SETTING ASIDE BINDING FINANCIAL AGREEMENTS UNDER THE FAMILY LAW ACT 1975 (Cth) AND FAMILY COURT ACT 1997 (WA)

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1. Introduction

In the year 2000 the *Family Law Act 1975* (Commonwealth) ("*FLA*") was amended to include Part VIIIA, governing Financial Agreements. The purpose of Part VIIIA was to oust the jurisdiction of the Family Court to make property adjustment orders, and encourage parties to reach agreement about how their property would be distributed in case of marital breakdown. These provisions finally enabled married spouses to enter into Binding Financial Agreements ("BFAs") at various stages of their relationship. In 2008, Division 4 of Part VIIIAB was inserted to allow de facto spouses to do the same. In Western Australia, married spouses who want to enter into a BFA fall under Part VIIIA of the *FLA*. However, de facto spouses fall under Division 3 of Part 5A of the *Family Court Act 1997* (Western Australia) ("*FCA*").

There are many benefits for parties to enter into BFAs, such as choosing how to deal with their assets if they separate rather than have this imposed by a court, and not requiring the court's approval of the BFA before it is executed. Although there are additional benefits of entering into BFAs, such as taking significantly less time than litigation, applying to set aside a BFA does include litigation. This benefit therefore disappears if a party refuses to be bound by the BFA. Not only will litigation take time, but the parties will also bear legal costs. Further, although a BFA does not need to be just and equitable in the same manner as a court's decision does,[2] this is usually a motivating factor for a party to apply to set it aside. Finally, although parties often enter into BFAs because its terms are confidential, once litigation commences, this confidentiality may be lost.

Since the introduction of the new legislative provisions, a number of applications have been made to the courts to enforce, vary, invalidate, rectify, or set aside BFAs.[3] The focus of this

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[2] See section 79(2) of the *Family Law Act* 1975 (Cth) which provides that a court cannot adjust parties' property interests unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. The High Court of Australia also reaffirmed that a BFA can be set aside if it is grossly unreasonable (*Thorne v Kennedy* (2017) 91 ALJR 1260). See also Staindl, Paul and Bradley, Lisa. 2008. "Financial agreements: Risks, responsibilities and rewards". *Current Family Law*, 13(2): 64.

[3] Feary, Grant. 2015. "Risk watch: The risks to lawyers of pre-nup agreements". *Bulletin* (Law Society of South Australia), 37(9): 23p. 23; Papadakis, Marianna. 2015. "Pre-nuptial agreements too risky for lawyers". *Australian Financial Review*, 23 July 2015, accessed at http://www.afr.com/business/legal/prenups-too-risky-for-lawyers-20150520-gh61gj.

paper is primarily on setting aside BFAs. Parties who seek to set aside BFAs generally do so because they are no longer happy with the division of the assets, or because an error in the BFA makes a provision inoperable. Consider the following examples:

(a) *A husband and wife enter into a BFA during marriage to determine how their assets and financial resources would be distributed in case of separation. They agree that the terms of the BFA reflect their respective contributions and are fair. Some 10 years later, they separate. The wife wishes to comply with the BFA, which provides that she retains the real property, now worth some $2 million. The husband does not. He considers the BFA to be grossly unfair because under its terms he only retains a company, which now has no value. He wishes to set the BFA aside and seek an equal division of the matrimonial pool.*

(b) *A wealthy property developer meets a woman 30 years his junior on an online dating site, and after some time dating, arranges for her to travel to Australia with the purpose of marriage. Two weeks before the wedding he asks her to sign a BFA. The BFA seeks to protect his financial interests only. The fiancée attends upon a solicitor and is advised not to sign the BFA. Reluctantly she signs the BFA because if she does not, the wedding would be called off, and she would need to return to her country of origin. Some 3 years later the husband initiates separation and pursuant to the BFA, sends his wife away with nothing. The wife seeks to set the BFA aside and seek a fair property settlement*.

