HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **R LAWYERS**
Appellant

and

MR DAILY
First Respondent
MRS DAILY
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of the issue

2. The issue on appeal is when Mr Daily's cause of action against R Lawyers in negligence accrued for the purposes of s 35 of the *Limitation of Actions Act 1936* (SA). If Mr Daily's action in negligence accrued when Mr and Mrs Daily entered into their financial agreement or subsequently married, then Mr Daily's claim is statute barred. However, if Mr Daily's cause of action did not accrue until Mr and Mrs Daily separated (or at some later point), then Mr Daily's claim has been brought within time.

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: Citation of the decisions below

4. The decision of the Federal Circuit and Family Court of Australia (Division 1) is *Daily & Daily* [2023] FedCFamC1F 222 (Berman J) (**PJ**) (CAB, 5-81).

5. The decision of the Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction is *Daily & Daily (No 4)* [2024] FedCFamC1A 185 (Aldridge, Tree and Campton JJ) (**FC**) (CAB, 123-163).

Part V: Relevant facts

6. **Background:** On 21 July 2005, Mr and Mrs Daily entered into a financial agreement before getting married on 19 September 2005 (PJ, [42], [301] / CAB, 16, 58). The financial agreement sought to contract out of Part VIII of the *Family Law Act 1975* (Cth) in the event of a separation with each party to retain their separate property and receive half of the jointly owned property under the agreement (PJ, [53]-[54] / CAB, 18-19). R Lawyers advised Mr Daily and acted for him in relation to the preparation of the financial agreement.

7. Mr and Mrs Daily separated on 15 September 2018 (PJ, [301] / CAB, 58). Mr Daily commenced parenting proceedings shortly thereafter on 5 November 2018 (PJ, [301] / CAB, 58). Mrs Daily by her response filed 7 December 2018 sought orders setting aside the financial agreement and a property settlement under s 79 of the *Family Law Act* (PJ, [301] / CAB, 58). The property proceedings were bifurcated with an initial hearing to determine whether the financial agreement was binding, and if so, whether it should be set aside (PJ, [5] / CAB, 10).

8. On 17 June 2020, the primary judge rejected Mrs Daily's primary claims but ordered that the financial agreement be set aside pursuant to s 90K(1)(d) of the *Family Law Act* because Mrs Daily would otherwise suffer hardship as a result of a material change in circumstances relating to the care, welfare and development of children of the marriage (PJ, [5]-[13] / CAB, 10-11; *Daily & Daily* [2020] FamCA 486; 61 Fam LR 75 (AFM, 4-59)). The Full Court allowed Mr Daily's appeal and remitted the matter to the primary judge on the basis that he had incorrectly approached the issue of hardship (PJ, [16]-[20] / CAB, 12-13; *Daily & Daily* [2020] FamCAFC 304 (AFM, 100-115)). The Full Court also expressed reservations about whether the financial agreement was void for uncertainty, an issue not previously raised in the proceedings (PJ, [21] / CAB, 13).

9. On 31 May 2021, Mr Daily joined R Lawyers to the proceedings and sought damages for breach of contract and negligence in the event that the financial agreement was not binding. It was alleged amongst other things that R Lawyers failed to advise Mr Daily that the financial agreement was uncertain or that the birth of a child could constitute a material change in circumstances under s 90K(1)(d) (PJ, [389] / CAB, 73; AFM, 81, 83-84). Mr Daily alleged that if he had been so advised, he would have insisted that the financial agreement be amended and re-executed, and in the event that Mrs Daily refused he would have either not married her or had any children with her (FC, [114] / CAB, 156; AFM, 81-82, 84). Mr Daily sought to recover damages on the basis that he would be liable to pay Mrs Daily more by way of a property settlement under s 79 than under the expected financial agreement (PJ, [425] / CAB, 80; AFM, 83-84).

10. Mr Daily conceded that his claim for breach of contract had not been commenced within six years of that cause of action having accrued (PJ, [331] / CAB, 60). However, Mr Daily contended that his cause of action in negligence was brought within time because loss only accrued upon separation or when Mrs Daily commenced proceedings challenging the validity of the financial agreement (PJ, [339] / CAB, 64). Mr Daily also sought an extension of time under s 48(3)(b)(i) of the *Limitation of Actions Act* on the basis that facts which were material to his case were not known until either the judgment at first instance or the decision of the Full Court (PJ, [337] / CAB, 64).

