



Binding Financial Agreement Upheld and Argument of Repudiation Rejected

Binding Financial Agreements under the Family Law Act to be read like other contracts

The important new case of *Donald & Forsyth* [2015] FamCAFC 72 (5 May 2015) was heard by the Full Court of the Family Court of Australia on appeal from a single Judge of the Family Court.

Introduction

The Parties in this case were married and after several years they separated and eventually divorced. They entered into a Binding Financial Agreement under the *Family Law Act 1975* (Cth) (“the Act”) for the division of their property after they separated. In the financial agreement the parties agreed that their properties should be sold and the proceeds split between them equally. They both agreed that they would share the costs of putting a property (“Property A”) in *good repair* for sale. After the separation Mrs Forsyth continued to live at Property A. Mr Donald believed it was unfair that he pay half of the costs to keep Property A in good repair while Mrs Forsyth lived there. Mr Donald made statements that he would not meet half of the costs to place Property A in good repair.

Mrs Forsyth applied to the Family Court for orders including:

1. That the financial agreement be set aside under the Act because Mr Donald repudiated or showed an unwillingness to perform the agreement;
2. That the financial agreement be set aside under the Act because of changes in Mrs Forsyth’s personal circumstances including mental and physical illness;
3. Spousal maintenance; and
4. That the Court decide how the property of the parties be divided.

In reply, Mr Donald asked the Court for orders including:

1. Dismissal of Mrs Forsyth’s spousal maintenance claim;
2. That the financial agreement be enforced, but varied so:
 - a. Mr Donald did not need to meet half of the expense of placing Property A in good repair; and
 - b. Mrs Forsyth pay Mr Donald rent for staying in Property A.

The Court at first instance found for Mrs Forsyth and set aside the financial agreement. This was on the grounds that Mr Donald repudiated the financial agreement by showing he was unwilling to meet its terms. This included by not



meeting half of the costs to put Property A in good repair and by asking for rent from Mr Forsyth for staying in Property A.

Mr Donald appealed to the Full Court of the Family Court. The Full Court of the Family Court found Mr Donald had not repudiated the financial agreement.

Background

The parties met in the year 2000 and were married in 2003. In 2005 they separated and entered into a Binding Financial Agreement under the Act. The financial agreement included settlement of their property and assets. They separated permanently in 2008 and divorced in 2010.

In the financial agreement the parties agreed to sell and split their properties.

In 2011 Mrs Forsyth commenced proceedings in the Family Court.

Original Proceedings

After negotiations failed between Mr Donald and Mrs Forsyth's as to variations with their financial agreement, Mrs Forsyth made an application to the Family Court. The application was for:

1. An order for the financial agreement to be set aside as unenforceable for fraud under section 90K(1)(a) of the *Family Law Act 1975* (Cth) ("the Act"). This was on the grounds that Mr Donald had provided fraudulent information in the financial agreement;
2. An order for the financial agreement to be set aside as unenforceable under section 90K(1)(c) due to Mrs Forsyth's personal circumstances. The grounds were mental illness and physical injury which Mrs Forsyth submitted was due to abuse suffered by her from Mr Donald during the marriage;
3. An order for the financial agreement to be set aside as unenforceable under section 90K(1)(c) of the Act. This was on grounds that Mr Donald repudiated the financial agreement because he made:
 - a. Statements written in a letter to Mrs Forsyth stating he would not meet half the costs of putting Property A in good repair; and
 - b. Statements in an affidavit to the Family Court asking the Court to vary the financial agreement to remove the clause which required Mr Donald to meet half of the costs of placing Property A in good repair.
4. An order for spousal maintenance to be payable from Mr Donald to Mrs Forsyth; and
5. An order for the Court to determine the division of the parties' property under section 79 of the Act.

In response, Mr Donald asked the Court to make orders to vary the financial agreement by removing the requirement for Mr Donald to meet half of the costs of putting Property A in good repair, and to have Mrs Forsyth pay Mr Donald half of the going market rent for staying in Property A.