(c) *A de facto husband discovers that his de facto wife developed a gambling problem and incurred significant financial loses*. *In order to protect the family home from the creditors, and without disclosing the reason to his solicitor, he instructs preparation of a BFA whereby he would receive the family home in case of separation, and the de facto wife would retain all other assets of nominal value. As soon as the BFA is signed, the parties arrange to separate and transfer the home to the de facto husband pursuant to the BFA. The creditors wish to set the BFA aside and seek payment of the loans advanced to the de facto wife.*

These three examples illustrate some common circumstances in which courts are asked to set aside BFAs entered into pursuant to the *FLA* or the *FCA*. This paper discusses the grounds available to parties considering making such an application. First, these grounds are analysed. Next, the application process and procedure is outlined. Finally, alternative dispute resolution is suggested as a preferred method to litigation.

2. Grounds to set aside BFAs

The type of BFAs entered into pursuant to the *FLA* and the *FCA* are:

(a) BFAs pursuant to sections 90B, 90C, 90D of the *FLA*;
(b) BFAs pursuant to sections 90UB, 90UC and 90UD of the *FLA;* and
(c) BFAs pursuant to sections 205ZN, 205ZO and 205ZP of the *FCA*.

Setting aside a BFA is essentially a two-step process. First a ground must be established. If the ground is established, then the court chooses whether to exercise its discretion to set the BFA, or part of it, aside. Therefore, establishing a ground alone does not guarantee that the BFA will be set aside, and parties may be bound by it.

The grounds for setting aside a BFA are contained in sections 90K and 90UM of the *FLA*, and section 205ZV of the *FCA*. Further provisions in relation to the validity, enforceability and effect of BFAs are outlined in section 90KA and 90UN of the *FLA*, and section 205ZW of the *FCA*. These will be analysed below. First, however, it is necessary to consider whether failure to comply with procedural requirements of drafting and executing BFAs would itself warrant the setting aside of the BFA.

2.1 Failure to comply with legislative provisions – technicalities

Parties may attempt to set a BFA aside on the ground of technicalities or procedural errors. For example, sections 90DA and 90UF of the *FLA* require that a separation declaration be signed by at least one of the parties if the parties are separated but not yet divorced, for the terms of the BFA to have effect.[4] A lawyer analysing the BFA may discover that a separation declaration was not executed at all. However, this may be insufficient for the BFA to be set aside. In *Kostres v Kostres*,[5] Wilson FM stated that:

> *In my view, on a proper construction of s 90DA(1) of the Act, the existence of a separation declaration is a procedural matter. It need not exist at the commencement of the proceedings, nor even at the commencement of the final hearing. However, the entitlement to enforce the financial agreement is contingent upon such a document coming into existence. To construe the section otherwise would give rise to potentially anomalous results. If proceedings were commenced by one party to the marriage for property settlement orders, and the other party filed a response relying on the existence*

[4] *FLA* s 90DA.
[5] (2008) 40 Fam LR 228.

> *of a financial agreement, would the court strike out that response if the separation declaration did not exist at the date of the filing of the response, but was provided to the court on the hearing of the strike — out application? I think not. … While there may be costs considerations stemming from the failure to properly comply with s 90DA until late in the proceedings, I do not think a court would preclude a party from relying on an otherwise binding financial agreement.*[6]

The FM dealt with this matter on the basis that there was a binding financial agreement, but the enforcement of the orders were contingent on the filing of an affidavit exhibiting a separation declaration. Although on appeal the BFA was set aside on other grounds, the Full Court noted that no challenge was made to the FM allowing the wife to provide the separation declaration.[7] It is therefore unlikely that a BFA would be set aside just because a separation declaration was not executed by the parties.

