – means what it says, namely that it is otherwise not binding on the parties – at all or for any purpose. The terminology *"binding ... only if"* is significant. The concept of parties being bound by an agreement, or not bound, is a widely-understood notion, and does not ordinarily involve being bound for some purposes but not others: an agreement is either binding or not. If it were intended that the effect of a financial agreement not complying with s 90G

[3] *Fevia v Carmel-Fevia* [2009] FamCA 816, [127] (Murphy J); *Senior & Anderson* (2011) 45 Fam LR 540; (2011) FLC ¶93-470.

[4] This is adapted from the clear exposition of this theory by Strickland J in *Senior & Anderson* 2011) 45 Fam LR 540; (2011) FLC ¶93-470, [94]-[95].

was limited to rendering the agreement ineffective to exclude the jurisdiction of the Court but otherwise remaining valid and enforceable – rather than that the agreement not be binding for any purpose – different terminology would have been used. At common law, an agreement which excluded the jurisdiction of the courts in respect of financial adjustment between spouses was contrary to public policy and void;[5] the effect of provisions such as (CTH) *Matrimonial Causes Act 1957,* s 87(1)(k), and *Family Law Act,* s 87, was that such agreements were valid and effective *if approved by the Court,* but otherwise they were void as contrary to public policy – not valid and effective for purposes other than excluding the jurisdiction of the Court. The introduction of Part VIIIB changed this, by permitting parties, before, during or after marriage, to enter into an agreement that ousts the court's jurisdiction, if the relevant preconditions that make them binding are satisfied. Such agreements are styled "financial agreements", and are binding on the parties if and only if the relevant preconditions are met. I see nothing in this history to suggest that such agreements were to be otherwise valid and effective, even if they were (for noncompliance with s 90G) ineffective to exclude the jurisdiction of the Court and thus not binding on the parties, and everything to suggest that, as previously, if the preconditions for them to be "binding" were not met, they would be void (as they would have been but for Part VIIIB). If a financial agreement is void or voidable or unenforceable, it may be set aside under s 90K, whereupon it also ceases to be "binding" under s 90G(1)(d). But even if it is otherwise valid, enforceable and effective, the parties are simply not bound by it unless there is compliance with s 90G – it is as if they never executed it.

Setting aside financial agreements [S 90K(1)]

The grounds in s 90K(1) overlap. In the light of s 90KA, the ground in s 90K(1)(b), that the agreement is "void, voidable or unenforceable", permits invocation of any of the "vitiating factors" that can render a contract void, voidable or unenforceable at general law. These include misrepresentation,

[5] *Hyman v Hyman* [1929] AC 601; *Shaw v Shaw* [1965] HCA 39; (1965) 113 CLR 545.

mistake, duress, undue influence, unconscionable conduct, and public policy. The breadth of s 90K(1)(b) provides to the court the full range of common law and equitable grounds for impugning the validity or enforceability of a contract

Fraud and non-disclosure [S 90K(1)(a)]

Sub-section (a) refers to an agreement that was obtained by fraud (including non-disclosure of a material matter). A contract procured by a fraudulent misrepresentation would be voidable in equity, and could be set aside under s 90K(1)(b), so this paragraph is probably surplusage.

The reference to fraud includes the common law meaning of "actual dishonesty or conscious wrongdoing".[6] This encompasses deliberate misstatement of a material particular that was intended to, and was, relied upon by the other party.[7] Whether it extends to equitable fraud, which reaches beyond actual dishonesty or recklessness regarding the truth to "sharp practices",[8] is doubtful; in statutory contexts, "fraud" is usually construed as meaning common law fraud.

Moreover, "equitable fraud" is captured by other provisions, in particular paragraphs (b) and (e). In *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362 (at 385) McTiernan J described equitable fraud as including when "advantage was taken of weakness, ignorance and other disabilities on the side of the respondent and the contract was derived from such behaviour and it is an unfair bargain". Essentially, the notion encompasses undue influence and unconscionable dealing. Accordingly, while I prefer the view that s 90(1)(a) does not extend beyond common law fraud to "equitable fraud", this is of little practical, significance as paragraphs (1)(b) (void, voidable or unenforceable)

[6] Young et al, 2009, *On Equity*, Thompson Reuters, [5.10].

[7] *Derry v Peak* (1889) 14 AC 337.

[8] Young, *On Equity*, [5.20].

and (1)(e) (unconscionable conduct) would catch equitable fraud in any event.[9]

Non-disclosure?

While non-disclosure can amount to fraud at general law, this is so only where there is an *intentional* non-disclosure in the context of a *duty to disclose*, or where the non-disclosure (in the context of the surrounding circumstances, including any disclosures that are made) has the effect of conveying a *misrepresentation*. Generally, there will be a non-disclosure of a material matter only where there is a duty to disclose, or where a representation is rendered effectively misleading by the non-disclosure.

There is rarely a general law *duty to disclose*, although I shall come to a potentially relevant exception shortly. Given that financial agreements no longer require the approval of the court, the scope of any duty of disclosure when negotiating them is not clear.

For a s 90C or 90D agreement, negotiated in the context of pending proceedings for financial adjustment between the parties, it seems that the duty to disclose is that of "full and frank disclosure" applicable in such proceedings, as enunciated in such cases as *Oriolo v Oriolo* (1985) 10 Fam LR 665, and *Morrison & Morrison* (1994) 18 Fam LR 519. Thus in the recent case of *Nyles & Nyles* [2011] FamCA 565; (2011) 46 Fam LR 29, a binding financial agreement was entered into pursuant to s 90C as part of the settlement of s 79 proceedings for alteration of property interests. Consent orders were made that noted that the agreement came into effect upon the making of the orders. Mushin J held that the duty of disclosure in the *Family Law Rules 2005* provided only the beginning, not the end, of disclosure requirements when consent orders are sought, and referred to the obligation of parties who apply for consent orders to make full and frank disclosure of all

[9] *Kostres v Kostres* (2009) 42 Fam LR 336, [149]–[150]; *Nyles & Nyles* [2011] FamCA 565; (2011) 46 Fam LR 29.

material facts. His Honour found that the wife had breached her duty of disclosure, and that this amounted to fraudulent conduct; however, his Honour further found that the husband did not rely on the non-disclosure, because he had received legal advice to the effect that further investigations were warranted before entering into a financial agreement. Accordingly, where a financial agreement is entered into as part of a settlement of pending proceedings for financial adjustment, the duty of disclosure will be co-extensive with that which operates in the proceedings.

But in the absence of proceedings that attract that duty of disclosure, *prima facie,* parties negotiating a financial agreement who are adequately resourced, legally represented, and at no special disadvantage, are not under any obligation to make disclosure. In *Cording v Oster* [2010] FamCA 511, Cronin J considered whether there is an obligation on a party to a financial agreement to make comprehensive disclosure prior to its execution (at [56] – [61]). Following the decision of the Full Court in *Kostres v Kostres* [2009] FamCAFC 222, his Honour inclined to the view that, because the Act requires parties to obtain legal advice prior to execution, it is for the client to contemplate whether sufficient disclosure has been made. However, this cannot be the end of it. Section 90G requires legal advice to be given as a precondition to a financial agreement binding the parties and ousting the court's Part VIII jurisdiction. The inclusion of the words in parentheses in s 90K(1)(a) means that Parliament cannot have intended that mere satisfaction of the requirement for legal advice dispense with any duty of disclosure in negotiating financial agreements.