The matter was heard before the Family Court. The Family Court found at first instance:



1. That there was no fraud under *section* 90K(1)(a) of the Act in the construction of the financial agreement by Mr Donald based on the evidence available.
2. That the financial agreement could be set aside under *section* 90K(1)(c) of the Act due to impracticability. This was on grounds that Mr Donald refused to meet half of the costs of putting Property A in good repair;
 - a. The Court found this arose from Mr Donald's affidavit which "moved away" from the terms of the financial agreement by:
 - i. stating he would not meet half the costs of placing Property A in good repair; and
 - ii. stating that Mrs Forsyth should pay half of the standard rent for Property A to Mr Donald for staying there without any costs.
 - b. The Court found repudiation did not arise when Mr Donald wrote to Mrs Forsyth seeking alternatives to the financial agreement that would take into account changes in Mrs Forsyth's personal circumstances.
3. That the financial agreement could not be set aside under *section* 90K(1)(c) of the Act due to impracticability based on the personal circumstance of Mrs Forsyth including mental and physical illness.

Mr Donald appealed to the Full Court of the Family Court.

Appellate Proceedings

Mr Donald appealed against the original decision of the Family Court to the Full Court of the Family Court. The appellate Court ruled in favour of Mr Donald and overturned the original decision. This was on two grounds. The first ground was that a party who attempts to end or rescind a financial agreement due to repudiation must themselves be ready and willing to perform the terms of the agreement. The second ground was that Mr Donald's breach of the financial agreement was not significant and therefore did not amount to repudiation.

The appellate Court considered the decision of the Court in setting aside the financial agreement under *section* 90K(1)(c) of the Act due to impracticability. This was on grounds that Mr Donald submitted an affidavit to the Court stating he should not have to pay for half of the costs of putting Property A in good repair and that Mrs Forsyth should pay half of the standard rate of rent for Property A.

The appellate Court first considered *section* 90KA of the Act. *Section* 90KA determines the validity, enforceability and effect of financial agreements. This *section* states that a financial agreement is "to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts". This provides that a financial agreement is a contractual agreement and the law of contract and equity apply to financial agreements.

In considering if Mrs Forsyth was in a position to rescind the financial agreement due to repudiation by Mr Donald, the Court considered the case of *Foran v Wight* (1989) 168 CLR 285. In that case, Justice Dawson determined that breach and repudiation of a contract can only be brought by a party if that party is ready and willing to perform the terms of the contract.



The appellate Court considered that Mrs Forsyth was not ready and willing to fulfil the terms of the financial agreement. This was because the financial agreement stated that Property A would be sold. Mrs Forsyth instead wanted Property A to be transferred into her name. Clearly this went against the terms of the financial agreement.

In considering if Mr Donald repudiated the financial agreement, the Court considered the case of *Shevill v Builders Licensing Board* (1982) 149 CLR 620. Chief Justice Gibbs stated in that case that “a contract may be repudiated if one party renounces his liabilities under it...or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations”.

The question then was, is Mr Donald keeping Property A in good repair a significant or essential term of the financial agreement, the breach of which would show Mr Donald renounced his liabilities or obligations?

To answer this question, the appellate Court considered the case of *Koompahtoo Local Aboriginal Land Council and Anor v Sanpine Pty Limited and Anor* (2007) 233 CLR 115. In this case it was found that the circumstances of the parties in the contractual relationship and the purpose of the contract determines if a clause in a contract is essential or significant.

In considering if placing Property A in good repair was an essential term of the financial agreement, the Court looked at the other terms and in the agreement and the surrounding circumstances. The other terms of the agreement included selling several properties, splitting the marital property and sharing the proceeds. In this circumstance, keeping a property in good repair was a small and insignificant part of the contract compared to the other terms. Its breach therefore would not amount to repudiation.

Concluding Remarks

In this case, the parties entered into a financial agreement in 2005 during a period of separation. They had not completed the terms of the financial agreement even after several years passed. During this time their circumstances changed. Despite this, the financial agreement still applied to the parties.

This case shows the danger of not undertaking the terms of a financial agreement in a reasonable amount of time. Had the parties done so, they could have avoided costly and time consuming litigation.



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In this case the appellate Court determined that:

1. A financial agreement is a contract under section 90KA of the *Family Law Act 1975* (Cth). As such, the law of contract applies to financial agreements;
2. A party may only rescind a financial agreement for repudiation by another party, if that party is ready and willing to perform the terms of the financial agreement.
3. Whether or not a breach or anticipatory breach of a financial agreement amounts to repudiation of a financial agreement depends on whether the breached term is a significant term or not.
4. Whether a term of a financial agreement is significant or not depends on the financial agreement as a whole and the surrounding circumstances. This includes all of the terms of the financial agreement.