A further example is contained in sections 90E, 90F, 90UH and 90UI of the *FLA*, and sections 205ZQ and 205ZR of the *FCA*, which provide that:

(a) Provisions relating to maintenance of a party or a child/children must specify which party or child/children the provision is made for, and the amount or value of property attributed to the maintenance;[8] and
(b) Parties to the BFA must be able to support themselves without an income tested pension, allowance or benefit.[9]

The latter provision is particularly important. In *Millington v Millington*,[10] the parties entered into a BFA which intended to oust the jurisdiction of the Court in relation to the wife's maintenance. The wife was in receipt of an income-tested pension, without which she claimed she was unable to support herself given her income and expenditure. The court held that there was no validly executed BFA in this case. However, had there been, it would have been necessary to determine whether the wife was indeed unable to support herself without an income-tested pension. In order to do this, the court would need to consider the terms and effect of the BFA and not the party's property and financial resources.

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[6] Ibid at [72] and [73].
[7] *Kostres v Kostres* [2009] FamCAFC 222 at [11].
[8] *FLA* s 90E.
[9] *FLA* s 90F.
[10] [2007] FamCA 687; see also Dowd, Justin and Harland, Alexandra. 2008. "Bound by strict compliance". *Law Society Journal*, 46(2): 60-6, pp. 61 and 62.

This issue was further considered by the High Court of Australia in *Thorne v Kennedy.*[11] Although no submissions were made about section 90F of the *FLA* before the primary judge or before the Full Court by the applicant, it was considered so significant in the High Court that it was drawn to the attention of the parties:[12]

> *Despite Ms Thorne's extremely limited personal means, the agreements purported to provide for an "acknowledgement" that Ms Thorne was able to support herself without an income tested pension, allowance or benefit. It seems that this clause was an attempt to oust the operation of s 90F of the Family Law Act.*[13]

Sections 90F and 90UI of the *FLA*, and section 205ZR of the *FCA*, prohibit the BFA from excluding or limiting the power of a court to make an order in relation to the maintenance of a party if "when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit."[14] It is therefore likely that a BFA would be set aside on the ground that these sections were not complied with.

2.2 Failure to comply with legislative provisions – independent legal advice

Sections 90G and 90UJ of the *FLA*, and section 205ZS of the *FCA*, specify various requirements in relation to the provision of independent legal advice and execution of the BFA. The provisions in the *FLA* and the *FCA* differ slightly. The *FLA* provides that:

(a) The BFA must be signed by all parties;[15]
(b) Before signing the BFA, each spouse party must be provided with independent legal advice from a legal practitioner about the effect of the BFA on their rights, and about the advantages and disadvantages of them entering into the BFA;[16]
(c) Before or after signing the BFA, each spouse party must be provided with a signed statement by the legal practitioner that independent legal advice was provided, and a copy of this statement is to be provided to the other party or their lawyer;[17] and
(d) For the BFA to be binding, it must not have been terminated or set aside by a court.[18]

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[11] (2017) 91 ALJR 1260.
[12] Ibid at [20].
[13] Ibid at [20].
[14] Ibid at [19].
[15] *FLA* s 90G(1)(a) and s 90UJ(1)(a).
[16] *FLA* s 90G(1)(b) and s 90UJ(1)(b).
[17] *FLA* ss 90G(1)(c) and (ca) and s 90UJ(1)(c) and (ca).
[18] *FLA* s 90G(1)(d) and 90UJ(1)(d).

Sections 90G and 90UJ of the *FLA* state that a BFA is binding on the parties "if, and only if" subsections 1(a) to 1(d) are complied with. However, this is subject to the provisions of subsection (1A). Subsection (1A) provides that a court may make an order that a BFA is binding despite subsections (b), (c) or (ca) of section 90G(1) and 90UJ(1) not having been complied with. For example, if the BFA is signed by all parties but a party was not provided with independent legal advice or a signed statement that such advice was given, the BFA may still be binding if the court is satisfied that it would be unjust and inequitable if the BFA was not binding.[19] Therefore, the court may make an order that the BFA is binding despite an error or omission, disregarding any changes in circumstances since the BFA was made.[20]

Strict compliance with these sections was required by the Full Court in *Black v Black.*[21] However, following legislative amendments, this strict compliance test in relation to technical requirements was soon overruled by the same court in *Kostres v Kostres.*[22] Here the court held that a BFA can be binding on the parties despite a procedural failure if this would render the BFA otherwise unjust.

