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Thorne in my side – The aftermath of *Thorne v Kennedy*

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Introduction

The 2017 High Court decision of *Thorne v Kennedy* [2017] HCA 49 to set aside two financial agreements on the basis of 'unconscionable conduct' and 'undue influence', was a significant moment in the history of financial agreements. If practitioners already had pause for thought as to whether financial agreements could easily withstand challenges, commentary suggests the ramifications of this decision will have a significant impact on the strength of all future financial agreements, and leave practitioners to wonder whether they should be signing a Statement of Independent Legal Advice.

This session will discuss both the clarifications and uncertainties which remained following the High Court's decision, as well as strategies and advice to be given to your client post *Thorne v Kennedy*, and will discuss drafting tips in light of this case.

Setting aside a Financial Agreement – the statutory framework

Section 90K(1) of the *Family Law Act* sets out the circumstances in which a Court may set aside a Financial Agreement. This section reads:

> **90K Circumstances in which court may set aside a Financial Agreement or termination agreement**
>
> (1) A court may make an order setting aside a Financial Agreement or a termination agreement if, and only if, the court is satisfied that:
>
> a. the agreement was obtained by fraud (including nondisclosure of a material matter); or
>
> aa. a party to the agreement entered into the agreement:
>
> i. for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

ii. with reckless disregard of the interests of a creditor or creditors of the party; or

ab. a party (the agreement party) to the agreement entered into the agreement:

i. for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or

ii. for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

iii. with reckless disregard of those interests of that other person; or

b. the agreement is void, voidable or unenforceable; or

c. in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

d. 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, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

e. in respect of the making of a Financial Agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

f. a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

g. the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

In respect of part VIIIAB Financial Agreements, the relevant section is 90UM(1).

Whereas section 90K(1)(b) operates to apply the principles of contracts and equity in determining whether an agreement is “void, voidable or unenforceable”, section 90KA brings these same principles into play in determining the enforceability of an agreement. This section reads as follows:

90KA Validity, enforceability and effect of financial agreements and termination agreements

The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:

(a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and

(b) has power to make an order for the payment, by a party to the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by theapplicable Rules of Court; and

(c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court.

In his paper "Binding or Bound to Fail", Justice Brereton draws out the two consequences of the operation of section 90K and 90KA together. They are:

1. The question of whether a Financial Agreement is "void, voidable or unenforceable" as referred to in 90K(1)(b) is to be determined according to the principles of law and equity applicable in determining the validity, enforceability and effect of contracts.

2. In proceedings to set aside, salvage or enforce a Financial Agreement, the Court's armoury includes the full range of remedies available to a court of law or equity[1].

Thorne v Kennedy

Mr Kennedy was a wealth property developer. He was 67 years of age when the parties met, and was worth between $18 million and $24 million. He was divorced with three adult children.

Ms Thorne was his fiancée. She was an Eastern European woman, living in the Middle East. At the time the parties met, she was 36 years old and had no substantial assets. She did not speak proficient English, and the parties generally conversed in Greek.

The parties met online on a website for potential brides. Mr Kennedy travelled overseas to meet Ms Thorne shortly after them met online. He told her that if he liked her, he would marry her, but that she would have to sign papers. His money was for his children.

During their courtship phase, Mr Kennedy travelled overseas twice to meet Ms Thorne. He took her on an extended holiday around Europe, during which he met her family. He bought her expensive jewellery. In February 2007, about seven months after Mr Kennedy and Ms Thorne met, they moved to Australia to live in Mr Kennedy's expensive penthouse with the intention of getting married.

[1] Justice Brereton, "Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements", (2012) 23(2) *Australian Family Lawyer*

The wedding was set for 30 September 2007.

On 8 August 2007, Mr Kennedy had a pre-nuptial Agreement drawn up.

On 19 September 2007, Mr Kennedy told Ms Thorne they were going to see lawyers about the signing of an Agreement. Mr Kennedy told Ms Thorne that she did not sign the Agreement then the wedding would not go ahead.