11. **Primary judge:** On 31 March 2023, the primary judge found that the financial agreement was void for uncertainty (PJ, [97] / CAB, 26). His Honour also found that, had the agreement been binding, it would have been set aside in any event under s 90K(1)(d) because Mrs Daily would otherwise suffer hardship as a result of a material change in circumstances relating to the care, welfare and development of the children of the marriage (PJ, [424] / CAB, 80). The primary judge further found that Mrs Daily was entitled to an indicative sum of $741,634 under s 79 of the *Family Law Act* by way of property settlement, subject to further consideration after the finalisation of Mr Daily's damages claim against R Lawyers (PJ, [286] / CAB, 56).

12. R Lawyers was found to have failed to exercise reasonable care and skill (PJ, [415] / CAB, 79). The primary judge held that Mr Daily's claim against them in negligence

was not statute barred because an "*important consideration is when the actual damage has been sustained*" which was at the earliest "*the date of separation when the parties may have considered the application of the BFA or certainly at the date of the notification and/or institution of the proceedings by the wife*" (PJ, [358] / CAB, 67). His Honour did not go on to consider whether Mr Daily had discharged his onus of establishing a basis for an extension of time within which to institute proceedings pursuant to s 48 of the *Limitation of Actions Act*.

13. In a subsequent judgment, the primary judge awarded Mr Daily damages in the amount of $38,000 on the basis that the finding of hardship under s 90K(1)(d) left him in no different position than if the agreement was not void for uncertainty save for the legal costs he incurred in relation to that issue (*Daily & Daily (No 3)* [2024] FedCFamC1F 47 (CAB, 85-101)).

14. **Full Court:** The Full Court dismissed R Lawyers cross-appeal that they had not breached their duty of care to Mr Daily and that Mr Daily's claim in negligence was otherwise statute barred (FC, [68]-[97] / CAB, 140-148). The Full Court allowed Mr Daily's appeal in part finding that the primary judge erred in failing to assess his damages for the lost opportunity to negotiate a financial agreement which made provision for the birth of children which may have ameliorated the agreement being set under s 90K(1)(d) of the *Family Law Act* (FC, [102]-[126] / CAB, 149-160).

Part VI: Argument

"Two competing characterisations"?

15. By virtue of s 35(c) of the *Limitation of Actions Act* an action founded in tort must be brought within six years of the cause of action having accrued. As loss or damage is the gist of the tort of negligence, the cause of action does not accrue until loss or damage is first suffered.

16. The Full Court considered that there are "*two competing characterisations of when a negligently drawn contract first sees damage sustained*" (at [75] / CAB, 141). The first is to look at the negligently drawn contract as analogous to a "*defective asset*" by reference to ***Orwin*** *v Rickards* [2020] VSCA 225 and *Davys Burton v* ***Thom*** [2009] 1 NZLR 437; in which case damage is sustained upon entering the contract. The second is to regard any loss as "*merely contingent until events precipitate it*", in supposed reliance upon this Court's judgment in ***Wardley*** *Australia Ltd v Western*

Australia (1992) 175 CLR 514; in which case damage is suffered only if and when that contingency eventuates. Having identified those two approaches, the Full Court held at [82] that, to the extent that the Supreme Court of New Zealand, or an Australian intermediate appellate Court, may have said anything different, the Full Court was "*bound*" to apply *Wardley* (CAB, 144). It was an error to do so.

17. Contrary to the Full Court's reasoning, there are not two competing approaches to the question of when a cause of action accrues against a solicitor in respect of a negligently drawn contract. A negligent solicitor is liable for the damage attributable to a failure to exercise reasonable skill and care. In the case of a negligently drawn contract, a solicitor's failure to secure some right or benefit for the client in connection with the transaction contemplated by the contract causes the client to suffer damage when the contract is entered into. That is because the client receives, there and then, less than he or she should have received under the agreement because of the solicitor's negligence: *Law Society v* ***Sephton*** *& Co* [2006] 2 AC 543, [21]-[22], [44]-[48], [67]-[71]. The client's cause of action accrues even if there is a chance of further loss stemming from the same negligence. Difficulties in quantifying or measuring the client's loss or damage at the time of entering the agreement does not mean that the client has not suffered loss or damage. These now well-established propositions are illustrated by the following authorities, all of which survive *Wardley* as will be shown.

