HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **R LAWYERS**
Appellant

and

MR DAILY
First Respondent
MS DAILY
Second Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument

2. **Defective asset**: Mr Daily correctly accepts, consistently with *Wardley*, that loss would have accrued if the execution of a properly drawn financial agreement would have conferred upon him at that time "*a valuable bundle of rights*" (RS [13]). The issue which divides the parties is Mr Daily's contention that a chose in action does not constitute a valuable bundle of rights at the time of the agreement if those rights protect only against a future contingency, such as the application of Part VIII of the *Family Law Act* in the event of a separation (esp RS [71]-[78]; see also RS [35], [45]-[46], [48]-[49], [60], [68]-[69]). The Court should reject that contention.

3. A properly drawn agreement, whether a financial agreement or otherwise, creates a valuable bundle of rights at the time of that agreement even if those rights only operate to protect against a future contingency. For example, an effective restraint in *D W Moore* would have created a valuable bundle of rights at the time of entry of the agreement, even though the operation of those rights was dependent upon Mr Fenton ceasing his employment in competition with his former employer, which did not eventuate until some nine years later and may never have eventuated.

4. In the same way, a properly drawn financial agreement would have created "*a valuable bundle of rights*" for Mr Daily at the time of that agreement, even if those rights protected him only against a future contingency, namely the application of Part VIII following marriage breakdown. A financial agreement enables Mr Daily to arrange his financial and other affairs on and from entry into the agreement secure in the knowledge that in the event of a separation the matrimonial property would be divided in the manner intended (AS [56(a)]). Without such security, Mr Daily says he would not have married Mrs Daily or proceeded to have their children (AFM, 82).

5. **Financial agreement not operative solely on a contingency:** In any event, contrary to RS [59]-[69], not all of the "*valuable bundle of rights*" that Mr Daily received under the financial agreement was contingent on the parties' separation. Under s 90DA(1) a financial agreement is of no force or effect until a separation declaration is made only "*to the extent to which*" the financial agreement "*deals with how, in the event of the breakdown of the marriage, all or any of the property ... are to be dealt with*". The present financial agreement governed other aspects of their relationship which were *not* contingent upon separation, such as a requirement that each party obtain written consent before disposing of assets in excess of $5,000 (cl 8), and a prohibition on disclosing confidential information about the other (cl 31) (RFM, 8, 15). The present case thus does not collapse into one where the 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*" (*Wardley*, 531). The financial agreement was not a contract which fell into either of the two classes of strict condition precedent discussed in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 551-552.

6. **Additional cost of seeking to remedy the defective financial agreement:** The Appellant does not contend that Mr Daily would be entitled to recover the fees paid to R Lawyers in an action for negligence (cf RS [79]-[81]). Rather, the Appellant contends that Mr Daily would be entitled to recover *the additional cost* of seeking to remedy the defective financial agreement in an action for negligence (AS [58(a)]). That loss was recoverable by Mr Daily at the time that he entered into the financial agreement and was in no way contingent upon the breakdown of his marriage: see *Bell*, 503; *Thom*, [26], [47]. On that basis alone, Mr Daily suffered measurable loss

when he entered the financial agreement quite apart from any other loss: *Wardley*, 531.

7. **Measurable loss:** RS [70]-[83] argue that no measurable loss was suffered when Mr Daily entered into the financial agreement because his loss "*can only be determined where the extent of Mr Daily's loss was not determined by any contingencies*" (i.e. separation) (RS [76]). That submission flies in the face of authorities such as *D W Moore* and *Bell* which were endorsed by this Court in *Wardley*, and the correctness of which Mr Daily has not challenged, as well as their more recent application in decisions such as *Thom*, the correctness of which is also unchallenged. Those authorities make plain that the existence of future contingencies does not prevent the assessment of loss at the time that the agreement was made. As Bingham LJ said in *D W Moore* at 279-280 (see also *Bell* at 502 and *Thom* at [25], [49]-[50]):

> *If quantification of the plaintiffs' damage had fallen to be considered shortly after the execution of either agreement, problems of assessment would undoubtedly have arisen… In making his assessment the judge would have had to attach a money value to a possible future contingency; but judges do this every day in awarding claimants damages for the risk of epilepsy, the risk of osteoarthritis, the risk of possible future operations, the risk of losing a job and so on. The valuation exercise is, of course, different, but the difference is one of subject matter, not of kind.*

8. That valuation exercise is no different to the one remitted by the Full Court to assess Mr Daily's "*loss of a chance to negotiate a binding BFA*" being one dependent upon a series of contingencies, such as the likelihood of Mrs Daily agreeing to the inclusion of certain terms. That lost opportunity must have occurred when Mr Daily entered the financial agreement in 2005, not when his marriage broke down in 2018 (AS [60]). Contrary to RS [83], AS [60] does not misstate Mr Daily's submissions below or the Full Court's reasons.