Consequently, in *Bilal v Omar,*[23] the wife's claims that she did not receive any legal advice in circumstances where the BFA and the certificates of independent legal advice were not translated into her own language, failed. Provision of independent legal advice by a solicitor who spoke a similar dialect and used an interpreter was sufficient to render the BFA compliant with section 90G of the *FLA*.

However, in *Ruane v Bachmann-Ruane and Anor*,[24] the BFA was set aside on the ground that section 90G was not complied with because the lawyer providing independent legal advice was not an Australian Lawyer. The court held that it does not follow that the independent legal advice has to be followed or that it has to be correct.[25] However, the lawyer giving it has to be competent and accountable as an officer of the court.[26]

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[19] *FLA* ss 90G(1A)(1B)(1C) and (2) and 90UJ(1A)(1B)(1C) and (2).
[20] Ibid.
[21] [2008] FamCAFC 7.
[22] *Kostres v Kostres* [2009] FamCAFC 222, recognised that the 2009 amendments to the *FLA* whereby section 90G(1A) was inserted, were designed to overcome the effect of *Black v Black*, which required strict compliance with section 90G. Following the insertion of section 90G(1A), on appeal, *Kostres v Kostres* overruled the strict compliance test.
[23] [2015] FamCAFC 30.
[24] [2009] FamCA 1101.
[25] Ibid at [76]. The Full Court in *Logan v Logal* [2013] FamCAFC 151 at [51], following *Hoult v Hoult* [2015] FamCAFC 109, also found that it is only necessary to enquire whether legal advice was given, and not as to the content of that advice. Despite these findings, lawyers should ensure they provide correct legal advice. These decisions would not prevent lawyers from being sued for negligence if they provided incorrect legal advice on which clients relied when entering into the BFA.
[26] Ibid. This judgment followed an earlier decision of *Murphy v Murphy* [2009] FamCAFM 270 where the legal advice for the bride was provided by a foreign lawyer.

Section 205ZS of the *FCA* does not mirror sections 90G and 90UJ of the *FLA* with respect to the court having the power to hold a BFA valid even if certain provisions are not complied with. It does provide, however, that the BFA is binding in the parties "if, and only if" the following requirements are complied with:

(a) The BFA is signed by all parties;[27]
(b) The BFA contains a statement with respect to each party that they were provided with independent legal advice, before they signed the agreement, about the effect of the BFA on their rights, and the advantages and disadvantages of them entering into the BFA;[28]
(c) The person providing the independent legal advice signs a certificate that the advice was given and annex it to the BFA;[29]
(d) The BFA has not been terminated or set aside by a court;[30] and
(e) After execution the original BFA is given to one of the parties and a copy given to the other.[31]

Further, section 205ZS(3) of the *FCA* provides that a court may make such orders for the enforcement of the BFA that is binding on the parties as it thinks necessary. This may include circumstances where setting aside a BFA because of a procedural error or omission would otherwise be unjust or inequitable. Therefore, BFAs which do not comply with section 205ZS of the *FCA* may still, nevertheless, be binding on the parties.

2.3 Circumstances in which a court may set aside a BFA

A number of grounds are identified in sections 90K, 90KA, 90UM and 90UN of the *FLA*, and sections 205ZV and 205ZW of the *FCA*, on which a BFA may be set aside. The grounds identified by these provisions are analysed next.

(a) Statutory fraud

Sections 90K(1)(a) and 90UM(1)(a) of the *FLA*, and section 205ZV(1)(a) of the *FCA*, provide that a court may set aside a BFA if it is satisfied that the BFA was obtained by fraud (including non-disclosure of a material matter).

[27] *FCA* s 205ZS(1)(a).
[28] *FCA* s 205ZS(1)(b).
[29] *FCA* s 205ZS(1)(c).
[30] *FCA* s 205ZS(1)(d).
[31] *FCA* s 205ZS(1)(e).

