



Quick cautionary tales for a better practice

## Episode 77

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# BFAs – What is adequate advice?

Drafting and advising on a pre-nuptial binding financial agreement (or BFA) can be a complex and challenging process. What's more, when the parties separate and one is seeking to set the BFA aside, the solicitors who prepared or advised on the BFA can find themselves caught in the crossfire, often many, many years after the file was closed.

In *R Lawyers and Mr Daily* the High Court considered a BFA that had been entered into in 2005 and was found to be void for uncertainty and liable to be set aside on hardship grounds. The court determined that a claim against the lawyer who had advised the husband was not statute-barred as time did not begin to run until the couple separated in 2018.

The solicitor in this case had provided some pro-forma written advice to the husband setting out a number of things that could lead to the BFA being set aside. The court held that the advice given was general and cursory, was not specific to the husband's circumstances and did not identify the potential for the agreement to be void for uncertainty. There was a breach of the lawyer's duty to take reasonable care in advising the husband.

So what might adequate advice look like? From the primary judgment in this case as well as the comments of Justice Aldridge in *Abrum and Abrum*, there are a lot of things to consider:

- What is the effect of the BFA taking into account the particular circumstances and anticipated future circumstances of the parties?
- What are the advantages and disadvantages of entering into the agreement for your particular client?
- Is there strict compliance with all of the formal requirements for a BFA?
- Are all of the terms clear? Is there any ambiguity in the treatment of potential future assets of the parties?
- Have you made a detailed file note of advice given and, ideally, confirmed that advice in writing with the client?
- Have you marked the file to be retained indefinitely, in case evidence is needed in future to defend a claim?

I'm Glenda Carry

*R Lawyers v Mr Daily & Anor* [2025] HCA 41

*Abrum v Abrum* [2013] FamCA 897