SETTING ASIDE A FINANCIAL AGREEMENT IN EQUITY

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1. INTRODUCTION

1.1. Section 90K(1)(b) of the Family Law Act ("**the Act**") gives a Court power to set aside a Financial Agreement that is 'void, voidable or unenforceable'. The language used in that sub-section is precise and deliberate. It recognises in a prescriptive manner the Court's power to grant relief pursuant to a breadth of law not confined to specific remedies identified in the Act. Among which, foremost is equity.

1.2. In this respect the Court's power differs from that which is available to set aside a consent order under Section 79A of the Act. This is not a surprise. The inherent nature of a consent order means that while it may have started life as a bargain between two parties, it concludes it as a judicial exercise where a Judge has considered and approved the same. The level of protection required is different.

1.3. Accordingly, the introduction of Section 90K(1)(a),(b) and (e) immediately thrust upon legal practitioners who frequently advise and appear in family law matters, an entire body of law which previously only had limited application to their day to day practice. The need to upskill necessarily arises in relation to advising and acting on setting aside a Financial Agreement. However, practitioners who provide advice to parties entering into a Financial Agreement also need to have a good understanding of the forms of relief available to set aside these agreements, including equity.

1.4. This paper supports a hypothetical case presented at the 2016 National Family Law Conference organised by the Family Law Section of the Law Council of Australia. The hypothetical scenario charts a litigant's path in seeking to set aside an imprudent Financial Agreement. The presentation selects a number of common issues that arise. The fact scenario does not attempt to canvas every issue or every form of relief available pursuant to Section 90K(1)(b) or (e), and therefore this paper comprises a curation of the reported cases limited to those issues that arise for consideration on the fact scenario for the hypothetical.

2. INTERLOCUTORY MATTERS

2.1. OVERVIEW

2.1.1. In a steady diet of property proceedings pursuant to Section 79, family law legal practitioners have become accustomed to the consistent procedure and preparation of that type of litigation. Proceedings to set aside a Financial Agreement are radically different. They involve issues of jurisdiction, power, onus of proof and disclosure very different to Section 79. The cases are

prepared and conducted in an entirely different manner. Before a case is commenced it is important that legal practitioners are aware of these matters so they appropriately forewarn clients about them and be prepared to deal with the challenges each presents.

2.1.2. While not trying to present a workshop on how s.90K(1)(b) and/or (e) proceedings ought be prosecuted (or defended), the hypothetical confronts issues that involve a significant departure from the ordinary course of the conduct of interlocutory matters pursuant to the Act.

2.2. INTERIM COSTS

2.2.1. Litigation pursuant to the Act of complex matters is an expensive undertaking. This is true for any litigation in any jurisdiction where parties are attempting to deal with significant rights that, because of their significance, give rise to a large body of jurisprudence. The complexity of matters in issue in s.90K(1)(b) and/or (e) usually render it beyond the scope of a litigant in person in most cases. The existence of a financial agreement that is the subject of complaint often means there already exists an inequality in financial power between parties.

2.2.2. Traditionally the Family Court of Australia has supported the development of jurisprudence which levels the playing field in terms of competing parties' capacity to meet the costs of litigation. Cases like *Strahan*[3] have demonstrated the robust nature of the interlocutory relief a financial weaker party can seek in order to secure the proper conduct of proceedings. However, the nature of proceedings to set aside a Financial Agreement pose significant challenges to accessing that relief. Importantly:

2.2.2.1 The more traditional power employed to make interim costs orders in partial property alteration cases is not available. The existence of the Financial Agreement usually precludes the Court's power to make any property alteration order.

2.2.2.2 The outcome of the proceedings is multi-faceted. The Financial Agreement may be upheld or set aside. Alternatively, it may be upheld or set aside as to part, as necessary to do equity between the parties.[4] If it is upheld, the defeated party is not going to benefit from any financial

[3] (2011) FLC 93-466.
[4] Note, for example, the potential breadth of the court's powers in this respect in s.90KA.

relief from which to meet their legal costs if they have been deferred or borrowed.

2.2.3. Any interim costs order made pursuant to Section 117 must accordingly be considered as final relief. The party meeting the costs of that Order could not reasonably expect to be both successful in upholding the Financial Agreement and successful in recouping a final costs order at the end of those proceedings. There will be exceptions though depending on the terms of the Financial Agreement that is upheld.

2.2.4. These issues were recently considered in *Chatterjee and Woodby-Chatterjee*[5] ("***Chatterjee***"). In a first instance decision, Her Honour Justice Rees, sitting in the Family Court of Australia at Sydney refused an Application for $50,000 towards legal costs to prosecute proceedings to set aside a Financial Agreement. The said agreement effectively provided that each party keep what they owned when the agreement was signed and that any joint property acquired was to be divided equally in terms of net value. The most significant item of joint property was a residence which the parties had purchased with funds obtained from a loan from a bank and an advance from the husband's father. There was a contest in the proceedings as to whether or not the advance from the husband's father was a loan or a gift. The husband's father had commenced proceedings in another Court for recovery of the alleged loan and ten years of unpaid interest on the same. Save for a $300,000 redraw facility on the home loan, there was no other fund available to support the order sought by the wife. There was equity in the home of $1.3 million but that would be substantially eroded if the husband's father's claim for unpaid interest was successful. The wife could not draw on the redraw facility without the consent of the husband.

2.2.5. Traditionally, applications for interim costs or interim legal funding are made by way of partial property alteration or an advance upon property alteration. This characterisation necessarily involves the early release to parties of a portion of an entitlement they seek to enable them to conduct litigation on an even footing with the other party. However, the Court in proceedings to set aside a binding Financial Agreement does not have that power. Section 71A prevents the Court exercising a power pursuant to Section 79, unless and until that agreement has been set aside. This dilemma has similarities with the position of a party seeking interim costs in a de facto relationship where the jurisdiction of the Court to make a de facto property alteration has been put in issue. The parties

[5] [2015] FamCA 947.

and Her Honour recognised in *Chatterjee* that while Section 79 is not a power presently available to the Court, relief for interim costs can still be sought under Section 117(2). The same was made clear by the Full Court in *Strahan*.

2.2.6. In weighing matters that might inform her discretion to make a Section 117 order Her Honour concluded:

2.2.6.1 there was uncertainty about the amount the wife would be entitled to receive from the substantive proceedings and that the husband's financial circumstances would be materially affected if his father succeeded in enforcing the repayment of the loan and interest on that amount;

2.2.6.2 there is no evidence that the wife would be left without representation if she did not succeed in the application (notwithstanding, as was made clear in *Strahan*, that factor in itself cannot be determinative of an application for interim costs); and

2.2.6.3 there was no proposal from the wife to indemnify the husband in the event the costs order ultimately impinged upon the husband's prospective entitlement under the Financial Agreement if it was upheld.