In *Parke v Parke*,[32] the husband failed to disclose all of his assets and financial resources, in accordance with the parties' intentions pursuant to the terms of the BFA. The court found this material non-disclosure to be fraudulent because the husband knew he was making a false representation. At the least, he was recklessly careless as to whether or not the list of his assets and financial resources amounted to a full and frank disclosure. Although the BFA in this case was set aside for other reasons, there is no basis for the proposition that a BFA would not be set aside on the ground of statutory fraud alone.

(b) Interests of creditors

Sections 90K(1)(aa) and 90UM(1)(b) of the *FLA*, and section 205ZV(1)(aa) of the *FCA*, provide that a court may set aside a BFA if it is satisfied that a party to the BFA entered into it to defraud or defeat a creditor, or with reckless disregard of the interests of a creditor. A creditor is defined in sections 90K(1A) and 90UM(2) of the *FLA* and section 205ZV(6) of the *FCA*, as including a person who could reasonably have been foreseen by the party as being reasonably likely to become a creditor of that party. A creditor must have standing to make such an application. In addition, an intention to defraud or defeat a creditor, or a reckless disregard of their interests must be established.

For example, a trustee in bankruptcy did not have standing to apply to set aside a BFA entered into by a husband and wife after the husband was discharged from bankruptcy.[33] An Official Trustee was held not to be a "government body" within section 4A(1)(b)(iii) of *FLA*, but a statutory trustee. Interestingly, the Full Court contrasted the Australian Securities & Investments Commission (ASIC) with the Official Trustee, stating that it is a government body, which would demonstrate standing to make such an application.

(c) Interests of others

Sections 90K(1)(ab) and 90UM(1)(c) and (d) of the *FLA* provide that a court may set aside a BFA if it is satisfied that a party to the BFA entered into it to defraud another person who is a party to a de facto relationship or to a marriage with a spouse party, or with reckless disregard of the interests of that person. Similarly to the requirements of the preceding section, once the applicant demonstrates standing,

[32] [2015] FCCA 1692.
[33] *Official Trustee in Bankruptcy & Galanis* [2017] FamCAFC 20.

then the purpose of defrauding, defeating, or recklessly disregarding the interest of another person must be demonstrated.

(d) Void, voidable or unenforceable

Sections 90K(1)(b) and 90UM(1)(e) of the *FLA*, and section 205ZV(1)(b) of the *FCA*, provide that a court may set aside a BFA if it is satisfied that it is void, voidable or unenforceable. For instance, it may be void, voidable or unenforceable because of mistake, misrepresentation, public policy, uncertainty, incompleteness, duress, undue influence, unconscionability, breach, waiver, or estoppel.

In addition, sections 90KA and 90UN of the *FLA*, and section 205ZW of the *FCA*, provide that the question whether a BFA is valid, enforceable or effective is to be determined by a court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts. This includes consideration of the general law relating to contracts such as capacity, breach, frustration, mistake, misrepresentation, public policy, duress, undue influence and unconscionable conduct.[34]

If part of the BFA is void, voidable or unenforceable, then the court may sever that part rather than finding the whole contract to be void, voidable or unenforceable. Additional contractual remedies are available to the court, such as damages for breach, enforcement, severance, specific performance, injunctive relief, estoppel, or rectification.

These provisions are closely linked with the ground of unconscionability, discussed further in this paper, where examples of recent decisions are provided.

(e) Impracticable because of change of circumstances

Sections 90K(1)(c) and 90UM(1)(f) of the *FLA*, and section 205ZV(1)(c) of the *FCA,* provide that that a court may set aside a BFA if, and only if, the court is satisfied that in the circumstances that have arisen since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out. It must be impracticable (or impossible), and not merely unjust (or unfair).[35]

[34] Kostres v Kostres (2009) FamCAFC 214 at [218].
[35] [2011] FamCAFC 210.

