

## Binding Financial Agreements an important element of SMSFs

*By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal*

It may not be romantic, but a leading SMSF legal specialist says putting in place a Binding Financial Agreement when drawing up an SMSF makes economic sense and could save court action and legal fees in the long-run.

Matthew Burgess, director of View Legal, said historically super entitlements could not be regulated under the Family Law regime but a number of cases, including *Adame & Adame* [2014] FCCA 42, have since remedied the situation.

“The *Adame* case provides an example where a pre-nup had been set aside,” Mr Burgess said,

Although the factual background of the case was somewhat complex, briefly, they were:

- The relationship was described as 'tumultuous' and the parties had separated and then reconciled on numerous occasions.
- The wife had been told by two separate lawyers (one of whom was introduced and paid for by the husband) not to sign the draft agreement.
- There was evidence that suggests that the husband may have attempted to avoid disclosing the existence of some assets to the wife.
- There was a lack of evidence to support that the lawyer who ultimately signed the certificate saying that he had provided the required advice to the wife had in fact provided the advice.

In the context of the above factual scenario, the court decided the agreement was not binding for the following reasons:

- the wife said she relied on the husband's representation of the assets that he had and that those representations were false;
- the court accepted that the wife was 'harassed until she signed the agreement'; and
- the wife's lawyer did not discharge all of his duties to provide her with independent advice.

“Mr *Adame* was certainly being very particular about what he disclosed in this case,” Mr Burgess said.

“Before this case, and others around that time, a splitting order could be imposed on superannuation, but it is advisable now that if you draw up a pre-nup or BFA it deals specifically with an SMSF if one is in place.

“It is often not considered in the case of an SMSF but it absolutely should be.”

Mr Burgess said the case of ex-Olympian swimmer Grant Hackett, in which he had two separate pre-nups which were both discarded by the court, highlights the importance of having a well-drawn up BFA inside an SMSF.

“It is rare these days for a BFA to be declared invalid,” he said.

# SMSFAdviser

“It can often be the case in a relationship that one party is significant younger and the other will have significant wealth in a SMSF, and even if the spouse is not a member of the SMSF, there are ways to regulate the distribution of wealth.

“At View Legal we position BFAs like a BDBN or a will. There’s times in life when you don’t have a contractual agreement and if something goes wrong it is lawyers or the Government that will be the only ones that make a lot of money.

“If these things are done properly they work. As people live longer, there is every chance that one party will have disproportionately more wealth, and a BFA can be in the interests of the new spouse as well.”