I said that I would come to an exception to the statement that there is no duty of disclosure at general law. Equity has long imposed a duty of disclosure of material facts in negotiations between family members. In *Gordon v Gordon* (1821) 36 ER 910, Eldon LC said (at [467]) that "though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though innocent, and the other party is accessory to it, this court will interpose". Further, his Lordship said "[b]ut in every case it has been said, and it would be

monstrous to hold otherwise, that if what one knows has been concealed from the other, who has been misled by that concealment, the Court would not sanction the agreement". And, "In contracts of this sort, full and complete communication of all material circumstances is what the Court must insist on". The impugned agreement was between brothers who were in dispute as to which was the oldest legitimate son, and it was alleged that one knew facts relating to the date of marriage that he did not disclose to the other when the agreement was made.

In *Greenwood v Greenwood* (1863) 46 ER 285, family members entered into an agreement regarding the distribution of assets in a deceased family member's estate in substitution for whatever provision the will made. The agreement was impeached on the ground that one of the parties had knowledge of the assets and their disposition by the will that was not disclosed to the others. Turner LJ said (at [42]) the court "expects and requires, as I think, in such cases a full and complete disclosure of all material circumstances within the knowledge of any of the parties, whether inquiry be or be not made as to such circumstances. It expects and requires in such cases the most perfect *bona fides*…". Knight Bruce LJ similarly held (at [38]) that there was a duty of disclosure in such cases.

In my view, there is a strong argument that these principles apply to the negotiation of financial agreements, so as to impose an obligation of "full and complete disclosure of all material circumstances within the knowledge of any of the parties", perhaps more strongly so in the context of s 90C and s 90D agreements than for s 90B agreements.

Inadvertent non-disclosure?

On the question of what kind of non-disclosure would justify a decision to set aside an agreement under 90K(1)(a), Cronin J said in *Cording v Oster* [2010] FamCA 511 (at [60]) (emphasis added):[10]

[10] With reference to s 90UM(1)(a), which is in the same terms.

> To reach the standard of a fraud, the non-disclosure must amount to a misrepresentation *whether it is intended or otherwise*. That is because the recipient of the information, is entering into the agreement on the basis of the representations. To prove a misrepresentation of a material fact, one of the parties to the agreement must be able to show that *he or she was contracting about something other than that referred to in the contract* and *in the circumstances, it would be unconscionable for the agreement to stand*.

The third sentence in that passage seems to contemplate so-called equitable fraud, which is more appropriately addressed under s 90K(1)(b) or (e). As to the first sentence, it suggests that an unintentional non-disclosure amounting to a misrepresentation can amount to fraud. Similarly, in *Blackmore & Webber* [2009] FMCAfam 154, Bender FM expressed the view (at [42]) that a lack of disclosure of a material matter, whether by way of a deliberate intent to mislead *or by inadvertent omission*, can ground the setting aside of a Financial Agreement under s 90K(1)(a). His Honour referred to *Stoddard & Stoddard* [2007] FMCAfam 735, in which Altobelli FM observed that "[i]t is possible though that in the context of s 90K(1)(a), fraud has a broader meaning in that it may be constituted by non-disclosure of a material matter. Thus, whereas fraud at common law may require a representation, under s 90K(1)(a) fraud may be constituted by omission — i.e. non-disclosure of a material matter".

While I would accept that an intentional non-disclosure, where there is a duty to disclose, would be within a 90K(1)(a), it is difficult to conceive that it was intended that fraud, for the purposes of s 90K(1)(a), should include inadvertent omissions. To be fraud, a misrepresentation must be intentional: negligent or innocent misrepresentation does not make a case of fraud. In *Hoult v Hoult* [2011] FamCA 1023, Murphy J said:

> Fraud for the purposes of s 90K(1)(a) can, plainly, include material non-disclosure, but not every material non-disclosure is fraudulent. The inclusion of the phrase in parenthesis in s 90K(1)(a) is explained in my view by the desirability of making clear what might otherwise not clearly emerge from the position at common law or in equity. As a general proposition, at common law a finding of fraud in and about an agreement requires (among other things) a misrepresentation. A misrepresentation is, generally speaking, not constituted by silence or non-disclosure (material or otherwise).

His Honour rejected a submission that innocent or negligent material non-disclosure was sufficient, by itself, to attract 90K(1)(a). I respectfully entirely agree. An intention to deceive is required to establish fraud under 90K(1)(a) – which is to say, it requires proof of common law fraud, with a statutory gloss that non-disclosure is included where the material matter was omitted with the requisite intent.

Duress [S 90K(1)(b)]

Duress avoids a contract at common law (although the emergence of the concept of economic duress has resulted in an overlap with the equitable notion of unconscionable conduct). Duress involves the procuring of contractual assent by overbearing the will of the subordinate party by illegitimate pressure. In *Crescendo Management v Westpac Banking* (1988) 19 NSWLR 40], McHugh JA said that question is "whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it amounts to unlawful threats or unconscionable conduct". However, in *Australia & New Zealand Banking Group v Karam* [2005] NSWCA 344, the NSW Court of Appeal has maintained that duress ought to be confined to its common law basis of unlawful conduct, and that where the pressure is lawful but unconscionable, it ought to be dealt with as undue influence or unconscionable conduct.

There are some reported cases where financial agreements have been set-aside, purportedly on the ground that they were entered into under duress. The common feature is that one party, typically the woman, is at some economic and/or legal disadvantage that the other threatens to exploit if the agreement is not entered into, and the agreement disadvantages the first party. Examples are taking advantage of fear of losing a visa if the marriage ends,[11] or threatening to report to police that the wife took money from a joint

[11] *Moreno v Moreno* [2009] FMCAfam 1109, [44].

account by forging the husband's signature.[12] However, while the element of *threat* made in those cases by the husband satisfies one of the elements of duress, the threat was not an unlawful one. These decisions are better seen as cases of actual undue influence, discussed below.

Undue influence [S 90K(1)(b)]

Undue influence is perhaps the single most significant equitable doctrine in this field. Equity treats as voidable transactions procured by the improper or unconscientious use of the influence of one person over another, that cannot be explained on the grounds of friendship, charity or other ordinary motives on which people ordinarily act.[13] It is the "actual or presumed impairment of the judgment of the weaker party that is the critical element in the grant of relief on the ground of undue influence".[14]

Undue influence may be established by proof that the disponor's assent was in fact procured by undue influence ("actual undue influence"), or by an unrebutted presumption arising from the existence of a relationship of influence between the parties where the quantum or improvidence of the transaction is such that it cannot be explained on grounds of friendship, relationship, charity, or other ordinary motives ("presumed undue influence").[15]

To prove actual undue influence, it must be shown that one party had the capacity to influence the other improperly, that this in fact occurred, and that the transfer was a result of the influence: *Johnson v Buttress* (1936) 56 CLR 113, 134. But undue influence will be presumed (1) where the relationship between the parties is within recognised categories that are presumed to be

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[12] *Tsarouhi v Tsarouhi* [2009] FMCAfam 126, [43].