On 20 September 2007, Mr Kennedy took Ms Thorne and her sister to see an independent solicitor, Ms Harrison, who was an accredited family law specialist. Mr Kennedy waited in the car outside. It was during this appointment that Ms Thorne first became aware of the contents of the Agreement. By this time, Ms Thorne's parents and sister had been flown to Australia from Eastern Europe and accommodated for the wedding by Mr Kennedy. Guests had been invited to the wedding. Ms Thorne's dress had been made. The wedding reception had been booked.

The next day, Ms Harrison provided a written advice to Ms Thorne, which she subsequently explained to Ms Thorne. The advice concluded with the following paragraph:

> *"I believe that you are under significant stress in the lead up to your wedding and that you have been put in a position where you must sign this Agreement regardless of its fairness so that your wedding can go ahead. I also understand from what you have told me that you are longing to have a child and you see your relationship with [Mr Kennedy] as the opportunity to fulfil what may well be a long held desire. I hold significant concerns that you are only signing this Agreement so that your wedding will not be called off. I urge you to reconsider your position as this Agreement is drawn to protect [Mr Kennedy's] interests solely and in no way considers your interests."*

There was no dispute in the proceedings that Ms Harrison's advice was accurate.

A number of minor amendments to the Agreement were made at Ms Harrison's suggestion, and on 24 September 2007 Ms Harrison again met with Ms Thorne to explain her advice. Ms Thorne understood Ms Harrison's oral advice to be that the Agreement was the worst agreement Ms Harrison had ever seen. Ms Thorne however did not conceptualise that separation was a possibility, and was more concerned about her rights if Mr Kennedy died before her.

The Agreement was ultimately signed on 26 September 2007. The Agreement contained a Recital that within 30 days, the parties would sign another agreement in similar terms.

A second Agreement was ultimately entered into, in almost identical terms to the first. Ms Thorne met with Ms Harrison again on 5 November 2007, to get advice with respect to the second Agreement. Again, Ms Harrison urged Ms Thorne not to sign. During their meeting, Ms Thorne received a call from Mr Kennedy asking how much longer she was going to be. Ms Harrison gained the impression that Ms Thorne was being pressured to sign the document. Again, Ms Thorne ignored Ms Harrison's advice and signed the second agreement on the same day, 5 November 2007.

Four years later, Mr Kennedy signed a separation declaration, and the parties separated. Ms Thorne then commenced proceedings, seeking to set the two agreements aside, and seeking an adjustment of property and spousal maintenance.

The trial judge, Justice Demack, set aside both Agreements on the basis of duress, borne of the inequality of bargaining power.[2] She found that Ms Thorne was powerless but to enter into the Agreements, and pointed to the following six matters to ground this finding:

1. Her lack of financial equality with Mr Kennedy.
2. Her lack of permanent status in Australia at the time.
3. Her reliance on Mr Kennedy for all things.
4. Her emotional connectedness to their relationship and the prospect of motherhood.
5. Her emotional preparation for marriage.
6. The publicness of her upcoming marriage.

Her Honour went on to describe Ms Thorne's circumstances at paragraphs 91-92 as follows:

> *She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions ... She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world. Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear.*

The Full Court of the Family Court, comprised of Justices Strickland, Aldridge and Cronin, allowed Mr Kennedy's appeal against the decision of the trial judge.[3] They found that the trial judge had misapplied the test for duress, and that the elements of duress were not made out. The Full Court also dismissed Ms Thorne's submissions that the trial judge had erred in not finding that the Agreements ought to be set aside for other reasons, including non-disclosure and unconscionable conduct.

Ms Thorne appealed to the High Court. The High Court allowed the appeal, and found that both Agreements failed. The entirety of the Court found that the Agreements were tainted by unconscionable conduct from Mr Kennedy. The majority, comprised of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ also found the Agreements were vitiated on the basis of undue influence. Nettle J and Gordon J each delivered minority judgments.

[2] *Thorne & Kennedy* [2015] FCCA 484
[3] *Kennedy & Thorne* [2016] FamCAFC 189

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Unconscionable Conduct

Unconscionable conduct is an equitable remedy available pursuant to section 90K(1)(b), and is also referred to at section 90K(1)(e) of the Act.

