HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

R LAWYERS	APPELLANT
AND	
MR DAILY & ANOR	RESPONDENTS

R Lawyers v Mr Daily
[2025] HCA 41
Date of Hearing: 12 June 2025
Date of Judgment: 5 November 2025
A8/2025

ORDER

1. *Grant leave to the appellant to file an amended notice of appeal.*

2. *Appeal allowed.*

3. *Set aside orders 2, 3 and 4 of the orders made by the Full Court of the Federal Circuit and Family Court of Australia (Division 1) on 17 October 2024 and, in their place, order that:*

   (a) *the appeal be dismissed; and*

   (b) *the appellant pay the second respondent's costs of the appeal.*

4. *The first respondent pay the appellant's costs of the appeal.*

On appeal from the Federal Circuit and Family Court of Australia

Representation

J T Gleeson SC with R J May for the appellant (instructed by Barry Nilsson Lawyers)

A L Tokley KC with A S Hillary for the first respondent (instructed by Charlton Rowley)

Submitting appearance for the second respondent

CATCHWORDS

R Lawyers v Mr Daily

Negligence – Proof of loss and damage – Negligence by solicitor – Financial agreement under *Family Law Act 1975* (Cth) Pt VIIIA entered before marriage – Financial agreement provided how property and financial resources dealt with on breakdown of marriage – Where financial agreement prepared by solicitor void for uncertainty – Where financial agreement prepared by solicitor set aside on hardship grounds – Where solicitor breached duty of care to take reasonable care in giving advice – Whether client failed to adduce evidence establishing loss – Whether negligence claim statute barred – When loss first suffered.

Words and phrases – "binding financial agreement", "cause of action accrued", "character of the alleged loss", "compensable loss", "compensatory damages", "consequential losses", "damages", "date of separation", "did not get what he should have got", "failed to prove any further loss or damage", "financial agreement before marriage", "financial agreement prepared with reasonable care and skill", "in the event of the breakdown of the marriage", "lack of any evidence", "loss of chance", "loss or damage in tort", "lost opportunity", "no force or effect until a separation declaration is made", "properly characterising the claimed loss", "provision for the birth of a child or children", "provision of advice", "recovery of damages for the legal costs", "set aside for uncertainty", "spouse parties", "statute barred", "substantial prospect of a beneficial outcome", "terms or scope of a financial agreement drafted with reasonable care and skill", "unless and until the marriage breaks down", "void, voidable or unenforceable", "wasted legal fees", "would not have entered into the marriage".

Limitation of Actions Act 1936 (SA), s 35(c).
Family Law Act 1975 (Cth), ss 71A, 79, 90B, 90C, 90D, 90DA, 90DB, 90G, 90K, 90KA.

The appeal

1 Before his marriage, the first respondent to this appeal, Mr Daily (a pseudonym), purported to enter into a financial agreement under Pt VIIIA of the *Family Law Act 1975* (Cth) ("the FLA") with his prospective spouse, Ms Daily (also a pseudonym), providing for how their property and financial resources were to be dealt with in the event of a breakdown of the marriage (the so-called "BFA").[1] The appellant, R Lawyers, is the firm of solicitors that advised and acted for Mr Daily in relation to the preparation of the BFA.

2 After the marriage ended many years later, on the application of Ms Daily the Federal Circuit and Family Court of Australia (Division 1) ("the Division 1 Court") set aside the BFA on the grounds that the Division 1 Court was satisfied that it was void for uncertainty and that since the time the BFA was made there had been a material change in circumstances relating to the care, welfare and development of children of the marriage the result of which would occasion hardship if the agreement was not set aside.[2] The Division 1 Court also upheld part of a claim brought by Mr Daily in negligence against R Lawyers in relation to the advice it gave about the drafting of the BFA.

3 The Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction ("the Appellate Court") allowed an appeal by Mr Daily against the Division 1 Court's dismissal of the balance of his claim against R Lawyers in negligence and remitted that balance for a further hearing at first instance.[3] The Appellate Court rejected R Lawyers' contention that the claim in negligence against it was statute barred under the *Limitation of Actions Act 1936* (SA).

4 The question of principle argued in this appeal is whether Mr Daily's claim against R Lawyers for negligence is statute barred because loss or damage caused by the negligence as found occurred at the time the BFA was entered into or at the time of his marriage on the one hand (as R Lawyers contend), or when Mr Daily and Ms Daily separated on the other (as Mr Daily contends).

5 For the reasons that follow the answer is that, on the evidence in this case, R Lawyers' negligence did not cause Mr Daily to incur any loss or damage until

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1 FLA, s 90B(2)(a).

2 *Daily & Daily* [2023] FedCFamC1F 222; FLA, s 90K(1)(b), (d).

3 *Daily & Daily [No 4]* [2024] FedCFamC1A 185.

the time he separated from Ms Daily. Accordingly, Mr Daily's action is not statute barred and the grounds of appeal contending that the Appellate Court erred in concluding to that effect should be rejected.

6 After oral argument in this appeal R Lawyers applied for leave to amend its notice of appeal to include a further ground that raises another issue, namely whether that part of Mr Daily's claim for negligence against R Lawyers that was remitted for a further hearing was bound to fail because Mr Daily did not adduce evidence of the terms or scope of a financial agreement drafted with reasonable care and skill addressing the contingency that there might be children of the marriage.

7 For the reasons that follow R Lawyers should be granted leave to amend its notice of appeal and the additional ground of appeal should be upheld. Orders should be made accordingly.

8 The procedural history of this matter is unduly complicated. These reasons will not record every complexity of that history.

Pts VIII and VIIIA of the FLA

9 It is necessary to note only the following aspects of Pts VIII and VIIIA of the FLA.

10 A financial agreement can be entered before marriage,[4] during marriage[5] or after divorce.[6] The parties to the proposed marriage, the marriage, or the former marriage (the "spouse part[ies]"[7]) are necessary parties to a financial agreement but other persons can also be parties.[8] A financial agreement entered into before marriage can address how the property or financial resources of either or both of the parties at the time the financial agreement is made, or at a later time before

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4 FLA, s 90B.

5 FLA, s 90C.

6 FLA, s 90D.

7 FLA, s 4.

8 FLA, ss 90B(1), 90C(1), 90D(1).

divorce, are to be dealt with in the event of a breakdown of the marriage,[9] as well as the maintenance of either spouse during the marriage, after divorce or both.[10]

11 Part VIIIA distinguishes between a "binding" financial agreement and a financial agreement that is of force and effect.[11] There are preconditions to a financial agreement becoming "binding", including that the financial agreement must be signed by all parties[12] and that each spouse party must have received independent legal advice about the financial agreement's effect as well as the advantages and disadvantages to that party of making the financial agreement.[13] To the extent that a binding financial agreement deals with how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties, at the time the financial agreement is made or at a later time before divorce, are to be dealt with, that part of the financial agreement "is of no force or effect until a separation declaration is made".[14]

12 A separation declaration must be signed by at least one of the spouse parties to the financial agreement [15] and must state that the spouse parties "have separated" and are living separately and apart at the time of making the declaration and, in the opinion of the spouse parties making the declaration, "there is no reasonable likelihood of cohabitation being resumed".[16] Clearly no such declaration can be made until the spouse parties to the financial agreement are separated. To address the issues in this appeal it is not necessary to consider whether there is any relevant difference between the time of separation of the spouse parties to a financial agreement and the time at which such a declaration was or might have been made.

13 A court with jurisdiction under the FLA may set aside a financial agreement "if, and only if," the court is satisfied of one or more specified circumstances

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9 FLA, s 90B(2)(a).

10 FLA, s 90B(2)(b).

11 FLA, ss 90DA, 90DB, 90G.

12 FLA, s 90G(1)(a).

13 FLA, s 90G(1)(b).

14 FLA, s 90DA(1).

15 FLA, s 90DA(3).

16 FLA, s 90DA(4)(a)-(b).

including (relevantly) that the "agreement is void, voidable or unenforceable"[17] or "since the making of the agreement, a material change in circumstances has occurred (... relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant [seeking to set aside the financial agreement] has caring responsibility for the child ... , a party to the agreement will suffer hardship if the court does not set the agreement aside"[18] ("hardship grounds").

14 Within Pt VIIIA, s 90KA provides that the "principles of law and equity" that are applicable to determining the "validity, enforceability and effect of contracts and purported contracts" are applicable in determining whether a financial agreement is "valid, enforceable or effective".[19] Section 90KA(a) also provides that, in proceedings relating to a financial agreement, a court has the same powers, and may grant the same remedies, as this Court has and may grant in proceedings "in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction".[20] A court with jurisdiction may order that the financial agreement or a specified part of it "be enforced as if it were an order of the court".[21]

15 Part VIII of the FLA deals with property, spousal maintenance and maintenance agreements. Section 79 confers power on a court "[i]n property settlement proceedings"[22] to make orders, in proceedings with respect to the property of the parties to the marriage, altering the interests of the parties to the marriage in that property.[23] However, Pt VIII does not apply to "financial matters" or "financial resources" to which a financial agreement "that is binding on the parties to the agreement applies".[24] "[F]inancial matters" in relation to the parties to a marriage are matters with respect to the maintenance of one of those parties,

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17 FLA, s 90K(1)(b).

18 FLA, s 90K(1)(d).

19 FLA, s 90KA.

20 FLA, s 90KA(a).

21 FLA, s 90KA(c).

22 See FLA, s 4.

23 FLA, s 79(1)(a).

24 FLA, s 71A(1), save for the proceedings referred to in s 71A(2).

the property of the parties or of either of them, or the maintenance of children of the marriage.[25] "[F]inancial resources" are not defined.

16 This appeal is concerned only with that part of a financial agreement entered into before marriage[26] purporting to make provision for how, in the event of the breakdown of the marriage, the property or financial resources of the spouse parties at the time when the financial agreement was made and up until the time of divorce are to be dealt with.[27] That part of a financial agreement would be of no force or effect until a separation declaration had been made (after separation).[28] If a separation declaration had been made, and the financial agreement were binding (including because it was not set aside by an order of a court), then the financial agreement could be enforced by a court under s 90KA. In that event, Pt VIII of the FLA, including s 79, would not apply in respect of those "financial matters" and "financial resources" to which the financial agreement applies.[29] If the financial agreement were not "binding", or if it were set aside, then the exemption from Pt VIII would not apply and instead Pt VIII, including s 79, would apply to the financial matters and financial resources that were the subject of the financial agreement.

Background

17 All the relevant events occurred in South Australia. Mr Daily and Ms Daily met in 1996 and started living together the following year. Between 2002 and July 2005, R Lawyers provided advice to Mr Daily and prepared a draft financial agreement. On or around 21 July 2005, Mr Daily and Ms Daily signed a deed. That deed recited the parties' intention to "contract out" of Pt VIII of the FLA and to enter into a "binding financial agreement under s 90B" within Pt VIIIA of the FLA (ie, the BFA). The BFA's intended effect under the FLA has already been described. Mr Daily and Ms Daily were married later that year. They had a child in 2006 and another in 2009. They separated in September 2018.

18 In December 2019 Ms Daily commenced proceedings in the Division 1 Court against Mr Daily. She sought a declaration under s 90G that the BFA was not binding, an order under s 90K that the BFA be set aside, and an order under

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25 FLA, s 4.

26 FLA, s 90B.

27 FLA, s 90B(2)(a).

28 FLA, s 90DA(1).

29 FLA, s 71A(1).

s 79 for the alteration and settlement of property. In August 2021, and against the contingency that the BFA might be set aside or unenforceable, Mr Daily filed an application joining R Lawyers to the proceedings and seeking damages for breach of contract and negligence. The particulars of breach concerned the drafting of the BFA, the provision of advice about the terms of the BFA, and the provision of advice about the operation of the FLA. R Lawyers denied negligence and breach of contract, and pleaded that the claims against it were statute barred.