[13] *National Westminster Bank plc v Morgan* [1985] AC 686, 708; *Bank of New South Wales v Rogers* [1941] HCA 9; (1941) 65 CLR 42, 54.

[14] Sir Anthony Mason, "Impact of Equitable Doctrine on the Law of Contract", 27 *Anglo-American Law Review*, 1 (1998), 7.

[15] *Whereat v Duff* [1972] 2 NSWLR 147, 168; *Quek v Beggs* (1990) 5 BPR 11,761; *Allcard v Skinner* (1887) 36 Ch D 145, 185; *Goldsworthy v Brickell* [1987] Ch 378, 400-1.

relationships of influence; (2) where it is proved that the relationship was one of influence.

Some relationships – such as parent and child, guardian and ward, solicitor and client, doctor and patient, spiritual adviser and follower, and (probably) fiancé and fiancée – but not husband and wife – are presumed to be relationships of influence. This is because they are considered to involve such a reposing of trust and confidence in one party by the other, and likelihood of the reciprocal exercise of authority by the one over the other, that any substantial gift had to be justified by the recipient, so that the gift would otherwise be presumed to be the result of exertion of influence which was "undue".[16]

In other relationships, not presumed to be relationships of influence, proof of particular aspects of the relationship may nonetheless show the relationship to be one of influence, in that one party is in a position of ascendancy or dominion over the other, who is in a position of dependence or subjection. As Barrett J has recently explained in *Winfield v Clarke* [2008] NSWSC 882 (at [27]):

> Presumed undue influence may arise from the existence of a relationship where one person has assumed a position of ascendancy or influence over the other person or the other person has reposed trust and confidence in the former, and the former has used that relationship to achieve a transaction in which the first person benefits. … In the case of presumed undue influence the onus will rest on the ascendant or trusted party to rebut the presumption and prove that the transaction was voluntary and a result of a free exercise of will or a well understood decision-making process: *Johnson v Buttress* (1936) 56 CLR 113.

This enables a party to raise a presumption in a *particular* case from the *general* nature of their relationship.

Thus there are essentially three categories of undue influence: (1) actual undue influence; (2) presumed undue influence arising from a presumed

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[16] See *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th Edition, [15-055].

relationship of influence; and (3) presumed undue influence arising from a proven relationship of influence.

Once there is a presumed or proved relationship of influence, the dominant party bears the onus of showing that a transaction for his or benefit was not procured by undue influence. In this respect, it is not sufficient to show that the plaintiff understood what he or she was doing or its significance; it must be established that the intention was formed free from the influence of the defendant, and that he or she was at the time of the gift "emancipated" from the influence. In many cases the courts have placed particular reliance upon the presence or absence of improvidence and independent advice [*Meagher, Gummow and Lehane*, [15-125]]. But independent legal advice, though important, is insufficient. The mere existence of independent legal advice does not rebut the presumption, at least unless it is acted on, as otherwise the same influence that procured the transaction would produce disregard of the advice to refrain from entering into it.[17]

Parties to financial agreements are not at arms length, and will often be in relationships of the kind in which trust and confidence may be reposed by one in the other, and influence exercised by the other over the first. Three types of relationship need special consideration in the light of the types of financial agreement for which the Act make provision.

The first is that of fiancé and fiancée, which is highly relevant in the context of s 90B financial agreements. The better view is that in Australia at least, this remains a *presumed relationship of influence*. This class was established in *Page v Horne* (1848) 11 Beav 227, 50 ER 804, where Langdale MR said that "no one can say what may be the extent of the influence of a man over a woman, whose consent to marriage he has obtained".[18] Despite the extensive changes in society since, I venture that many family law practitioners who have been asked to prepared financial agreements on the

[17] *Powell v Powell* [1900] 1 Ch 243, 246 (Farwell J).

[18] See also *Cobbett v Brock* (1855) 20 Beav 524, 52 ER 706; *Lovesy v Smith* (1880) 15 Ch D 655; *James v Holmes* (1862) 31 LJ Ch 567; *Re Lloyd's Bank Ltd* [1931] 1 Ch 289.

eve of a wedding would not disagree today. In *Zamet v Hyman* [1961] 1 WLR 1442, the English Court of Appeal took a different view, Donovan LJ asserting that there had never been such a presumption; and Lord Evershed MR (Danckwerts LJ concurring) saying that taking a sensible view of the position of women in modern society they would not necessarily assume the existence of the influence in every case.

However, in Australia, the existence of this class was twice accepted by Sir Owen Dixon. In *Johnson v Buttress* (1936) 56 CLR 113, Dixon J observed that there are certain "well-known relations" that will cast a burden on one party to the transaction "as soon as it appears that the relation existed, and that [one party] has obtained a substantial benefit from the other" to prove that the advantage was not obtained by undue influence, and gave the following instances: "[a] solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry". And in *Yerkey v Jones* (1939) 63 CLR 649 at 675, Dixon J noted the "distinction drawn between large gifts taken by a man from the woman to whom he is affianced, a case to which the presumption [of undue influence] applies, and similar gifts by a wife to her husband, a case to which it does not apply…".

It is true that in *Louth v Diprose* (1992) 175 CLR 621, Brennan J observed (at 630) that it "may no longer be right to presume that a substantial gift made by a woman to her fiancé has been procured by undue influence", but until and unless the High Court otherwise determines, the presumption remains the law in Australia. I do not think this is to be regretted; it affords significant protection to women of whom advantage might otherwise be taken – as in the experience of many practitioners it frequently is, not long before a wedding. It ought to be seen as an early instance of positive discrimination.

The practical impact of this is profound: every s 90B agreement will be presumptively voidable for undue influence, so that the husband will bear the onus of proving that the wife understood what she was doing and its significance, and that her intention was formed free from the influence of the husband.

The second type of relationship for consideration is that of husband and wife. As just noted, in *Yerkey v Jones* Dixon J said that this was not a presumed relationship of influence. The rationale for the presumption not applying to married persons was that natural bonds of love and affection may dispose them to transfer property on terms that would otherwise be inexplicable. That said, as Dixon J also observed, the marital relation has never been divested completely of "equitable presumptions of an invalidating tendency", and it may often be relatively easy to establish a *proved* (as distinct from presumed) relationship of influence, from which undue influence will then be presumed, although that is much less likely to be the case after separation. Thus while there may not be adequate evidence of actual undue influence relating to the negotiation of the financial agreement itself, there may be good evidence that one party routinely exercised dominion over the other so that, if established, the dominant party would then have to justify the agreement.

