



Précis Paper

Binding Financial Agreements

The Hon. Ian Coleman SC (Barrister) discusses *Saintclair v Saintclair* [2013] FamCA 491 which considered the validity of binding financial agreements under the *Family Law Act 1975* (Cth). Mr Coleman observes, "when people marry it is often hope over experience... (particularly where the law on binding agreements provides) so many questions and so few answers."

Discussion Includes

- Binding Financial Agreements (BFA) allow parties to divide their property as intended, without the court interfering
- BFAs may be entered into by de-facto partners or married couples at any time
- BFAs can be set aside if they were vitiated by fraud, duress or undue influence or when a court simply declines to enforce them
- A party disadvantaged by a BFA will not need to present much to the court to avoid the BFA being enforced
- Terms of settlement or discretionary trusts are more effective than BFAs at keeping agreements away from any interference by the courts

Précis Paper

Binding Financial Agreements

1. In this edition of BenchTV, the Hon. Ian Coleman SC (Barrister) and Dasith Vithanage (Solicitor) present on the Family Court's (Ryan J) decision in *Saintclair v Saintclair* [2013] FamCA 491 which considered the validity of a binding financial agreement under the *Family Law Act 1975* (Cth). Mr Coleman SC is a former Family Court Judge in the Appeal Division who now privately practices from Culwulla Chambers.

Binding Financial Agreements Generally

2. Binding financial agreements (BFA), to the extent that they are binding, oust the jurisdiction of the court. Generally BFAs purport to be binding with respect to property settlement rights, but may also extend to spousal maintenance rights.
3. Financial agreements that are not binding may still have significance in determining whether it is just and equitable to alter property interests – a preliminary step to property settlement in light of the High Court's judgment in *Stanford v Stanford* (2012) 247 CLR 108.
4. BFAs can be entered into by parties in a de-facto relationship, parties to a marriage or parties who intend to enter into marriage, at any time. In addition, there is no time restriction on when an intended marriage must take place.
5. Assuming the agreement is not vitiated by fraud, duress, undue influence or some other equitable basis, to be binding it needs to have certificates in the form set forth in the provisions of the *Family Law Act 1975* (Cth) ("the Act"). In addition, since enforcement of a BFA is discretionary, the court may decline to enforce a BFA, which creates uncertainty about its validity for practical purposes. The validity of a BFA is determined by a consideration of the circumstances at the time the agreement is entered into.
6. The deeming provision, s 90(G)(1)(a) of the Act is a remedial provision intended to cure technical defects, such as incorrect names.

SECTION 90G:

When financial agreements are binding

- (1) *Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:*
 - (a) *the agreement is signed by all parties; and*

- (b) *before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and*
 - (c) *either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and*
 - (ca) *a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and*
 - (d) *the agreement has not been terminated and has not been set aside by a court.*
- (1A) *A financial agreement is binding on the parties to the agreement if:*
- (a) *the agreement is signed by all parties; and*
 - (b) *one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and*
 - (c) *a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and*
 - (d) *the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and*
 - (e) *the agreement has not been terminated and has not been set aside by a court.*

...

Background to Saintclair

7. The agreement was signed during the marriage at a time when the wife was suffering from post-natal depression, she had credit card debts of over \$100,000 (which the husband paid on execution of the agreement), there had been incidents of physical violence, the wife underwent a significant surgical procedure approximately 4 weeks before the agreement was signed and she was only released from hospital a few days before a round table conference. The agreement advantaged the husband and disadvantaged the wife.

Resolution of the Case

8. Ryan J found that the agreement was voidable under s 90G(1)(b) of the Act for undue influence and unconscionable conduct.

9. Ryan J found that the wife was emotionally vulnerable and, having undergone major surgery, was also physically stressed, and more dependent upon the husband. This vulnerability was not neutralised by her having legal advice as there was no evidence that her solicitor was aware of the wife's full circumstances. Even though the wife was able to negotiate better terms than the husband originally proposed, Ryan J was strongly satisfied that a relationship of undue influence existed and that this was why the wife signed the financial agreement.
10. Largely relying on the same facts, Ryan J also found the agreement was voidable for unconscionable conduct on the part of the husband in taking advantage of the wife and set it aside.

Implications

11. *Saintclair* is an illustrative case on how likely an agreement between parties, which the court perceives to be unfair, is found voidable. So as not to enforce a BFA, judges may work backwards and accumulate enough evidence to bring the wife, in this case, within a recognized category of relief.
12. As Mr Coleman SC states: "A party who is found to be in an inferior position and to in effect do worse under the BFA may well not have a terribly substantial evidentiary onus to overcome to avoid the BFA being binding." Further: "There is almost a presumption of invalidity (of BFAs in Australia)."
13. In contrast to BFAs, Mr Coleman SC recommends the use of terms of settlement or discretionary trusts as much more effective than BFAs at keeping agreements away from the jurisdiction of the court.
14. Mr Coleman SC concludes that "when people marry it is often hope over experience... (particularly where the law on binding agreements provides) so many questions and so few answers".

BIOGRAPHY

The Hon. Ian Coleman SC

The Hon. Ian Coleman SC was admitted as a Lawyer in 1974, called to the NSW Bar in 1975 and appointed Senior Counsel in 2013. He has a long history on the Bench in the Family Court of Australia, having been appointed to the Trial Division in 1991, The Appeal Division in 1999, and serving from 2009 to 2013 on the Western Plains. He was a Judge Advocate for the Australian Defence Force from 1992 to 1997 and a Commissioner of the Australian Law Reform Commission from 1993 to 2003. He is also currently an Adjunct Professor at the Western Sydney University, School of Law.

Dasith Vithanage

Dasith Vithanage is an Associate at A R Conolly and Company.

BIBLIOGRAPHY

Focus Case

Saintclair & Saintclair [2013] FamCA 491

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/FamCA/2013/491.html>

Cases

Bradford & Bradford [2012] FamCA 393
Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447
Kostres & Kostres [2009] FamCAFC 222; (2009) 42 Fam LR 336
Louth v Diprose [1992] HCA 61; (1992) 175 CLR 621
Parker & Parker [2010] FamCA 664
Stanford v Stanford (2012) 247 CLR 108
Wallace & Stelzer [2011] FamCA 54
Winefield v Clark [2008] NSWSC 882

Legislation

Family Law Act 1975 (Cth)
Matrimonial Causes Act 1959 (Cth)
Property (Relationships) Act 1984 (NSW)