The Division 1 Court's reasons

19 On 31 March 2023, the Division 1 Court found that the BFA was void for uncertainty and unenforceable. The Division 1 Court also found that the BFA was liable to be set aside on hardship grounds (ie, s 90K(1)(d) of the FLA). The Division 1 Court made an order setting aside the BFA on both bases. The Division 1 Court undertook an "indicative" assessment of each party's entitlements under s 79 of the FLA, subject to further consideration of whether that outcome was just and equitable.[30]

20 The Division 1 Court also found that, by the provision of "cursory, nonspecific" advice that, inter alia, failed to advise Mr Daily as to the two bases that might warrant the BFA being set aside, R Lawyers breached the duty of care it owed to take reasonable care in advising Mr Daily. In particular, the Division 1 Court found that the duty was breached by R Lawyers' failure to provide "specific advice" to Mr Daily as to "what would happen upon the birth of a child and whether that might represent a material change in circumstances" and to advise Mr Daily as to the risks "to the integrity of the [BFA] namely, whether there was a risk that it could be considered as void for uncertainty".[31] The Division 1 Court did not accept that the action against R Lawyers in negligence was statute barred, finding that the cause of action accrued at the "earliest [on] the date of separation" or "at the date of the notification and/or institution of proceedings" by Ms Daily.

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30 FLA, s 79(2).

31 The Appellate Court characterised Mr Daily's case as being an allegation that R Lawyers was negligent in failing to advise him (1) that the BFA was void for uncertainty and (2) that the BFA was liable to be set aside under s 90K(1)(d).

The Division 1 Court's further reasons

21 In a further judgment dated 9 February 2024, the Division 1 Court addressed the balance of the issues arising from Mr Daily's claim against R Lawyers.[32]

22 One component of Mr Daily's claim was for the recovery of damages for the legal costs he incurred in litigating whether the BFA was void for uncertainty which had been wasted given the setting aside of the BFA on that ground ("the first component"). The Division 1 Court allowed that component of the claim and assessed damages for that component as $38,000. In awarding that amount, the Division 1 Court found either a further breach of R Lawyers' duty to Mr Daily or further particularised the breaches that had already been found, namely a failure to draft a financial agreement that would not be set aside for uncertainty.

23 The second component of Mr Daily's claim was that, by reason of R Lawyers' breaches of duty, he was financially worse off as a result of the outcome of Ms Daily's application for orders under s 79 of the FLA ("the second component"). With this second component, Mr Daily accepted before the Division 1 Court that he needed to "prove on the balance of probabilities that there was available to him an opportunity or opportunities of securing a better financial result than that which was delivered to him under the judgment of the Court". Proceeding from the premise that, had R Lawyers discharged its duty to Mr Daily, his financial agreement with Ms Daily would not have been liable to be set aside for uncertainty, Mr Daily's written submissions before the Division 1 Court articulated the basis for the second component of his claim as follows:

> " ... there are only two realistic possibilities open. Either the [h]usband would not have reached agreement with the [w]ife on a financial agreement and would not have entered the marriage *or* the [h]usband would have reached agreement with the [w]ife on the terms of a financial agreement consistent with his instructions to [R Lawyers] but including a sufficient provision for any child of the marriage, in the event of a breakdown in the marriage, so that the agreement was not vulnerable to being set aside under s 90K(1)(d)." (emphasis added)

24 The Division 1 Court rejected this second component of Mr Daily's claim and declined to award any further "compensatory damages" against R Lawyers beyond the $38,000 for the first component in respect of wasted litigation costs as

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32 *Daily & Daily [No 3]* [2024] FedCFamC1F 47.

outlined above. The Division 1 Court made three critical factual findings in rejecting the second component of the claim.

25 First, the Division 1 Court found that Mr Daily did not establish that he gave a clear instruction to R Lawyers as to "what he wanted" with respect to the BFA, being a financial agreement that "was effectively bullet proof against the application" of the hardship grounds in s 90K(1)(d) of the FLA. The Division 1 Court found that, instead, Mr Daily understood that "absolute certainty of outcome could not be guaranteed".

26 Second, the Division 1 Court found that Mr Daily did not demonstrate "the type of clauses that could have been considered ... [to be] a reasonable attempt to avoid a potential application of s 90K(1)(d)" of the FLA.

27 Third, the Division 1 Court was not satisfied that, absent an assurance of certainty with respect to the effectiveness of the BFA, Mr Daily "would not have entered into the marriage".

28 These findings were clearly fatal to the first of the "only two realistic possibilities" that Mr Daily raised with respect to this component of his claim, namely that he would not have married Ms Daily. Whether those findings are fatal to the second possibility will be considered below.

The Appellate Court

29 Mr Daily appealed to the Appellate Court against (relevantly) the Division 1 Court's finding that he suffered no compensable loss beyond the amount of $38,000 awarded for wasted legal fees in Mr Daily unsuccessfully defending the validity of the BFA. R Lawyers (relevantly) cross-appealed against the Division 1 Court's refusal to dismiss the entirety of the action against it as statute barred.

30 The Appellate Court allowed Mr Daily's appeal against the Division 1 Court's refusal to award any compensation for the second component of Mr Daily's claim and dismissed R Lawyers' cross-appeal. The Appellate Court remitted the assessment of the second component for a further hearing at first instance.

31 In upholding this aspect of Mr Daily's appeal, the Appellate Court reviewed Mr Daily's pleading and submissions at trial and before the Appellate Court, and characterised the second component of his case as a claim for a "loss of chance", specifically the "lost opportunity to negotiate a BFA which made provision for the birth of a child or children". The Appellate Court concluded that the Division 1 Court did not address that component and remitted it for "assessment".

Proceedings in this Court – amendment of the Notice of Appeal

32 Pursuant to a grant of special leave to appeal, R Lawyers contended that the Appellate Court erred in finding that Mr Daily's claim against it was not statute barred, because the Appellate Court should have found that Mr Daily sustained loss and damage upon his entry into the BFA.

33 However, during the hearing of the appeal an issue emerged as to whether the Appellate Court had correctly characterised the basis upon which Mr Daily sought damages in respect of the second component of his claim. The issue arose because one of R Lawyers' submissions in this Court took as its premise the Appellate Court's holding that the Division 1 Court erred in not addressing Mr Daily's claim for damages for the "lost opportunity [or chance] to negotiate a BFA which made provision for the birth of a child or children". R Lawyers contended that opportunity must have been lost in 2005 when the BFA was signed and hence loss or damage accrued at that point in time. According to R Lawyers there is a resulting "disconnect" in the Appellate Court characterising Mr Daily's loss as the loss of an opportunity and concluding that Mr Daily's claim was not statute barred.

34 In this Court, Mr Daily disavowed any characterisation of his case as involving a loss of a chance even though the Appellate Court recorded his case to that court as being that the Division 1 Court failed to address whether he suffered "loss comprising the loss of a chance to negotiate a binding" financial agreement. Instead, in this Court, Mr Daily contended that his case was that he suffered a loss in the form of a diminution of his interest in securing a binding financial agreement that was not liable to be set aside under the FLA and that was effective upon his separating from Ms Daily, and that the diminution or infringement of that interest was purely contingent until at least when he and Ms Daily separated (citing *Wardley Australia Ltd v Western Australia*[33]). To that end, Mr Daily contended that the scope of the remittal contemplated by the Appellate Court was unrestricted and enabled him to adduce further evidence proving the amount of that loss. R Lawyers contended that the Appellate Court's order for remittal resulted from error (in that it should have held that Mr Daily's claims were statute barred) and, if not, was restricted to an assessment of the value of the lost opportunity to have agreed upon a different financial agreement.

35 At the conclusion of the hearing, Mr Daily was granted leave to file a notice of contention to reflect his case as it was put in this Court. His notice of contention contended that the Appellate Court erred to the extent that it characterised his claim as including a lost opportunity to negotiate a different financial agreement.

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33 (1992) 175 CLR 514.

Mr Daily contended, however, that the orders of the Appellate Court should be maintained on the basis that the Division 1 Court should have assessed (although it did not) Mr Daily's loss by "undertaking [a] comparison between the position Mr Daily would have enjoyed but for the negligence of R Lawyers, and the position Mr Daily actually found himself in at separation because of R Lawyers' negligence".

36 After the hearing of the appeal and having regard to the apparent recalibration of Mr Daily's case in this Court, the Court invited the parties to address the basis on which Mr Daily might be permitted on a remittal in accordance with the Appellate Court's orders to lead evidence of what a financial agreement prepared with reasonable care and skill would or might have been, how this second component of Mr Daily's claim could have succeeded without evidence to that effect, and whether these issues were raised by R Lawyers' notice of appeal.

37 In response, R Lawyers filed an application for leave to amend its notice of appeal to include a ground contending that, given that Mr Daily did not adduce evidence of what the terms of a financial agreement prepared with reasonable care and skill would or might have been, the Appellate Court erred in attributing to the Division 1 Court an error of failing to properly address the second component of Mr Daily's claim and in remitting the assessment of that component for a further hearing.

38 As noted, R Lawyers should be granted leave to amend its notice of appeal. Mr Daily submitted that the amended notice of appeal purports to introduce a ground of appeal that was not raised before the Appellate Court by way of notice of contention and does not reflect an argument that was before the Division 1 Court. So far as proceedings before the Division 1 Court are concerned, the onus was on Mr Daily to prove his case and, if the proposed additional ground of appeal is upheld, he failed to do so. It is correct that R Lawyers filed no notice of contention to this effect in the Appellate Court, but this issue only emerged out of the Appellate Court's reasoning and (supposedly, on Mr Daily's case) the unconfined remittal order.

39 The question of the *character* of the alleged loss suffered is related (and generally anterior) to an assessment of *when* that loss was suffered. The difficulties in characterising the character of Mr Daily's alleged loss only emerged during argument in this Court about when that loss arose. It was that debate which prompted the grant of an indulgence to Mr Daily to allow him to file his notice of contention even though in that notice he appears now to have retracted the characterisation of his loss that he urged on the Appellate Court.

40 The result is that, if this Court were to address and reject only the existing grounds of appeal, the Appellate Court's remittal order would be undisturbed. The

scope of that remittal would remain uncertain, such that Mr Daily would seemingly seek to rerun or supplement his case by evidence that he should have adduced at trial. R Lawyers should be granted leave to amend its notice of appeal to avoid the proceedings being left in such an unsatisfactory state.

The Appellate Court erred in upholding and remitting Mr Daily's claim for further compensatory damages

41 Given R Lawyers' contention as to the "disconnect" in the Appellate Court's reasons, it is appropriate first to address the additional ground of appeal before determining whether Mr Daily's claim was statute barred.[34]

42 To establish his case against R Lawyers in negligence, it was necessary for Mr Daily to prove on the balance of probabilities that the breaches of the duty of care owed to him by R Lawyers were a cause of loss or damage "(in the sense of detrimental difference)".[35] While that standard of proof is not exacting and "does not require certainty or precision",[36] that standard is not discharged by merely proving the loss of a *possible* chance of a better outcome.[37] In some contexts, a lost opportunity may constitute loss or damage in tort[38] but, even in those cases, the opportunity must itself be of some value; that is, it must be shown that there was a "substantial prospect of a beneficial outcome" but for breach of the duty of care.[39]

43 The argument in this Court did not address whether the second component of Mr Daily's claim *could* be framed as a claim for a lost opportunity. Instead, the argument in this Court addressed how Mr Daily *in fact framed* this second component of his case. That framing is encapsulated in the paragraph of his submissions before the Division 1 Court noted earlier.[40] Although that paragraph

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34 See, eg, *Tomasetti v Brailey* [2012] NSWCA 399 at [92], [95].

35 *Tabet v Gett* (2010) 240 CLR 537 at 564 [69]; see also at 562 [58], 575 [101].

36 *Tabet* (2010) 240 CLR 537 at 587 [145].

37 *Tabet* (2010) 240 CLR 537 at 559 [46], 564 [68]-[69], 575 [101], 587 [143], 589 [152].

38 See especially *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364; *Tabet* (2010) 240 CLR 537 at 561-562 [55].

39 *Badenach v Calvert* (2016) 257 CLR 440 at 454 [40]. See also *Sellars* (1994) 179 CLR 332 at 364, quoted in *Tabet* (2010) 240 CLR 537 at 561 [54].