United Kingdom authorities

18. In ***D W Moore*** *& Co Ltd v Ferrier* [1988] 1 WLR 267 the plaintiffs retained the defendant solicitors to prepare restrictive covenants. It was subsequently discovered that the restrictive covenants did not give the plaintiffs the protection which they had sought and which they thought that they had obtained because the clauses did not take effect if Mr Fenton ceased to be a director or employee, but only if Mr Fenton ceased to be a shareholder. The plaintiffs argued that no loss was suffered until Mr Fenton ceased being a director and employee to start a competing business. It was held at 278-279 that damage was suffered when the plaintiffs entered the restrictive covenants because "*[they] did not get what [they] should have got… The plaintiffs' rights under the two agreements were demonstrably less valuable than they would have been had adequate restrictive covenants been included*" and that

"*instead of receiving a potentially valuable chose in action they receive one that was valueless*". Bingham LJ observed at 279-280 that there may be difficulties in assessing the plaintiffs' damages shortly after the agreements were executed as the judge would need to attach a money value to possible future contingencies but that this often occurred in the assessment of damages.

19. In ***Bell*** *v Peter Browne & Co* [1990] 2 QB 495 the plaintiff consulted the defendant solicitors following the breakdown of his marriage. The plaintiff agreed with his wife that he would transfer to her the former matrimonial home which was registered in their joint names and that he would receive one-sixth of the gross proceeds when a sale took place. In 1978, the plaintiff executed a transfer of the house into his wife's sole name, but his solicitors took no step to protect his one-sixth share in the proceeds of sale, nor did they tell him that they had failed to do so. In 1986, the plaintiff learnt that his former wife had sold the property earlier that year and spent the proceeds. It was held that the plaintiff suffered loss and damage when he transferred title to his wife, not when the wife subsequently sold the property and spent the proceeds. After the plaintiff transferred title, the extent, but not the fact of, damage depended upon the attitude of his former wife (502). Nicholls LJ suggested at 503 that whether a cause of action arose at the time of the transaction could be tested by considering whether the plaintiff could recover his legal costs of seeking to remedy the transaction. In that case, the plaintiff could have recovered the "*modest, but not negligible*" cost of consulting another solicitor and lodging a caution (something similar to a caveat) at the time of the transaction.

20. The plurality in *Wardley* at 530 (second paragraph and footnote 69) cited each of *D W Moore* and *Bell* as part of a collection of relevant English authorities decided in the previous decade.

21. In an important passage at 531 (first full paragraph), the plurality made two observations about these English cases. *First,* they doubted that the principle underlying them extends to the point that "*a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency*". *Second,* the plurality said that the decisions in cases involving contingent loss turned on the plaintiff sustaining "*measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later*

date." At this point, the plurality expressly singled out *D W Moore* (along with another English case) – see footnote 71 – as illustrations of the correct principle.

22. Similarly, Lord Hoffmann, writing some 15 years later in *Sephton*, said that *Bell* was "*readily explicable*" as a case in which "*it was possible to infer that the plaintiff's failure to get what he should have got from a bilateral transaction was quantifiable damage, even though further damage which might result from the flaw in the transaction was still contingent*": at [22].

23. The position established in the United Kingdom in the decade before *Wardley* which was subsequently affirmed in *Wardley* and then reaffirmed in *Sephton* remains the law in the United Kingdom: ***Axa*** *Insurance Limited v Akther & Derby* [2010] 1 WLR 1662, [31]-[35].

