



## Précis Paper

### Setting Aside Binding Financial Agreements

This is a useful discussion for family law practitioners about binding financial agreements.

#### **Discussion Includes**

- Requirements for a valid binding financial agreement
- Setting aside a binding financial agreement
- Material changes relating to the birth of children
- Establishing hardship
- Disclosure requirements
- Unconscionable conduct

## Précis Paper

### Setting Aside Binding Financial Agreements

1. In this edition of BenchTV, Giles Stapleton (Barrister, 7 Wentworth Selborne Chambers, Sydney) and David Meredith (Solicitor, Meredith Lawyers, Sydney) discuss the recent case of *Kapsalis & Kapsalis* [2017] FamCA 89.

#### Background and Material Facts

2. *Kapsalis & Kapsalis* involved an application to set aside a binding financial agreement. The circumstances were such that if the agreement was not set aside, the husband would end up with 100 percent of the asset pool.
3. The facts of the case were such that the asset pool as at the date of separation was of no material difference to how it was at the start of the marriage. The husband had contributed the entire asset pool at the start of the marriage, specifically a home, a business, and a number of corporate interests. The wife had not brought any assets into the relationship. The couple had two children during the marriage.
4. The parties had entered into a binding financial agreement prior to their marriage.
5. After the couple's divorce, the wife brought an application to set aside the binding financial agreement. The primary ground relied upon was hardship, as the wife was living off social security and spousal maintenance payments and had little income of her own. In contrast, the husband had retained the house and his business, and was relatively well off financially.

#### Binding Financial Agreements

6. A binding financial agreement is an avenue provided by Parliament for parties in a marriage to contract out of property settlement provisions of the *Family Law Act 1975* (Cth). A binding financial agreement thus enables the parties to determine by themselves how property will be divided, rather than having recourse to s 79 of the *Family Law Act*, and effectively ousts the jurisdiction of Part VIII of the *Family Law Act*: see s 71A. It is the equivalent of the American concept of a "pre-nuptial agreement", but can be entered into before, during or even after the marriage.
7. For a binding financial agreement to apply, the key requirements are set out in s 90G of the *Family Law Act*. Most importantly, the agreement must be signed by both parties, and the parties must have received comprehensive legal advice. This latter requirement is important because in circumstances where the parties will not go to court, it is necessary

for them to be aware of their rights and properly understand the agreement that they are entering into. The legal advice must include what the binding financial agreement is and does; the terms of the agreement and what will happen pursuant to it; the basis upon which the agreement may be set aside; and what events might take place later on for the parties and how the agreement would treat those events (such as birth of children; loss of income; and sickness).

8. Mr Meredith noted that it is relatively straightforward to ensure that an agreement is binding under s 90G of the *Family Law Act*. However the real challenge is seeking to ensure that it will not be set aside by the Court under s 90K.
9. A binding financial agreement may only be set aside on the basis of the grounds in s 90K(1), which include:
  - Unconscionability;
  - Fraud; and
  - Material changes relating to the birth of a child resulting in hardship.
10. The Court *only* has the power to set aside a binding financial agreement on the basis of the grounds in s 90K(1). That is, there is no general, discretionary power to re-open an agreement.

#### Material Change in Circumstances Resulting in Hardship

11. In *Kapsalis & Kapsalis*, the wife relied primarily on s 90K(1)(d) in seeking to set aside the binding financial agreement. That sub-section provides that the Court may set aside a binding financial agreement if:

*since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside.*

12. In essence, s 90K(1)(d) deals with a situation where there has been a material change in circumstances that leads to hardship arising from the birth of a child. In relation to the first limb (a material change), the position of the wife was that she had gone from living under one roof with her husband and her children, to living under another roof with only herself and her children, and having to fund her own accommodation. The wife's argument centred on the premise that the children were themselves the change in circumstances, and because of the birth of the children, she was now in a poor financial situation. The husband,

however, argued that the binding financial agreement had expressly contemplated the birth of children, and had made separate provision for the children through child maintenance payments. Moreover, the husband argued that what had really created the change in circumstances was not a material change relating to the birth of the children, but rather the separation, and the wife's departure from the family home.

13. The judge rejected the wife's submission, finding:

*39. I do not accept that submission. The Agreement itself contemplated that the parties would have children. As the Full Court observed in Fewster [ & Drake [2016] FamCAFC 214], the birth of a child is within the ordinary realms of expectation of a marriage and so is the care, welfare and development of a child.*

*40. I accept, as the Full Court stated in Fewster, that there could be circumstances where, after an Agreement is signed, a child suffers a life changing illness or injury, and that, as a result of being the carer of that child, a parent suffers hardship. I do not accept that the section is enlivened only because a child is born when the Agreement contemplates such an event.*

*41. In relation to the second question, counsel for the husband submits that, if the wife suffers hardship (which is not conceded), that hardship arises, not because of the birth of the children, but because of the separation. I accept that submission.*

*42. The wife does not assert that she suffered any hardship after the birth of the children and up to the date of separation. The hardship which she now asserts arises out of the fact that she no longer lives in the house owned by the husband, that she has to pay rent, and that she no longer has the use of the husband's income. Those are not matters arising out of changed circumstances relating to the children but rather out of changed circumstances relating to the marriage and separation.*

14. The hardship limb therefore has two aspects: (1) the hardship itself; and (2) that the hardship has been caused by the material change. The Court here concluded that the hardship – if it existed – had not been caused by a material change brought about by the birth of the children. It found that children are a likely outcome from marriage, so a material change in circumstance arising from children is not the birth of the children itself, but things that might occur to the children after they are born. The birth of a child alone does not enliven s 90K(1)(d). There is therefore a high threshold for establishing hardship arising from the birth of children.