40 See [23] above.

of those submissions is prefaced by a reference to proving an "opportunity or opportunities of securing a better financial result", the submissions contended that, in the context of receiving advice about entry into a hypothetical financial agreement that was not liable to be set aside under the FLA, there were "only two realistic possibilities". According to those submissions, those two possibilities represented an exhaustive statement of the counterfactual scenarios; they were not two examples of valuable lost opportunities amongst other possibilities.

44 Once the Division 1 Court concluded that it was not satisfied that Mr Daily "would not have entered into the marriage" unless absolutely certain that the BFA would be held to be valid if it were to be challenged, the only possible remaining basis for establishing loss that Mr Daily articulated was that he "would have reached agreement with [Ms Daily] on the terms of a financial agreement consistent with his instructions to" R Lawyers which made "sufficient provision for any child of the marriage" so that it was not vulnerable to being set aside under s 90K(1)(d) of the FLA. That is, Mr Daily's case before the Division 1 Court was that he *would have* agreed upon a financial agreement and it *would have* survived such a challenge and been effective upon separation (and been more favourable than the orders made against him under s 79 of the FLA).

45 While a plaintiff may seek to frame their case as they choose, the nature of their loss and the time at which loss occurs is a matter which a defendant may contest and, ultimately, is for the court to determine. Until the hearing before the Appellate Court, Mr Daily's claim was not framed as a loss of chance case. Nor is it apparent that Mr Daily could have proved the loss of a chance of any value given that, irrespective of the invalidity of the BFA for uncertainty as found below, the BFA was always vulnerable to be set aside on any of the other grounds in s 90K(1) of the FLA which include contingencies (such as s 90K(1)(c) and (d)) that could not be known or assessed at the time the BFA was executed. As such, Mr Daily's case should have risen or fallen before the Appellate Court on the basis of his alleged loss as put before the Division 1 Court.

46 As noted, one ground of Mr Daily's notice of contention is that, even if the Appellate Court erred in properly characterising the claimed loss, it was correct to conclude that the Division 1 Court did not properly consider Mr Daily's loss. However, as also noted, the Division 1 Court found that Mr Daily did not instruct R Lawyers to the effect that he wanted a financial agreement that "was effectively bullet proof against the application of s 90K(1)(d)" of the FLA and otherwise noted the absence of any evidence of the terms of a financial agreement that even amounted to a "reasonable attempt to avoid a potential application of s 90K(1)(d)". Those findings were fatal to the second component of Mr Daily's case.

47 In any event, the second component of Mr Daily's claim was bound to fail by reason of Mr Daily's failure to adduce evidence establishing the *fact* of loss

beyond the litigation costs wasted in unsuccessfully defending the validity of the BFA as not void for uncertainty. At trial Mr Daily did not adduce any evidence as to a form of financial agreement that a lawyer in 2005, exercising reasonable care and skill, would (or might) have drafted to avoid that financial agreement being set aside and to have that financial agreement be effective upon separation, including a financial agreement that addressed the potential that Mr Daily and Ms Daily might have had children. Nor did Mr Daily adduce any evidence from which it could have been inferred that Ms Daily would (or might) have agreed to such a financial agreement around that time.

48 In this Court, Mr Daily asserted that there was such evidence but did not identify what it was beyond pointing to the Division 1 Court's finding of negligence on the part of R Lawyers, and part of Mr Daily's evidence of his instructions to the effect than he wanted the BFA to "include our plans and scenarios, including children". The Division 1 Court's findings of negligence on this topic, however, went no further than that R Lawyers failed to advise Mr Daily "what would happen upon the birth of a child and whether that might represent a material change in circumstances".

49 In some lawyer negligence cases a court can infer the particular steps that might have been taken had the lawyer discharged their duty.[41] However, the lack of any evidence about what such a financial agreement should have provided in this case if there were children of the marriage could not be so inferred.[42]

50 It may be that a finding that Mr Daily suffered loss as a consequence of R Lawyers' failure to exercise reasonable care and skill would not have required the precise terms of the counterfactual financial agreement to have been identified, but Mr Daily would have had to identify at least the scope, nature and likely monetary amount or range of monetary amounts that any provision for children would have entailed. Unless that was done there could not be any assessment of whether Ms Daily would (or may) have agreed to such a financial agreement, whether it would or may have survived a challenge on hardship grounds many years later and, if so, whether it would have secured a better outcome for Mr Daily compared to the orders the Division 1 Court made under s 79 of the FLA.

51 R Lawyers' additional ground of appeal must be upheld.

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41 See, eg, *Badenach* (2016) 257 CLR 440 at 452 [28]-[29], 453 [31]-[33]. See also *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585 at 611 [131]; *Howe v Fischer* (2014) 12 ASTLR 66 at 80 [80].

42 See *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103 at 122 [72].

Mr Daily's claim against R Lawyers was not statute barred

52 There remain to be considered R Lawyers' original grounds of appeal concerning whether Mr Daily's claim against it was statute barred. R Lawyers contended that the wasted legal fees Mr Daily incurred in litigating about the uncertainty of the BFA was consequential loss he suffered after incurring direct loss on entry into the BFA in 2005. If that argument were to be accepted it would mean that, subject to any extension of the limitation period, an action for the recovery of damages for those wasted legal fees would be statute barred. However, by its amended notice of appeal, R Lawyers did not seek to challenge the award of $38,000 in damages for those wasted legal fees. Even so, as the limitation issue was fully argued it should be addressed**.**

53 As noted, Mr Daily sued R Lawyers in contract and tort. The Division 1 Court had accrued jurisdiction to hear and determine that claim.[43] As all the relevant events the subject of the claim took place in South Australia, the *Limitation of Actions Act* was picked up and required to be applied to Mr Daily's claim.[44] Subject to any extension of the limitation period, actions founded upon contract or tort must be commenced within six years of the accruing of the cause of action.[45] Mr Daily's action in contract accrued upon the breach of the standard imposed upon R Lawyers under Mr Daily's contract of retainer[46] with it, and therefore became statute barred by around 2011.[47] However, time did not start to run for his cause of action founded on the tort of negligence until that cause of action was complete, which would occur "only if and when damage [was] sustained".[48]

54 In *Wardley* this Court held that, where a misrepresentation caused the injured party to enter into an agreement which exposed that party to a loss on the subsequent occurrence of contingencies, such as an indemnity, no loss was

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43 *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 29.

44 *Judiciary Act 1903* (Cth), s 79.

45 *Limitation of Actions Act*, s 35.

46 *Tabet* (2010) 240 CLR 537 at 559 [47]. See also *The Commonwealth v Cornwell* (2007) 229 CLR 519 at 522 [4], referring to *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 649-650 [14].

47 *Limitation of Actions Act*, s 35.

48 *Tabet* (2010) 240 CLR 537 at 559 [47]. See also *Cornwell* (2007) 229 CLR 519 at 523 [5].

suffered until those contingencies were fulfilled.[49] Three particular aspects of *Wardley* relevant to the present context should be noted.

55 First, in *Wardley* Mason CJ, Dawson, Gaudron and McHugh JJ observed that, for actions in negligence, "[t]he 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".[50]

56 The significance of identifying the nature of the interest infringed was emphasised in *The Commonwealth v Cornwell* where it was held that actual loss was not sustained by an employee who was advised in 1965 that he was not eligible to join a superannuation fund created by a public service statutory superannuation scheme until his retirement in 1994, when he received a lesser benefit than that which he would have received had he joined the scheme in 1965.[51] In 1976 the fund had been closed so that after that time the employee could not join the fund and make up the benefits he would otherwise have obtained through extra contributions.[52] In 1987 the employee joined a different fund that conferred lesser entitlements.[53]

57 The majority in *Cornwell* did not accept that loss accrued in either 1976 or 1987 because the employee's entitlements under the fund he would have joined in 1965 were always "prospective and contingent upon the falling in at a future time of the statutory criteria", the relevant statutory criterion being the fact of the employee's retirement in 1994.[54] An important step in the reasoning to that conclusion was the identification of the "interest" that was infringed, not as a proprietary interest or a liability, but instead "an 'entitlement' conferred by federal statute law",[55] which required fulfilment of the statutory criteria (relevantly, retirement) to accrue.

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49 *Wardley* (1992) 175 CLR 514 at 527, 533, 536, 543-545, 558-559.

50 *Wardley* (1992) 175 CLR 514 at 527 (emphasis added).

51 (2007) 229 CLR 519 at 524-525 [13]-[14].

52 *Cornwell* (2007) 229 CLR 519 at 531 [36].

53 *Cornwell* (2007) 229 CLR 519 at 524 [12], 528 [27].

54 *Cornwell* (2007) 229 CLR 519 at 531 [37].

55 *Cornwell* (2007) 229 CLR 519 at 526 [18].

58 Second, in *Wardley* Mason CJ, Dawson, Gaudron and McHugh JJ distinguished various English cases[56] that suggested that a plaintiff sustains loss at the time of entry into an agreement even if many aspects of the agreement are contingent.[57] Their Honours described those English cases as "proceed[ing] according to the view that, where the plaintiff is induced by a negligent misrepresentation to enter into a contract and the contract, as a result of the negligence, yields property or contractual rights of lesser value, the plaintiff first suffers financial loss on entry into the contract".[58] Their Honours rationalised the outcome in those cases on the basis that the plaintiffs had "sustain[ed] measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date".[59] In *Law Society v Sephton & Co (a firm)*[60] Lord Hoffmann agreed with *Wardley* and Mason CJ, Dawson, Gaudron and McHugh JJ's analysis of those English cases.

59 Consistent with this approach, in *Wardley* Brennan J explained the difference between, on the one hand, entering into an agreement which imposed burdens and conferred benefits and, on the other, suffering loss:[61]

> "But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur."

60 Third, *Wardley* involved a misrepresentation inducing the innocent party to enter into an agreement that subjected that innocent party to a contingent liability,

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56 *Melton v Walker & Stanger* (1981) 125 SJ 861; *Baker v Ollard & Bentley (a firm)* (1982) 126 SJ 593; *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267; [1988] 1 All ER 400; *Islander Trucking Ltd (In liq) v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Bell v Peter Browne & Co* [1990] 2 QB 495.

57 *Wardley* (1992) 175 CLR 514 at 530.

58 *Wardley* (1992) 175 CLR 514 at 530.

59 *Wardley* (1992) 175 CLR 514 at 531.

60 [2006] 2 AC 543 at 550 [18].

61 *Wardley* (1992) 175 CLR 514 at 536 (footnote omitted), citing *Swingcastle Ltd v Gibson* [1990] 1 WLR 1223 at 1236; [1990] 3 All ER 463 at 473.

namely an indemnity. Mason CJ, Dawson, Gaudron and McHugh JJ in *Wardley*[62] and Lord Hoffmann in *Sephton*[63] recognised a potential difference between that circumstance and the circumstance where, through the negligence of a defendant, a plaintiff did not obtain the rights they should have obtained under an agreement had it been properly drafted, albeit that the accrual of benefits and the suffering of burdens under such an agreement are subject to contingencies.[64] In *Sephton*, Lord Hoffmann identified that class of case as one in which it "may be relatively easy ... to infer that the plaintiff has suffered some immediate damage, simply because he [or she] did not get what he [or she] should have got".[65] Mason CJ, Dawson, Gaudron and McHugh JJ made a similar observation in *Wardley*, although their Honours appear to have confined that observation to the circumstance in which the contractual measure of damages is applicable.[66] In *Sellars v Adelaide Petroleum NL* Brennan J observed that the loss of a right to obtain a benefit is itself a loss in respect of which an amount may be recovered.[67]

61 This aspect of *Wardley* and *Sephton* was of significance in *Davys Burton v Thom*,[68] which bears a superficial factual similarity to the present case. In *Davys Burton*, a firm of solicitors negligently failed to have a prenuptial agreement, purporting to contract out of the effect of some provisions of the *Matrimonial Property Act 1976* (NZ), properly executed and it was thereby held invalid. As a result, the provisions of the *Matrimonial Property Act* applied to the solicitors' client's house such that, much later after the couple separated, the client's former spouse was awarded a one-third interest in the house. Had the agreement been valid and enforced the house would have remained the client's separate property and outside the reach of the *Matrimonial Property Act*.[69]

62 In *Davys Burton* Elias CJ held that the client suffered an immediate loss on his marriage without the protection of a valid agreement because "he did not get

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62 (1992) 175 CLR 514 at 530-531.