2.2.7. There are some extraordinary aspects to this judgment that highlight the discretionary nature of Section 117 and the particular care that needs to be given to an interim costs application that relies solely upon Section 117. These types of interim costs cases needs to be crafted in a way that mitigates the adverse influence on the discretion to award costs that exists whenever there is a financial agreement in place.

2.2.8. The wife's case was not helped by the following matters:

2.2.8.1 The wife resisted a proposal made by the husband to sell the home and release to her in accordance with the terms of the Financial Agreement an amount in excess of $50,000 (the wife instead maintaining her desire to retain the residence as part of her substantive application).

2.2.8.2 The failure of the wife to provide any sort of indemnity to the husband to the extent an order was made for an amount greater than she might ultimately receive pursuant to the substantive proceedings. Even if the

indemnity proved worthless it would have seemed prudent to offer it nonetheless.

2.2.8.3 The wife did not seek an order that would meet the costs of the entire proceedings; indeed the amount sought did not even cover what she presently owed to her lawyers. What might have been seen as a measured and proportionate application for a lesser sum than was needed, instead seemed to support a conclusion in the Court's mind that she would still have the benefit of representation whether the interim costs order was made or not. This was further compounded by an absence of any evidence from her lawyers that they would not continue to act if interim costs were not forthcoming.

2.2.9. The individual circumstances of one case are always different to another. However, an extrapolation of the base facts in *Chatterjee* raise the following matters that may be worth consideration in certain situations:

2.2.9.1 Interim costs applications pursuant to Section 117 tend to focus upon the identification of a pool of wealth from which to meet the costs. However, Section 117 orders are not confined to being supported by net assets and can equally being met (and justified) from income. If that is sought, payment of costs on a periodic basis, even as an alternative form of relief, might be more appropriate.

2.2.9.2 If spouse maintenance is not dealt with in the financial agreement, then the same could be sought on an interim basis at the same time as the interim costs. While spouse maintenance is unlikely to be justified in pursuit of wealth to meet costs, a financially weak party might benefit from assistance with their day to day living costs while they bear the burden of the ongoing costs of the proceedings.

2.2.9.3 Much turned on the fact that the wife sought to retain the house and therefore would not co-operate in the early sale of that property. While there were no doubt strategic, emotional and practical reasons for that decision, the early refusal of that path may have left the wife compromised in her inability to otherwise meet the costs of the proceedings. This raises the question of the timing of a challenge to a financial agreement and whether there is merit in delaying the same until after compliance or even partial compliance if that would see a party invested with wealth that would not otherwise come to them while the

Agreement was in dispute. On the other hand issues of estoppel in respect of conduct need to be considered in some circumstances.

2.3. **DISCLOSURE**

2.3.1. It is a well-established, if not paramount, principle of law that each party owes a duty of full and frank disclosure to the other in proceedings for financial relief under Part VIII of the Act. This law derives from a long history of Full Court authority and is well enshrined in the manner in which the *Family Law Rules* operate in that type of litigation. However that principle has limited application to the much narrower scope of an application to set aside a Financial Agreement. This can present a significant obstacle where there is uncertainty about one party's financial circumstances and therefore doubt about the benefits of pursuing the litigation in the first place.

2.3.2. The dilemma is much more obvious in property alteration litigation pursuant to the Act between parties to a de facto relationship where there is a challenge to jurisdiction. While there are significant differences in the legal issues behind the approach taken in these cases compared to those where a Financial Agreement is being challenged, the approach has some attraction to the later categories of cases.

2.3.3. Holden & Wolff[6] ("***Wolff***") is a decision of the Full Court of the Family Court of Australia comprising their Honours Ainslie-Wallace, Ryan and Aldridge JJ. on an Appeal from a decision of Judge Henderson in the Federal Circuit Court of Australia. In *Wolff* the de facto wife sought property alteration arising out of a de facto relationship that she said concluded in late 2010. The de facto husband contended the relationship concluded in January 2006. There was therefore a contest as to whether or not the Federal Circuit Court of Australia had jurisdiction pursuant to the Act to determine the property alteration issue. Before that juridical fact could be determined, the de facto wife filed an application for interlocutory financial relief. Correctly, when the application came before Judge Henderson, she informed the parties that the correct course was for her to determine whether or not the Court had jurisdiction before interlocutory relief of that nature ought to be considered. She listed the s.90RD jurisdictional hearing over three days and listed the interlocutory financial relief for hearing at the same time. In the course of making directions

[6] (2014) FamCAFC 224.

to prepare both issues for trial she made directions that effectively provided for financial disclosure by the de facto husband. In a roundabout manner he came to appeal that aspect of the directions made.

2.3.4. Following an earlier decision of *Norton and Locke*[7] (**"*Norton*"**) the Full Court determined that until such time as the relevant jurisdictional facts are determined there was no power to order the provision of financial information pursuant to the relevant rules. Accordingly, the directions made by the trial judge were upset.

2.3.5. However, the Full Court distinguished that principle with the Court's own inherent power to make directions reasonably necessary for the determination of the jurisdictional fact. In essence, if to determine the jurisdictional fact, it was necessary to receive evidence of the parties' current financial circumstances then a direction to that effect would be within power.

2.3.6. Both *Wolff* and *Norton* are cases where the substantive proceedings related to de facto property alteration claims and not to setting aside financial agreements. In the former type of cases, the existence of a qualifying de facto relationship is undoubtedly a jurisdictional fact. In the absence of that jurisdictional fact being proved, the Act has no relevance to the parties at all. The situation is similar but not identical in a challenge to a financial agreement. The Act has relevance to the parties' property, whether the financial agreement is binding or not as the Court has powers of enforcement and interpretation. Moreover, s.71A which prevents property alteration and maintenance proceedings excludes rather than enables power (not jurisdiction).

2.3.7. Yet the underlying practical principle is true of both types of proceedings. Namely, why should a litigant be put to the expense and inconvenience of making full and frank financial disclosure about their current financial circumstances, when the same may ultimately not be required if the substantive relief being sought fails before it even starts.

2.3.8. The following implications flow from the risk that a Court may refuse to direct disclosure at the commencement of the s.90K(1) proceedings.

[7] [2013] FamCAFC 202.

2.3.8.1 Applicants should not assume they will quickly become aware of a respondent's current financial proceedings in the early stages of litigation to set aside a Financial Agreement.

2.3.8.2 Other ancillary proceedings which might otherwise be available to an applicant may be a useful means to ensure prompt and early full and frank disclosure is made, such as spouse maintenance or enforcement.

2.3.8.3 Some relief to set aside a Financial Agreement requires a present understanding of the effect of the Agreement on the current property of the parties – that type of relief would support the early disclosure of current financial circumstances.

2.3.8.4 Emphasis should be given to ascertain what current wealth exists as part of any pre-litigation negotiation, if at all possible.

