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 OUTLINE OF ORAL SUBMISSIONS

## Part I: Certification

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

## Part II: Propositions to be advanced in oral argument

1. **Part VIIIA of the Family Law Act: (1)** A financial agreement made in contemplation of marriage may deal with the matters in s 90B(2) and (3). **(2)** The agreement is *binding* if s 90G is satisfied. **(3)** Under a binding agreement, some provisions, those for how property is to be dealt with on breakdown, are of no force and effect until a separation declaration is made: s 90DA. **(4)** An agreement may be terminated by the parties only by further consent of both parties satisfying s 90J. **(5)** The court may set aside an agreement under s 90K, including if the agreement is void for uncertainty (s 90K(1)(b); cf s 90KA) or if due to material change in circumstances since the making of the agreement (including in relation to children) a party would suffer hardship if the court does not do so (s 90K(1)(d)): JBA v 2 / pp 146-157.

2. **The solicitors' negligence: (1)** The Appellant, in breach of a duty of care to Mr Daily, negligently drafted and advised on a financial agreement in July 2005, in advance of a marriage in September 2005 to Ms Daily. **(2)** The Appellant's duty, so far as reasonable care and skill would permit, was to draft and obtain an agreement which was *binding*; enforceable immediately as to part; and, so far as it dealt with division of property on breakdown, would come into full force and effect on a separation declaration being made, so as to distribute the property in accordance with Mr Daily's instructions rather than under s 79, with Ms Daily having no unilateral ability (before or after separation) to pre-empt that course. **(3)** In breach of that duty, the Appellant drafted and obtained

an agreement which was liable to be set aside and rendered *not binding* (s 90G(1)(d)), by reason of its uncertainty (s 90K(1)(b); cf s 90KA) and its vulnerability to being set aside on hardship grounds through its failure to address potential children (s 90K(1)(d)). The Appellant thereby exposed Mr Daily in and from 2005 to the unavoidable operation of s 79 of the Act in the event of later separation, the very thing the agreement was meant to avoid: AS [6], [11]-[12], [14].

3. **Causation of loss in 2005:** The Appellant's negligence caused Mr Daily to suffer the following losses in 2005: **(1)** the need to incur additional legal costs to prepare and obtain from Ms Daily, so far as possible, a *binding* agreement; **(2)** the difference in value between the defective agreement obtained and the best available *binding* agreement that could have been obtained on due performance of the retainer, together with losses consequent thereon, or the loss of a chance of obtaining such an agreement: AS [56]-[60]; AR [6]-[8].

4. **'Damaged asset'/'Package of rights':** UK and New Zealand authorities (e.g. *D W Moore* and *Thom*) establish that if, because of a defendant's negligence, a plaintiff receives less valuable rights under an agreement or other bilateral transaction than the plaintiff was entitled to receive, the plaintiff suffers loss at the time of the agreement. The loss is measurable in different ways: AS [18]-[23], [26]-[28]. That principle includes rights that the plaintiff was entitled to receive under that agreement which protected against a future contingency: AR [2]-[4]; cf RS [71]-[78].

5. ***Wardley*: (1)** *Wardley* expressly adopted the UK authorities to the extent they hold that a client suffers loss when they receive a bundle of rights which are less valuable than he or she was entitled to receive because of the negligence of their professional adviser. **(2)** *Wardley* did not extend the UK authorities to a case (unlike the present) where a party, by the negligent representation of another, entered an agreement under which it was to receive no benefit, but merely assumed a wholly contingent liability: AS [20]-[21], [29]-[37]; AR [9].

6. **Authority subsequent to *Wardley*: (1)** *Winnote* expresses the correct principle and result. **(2)** *Orwin* expresses the principle infelicitously but reaches the correct result. **(3)** See also *Cornwell* and *Axa*: AS [23]-[25], [38]; AR [12]-[13]; cf RS [30]-[41].

7. **Mr Daily's arguments: (1)** Save for *Orwin,* Mr Daily accepts the above authorities but seeks to distinguish them on the basis that, under the terms of the agreement and s 90DA, no valuable rights or benefits passed, or were intended to pass, on entry of the

agreement, such that no *"actual loss"* was suffered until separation in 2018: RS [13], [70]-[78]. **(2)** This submission overlooks the bundle of rights which what was intended to pass under due performance of the retainer, as contrasted with the radically inferior bundle of rights which actually passed, as per proposition [2] above. **(3)** RS [79]-[80] fail to address the head of loss suffered in 2005, being the need to incur *additional* legal fees to *"repair"* the damaged agreement. **(4)** The logic produces the perverse result that Mr Daily, if he knew of the defects in the agreement at any time after 2011, could not have sued in either contract or negligence, even for the cost of *"repair"*; instead would have been compelled to wait until the defects had done their worst: AS [58]; AR [6].

8. **The heads of loss now pursued: (1)** Mr Daily claims: (a) $38,000 awarded in additional legal fees incurred in defending the uncertainty claim; and (b) the remitted claim for damages for loss of the opportunity to negotiate an agreement which made provision for the birth of children (including loss of the chance to avoid incurring additional legal fees in defending a hardship claim). **(2)** Each of these claims reflects a loss suffered in 2005, even if the quantification of the loss having regard to the contingencies might have differed in 2005 from today: AS [59], [60]; AR [7], [8].

9. **Full Court errors: (1)** Identifying "*two competing characterisations*" and in saying that it was "*bound*" to apply *Wardley* such that Mr Daily did not suffer loss when he entered into the financial agreement: FC [75]-[82]; AS [16]-[17]. **(2)** Regarding s 90DA(1), or the terms of the financial agreement itself, as deferring accrual of the cause of action until separation: FC [83]-[84]; AS [39]-[43]. **(3)** Dismissing a financial agreement as not constituting an intangible asset capable of being *"damaged"*: FC [86]-[87]; AS [44]-[46].

10. **Public policy considerations:** The above propositions apply accepted principle. Public policy considerations require no different result. The South Australian legislature has sought to balance the competing interests of plaintiffs and defendants (and the demands on court resources) through the operation of ss 35 and 48 of the *Limitation of Actions Act 1936* (SA). Section 35 gives plaintiffs six years within which to bring a claim. Section 48 gives the Court a discretion to extent a limitation period where material facts to the plaintiff' case occurred after the expiration of the limitation period. The s 48 claim remains undetermined: AS [47]-[55].

**12 June 2025**

**Justin Gleeson SC**