63 [2006] 2 AC 543 at 551-552 [21].

64 See *Davys Burton v Thom* [2009] 1 NZLR 437 at 450 [20].

65 *Sephton* [2006] 2 AC 543 at 551 [21].

66 *Wardley* (1992) 175 CLR 514 at 531.

67 *Sellars* (1994) 179 CLR 332 at 362.

68 [2009] 1 NZLR 437.

69 *Davys Burton* [2009] 1 NZLR 437 at 442 [1], 444-445 [9].

what he should have got" and thus his claim was statute barred.[70] Her Honour noted Lord Hoffmann's observations in *Sephton* as to the point in time at which loss in such circumstances might be more readily inferred.[71] The remaining members of the Court in *Davys Burton* also found that the client had suffered an immediate detriment upon receiving a "flawed"[72] or "damaged" asset[73] such that the limitation period commenced to run upon receipt of the asset.

63 R Lawyers relied on *Davys Burton* and contended that the present case is analogous in that, as a result of its negligence and the consequential invalidity of the BFA, Mr Daily "did not get what he should have got" from the performance of R Lawyers' duty and thus it can be readily inferred that he suffered loss when the BFA was executed or no later than the time at which he married Ms Daily with an inadequate financial agreement in place.

64 As explained, identifying the interest that is said to be infringed is critical to an application of the limitation periods to actions founded on the tort of negligence causing economic loss.[74] R Lawyers appeared to treat Mr Daily's interest in securing a financial agreement not liable to be set aside under the FLA that was effective upon separation as equivalent to a flawed contract or "damaged asset" which, had it been properly drafted, would have operated in a similar manner to the intended operation of the prenuptial agreement in *Davys Burton*. That characterisation of Mr Daily's interest is inapposite.

65 Although a financial agreement has features of an agreement or simple contract, it is also very much a creature of statute. Insofar as a financial agreement deals with how property or financial resources of the parties to a marriage are to be dealt with in the event of a breakdown of the marriage, the financial agreement's ultimate function is to define rights and obligations enforceable by an order made under s 90KA and avoid the operation of s 79. Critically, those parts of a financial agreement are not enforceable until after separation.[75] Those parts of a financial agreement do not operate or attach any consequence to any property of a party to the financial agreement or have any other relevant effect at the time of the

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70 *Davys Burton* [2009] 1 NZLR 437 at 451 [25].

71 *Davys Burton* [2009] 1 NZLR 437 at 449 [19].

72 *Davys Burton* [2009] 1 NZLR 437 at 452-453 [28]-[29].

73 *Davys Burton* [2009] 1 NZLR 437 at 459 [49].

74 *Cornwell* (2007) 229 CLR 519 at 525 [16].

75 FLA, s 90DA.

marriage. Unlike the statutory scheme in *Davys Burton*, the relevant parts of the FLA do not "attach[] immediately upon ... marriage".[76] Further and unlike many classes of agreement, a financial agreement is also liable to be set aside on various grounds that relate to unknowable material changes in circumstances that have arisen after entry into the financial agreement, including circumstances relating to "the care, welfare and development of a child of the marriage".[77]

66 Ultimately, the "interest" of Mr Daily that was infringed as a consequence of R Lawyers' negligence as found, namely Mr Daily's interest in securing a financial agreement not liable to be set aside under the FLA so that it was enforceable on and after separation, is of a kind similar to the interest of the employee in respect of the statutory scheme considered in *Cornwell* and is not of a kind similar to a party's interests in a bundle of contractual rights in a commercial agreement.

67 The statutory context in which a financial agreement operates involves a limitless variety of individual circumstances not all of which can be known or even anticipated in a meaningful way at the time of entry into the financial agreement, including but not restricted to variations in lengths of relationships, the number and needs of any children of the relationship and the financial, health and other needs of the parties to the relationship. The potential variations in personal circumstances that may occur from the time of a marriage until it ends are so innumerable that it is not "possible to ascertain whether loss or damage has been"[78] sustained by reason of a person's entrance into or failure to enter into a binding and effective financial agreement at the time of entry (or marriage).

68 More than a decade after he married Ms Daily, Mr Daily considered it was in his interests to seek to enforce the BFA. However, there are numerous permutations of events that might have occurred between the date of execution of the BFA and the separation of the parties to the marriage, such as radical changes in one or both of Mr Daily's and Ms Daily's respective financial circumstances or health, which may have rendered Mr Daily worse off financially if the BFA had been binding and effective than if orders were made under s 79 of the FLA.

69 It is true that, as a result of R Lawyers' negligence, Mr Daily "did not get what he should have got", in that he was denied entry into a binding and enforceable financial agreement. However, the process of reasoning identified by

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76 *Davys Burton* [2009] 1 NZLR 437 at 451 [24].

77 FLA, s 90K(1)(d).

78 *Wardley* (1992) 175 CLR 514 at 536.

Lord Hoffmann in *Sephton* that was approved in *Davys Burton* involves *inferring* from that denial that Mr Daily "suffered some immediate damage".[79] No doubt in many contexts it will be inferred that a party who retained a solicitor to draft and advise upon an agreement that was found to be void and ineffective suffered loss or damage when that agreement was purported to be executed. However, a finding that a party suffered loss at that time is not inevitable. In this particular statutory and factual context, it is an inference that cannot be drawn.

70 R Lawyers otherwise submitted that the fact that Mr Daily could have recovered legal costs for remedying the defects in the BFA on or after execution of the BFA in 2005 demonstrated that the loss or damage was suffered in 2005. That might have been so if Mr Daily had incurred legal costs to remedy the defects in the BFA on or after 2005 but that did not occur.[80] There is a difference between, on the one hand, identifying when loss or damage first accrues in the events that happened even if that is not the loss that is claimed in the action and, on the other, merely speculating about loss that might have been suffered or recovered if the events had been different.[81] This submission of R Lawyers is in the latter category.

71 Accordingly, Mr Daily's cause of action in negligence against R Lawyers did not accrue until (at least) the time of his separation from Ms Daily. It follows that Mr Daily's claim against R Lawyers was not statute barred. The original grounds of the notice of appeal should be dismissed.

Disposition

72 The orders proposed by Gordon and Edelman JJ should be made.

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79 *Sephton* [2006] 2 AC 543 at 551 [21]; *Davys Burton* [2009] 1 NZLR 437 at 449 [19].

80 See *Davys Burton* [2009] 1 NZLR 437 at 452 [26].

81 See *Cornwell* (2007) 229 CLR 519 at 531-532 [38].

73 GORDON AND EDELMAN JJ. A financial agreement entered into between the first respondent, Mr Daily (a pseudonym), and the second respondent, his wife, Ms Daily (also a pseudonym), under s 90B in Pt VIIIA of the *Family Law Act 1975* (Cth) ("the FLA") was set aside for uncertainty by the Federal Circuit and Family Court of Australia (Division 1). The appellant, R Lawyers, who acted for Mr Daily in preparing the financial agreement, was held liable to Mr Daily in negligence. There is no challenge in this Court to the finding of negligence.

74 The question raised by the initial grounds in this appeal is whether Mr Daily's claim in negligence against R Lawyers[82] was barred by the *Limitation of Actions Act 1936* (SA) ("the Limitation Act"). Section 35(c) of the Limitation Act provides a defence to a claim in negligence that is brought more than six years from the date on which the cause of action accrued. Whether Mr Daily's claim in negligence was barred by s 35(c) of the Limitation Act turns on *when* he suffered loss as a result of the defective financial agreement ("the BFA").

75 As these reasons will show, however, it was not established that any actual loss that Mr Daily suffered as a result of the negligence of R Lawyers arose before a separation declaration was made within the meaning of s 90DA(1) of the FLA. The appeal must be allowed on the basis of a proposed additional ground of appeal raised after the hearing by R Lawyers that, other than $38,000 in damages awarded to him by the primary judge for his legal fees in relation to the claim that the BFA was uncertain and not in issue in this Court, Mr Daily failed to prove any further loss or damage caused by the negligence of R Lawyers. Consequential orders should be made setting aside the orders of the Federal Circuit and Family Court of Australia (Division 1) in its appellate jurisdiction ("the Full Court") of 17 October 2024 and, in their place, it should be ordered that the appeal to that Court be dismissed and that Mr Daily pay R Lawyers' costs of that appeal.

76 These reasons will identify the relevant provisions of the FLA which provide the framework for determining the validity and enforceability of a financial agreement entered into under Pt VIIIA of the FLA (Pt 1), then set out, in some detail, the history of the proceedings, including the decisions of the lower courts (Pt 2). The reasons will then turn to consider the several ways in which a client may suffer and then prove loss or damage as a result of the negligent conduct of a solicitor (Pt 3), before dealing with the issues raised in this Court (Pt 4).

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82 Mr Daily's claim was brought in August 2021.

Pt 1: *Family Law Act* (the FLA)

77 Part VIII (ss 71 to 90) of the FLA deals with the property of parties to a marriage, spousal maintenance and maintenance agreements. Under s 79 in Pt VIII of the FLA, the court may make such orders as it considers appropriate as to the division of property in property settlement proceedings. However, Pt VIII does not apply to financial matters and resources "to which a financial agreement[[83]] that is binding on the parties to the agreement applies".[84]

78 Part VIIIA of the FLA deals with financial agreements. A financial agreement may be made before marriage,[85] during marriage[86] and after a divorce order is made.[87] A financial agreement is only binding on the parties if certain conditions are met,[88] and a provision of a financial agreement that relates to the maintenance of a spouse party to the agreement or a child or children is void unless it specifies certain matters, including the party, or the child or children, for whose maintenance provision is made and the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party or the child or each child.[89]

79 A financial agreement before marriage[90] is a written agreement with respect to any of the following matters: (a) "how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with";[91] or (b) the "maintenance of either of the spouse parties" during the marriage, after divorce or both during the marriage and after

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83 Section 4 of the FLA defines "financial agreement" as an agreement that is a financial agreement under s 90B, s 90C or s 90D, but the term does not include an ante-nuptial or post-nuptial settlement to which s 85A applies.

84 FLA, s 71A(1).

85 FLA, s 90B.

86 FLA, s 90C.

87 FLA, s 90D.

88 FLA, s 90G.

89 FLA, s 90E.

90 FLA, s 90B.

91 FLA, s 90B(2)(a).

divorce.[92] A financial agreement may also contain matters incidental to those matters[93] and "other matters".[94]

80 Importantly, a number of provisions address when a financial agreement is, or particular provisions of a financial agreement are, of force and effect. Whether an agreement is, or particular provisions are, of force and effect primarily depends on two matters – the subject matter of particular provisions of the financial agreement and then, in relation to that subject matter, the occurrence of a specified event.

81 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 of the property or financial resources of either or both of the spouse parties: (a) at the time when the agreement is made; or (b) at a later time and before the termination of the marriage by divorce; are to be dealt with, is of no force or effect until a separation declaration is made".[95] A separation declaration[96] is a written declaration that must be signed by at least one of the spouse parties to the financial agreement[97] and must state that the spouse parties have separated and are living separately and apart at the declaration time[98] and, in the opinion of the spouse parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.[99]

82 However, before a separation declaration is made, a financial agreement will be of force and effect in relation to the other matters it deals with (except for any matters covered by s 90DB).[100] Section 90DB(2) then provides that a financial agreement that is binding on the parties to the agreement, to the extent that it

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92 FLA, s 90B(2)(b).

93 FLA, s 90B(3)(a).

94 FLA, s 90B(3)(b).

95 FLA, s 90DA(1).

96 FLA, s 90DA(2).

97 FLA, s 90DA(3).

98 FLA, s 90DA(4)(a).

99 FLA, s 90DA(4)(b).

100 Note to s 90DA(1) of the FLA.

provides for the "other matters" in s 90B(3)(b) or s 90C(3)(b), is of no force or effect "unless and until the marriage breaks down".[101]

83 The combined effect of ss 90B, 90DA and 90DB is that a financial agreement entered into before marriage is of no force or effect in relation to the property or financial resources of either or both of the spouse parties until a separation declaration is made and, in relation to other matters, unless and until the marriage breaks down.