In *Sanger v Sanger,*[36] the BFA specified that the first $350,000 of the proceeds of the sale of the matrimonial property was to be paid to the wife and the balance to the husband. The husband argued that this agreement was predicated on his business being worth $400,000 and the matrimonial home being sold for $800,000. However, the husband's business went into liquidation and had no value, and the matrimonial home sold for only $649,000. The husband argued that this was not what the parties had contemplated and therefore the BFA was impracticable. The Full Court of the Family Court stated that

> *there is a material distinction between an agreement which is unable to be put in practice, and is thus "impracticable", and an agreement which, although producing a potentially different outcome from that for which a party hoped, is able to be implemented or put into practice*.[37]

The husband was unsuccessful at first instance and on appeal because he failed to establish that the provisions of the BFA could not be put into practice and that it was therefore impracticable for the purposes of s 90K(1)(c) of the *FLA*. To succeed on this ground, a party must demonstrate that the provisions of the BFA can no longer be put into practice, and not that they are unfair.

(f) Change in circumstances in relation to child causing hardship

Sections 90K(1)(d) and 90UM(1)(g) of the *FLA*, and section 205ZV(1)(d) of the *FCA*, provide that a court may set aside a BFA if it is satisfied that 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. A person having caring responsibility for a child is further defined in section 90K(2) and 90UM(4) of the *FLA*, and section 205ZV(2) of the *FCA*.

The Full Court recently considered this provision in *Fewster v Drake*.[38] At the time of signing the BFA, the wife was pregnant with the parties' first child, and two years later gave birth to a second child. After separation she successfully applied to set the BFA aside on the basis that the birth of the second child was a material change in

[36] Ibid.
[37] Ibid at [82].
[38] [2016] FamCAFC 214.

circumstances, causing her hardship. This was overturned on appeal. The Full Court noted that the primary judge adopted the conclusions from *Pascot v Pascot*[39] as the conclusions in the case before him, and therefore "proceeded in an unfortunate manner"[40] because:

> *It will be rare for the facts in different cases to be identical. Here there was at least one very significant and material difference between the two cases. In Pascot, the agreement barred any claims for spousal maintenance. However, in the matter before his Honour, the right to claim spousal maintenance was preserved. His Honour gave no consideration to this important difference*.[41]

The court held that the birth of a child can be a material change,[42] however it is this change which must give rise to the hardship and not the agreement itself.[43] Hardship means something more than unfairness, and is akin to such concepts as "hardness", "severity" and "privation".[44] It can only be determined by the court by comparing the position of the child, or the person with caring responsibility, if the agreement remains in place with the position of that child or person if the agreement is set aside.[45] In *Fewser v Drake*, the BFA provided that the wife may make an application for spousal maintenance.[46] Therefore, if the BFA was not set aside, and she successfully applied for spousal maintenance, she would not suffer hardship. On this basis the wife failed in her application to set the BFA aside.

(g) Unconscionable conduct

Sections 90K(1)(e) and 90UM(1)(h) of the *FLA*, and section 205ZV(1)(e) of the *FCA*, provide that a court may set aside a BFA if it is satisfied that in respect of the making of the BFA, a party to it engaged in conduct that was, in all the circumstances, unconscionable. The most recent decision considering this, in addition to other grounds, is the High Court decision of *Thorne v Kennedy*.[47]

In *Thorne v Kennedy*, a 36 year old woman of little means relocated from overseas to Australia to marry a 67 year old wealthy property developer. Although she was

[39] [2011] FamCA 945.
[40] Ibid at [45].
[41] Ibid at [45].
[42] Ibid at [62].
[43] Ibid at [65].
[44] Ibid at [68]-[69].
[45] Ibid at [67].
[46] Ibid at [70].
[47] (2017) 91 ALJR 1260.