9. ***Wardley*:** Mr Daily has not grappled with the distinguishing feature of the contract in *Wardley*, being one under which the State received no benefit but assumed a contingent and prospective liability only (cf RS [17]-[22]). That was the "*nature of the interest infringed*" and the relevant context in which this Court held that the State had not suffered loss until the occurrence of the contingency. Unlike the present

case, the contract in *Wardley* was not one in which the State expected to receive "*a valuable bundle of rights*" upon its execution. In addition to ignoring this important aspect of *Wardley*, Mr Daily has cited *Wardley* as supporting propositions for which it does not stand. Nothing in *Wardley* at 527 supports the submission in the second sentence of RS [20] or the first sentence of RS [21].

10. ***Islander Trucking*: *Islander Trucking*** *Ltd v Hogg Robinson* [1990] 1 All ER 826 does not stand for the proposition that a cause of action cannot arise "*at a time when its existence is unknown and could not reasonably be known to the injured plaintiff*" (RS [25]). Further, such a proposition was rejected in *Hawkins v Clayton*, 543, 560-561, 587 and 599. Economic loss can accrue irrespective of whether its existence is known to, or is discoverable by, a plaintiff.

11. ***D W Moore*:** Mr Daily seeks to distinguish *D W Moore* by asserting without more that the plaintiff in that case "*sustained measurable 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*" (RS [26]). *D W Moore* is relevantly indistinguishable because, "*instead of receiving a potentially valuable chose in action*", Mr Daily, like the plaintiff *D W Moore*, received something that was "*valueless*" (*D W Moore*, 280).

12. ***Bell* and *Winnote*:** Even though *Bell* and *Winnote* concerned the loss of a potential interest in land, the same principle applies to cases like the present where the plaintiff did not receive valuable contractual rights: see *D W Moore* and *Islander Trucking*; cf RS [27], [30]-[31]. In the same way as in *Bell* and *Winnote*, Mr Daily's rights were "*immediately compromised*" as a result of R Lawyer's negligence and his loss "*measurable*" as the difference between what he was entitled to expect to receive and what he in fact received.

13. ***Orwin*:** Mr Daily's analysis of *Orwin* reflects the erroneous approach he has taken to identifying loss as set out at [2]-[3] above. Mr Daily submits that the Court of Appeal "*did not properly analyse whether the relevant financial agreement conveyed any rights at the time of separation*" (RS [35]). In doing so, Mr Daily has incorrectly inverted the analysis from whether a properly drawn financial agreement would have conveyed any rights at the time of the agreement. Complaint is also made that the Court of Appeal did not "*make a finding that the financial agreement conveyed immediate, as opposed to contingent rights*" (RS [35]). A properly drawn financial

agreement would have 'conveyed immediate' rights, albeit rights against a future contingency, namely the operation of Part VIII of the *Family Law Act*, which would have enabled the plaintiff to make secure decisions on that basis on and from the date of the agreement. In any event, here the financial agreement conveyed the rights set out at [5] above which were operative from the date of the agreement and irrespective of any separation. Further, contrary to RS [36]-[38], the Court of Appeal did not find that the professional fees paid for the defective agreement was loss suffered as consequence of negligence: *Orwin* at [68].

14. ***Thom*:** Unlike the Full Court, Mr Daily does not accept that an application of *Thom* would result in him suffering loss at the time he entered into the financial agreement (RS [47]-[54]; cf FC [75], [82]). Instead, Mr Daily seeks to distinguish *Thom*, but by mischaracterising it. Each member of the Court in *Thom* found that the plaintiff suffered loss when he entered the financial agreement in 1990 because it was at that time that he received less valuable rights than he was entitled to expect: *Thom* at [4], [20], [24]-[25], [28]-[29], [47]-[49]. However, it was not until 1993 that Mr Thom's house became the family home and thereby 'matrimonial property' under the Act; the very thing the agreement was intended to prevent: *Thom* at [7], [9], [24], [33], [47]-[49]. The use of Mr Thom's house as the family home, just like the breakdown of his marriage, was only a future contingency when he entered the agreement in 1990: *Thom* at [24], [47]. Mr Thom nevertheless suffered loss upon entering the agreement in 1990 because it failed to provide him in and from 1990 with valuable rights, being protection against those future contingencies: *Thom* at [24]-[25], [47]-[49]. In the same way, Mr Daily suffered loss when he entered into the financial agreement in 2005 because the financial agreement did not at that time prevent the application of Part VIII of the *Family Law Act* in the event of a marital breakdown. In any event, here Mr Daily did not receive the contractual rights set out at [5] above which would have operated from the date of the agreement irrespective of any later separation.

Dated: 14 May 2025

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