84 Finally, a court may make an order setting aside a financial agreement if satisfied of certain matters, including that the agreement is void, voidable or unenforceable or, since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or a party to the agreement who has caring responsibility for the child will suffer hardship if the agreement is not set aside.[102]

Pt 2: Background

85 The history of the litigation is long, tortured and complex. It is hoped it is never repeated. The complexity is in part the result of the imprecision with which Mr Daily pleaded, argued and sought to prove the loss arising from R Lawyers' negligence. Not all of that complexity is recorded in these reasons.

The BFA

86 Mr Daily and Ms Daily met in 1996. Over the course of 2002 to July 2005, R Lawyers provided advice to Mr Daily and ultimately drafted the BFA. On 21 July 2005, Mr Daily and Ms Daily entered into the BFA, in the form of a deed.

87 The BFA recited that the parties wanted "so far as possible to contract out of the provisions of [Pt VIII of the FLA]" and "to enter into a binding financial agreement under [s 90B of the FLA]".

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101 In a proceeding instituted by an application for a divorce order, a marriage is held to have broken down irretrievably if the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order: FLA, s 48.

102 FLA, s 90K(1)(b) and (d).

88 The BFA commenced upon the parties' marriage. The parties confirmed the accuracy of the recitals. The BFA recorded that it was made under s 90B of the FLA.

Later events

89 Mr and Ms Daily married in late 2005. They had one child in 2006 and another in 2009. They separated in September 2018.

90 In December 2019, Ms Daily sought to set aside the BFA and, in the event that occurred, to claim a property settlement under s 79 of the FLA. Mr Daily opposed that application. The proceedings were bifurcated. The validity of the BFA was determined first. In June 2020, the BFA was set aside.[103] Mr Daily successfully appealed to the Full Court, which remitted the question of the validity of the BFA to the primary judge for rehearing.[104]

Mr Daily's claim against R Lawyers

91 In August 2021, prior to the rehearing about the validity of the BFA, Mr Daily joined R Lawyers to the proceedings claiming, in the event that the BFA was not enforceable or was set aside, or in the event that it did not provide for the division of the assets of the parties in accordance with Mr Daily's instructions, damages, costs and interest for breach of contract and negligence. It is necessary to set out Mr Daily's claim in some detail.

92 Mr Daily alleged that R Lawyers breached its duty of care to Mr Daily by, among other things: not informing Mr Daily that the BFA would not result in the division of the assets of the parties in accordance with his instructions; not advising Mr Daily that the terms of the BFA were not specifically enforceable because they lacked certainty; failing "to further amend" the BFA such that its terms were more certain and capable of specific enforcement; and failing to advise Mr Daily that the effect of s 90K(1)(d) of the FLA was that a "material change in circumstances" was "either/or the birth of a child or separation, *simpliciter*".

93 In the event that the Court found that the BFA was not enforceable for want of certainty of its terms, Mr Daily alleged that he had suffered, or would suffer, loss and damage by reason of R Lawyers' negligence because, among other things: Mr Daily would be liable to pay Ms Daily more by way of property settlement than he would have been required to pay her pursuant to the BFA; Ms Daily made a claim to spousal maintenance that should have been excluded by the BFA;

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103 *Daily v Daily* (2020) 61 Fam LR 75.

104 *Daily & Daily* (2020) FLC ¶93-999.

and Mr Daily had incurred, and was liable to his advisers for, the costs of the proceedings, including the appeal to the Full Court. Mr Daily claimed that he was unable to provide particulars of what property settlement might be determined by the Court, save to say that the monetary amount of the property orders must by definition be greater than that which would be due to Ms Daily under the BFA where the Court had determined that Ms Daily would suffer "hardship" within the meaning of s 90K(1)(d) of the FLA if the BFA were not set aside.

94 Two other aspects of Mr Daily's claim should be noted. First, Mr Daily pleaded that, if R Lawyers had informed him that the terms of the BFA were not enforceable because they lacked certainty, then Mr Daily would have insisted that the BFA be amended to reflect his instructions and re-executed by the parties in compliance with the FLA. He also pleaded that, if Ms Daily had refused to sign the BFA as amended, then Mr Daily would not have married her or had the children with her. The "no marriage" claim was rejected by the primary judge. Those claims – that Mr Daily would not have married Ms Daily and that he would not have had children with Ms Daily – are no longer pressed.

95 Second, Mr Daily pleaded that, to the extent he required an extension of time within which to make the claim against R Lawyers (which was not admitted), he relied on s 48(3)(b)(i) of the Limitation Act on the basis that he first ascertained the following material facts at the following times: (1) that the BFA might be set aside because of the birth of the children – on receipt of the judgment at first instance;[105] (2) that the BFA might be unenforceable for uncertainty of terms – on receipt of the judgment on appeal[106] or, in the alternative, the judgment at first instance;[107] and (3) that the BFA may not reflect the instructions that he gave to R Lawyers for the division of the assets of the parties upon separation – on receipt of the judgment on appeal.[108] Mr Daily pleaded that it was just and equitable that the time within which his action might be commenced be extended to 31 May 2021.

R Lawyers' response

96 R Lawyers' pleaded response denied Mr Daily's claim in negligence, denied that he suffered the pleaded loss or damage and further said that, in the event the BFA was not enforceable (which was not admitted), the BFA was liable

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105 *Daily v Daily* (2020) 61 Fam LR 75.

106 *Daily & Daily* (2020) FLC ¶93-999.

107 *Daily v Daily* (2020) 61 Fam LR 75.

108 *Daily & Daily* (2020) FLC ¶93-999.

to be and would be set aside on the grounds of a material change in circumstances relating to the care, welfare and development of a child of the marriage and hardship to Ms Daily if the BFA was enforced.

97 In answer to Mr Daily's request for an extension of time, and in answer to the whole of Mr Daily's claim, R Lawyers said that the claims were statute barred and that, if Mr Daily suffered any loss or damage, the cause of action arose on or about 21 July 2005. R Lawyers pleaded that Mr Daily did not satisfy the requirements of s 48 of the Limitation Act to seek an extension of time and denied that any new material fact was ascertained following the expiration of the time period, such that Mr Daily was not entitled to an extension of time as alleged or at all.

Primary judge – rehearing on validity of BFA and hearing on liability of R Lawyers

98 Before the primary judge, there were therefore two issues – whether the BFA was binding and, in the event that it was not binding, the liability of R Lawyers.

99 The primary judge upheld Ms Daily's claim that the BFA was void for uncertainty and set aside the BFA. The primary judge held that the interests of Mr Daily and Ms Daily were to be considered pursuant to s 79 of the FLA.

100 It was common ground that the Court had accrued jurisdiction to determine Mr Daily's claim against R Lawyers with the challenge to the validity of the BFA but Mr and Ms Daily disagreed as to how the separate actions should be heard and determined and the impact, if any, on the s 79 proceedings should there be a finding that R Lawyers was liable to Mr Daily for damages. The concern was that there would be a cycle of proceedings under s 79 of the FLA, following which there would be further argument as to how the damages should be treated in the s 79 proceedings. The primary judge approached the issue on the basis that a consideration of any award of damages was a relevant factor in determining the appropriate order to make in the property settlement proceedings under s 79(4)(e) of the FLA.[109]

101 Subject to that issue, the primary judge identified the net pool of assets as $2,168,151 and, on the basis that Ms Daily was entitled to 50 per cent, awarded her an "indicative settlement sum payable to her of $741,634, subject to further consideration of whether the outcome is just and equitable taking into account any successful damages claim" by Mr Daily against R Lawyers.

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109 See, eg, *F Firm & Ruane* (2014) FLC ¶93-611 at 79,556 [7], 79,569 [97].

102 The primary judge then turned to address Mr Daily's claim against R Lawyers. After recording the finding that the BFA was void for uncertainty, the primary judge turned to address R Lawyers' contention that Mr Daily's claim was statute barred by s 35 of the Limitation Act.

103 The primary judge upheld Mr Daily's pleaded duty of care and his allegations of breach of duty of care. In particular, the primary judge held that R Lawyers fell short of the applicable standard of care both in respect of the risk of the BFA being held to be void for uncertainty and the risk of it being set aside on hardship grounds. The primary judge concluded that the loss and damage claimed by Mr Daily was not sustained until, at the earliest, the date of separation when the parties may have considered the application of the BFA, and that Mr Daily's claim in negligence was thereby within time and not statute barred. In any event, the judge also considered that there had been a material change in the circumstances relating to the care, welfare and development of the children and, as a result, Ms Daily would suffer hardship if the Court did not set aside the agreement.[110]

104 The primary judge recorded that, "[b]roadly speaking", Mr Daily "would seek damages to be assessed on the difference between his expectation of the payment to [Ms Daily] pursuant to the BFA and the settlement sum ordered following a consideration of [Ms Daily's] entitlement pursuant to s 79 of the [FLA]". The primary judge noted that the assessment of damages was "made more complex by the uncertainty of the terms of the BFA and how that would translate or be capable of certain determination pursuant to the BFA".

105 Although it appears that at the conclusion of the evidence the judge heard detailed submissions from the parties as to the question of damages that might flow from the decision of the Court to set aside the BFA on the basis of uncertainty, neither Mr Daily nor R Lawyers made submissions on the question of the *quantum* of damages. Instead, the primary judge set aside the BFA and ordered the matter to "be listed for further submissions on the question of the quantum of damages".

106 As the primary judge subsequently recorded, whilst Mr Daily sought leave to make further submissions as to "a more precise calculation of the quantum of damages", his "initial position" stated in July 2022 was that, if the Court found that the BFA was not enforceable for want of certainty of terms, he had suffered, or would suffer, loss and damage by reason of R Lawyers' negligence because he

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110 An appeal by Mr Daily limited to the terms of the order setting aside the BFA (pursuant to s 90K(1)(d) and/or s 90KA of the FLA) was dismissed in August 2023: *Daily & Daily [No 2]* (2023) FLC ¶94-151.

would be liable to pay Ms Daily more by way of property settlement than he would have been required to pay her pursuant to the BFA.

Mr Daily's application to adduce further evidence

107 On 4 September 2023, Mr Daily applied to adduce further evidence including, relevantly, updated particulars of his legal fees.[111] R Lawyers conceded that the relevant component of Mr Daily's costs relating to the negligence of R Lawyers' conduct was a relevant consideration in the assessment of damages and did not oppose further evidence being adduced.[112] Given those circumstances, the primary judge granted Mr Daily leave to introduce evidence of his legal fees that he considered relevant to the determination of damages.[113] However, the primary judge stated that at that stage, "and as a result of the lack of particularity provided by [Mr Daily], the extent of the further evidence to be led and the extent of any cross-examination, if any, [was] not to be determined".[114] The judge concluded that aspect of his reasons by stating that "[b]ut for the concession of [R Lawyers], the paucity of evidence provided by [Mr Daily] would have been a factor to consider".[115]

Primary judge – quantum of damages

108 On 9 February 2024, the primary judge made final property settlement orders between Mr Daily and Ms Daily and, subject to the question of damages (if any) arising from Mr Daily's legal fees, made a finding that Mr Daily had not suffered any compensable loss and damage because of the negligence of R Lawyers. It is this latter finding that lies at the heart of the issues in this Court.

109 Mr Daily contended that he was entitled to damages that were to be assessed by reference to the amount payable under the BFA and the amount now payable to Ms Daily, having regard to the indicative settlement sum, and his legal fees of $821,000 as damages. Mr Daily's initial position in terms of calculation was beset with difficulties. He submitted that Ms Daily may have wished to negotiate around the terms of a financial agreement prepared reasonably and competently, which was a contingency the Court was required to take into account. Mr Daily submitted that there were two possibilities: either he would not have entered into

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111 *Daily & Daily [No 2]* [2023] FedCFamC1F 858 at [9].

112 *Daily & Daily [No 2]* [2023] FedCFamC1F 858 at [55], [63]-[64].

113 *Daily & Daily [No 2]* [2023] FedCFamC1F 858 at [64]-[65].

114 *Daily & Daily [No 2]* [2023] FedCFamC1F 858 at [65].

115 *Daily & Daily [No 2]* [2023] FedCFamC1F 858 at [65].

any financial agreement or the marriage, or he would have entered into a financial agreement that made sufficient provision for any child of the marriage in the event of a breakdown in the marriage.