As to whether there are two separate meanings of "unconscionable" for each purpose, Jarrett FM in *Jacobs & Vale* [2008] FMCAfam 641 found that there were. Justice Brereton however argues that the better view is that the reference to "unconscionability" in section 90K(1)(e) is informed by the equitable notion of unconscionability.

This question remains unanswered, however in *Thorne v Kennedy*, the High Court made it clear that in finding the Agreements vitiated for unconscionability, they were referring to the equitable remedy pursuant to section 90K(1)(b), and not the statutory reference to "unconscionable" at 90K(1)(e).

In terms of the substantive elements of unconscionability, the case that tends to spring to mind is *Commercial Bank of Australia v Amadio*[4]. In *Amadio*, the elements of unconscionable were defined as follows:

- A party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them; and

- That disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable[5]

The High Court in *Thorne v Kennedy* put this test in somewhat simpler language, at paragraph 38:

- The innocent party must be subject to a special disadvantage, which seriously affects the ability of that party to make a judgment as to their own best interests;

- The other party knew or ought to have known of the existence and effect of the special disadvantage; and

- The other party must have unconscientiously taken advantage of the special disadvantage.

[4] *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14
[5] Ibid at paragraph 12

The mere difference in the bargaining power of the parties is not enough. The disabling condition or circumstance must be one which seriously affects the ability of the innocent party to make a judgment as to his own best interests.[6]

Prior to *Thorne v Kennedy*, unconscionable conduct was raised recently in the context of a Financial Agreement in the decision of *Saintclare & Saintclaire* [2015] FamCAFC 245. The facts of this case are as follows:

- The parties began cohabiting in 2005/2006. They had two children together, born in 2006 and 2008 respectively. The parties married in early 2009.

- The parties entered into a Financial Agreement on 28 September 2009. This was 5 months after they were married, and was designed to replace a previous agreement they had pursuant to state de facto legislation.

- Separation occurred on 3 September 20101. The wife commented proceedings in December 2010, and sought to set aside the Financial Agreement, on the basis that:

    - The Agreement was described in the certificates and the recitals as a section 90B agreement when it ought to have been a 90C agreement.
    - Her execution of the Agreement was the result of undue influence (or in the alternative unconscionable conduct) exerted on her by the Husband, as:

        - She had been diagnosed as suffering from postnatal depression.
        - She was in debt.
        - The husband was abusive to her.
        - The husband was threatening to her.

- At trial, Ryan J found in favour of the Wife and set aside the Financial Agreement, on the basis the agreement was vitiated by undue influence and tainted by unconscionable dealing. She also found that the Agreement was not "binding" for the purposes of section 90G of the Act.

- The husband succeeded on appeal. The Full Court allowed the appeal. They found that neither undue influence or unconscionable conduct had been made out.

- In relation to unconscionable conduct, the Full Court could not identify any basis to conclude that the wife was in a position of special disadvantage with respect to the husband. In particular:

    - There could be little doubt that the husband "had an intimate knowledge of the stresses under which [the wife] laboured" but nothing about those "stresses"

6 ibid at Paragraph 462

amounted to a “special disadvantage” and nothing about his negotiating with knowledge of them amounts to unconscionable conduct;

- The evidence was that both parties through their respective solicitors were negotiating to achieve an agreement both parties desired;

- There was no evidence of any conversations between the wife and the husband to the effect that she was not just as desirous of agreement being reached as was the husband;

- There was no evidence which suggested that prior to, or at the time of, the execution of the agreement (including in the period after negotiations weresuspended at the time of the wedding) the wife had suggested that she did not want the agreement to proceed;

- There was no evidence before her Honour that, subsequent to the husband agreeing to suspend negotiations in the lead up to the parties’ wedding, the wife ever sought to suspend negotiations or that she instructed her solicitor to that effect.

In *Thorne v Kennedy*, the Full Court also found that Ms Thorne was not under a special disadvantage, nor that Mr Kennedy’s conduct was unconscionable. The Full Court referred to the following in support of this:

1. There were no findings of any misrepresentations by Mr Kennedy about his financial position.

2. Mr Kennedy was open early on that Ms Thorne would not receive any part of his wealth on separation.

3. Thorne's staunch belief that Mr Kennedy would never leave her and her lack of concern about her financial position while Mr Kennedy was alive.