2.3.9. Applicants who have no knowledge of the current financial affairs of the respondent face a risk of a pyrrhic victory in conducting litigation to set aside a Financial Agreement if they are in the dark about what ultimate benefit might be available (e.g. pursuant to s.79) if the agreement was set aside.

2.4. **PLEADINGS**

2.4.1. It would presently be unsafe for one's own vanity to admit that you practiced family law at a time when cases were conducted on pleadings. For many years they have not been a feature of family law litigation. In fact, many lawyers who have exclusively practiced in family law throughout their career may have never once had to draw a pleading. Whereas, pleadings in cases where a party is seeking to enliven equitable relief are essential.

2.4.2. The reasons for a respondent to insist upon pleadings are obvious. They seek to understand the case they have to meet and confine the applicant at trial to the case as pleaded. However, they are equally necessary to the applicant given the likely unfamiliarity of the client, their lawyers and possibly the judicial officer from whom legal relief being sought. While some lawyers might think that an applicant could benefit from the freedom of running a case without the limitations of pleadings, it is a path that entails many risks to the applicant. Even if they have not been directed, an applicant should offer them up.

2.4.3. In failing to plead their case, an applicant is at significant risk of:

2.4.3.1 not identifying at an early stage:

- each and every type of equitable relief that might be available; and

- each of the necessary elements that support the various forms of relief;

It is also worthwhile noting that pleadings also assist a party to focus on the evidence which will be required to support each of those elements; and

2.4.3.2 inadvertently leading a trial judge, who does not hear equity cases day to day, into appellable error.

2.4.4. All of these matters were well made out in the recent case of *Saintclaire and Saintclaire* which is considered later in this paper.

2.5. WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

2.5.1. It is a necessary element of any Financial Agreement, if it is to comply with s.90G, that each party has received independent legal advice. There have been a plethora of cases under the Act dealing with incorrect certificates of advice, where the content and quality of the advice received has been put in issue. Most lawyers are well versed with the concept that raising such an issue will lead, in all likelihood, to an implied waiver of any privilege over that advice. To complain about the absence of advice on one hand and then refuse to allow that advice to be tested on the other, would be inconsistent. The law of implied waiver of legal professional privilege derives centrally from the fact of that inconsistency, as the High Court has made plain in the often cited decision of *Mann v Carnell.*[8]

2.5.2. Many of the grounds in equity for vitiating an agreement require a court to make findings as to the state of mind of the weaker or overborne party at the time they entered into the bargain that is being challenged. It is not surprising that the provision of independent legal advice about the bargain can go a long way to mitigating the suggestion of a weaker party being overborne or unduly influenced. But, the existence of independent legal advice in itself is rarely

[8] (1999) 201 CLR 1.

conclusive of the issue. The very nature of the effect of the behaviour complained about in unconscionable or unduly influenced bargains, means that a weaker party may, notwithstanding independent legal advice, be unable to avoid the bad bargain presented to them. In either event, the nature of the instructions given to a lawyer, and the advice provided by the lawyer, will be useful windows into the state of mind of the alleged weaker or overborne party.

2.5.3. The seminal authority on implied waiver in the Family Court of Australia is *Stamp and Stamp*[9] *("**Stamp**")*; a decision of the Full Court of the Family Court of Australia on Appeal from an interlocutory decision of Stevenson J. The majority judgment of the Full Court comprised May and Boland JJ. Her Honour Justice Finn dissented. The substantive proceedings involved a claim by the wife pursuant to Section 79A(1)(a) to set aside an order made by consent for final property alteration. The wife particularised her claim by including, among other things, an assertion that her poor health at the time that she entered into the consent order, affected her capacity to provide proper instructions in relation to the proposed terms.

2.5.4. The husband caused a subpoena to issue to the lawyers who acted for the wife at the time she signed the consent order. The wife objected to the subpoena on the grounds of legal professional privilege. The husband sought to resist that claim on the basis that the wife had waived any entitlement to claim privilege by putting into issue her lack of capacity. A Registrar found in favour of the husband. On review of that decision, her Honour Justice Stevenson found in favour of the wife. In particular, her Honour determined that capacity to provide proper instructions might be expected to be a matter for medical evidence and the actual instructions given by her and the advice she received from her solicitors would not touch on the issue. She was not convinced that Mrs Stamp had waived her privilege or that it was necessary to examine the file of the lawyers who acted for the wife on the matter about which capacity was put into issue. The husband appealed.

2.5.5. The core of the assertion made by the wife related to a horse riding incident in 1996 from which the wife received compensation. There were documents produced at the time that the consent order was being negotiated to make it apparent that both parties were aware that Mrs Stamp had fallen from a horse, hit her head severely and suffered mental disability since that date. Moreover, that her incapacity was not apparent in day to day communications at first

[9] [2007] FamCA 420.

instance but was apparent in her communications to people who knew her before the accident and had known her since.

2.5.6. Because the claim by the wife arose in interlocutory proceedings, it was the common position of all parties that rather than relying upon the *Evidence Act 1995* (Cth) - which is confined in its application to the adducing of evidence in the course of a hearing – the interlocutory nature of the proceedings in which the claim was being made meant that reference must instead be made to the common law.[10]

2.5.7. The majority judgment followed the decision in *Mann v Carnell* in restating the principles that:

2.5.7.1 Legal professional privilege can be waived by the person who would otherwise have the benefit of that privilege in a way that may be expressed or implied;

2.5.7.2 An implied waiver, such as the issue in these proceedings, arises through the operation of law and not through any intention on the part of the person who would otherwise have the benefit of the privilege;

2.5.7.3 The implied waiver applies when a Court considers that there is an inconsistency between the confidentiality of the client and a course they adopt in proceedings.

2.5.8. The Full Court referred to the decision in *DSE (Holdings) Pty Limited v Intertan Inc*.[11] where Allsop J, adopting parts of the decision of Wheeler J, in *Commonwealth of Australia v Temwood Holdings Pty Limited,*[12] expressed the conclusion that where a party seeks to put his or her state of mind in issue in proceedings, it will mean that privilege in relation to any legal advice which may have contributed to that state of mind, is waived.

2.5.9. In *Stamp* the majority concluded that if the wife was under a disability, then there must be an issue about the extent to which it affected her capacity to give instructions to her solicitor and that that would inevitability bring attention to the role played by her solicitors and any advice and influence upon the wife. Having raised the issue of capacity to provide proper instructions, it was said to be inconsistent as a matter of law to permit the maintenance of the wife's usual

[10] *Commissioner of Taxation v Rio Tinto Limited* (2006) 229 ALR 304 at 43-45-47 and 51.
[11] (2003) 127 FCA 499.
[12] (2002) WAC 107.

right to professional legal privilege. At law she was taken to have waived that privilege.

