LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Risk video bites

Risk video bites – Family law financial agreements

Presenter: Alex Macmillan

Most family lawyers know all too well the difficulties, not only in drawing financial agreements, but also in advising on them.

A recent trend we are seeing in the claims is non-family lawyers advising on the financial agreement for the financially weaker party – often at the request or recommendation of the financially stronger party (in most cases the husband) or his solicitor or accountant.

The non-family lawyer, usually a commercial lawyer, thinks all they have to do is advise on what the agreement says, much as they would on any commercial contract. They often do it for a small fee and think that placing a tick next to each clause of the agreement is sufficient evidence to show they gave adequate advice.

Unfortunately, this falls a long way short of what is required. In Renard & Geach [2013] FCCA 617 the solicitor faced such a situation - while he was not being sued, he was grilled in the witness box about the advice he gave and the lack of file notes made at the time.

Section 90G of the Family Law Act places a heavy burden on practitioners. A practitioner must advise their client about the effect of the agreement on the rights of the client **and** about the advantages and disadvantages of entering into the agreement, at the time the advice was provided.

Justice Murphy in Hoult & Hoult said, it is by no means clear what is contemplated by the requirements of section 90G but, he said, the advice must

"depend, at least in part, upon a myriad of circumstances which may (or may not) arise in the course of the parties' married lives …

Justice Murphy made the point that it is difficult to determine how the justice and equity of the agreement, in terms of s.79 of the Family Law Act, is to be determined, and advice about the advantages and disadvantages given, if the agreement does not become operative until separation occurs. He said:

The terms of an agreement might be seen to be wholly just (or advantageous) if separation was to occur a week later and wholly unjust (or disadvantageous) if separation was to occur 25 years later. The terms of an agreement may be seen to be wholly just (or advantageous) if

the parties have modest assets at the time it is made, but be seen to be wholly unjust (or disadvantageous) should, 20 years later, one of the parties acquires very significant wealth. Permutations are innumerable." [65]

While the decision of Justice Murphy was overturned on appeal, the description of the extent of the advice required remains relevant.

It seems that what is required of practitioners when advising on prenuptial financial agreements is:

- advice on the meaning of the agreement, and
- advice on the client's likely entitlements under the Family Law Act, in particular, section 79, that are being given up by signing the agreement.

To provide this advice, you will need to have a good understanding of the Family Law Act and the case law interpreting it.

These agreements are unique because they entail giving up legal entitlements the party would otherwise have had, and the real difficultly, is that no one can say for certain what those entitlements might have been worth.

Signing the statement required by section 90G may not be sufficient evidence that appropriate advice was given if the client later alleges that no or inadequate advice was provided. When giving this kind of advice you should always keep a written record of what was said and confirm it in writing for the client.