4. Mr Kennedy's acceptance of handwritten amendments to the agreements that were made by Ms Thorne's solicitor.

The High Court in *Thorne v Kennedy* explicitly did not challenge the law relating to unconscionability, nor did they say that the Full Court had misapplied the test. However they found that the Full Court erred in its conclusion that that Ms Thorne was not under a “special” disadvantage, nor that Mr Kennedy took advantage of this.

In relation to the “special” disadvantage, this requires more than a mere difference in bargaining power; rather it requires an inability for a person to make a judgment as to his or her own best interests. The High Court said that the findings of the trial judge that Ms Thorne was powerless with no choice but to enter into the agreements pointed inevitably to the conclusion of a special disadvantage on her part.

The High Court also found that this special disadvantage was known to Mr Kennedy, and had in part been created by him. Although he had conveyed his intention early on that his wealth was to go to his children, the extent of the unfairness of the Agreement was not known until Ms Thorne met with her lawyer. He took unconscientious advantage of Ms Thorne's vulnerability to obtain the Agreements.

Thus, the elements of unconscionable conduct were made out.

Undue Influence

Undue influence arises where a transaction has been brought about by the exertion of influence or pressure by one party on the will of the other party, to the point where that party is deprived of free agency. What amounts to undue influence is difficult to define, and can arise from widely different sources. Crucial however is the extent to which the will of the weaker party is so overborne that it is no longer being exercised freely.

In *Thorne v Kennedy*, the High Court said that the question of whether a person's act is "free" requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a "mere channel through which the will of the defendant operated". Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be "markedly sub-standard" as a result of the effect upon the person's mind of the will of another.

There is a degree of overlap between undue influence, duress and unconscionability, however they both have distinctive spheres of operation, and one can be present without the other.

Undue influence can be either actual or presumed:

- Actual undue influence requires the claimant to prove that the wrongdoer exerted undue influence on the claimant, which resulted in the particular agreement.

- Presumed undue influence requires there to be a relationship of trust and confidence between the parties (either proven or from an existing category of relationships of influence). Once the relationship of influence is established, the dominant party bears the onus of establishing that the transaction was not procured by undue influence.

The difference between the two categories was also considered in the Full Court decision of *Saintclare*. There, the Full Court distinguished between presumptive and actual undue influence. If the wife was to succeed in a case founded in actual undue influence, it was necessary for her to prove facts that established that in making the agreement, she was not exercising her free and independent will. This was not borne out on the evidence. If the wife was to succeed in a case founded in presumptive undue influence, it was necessary for her to prove facts which established

that the antecedent relationship between her and the husband was such that the making of their agreement involved the exercise by him of dominion or ascendancy over her will and a concomitant dependence by her upon him or subjection to his will. Again, the Full Court could not identify any evidence that indicated that the wife was beholden or obliged to the husband, disadvantaged with respect to him or that he exercised any dominion over her.

Financial Agreements, and those entered into pursuant to sections 90B and 90UB in particular, are by their nature not arms-length and will often have elements of influence. The relationship of fiancé and fiancée was for a long time an established category of a relationship of influence.[7] The significance of this was that every section 90B agreement was potentially presumptively voidable for undue influence. However, the High Court in *Thorne v Kennedy* expressly rejected this category of relationship, saying at paragraph 36 that the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other.

In *Thorne v Kennedy*, Ms Thorne successfully argued the existence of actual undue influence. The High Court majority agreed with the trial judge that Ms Thorne had no choice but to enter into the Agreements. Relevant to this was the fact that Ms Thorne understood the advice of her lawyer that the Agreements were grossly unfair to her, yet signed them anyway. The trial judge found and the High Court agreed that this inconsistency was explained by Ms Thorne believing she had no choice but to sign the Agreements as presented to her. In other words, the extent to which she was unable to make clear, calm or rational decisions was so significant that she could not aptly be described as a free agent.

The High Court majority also, helpfully, gave a list of non-exhaustive factors that may be relevant to the determination of the presence of undue influence in relation to financial agreements. Specifically:

1. Whether the agreement was offered on a basis that it was not subject to negotiation.

2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement.