The third relevant type of relationship is that of de facto partners. There has never been any "equitable presumption of an invalidating tendency" in that context. However, as in formal marriages, so in de facto relationships, it may be possible to prove the existence of a relationship of influence, from which undue influence will then be presumed.

S 90K(1)(e) - Unconscionability

A transaction procured by unconscionable dealing is voidable in equity, and would therefore be within s 90K(1)(b). However, s 90K(1)(e) also provides for setting aside where "in respect of the making of a financial agreement – a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable".

Paragraph (1)(e) was added by amendment moved in the Senate, in response to which the then Attorney-General made clear that, in the Government's view, unconscionable conduct in (1)(e) was not to have a different meaning than it would have in equity,[19] and was, in the Government's view, already provided for by (1)(b). In *Jacobs v Vale* [2008] FMCAfam 641, Jarrett FM said:

> Sub-sections 90K(1)(b) and 90K(1)(e) are probably directed at different matters – the former to the circumstances in which the agreement was formed and the latter to the overall circumstances in which it might be argued that the retention of a benefit derived from a joint endeavour which has failed to the exclusion of the other party or parties to that endeavour is unconscionable.

With respect, I suggest that the terminology of s 90k(1)(e) – commencing as it does with the words "in respect of the making of a financial agreement" – makes clear that it is concerned with the circumstances in which the agreement was formed, and that the Attorney-General's observations suggest that it was thought to be already included in s 90K(1)(b). In *Mardones v Mardones* [2012] FMCAfam 323, Burchardt FM (at [100]) took the view that the statutory words were untrammelled by the equitable principles explained in *Amadio*, and simply invited the court to decide whether in all the circumstances a party has engaged in conduct that is unconscionable. On that basis his Honour set aside, under s 90K(1)(e), an agreement entered into by a wife who had been given advice not to enter it by her lawyer following "constant badgering and psychological pressure" by the husband, which the Magistrate found to be unrelenting and improper. While the jurisprudence in respect of (former) (CTH) *Trade Practices Act,* ss 51AB and 51AC, provides

[19] The Hon Daryl Williams, Australian Senate *Parliamentary Debates*, Hansard, 9 November 2000.

some support for this approach,[20] I respectfully doubt whether the use by Parliament of words that have a well-established legal content permits this issue to be approached without reference to the established law on unconscionable conduct, especially in the light of the provisions of s 90KA. In any event, undue influence may be the better explanation of the case.

Accordingly, I think the better view is that the content of "unconscionability" in s 90K(1)(e) is informed by the equitable notion of unconscionability.

Equity intervenes to avoid a transaction which has been brought about by one party knowingly taking advantage of a special disadvantage to which the other party was subject, which affected that party's ability to safeguard his or her own interests. Whereas undue influence focuses on the consent of the weaker party, unconscionable conduct focuses on the conduct of the stronger party in taking advantage of known weaknesses, disabilities or disadvantages of the other party. In *Commercial Bank of Australia v Amadio* [1983] HCA 14; (1983) 151 CLR 447, Mason J, as he then was, emphasised the distinction between the doctrines of unconscionable dealing and undue influence, and in particular that for the purpose of attracting the former – unlike the latter – it was not necessary that the plaintiff's will had been overborne (at 461):

> Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and

[20] Section 51AC provides that a corporation must not, in trade or commerce, ... engage in conduct that is, in all the circumstances, unconscionable. It has been held that the term "unconscionable" was intended to be interpreted more broadly than the general law concept, given the broad range of matters that the section provide for the court to take into account: *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761; (2001) 117 FCR 23; 191 ALR 342; 40 ACSR 252; *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376 (French J); [2003] HCA 18; (2003) 197 ALR 153 (Gummow and Hayne JJ); *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286; (2003) ATPR 46-229 (Hasluck J); *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246; ATPR 41-487; and *Hurley v McDonalds Australia Ltd* [1999] FCA 1728, [22], [31], which nonetheless emphasises that to attract the epithet of unconscionable, there must be circumstances other than the mere terms of the contract that would render reliance on its terms 'unfair' or 'unreasonable' or 'immoral' or 'wrong'. However, the case for applying this approach to s 90K(1)(e) is weakened by the absence from that section of the extensive list of relevant factors contained in *TPA* s 51AC; the absence of the internal contrast with *TPA* s 51AA which (in distinction to ss 51AB and 51AC) expressly refers to conduct that is unconscionable within the meaning of the unwritten law of the States and Territories; the presence of s 90KA ,which requires the court to apply that unwritten law; and the Attorney-General's observations about the amendment mentioned above.

> voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position. ... though not deprived of an independent and voluntary will, [he] is unable to make a worthwhile judgment as to what is in his best interest.

The doctrine was summarised by Kitto J in *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362 (at 415) in the following terms (emphasis added):

> It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances *affect his ability to conserve his own interests*, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

In *Amadio* Deane J, with whom Mason and Wilson JJ agreed, described the elements that would attract relief (at 474), as follows (emphasis added):

> The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party *with the consequence that there was an absence of any reasonable degree of equality between them* and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: "the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract" (see per Lord Hatherley, *O'Rorke v Bolingbroke* [46]; *Fry v Lane* [47], at p. 322; *Blomley v Ryan* [48], at pp. 428-429).

Thus, where a party impugns a transaction on the ground that it is an unconscionable dealing: (1) the plaintiff must establish that there was a relevant relationship of "special disadvantage"; (2) the plaintiff must establish that the defendant understood that the plaintiff was at a special disadvantage. In this respect, actual knowledge of any specific diagnosis or condition is not required, and it suffices that the defendant knew, or ought reasonably have known, that the plaintiff was not in a position to look after his own interests; and (3) the defendant then bears the onus of establishing that the transaction was "fair, just and reasonable" [*Amadio*, 474 (Deane J)], which involves showing that the plaintiff received full value and/or was independently advised

[Cope, *Duress Undue Influence and Unconscientious Bargains*, Law Book Co, 1985, [260]].

In this context, "special disadvantage" is usually associated with conditions that make people vulnerable to exploitation and less able to conserve their own interests. Mason J, in *Amadio*, explained the concept in the following terms (at 461-462):

> It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct. As Fullagar J said in *Blomley v Ryan*, at p. 405:
>
> > The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.
>
> Likewise Kitto J. spoke of it as "a well-known head of equity" which-
>
> > ... applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands".
>
> It is not to be thought that relief will be granted only in the particular situations mentioned by their Honours. It is made plain enough, especially by Fullagar J., that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.

At the heart of the doctrine is the prevention of unfair exploitation of a disadvantage or vulnerability. A relationship of emotional dependence that renders a party susceptible to improvidence in favour of the stronger party may attract the doctrine [*Louth v Diprose* [1992] HCA 61; (1992) 175 CLR 621; *Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457], although not every case of illness, impairment or emotional dependence is a case of special disadvantage. The cases to which reference has so far been made show that it is insufficient to attract the doctrine merely that there be an inequality of bargaining power, or that the plaintiff be affected by one or more of the relevant conditions; it is critical that the condition be such as to impact on the plaintiff's ability to conserve his or her own interests and render him or her vulnerable to exploitation [see *Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040, [49]-[54]]. One can be ill, or poor, or even affected by delusions, and still perfectly capable of robustly conserving one's own interests.