110 Mr Daily submitted that, once he had established on the balance of probabilities the existence of one or other of those opportunities, the Court should then value the extent or degree of the opportunity and its worth by a process of informed estimation, referring to *Sellars v Adelaide Petroleum NL*.[116] Had Mr Daily and Ms Daily entered into a financial agreement that made sufficient provision for any child of the marriage, "then the financial result, put broadly, would have been something in the order of $250,000". "[S]winging a broad axe",[117] Mr Daily submitted that he was worse off as a result of R Lawyers' negligence "in an amount something in the order of $991,634 (representing the sum of $250,000 already paid to [Ms Daily] and the indicative property settlement sum", in addition to his legal costs.

111 The primary judge described Mr Daily's claim as being "distilled to [him] seeking that his damages be assessed as to the extent to which he would have been better off if he had not entered into a marriage with [Ms Daily]". At the hearing, Mr Daily maintained that his loss was "a loss of opportunity", again citing *Sellars* for the proposition that there was "a loss of opportunity of some value" so that the value should "be ascribed or ascertained by reference to degrees of probabilities and possibilities".

112 In response, R Lawyers submitted that Mr Daily "did not plead (or otherwise articulate) much less prove":

> "(1) the content of the more detailed or specific advice that a reasonably competent family law practitioner should have ... given about s 90K(1)(d) (... the only pleading relevant to [t]his was in general terms at ... [45.6] [of the statement of claim]);
>
> (2) that [Mr Daily] would have taken particular steps to mitigate the hardship risk by proffering any particular instructions that would have immunised the BFA from the risk of being set aside for hardship grounds in the circumstances that ultimately unfolded; [or]
>
> (3) that those steps would have rendered the BFA invulnerable to be [set] aside in the events that ultimately occurred".

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116 (1994) 179 CLR 332 at 355.

117 See *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 81.

113 R Lawyers submitted that Mr Daily had therefore suffered no loss or damage caused by the negligence of R Lawyers. R Lawyers rejected Mr Daily's primary position that, unless there was a reliable financial agreement in place, he would not have entered into the marriage with Ms Daily. R Lawyers submitted that the only area where damages *might* be awarded was in respect of Mr Daily's legal fees which had properly arisen from the finding that the conduct of R Lawyers had resulted in the setting aside of the BFA for uncertainty and that the total damages arising from Mr Daily's legal fees in relation to the uncertainty claim should be limited to no more than $38,000.

114 The primary judge rejected most of Mr Daily's arguments. As to Mr Daily's claim for damages representing the difference between a financial agreement drafted with reasonable care and the property settlement in fact obtained, the judge made the following findings.

115 First, he found that Mr Daily was entitled to expect that the solicitor was "definitely" skilled in the ability to draft a financial agreement that would not be set aside for uncertainty.

116 Second, it was not controversial that Mr Daily had received written advice from R Lawyers on 30 September 2002, setting out five possible bases on which a financial agreement may be set aside.

117 Third, Mr Daily acknowledged that the BFA referred to s 90K(1)(d) of the FLA.

118 Fourth, the evidence of the solicitor, as to her advice to Mr Daily regarding what may happen should the parties decide to have children, should be preferred to the evidence of Mr Daily; in particular, Mr Daily did not accurately recall the discussion with his solicitor on 21 July 2005.

119 Fifth, Mr Daily did not establish on the balance of probabilities that a clear instruction was given to his solicitor as to what he wanted as opposed to what he would have liked to happen: namely, that his solicitor draft a financial agreement that was effectively bullet proof against the application of s 90K(1)(d) of the FLA.

120 Sixth, Mr Daily understood that absolute certainty of outcome could not be guaranteed and no case was prosecuted by Mr Daily which might have demonstrated the type of clauses that could have been considered by his solicitor in 2005 evidencing a reasonable attempt to avoid a potential application of s 90K(1)(d) of the FLA.

121 Seventh, Mr Daily's evidence did not permit a finding that he required absolute certainty of outcome, in the absence of which he would not have entered into the marriage.

122 Eighth, a finding of hardship did not inform or derogate from the determination that the BFA should be set aside as a result of being void for uncertainty. The finding of hardship was not informed by the terms and conditions of the BFA but was rather reached in light of the circumstances of the parties 15 years after the BFA was executed.

123 Ninth, the primary judge made the following important finding:

> "In the absence of [Mr Daily] being able to identify what could or should have been done by the solicitor, there is merit in the argument of [R Lawyers] that given the solicitor's oral and written advice that the [BFA] could not provide certainty of outcome in respect of a bar to any future challenge by [Ms Daily], [Mr Daily] is not able to establish on the balance of probabilities that his preparedness to enter into the marriage with [Ms Daily] was conditional on not just entering a financial agreement that would be binding but also that [Ms Daily] would have no redress to bring an application pursuant to s 90K(1)(d) of the [FLA]."

124 Tenth, the judge rejected Mr Daily's assertion that the solicitor had given him unconditional and unqualified advice that the BFA provided a certain outcome, namely that, first, it was binding and, second, there was no possibility of a challenge generally but in particular pursuant to s 90K(1)(d) of the FLA.

125 Finally, the primary judge concluded the assessment of compensable damages representing the difference between a financial agreement drafted with reasonable care and the property settlement in fact obtained as follows:

> "The unchallenged finding of hardship and the acceptance by [Mr Daily] that the [BFA] is void for uncertainty, subject to the question of damages if any arising from [Mr Daily's] legal fees, permits of a finding that [Mr Daily] has not suffered any compensatory damages."

126 The primary judge then addressed the component of Mr Daily's damages claim arising from his legal fees. The primary judge recorded that the "somewhat surprising result [was] that in circumstances" where Mr Daily had not presented evidence as to the breakdown of his costs referable to the issues in dispute, R Lawyers conceded that $38,000 should be awarded as damages, and the judge ordered R Lawyers to pay that sum to Mr Daily. The conceded amount represented Mr Daily's legal costs in litigating against Ms Daily resulting from the BFA being void for uncertainty. In relation to the property settlement orders, the primary judge said that, given Mr Daily's "significant latitude in terms of the evidence" upon the various applications, his affidavit material and his updated financial statements, the judge did not consider that there should be any downward adjustment to the determination of the property settlement sum in favour of Ms Daily.

Full Court

127 Mr Daily appealed to the Full Court against the property settlement orders and the award of damages, relevantly contending that the primary judge erred in finding that Mr Daily suffered no compensable loss beyond the $38,000 awarded for legal fees. R Lawyers, by notice of contention, sought to restrict any award of damages to $38,000 on a basis not relied upon by the primary judge. In addition, R Lawyers cross-appealed contending, among other things, that Mr Daily's claim against it was statute barred on the basis that the loss and damage claimed by Mr Daily arose by no later than the date of marriage ("ground 1 of the cross-appeal"). Mr Daily's appeal against the property settlement orders was dismissed and may be put to one side.

128 Mr Daily's appeal against R Lawyers succeeded, the award of damages was set aside and the reassessment of damages remitted to a judge other than the primary judge.[118]

129 In relation to the primary judge's decision that Mr Daily suffered no compensable loss, in oral submissions Mr Daily submitted that the primary judge "got sidetracked" into considering the contingency of the BFA being set aside on hardship grounds as a barrier to compensable loss, when in fact contingencies like hardship "go towards the assessment of loss, as opposed to causation". Mr Daily submitted that "the loss that is suffered flows from the loss of opportunity to get the correct advice" and that "[h]aving proved some loss, you then ascertain or assess the quantum of that loss by reference to possibilities and probabilities, consistent with [*Sellars*]". Mr Daily submitted that his case remained his case as pleaded – that, if the BFA was not enforceable, Mr Daily would be liable to pay more to Ms Daily than he would have been required to pay pursuant to a properly drafted agreement.

130 In its written submissions filed before the hearing in the Full Court, R Lawyers again submitted (as it had done before the primary judge[119]) that Mr Daily's case did not reflect and was in fact inconsistent with his pleaded case and the basis on which the trial was conducted. The Full Court addressed R Lawyers' cross-appeal. It is only necessary to address ground 1 of the cross-appeal that Mr Daily's claim against R Lawyers was statute barred on

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118 *Daily & Daily [No 4]* [2024] FedCFamC1A 185. Mr Daily also filed an application in an appeal seeking leave to adduce further evidence and to commence an appeal from the orders made by the primary judge refusing his previous application to adduce further evidence. The application was dismissed given the Full Court remitted the assessment of damages.

119 See [112] above.

the basis that the loss and damage claimed by Mr Daily arose by no later than the date of marriage.

131 The Full Court properly recorded that a cause of action in negligence is complete when damage is first sustained. The Full Court then addressed what loss was suffered by Mr Daily by considering whether to characterise the negligently drawn BFA as analogous to a defective asset or rather to regard any loss as merely contingent until events precipitated the loss itself. In this regard, the Full Court referred to this Court's decision in *Wardley Australia Ltd v Western Australia*.[120] The Full Court rejected the first characterisation of the BFA before concluding that, under the FLA, the BFA only became of force and effect upon a separation declaration being made and, accordingly, as the primary judge found, the loss suffered by Mr Daily as a result of the negligence of R Lawyers was first suffered, at the earliest, at the time of the separation declaration.[121] The Full Court sought to apply the reasoning in *Wardley*. The approach adopted by the Full Court was in error.

132 First, the Full Court addressed the issues in the wrong order and, as a result, failed to consider the issues correctly. The Full Court incorrectly addressed whether Mr Daily's claim was statute barred before addressing the question of loss. That was wrong. The proper order for the Full Court was to first identify what the claimed loss was and when that claimed loss was first incurred by Mr Daily, and then to address the question of causation – whether, but for the negligence of R Lawyers, Mr Daily would have achieved a particular outcome or, but for the negligence of R Lawyers, Mr Daily lost the chance of obtaining a different financial agreement and thereby securing a particular better outcome.

133 In relation to when the claimed loss was incurred, the Full Court correctly identified that, under the FLA, the BFA only became of force and effect upon a separation declaration being made and, accordingly, as the primary judge found, the loss suffered by Mr Daily as a result of the negligence of R Lawyers was first suffered, at the earliest, at the time of the separation declaration.[122]

134 The Full Court's analysis of *when* actual loss was first suffered said nothing about the *nature* of the loss Mr Daily claimed that he suffered or whether he had pleaded and proved such loss. As will be explained, there are several ways in which a client may incur loss or damage as a result of the negligent conduct of a solicitor

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120 (1992) 175 CLR 514.

121 See [103] above. See also [174] below.

122 See [103] above. See also [174] below.

in providing advice in relation to a financial agreement.[123] Reliance on the principles identified in *Wardley* was not the way in which Mr Daily had pleaded or sought to prove the actual loss he had suffered. Indeed, in the context of considering the limitation period issue, the Full Court said that, as recognised in *Wardley*, the assessment of damages before separation would be "almost farcical" as "there would be so many imponderables, with a distinct risk of under compensation". If damages were assessed in relation to an intact marriage, the assessment may bear no resemblance to any actual loss eventually suffered. Those "imponderables" arose because of the statutory framework in relation to financial agreements,[124] not because of what was set out in *Wardley*.

135 The Full Court then turned to Mr Daily's remaining appeal grounds which were said to "challenge the assessment of damages against [R Lawyers]". The Full Court described Mr Daily's pleading as a loss of chance claim and then referred to the later particularisation of that claim by Mr Daily in his written submissions, which "simply relied upon characterisations of the evidence and earlier findings".

136 After setting out the relevant findings of the primary judge as to R Lawyers' liability, the Full Court said that what the primary judge then did in the quantum of damages reasons was "a little difficult to follow". Two aspects of the primary judge's quantum reasons that the Full Court isolated for particular criticism were, first, the judge's rejection of Mr Daily's claim that he would, if told that a financial agreement could not be drawn so as to avoid the risk of it being set aside under s 90K(1)(d), have insisted on "absolute certainty"; and, second, the judge's rejection of Mr Daily's claim that, without "absolute certainty of outcome and in the absence of such advice and assurance from the solicitor, he would not have entered into the marriage"; leading to the primary judge concluding that "[t]he unchallenged finding of hardship and the acceptance by [Mr Daily] that the [BFA] is void for uncertainty, subject to the question of damages if any arising from [Mr Daily's] legal fees, permits of a finding that [Mr Daily] has not suffered any" compensable loss or damage.