3. Whether there was any time for careful reflection.

4. The nature of the parties' relationship.

5. The relative financial positions of the parties.

6. The independent advice that was received and whether there was time to reflect on that advice.

[7] Yerkey v Jones (1939) 63 CLR 649 at 675.

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Duress

The elements of duress are:

- Illegitimate pressure is used by one person in relation to a transaction.
- The pressure causes the innocent party's consent to the transaction.

Historically duress has also required that the "illegitimate" pressure be unlawful or illegal. This has the effect of rendering duress fairly difficult to establish.

Duress does not, however, require that the innocent party's will be overborne, nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subject to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing only too well what he or she is doing.

Although no finding of duress was made by the High Court in *Thorne v Kennedy*, it featured heavily in all three judgments. At first instance, the trial judge found that Ms Thorne signed the Financial Agreements in circumstances of duress. The factual basis underpinning the trial judge's decision are set out in her judgment at paragraphs 88-94 as follows:

> 88. The [wife] knew that there would be no wedding if she didn't sign the first agreement. The husband's position about that was plain.
>
> 89. The husband did not negotiate on the terms of the agreement as to matters relating to property adjustment or spousal maintenance. He did not offer to negotiate. He did not create any opportunities to negotiate. The agreement, as it was, was to be signed or there would be no wedding. Without the wedding, there is no evidence to suggest that there would be any further relationship.
>
> 90. The [wife] wanted a wedding. She loved [the husband], and wanted a child with him. She had changed her life to be with [the husband].
>
> 91. She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions in [Country B]. She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to [the wife]. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.
>
> 92. Every bargaining chip and every power was in [the husband's] hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear.
>
> 93. [The husband] knew that [the wife] wanted to marry him. For her to do that, she needed to sign the document. He knew that she would do that. He didn't need to open up

> negotiations. He didn't need to consider offering something different, or more favourable to [the wife]. If she wanted to marry him, which he knew her to want, she must sign. That situation is something much more than inequality of financial position. [The wife's] powerlessness arises not only from her lack of financial equality, but also from her lack of permanent status in Australia at the time, her reliance on [the husband] for all things, her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage.
>
> **94. In those circumstances, the wife signed the first agreement under duress. It is duress born of inequality of bargaining power where there was no outcome available to her that was fair or reasonable.**

The Full Court did not agree with Her Honour's articulation of the test for duress. They stated at paragraphs 68 to 73:

> 68. That brings us to the complaint raised in this ground, that her Honour applied the wrong legal test to the facts, and we agree that that is the case. Indeed that was effectively conceded by the wife's senior counsel in oral submissions before us. However, we do not necessarily agree with the trustees' submission as to the law. The reliance on Crescendo Management Pty Ltd v Westpac Banking Corporation(1988) 19 NSWLR 40 at 45 – 46 is not entirely justified. There McHugh JA was discussing the conceptual basis of the defence of economic duress, albeit in terms in which the other members of the court did not join, and said this at 45:
>
> > The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate.
> >
> > His Honour continued at 45 – 46:
> >
> > A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.
>
> 69. Although the remarks of his Honour have been picked up in subsequent decisions, there has also been some difficulty in fitting the doctrine of economic duress within the equitable doctrines. Indeed, the court of appeal in Australia & New Zealand Banking Group v Karam [2005] NSWCA 344; (2005) 64 NSWLR 149 said as much. At [61] the court said this:
>
> > How the doctrine of economic duress fits with the equitable doctrines is unclear. The reference to "unlawful" conduct, read in context of the earlier authorities, was

> originally a reference to unlawful detention of goods. Concepts of "illegitimate pressure" and "unconscionable conduct", if they do not refer to equitable principles, lack clear meaning, outside, possibly, concepts of illegitimate pressure in the field of industrial relations.

70. Further, the uncertainty around the terminology led the court of appeal to make the following comments at [66]:

The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in Commercial Bank of Australia Ltd v Amadio.

71. **The correct test is whether there is "threatened or actual unlawful conduct", and not the test identified by her Honour. There needed to be a finding that the "pressure" was "illegitimate" or "unlawful"**.