Australian intermediate appellate authority

24. In *Winnote Pty Ltd v Page* (2006) 68 NSWLR 531 the plaintiff in reliance upon negligent advice entered a lease with a landowner in 1988 to extract peat from a deposit when they should have obtained a mining licence. The plaintiff extracted peat from the deposit from 1988 until 1993 when a third party obtained a mining licence and prevented the plaintiff from extracting any further peat from the site. The plaintiff contended by reference to *Wardley* and *Sephton* that the disadvantage that it suffered in 1988 by failing to obtain a mining licence was merely contingent until it suffered actual loss in 1993 when the third party's intervention prevented it from extracting any further peat. Mason P, with whom Tobias JA agreed, held at [44] that the case was not a pure contingent loss case of the type discussed in *Wardley* and *Sephton*. The plaintiff suffered damage in 1988 because, there and then, it "*got significantly less than it should have*" as a result of the solicitors' negligence (at [60]). Merely because a substantial loss occurs (*ex hypothesi*) at a later point in time does not establish that there was no damage stemming from the same breach occurring at an earlier time (at [66]).

25. In *Orwin* the appellant advanced a similar argument in purported reliance upon *Wardley* to the one being made by Mr Daily, namely that she did not suffer any loss as a result of the negligently drawn financial agreement until the de facto relationship ended and a claim was made under the *Family Law Act*. The Victorian Court of Appeal said "*The authorities show that… if the defective contract is characterised as*

an asset, and the defendant as having delivered 'damaged goods', the loss is treated as having been suffered immediately. If, however, the question is approached by reference to the character of the contract, and the consequences for the plaintiff of its particular provisions (or lack of provisions), a quite different result may follow": at [53]. The Court of Appeal dismissed the appeal on the basis that "*either characterisation might properly have been adopted… it follows that the challenge to the primary judge's characterisation must be rejected*": at [63]. While correct in its result, instead of there being alternative characterisations available, *Orwin* ought to have been decided on the basis that *Wardley* had no application when as a result of the solicitor's negligence, the client received less than he or she was entitled to expect under a contract.

New Zealand authority

26. While there are a multitude of other examples, the final illustration, in a context very close to the present, is by reference to the Supreme Court of New Zealand's judgment in *Thom*. In that case, the plaintiff's solicitors breached their duty of care to him in relation to the execution of a prenuptial agreement such that the agreement was void for non-compliance with the *Matrimonial Property Act 1976* (NZ). Under that Act, the court had the power to set aside a complying prenuptial agreement if giving effect to it would be unjust, and the court also had the power to give effect to a non-compliant agreement if the non-compliance did not materially prejudice the interests of a party. The plaintiff argued that he did not suffer any loss when he entered into the financial agreement as he "*was simply exposed to a contingent liability under the Matrimonial Property Act*" which contingency was only realised when the court subsequently declined to enforce the prenuptial agreement.

27. Elias CJ held at [24] that the plaintiff was not exposed to a wholly contingent liability. The plaintiff did not obtain the benefit he should have secured if his solicitors were not negligent – the exclusion of the *Matrimonial Property Act*, subject to the prenuptial agreement being set aside as unjust (at [25]). Although the extent of loss became much worse when the marriage failed, the plaintiff had an immediate cause of action upon entering the agreement. While the measurable loss may have been subject to a discount for future contingencies, that is not unusual in the assessment

of damages and the plaintiff would in any event have had an immediate claim for the cost of remedying the defective agreement (at [25]-[26]).

28. Tipping, McGrath and Wilson JJ held at [47]-[49] that the plaintiff suffered an immediate loss upon signing the prenuptial agreement because he received a less valuable asset, an agreement that was not legally enforceable, even though the extent of the resultant damage would not become apparent until later. The damage was quantifiable when the plaintiff entered into the agreement, either on the basis of the cost to obtain or attempt to obtain a valid agreement, or on the more difficult basis of the difference in value between a non-compliant and a compliant agreement (at [49]). The latter measure of damages involves an assessment of matters such as the likelihood of the marriage failing and the likelihood of the court upholding the agreement. However, that type of contingency is relevant to the measure of damages, not to whether the plaintiff has suffered any damage at all (at [50]).

Where does Wardley sit in the light of these authorities?

