

Non-disclosure and Duress Unbind a Binding Financial Agreement

In Adame [2014] FCCA 42 Judge Jarrett was satisfied that the husband's **non-disclosure of material assets** and his exertion of **duress** in pressuring his wife to enter the agreement, was each alone sufficient to enable her to avoid being bound by a Section 90C 'binding financial agreement' entered into during the marriage but which provided for the division of the parties' assets in the eventuality of a future separation.

It probably goes without saying that the marriage soon broke down.

The agreement had three schedules. Schedule A purported to list Mr Adame's assets and Schedule B purported to list Mrs Adame's assets. None of the assets had values ascribed to them in the Schedules.

The relevant issues included whether the BFA could be avoided by reasons of:

- fraud, and/or
- duress.

The 'fraud' argument revolved around whether the Court could reasonably infer that the husband owned property in the US and if so, had he fraudulently failed to disclose it to his wife when the parties entered the BFA.

The Judge concluded that:

- although it was not expressly stated, there was a clear implication arising from the Recital to the BFA that all of the parties' assets were intended to be detailed within the schedules attached to the agreement; and
- Mr Adame's assets were not all set out in Schedule A to the agreement as he acquired an interest in a property in California prior to entering into the BFA.

Where the terms of the financial agreement provide, either expressly or by implication, that the parties' assets and financial resources are recorded within the terms of the agreement itself, the failure to include particular assets or financial resources amounts to non-disclosure of a material matter.

Accordingly the agreement was voidable at the wife's election once she satisfied the Court she had entered into it on the basis of the husband's misrepresentation as to his assets.

However the Judge also observed it is not generally necessary that such disclosure extends to the provision of values in the agreement. Parties are generally entitled and able to satisfy themselves about the values of the assets and financial resources disclosed for the purposes of such agreements. That the parties or a party might choose not to do so is usually their choice.

The Judge concluded it is the identity and existence of the relevant assets and resources which is material to a BFA.

The Judge also concluded the agreement was voidable on the basis of the wife's 'duress' argument finding that she just 'gave in' and signed the BFA as a result of the pressure placed on her by the combined effects of:

- recently relocating interstate with young children at the behest of the husband;
- lacking friends and family support upon relocating;
- trying to make her marriage work with a 'fresh start' interstate;
- the husband's constant theme that the parties risked losing their house if she did not sign the BFA;
- having no independent source of income;
- the many arguments over many months arising from her refusal to sign the agreement;
- being made to feel that she had no choice but to sign the BFA if she wanted to give the marriage another chance; and
- lending the husband most of the proceeds of the sale of her former home.