137 The Full Court then stated:

> "It is clear that, notwithstanding the quite specific findings in the [primary judge's liability reasons], in the [quantum] reasons the primary judge failed to grapple with [Mr Daily's] case that his compensatory

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123 See [145]-[150] below.

124 See [77]-[84] above.

damages claim *included a claim for damages for the lost opportunity to negotiate a BFA which made provision for the birth of a child or children*.

That seemingly accepted negligence ... required the primary judge to engage with the difficult tasks of:

- evaluating the likelihood that [Ms Daily] would have agreed to include such terms in the BFA, and if so, what those terms might have been; and in that event
- consider the prospects that the BFA would nonetheless have been susceptible to being set aside under s 90K(1)(d); and then
- to consider what additional sum beyond that payable under the BFA would have been ordered under s 79." (emphasis added)

138 The view of the Full Court was that Mr Daily's claim for compensable damages survived, that the primary judge had misconceived the nature of Mr Daily's case being the loss of a chance to negotiate a financial agreement which would survive s 90K(1)(d), that it was unnecessary for the primary judge to determine the hardship claim in order to assess damages against the solicitors, and that by doing so the primary judge lost focus on the distinction between causation and damage.

139 As is apparent from the lengthy description earlier in these reasons of the course of proceedings at first instance and the findings made by the primary judge, it is far from clear that Mr Daily pleaded his case, or conducted his case at trial, based on a loss of opportunity to obtain a financial agreement and thereby obtain a more favourable property settlement, even if that is how his case was argued at the quantum hearing and on appeal to the Full Court. The Full Court misunderstood and misstated the way in which Mr Daily had put his case at trial and why the primary judge had rejected that case.

140 In relation to Mr Daily's claim for damages based on his legal costs, the Full Court concluded that the primary judge should have assessed damages in relation to Mr Daily's legal costs not only in relation to the BFA being uncertain, but also in relation to the BFA being set aside on hardship grounds. The Full Court therefore remitted the assessment of damages relating to Mr Daily's legal costs.

Pt 3: Principles relevant to loss caused by solicitor's negligence

141 Before turning to the appeal in this Court, it is necessary to address the measure of damages in tort and contract and the ways in which a client may prove loss by reason of the negligence of their solicitor.

Measure of damages in tort and contract

142 In an action in tort or contract, the compensatory principle entitles the injured party to damages in a sum which, so far as money can do, will put that party in the same position as they would have been in had the wrong not occurred.[125] Part of the compensatory principle requires the award of damages for consequential losses, such as those claimed by Mr Daily. In general, and subject to the rules that limit the awards of damages, when awarding damages for consequential losses the court awards compensation for all losses that the plaintiff would not have suffered but for the defendant's wrong.

143 For actions in tort, damages for consequential losses are intended to put the plaintiff in the same position as they would have been in, so far as money can do, had the tort not been committed.[126] A claim in negligence requires that the defendant's breach of a duty of care caused loss or damage to the plaintiff within the scope of that duty with damages recoverable where they are not too remote. As loss or damage is an element of the cause of action, the plaintiff bears the onus of proving loss or damage and negligence is not actionable until it results in actual damage to the plaintiff,[127] as distinct from potential or likely damage.[128] What qualifies as actionable damage is a question of fact and degree.[129] The onus then shifts to the defendant to exclude or limit the extent of liability or to establish any relevant defence.[130]

144 By contrast, damages for breach of contract aim to put the plaintiff in the same position they would have been in had the defendant performed the contract.[131] In essence, the court asks how much it costs the plaintiff to obtain a pecuniary substitute for the primary performance of the contractual obligation

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125 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; *Haines v Bendall* (1991) 172 CLR 60 at 63; *Stewart v Metro North Hospital and Health Service* (2025) 99 ALJR 1348 at 1354 [24]-[25]; 424 ALR 468 at 475.

126 *Butler* (1966) 114 CLR 185 at 191; *Haines* (1991) 172 CLR 60 at 63.

127 *Williams v Milotin* (1957) 97 CLR 465 at 474; *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 at 7 [8].

128 *Wardley* (1992) 175 CLR 514 at 526-527.

129 *Alcan Gove* (2015) 257 CLR 1 at 7 [8].

130 *Watts v Rake* (1960) 108 CLR 158 at 159.

131 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80-81, 161.

together with any consequential losses. For a claim for breach of contract, the onus is on the plaintiff to prove that the plaintiff has a cause of action for breach of contract.[132] Unlike a claim for negligence, in the absence of proof of actual loss a defendant will still be liable to pay nominal damages for breach of contract.[133] Like in tort, the onus is on the defendant to exclude or limit the extent of liability including proving that the plaintiff has failed to take reasonable steps to mitigate loss.[134]

Heads of loss or damage for negligence by solicitor

145 There are several ways in which a client may suffer and then prove loss or damage as a result of the negligent conduct of a solicitor.

146 On the one hand, the client may have incurred loss by reference to events that allegedly would have occurred but for the solicitor's negligence – that is, a past hypothetical. In such a case, there are two ways in which the client might formulate their claim. First, the client might claim to have lost an identified benefit or interest that they would have obtained but for the solicitor's negligence. As a matter of causation, the client would need to prove, on the balance of probabilities, that they would have obtained the identified benefit or interest but for the solicitor's negligence. This might be described as a case based on the loss of a particular outcome. So, for example, if a solicitor failed to ensure that a financial agreement was signed by all parties,[135] or failed to record the agreement of the parties to a financial agreement with sufficient certainty, the client might contend that, but for the solicitor's negligence, they would have had an enforceable financial agreement and thereby obtained a more favourable property settlement.

147 In the case of a client's claim for loss of a particular outcome caused by negligent drafting of a financial agreement, the client would need to prove, on the balance of probabilities, that (a) the financial agreement, including the substance of the terms of that agreement, *would* have been agreed; (b) that agreement *would not* have been set aside; and (c) that agreement *would* have secured for the client a better outcome than that which they in fact achieved. It would be necessary for

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132 In relation to proof of loss or damage, see *Amann Aviation* (1991) 174 CLR 64 at 80, 99, 118, 137-138.

133 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 300-301, 305, 312.

134 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138.

135 FLA, s 90G(1)(a).

the client to prove the amount of the loss, but they would be entitled to recover the loss in full.

148 Alternatively, the client might claim that, as a result of the solicitor's negligence, they "lost the chance or opportunity" to enter into a *different* agreement and thereby secure a more favourable property settlement, and recover damages "by reference to the court's assessment of the prospects of success of that opportunity had it been pursued".[136] This might be described as a case based on the loss of a chance. As a matter of causation, the client would need to prove, on the balance of probabilities, that the solicitor's negligence caused them to suffer the loss of a chance or opportunity to secure a better outcome, and that that chance or opportunity was a "significant chance"[137] or a "substantial prospect"[138] and had "*some* value (not being a negligible value)".[139] In a loss of chance case, therefore, the client is usually required to plead at least that the loss they have suffered is a loss of a valuable opportunity, identifying that opportunity with some particularity, as well as what the client might have done but for the solicitor's negligence where that is necessary to prove causation.[140]

149 In the case of a defective and negligently drawn financial agreement entered into under the FLA, proof of causation of the loss of a *chance* of obtaining a different financial agreement might depend on proof, on the balance of probabilities, of matters such as whether there was a substantial and valuable chance that the client and the other party would have agreed to a different financial agreement, including the substance of the terms of that agreement.[141] Once the client has proved that there was a substantial and valuable chance that they and the other party would have entered into a different agreement, their loss is then valued by reference to "the degree of probabilities or possibilities", often expressed

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136 *Sellars* (1994) 179 CLR 332 at 355. See also *Amann Aviation* (1991) 174 CLR 64 at 119.

137 *Sellars* (1994) 179 CLR 332 at 356.

138 *Sellars* (1994) 179 CLR 332 at 365. See also *Badenach v Calvert* (2016) 257 CLR 440 at 454-455 [40]-[41].

139 *Sellars* (1994) 179 CLR 332 at 355 (emphasis in original).

140 *Lantrak Holdings Pty Ltd v Yammine* [2023] FCAFC 156 at [17], [289], citing *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221 at [50].

141 *Badenach* (2016) 257 CLR 440 at 454-455 [40]-[41], 467 [98]. See also *Sellars* (1994) 179 CLR 332 at 355-356, 368-369.

as a percentage, of the chance or opportunity succeeding.[142] That assessment would take into account matters such as the likelihood that the different agreement would not have been set aside and that it would have secured a better outcome for the client than that which they in fact achieved.

150 Of course, a client also may have incurred loss that may be proved by reference to actual past events. For example, the client may have expended money in litigating against a third party with respect to the loss or damage suffered due to the solicitor's negligence. The costs of litigation that are reasonably incurred in an attempt to reduce losses caused by wrongdoing are recoverable.[143] In such a case, provided that the client can prove, on the balance of probabilities, that the solicitor's negligence caused the actual past loss, the client will be entitled to recover the full amount of that loss (subject to defences and limits including remoteness and mitigation).

Pt 4: The appeal in this Court

151 R Lawyers was granted special leave to appeal from that part of the judgment of the Full Court which dismissed ground 1 of the cross-appeal in the Full Court. On the hearing of the appeal, R Lawyers had two appeal grounds: (a) the Full Court should have found that, if a party to a contract has received less than they should have done as a result of their solicitor not performing their duty, damage is sustained when the contract is entered into; and (b) the Full Court should have found that loss and damage was sustained by Mr Daily upon entry into the BFA, so that his claim was statute barred.

152 After the hearing of the appeal, R Lawyers applied to amend its notice of appeal to include an additional ground. By the additional ground, R Lawyers contended that the Full Court erred in finding that the primary judge failed to consider Mr Daily's claim for damages for the loss of a particular outcome or the loss of a chance and in remitting the assessment of damages. R Lawyers contended that the Full Court erred in light of the primary judge's unchallenged finding that Mr Daily adduced no evidence at trial that would establish the terms of an alternative agreement. In other words, Mr Daily had failed to prove any loss

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142 *Sellars* (1994) 179 CLR 332 at 355, 368. See also *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643; *Thompson v Schacht* (2014) 53 Fam LR 133 at 135-136 [7], 147 [76].

143 *Talacko v Talacko* (2021) 272 CLR 478 at 502 [60], citing *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 11 [24], [26], in turn quoting *Berry v British Transport Commission* [1962] 1 QB 306 at 321.

or damage (other than the $38,000) that was caused by the negligence of R Lawyers.

153 R Lawyers' application to amend its notice of appeal should be granted. Before determining *when* any loss accrued, it is necessary to determine the *nature* of the claimed loss, which in turn requires consideration of whether Mr Daily adduced evidence sufficient to establish the claimed loss. The proposed ground of appeal is closely related to the question on which the parties have already joined issue and its determination is necessary to ensure that an already lengthy and complex proceeding may be finally resolved.

154 As will be explained, the appeal must be allowed because, regardless of whether Mr Daily's claim was for the loss of a particular outcome or the loss of a chance, the primary judge was correct to find that, subject to the award of damages of $38,000 for his legal fees, Mr Daily suffered no compensable loss because of the negligence of R Lawyers.

155 The appeal may be resolved by answering two questions.

156 First, what was Mr Daily's claimed loss? In answering this question, it will be necessary to deal with the ground of Mr Daily's notice of contention by which he submitted that the Full Court erroneously stated that his compensable damages claim included a claim for damages for the lost opportunity to negotiate a financial agreement.

157 Second, did Mr Daily prove that he suffered loss? Answering that question will require dealing with the other ground of Mr Daily's notice of contention, being that the Full Court was correct to find that the primary judge did not engage in the proper process of measuring Mr Daily's loss in so far as the primary judge failed to undertake the relevant comparison between the position Mr Daily would have enjoyed but for R Lawyers' negligence and the position he actually found himself in as a result of the negligence.

What was Mr Daily's claimed loss?