29. Contrary to the Full Court's judgment, *Wardley* contains no statement of principle that differs from the above authorities, nor would it preclude the Appellant succeeding on the facts of the present case. In *Wardley*, the plaintiff alleged that as a result of misleading or deceptive conduct it gave an indemnity; and sought to recover damages pursuant to s 82 of the *Trade Practices 1974* (Cth) for its loss arising after a due demand was made under that indemnity. The full terms of the indemnity are set out at 523-524. Under those terms, the State's obligation to pay arose only when the borrower had failed to satisfy its liabilities; the lender had proceeded to obtain payment out of the borrower's assets to the fullest extent possible (including through the borrower's liquidation); and due demand was then made upon the State: see 524 (middle paragraph).

30. This kind of indemnity was wholly contingent and executory. It was carefully distinguished by the plurality from a different type of indemnity, one which generates an immediate non-contingent liability, citing the discussion by Barwick CJ in *Wren v Mahoney* (1972) 126 CLR 212 at 225-229.

31. Thus, on the facts of *Wardley*, there was no parallel to the situation considered in any of the above authorities. It was not a case in which the State got less than it was otherwise entitled or expected to receive under the transaction which it was wrongly

induced to enter[1]. Instead, the State was exposed to a purely contingent and executory liability because of the allegedly wrongful conduct. Those were the critical circumstances in which this Court held that the State did not suffer loss and damage merely by reason of, or at the time of, providing the indemnity.

32. The joint judgment at 527 (first full paragraph) emphasised, by reference to Gaudron J's judgment in ***Hawkins v Clayton*** (1988) 164 CLR 539 at 600-601, that in actions of negligence for economic loss, the *kind* of economic loss and the *time* when it was first sustained depend upon the *nature of the interest* infringed (and potentially upon the nature of the interference to which it is subjected): see also Toohey J at 555-556; *Commonwealth v* ***Cornwell*** (2007) 229 CLR 519, [16]-[19]. Their Honours further stated at 532 (first full paragraph) that where a plaintiff, by reason of a negligent misrepresentation, enters a contract which exposes them to a "*contingent loss or liability*", the plaintiff "*sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred.*" The plurality at 533 said that the principle underlying the line of English cases, considered above, "*in which the plaintiff acquires property (or a chose in action)*" should not be "*extended to cases where an agreement subjects the plaintiff to a contingent loss*".

33. Brennan J identified at 535-538 the various ways in which a plaintiff may suffer economic loss. For example, if a plaintiff is induced by misrepresentation to purchase an asset for a price greater than its true value, loss may be suffered when the plaintiff pays the price or becomes bound to do so. However, as his Honour highlighted at 538 "*the present case does not involve the acquisition by the State of a contractual benefit: there was simply an indemnity given to the Bank*" dependent upon certain contingencies. In those circumstances, the plaintiff did not suffer a loss by giving the indemnity; the plaintiff only suffered a loss when a demand was duly made after the various contingencies had come home.

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[1] While the indemnity recited that the lender had provided consideration to the State, it was in the form of granting financial accommodation to the borrower up to a stated amount: at 523. That consideration was wholly executed. The alleged wrongful conduct did not deprive the State of any consideration that it was entitled, or expected, to receive. The facts of *Wardley* thus create no parallel with the kind of bilateral transaction dealt with in the authorities cited above.

34. Deane J similarly held at 543 that the only detriment that the plaintiff subjected itself when it executed the indemnity was the *risk* that it would come under an actual liability; the plaintiff only suffered loss when subsequent events transpired that gave rise to an actual or certain liability. However, where loss or damage has been suffered, the assessment must take into account the consequent risk of future economic loss (at 544). Further, the loss of a chance of an economic benefit is not the risk of a future loss but loss that has been sustained (at 544).

35. Further, in looking at the *nature of the interest infringed* as directed in the judgment of the plurality at 527 and Toohey J at 555-556, *Wardley* was concerned with a statutory cause of action for misleading or deceptive conduct with respect to which the courts have under ss 82 and 87 of the *Trade Practices Act* a much broader discretion as to the remedies than they have in granting relief for a common law claim: ***Murphy v Overton*** *Investments Pty Ltd* (2004) 216 CLR 388, [31]. The judgments in *Wardley* are replete with statements emphasising the statutory and therefore special nature of the cause of action and relief available: *Wardley*, 526, 534, 542, 545, 551-552. *Wardley* does not establish a rule of general application with respect to the completion of a tort which is not actionable per se.