Even the presence of mental illness is not necessarily indicative of "special disadvantage" in the relevant sense. People who are depressed or psychotic are not necessarily unable to look after their own interests. Depression does not, of itself, necessarily inhibit a person's ability to attend to his or her own interests, or render one vulnerable to exploitation. Delusions and hallucinations may, but not necessarily do, affect a person's judgment; that will typically depend on the subject matter of the delusion or hallucination. Thus, in the context of testamentary capacity, "insane delusions" that poison the testator's affections in respect of potential beneficiaries bear on capacity; but only if the delusions be of such a character as to have "a direct bearing on the provisions of the will" [*Banks v Goodfellow*, (1870) LR 5 QB 549, 557; *Bull v Fulton* (1942) 66 CLR 295, 299].

Absence of legal or other advice when advice is required, can be, or can compound, a "special disadvantage", but it is important to bear in mind the supposed vulnerability [*Bridgewater v Leahy*, [41]]. The obtaining of advice, or its availability, is not a pre-requisite to validity. Its importance is influenced by the complexity of the transaction as well as the plaintiff's capacity and

weaknesses; a key consideration is whether advice was necessary for the party to appreciate the nature and practical effect of the transaction, and it is difficult to see how absence of advice would amount to a "special disadvantage" if, without it, the plaintiff nonetheless appreciated the nature and effect of the transaction.

Although improvidence is a flag, mere improvidence is not enough. There are many cases in which a party may enter into an apparently disadvantageous agreement without being at any special disadvantage (or, for that matter, under any undue influence). One illustration is provided by *Gebert & Gebert* (1990) 14 Fam LR 62, in which the husband agreed to accept only 10% of the asset pool within 2 weeks of the separation. The Full Court observed (at 66) that:

> There may be many situations where a party acting perfectly rationally, for reasons of his or her own, is prepared to make a more substantial allowance to the other spouse than would normally be the case. Indeed, there may be some cases where a party will voluntarily concede the whole of the matrimonial property to the spouse.

Another is *Logan & Logan* [2012] FMCAfam 12, in which the wife agreed to accept only 15% of the property pool after 23 years of marriage, where neither brought significant assets to the marriage and both contributed relatively equally during the marriage. The evidence was that the wife felt significant guilt at the circumstances that led to divorce. She later claimed that the husband unconscionably took advantage of this, and threatened to distribute emails sent by her to third parties that were embarrassing to her, to obtain the agreement. However, her application did not succeed.

Laches, acquiescence and affirmation

It is worth noting that the ability of a party to invoke any of the equitable vitiating factors may be lost by laches, acquiescence or affirmation.

The essential elements of the defence of laches are (1) knowledge of the facts and the rights to justify commencement of proceedings, (2) delay, and (3) unconscionable prejudice to the opponent as a result [*Crawley v Short* [2009] NSWCA 410, [163]; *Savage v Lunn* [1998] NSWCA 203]. In

respect of (1), references in the authorities to "means of knowledge" being as good as knowledge appear to be concerned with knowledge of one's rights, as distinct from knowledge of the facts from which those rights arise. In *Savage v Lunn (No 2)* [1998] NSWCA 204, the Court of Appeal maintained that "actual or inferred knowledge of the facts" is a necessary requirement of the defence.

The seminal case of *Allcard v Skinner* (1887) 36 Ch D 145 provides a useful illustration of the practical application of these equitable defences.[21] Ms Allcard had sued to recover gifts made by her to a sisterhood of nuns, St Mary of the Cross, which she had joined in 1868. Sometime after joining the sisterhood, Ms Allcard, at the request of the lady superior of the sisterhood, Ms Skinner, made a will leaving all her property to the sisterhood. She also bestowed a large portion of her fortune to the sisterhood, comprising from shares in railway stock and various other securities, and amounting to some 8,500 pounds. After leaving the sisterhood in May 1879, Ms Allcard revoked her will, but made no demand for the return of her property until 1885. The evidence established that, soon after she left the sisterhood, she had a conversation with her brother about getting her money back. He said she did not need the trouble and had better leave it alone. Having left the Church of England's sisterhood and joined the Roman Catholic Church, she was advised by a Roman Catholic priest not to trouble about it. In February 1880, she consulted a solicitor about making a new will and discussed with him her gifts to the sisterhood. He told her it was too large a sum to leave behind without asking for it back, but she would not trouble about it. In 1884, she heard that another sister had left the sisterhood, had asked for her money back and had had it returned to her. Only then did Ms Allcard make up her mind to try to get her money back. It was held that the gifts had been voidable for undue influence, but that Ms Allcard's claim was defeated by confirmation, estoppel, acquiescence and/or laches. Lindley LJ said that the evidence showed that she had considered the matter and had come to the

[21] For a recent application of these principles, see *Anderson v Lauridsen* [2011] NSWSC 849, [29]-[34].

conclusion that it was not worth troubling about. His Lordship said (at [178]) that it was not necessary to decide whether or not delay alone would be a sufficient defence, because the case did not rest on mere lapse of time:

> There is far more than inactivity and delay on the part of the Plaintiff. There is conduct amounting to confirmation of her gift.

His Lordship concluded (at [189]):

> Whether the Plaintiff's conduct amounts in point of law to acquiescence or laches, or whether it amounts to an election not to avoid a voidable transaction, or whether it amounts to a ratification, or a confirmation of her gifts, are questions of mere words which it is needless to discuss. In my judgment, it would not be fair or right to the Defendant to compel her now to restore the money sought to be recovered by this appeal. Nor, in my opinion, would such a result be in conformity with sound common legal or equitable principles.

The other majority judge was Bowen LJ, who concluded:

> In my view, this appeal ought to be dismissed, and dismissed on the ground that the time which has elapsed, though not a bar in itself, though not accurately to be described as mere laches which disentitles the Plaintiff to relief, is nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world - namely, that the lady considered her position at the time and elected and chose not to disturb the gift which she then at that moment felt, if she had the will, she had the power to disturb.

Rectification

Here I am concerned with rectification in Equity – not with what has sometimes inaccurately been described as “rectification” pursuant to s 90G(1A) and (1B).

