HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A8/2025
File Title:	R Lawyers v. Mr Daily & Anor
Registry:	Adelaide
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Filing party:	Respondents
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Important Information

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Form 27D—Respondent's submissions

Note: See rule 44.03.3.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

R LAWYERS
Appellant

and

MR DAILY
First Respondent
MS DAILY
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues Arising

2. Mr Daily accepts R Lawyer's concise statement of the issue as contained in paragraph [2] of their written submissions (**AWS**).

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Relevant Facts

4. Mr Daily accepts the facts set out in paragraphs [7] – [14] of the AWS.

5. In relation to paragraph [6] of the AWS, the financial agreement did not seek to "contract out" of the *Family Law Act 1975* (Cth) (Recital E / RFM, [4]). The financial agreement intended to create a binding agreement under the *Family Law Act* to exclude the effect of Part VIII of the *Family Law Act* so far as it related to property, in the event of separation (Recital E, RFM [4]) (*Daily & Daily* [2023] FedCFamC1F 222 at [352]) (**PJ**) (CAB, 67). Mr Daily agrees that R Lawyers acted for him in relation to the preparation of the financial agreement.

6. Mr Daily also points out that the Courts below correctly found that:

   (a) R Lawyers owed Mr Daily all duties pleaded by him in his claim against them including a duty to inform, a duty to advise, and a duty to properly draft the financial agreement (PJ, [389]-[390] / CAB, 73-74) and that such duties were breached (PJ, [415] / CAB, 79);[1]

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[1] Mr Daily's pleadings of negligence alleged that R Lawyers:

"*45.1 did not inform* [Mr Daily] *that terms of the Draft Agreement, The First Deed, the Second Deed or the Third Deed respectively would not result in the division of the assets of the parties in accordance with his instructions…;*

45.2 failed to advise [Mr Daily] *that the [Ms S] Certificate must be re-issued after specific advice was provided to* [Ms Daily] *as to the effect of the Third Deed upon her rights under the Act and that it was, or might be, unenforceable pursuant to the Act if not re-issued;*

45.3 failed to advise [Mr Daily] *that cl. 17 of the Third Deed was void by reason of s 90E of the Act;*

45.4 did not advise [Mr Daily] *that the terms of the Third Deed were not specifically enforceable as a contract because they lacked certainty;*

45.5 did not to (sic) further amend the Second Deed such that the terms of the Third Deed were more certain and capable of specific enforcement; and

45.6 failed to advise [Mr Daily] *that the effect of s 90KA(1)(d) of the Act was that "a material change in circumstances" was either/or the birth of a child or separation, simpliciter*" (PJ [389] / CAB, 73).

(b) R Lawyers breached its retainer (PJ, [415] / CAB, [79]);[2]

(c) R Lawyers failed to advise in relation to the financial agreement (PJ, [389], [415] / CAB, 73, 79);

(d) The actual loss incurred by Mr Daily was, at the earliest, the date of separation when the parties may have considered the application of the financial agreement or certainly at the date of the notification and/or institution of proceedings by Ms Daily (PJ, [358] / CAB, 67) (see also *Daily & Daily (No 4)* [2024] FedCFamC1A 185 at [72]) (**FC**) (CAB, [141]);

(e) "*It would be unjust or unreasonable for both parties to an intact marriage (or de facto relationship) which may never fail, to nonetheless commence proceedings before the occasion for the statutory implication of the* [financial agreement's] *effect has arisen*" (FC, [81] / CAB, 144);

(f) s 90DA(1) of the *Family Law Act* mandates that the financial agreement would only become of force and effect upon a separation declaration and that before this time ascertained or ascertainable damage is very difficult to see (FC, [84] / CAB, 145);

(g) "*a* [financial agreement] *is not a tangible or even intangible asset, nor anything like it. It is two things. First, it is an agreement as to how, if particular events ensue, the parties' property ought to be divided (leaving to one side any spouse maintenance component); and secondly, it is a potential defence to property adjustment proceedings*" (FC, [86] / CAB, 145);

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[2] It was found that "*the husband has established a breach of duty with respect to the 2005 fresh retainer and that the second respondents have not made out a defence pursuant to s 41 of the Civil Liability Act*" (PJ, [415] / CAB, 79). This finding was challenged by R Lawyers on appeal to the Full Court in respect of which the Full Court ruled that "*In our view, the solicitors' advice was clearly inadequate. Indeed a 30 minute advice session for this* [financial agreement] *was always fraught with the highly likely risk of inadequate advice. In fact, any oral advice was always going to be fraught*" (FC, [94] / CAB, 148).

