The Perils of Prenups revisited in Hoult

In **Hoult [2013] FamCAFC 109** the Full Court of the Family Court returned once again to a much litigated prenuptial agreement when it was the subject of appeals by both parties.

Apart from the size of the asset pool, the objective facts of the case were not particularly unusual:

- the parties married after cohabiting for 7 years at which time the husband's net assets were estimated to be worth about $32M;
- the agreement was signed only seven days before the parties' overseas wedding and shortly before the wife was about to depart for overseas to prepare for the wedding;
- many guests were already committed to travelling and accommodation for the wedding;
- the husband told the wife that the wedding would not proceed unless the agreement was signed;
- the wife was already financially dependent on the husband as his de facto partner;
- the husband had the benefit of accountants and other financial advisors available to him;
- English was not the wife's first language; and
- the financial provision for the wife in the agreement was clearly less favourable to her than the likely outcome of a Family Court determination.

In the original hearing the wife successfully argued that she should not be bound by the agreement because she claimed the legal advice she received did not satisfy the requirements prescribed by the Family Law Act.

However, that was not the end of the matter. Despite having made a finding that prima facie the agreement was not binding, the Trial Judge then exercised his discretion and found in favour of the husband that it would be 'unjust and inequitable' if the parties were not bound by their agreement.

Needless to say both parties appealed this decision.

In devoting over 220 paragraphs to delivering its divided Appeal Judgements which effectively allowed both appeals, the Full Court has not managed to instil any great confidence or certainty that the original legislative aspirations intended for Binding Financial Agreements have been achieved, particularly insofar as pre-relationship agreements are concerned.

The original intention for introducing Binding Financial Agreements was to allow parties in or contemplating marriages (which later included de facto relationships) to make their own agreements regulating their current or future financial arrangements which would prevent the Court from interfering with those arrangements in the future.

As a result of a number of such agreements being subsequently challenged on the grounds of non-compliance in relation to the technical requirements specified in the original version of the legislation, the Act was amended in 2009 to relax those requirements and restore confidence in the binding nature of these agreements.

However the as yet unresolved litigation spawned by Hoult's case and the lack of clear and generally applicable judicial guidance as to how the legislation as amended should be interpreted and adopted unfortunately means that neither the legislation nor its interpretation by the Court has yet struck a balance between:

- the wish to permit parties to enter into their own 'deals' without being subject to the oversight of the Court;
- the Government's wish to free up the time of the Family Law Courts by encouraging parties to make their own agreements with confidence;
- the need for a level of confidence and rigour in the legal advice being provided to parties contemplating such agreements, particularly those who might be considered to be in the weaker bargaining position; and
- whether or not the level of confidence referred to above is ever able to be achieved by insisting upon compliance with technical drafting requirements.