2.5.10. The decision in *Stamp* makes it clear that in any proceeding under the Act where state of mind is a relevant issue in respect of a transaction, if legal advice was provided about the transaction, privilege will be lost. Put differently, even if the wife in *Stamp* had simply said that she had insufficient capacity to give consent, without referring to the receipt of legal advice or the giving of instructions to lawyers or any deficiency in respect of those matters, an exploration of her state of mind necessarily involved the consideration of interactions between her and her lawyer at that time. When it comes to setting aside a binding financial agreement, in which legal advice is a mandatory feature, if state of mind is an issue then legal professional privilege will, most likely, be waived.

2.5.11. It follows that:

2.5.11.1 Early attention needs to be given to identifying the type of equitable relief sought and whether or not that particular relief brings into question as a necessary element the state of mind of the party seeking to avail themselves of the relief;

2.5.11.2 If pleading a claim for equitable relief, as implied waiver of legal professional privilege is a possibility, early consideration should be given to inspecting the file of the former solicitor to ascertain what might arise from the same;

2.5.11.3 It may be prudent in the applicant's case to call evidence from the former solicitor, even if the same might be viewed as of no assistance to either party (in *Saintclaire* criticism was made of a party failing to call evidence from their former solicitor to support their claim for equitable relief).

2.6. **SUMMARY**

2.6.1. In addition to the interlocutory matters canvassed in the hypothetical case scenario and discussed above, the following additional matters are all worthy of consideration where a Financial Agreement is sought to be set aside:

2.6.1.1 bifurcation of the Section 90K and Section 79 proceedings;

2.6.1.2 limitation of the power to make interlocutory injunctions;

2.6.1.3 summary dismissal;

2.6.1.4 security for costs; and

2.6.1.5 partial enforcement/performance of the Financial Agreement.

2.6.2. The guiding principle is that before embarking on litigation pursuant to s.90K, care needs to be taken to work through all of the interlocutory challenges that may have to be met. These proceedings do not lend themselves to interlocutory assistance as easily as s.79 proceedings. Practitioners would do well to canvas early with applicants, all of the potential road blocks that might arise and will need to be dealt with and of course the costs of the same.

3. EQUITABLE RELIEF FROM THE CONSEQUENCES OF FINANCIAL AGREEMENTS

3.1. By their terms, sections 90K(1) and 90KA of the Act open the door to the application of equitable principles as a means by which to liberate an aggrieved party from the consequences of an unconscionable financial agreement.

3.2. By ss.90K(1)(a), (b) and (e) respectively, the court may set aside a financial agreement or a termination agreement if the court is satisfied that the agreement:

3.2.1. was obtained by fraud (including non-disclosure of a material matter);

3.2.2. is void, voidable or unenforceable; or

3.2.3. was struck as a consequence of unconscionable conduct on the part of the one of the parties.

3.3. Whilst there is some overlap in their potential operation, ss.90K(1)(a) and (e) focus on the circumstances giving rise to the execution of the agreement. On the other hand, s.90K(1)(c) has a potentially wider application enabling the court to set aside any financial agreement that is for whatever reason void, voidable or unenforceable.

3.4. By s.90K(3), a court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such remedial orders as the court considers just and equitable to preserve or adjust the rights of the parties and any other interested persons.[13]

3.5. Section 90KA applies where the court has to resolve whether a financial agreement or termination agreement is valid, enforceable or effective and requires the court to apply the principles of law and equity which would apply generally to the determination of these issues in contract law. To this end, the section confers upon the court all the powers

[13] The precise reach of s.90K(3) is unclear. For example, would a third party have standing to challenge a financial agreement that affected property in respect of which the third party claimed an interest?

which the High Court, in the exercise of its original jurisdiction, enjoys in proceedings in connection with contracts.

3.6. In equity, there are a number of remedies which may assist an aggrieved party to set aside or adjust an agreement struck in circumstances involving unconscionable conduct. These doctrines include estoppel, undue influence, duress, unconscionability, mistake and non-est factum. Other remedies, such as rectification, may also have a significant role to play in the determination of legal rights arising in contract.

3.7. It is not the intention in this paper to consider all these equitable remedies in detail but rather to identify their potential relevance to any critical evaluation of the efficacy and enforceability of a financial agreement to which the Act applies. That said, it is useful to say something about the equitable remedies that may have significant potential utility in this context.

4. ESTOPPEL

4.1. In the evaluation of the enforceability of a financial agreement to which s.90K applies, the contractual analysis is critical.[14] The starting point is to understand the terms of the parties' bargain. As an expression of the freewill of the parties, the court will seek to preserve the sanctity of the contract[15] to give effect to the parties' intentions.[16]

4.2. But in evaluating the enforceability of a contract, the court must look beyond contractual content to the circumstances in which the bargain was struck and the parties' intentions as to how it may be enforced. This is where estoppel has a potentially important role to play, for the parties' obligations towards one another do not arise exclusively from the contract. They arise both from the contract and more broadly from the parties' conduct, from what they say or represent. Obligations may also be imposed upon the parties by law.

4.3. The object of the estoppel remedy is to prevent a party to a contract or arrangement from unconscionably departing from an assumption which the party played some part in perpetuating and which the other party (the innocent party) has adopted as a basis for their dealing.

4.4. So to succeed, a party claiming an estoppel must establish that he or she has adopted an assumption and done so on the basis of some act or omission by the other party.

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[14] This is clear from the terms of s.90KA allied to the reality that a financial agreement is a contract between the parties to which, subject to the operation of the Act, the principles of contract law apply.

[15] *Moshi v Lep Air Services Limited* [1973] AC 331. It must be remembered that in the case of a binding financial agreement to which Pt VIIIA applies, the court's powers under Pt VIII do not apply to financial matters or resources to which the agreement applies. That is, the court's jurisdiction is ousted.

[16] It is the parties' objective intentions that are critical here.

4.5. The assumption may take many forms. It may be something said, or an act or omission, or other conduct. It may be an agreement or a mutual understanding. The assumption may be of fact or law. If of fact, the assumption may be as to an existing fact (upon which common law estoppel was traditionally based) or some representation as to future facts or conduct (upon which equitable estoppel often arose – eg. a breach of promise).[17] The assumption may be, for example, as to the legal effect of a document (or an arrangement reflected in a document). Indeed it may even be founded upon a mistaken belief as to the legal effect of a document.[18]

4.6. Traditionally, the different means by which the assumption arose defined the different categories of the doctrine's application.[19] But following the decision of the High Court in *Waltons Stores (Interstate) Ltd v Maher*,[20] these different categories have been regarded as strands of a wider equitable remedy, the unifying theme of which is unconscionability:[21]

> *"...it is an essential element of the principle of estoppel, that the conduct of the parties sought to be estopped must properly be characterised as 'unconscionable'".*[22]

4.7. In the end, the point is that the party relying thereon would suffer detriment if the assumption were not adhered to.[23]

4.8. So, reliance and detriment are essential to a successful plea of estoppel; indeed the two concepts are intimately connected. In *Grundt v Great Boulder Pty Gold Mines Ltd*, Dixon J articulated what detriment means in this context:

> "*It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it*."[24]

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[17] In earlier times, it was generally thought that assumptions as to law could not found an estoppel. However, the weight of modern authority supports the contrary view: *The Principles of Equity Edited by Parkinson* 2nd Edition at [722] et seq.