(h) "*a party to a* [financial agreement] *cannot assign their rights under a* [financial agreement] *to another, and indeed not assign the* [financial agreement] *itself. Moreover, they could not assign or transfer their rights to bring property proceedings, or any defence to them which they may have derived from the* [financial agreement] *and the relevant statutory provisions*" (FC, [87] / CAB, 145-146).

Part V: Argument

7. It is common to the parties that, by virtue of s 35(c) of the *Limitation of Actions Act 1936* (SA), an action founded in tort must be brought within six years of the cause of action having accrued. The time of accrual of such a cause of action, in negligence, is the time that ascertainable or measurable "*loss or damage*" is first suffered (AWS, [15]) (*Hawkins v Clayton* (1988) 164 CLR 539).

8. In determining *when* a cause of action for negligence causing economic loss accrues consideration ought be given to the precise interest infringed. The kind of economic loss which is sustained and the time when it is first sustained depend on the nature of such interest: ***Wardley*** *Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527.

9. Where a party merely suffers detriment in a general sense on entry into an agreement, such detriment will not necessarily equate to the legal concept of "*loss and damage*" (*Wardley* at 527).

10. In order for loss to be determined it must be capable of assessment and not illusory. The loss must be measureable in terms of actual loss or damage incurred as distinct from potential or likely damage or general detriment: *Wardley* at 526.

11. In the case of a purely contingent loss, arising from negligence, the ability to assess such loss only crystallises upon the happening of the contingency. Before such time, the loss is incapable of assessment (*Wardley* at 533, 536-537).

12. Where the analysis of the accrual of economic loss arising from a negligently drawn agreement may consider competing characterisations, the ultimate

character of the tortious loss may fall into one of two discrete categories. First, a "*defective asset*" or, second, a "*contingent liability*".

13. In the case of a "*defective asset*", loss only accrues and is assessable where a valuable bundle of rights passes at the time of execution of the relevant agreement. In such case, the relevant loss can be assessed according to the difference between the value of such rights as compared to the value of rights that should have been conveyed (*Wardley* at 531, 536).

14. In the event of a "*contingent liability*", before the happening of the contingency, loss is incapable of calculation, any such "*liability*" reflects a mere propensity for loss. While in a general sense a party may sustain a detriment on entry into an agreement (*Wardley* at 527) it would be too simplistic to restrict analysis of economic loss merely to consideration of reduced value or increased liability. Actual loss is only sustained when the adjustment occurs in accordance with the agreement (*Wardley* at 533).

15. In assessing that Mr Daily's loss was contingent, the Full Court did not assess the loss to have "*competing characterisations*". Alternatively, the discussion of such "*competing characterisations*" by the Full Court and other intermediary courts in similar cases, merely refers to the "*evaluative process*" to be undertaken and the alternate characterisations that ought be considered when determining the nature of loss arising from negligently drawn agreements (FC, [81]-[88] / CAB, 144-146).

16. The loss, as found to have been sustained by Mr Daily, was not subject to "*competing characterisations*" (PJ, [358] / CAB, 67) (FC, [81]-[88] / CAB, 144-146). The loss was purely contingent upon separation, before which time, tortious loss did not exist and was incalculable (*Wardley* at 533). For the reasons set out above, such analysis is entirely consistent with this Court's decision in *Wardley*.

Wardley

17. *Wardley* analysed the accrual of loss in the context of statutory misrepresentation but, in so doing, analysed tortious loss in the context of false and negligent mis-statement at common law (at 527) (see also footnotes 57 and 58).