Conclusions on Wardley

36. The above analysis has demonstrated that the Full Court has read *Wardley* as standing for a wider principle than it really does. *Wardley* was a case where the wrongdoing (in that case, statutory misleading or deceptive conduct) led the plaintiff to enter an agreement under which, there and then, the plaintiff suffered no actual damage, and no measurable loss, and might never do so. The most that had happened was the plaintiff had assumed a legal obligation (of a particular kind of indemnity) which was wholly contingent and executory. The obligation might never be called upon. The mere risk of future loss did not constitute present damage which could complete the cause of action and allow suit to be brought there and then.

37. *Wardley* does not detract from, and indeed as seen above expressly preserves, the proposition that a client suffers loss or damage when they receive a package of rights which is less valuable than he or she was entitled to expect because of the negligence of his or her professional adviser.

38. Although this Court has referred to *Wardley* in later cases (including *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) CLR 413; *Murphy v Overton*; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; *Cornwell*; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1; *Talacko v Talacko* (2021) 272 CLR 478), the context has been different. Importantly, the positions distilled above from *Wardley*, which are dispositive of the appeal, have not been modified or retreated from.

The potential implications of s 90DA(1)

39. The Full Court considered s 90DA(1) of the *Family Law Act* to be relevant to the date when loss was first suffered (FC, [83(b)] / CAB, 144-145). Subsection 90DA(1) provides:

> *A financial agreement that is binding on the parties to the agreement, to the extent to which it deals with how, in the event of the breakdown of the marriage, all or any part of the property or financial resources of either or both of the spouse parties … are to be dealt with, is of no force or effect until a separation declaration is made.*

40. Section 90XP of the *Family Law Act* provides that a separation declaration is a written declaration signed by at least one spouse which states that the spouses are married but have separated.

41. The Full Court correctly accepted at [84] that s 90DA(1) does not have any application where the financial agreement does not meet the statutory requirements of Part VIIIA of the *Family Law Act*, as is the case with the present financial agreement (CAB, 145). That is because the operation of s 90DA(1) is premised on the existence of a binding financial agreement ("*A financial agreement <u>that is binding</u> on the parties … is of no force or effect until a separation declaration is made*"). It is only *if* there is a binding financial agreement that s 90DA(1) has any operation. In the absence of there being a binding financial agreement, a party is unable to make a separation declaration giving force and effect to the operation of that agreement. In those circumstances, s 90DA(1) does not bear upon when a cause of action accrues against a solicitor in respect of a negligently drawn financial agreement.

42. However, their Honours went on to say in relation to a negligently drawn, but *otherwise binding*, financial agreement that it is "*very difficult to see*" how damage could be suffered at an earlier time if the financial agreement only has force and effect after a separation declaration has been made (FC, [84] / CAB, 145). Assuming that as a consequence of the solicitor's negligence, the client received less valuable rights than he or she was otherwise entitled to receive, the distinction sought to be drawn by the Full Court is one without a difference. In those circumstances, irrespective of whether the negligently drawn agreement is binding or not, the client will have suffered damage upon entering the agreement.

10 43. Taking the false dichotomy between a non-binding, and a binding but still negligently drawn financial agreement, the Full Court posits at [84] "*why the cause of action in negligence in relation to such a BFA should have a different commencement date from one where the negligence was such that the BFA was never binding at all, is also quite unclear*" (CAB, 145). However, there is no different commencement date. For the reasons already given, on either case the client suffered loss when they executed the financial agreement and their cause of action in negligence accrued.