72. It is not sufficient as her Honour says in [87] that the pressure may be overwhelming and that there is "compulsion" or "absence of choice". As is pointed out by the trustees in their written summary of argument at paragraph 35:

> The law's tolerance for at times intense pressure in relation to the making of agreements was long ago identified by Lords Wilberforce and Simon of Glaisdale in Barton v Armstrong [[1976] AC 104 at 118] (although in the minority generally, consistent with the majority on this issue):
> '...in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this pressure must be one of a kind that the law does not regard as legitimate." (Emphasis omitted)

73. As to the different test set out at [94] **it is beyond doubt that "inequality of bargaining power" cannot establish duress.** Thus, again, her Honour has erred.

The Full Court then came to the conclusion that the elements of duress were not made out, and the Agreements were not vitiated on this basis.

When the matter came before the High Court, they avoided making a determination as to whether or not duress existed. Rather, the plurality said that when the trial judge was referring to "duress", what she was actually meaning was "undue influence". And, as the Agreement was already vitiated on the basis of both undue influence and unconscionability, there was no need to also decide the issue of duress.

The High Court did however provide some interesting commentary regarding whether, to meet the requirements of duress, the pressure does actually need to be illegal/unlawful or whether illegitimate pressure would suffice. The High Court (and Nettle J in particular) suggested that, contrary to the prevailing opinion, it may be possible that lawful but illegitimate and improper conduct may be enough to ground a finding of duress. It will be interesting to see where this opening may lead.

The aftermath of *Thorne v Kennedy*

Although the commentary on *Thorne v Kennedy* has been extensive, to date there has only been a trickle of Family Court and Federal Circuit Court decisions following *Thorne v Kennedy*. Of note are the following.

Frederick & Frederick [2018] FCCA 1694

This was a decision of Judge Harper, who was asked to determine whether a financial agreement was vitiated by undue influence and unconscionable conduct. The facts are as follows:

- The husband was born 1961 in Australia and at the time of trial was 56 years of age. The wife was born 1979, overseas, and at the time of trial was 38 years of age.
- The parties met whilst the husband was on holidays and from 2003 onwards commenced a relationship. From 2003 until 2006, the husband travelled regularly to the wife's country, and leased an apartment there.
- On 2005, the parties' first child was born, and in 2007 their second child was born.
- In 2006, the wife arrived in Australia with the parties' first child, under a bridging visa which expired on 14 April 2007.
- On 5 February 2007, the wife had a conference with a solicitor, Mr Michael Soulos. The parties subsequently entered into a financial agreement on 5 February 2007.
- The parties married in 2007 and separated in or prior to 2013.
- The husband commenced proceedings, seeking a declaration that the financial agreement entered into by the parties in 2007 was binding. The wife in response sought an Order that the Agreement be set aside on the basis of undue influence and unconscionable conduct.

In relation to the question of undue influence, His Honour referred to the six factors set out in *Thorne v Kennedy* which "may have prominence" in determining undue influence in the context of pre-nuptial agreements. However he went on to emphasise his understanding that in creating this

list, the High Court was not setting out a prescribed checklist to be followed in every case. Rather, the High Court had made it clear that the role of the trial judge is to make an evaluative judgment in assessing whether a person is lacking free will, and that a trial judge must evaluate all the relevant circumstances.

His Honour also did not interpret *Thorne v Kennedy* to be suggesting that grossly unreasonable terms court, in of themselves and without more, support a finding of undue influence.

Ultimately, His Honour found that there were insufficient factors to lead to a conclusion that the Wife was a victim of undue influence, having regard to the following:

- Prior to signing, improved terms were negotiated to the Agreement.
- It was inconclusive as to whether the relationship would have been terminated if the financial agreement had not been signed.
- Even if the relationship had been terminated, the Wife had options available to her.
- The wedding was to be held in a Registry Office. There were no relatives present. It lacked the element of "publicness" which was present in *Thorne v Kennedy.*

In relation to unconscionable conduct, again His Honour differentiated the facts from *Thorne v Kennedy.* He found that whatever limitations there were upon her options, they were not eliminated or as severely confined as in *Thorne v Kennedy*. This led to the conclusion that she was not subject to a special disadvantage for those reasons.