15. In addition, the wife in this case failed to establish that she was suffering hardship. The presenters noted that just because a person's financial situation deteriorates from the position that they were in during the marriage, and they are receiving social security payments, is not sufficient in itself establish hardship. In *Fewster & Drake* [2016] FamCAFC

214, the Court noted that it is the changed circumstances which must give rise to the hardship, and not the agreement itself. Subject to compliance with the statutory requirements, people are free to enter such binding financial agreements as they see fit. There is no statutory provision which enables a binding financial agreement to be set aside merely because it is unfair: *Hoult & Hoult* (2013) FLC 93-546.

16. The wife's evidence indicated that her weekly income (from a combination of social security benefits, spousal maintenance and child support payments) amounted to approximately \$1,200 per week, tax free. She paid \$540 per week in rent. The Court therefore found that the wife's financial position, although poor, did not equate with "hardness, severity, privation, that which is hard to bear or a substantial detriment" (at [50]). Where the wife's income exceeded her expenses, hardship was not made out. Importantly, it was open to the wife to persist with her application for spousal maintenance independent of the application to set aside the binding financial agreement, which dealt solely with the division of assets and not an entitlement to spousal maintenance.
17. The presenters therefore reminded viewers that in applications of this nature, hardship is a difficult factor to overcome, and will not be established on a speculative basis. It is a severe exercise of the Court's power to set aside a binding financial agreement, and therefore solid evidence must be presented to establish this limb.

#### Disclosure Requirements

18. In this case, the husband ran a number of companies. The wife sought to argue that the husband's disclosure, at the time that the binding financial agreement was entered into, was insufficient. This argument was advanced under s 90K(1)(a), which provides that an agreement may be set aside if it was obtained by fraud (including non-disclosure of a material matter).
19. The Court rejected this argument, noting that there is a fundamental difference between the obligation to make full and frank disclosure in proceedings before the Court, and the disclosure obligations arising in the context of a private agreement. The Court noted that consistent with the doctrine of freedom of contract, a party may enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence.
20. Moreover, the wife's allegation did not suggest that she had been misled by the husband or induced to think something different by information provided. Section 90K(1)(a) is intended to cover situations where this has occurred, and not situations where one party has simply not been privy to information held by the other party. The wife here had not made inquiries

in relation to her husband's assets, and in fact her evidence acknowledged that a different disclosure of assets would not have affected her decision to enter into the agreement. This acknowledgment also meant that causation was not established – s 90K(1)(a) requires that the agreement be *obtained* by fraud, and in circumstances where the wife would have entered into the agreement anyway, this could not be established.

### Unconscionable Conduct

21. The final submission to set aside the agreement was made under s 90K(1)(e). This involved an argument by the wife that her signature on the binding financial agreement was achieved through unconscionable conduct. The wife relied upon two key factors to establish unconscionability: first, the proximity of the signing of the agreement to the marriage (the agreement was entered into a few days prior to the marriage); and second, the fact that the husband had paid for the wife's solicitor. The latter argument was rejected by the Court as there was no evidence to suggest that the solicitor had not acted properly or professionally in giving independent advice.
22. In relation to the first argument, the Court explored concepts of unconscionability. Applying *Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; 151 CLR 447, the Court noted that following elements must be proven: that the wife was under a "special disability" in dealing with the husband; and that the wife's special disability was sufficiently evident to the husband or that he had knowledge of it; and that the husband unconscientiously took advantage of the wife's special disability. As no special disadvantage was made out, this ground was not established.

### Conclusion

23. The presenters noted that this case reminds practitioners that there is no ground in s 90K to set aside a binding financial agreement on the sole basis that it is unjust or inequitable, or that it would lead to a disparity in the financial situation of the parties. The Court has taken a precise approach to interpreting s 90K, and where a party enters into an agreement with the benefit of legal advice, that agreement will be upheld unless a specific ground under s 90K is made out.

## **BIOGRAPHY**

### Giles Stapleton

Barrister, 7 Wentworth Selborne Chambers, Sydney

Giles Stapleton was admitted as a solicitor in 2005 before being called to the NSW Bar in 2012. Prior to coming to the Bar, Giles held executive positions in public companies in the Australian property funds management industry. His primary practice is in property ownership, development, investment management, financing arrangements, corporate/family asset structures, and directors' duties.

### David Meredith

Solicitor, Meredith Lawyers, Sydney

David Meredith was admitted to the Supreme Court of Western Australia in 2002. He has practiced almost exclusively in family law. David has represented clients in the Family Court in Perth, Sydney, Newcastle, Parramatta, Melbourne and Dandenong. He has significant trial experience and represents higher net worth clients and parties involved in complex children's matters. David has achieved excellent results for his clients who are referred to him by trusted colleagues.

## **BIBLIOGRAPHY**

### Focus Case

*Kapsalis & Kapsalis* [2017] FamCA 89

### Judgment Link

<http://www.austlii.edu.au/au/cases/cth/FamCA/2017/89.html>

### Cases

*Fewster & Drake* [2016] FamCAFC 214

*Hoult & Hoult* (2013) FLC 93-546

*Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; 151 CLR 447

### Legislation

*Family Law Act 1975* (Cth)