A financial agreement as a 'damaged asset'

44. The Full Court also expressed "*great difficulty*" in applying the 'damaged asset' analogy to a financial agreement (FC, [86]-[87] / CAB, 145). Their Honours said
20 that a financial agreement is not "*even [an] intangible asset, nor anything like it.*" This conclusion appears to follow from their observations that "*a party to a BFA could not assign their rights under a BFA to another, and indeed not assign the BFA itself. Moreover, we cannot see that they could assign or transfer their rights to bring property proceedings, or any defence to them which they may have derived from the BFA and the relevant statutory provisions.*"

45. Contrary to the Full Court's judgment, a financial agreement is an intangible asset or property, namely a chose in action: see *Barre & Barre* [2021] FamCA 101. Section 90KA of the *Family Law Act* gives the Court power to enforce a financial agreement. Further, a chose in action does not need to be transferable or assignable
30 in order to constitute property.

46. In any event, while analogies can sometimes obfuscate rather than illuminate, the 'damaged asset' analogy is no more than a metaphor for a situation where the client

through the negligence of his or her professional advisers obtained a package of rights less valuable than he or she was entitled to expect: *Sephton*, [45]; *Axa*, [30]-[32]. Once the 'damaged asset' analogy, or as Arden LJ in *Axa* perhaps more accurately described it as the 'the package of rights rule', is properly understood there can be no difficulty in its application to negligently drawn financial agreements generally, or this financial agreement in particular.

Public policy considerations

47. The Full Court's conclusion that no loss was suffered until Mr and Mrs Daily separated was at least in part the product of public policy considerations. The Full Court said that it would be "*unjust and unreasonable*" for parties to an intact marriage to be required to commence proceedings before the occasion for the operation of the financial agreement has arisen, which would see "*plaintiffs as virtual sitting ducks for defendants, or more likely their professional indemnity insurers*" (FC, [81], [86] / CAB, 144-145).

48. Caution is always required before allowing contestable views of public policy to be given significant or decisive weight in questions like the present. A surer guide is to discern the legislative intention moored to the text, context and statutory purpose at hand.

49. A limitation statute represents Parliament's attempt to strike a balance between the legitimate, but conflicting, interests of plaintiffs and defendants (and indeed of the court system as a whole). It is the task of the judiciary to identify the balance that the statue has endeavoured to strike and apply the statute accordingly. As Lord Scott said in *Haward v Fawcetts* [2006] WLR 682 at [32] "*it is emphatically not the function of the judges to try to strike their own balance, whether as a response to the apparent merit of a particular case or otherwise*".

50. Here, the present Parliament has sought to address the public policy considerations which activated the Full Court through a combined mechanism.[2]

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[2] It was common ground that Mr Daily's claim against R Lawyers, while under the common law, was in federal jurisdiction as part of the larger federal matter (PJ, [100] / CAB, 26; FC, [17] / CAB, 130). The *Limitation of Actions Act* is picked up and applied by reason of s 79 of the *Judiciary Act 1903* (Cth): *Rizeq v Western Australia* (2017) 262 CLR 1; *Masson v Parsons* (2019) 266 CLR 554.

51. On the one hand, s 35 of the *Limitation of Actions Act* sets the primary rule. Once damage has been suffered and the cause of action has accrued, it is for plaintiffs who wish to sue to commence within six years. Conversely, potential defendants have the security that if action is not brought within six years, they are *prima facie* free to regulate their affairs free of the risk of this type of claim. The court system is also, *prima facie*, not called upon to carry out the ever more difficult task of sound fact finding as more and more years go by: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 552.

52. On the other hand, s 48 gives the Court a discretion to extend a limitation period in circumstances where material facts to the plaintiff's case occurred after the expiration of the limitation period and the action was instituted within twelve months of those facts being ascertained (s 48(3)(b)(i)), or where the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant (s 48(3)(b)(ii)).

53. As seen above (at [12]), the claim for an extension of time has not yet been resolved in this case.

54. To the extent that the public policy considerations identified by the Full Court are relevant to the application of s 35 of the *Limitation of Actions Act*, their Honours did not consider the operation of s 48 which ameliorates those concerns.

55. However, there is a more fundamental point about public policy and statutory intent. Even if a claim like the present arose in a jurisdiction where the applicable limitation statute did *not* contain a discretion to extend, that would do no more than indicate that the particular Parliament whose law mattered (having regard to choice of law/federal jurisdiction questions) took a view of how the public policy considerations are to be balanced more protective of defendants/court resources than a jurisdiction like South Australia. It would not warrant restating the principle as to when damage accrued and the limitation period commences. In *Wardley*, the conclusions already reached by the plurality were merely "*reinforced*" by the public policy considerations which had decisive or significant weight for the Full Court (at 533).