advised that she would need to sign some papers if they were to marry, the BFA was not provided to her until some ten days before the wedding. The court noted that Ms Thorne's family were flown in for the wedding, and all arrangements including the wedding dress were made. Ms Thorne was advised by her solicitor that the BFA was entirely inappropriate and that she should not sign it. Despite the advice, Ms Thorne signed the BFA four days before the wedding, and an almost identical BFA a few weeks after the wedding. She did so because she said she knew that if she did not sign the BFAs the wedding would be called off and she would be forced to return to her country of origin. The High Court made the following observations:

- That each of the vitiating factors of duress, undue influence, and unconscionable conduct, which was to be determined by the court, would be applied according to the principles of common law and equity as described in section 90KA of the *FLA*;[48]
- For duress to be established, a party does not need to demonstrate that their will was overborne, or that the pressure was such as to deprive them of any free agency or ability to decide;[49]
- The boundaries between undue influence and duress are blurred, and undue influence can arise from widely different sources such as excessive pressure, where questions of degree are involved;[50]
- In these type of cases pressure which contributes to a conclusion of undue influence does not need to be characterised as illegitimate or improper;[51]
- A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage which seriously affects their ability to make a judgement as to their best interests, and the other party must know of the existence of the special disadvantage;[52]
- A trial judge must conduct a close consideration of the facts of each case and assess the character of the parties to determine whether a claim to relief has been established;[53] and

[48] Ibid at [22] and [23].
[49] Ibid at [26].
[50] Ibid at [30] and [32].
[51] Ibid at [30].
[52] Ibid at [38].
[53] Ibid at [41].

- The trial judge's description of the BFAs as not being fair and reasonable was an understatement, and the fact that a BFA is signed despite being known to be grossly unreasonable can itself be an indication of undue influence.[54]

The trial judge took into account a number of matters which, in combination, let her Honour to conclude that the BFA should be set aside on the ground of duress, used interchangeably by her Honour with undue influence.[55] The High Court held that her Honour's findings and conclusions were correct, and the BFA was voidable due to both undue influence and unconscionable conduct.[56]

As evident in this decision, the grounds of duress, undue influence, and unconscionable conduct overlap, and may be used interchangeably by a court. Whether a BFA will be set aside on any of these grounds will depend on the facts of each case and the assessment of the character of each party by the trial judge.

(h) Payment flags and superannuation interests

Finally, sections 90K(1)(f) and (g), and 90UM(1)(i) and (j) of the *FLA* provide that a court may set aside a BFA if it is satisfied that a payment flag is operating on a superannuation interest covered by the BFA and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement, or if the BFA covers at least one superannuation interest that is an unsplittable interest. Although this ground is likely to succeed, the court may choose to sever the superannuation provisions from the remainder of the BFA, which could still be binding on the parties.

3. Discretion

As stated earlier, even if one or more of the above grounds is established, the court has to choose to exercise its discretion to set the BFA aside. Pursuant to sections 90K(1) and 90UM(1) of the *FLA*, and section 205ZV(1) of the *FCA*, a court 'may' make an order setting aside the BFA if it is satisfied of a particular circumstance. Whether or not a court will exercise its discretion will depend on the facts of each case and the judge's assessment of the character of the parties.

[54] Ibid at [55].
[55] Ibid at [2].
[56] Ibid at [2].

4. Commencing proceedings

A BFA may require the parties to consider mediation or another form of dispute resolution prior to making an application to court. If these provisions are exhausted, a party may have no alternative but to make an application to court to set aside a BFA.

It is crucial for lawyers to recognise that provisions allowing parties to set aside BFAs "were not designed to and do not facilitate a party escaping from what proves, or is perceived to be a 'bad bargain'".[57] A BFA will not be set aside just because it is unfair.[58] To determine whether or not a ground is established, the court will scrutinise the facts of each case, assess the character of the parties, and analyse relevant legislation and case law. Therefore, when a BFA is set aside on a specific ground in one case, this does not mean that it will be set aside in a similar case.

