HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Jun 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A8/2025
File Title:	R Lawyers v. Mr Daily & Anor
Registry:	Adelaide
Document filed:	Form 27F - First Respondent's Outline of oral argument
Filing party:	Respondents
Date filed:	12 Jun 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

R LAWYERS
Appellant

and

MR DAILY
First Respondent
MS DAILY
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Propositions to be Advanced in Oral Argument

Context

1. The primary judge found that the intention of the parties was to contract out of the jurisdiction of the Court pursuant to s 79 of the *Family Law Act 1975* (Cth) and to determine their separate interests to property settlement and division *consequent upon* a breakdown of their relationship (CAB, 67 at [352]).
2. **Before** separation, the Financial Agreement did not oblige the parties to pay money, transfer property or incur liabilities, nor was there to be any adjustment in their joint property interests (see the Financial Agreement (RFM, 4 - 21). For that reason, amongst others, the UK authorities are distinguishable (see below).
3. **After** separation (*the contingency*) Mr Daily would be obliged to act in accordance with the terms of the Financial Agreement prepared by the solicitors (paragraph [5] / RFM 8) (CAB, 67 at [357]).
4. The terms of the Financial Agreement as to the division of proprietary interests, by virtue of ss 90B, 90DA and 90G of the *Family Law Act*, could only apply upon separation of the parties and not before then, as those sections only give "*force and effect*" to a "*binding*" Financial Agreement *upon separation.*
5. Mr Daily's *interest* was to have a binding Financial Agreement compliant with the *Family Law Act* that was *effective upon separation.* It was *that interest* that was infringed by the breach of the duty of care owed by the solicitors.
6. The primary judge was correct in finding that *no actual loss* occurred *until* separation because before then, no *actual* loss could arise (CAB, 67 at [357]-[358]). The Full Court was correct in upholding the primary judge's decision.
7. The primary judge's decision was in accordance with the approach of this court to economic loss in *Wardley* and *The Commonwealth of Australia v* ***Cornwell*** (2007) 229 CLR 519, 525-526 at [16]-[18] (JBA, 174-175).

The Australian decisions

8. This Court's decision in *Wardley* is obviously of central importance to the resolution of this matter.
9. The several judgments should be understood against the arguments advanced by the appellants in that case; which included an argument based on earlier English decisions

that loss for the purposes of the law of torts was sustained *upon entry* into an agreement: *Wardley* at 516 and FN7 (JBA, 196).

10. All of the judges rejected that argument and emphasised the importance of *actual or measurable* loss occurring *before* the accrual of a cause of action for negligence: see *Wardley* at 527-533 (JBA, 207-213).

11. Where the loss depends upon the happening of a contingency, it is only upon the happening of the event that *measurable* loss may occur.

The UK decisions

12. R Lawyers contends that damage occurred at the time of entry into the Financial Agreement based upon earlier English decisions, that "*survive*[d]" and were "*affirmed*" in *Wardley* (AWS, [17], [23]). AWS[17] does not accurately reflect the statement of the principle as expressed by Lord Hoffman in *Law Society v* ***Sephton*** *& Co* [2006] 2 AC 543, 552 at [22] (JBA, 368).

13. The earlier English decisions relied upon by R Lawyers were all considered by the judges in *Wardley* and the plurality distinguished them upon at least three important bases: see 529-532 (JBA, 209–212).

14. The plurality in *Wardley* questioned the approach now urged upon this court by R Lawyers (AWS, [17]) that where a plaintiff enters upon a contract that yields rights of lesser value, the plaintiff first suffers financial loss on entry into the contract: *Wardley* at 530-531, 533 (JBA, 210-211, 213).

15. The approach of the plurality in *Wardley* has been followed in *Cornwell*. This court ought to follow the approach in *Wardley* and *Cornwell*.

16. It is noteworthy that in *Sephton*, Lord Hoffman endorsed the analysis of the earlier English decisions in *Wardley*, and in particular, a passage from the judgment of Brennan J (as he then was): see *Sephton* at 551-552, [19]-[22] (JBA, 367-368).

17. The earlier English authorities are explicable on the basis that the plaintiff had paid money, transferred property, incurred liabilities or suffered an immediate diminution in the value of an asset and in return obtained less than he should have got: *Wardley* at 536 (JBA, 216) (and also *Sephton* at [22] (JBA, 368)).

R Lawyers' approach to the identification of "loss"

18. R Lawyers' approach involves an assertion that Mr Daily's interest was "*the value of the rights*" that he received under the Financial Agreement; and it compares two positions: that of Mr Daily's *expectations* or *entitlement* with respect to the Financial

Agreement (AWS, [56(a)]), with what he received – an agreement with a "*vice*" in it (AWS, [56(b)]). There are difficulties with that approach.

19. In contrast to the principle underlying the earlier English authorities, there has been no payment of money or transfer of property or the incurring of a liability or the immediate diminution in the value of an asset.

20. The approach is the equivalent of saying that because the subject matter of the Financial Agreement lacked the qualities which it had been represented as having, that subject matter was therefore *less valuable* than it would have been if the advice had been correct. That appears to reflect the contractual measure of damages: see *Wardley* at 531 (JBA, 211) but it is the tortious measure that is in issue in this case.

21. The relevant comparison for tortious loss is between the position he would have enjoyed but for the negligence and the position he actually found himself in as a result of the negligence; that is, how much *worse off* he was: *Wardley* at 531, 535 (JBA, 211, 215).

22. The position he should have been in was to have a Financial Agreement that was compliant under the *Family Law Act* (and effective upon separation) and the position he found himself in was being without any effective Financial Agreement, so that s 79 of the *Family Law Act* was applicable.

23. In summary: before separation, the interest of Mr Daily was in having a Financial Agreement that complied with the relevant provisions of the *Family Law Act* and was one that, *upon separation*, determined and divided their respective property interests in accordance with its terms. It was upon separation that his economic loss arose and could then be measured.

24. *Wardley* supports the arguments advanced by Mr Daily. R Lawyers' arguments should not be accepted.

12 June 2025

Andrew Tokley KC **Anthony Hillary**