18. The indemnity being considered generated no immediate, non-contingent liability and was reliant upon a misrepresentation. It did not generate any immediate liability to pay upon execution of the relevant instrument (*Wardley* at 524).

19. Determining when an action for negligence causing economic loss accrues requires consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained, and the time when it is first sustained, depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected (*Wardley* at 527).

20. In assessing the loss and damage arising from a negligently drawn agreement, the Court must have regard to the precise rights and interests that pass to the parties at the time that the agreement is executed. The mere passing of an interest, contingent upon a future event, may act to the detriment of a party, but is insufficient to cause loss in a tortious sense (*Wardley* at 527).

21. Agreements that immediately vest proprietary or obligatory rights to the parties are said to create an asset, the value of which is determinable (*Wardley* at 527), for example leases, mortgages, restraints and property transfers. Where the asset that is created is different from the asset intended to be created, loss can be determined by the quantification of the diminution in the value of the asset arising from the negligence (*Wardley* at 530, 536).

22. Such position is reflected in the genesis of parallel English authorities which require that actual, as distinct from prospective, loss is required (*Wardley* at 530). To the extent that R Lawyers contends that such authorities support the submission that entry into an agreement, which merely exposes a party to a contingent loss or liability, incurs loss, such interpretation of the authorities has been dismissed by this Court (*Wardley* at 532).

23. In assessing the kind of loss or damage arising from any particular conduct, attention ought be given to any distinction that may arise between the measure of contractual, as opposed to tortious, loss (*Wardley* at 531, 534).

United Kingdom authorities

24. The United Kingdom cases which involve contingent losses were decisions which turned on the plaintiff sustaining measurable loss at an early time, quite apart from the contingent loss which threatened at a later date (*Wardley* at 531, footnote 71).

25. Any authority to the effect that a cause of action may arise at a time when its existence is unknown and could not reasonably be known to the injured plaintiff, departed from the proper interpretation of the common law of the United Kingdom: *Islander Trucking Ltd v Hogg Robinson Ltd* [1990] 1 All ER 826, Evans J at [72] (referred to with approval in *Wardley* at 531).

26. *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267, when properly considered, is distinguishable, as the plaintiff sustained measureable loss at the time the relevant restraint provision was entered into, quite apart from a purely contingent loss arising from the defendant's departure from the plaintiff's business at a later date (*Wardley* at 531).

27. *Bell v Peter Browne & Co* [1990] 2 QB 495 is distinguishable in so far as the relevant loss of the plaintiff arose from the transfer of real property to his wife. Because the negligent act resulted in the immediate transfer of property, the plaintiff's proprietary rights were immediately compromised and such compromise was not subject to any future contingency. The loss was therefore measurable by the difference between the plaintiff's compromised proprietary rights as compared to the value of his proprietary rights immediately before the transfer.

28. *Wardley* has been accepted and adopted by the United Kingdom authorities: *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, *Law Society v* ***Sephton*** *& Co* [2006] 2 AC 543 at [17], *Axa Insurance Limited v Akther & Derby* [2010] 1 WLR 1662 at [35] (AWS, [23]).

29. There would appear to be no material distinction between the laws of the United Kingdom and Australia, so far as concerns the characterisation of measureable tortious loss as described in *Wardley* and, in particular, the requirement that any

such loss is real and calculable as opposed to such loss being assessed against a mere propensity for, or purely contingent, loss.

Australian intermediate appellate authority

30. *Winnote Pty Ltd v Page* (2006) 68 NSWLR 531 is distinguishable. This case examined the effect of a negligently drawn lease. The plaintiff, in reliance upon negligent advice, entered into a lease that conveyed immediate, proprietary rights in real property. Although the lease failed to adequately protect the plaintiff's rights, the plaintiff obtained a proprietary interest at the time the lease was executed.

31. The difference between the rights conveyed by the lease compared to the rights that would be conveyed by the lease in addition to a mining licence were readily capable of calculation as being the monetary difference between the value of the two sets of rights.

32. ***Orwin*** *v Rickards* [2020] VSCA 225 is not binding on this Court and seems contrary to the approach taken in *Wardley* (see also FC, [77] / CAB, 143).