Where the written form of an instrument – a document – embodies a mistake, so that it does not reflect the true intention of the maker or makers, it can be rectified so as to express that true intention. While the remedy is most frequently invoked in relation to documents that record contracts, it is not so

limited, and may be sought of most documents.[22] Thus it has been applied to conveyances,[23] deeds poll,[24] settlements,[25] instruments of appointment,[26] life insurance policies,[27] bills of exchange,[28] and leases.[29]

It is fundamental that courts of equity do not rectify contracts or agreements; they rectify instruments that purport to record the terms of contracts.[30] Rectification cures the erroneous expression of the parties' true intention, in a contract that is already binding; it does not bring into existence a binding contract where the parties have failed to make one, nor fill in the blanks.[31] As Hodgson J (as he then was) said in *Bush v National Australia Bank* (1992) 35 NSWLR 390 (at 407):

> A further difficulty which may arise when rectification is sought on the basis of a common mistake as to the legal effect of words is that the court cannot draft an agreement for the parties, to give effect to some intention of the parties which they have totally failed to accomplish with the words they have chosen. It is necessary that the common intention be such that the court can conclude, with the appropriate clarity, both the substance and the detail of the precise variation which needs to be made to the wording of the instrument: see *Pukallus v Cameron* (1982) 180 CLR 447 at 452; *GPI Leisure Corporation v Herdsman Investments Pty Limited* (No 4), Young J, 17 August 1990, at [9]-[14]).

In short, rectification is concerned with the expression of an already formed intent, not with the formation of a contractual intent. Convincing proof of the error and the omission in "clear and precise terms" is required, because

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[22] Spry, *Equitable Remedies,* 5th edn, p609. Corporate Articles of Association are an exception [*Scott v Frank F Scott (London) Pty Ltd* [1940] Ch 794], as are wills, although in some jurisdiction there is now statutory provision for rectification of wills.

[23] *White v White* (1872) LR 15 Eq 247.

[24] *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087.

[25] *Welman v Welman* (1880) 15 Ch D 570.

[26] *Daniel v Arkwright* (1864) 2 H & M 95; 71 ER 396.

[27] *Collett v Morrison* (1851) 9 Hare 162; 68 ER 458; *Metlife Insurance Ltd v Visy Board Pty Ltd* [2007] NSWSC 1481.

[28] *Druiff v Parker* (1868) LR 5 Eq 131.

[29] *Murray v Parker* (1854) 19 Beav 305; 52 ER 367.

[30] *McKenzie v Coulson* (1869) LR 6 Eq 368, 375 (James VC); see also *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, 461.

[31] *Sindel v Georgiou* (1984) 154 CLR 661.

parties are usually taken to have intended to be bound by the documentary record. For this reason, at least in contract cases, courts are wary of acting on the evidence of a single witness, although there is no absolute rule against doing so.

When granted, rectification is retrospective and relates back to the date of execution, so that the rectified document is to be read as if it had originally been executed in its rectified form. This is important, because it can result in the retrospective validation of acts otherwise invalid under the instrument in its original form.[32] For example, rectification can make a previously non-compliant document a sufficient written memorandum to fulfil the requirements of the Statute of Frauds.[33]

The essential principles in a claim for rectification in a case of common mistake in a contract were stated by Wilson J in *Pukallus v Cameron* (1982) 180 CLR 447, 452, as follows: *first,* that though there need not be a concluded antecedent contract, there must be an intention common to both parties at the time of the contract to include in their bargain a term which by mutual mistake is omitted from it; *secondly,* that a plaintiff must advance convincing proof that the written contract does not embody the final intention of the parties; and *thirdly,* that the omitted ingredient must be compatible of such proof in clear and precise terms, so that the Court must not assume for itself the task of making the contract for the parties.

Rectification is also available in respect of unilateral mistake, where the plaintiff mistakenly believed that the agreement did, or did not, contain a particular term; the defendant was aware that of the plaintiff's mistaken belief and omitted to make the plaintiff aware of the mistake; and the mistake was one calculated to benefit the defendant.[34] For this purpose, the defendant may be held to have the requisite knowledge if he or she shuts their eyes to

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[32] *Malmesbury v Malmesbury* (1862) 31 Beav 407, 418; 54 ER 1196.

[33] *Craddock Bros v Hunt* [1923] 2 Ch 136; *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560.

[34] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 516.

facts or circumstances that indicate the other party is entering into the agreement under some mistake or misapprehension.[35]

However, the availability of rectification is not limited to bilateral contracts, and extends to deeds poll,[36] voluntary settlements,[37] instruments of appointment,[38] and bills of exchange.[39] In such cases, it will be the intention of the maker that is critical. Thus voluntary settlements would be rectified at the instance of the settler, but not at the instance of the grantee over the opposition of a living settler (though they could be where the settler was deceased and the case was brought against his or her estate).[40]

In *Fevia v Carmel-Fevia*,[41] the versions of counterparts signed by the two parties were substantially different, in that one omitted an annexure that detailed the property the subject of the agreement; Murphy J held that this ought not be rectified, as the discrepancy meant that the mutual intention of the parties was not ascertainable (at [154 – 155]). The centrality of the property on which the agreement will operate to the intention of the parties must lead to this conclusion.

In *Senior v Anderson* [2010] FamCA 601, there were two alleged errors or omissions. First, the Agreement described itself as one made under s 90C (agreements during marriage), when it ought to have referred s 90D (agreements after divorce); secondly, the certificates of legal advice required by s 90G, while initially referring to Ms Senior and Mr Anderson in the introductory part, later used first names which were not those of Ms Senior and Mr Anderson. At first instance, Young J concluded that in both these

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[35] *Terceiro v First Mitmac Pty Ltd* (1997) 8 BPR 15,733, 15,739 (NSW SC) (McLelland J).

[36] *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087.

[37] *Welman v Welman* (1880) 15 Ch D 570.

[38] *Daniel v Arkwright* (1864) 2 H & M 95; 71 ER 396.

[39] *Druiff v Parker* (1868) LR 5 Eq 131.

[40] *Ogilvie v Littleboy* (1897) 13 TLR 399; *Lister v Hodgson* (1867) LR 4 Eq 30, 34 (Romilly MR); *Weir v Van Tromp* (1900) 16 TLR 531; *Christie v Public Trustee* (1921) 22 SR(NSW) 148.

[41] [2009] FamCA 816.

respects the agreement should be rectified in a manner "consistent with the true intentions of the parties and the financial outcome that they intended to conclude", although it may be that his his Honour was applying s 90G(1A) and (1B) rather than the equitable doctrine of rectification.

On appeal, the Full Court did not take issue with the rectification of the reference to the incorrect section in the agreement, but held that the certificates could not be rectified.[42] With respect to rectification of the certificates of legal advice, May J, dissenting, simply construed the manifestly mistaken references to *Patricia* and *Chris* as references to the correct parties, relying on the judgment of the High Court in *Fitzgerald v Masters.*[43] It is strongly arguable that this approach was open. In a passage which has been judicially approved,[44] the learned authors of Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (4th ed) write (at [26-040]):

> Proceedings for rectification ought not be brought if whatever mistake appearing in the written instrument is of the kind that the true meaning of the document could be ascertained as a matter of construction without recourse to extrinsic evidence. Courts both of law and of equity regularly insert, delete, alter and interpret words in such a fashion as to make the document sensible, without necessary recourse to any doctrine of rectification. Thus, in *Wilson v Wilson* (1854) 5 HLC 40 at 67; 10 ER 811 at 822, Lord St Leonards had no difficulty in reading "Mary" for "John" and in *St Edmundsbury Board of Finance v Clark* [1973] 3 All ER 902 at 915; [1973] 1 WLR 1572 at 1585, Megarry J read "coloured blue and red" instead of "coloured blue". In *Fitzgerald v Masters* (1956) 95 CLR 420 the High Court of Australia was able to construe clause 8 of a contract for sale on a parcel of land reading:
>
> > The usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by approved contract of land held under the Crown Lands Act shall so far as they are inconsistent herewith be deemed to be embodied herein.