[18] *Parkinson* at [724] p.245.

[19] For example, estoppel by representation, estoppel by conduct, by convention or "*in pais*", promissory estoppel and estoppel by acquiessence.

[20] (1988) 164 CLR 387.

[21] *Parkinson,* supra*,* at [403] p.214 citing Mason CJ, in *Commonwealth v Verwayen* (1990) 170 CLR 394 at pp.410-411 where he says, "*the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppels rather than a series of independent rules*."

[22] *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241 at 287, per Santow J. See also *Commonwealth v Verwayen*, supra at p.440 per Deane J where he says the doctrine is "*founded upon good conscience*".

[23] *In The Principles of Equity*, the author, at p.211, has gathered a useful collection of the various statements of principle in the key estoppels cases – *Thomson v Palmer* (1933) 49 CLR 507, Dixon J at p.547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at pp.674-677; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at p.404; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at p.412-413, Deane J at p.443-446.

[24] (1937) 59 CLR 641 at 647.

4.9. So, properly understood, detriment is the harm (financial or otherwise) which has occurred (or is likely to occur), if the other party is permitted to depart from the assumption relied upon. This element is critical to the operation of the doctrine. As Dixon J put it in *Grundt*,

> "O*ne condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing or that state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption*."[25]

4.10. But reliance and detriment are not enough. Something more is required to make that reliance unconscionable, and without it, this form of equitable relief will not be available. But assuming some detriment has been suffered, the line between a set of circumstances which make it unconscionable to allow that detriment to stand and a set of circumstances which do not, can be a difficult one to draw. The question can be one of degree. The unconscionability customarily arises from the fact that the person against whom an estoppel is asserted played some part, whether by inducement or otherwise in the adopting of the assumption by the innocent party, such that it would be unfair or unjust for the party to be simply allowed to ignore it.[26] The extent of the inducement or the degree of knowledge or involvement, will vary from case to case, but may be of critical importance in determining whether conduct is not merely unconscionable, but sufficiently unconscionable for equity to respond. The focus here is really on the exploitative element of the conduct.

4.11. Importantly, a causal connection between the assumption and the detriment must be shown. That is, the detriment must flow from reliance upon the assumption, at least in part, or be causally connected to the assumption in the relevant sense.[27] A causal connection may be presumed if the representation (or the convention) is calculated to influence the decision of a reasonable person – i.e. there is an objective element to the causation issue.[28]

4.12. Detriment is assessed at the time when the other party seeks to act in a manner contrary to the assumption induced or the convention agreed.[29] It may be enough to prove that an opportunity has been forgone (i.e., the lost opportunity to do something or take some action where the representation or convention promoted inaction).[30] The burden of showing detriment is upon the person who asserts that an estoppel has arisen:[31]

> "*The very foundation of the estoppel is the change of position to the prejudice of the party relying upon it, and I think the burden of proving the issue must lie upon him*."

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[25] *Grundt*, per Dixon J at p.674; see discussion in *Parkinson* at [730] et seq.
[26] *Grundt*, per Dixon J at [675].
[27] *Parkinson*, supra, at [736].
[28] Supra at [737].
[29] *Parkinson*, supra, at [731].
[30] Cases cited in *Parkinson* [734] ff. 183.
[31] *Thompson v Palmer*, supra at p.549.

4.13. So, the essential elements of an estoppel in equity are: (1) an assumption upon which the innocent party acts; (2) the other party playing a role in the innocent party having acted in that manner or having adopted that assumption (i.e. inducing, procuring, agreeing, acquiescing etc.); (3) the innocent party relies on the assumption and acts to their detriment by changing their position adversely; and (4) the other party either intends the innocent party to so act, or is aware that they are so acting.[32]

4.14. Traditionally, estoppel has been applied defensively or preclusively to prevent unconscionable departure by the party (i.e. the party estopped) from the assumption adopted by the other party. An example in this context would be where one party, in answer to a proceeding by the other party seeking to enforce an agreement, raises an estoppel defence to preclude the other party relying unconscionably on its strict legal rights under that agreement.[33] But it is now accepted that the doctrine may be used as a sword as well as a shield.[34] In the s.90K context, the question then becomes how?

4.15. One species of estoppel may be useful to consider in this context. Equitable estoppel, which encapsulates the doctrines of promissory estoppel, proprietary estoppel and estoppel by acquiescence, prevents a party from departing unconscionably from an assumption that the other (innocent party) has adopted as a result of their conduct.

4.16. One example of such an application would be unconscionable insistence on strict enforcement of existing contractual rights. As Deane J said in *Verwayen*, conduct which is unconscionable will often involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure.[35]

4.17. So for example, where a landlord had given a tenant notice to complete repairs to certain properties within six months and the parties then began negotiating for the surrender of the leases in which context the tenant assumed that, while those negotiations were continuing, it would not be required to complete the repairs. However, when the negotiations broke down, the landlord tried to evict the tenant for breach of lease. The House of Lord held that the landlord was estopped from doing so.[36]

> "*...the first principle upon which all courts of equity proceed is that if parties who have entered into definite and distinct terms involving legal results-certain penalties or legal forfeiture-afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties*."

[32] *Waltons Stores (Interstate) Ltd v Maher*, supra per Brennan J at pp.428-9.
[33] *Legione v Hateley* (1983) 152 CLR 406.
[34] *Waltons Stores v Maher*, supra; *Commonwealth v Verwayen*, supra.
[35] *Commonwealth v Verwayen*, supra at p.441, referring to *Stern v McArthur* (1988) 165 CLR 489 at 526-7.
[36] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at p.448 per Lord Cairns LC.

4.18. Another example would be where words or conduct by one party, in the course of contractual negotiations (i.e. before a contract is signed), are accepted and acted upon by the innocent party, for example, entering into the contract, or otherwise giving away rights where they would not otherwise have done so. So for example, if a landlord says to a tenant before a lease is executed, that he will not enforce a clause that forbids certain conduct, and later objects to the tenant breaching the clause once the contract is signed, an estoppel may arise. If a reasonable person in the position of the tenant would have relied on the representations in the circumstances and the requisite element of unconscionability is present, then the party making the representation will be estopped from departing from what they have said done.