33. If analysed in accordance with the approach in *Wardley*, the loss and damage arising from the negligent drafting of a financial agreement and failing to advise in respect of the financial agreement, when properly considered, was contingent upon the plaintiff's separation.

34. It is arguable that the Court of Appeal's failure to overturn the decision of the Court below arose from its failure to properly analyse the purported measurable loss at the time the relevant binding financial agreement was entered into.

35. The Court of Appeal's adoption of the "*defective asset*" loss characterisation, appears to be contrary to *Wardley* (*Orwin* at [63]). In so doing, the Court did not properly analyse whether the relevant financial agreement conveyed any rights at the time of separation and did not make a finding that the financial agreement conveyed immediate, as opposed to contingent rights, the loss of which were assessable as the difference in the value of such sets of rights.

36. The Court of Appeal erred in finding that quantifiable loss arose on account of the professional fees paid by the plaintiff. The question of whether any loss is theoratically calculable, is not proof of the existence of loss (*Orwin* at [58]).

37. Contraindicatively, the Court of Appeal found that the tortious loss of the appellant did not, in fact, include such loss and damage as "*on the 'no negligence' assumption which must be made, [the appellant] would still have paid the fees. That payment was not causally connected with the negligence*" (*Orwin* at [24]).

38. The effect of this finding undermines the grounds upon which it could be said that tortious loss existed, or was assessable.

39. Upon proper examination, the financial agreement, at best, caused potential detriment. However, any loss was purely contingent upon separation.

40. The financial agreement was not subject to alternative characterisations of loss.

41. This Court ought disregard *Orwin*.

42. ***Barre*** *v Barre* [2021] FamCA 101 considered a trustee in bankrupty's right to litigate the enforcement of a financial agreement in circumstances where the rights and liabilities conferred by the financial agreement had crystallised upon the occurrence of a contingency.

43. The facts pursuant to which *Barre* was adjudicated are distingushable.

44. R Lawyers has relied upon *Barre* to support the submission that the relevant financial agreement was a chose in action presumably on the basis of the finding in *Barre* that "*the husband's right to litigate the enforcement of the* [financial agreement] *and his contractual choses in action created by the* [financial agreement] *formed part of his personal property and have vested in the Trustee*" (*Barre* at 205).

45. The effect of such finding highlights that before crystallisation of the contingency, a financial agreement merely protects a right in respect of "*prospective loss*" as opposed to actual loss (*Wardley* at 527).

46. In this case, so far as the agreement is characterised as a chose in action, its effect upon the interest in property only crystallised upon separation or divorce. Before such time it cannot be characterised as a contractual chose in action equating to an interest in property.

New Zealand authority

47. *Davys Burton v* ***Thom*** [2009] 1 NZLR 437 considered the accrual of loss and damage consequent upon the provision of negligent advice as to the proper execution of a pre-nuptial agreement. The purpose of the agreement was to contract out of the *Matrimonial Property Act 1976* (NZ) (*Thom* at [1]). The facts and law are distinguishable.

48. The relevant provisions of the *Matrimonial Property Act* permit the parties to a pre-nuptial agreement to "*contract out*" of the *Matrimonial Property Act*. The effect of the agreement is immediate upon execution (*Thom* at [6]) and is in no way contingent upon separation (*Thom* at [24]).

49. The effect of such matrimonial agreements are to attach a bundle of rights at the time of formation of the agreements.

50. It was found that "*the immediate effect of the negligent advice* [was] *that Mr Thom did not achieve his object in securing…protection. The Matrimonial Property Act regime attached immediately upon his marriage, which was effectively contemporaneous with the agreement while the eventual impact of the matrimonial property regime depended on future eventualities, the application of the Act was not contingent. Its attachment brought about the result the agreement was designed to exclude. That is the harm occassionaed by the negligence*" (*Thom* at [24]). The exclusionary effect of the provisions of the *Matrimonial Property Act* on the relevant properties that were the subject of the agreement, crystallised upon marriage.