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[42] *Senior v Anderson* (2011) 45 Fam LR 540; (2011) FLC ¶93-470, [138]-[143].

[43] *Fitgerald v Masters* (1956) 95 CLR 420, 426-7.

[44] *Bowler v Hilda Pty Ltd* (2001) 112 FCR 59; 183 ALR 81; [2001] FCA 342 (Drummond J)

So that "inconsistent" was read as meaning "consistent". As their Honours, Dixon CJ and Fullagar J said in their joint judgment (at 426-7):

> There is a superficial difficulty in clause 8, because it purports to incorporate a set of conditions so far as they are inconsistent with what has been specifically agreed upon. No real difficulty, however, is created. Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency. Here it would be indeed absurd to suppose that the parties, having expressed their agreement on a number of special and essential matters, should intend to incorporate by reference terms inconsistent with what they had specially agreed upon. What they must clearly have intended is to incorporate a set of general conditions except so far as they were inconsistent with what they had specially agreed upon, and clause 8 must be read as if it is said "consistent" or "not inconsistent".

As those authors also point out, the decision of the Privy Council in *Watson v Phipps* (1985) 63 ALR 321; 60 ALJR 1, is to similar effect; see also *Ex parte Whelan* [1986] 1 Qd R 500 and *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363. In my respectful opinion, *Senior & Anderson* fell within the territory described by Dixon CJ and Fullagar J in the passage quoted above. It would be absurd to suppose that the solicitors intended to refer not to the wife and the husband but to people having different first names.

Strickland J (Murphy J agreeing) – founding on the distinction between financial agreements – which bind the parties to them to obligations as ordinary contracts – and "financial agreements that are binding" under the Act and oust the court's jurisdiction (at [94]) – held that "for there to be a financial agreement there must be an agreement, and to determine that, the principles of law and equity apply, and such an agreement is subject to equitable remedies such as rectification". It followed that when the question was whether an agreement was effective to oust the court's jurisdiction, strict

compliance with s 90G was required (following *Black and Black* (2008) 38 Fam LR 503), and rectification was not available to correct non-compliance with s 90G; compliance was held to be a jurisdictional fact.

In *Wallace & Steltzer*,[45] the solicitors had incorrectly signed certificates of advice in the 2000 form, which had inadvertently been included in a revised draft of the agreement, although the (correct) 2004 form had been included in earlier drafts. Benjamin J decided the case on other grounds, but had it been necessary would have rectified the certificates to the correct 2004 form, treating them as part of the agreement.[46]

These decisions contain a number of propositions which I respectfully doubt. *First,* I would not think that the certificates are "part of the Agreement". They are documents of the solicitors, not of the parties. They are annexed to the agreement, but do not form part of it. This is even more clearly the case in respect of the "signed statements" now required by s 90G(1), which need not even be annexed.

Secondly, the certificates being documents of the solicitors, ought to be capable of rectification if through error or omission they fail to express the true intention of the certifying solicitor. The mistaken references to incorrect first names in *Senior v Anderson* seem very plainly to have been in this category. However, as the certificates are the solicitor's document, and it is the solicitor's intention that is crucial, it seems to me that the solicitor would be a necessary party to proceedings for their rectification.

Thirdly, the fact that s 90G requires a certificate as a precondition to an agreement being binding on the parties ought not preclude rectification of the certificate so that its terms accord with the true intent of the certifying solicitor. Once it is recognised that rectification has retrospective effect and can validate acts that would not have been valid under the original form of

[45] [2011] FamCA 54.

[46] His Honour's decision preceded the Full Court decision in *Senior v Anderson.*

document, there is no obstacle to a rectified certificate establishing compliance with s 90G, without detracting from the insistence on strict compliance.

Equity and s 90G(1A) and (1B)

Subsections 90G(1A) and (1B) provide an avenue for upholding an agreement as binding notwithstanding failure to comply with 90G(1), if the court is satisfied "that it would be *unjust and inequitable* if the agreement were not binding" [s 90G(1A)(c)] and makes an order declaring that the agreement is binding on the parties [s 90G(1A)(d)], upon application – called an enforcement application – by a party seeking to enforce the agreement [s 90G(1B)].

In such proceedings, s 90KA applies [s 90G(1C)], so that the validity, enforceability and effect of the agreement is determined according to general legal and equitable principles. However, as Murphy J has pointed out in *Fevia & Carmel-Fevia*,[47] in terms, s 90KA is not applicable to the determination of whether an agreement is "binding", and the general law would not, by estoppel, negate the clear terms of s 90G. I respectfully agree, as it is clear that s 90G protects parties to an agreement from outsing the court's supervisory jurisdiction unless its terms are complied with, and as the statements of principle discussed by his Honour show, the law does not in general operate to hold a person to a purported waiver of their statutory rights where those rights protect some public interest.

However, that is not to say that principles of equity are irrelevant to a judgment as to whether "it would be *unjust and inequitable* if the agreement were not binding" for the purposes of s 90G(1A)(c); to the contrary, that judgment will often be informed by equitable considerations of the kind embraced by principles of equitable estoppel and laches, acquiescence and delay.

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[47] [2009] FamCA 816.

The decision of the Full Court in *Parker and Parker*,[48] indicates that subs (1A) is to be read beneficially as a remedial provision, and not by implying into its words any gloss to the effect that only "technical" but not substantive failures to comply with 90G will be remedied.[49]

In *Hoult v Hoult (No 2)* [2012] FamCA 367, it had earlier been held that there was a complete failure by the wife's solicitor to advise her as required by s 90G; that the agreement was negotiated on the basis that if the wife did not consent to a financial agreement, there would be no wedding; and that the final agreement, and the opportunity for advice in respect of it, were presented nine days prior to the wedding overseas, and the day before departure from Australia. However, the agreement operated during their marriage to confer benefits on the wife, and also to confer benefits after separation, which occurred four years after the wedding and agreement. Both husband and wife acted on the assumption the agreement was valid, and nothing the husband did led to the invalidity, which emerged only when the wife's solicitor identified the issue after separation. The husband sought to have the agreement held to be binding. He argued that by reason of entering into the marriage, and seeking to rely on the agreement after separation, the wife had affirmed it and should be precluded from now resiling from it.

Murphy J accepted that reliance was a relevant consideration in a 90G(1A) application.[50] His Honour considered subs (1A)(c), and said (at [57]):

> It seems to me that the enquiry required of s 90G(1A)(c) is a wide-ranging one that might include considerations such as:
>
> 1. The facts and circumstances surrounding the particular s 90G requirement not being met;

[48] [2012] FamCAFC 33.