4.19. Whilst is it true that representations in the lead up to the execution of contracts can, in terms of the application estoppel principles, be complicated by the operation of contractual principles (for example, the parol evidence rule, rules in relation to collateral contracts, or the existence of protective provisions in the contract such as entire agreement clauses), nevertheless estoppel principles can still have an important role to play in these cases, depending on the facts of the particular case. The law is now clear that a pre-contractual representation(s) may form the basis for an estoppel.[37] The point is that estoppel may operate in any relationship and at any point (pre-contractual, post-contractual or otherwise) if the requisite elements of the doctrine, particularly detrimental reliance and unconscionability, are satisfied.[38]

4.20. In summary, the estoppel remedy has considerable flexibility as an instrument of equity in the contractual setting, and may be a relevant consideration for a practitioner considering a potential application in relation to a financial agreement under s.90K(1). As part of the renaissance in thinking concerning estoppel that took place in *Waltons Stores v Maher,* the High Court restated the equitable estoppel doctrine in terms which simplify its application but which require it to be given the most serious consideration in a contractual setting.

> "…*the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. in Grundt at p 675; see also Thompson at 547. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.*"[39]

4.21. The other species of estoppel worthy of particular consideration in this context is estoppel by convention and/or by conduct. In this case, parties may have entered into a

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[37] *Waltons Stores*, supra; *Caringbah Investments Pty Ltd v Caringbah Business and Sports Club Ltd (in Liq)* [2016] NSWCA 165; *Franklins Pty Ltd v Metcash Trading Pty Ltd* (2009) 76 NSWLR 603 at [33] and [554]; *Branir Pty Ltd v Owston Nominees* (No.2)(2001) 117 FCR 424; see also *Cheshire & Fifoot: The Law of Contract*, 10th Australian Edition, Ch.2 particularly at [2.18]-[2.30].

[38] *Waltons* Stores, supra. See also *Chesire & Fifoot*, supra at [2.19].

[39] *Waltons Stores*, supra at p104 per Mason CJ and Wilson J.

financial agreement in circumstances where certain facts are assumed such as would make it unconscionable for one party to seek to deny those assumptions at a later time. The facts or state of affairs may be agreed in writing or orally. But where the assumption(s) form the conventional basis on which the parties have entered into legal relations, an estoppel may arise to preclude an unconscionable departure from it.[40]

5. UNDUE INFLUENCE AND UNCONSCIONABILITY

5.1. Other forms of equitable relief available that require consideration in the context of s.90K are the doctrines of undue influence and/or unconscionability[41]. The two doctrines are related but distinct.[42]. An action that can support a claim for undue influence may also support a claim for unconscionability, but not always.

5.1.1. Before embarking on a short description of each doctrine it is useful to understand that following:

5.1.1.1 that at their heart, each are a type of equitable fraud, the doctrines having been developed in equity over time to confront particular types of fraud not properly catered for in law generally;[43] and

5.1.1.2 a significant feature of each doctrine is the way in which they shift onus from the proven weaker or overborne party to the stronger party to show that the bargain that was struck cannot be ascribed to the inequality between the parties;[44] and

5.1.1.3 it is trite to say that the mere fact that the bargain is a bad one does not, without more, give rise to an entitlement to relief.[45]

5.2. UNDUE INFLUENCE

5.2.1. Undue influence has long been regarded as a species of equitable fraud, which undermines the quality of the consent of the weaker party and thus impugns the freedom of the decision-making.[46] At the heart of the doctrine is the notion of the stronger party to a transaction (whether by way of gift or contract or otherwise) surreptitiously taking advantage of weakness or vulnerability in the

[40] *Grundt* per Dixon J at pp.674-677.
[41] Support for the former proposition can be found in the paper by The Hon. Paul Brereton, '*Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements*' (2013) 23(2) *Australian Family Lawyer* 31.
[42] *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447.
[43] *Symons v William* (1875) 1 VLR (E) 199.
[44] *Johnson v Buttress* (1936) CLR 113.
[45] *Brusewitz v Brown* [1923] NZLR 1106.
[46] It is the third type of equitable fraud identified in the famous case of *Earl of Chesterfield v Jannsen* (1751) 2 Ves Sen 124 (at 154).

other party. Thus, equity will intervene to void a transaction procured by the improper or unconscientious use by one person or their of influence over another that cannot be explained on the grounds of friendship, charity or other ordinary motives on which people ordinarily act.[47]

5.2.2. The leading case remains the decision of the High Court in *Johnson v Buttress*[48] where the disponor of a gift of land was an old man who was illiterate and intellectually impaired and who, following his wife's death, had become dependent emotionally on the recipient to whom he subsequently transferred what was his only real asset. The critical questions in the case (and which remain central to the application of the doctrine) were: (i) whether the decision made by the old man was fully informed at the time made; and (ii) whether it was independently made (i.e. uninfluenced).

5.2.3. There are two accepted categories of undue influence. The requisite proof is different for each.

5.2.3.1 '*Actual undue influence*', for which the necessary elements of proof are:[49]

1. one party had, in the particular circumstances, the capacity to influence the other improperly;
2. this has occurred; and
3. the transfer/disposition of rights or property was a result of that influence.

Not all pressure and influence in negotiations asserted by one party over another will be undue. To meet that test there must be influence over the mind of the person alienating their property or rights such that it cannot be considered his or her free act.[50]

5.2.3.2 '*Unrebutted presumed undue influence*', for which the necessary elements of proof are:[51]

1. a recognised relationship of influence; and

[47] *Bank of New South Wales v Rogers* (1941) 65 CLR 42,
[48] Supra.
[49] Hon Paul Brereton, '*Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements*' (2013) 23(2) *Australian Family Lawyer* 31.
[50] *Johnson v Buttress* (1936) 56 CLR 113.
[51] *Johnson v Buttress* (1936) 56 CLR 113.

2. a failure on the part of the benefiting party to demonstrate that the property and/or rights received was not obtained as a result of that relationship of influence.

5.2.4. There are two broad categories of relationship of influence, those that are presumed like between a parent and a child, a doctor and a patient, a lawyer and a client ("**presumed relationships of influence**") and those relationships that can be shown on the particular facts of a given case to have the characteristics that warrant the description of a relationship of interest ("**special relationship of influence"**[52]).

5.2.5. Presumed relationships are well defined in equity, albeit there is always the challenge of keeping pace with changes in societal attitudes. Topical to applications to set aside a financial agreement is the historical inclusion of fiancée and fiancé as a presumed relationship and the exclusion of husband and wife[53]. Special relationships of influence must be proved on the facts. A mere confidence or reciprocal influence is not enough, it must be shown that there is[54]:

5.2.5.1 dominion or ascendency by one over the other's will; and

5.2.5.2 dependence and subjection on the part of the other.