51. In so doing, the Court recognised the difference in the accrual of loss in contingent and non-contingent cases (*Thom* at [17]) and found that his assets diminished by an existing, not contingent, liability through the attachment of the *Matrimonial Property Act*.

52. Accordingly, when properly assessed, the difference in the value of the rights relating to that property were calculable, "*he suffered immediate loss on his marriage without the protection of a valid contracting/out agreement because he "did not get what he should have got". His assets were diminished by an existing, not contingent, liability through attachment of the Matrimonial Property Act regime*" (*Thom* at [25]).

53. Such characterisation is entirely consistent with the approach adopted in *Wardley*. The case is otherwise distinguishable as the loss and damage was not contingent upon separation and crystallised at the time of the deficient execution of the document (*Thom* at 25).

54. The facts are otherwise distinguishable as the interest in *Thom* was to immediately contract out of the *Matrimonial Property Act*, whereas Mr Daily's interest was not affected immediately, but rather, upon separation.

When was Mr Daily's loss assessable?

55. In order for the appeal to succeed, R Lawyers must demonstrate that Mr Daily suffered immediate actual economic loss at the time of his execution of the agreement, as a matter of fact, which he has not done (*Wardley* at 527-528).

56. R Lawyers advance their argument not by asking when actual measurable loss was first suffered by Mr Daily but by posing a comparison between "*what he was entitled to receive and what he did receive*" (AWS, [56]) and more specifically between what he "*was entitled to expect to receive*" (AWS, [56(a)]) and an "*unacceptable propensity*"[3] (AWS, [56(b)]) and then using their preferred answer to that comparison to conclude an essentially factual inquiry in their favour (*Wardley* at 527-528, 530-531). They are attempting to advance the point of accrual of the cause of action by the adoption of English cases, which are readily distinguishable.

[3] This submission seems inconsistent with the submission by R Lawyers to the Full Court (see FC, [93] / CAB, 148) which quotes from R Lawyers submissions, in particular, at paragraph [43].

Defective asset/chose in action

57. R Lawyers contend that Mr Daily suffered quantifiable loss and damage reflected by the interest that was infringed being the difference in the value of the rights that he received under the financial agreement compared to the value of rights that he was entitled to receive (AWS, [56]). It is further contended that Mr Daily "*suffered that loss when he entered the financial agreement because it was at that moment that he received less than he was entitled to expect. His loss was measurable on and from that point in time*" (AWS, [58]).

58. However, in so doing, R Lawyers does not address the findings of the Courts below or the actual terms of the financial agreement (see paragraph [6] above).

The financial agreement

59. To understand the effect of the financial agreement, the terms of the agreement must be considered. In considering the nature of the interest that has been infringed, it is necessary to consider the terms of the financial agreement.

60. Pursuant to the financial agreement, Mr and Mrs Daily expressly agreed that the financial agreement's terms would be wholly contingent on separation or the cessation of marriage (Recital L, R, paragraphs [4], [5], [9], [13], [17], [28] / RFM, [5]-[6], [8]-[11], [14]) and that the assets would only be divided pursuant to its terms "*in the event of separation*" (paragraph [9] / RFM, [8]-[9]).

61. Separation is defined by the financial agreement as "*the date upon which one party provides notice in writing to the other that separation has occurred, unless otherwise agreed between the parties*" (Recital M / RFM, [5]).

62. The financial agreement was also expressed to be made "*under Section 90B of the Family Law Act as amended*" (paragraph [4] / RFM, [8]).

63. Pursuant to the terms of the financial agreement, its critical provisions did not take effect before separation, and were entirely contingent on such event. The financial agreement did not, upon execution, impose upon Mr Daily, an obligation or detriment that gave rise to any immediate actual loss (*Wardley* at 527, 536).

64. If contrary to that view, Mr Daily incurred some detriment, in a general sense, such concept is not to be equated to legal loss (*Wardley* at 527).

The Family Law Act

65. In order to be a valid agreement, the financial agreement was required to be "*expressed to be made under*" s 90B(1)(b) of the *Family Law Act* and, once so made, the financial agreement enlivened the application of the broader effect of the *Family Law Act* so far as it relates to financial agreements generally.