Prior to making such an application it is prudent for a party to seek legal advice with respect to the grounds that may be open to them and their prospects of success.[59] Counsel may be briefed to provide such an advice. For example, counsel may advise on whether to rely on one ground that may have better prospects of success, or numerous grounds that may have lesser prospects of success. If a party relies on several grounds but only one succeeds, the party would be partially successful, and may not recover all of their costs. However, the BFA would be set aside (or severed). In contrast, if a party relies on only one ground, which fails, the party is wholly unsuccessful. The BFA would be binding, and the party may be liable for all costs. For example, in *Bilal v Omar,*[60] mentioned earlier, the wife's claim that she did not receive any legal advice, failed. Evidence demonstrated that she did receive legal advice. The court noted that she could have relied on the ground that she did not understand the legal advice which was provided, instead of claiming she did not receive it. She failed to do so. Clearly, the court can only consider the grounds which parties rely on in their applications. Therefore, applications to set aside BFAs must be very carefully considered and drafted.

An application seeking to set aside a BFA can be made to the Federal Circuit Court of Australia, or the Family Court of Australia. At times, specific practice directions are issued by these courts with respect to the filing of applications. For example, the Federal Circuit

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[57] *Sanger v Sanger* [2011] FamCAFC 210 at [86].
[58] *Hoult v Hoult* [2013] FamCAFC 109.
[59] Meyer, Max. 2005. "Binding financial agreements". *Australian Family Lawyer*; 18(3): 13-15, p. 15; Farrar, Dennis. 2012. "Prenuptial agreements: ...where angels fear to tread". *Ethos: Official Publication of the Law Society of the Australian Capital Territory*, 225: 28-29, p. 29.
[60] [2015] FamCAFC 30.

Court of Australia Practice Direction No 2 of 2017 directs that an Affidavit filed with an Initiating Application cannot exceed 10 pages and cannot contain more than 5 annexures. Practitioners intending to file an Initiating Application with respect to enforcing, varying, invalidating, rectifying or setting aside a BFA, must be able to include all relevant evidence within these constraints.

If the court exercises its discretion to set the BFA aside, then the court may make property adjustment orders. Sections 90K(3) and 90UM(6) of the *FLA*, and section 205ZV(3) of the *FCA*, provide that a court may, on an application by a person who was a party to the BFA that was set aside, or by another interested person, make such orders (including orders for transfer of property) as it considers just and equitable. The purpose of this is to preserve or adjust the rights of persons who were parties to that BFA and any other interested persons. In this instance a court may also order parties to attend mediation or another form of dispute resolution. Even if such an order is not made, but the BFA is set aside, it is advisable that parties still consider dispute resolution methods before property orders are made by a court. Dispute resolution methods provide parties with opportunities to enter into an agreement that considers all of their interests and needs. A court order does not always do so. Dissatisfaction with property orders may in fact lead to further litigation.

5. Conclusion

Drafting applications to set aside a BFA is not an easy exercise. Lawyers must be well versed in the law pertaining to BFAs. They must obtain detailed instructions about the circumstances that led to the BFA being drafted and executed, and the circumstances that occurred since. Then they must advise their clients about the grounds that should be relied on, and the evidence needed to support these grounds. Clients must be advised that if they are unsuccessful in their application at first instance, appeals are uncertain and will incur significant legal costs. If they are unsuccessful, they may be ordered to pay the other party's costs. To prevent any legal claims against the lawyer for alleged negligence in drafting BFAs which are set aside, lawyers need to keep detailed records of the instructions provided by the client, and the advice provided to them. This is particularly important if clients choose not to follow the advice of the lawyer.

Entering into BFAs has many benefits. Time, however, may result in significant changes to the parties' circumstances, often not envisaged by them. As a result, parties may seek to set aside BFAs. This should not preclude lawyers from drafting BFAs for their clients.[61]

[61] Farrar, above n 58, p. 29.

Although numerous applications setting aside BFAs have been successful, there are no doubt more BFAs which served their purpose and allowed parties who separated to divide their assets between them amicably, without ever resorting to litigation. This should encourage lawyers to continue providing this vital service to their clients.

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