5.2.6. To rebut the presumption of undue influence, the person who benefited from the transaction must be able to show that the weaker was emancipated from the influence of the stronger party. That is, it must be affirmatively established that the transaction was the well understood act of the donor.[55] The provision of independent legal advice will be a relevant consideration in this context but the simple fact that it has been given or obtained will not displace the presumption. The stronger party would need to prove the disposition by the weaker party was both[56]:

1. a well understood act; and
2. made by a person exercising free judgment.

[52] Adopting the term proposed The Hon. Paul Brereton, '*Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements*' (2013) 23(2) Australian Family Lawyer 31.
[53] The Hon. Paul Brereton, '*Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements*' (2013) 23(2) Australian Family Lawyer 31.
[54] *Tulloch v Braydon and Ors*. (No. 2) [2010] NSWSC 650.
[55] *Johnson v Buttress*, supra per Latham CJ at p.119; Dixon J at pp134-135.
[56] *Johnson v Buttress* (1936) 56 CLR 113; *Tulloch v Braydon and Ors. (No. 2*) [2010] NSWSC 650.

5.2.7. At common law, a transaction impeached by undue influence can be set aside in whole or in part. Alternatively, a court may deny specific performance. The object of the remedy is restitutionary but the court's jurisdiction is to do practical justice between the parties which ordinarily involves avoiding granting a windfall to the party upon whom relief is conferred.

5.3. **UNCONSCIONABILITY**

5.3.1. Equity may also set aside transactions brought about by a party who engages in deliberately exploitative conduct where advantage is taken of another party who labours under a special disadvantage.[57] This doctrine focuses on improvident transactions, ostensibly voluntarily made but with no sensible motive.[58] In a practical sense, what is examined is the extent to which such conduct is exploitative (i.e. the nature and extent of the wrongdoing). In this sense unconscionable dealing may be contrasted with the doctrine of undue influence (just discussed), which focuses more on the quality of the consent of the weaker or vulnerable party to ascertain whether the will of that party is not independent because it has been overborne.

5.3.2. There are three prerequisites to a finding that a dealing has been unconscionable in equity:

5.3.2.1 There must exist at the time of the transaction a special disadvantage in the weaker party with the consequence that there was an absence of any degree of equality between the parties in the dealing. Circumstances such as illness, ignorance, inexperience, impaired facilities, financial need and drunkenness may give rise to some disadvantage but emphasis needs to be given to the requirement for the disadvantage to be '*special*'.[59] The requirement that disadvantage be special recognises that in almost every case (contract or otherwise) parties to a transaction will, through their particular circumstances, be in unequal bargaining positions. But if inequality alone were determinative, the doctrine could seriously interfere with commercial relationships and transactions and therefore the sanctity of the contract. The categories of special disadvantage are not closed, will vary from case to case and may often be cumulative. What is essential is that the disadvantage

[57] *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447.
[58] *Wilton v Farnworth* (1948) 76 CLR 646 per Rich J at p.665.
[59] *Amadio*, supra.

adversely affects the weaker party's ability to conserve their own interests.[60]

5.3.2.2 The stronger party must know of the disadvantage to make it prima facie unfair that he or she accepts the weaker party's consent. Actual knowledge (as opposed to constructive knowledge) is almost always essential because it is actual knowledge that leads to victimisation or exploitation (i.e. sufficient to amount to taking of advantage). Constructive knowledge has been recognised as enough in some cases but they are rare.[61]

5.3.2.3 The stronger party is unable to show that the bargain was fair[62] or was for full value and the subject of independent advice.

5.3.3. The significance of equitable relief such as undue influence and unconscionability in this context is that, whilst the scope for operation in a commercial contractual setting is relatively rare, it may have more work to do in a s.90K context. For example, an allegation of unconscionable dealing is more likely to be sustained (and the presumption more difficult to rebut) where a transaction involves a gift between parties to a social relationship (e.g. marriage) than where it involves and arms-length commercial transaction. Another important feature of these doctrines is the shifting onus of proof, from one party to the other. Once the weaker party can prove special disadvantage and knowledge of the same, the onus then shifts to the stronger party to rebut the suggestion the transaction ought to be set aside.

5.4. **RALEIGH & RALEIGH**

5.4.1. While each case will obviously be different and turn on its particular facts, absent a presumed relationship of undue influence, it is suggested that in many instances it will be easier to prove unconscionability than undue influence. In any event, where possible a weaker party would seek to plead both. This is what the applicant did in *Raleigh & Raleigh* ("***Raleigh***")[63] before His Honour Justice Watts in the Sydney Registry in the Family Court of Australia. On the application of the wife, Watts J set aside a financial agreement which she had entered into with her then husband.

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[60] *Tillet v Vanell Holdings Pty Limited* [2009] NSWSC 1040.
[61] *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447.
[62] .Supra.
[63] [2015] FamCA625.

5.4.2. The parties had commenced cohabitation in 2001 and the wife had fallen pregnant in early 2003. While she was pregnant, the parties were married. Previously in 2001, the parties had discussed the idea of a financial agreement, a draft financial agreement had been prepared by the husband's then solicitor and the wife had consulted a solicitor herself; but the agreement was never executed. Two years later and eight days before the birth of the parties' first child, the wife signed a new financial agreement that had been prepared by new lawyers for the husband. The agreement provided that each party keep their separate property being their assets, liabilities and superannuation entitlements at the date that the agreement was entered into. Any property subsequently acquired in their sole names or their joint names was deemed to be "*earned*" by them in accordance with their respective contributions.

5.4.3. While necessarily the wife did consult with a lawyer for advice in relation to the agreement, the advice was given in a conference that lasted less than 15 minutes. The wife was advised that it was not prudent to enter into the financial agreement. She ignored that advice.

5.4.4. The husband had provided the wife with the financial agreement prior to the marriage, while she was pregnant and on returning from their honeymoon the husband said to the wife at times "*if you don't sign you will have to move out*". The wife was afraid of being a single mother. There were discussions over four months from time to time between the parties about the financial agreement but throughout that period the wife was not represented. In any event, the wife had no effective input during those discussions into the contents of the financial agreement.

5.4.5. The key findings by Watt J were as follows:

5.4.5.1 The husband put extreme pressure on the wife to ensure that she sign the agreement he had prepared prior to the birth of their first child.

5.4.5.2 The wife was anxious to eliminate the pressure she was under from the husband.

5.4.5.3 When she went to see the solicitor she was going to sign the agreement no matter the advice she was given.

5.4.5.4 The wife knew she would be totally financially dependent on the husband when she gave birth; the parties did not have any joint accounts and the

wife was in a weak financial position. The husband was in a superior financial position.

