

STATE OF PLAY FOR BFAs

Family lawyers must be on their guard when preparing binding financial agreements.

Binding financial agreements (BFAs) allow domestic partners to agree on how their assets will be divided if their relationship breaks down. By making such an agreement, the parties, some of whom are often vulnerable, are giving up or curtailing critical rights – the right to have their asset entitlements adjudicated by a court. There are few other legal areas that entail such a forfeiture of rights.

Perhaps this is why we have seen a steady stream of claims in the past four years, mostly relating to the enforceability of agreements. We have had a total of 13 claims costing an estimated \$2.5 million.

The claims

All but one of the claims involved mistakes in the drafting of the agreements, resulting in doubt about whether the agreements would be binding, given the strict interpretation in the *Black & Black* case.¹

The mistakes included:

- the agreement heading was s96C instead of s90C or there was no reference in the agreement to the *Family Law Act* or s90B;
- the s90G requirement of obtaining legal advice was not set out in the agreement (nearly all of them had this problem);
- the legal advice certificate was an old precedent; it had the original wording instead of the shorter 2003 wording;
- using the *Relationships Act* precedent instead of the *Family Law Act* precedent; and
- the agreements were not formally exchanged, so one party did not receive either an original or a copy;

We welcomed the recent amendments to the *Family Law Act* by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1)* 2009. (See LPLC column in *LIJ* March 2010.) They will hopefully prevent some claims where there are simple slip-ups.

Where mistakes do happen the agreement is only binding if the court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties. This may mean we will still have to incur the cost of getting a court decision to that effect.

There is still scope for claims to be made outside of these amendments. Mistakes like:

- not warning of the importance of full disclosure of assets;
- not specifying the dollar value of the maintenance claimed;

- not advising the client of the effect of forcing the other party to sign just before the wedding or in any other coercive or unconscionable way;
- not preparing the agreement quickly enough so as to avoid being too close to the wedding date;
- not taking into account changing circumstances such as making allowance for children of the marriage (or warning the client this needs to be done).

Just days before the wedding

We often take calls from practitioners who have been asked to give advice to the financially weaker party in relation to a financial agreement with only a week or two before the wedding. The agreements are usually unfairly weighted against that person and the instructions are that the other party will not go ahead with the wedding if the agreement is not signed.

to make a record of the advice, including when and how long it took.

Risk management strategies

Preparing BFAs

- Don't dabble (just because you advise on commercial agreements doesn't mean this is the right work for you).
- Don't act for both parties.
- Confirm in writing for whom you are and are not acting.
- Understand the nuances of BFAs.
- Explain carefully to clients the importance of disclosure.
- Explain the circumstances in which agreements will not be binding, especially:
 - material change to circumstances;
 - unconscionability.
- Explain the risks of insisting on signing up close to the wedding date.
- Send a comprehensive letter of advice.

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The recent cases of *Boonsiri & Whorlow*² and *Moreno & Moreno*³ suggest it will be the financially stronger party who is most at risk in those situations. In both these cases the financially weaker party had received independent legal advice and the courts still considered the behaviour of the other party amounted to duress and/or unconscionable conduct despite the "sensible solicitor's advice". The courts were not critical of the solicitors signing the clients up, even though the solicitors thought the clients were acting under duress.

"No advice" claims – not yet

We are yet to see a claim in which the financially weaker party says they received no advice from their independent lawyer (along the lines of the claims we see in relation to solicitors' certificates for third party mortgages). With the changes to the legislation making it harder to "unbind" the agreement, we may see "no advice" claims coming through.

The best defence to those claims is to give the advice (of course) and, just as importantly,

- Keep a copy of the financial agreement on your file indefinitely.

Certifying agreements

- Open a file.
- Give a clear explanation about the fact that the client is forgoing rights by signing the agreement. Make file notes and confirm your advice in writing.
- Insist on your client obtaining independent financial advice.
- Obtain written acknowledgment from your client that they understood your explanation.
- Ensure the wording of the agreement and certificate reflects the requirements in 90G.
- Keep your file indefinitely. ●

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1. [2008] FamFC 7.
2. [2009] FMCAfam 154.
3. [2009] FMCAfam 1109.