Mr Daily suffered loss entering the financial agreement

56. In an action for negligence causing economic loss, the nature of the interest that has been infringed must be identified to determine when damage was first sustained: *Hawkins v Clayton*, 600-601; *Wardley*, 527; *Cornwell*, [16]-[19]. In Mr Daily's case, the interest that has been infringed is the value of the rights that he received under the financial agreement. The diminution in value can been seen by a comparison between what he was entitled to receive and what he did receive:

(a) Mr Daily was entitled to expect to receive an agreement which, so far as reasonably practicable would survive later attempts to be set aside. Such an agreement was valuable to Mr Daily as it would operate to divide the matrimonial property pool in the manner intended by the parties at the time of entry of the agreement and would allow Mr Daily to arrange his financial and other affairs secure in that knowledge *on and from entry of such agreement*.

(b) Instead, by reason of the negligence, the agreement that Mr Daily entered had a vice in it. It had an unacceptable propensity to be held void for uncertainty and/or was vulnerable to being set aside under s 90K(1)(d). The financial agreement that Mr Daily in fact entered into was close to worthless – on the correct application of the law, it was void *ab initio*.

57. It follows that Mr Daily received less than he should have received under the financial agreement because of his solicitor's negligence.

58. 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. The extent, but not the fact of, damage depended upon a number of contingencies, as was correctly explained in *D W Moore* at 279-280, *Bell* at 502-503 and *Thom* at [25]-[26] and [49]-[50]. For example:

(a) If the evidence was that Mrs Daily *was* willing to enter into a new financial agreement which reflected what Mr Daily believed that they had initially entered into, Mr Daily would be entitled to recover the modest, but not negligible, costs of entering into that agreement.

(b) However, if the evidence was that Mrs Daily *was not* prepared to enter into a new financial agreement, Mr Daily's damages were likely to have been substantial.

In assessing those damages, the court would need to take into account a number of possible future contingencies such the possibility of the marriage failing, the financial agreement being set aside in any event, and any additional amounts that may be payable under s 79 of the *Family Law Act*.

59. While the amount of damage may be difficult to quantify, the difficulty in assessing that damage does not mean that there was no measurable or ascertainable damage. Nor does the mere fact that a substantial loss occurred *ex hypothesi* at a later point when the spousal parties separated mean that there was no loss stemming from the same breach at an earlier time when Mr and Mrs Daily entered the financial agreement.

60. Indeed, Mr Daily's submissions below, and the Full Court's reasons in relation to the assessment of Mr Daily's damages, are inconsistent with Mr Daily having first suffered loss only at or after the date of separation. Mr Daily successfully contended on his appeal below that the primary judge failed to assess his damages because of the Appellant's negligence for the *"loss of a chance to negotiate a binding BFA*" (FC, [99], [100] / CAB, 149). If Mr Daily's sustained loss because of the lost opportunity to negotiate a binding financial agreement, that loss occurred in 2005 when he entered into the financial agreement, not in 2018 when he and Mrs Daily separated. Further, the Full Court remitted the assessment of Mr Daily's damages notwithstanding the "*difficult task*" of evaluating a series of contingencies such as the likelihood of Mrs Daily agreeing to the inclusion of certain terms, the likelihood of the financial agreement being set aside in any event, and so on (FC, [122]-[123] / CAB, 159). That is the very task which, on the Appellant's submissions, s 35 correctly required to be carried out in a suit commenced within the six-year period commencing from entry of the agreement (or at the latest marriage), save only if an extension was granted under s 48 of the *Limitation of Actions Act*.

Part VII: Orders sought

61. The appellant seeks the orders set out in the notice of appeal (CAB, 175-177).

Part VIII: Time required for presentation of oral argument

62. The appellant estimates that it will need approximately one hour and thirty minutes for oral submissions in chief and fifteen minutes in reply.

Dated: 17 April 2025

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ANNEXURE TO APPELLANT'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