[49] [2012] FamCAFC 33, [231]-[232].

[50] [2012] FamCA 367, [50].

2. What the parties themselves said and did, if anything, so as to render the agreement not binding;

3. The circumstances within which the parties bargain was concluded;

4. The length of time between the signing of the agreement and the decision as to whether the parties are to be held to it;

5. What the parties said and did in reliance upon the agreement being binding subsequent to the signing of the agreement;

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

His Honour concluded that it would be unjust and inequitable if the agreement were not binding, in circumstances where the latent defect was not the result of any conduct by the husband, and the parties had both acted in reliance on it for some years.

Subject to a reservation addressed below, I am inclined to agree with Murphy J that the nature of the failure to comply with 90G, and subsequent conduct in the nature of reliance and confirmation, will be weighed when considering whether or not to hold an agreement to be binding. The facts of *Hoult* did not require directly dealing with the role, if any, of equitable estoppel, because the wife had not known of the defect, such that it could not fairly be said she was unconscionably seeking to depart from any representation she had made as to future conduct. While his Honour thought that the principles of promissory estoppel in *Waltons v Maher* (1988) 164 CLR 387, upon which the husband sought to rely, did not sit easily in the context of a proposed marriage,[51] the considerations that inform the equitable doctrines of estoppel, laches, acquiescence and confirmation closely overlap with many of the factors to which his Honour referred, and it is clear that these principles will be relevant in exercising the discretion in 90G(1A) – although I respectfully agree with

[51] [2012] FamCA 367, [49].

Murphy J that the inquiry is a broader one, and it is ultimately to the question of whether it would be unjust and inequitable if the agreement were not to be binding in the context of the consequences of so finding – that is, the invocation of the Part VIII jurisdiction to make adjustive property orders – that the court's attention is directed.

The notion that one should take into account the time that has passed since the making of the agreement and what has been done in reliance on it in deciding whether it would be unjust and inequitable if the agreement were not to be binding appears obvious and logical. However, the reservation to which I refer is occasioned by the parenthetical words in s 90G(1A)(c), "disregarding any changes in circumstances from the time the agreement was made". It is at least arguable that if these words mean anything, they require the court in considering that question to disregard changes in circumstances since the agreement was made.

It would be extraordinary if s 90G(1A)(c) excluded post-agreement reliance, or confirmation, as relevant factors. I am inclined to think it was intended to catch changes in the financial and other circumstances of the parties that would bear on whether the terms of the agreement were just and equitable (in the s 79 sense), rather than on facts and circumstances relating to the justice and equity of holding the agreement not to be binding. However, the generality of the words leaves the contrary position arguable.

Professional liability

Mr Lethbridge's paper raises the question of the potential professional liability of the certifying solicitor for one party to the other party, if it transpires that the solicitor has given inadequate advice and as a result the agreement is held not to be binding.

As Mr Lethbridge has pointed out, imposition of a duty of care in tort generally involves three considerations:[52] first, reasonable foreseeability that the defendant's act or omission could occasion harm to the plaintiff; secondly, a relationship of sufficient proximity between the defendant and the plaintiff (although "proximity" is now out of vogue in the High Court);[53] and thirdly, the policy consideration whether it is just, fair and reasonable that the law should impose the duty (which nowadays may be thought to include, but not be limited to, considerations formerly taken into account under "proximity").

Usually, the lawyer for one party will not owe a duty of care to the other party; this arises from considerations of lack of proximity and/or that it is not just, fair and reasonable to impose such a duty, as the lawyer's duty is usually to advance his or her own client's case to the detriment of the opposing party. However, there are exceptions. Solicitors can owe duties to third parties in respect of advice that they know will be communicated to and relied on by the third party.[54] One, now well-established, referred to by Mr Lethbridge, is that the solicitor for a testator can owe a duty of care to an intended beneficiary.[55]

Another is where, in the context of lending and security transactions, the lender relies on a certificate of independent advice provided by the borrower's solicitor.[56]

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[52] C.f. (NSW) *Civil Liability Act 2002,* s 5B.

[53] *Perre v Apand* [1999] HCA 36, [27] (Gaudron J), [70] – [74] (McHugh J); *Sullivan v Moody* [2001] HCA 59, [47] – [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Vairy v Wyong Shire Council* [2005] HCA 2, [28] (McHugh J), [68] (Gummow J).

[54] *Caparo Industries plc v Dickman* [1990] 2 AC 605, 638, 620-1.

[55] *Ross v Caunters* [1980] Ch 297; *Hill v Van Erp* (1997) 188 CLR 159; see also *Perre v Apland Pty Ltd* (1999) 198 CLR 180.

[56] *Allied Finance and Investment Ltd v Haddow & Co* [1983] NZLR 22. See also *Eade v Vogiazopoulos (No 2)* [1999] 3 VR 889 (mortgagors' solicitor owed the mortgagee a duty of care in representing that he acted for both the husband and wife and that the mortgage documents were duly executed); *Doran v Delaney* [1998] IESC 66 (vendor's solicitor owed purchasers a duty of care when replying to requisitions); cf *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All ER 865.

As Mr Lethbridge has mentioned, such a duty has been imposed in New Zealand in the context of an agreement settling a matrimonial dispute,[57] and its arguability has been recognised in the Family Court of Australia.[58]

In the context of financial agreements, foreseeability is plainly established, in that it is foreseeability that if the solicitor does not give proper and sufficient advice, the agreement may be held not binding and the other party may thereby suffer loss. Moreover, it is foreseeable (as it is in the financier cases) that the other party will rely on the advice having been properly and sufficiently given, in proceeding with the transaction. It is but a short step from imposing such a duty on a solicitor giving a certificate of independent advice in a lending and security transaction, to doing so on a solicitor providing a certificate or statement of advice in connection with a financial agreement.

Conclusion

Part VIIIA represents an attempt to extend the doctrine of freedom of contract into matrimonial financial matters. The current controversy over binding financial agreements largely reflects the long-standing tension between the common law's enthusiasm for the sanctity of freedom of contract, and equity's concern to prevent unconscientious misuse of bargaining power.

Both the public policy that – apart from Part VIIIA – holds contracts ousting the jurisdiction of the courts in respect of financial matters between spouses to be void, and the equitable invalidating presumptions and doctrines to which I have referred, are manifestations of the recognition that there is a high risk that parties to close personal relationships, in which emotions can outweigh logic, and in which dominance by one partner of the other's decision-making

[57] *Radisich v Templeton* (HCNZ, Auckland, 29 May 2009). See also *Connell v Odlum* [1993] 2 NZLR 257, which is closely analogous to binding financial agreements.

[58] *Reindel v Brachmanis-Reindel* (FamCA, Murphy J, 22 May 2012); *Noll v Noll* [2011] FamCA 872 (Le Poer Trench J).

is not uncommon, left to their own devices, are prone to make agreements which are improvident.

Part VIIIA does not appear to have changed this, and it may legitimately be questioned whether Australian society is any better off with Part VIIIA than it was with the arrangements that preceded its introduction in 2000.

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