66. Pursuant to the s 90B(2)(a) of the *Family Law Act*, the manner in which property or financial resources are to be dealt with by a financial agreement is conditional upon the "*event of breakdown of the marriage*".

67. A financial agreement that is otherwise binding on the parties which deals with, "*in the event of breakdown of the marriage*", property or financial resources of the parties "*is of no force or effect until a separation declaration is made*" (s 90DA(1) of the *Family Law Act*).

68. The section is relevant to determining the operation and functionality of the financial agreement and the rights and benefits conveyed by it. Alternatively, in considering the relevant financial agreement, the Court must take into account the effect of the *Family Law Act* upon its operation, the result of which, must be that the entire effect of the agreement is purely conditional upon separation. R Lawyers submission that s 90DA(1) has no effect is misconceived.

69. The *Family Law Act* remains of central relevance as to the intended operation of the financial agreement, particularly in relation to the agreement being wholly contingent upon separation and to the identification of the interest to be protected (paragraph [4] / RFM, [8]). R Lawyers' submission that the invalidity of the agreement on the grounds of uncertainty renders the *Family Law Act*'s effect on the agreement irrelevant is misconceived.

What interest did the financial agreement protect

70. R Lawyers contends that "*Mr Daily suffered loss when he entered the financial agreement because it was at that moment he received less than what he should have received under the financial agreement because of his solicitor's negligence*" and that "*the extent, but not the fact of, damage depended upon a number of contingenices*" (AWS, [57]-[58]).

71. In so doing, R Lawyers seeks to assess whether loss or damage has occurred by reference to an ability to calculate such loss or damage as opposed to properly considering whether any "*rights*" or "*interests*" attached to the agreement at such time.

72. As a matter of fact and law, the agreement imposed no immediate burdens or liabilities at the time of its execution. There were no benefits attaching to any asset that Mr Daily received or could enforce (refer to paragraph [60] above). All such rights incontrovertibly crystallised upon the occurrence of the future contingency of separation or divorce (*Wardley* at 527, 536).

73. The agreement did not otherwise have the immediate effect to exclude the relevant property and financial assets from the application of the *Family Law Act* (compare with *Thom,* see paragraph [54] above).

74. The agreement merely entitled the parties to a right to enforce the agreement upon separation or divorce. To this extent, any right or interest contained in the financial agreement was not an immediate non-contingent liability (*Wardley* at 524). The agreement was not capable of producing loss as no actual damage arose until the contingency of separation or divorce was fulfilled when the loss became actual. Until that time any purported "*loss*" attaching to the "*rights*" was prospective and may never have been incurred (*Wardley* at 532).

75. R Lawyers' submission that loss was "*the diminution in value*" fails to address the fact that the loss was not actual (AWS, [56]). Such exercise endeavours to compare something, namely the rights that ought to have been obtained, against nothing (a purely contingent loss), as opposed to actual loss (in the form of any immediate proprietary or obligatory benefit).

76. Such calculation can only be determined where the extent of Mr Daily's loss was not determined by any contingencies. Alternatively, Mr Daily's loss was entirely reliant upon the contingencies before which time there was no actual loss (*Wardley* at 527).

77. When properly characterised the actual loss and damage suffered by Mr Daily arising from the solicitor's negligence only accrued and was calculable at the time of separation.

78. To the extent that any rights and liabilities arose from the agreement before the contingency occurred, such rights and liabilities were limited to an interest in the way property was to be divided upon separation. Such interest does not constitute actual loss (refer paragraphs [59]-[69] above).

79. To the extent to which R Lawyers contend that Mr Daily's loss at the time of the execution of the financial agreement is effected by the costs of production of the negligently drawn agreement, such loss and damage is primarily reflected as contractual damage (*Orwin* at [68]) and is distinct from loss and damage so far as it relates to the difference in the value of rights compromised by the solicitor's negligence. This later loss and damage is only realised upon the contingency. Until such time, the diminuation of any rights is merely detriment in a general sense, and productive of no loss (*Wardley* at 527).