5.4.6. His Honour concluded that the relationship between the husband and the wife, while not a presumed relationship of influence was by its facts and circumstances a proved relationship of influence (or what is referred to above as a special relationship of influence). In addition, he concluded that there was, in fact, actual undue influence comprising

- disparity of financial position;
- financial agreement to the wife's detriment;
- husband's involvement in the engagement and instruction of the wife's solicitor;
- limitation of time available for the wife to properly consider the agreement;
- pressure to sign before the birth of the first child;
- incorrect representation as to the effect of a clause of the agreement; and
- wife's vulnerability because of her pregnancy meant she would sign the agreement no matter what the advice.

5.4.7. His Honour also concluded that at the time the financial agreement was signed, the wife suffered from a special disadvantage which affected her capacity to protect her own interests, that the husband knew this or knew the facts which would raise that possibility in the mind of a reasonable person, and that the husband took advantage of that opportunity. The factual basis of those conclusions were:

- the wife was about to give birth;
- the wife reasonably believed she would be financially dependent on the husband including for accommodation for her and her child yet to be born;
- she had no substantial assets and owed a large debt to the husband which was bearing interest at 8%;
- the wife was not in a position to bargain any specific variation;
- the husband misrepresented the terms of the financial agreement to the wife;
- the husband knew of the matters set out above; and
- the husband took advantage of those circumstances by insisting the agreement be signed prior to the birth of the child.

5.5. SAINTCLAIRE & SAINTCLAIRE

5.5.1. Where the weaker party in *Raleigh* succeeded in establishing undue influence and unconscionability, the weaker party in *Saintclaire v Saintclaire*[64] failed. While initially successful at trial, on appeal, the financial agreement was upheld. The case is a useful comparison to *Raleigh* as it demonstrates well the significant thresholds which need to be overcome to enliven these types of equitable relief.

5.5.2. The parties had entered into a cohabitation agreement while living in a de facto relationship in substitution for the rights for property alteration and spouse maintenance. Subsequently there were 2 children born of the relationship, they married and executed a financial agreement. The financial agreement was negotiated over a seven month period. The Financial Agreement differed from the Cohabitation Agreement in two main respects, namely:

5.5.2.1 at the wife's insistence spouse maintenance was not dealt with – those rights were left at large; and

5.5.2.2 the husband was required to forthwith pay the sum of $100,000 to the wife.

5.5.3. At trial the wife asserted that the financial agreement should be set aside on basis of undue influence and unconscionability. The trial judge agreed. Important to her findings were the following facts (which were not challenged for the purposes of the appeal):

5.5.3.1 from 17 months prior to the making of the agreement the wife consulted a general practitioner and a psychiatrist about postnatal depression;

5.5.3.2 by 11 months prior to the making to the agreement, the wife's post-natal depression had resolved and the wife ceased taking anti-depressants;

5.5.3.3 there were two incidents of domestic violence, one 11 months before the making of the agreement and the other five months prior to its execution – the first arose out of an argument about what ought be included in the financial agreement the second was an unrelated argument;

[64] [2015] FamCAFC 245

5.5.3.4 the wife was not coping with the care of the children, her own health, the limited support provided by the husband because of among other things his frequent overseas travel;

5.5.3.5 as a consequence of the first argument the husband agreed to take responsibility for joint expenses but the wife continued to be responsible for meeting her own expenses from her own income;

5.5.3.6 the wife had returned to employment more than 12 months prior to the execution of the agreement, but her income was reduced because of the impact of the period of maternity leave;

5.5.3.7 because of the distress the wife was under the husband called off the negotiation of the agreement until after their marriage;

5.5.3.8 the husband did not keep his promises to help more with the children;

5.5.3.9 the wife underwent a major surgery four weeks prior to the financial agreement being signed and was released from hospital a few days before a round table conference with lawyers was convened to discuss the execution of the financial agreement;

5.5.3.10 the wife had hidden from the husband her credit card debt of $100,000 until that conference.

5.5.4. The Full Court found that the trial judge had confused the different forms of undue influence – an error which in part arose from the poor manner in which the case had been pleaded. Considering the facts for themselves, the court on appeal emphasised:

5.5.4.1 the wife had successfully negotiated the exclusion of any reference to spouse maintenance and the payment of $100,000 to clear her credit card debts;

5.5.4.2 the wife was a financial professional or considerable experience;

5.5.4.3 there was no evidence that the wife did not understand the terms of the agreement; and

5.5.4.4 the wife had deposed to believing at the time she entered into the financial agreement she believed that she would continue in full-time employment and rebuild her career back to the posit where she earnt $300,000 per annum.

5.5.5. The court concluded that the wife's evidence, even taken at its highest fell a long way short of establishing:

5.5.5.1 the requisite influence over the mind of the wife – if actual undue influence was sought to be proven;

5.5.5.2 the parties' relationship demonstrated any dominion or ascendancy by the husband over her and for the wife's party any dependence on the husband or subjection to his will – if a relationship of influence was sought to be proven; and

5.5.5.3 while the husband was aware of the stresses that the wife laboured under, nothing about them amounted to a special disadvantage – if unconscionability was sought to be proven.

5.5.6. Above everything else *Saintclaire* is a lesson in two major respects. First, the need to carefully prepare these types of claims. This includes detailed particulars which address carefully the necessary elements of the relief; and further the strict adherence to those particulars in preparing evidence in support. Remarkably in *Saintclaire*:

5.5.6.1 there was no medical evidence of any temporary disability or impairment of the wife or her state of mind generally at the time the financial agreement was signed;

5.5.6.2 the wife failed to call her lawyer about her state of mind at the time she signed the financial agreement;

5.5.6.3 the wife gave evidence of feeling optimistic about her financial future (albeit unfounded);

5.5.6.4 there was no attempt to create any connection between recent historical events like the domestic violence and post-natal depression and the execution of the financial agreement; and

5.5.6.5 there was no evidence that the wife was not desirous of entering into a financial agreement.

5.5.7. Secondly, *Saintclaire* should stand as a reminder practitioners how difficult this type of equitable remedy is to secure and how careful evidential preparation must be. Concepts like dominion and subjection are weighty matters that will not usually arise. The difference between striking an imprudent bargain and there being evidence of unconscionable conduct in relation thereto is considerable.

6. **CONCLUSION**

6.1. Litigation in relation to a financial agreement pursuant to s.90K(1)(a) (b) or (e) is likely to be complex and challenging. At all stages of the proceeding (advice, pleadings, preparation of evidence and trial), the issues require careful evaluation with the background of a thorough appreciation of equitable principles and the nuanced circumstances in which it can be applied under s.90K. Likewise, it is advisable to be familiar with the procedure and processes of the court and the range of interim relief which is often a necessary feature of s.90K litigation between cohabitating parties (with accompanying financial interdependency).

6.2. Early considered advice is essential. Before a case is even commenced every aspect should be established and proved in the mind of the lawyers acting for the applicant. The risk of coming up short mid-way through in terms of costs, protection of the subject matter of the litigation or the necessary evidence to prove the required elements of the relief sought could leave an already financially weaker party in an even poorer position.