158 There was a lack of clarity in the manner in which Mr Daily's claim for damages for negligence was pleaded, conducted in the courts and decided. Sometimes, the argument for Mr Daily was framed in terms suggesting that his loss was the loss of a particular outcome. But at other times, those arguing Mr Daily's case used the language of the loss of a chance. This confusion has persisted in the argument in this Court where counsel for Mr Daily denied that he ever made a loss of chance case and counsel for R Lawyers submitted that was the only case he had ever advanced since the quantum hearing.

159 As has been explained, the Full Court misunderstood and misstated the way in which Mr Daily had put his case at trial and why the primary judge had rejected

that case.[144] However, that misunderstanding is explained to some extent by the fact that, by the quantum hearing, Mr Daily's case had shifted to being one expressed in terms of the loss of an opportunity to obtain a financial agreement on terms that would not have been vulnerable to being set aside on hardship grounds. In any event, as will be explained, regardless of whether Mr Daily argued a case based on the loss of a particular outcome or the loss of a chance, the primary judge was correct to find that Mr Daily did not prove that he had suffered any loss (apart from his legal fees in relation to the uncertainty claim).

Did Mr Daily prove that he suffered loss?

160 Mr Daily contended that his "claim as pleaded identified his damages as, inter alia, the difference between the Court's division of property and what he would have been required to pay upon separation pursuant to an enforceable financial agreement", referring to his statement of claim against R Lawyers.[145]

161 It may be accepted that, as Mr Daily submitted in this Court, "[s]imply put, damages should have been assessed as at the date of separation by undertaking a comparison of the position Mr Daily would have enjoyed but for the negligence of R Lawyers and the position that he found himself in as a result of such negligence". But, regardless of the basis on which Mr Daily sought or now seeks to put his case, Mr Daily simply did not prove that loss. In the Full Court, Mr Daily did not challenge the primary judge's finding that he adduced no evidence at the trial of what the terms of an alternative financial agreement would have been. The primary judge was correct to find that he adduced no such evidence.

162 Contrary to Mr Daily's submissions, the primary judge did not err in failing to separate out the issues of causation of loss and the assessment of damages. The task of the primary judge, after he correctly found that loss accrued, at the earliest, on separation, was to determine what position Mr Daily would have enjoyed but for R Lawyers' negligent advice and, therefore, how much worse off he was. The difficulty for Mr Daily was and remains that found by the primary judge – the failure by Mr Daily to prove loss caused by the negligence of R Lawyers other than the legal costs of the uncertainty claim.[146]

163 That position is reinforced by Mr Daily's submissions in this Court that the orders of the Full Court could and should be upheld on the basis of the facts and submissions made before this Court. None of the facts and matters identified

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144 See [139] above.

145 See [93] above.

146 See [114]-[125] above.

by Mr Daily, whether taken singularly or collectively, provide any basis for upholding the orders of the Full Court.

164 The four identified facts and matters were:

(1) the primary judge found that the intent of the parties was to contract out of the jurisdiction of the Court pursuant to s 79 of the FLA and to determine their separate interests to property settlement and division consequent upon a breakdown of their relationship;[147]

(2) the primary judge found that Mr Daily's loss arose upon separation or the institution of proceedings and that finding was upheld by the Full Court by way of the dismissal of R Lawyers' cross-appeal;[148]

(3) Mr Daily sought damages to be assessed on the difference between his expectation of payment to Ms Daily pursuant to the BFA and the settlement sum ordered following a consideration of Ms Daily's entitlements pursuant to s 79 of FLA;[149] and

(4) had the primary judge undertaken that task (also identified by the Full Court),[150] then the primary judge would have undertaken the comparison of the position that Mr Daily 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".

165 These facts and matters are not in dispute.[151] But acceptance of those facts and matters does not lead to the orders of the Full Court being upheld.

166 Mr Daily's central premise was that he would have secured a financial agreement that reflected his instructions in certain terms and he was entitled to damages for the difference between that financial agreement and the position he now finds himself in. That was the case which Mr Daily put to the primary judge and which was rejected. Mr Daily has maintained this central premise, although at times he has framed his case as a lost opportunity to obtain a financial agreement

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147 See [87] above.

148 See [103] and [131] above.

149 See [93] above.

150 See [114]-[125] above.

151 In relation to the third matter, R Lawyers contends that Mr Daily has argued a loss of chance case since the quantum hearing.

that would not have been set aside on hardship grounds. On either case, Mr Daily failed to prove that head of loss.[152] At no point in the proceedings did Mr Daily demonstrate that a different financial agreement would or might[153] have been agreed with Ms Daily. He did not prove: the substance of the terms of that agreement; that that agreement would or might not have been set aside; and that it would or might have secured a better outcome than the position he found himself in after the Court made orders under s 79 of the FLA.

167 Mr Daily claimed that he suffered loss in the amount of the difference between what the Court ordered he pay Ms Daily and what a financial agreement properly prepared in accordance with his instructions would have fixed as the amount he could be obliged to pay on the breakup of the marriage. But whether there was a difference between these two sums depended on identifying the amount which a properly prepared financial agreement would or might have fixed as the amount he could be obliged to pay Ms Daily. As the primary judge found, Mr Daily led no evidence at trial of what R Lawyers could or should have done to prepare a financial agreement of the kind just described.[154] And, there being no evidence at trial of what that hypothetical financial agreement would or might have been, Mr Daily led no evidence that an agreement of that kind would or might have been agreed with Ms Daily. On the contrary, at trial his central contention was that, unless a financial agreement had been prepared that would have fixed the amount he would be obliged to pay, there would have been no marriage and he and Ms Daily would have had no children.

168 Further, the primary judge found (as noted above) that: (a) Mr Daily was told he could not have a bullet proof agreement; (b) Mr Daily was told that there were five bases on which a financial agreement could be set aside (including hardship); and (c) this was a case of hardship. In these circumstances, to the extent to which Mr Daily pleaded a case based on the loss of a particular outcome, the case was not proved; it failed for want of evidence of the terms that the financial agreement should have contained, evidence that Ms Daily would have agreed to those terms prior to separation, and evidence that that financial agreement would have remained on foot and been enforceable at separation.

169 No different result would follow if it were accepted that Mr Daily had argued that he had lost an opportunity to obtain a *different* financial agreement that would not have been set aside on hardship grounds. Such a claim would also have

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152 See [146]-[149] above.

153 In relation to the case based on the loss of a particular outcome, see [146]-[147] above. In relation to the case based on the loss of a chance, see [148]-[149] above.

154 See [114]-[125] above.

failed for want of evidence: (a) of the substance of the terms that the financial agreement would or might have contained; and (b) that Ms Daily would or might have agreed to those terms prior to separation. If those matters had been proved to the requisite standard, then there would have been a further difficulty that Mr Daily had failed to establish that loss valued by reference to "the degree of probabilities or possibilities" that that agreement would or might have remained on foot and been enforceable at separation.

170 Both kinds of cases would have likely encountered a further difficulty – that the evidence would need to have addressed what terms were required in the financial agreement to avoid it being set aside under s 90K(1)(d) of the FLA on hardship grounds. For a case based on the loss of a particular outcome, that difficulty was insuperable. For a case based on the loss of a chance, the difficulty was at least very large, if not insuperable. Mr Daily failed to lead any evidence to prove that he would have secured, or that he would have had a substantial prospect of securing, an enforceable agreement which would have provided Ms Daily with less than the amount awarded.

171 It follows that the primary judge was correct to confine the assessment of damages in respect of Mr Daily's legal fees to the amount conceded by R Lawyers – that is, the costs of Mr Daily's proceeding against Ms Daily in so far as they related to the uncertainty claim. As Mr Daily failed to prove that he and Ms Daily would or might have entered into an alternative financial agreement that would or might not have been set aside on hardship grounds, he was not entitled to damages referable to his legal costs in litigating the hardship issue against Ms Daily. The Full Court was therefore wrong to remit the assessment of damages as they pertained to Mr Daily's legal fees.

172 For those reasons, the appeal must be allowed on the basis of R Lawyers' new ground of appeal.

Was Mr Daily's claim statute barred?

173 The conclusion that the appeal must be allowed on the basis of R Lawyers' new ground of appeal logically precedes the analysis of, and obviates the need to substantively consider, R Lawyers' initial appeal grounds. That approach is reinforced by R Lawyers' concession in the courts below,[155] which was maintained in this Court, that Mr Daily should be awarded $38,000 as damages in respect of his legal fees and the fact that, in the proposed amended notice of appeal, if R Lawyers succeeded on the new ground of appeal, it did not seek to disturb the award of damages in the amount of $38,000. The issue of whether a cause of action to recover that $38,000 falls within the limitation period in s 35(c) of

155 See [126]-[127] above.

the Limitation Act may raise questions, including as to the nature of the interest represented by the $38,000 in legal fees and whether it was separate damage,[156] that were not the subject of the initial grounds of appeal or argument in this Court.

174 Even if Mr Daily had proved, as is necessary to establish loss, that Ms Daily would or might have entered into an alternative beneficial financial agreement at a time or times prior to the separation declaration, on the proper construction of the BFA in issue in these proceedings, which was purportedly made under Pt VIIIA of the FLA, no loss or damage was sustained by Mr Daily until, at the earliest, the date of separation. No other conclusion is open.

175 As has been explained, s 35(c) of the Limitation Act prevents a claim in negligence being brought more than six years from the date on which the cause of action accrued. A cause of action in negligence is complete when damage is first sustained.[157] As we have seen, the combined effect of ss 90B, 90DA and 90DB of the FLA is that a financial agreement entered into before marriage is of no force or effect in relation to the property or financial resources of either or both of the spouse parties until a separation declaration is made and, in relation to other matters, unless and until the marriage breaks down.[158]

176 In sum, in so far as the BFA in issue in this appeal made provision for the division of property on separation, the loss or damage from the solicitor's negligent conduct that rendered that BFA void did not and could not crystallise until separation. Put in different terms, it is not until separation that a party unprotected by a financial agreement is exposed to s 79 of the FLA.[159] Section 79 does not operate like the legislation in New Zealand which identifies the property affected from the time of marriage.[160]

177 Moreover, until the time of separation, the couple's circumstances will vary over time. An assessment of whether loss or damage was occasioned to a party by entry into a financial agreement could not be undertaken until separation. Even if one could identify a point in time prior to separation when it was clear that no financial agreement could have been entered into then that would still not mean that loss or damage was suffered then. From that point until separation, the parties'

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156 See, eg, *Crumbie v Wallsend Local Board* [1891] 1 QB 503; *Christie v Purves* (2007) Aust Torts Reports ¶81-899 at 69,897-69,898 [42]-[48].

157 See [143] above.

158 See [80]-[83] above.

159 See [80]-[83] above.

160 See *Davys Burton v Thom* [2009] 1 NZLR 437 at 451 [24].

circumstances could still have changed so that no assessment could have been made as to whether compensable loss or damage was occasioned (for example, children born, financial harm or gain or personal misfortune).

178 That any loss or damage suffered by Mr Daily was not suffered until, at the earliest, separation remains true even if his case was framed as the loss of a chance. Although the loss of a chance of an economic benefit is itself a loss which has been actually sustained,[161] in the context of a financial agreement under the FLA[162] that loss of a chance is not ordinarily suffered until there is a separation declaration. The assessment of the value of that loss of a chance would proceed in accordance with the analysis by Brennan J in *Wardley*,[163] which was adopted by Lord Hoffmann in *Law Society v Sephton & Co (a firm)*.[164]

179 For those reasons, R Lawyers' initial appeal grounds must be rejected.

Pt 5: Conclusion and orders

180 For the above reasons, R Lawyers' application to amend its notice of appeal should be granted and the appeal must be allowed. Orders 2, 3 and 4 of the orders of the Full Court of 17 October 2024 should be set aside and, in their place, it should be ordered that the appeal to that Court be dismissed and that Mr Daily pay R Lawyers' costs of that appeal. Mr Daily is to pay R Lawyers' costs of the proceedings in this Court.

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161 See, eg, *Wardley* (1992) 175 CLR 514 at 544.

162 See [80]-[83], [174] above.

163 (1992) 175 CLR 514 at 536.

164 [2006] 2 AC 543 at 551.