80. The loss and damage suffered by Mr Daily that is the subject of calculation upon remittance will not include an amount for the fees paid by him to the solicitors as such fees would have been paid in the event that the agreement was properly drawn. Recovery of such loss would put Mr Daily in a better position than he would otherwise have been, but for the negligence, and are not recoverable tortious damages. Mr Daily admits that such loss is contractual, not tortious loss, and statute barred.

81. The actual tortious loss that crystallised after separation was not determinable at the time of production or execution of the agreement. As the loss was merely possible it could not be assessed at all, much less on a contingency basis as the relevant contingency, namely separation, was in itself uncertain and the risk of

separation was incapable of being used to derive any degree of probability as to whether the separation may or may not have occurred. The assessment of the risk of such eventuality occurring was incapable of sensible assessment (*Wardley* at 533).

82. The Full Court properly applied *Wardley* by undertaking a characterisation of Mr Daily's loss, determining that his loss and damage was purely contingent upon separation, before which time any purported rights or interests reflected by the agreement were merely prospective and indeterminable (FC, [72], [87]-[88] / CAB, 141, 147)

83. The AWS at paragraph [60] misstates what the Full Court said at paragraphs [99]-[100] (CAB, 149) and [122]-[123] (CAB, 159); in the former paragraphs the Full Court is merely recording an argument concerning the issues of causation of loss and assessment of loss, in the latter paragraphs it is addressing the failure of the Primary Judge to address an element of Mr Daily's claim for damages.

Public policy considerations

84. R Lawyers contend that the Full Court's conclusions were "*at least, in part, the product of public policy considerations*" (AWS, [47]).

85. Upon proper consideration, the Full Court's conclusions along with decisions assessing the accrual of loss are driven by the determination and proper characterisation of when loss arises as opposed to the pursuance of a result driven by any public policy.

86. Alternatively, comments made, in "*obiter*", that describe the effect of the improper characterisation of loss, being the need for plaintiffs to prosecute actions absent loss, identify why the prohibition of the accrual of loss in circumstances of prospective, as opposed to actual, loss is to be avoided.

87. R Lawyers' submissions (AWS, [47]-[55]), so far as they relate to s 48 of the *Limitation of Actions Act*, are irrelevant for the purposes of this Court's determination of the characterisation of Mr Daily's loss. An extension of time pursuant to this section is separate and only relevant in the event that R Lawyers

succeeds. The mere fact that an alternate avenue may be created by this section, which extends the limitation period, ought have no bearing on the Court's consideration of the appeal.

88. Alternatively, in the event that public policy is considered to be a relevant influence in respect of this appeal, Mr Daily contends that the public policy of both the *Family Law Act* and *Limitation of Actions Act* ought be considered in terms of the effect that, a finding that loss accrued at the time of production or execution of the agreement, would have. In particular, "*the implementation of such a policy would give rise to the situation where a cause of action would arise regardless of whether any actual concrete loss was ultimately sustained by reason of either the contingency liability becoming an absolute one or some other financial detriment being actually sustained (e.g. a payment made to escape the contingent liability). The result would be to require the institution of proceedings before it was known whether any concrete loss or damage would ever come home, in order to avoid the possible injustice of a legitimate claim being barred if action was not instituted until it could be seen whether the contingent liability would result in ultimate loss*" (*Wardley* per Toohey at 545; see also plurality at 533).

Part VII: Oral Argument

89. The first respondent estimates that it will need approximately one hour for its oral argument.

Dated 8 May 2025

A L Tokley KC
Anthony Mason Chambers
T (08) 8228 0000
E andrew.tokley@5wentworth.com

A S Hillary
Anthony Mason Chambers
(08) 8228 0000
ahillary@anthonymasonchambers.com.au

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Limitation of Actions Act 1936* (SA)	Version 1.7.2021	ss 35 and 48	Current version of the Act and there are no changes to the relevant provisions during the relevant period.	Not applicable
2.	*Family Law Act 1975* (Cth)	Compilation No 95 (1 March 2023 – 17 October 2023)	Parts VIII and VIIIA	Version in force at the time of the primary judge's judgment.	Not applicable