Imbardelli & Imbardelli (No. 2) [2018] FamCA 865

This decision of Justice Macmillan involved a consideration of whether, pursuant to section 79A, final Orders should be set aside.

> **79A - Setting aside of orders altering property interests**
>
> (1) Where, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, the court is satisfied that:
>
> (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance;
>
> …
>
> (1A) A court may, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

Although section 79(1)(a) only refers explicitly to duress, Her Honour noted that section 79A is a remedial section which should be construed liberally to effect its intended purpose of achieving justice and equity.

Her Honour went on to confirm that the concepts of duress, undue influence and unconscionable conduct as discussed in *Thorne v Kennedy* were relevant to the matters she must determine with respect to the section 79A application. In applying the tests for duress, unconscionable conduct and undue influence as set out in *Thorne v Kennedy*, Her Honour ultimately found that the Orders should not be set aside on the basis of undue influence. In relation to unconscionable conduct however, Her Honour found that there was a case of special disadvantage on the part of the Wife, which the husband unconscientiously took advantage of that. On that basis, it would be inequitable for the husband to retain the benefit of the Orders and accordingly they were set aside.

Strategies and tips when drafting and advising on Financial Agreements

Commentary has varied greatly as to whether *Thorne v Kennedy* represents the ultimate death knell for financial agreements, or whether it is little more than a restatement of the equitable principles already alive and in full swing.

The answer, most likely, lies somewhere in between the two. That is, although the decision does not substantially add to the equitable principles of duress, undue influence and unconscionable conduct, the range of factual circumstances that may give rise to a finding of one of these appears to have broadened. The decision has also clarified some areas and raised further questions in relation to others.

For Family Lawyers advising on and/or drafting Financial Agreements, some of the practical implications of the decision are as follows:

1. The distinction between duress, undue influence and unconscionable conduct is now clearer. The High Court has given clear guidelines as to what to look out for in the context of financial agreements when considering these vitiating factors. Practitioners should familiarise themselves with the criteria for each equitable remedy.

2. Agreement presented in a 'take it or leave it' format should be avoided. If acting on the part of the stronger party, they ought to be advised that it is in their interests to be open to negotiate meaningful changes to the Agreement.

3. In *Thorne v Kennedy*, one of the facts giving rise to the finding of undue influence and unconscionable conduct was the ultimatum given by Mr Kennedy, and the conclusion from this that Ms Thorne had no options if the Agreement was not signed. What would have been the impact if Mr Kennedy had offered to assist Ms Thorne financially to get back on her feet if the Agreement was not signed?

4. Parties ought to be provided with sufficient time for careful reflection on both the terms of the Agreement and the advice given. Although the High Court did not say what a suitable length of time would be, this seems achievable by adhering to the following:

    a. Engaging in a thorough negotiation process.

    b. Ensuring the client is provided with the independent legal advice well before the day they sign the Agreement.

    Also note that what will constitute sufficient time will depend on the specific facts, and the more vulnerable a party, the more reflection time that is likely to be needed.

5. Although it is recognised that the nature of financial agreements in of themselves means that their terms will usually be more favourable to one party, the fairness or otherwise of an agreement can be relevant to a finding of undue influence. Specifically, the degree of unreasonableness can be an indicator as to whether the weaker party lacks the requisite free will, giving rise to undue influence.

6. Although duress was not found, the comments of the High Court with respect to the elements of duress have left it open for an argument to be made that otherwise lawful conduct is nonetheless improper and illegitimate in the context of entering into a financial agreement. This may provide an opening for further disputes.

7. If a second Agreement after marriage is proposed to be entered into, it ought not be made a condition of the pre-marriage Agreement. It is also likely that to the extent the first Agreement is tainted by undue influence or unconscionable conduct, these factors will spill onto a second Agreement.

8. Remember section 90F. This section prohibits an Agreement from limiting the power of a court to make an order in relation to the maintenance of a party if:

    > *when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit*

    In *Thorne v Kennedy* the High Court noted that the Agreement contained a recital to the effect that Ms Thorne was able to support herself without an income tested pension, allowance or benefit. This was clearly not the case. However because this issue was not specifically argued before the Court, all this was significant for was contextual construction.

This should operate as a reminder to practitioners to not include these sorts of statements if they are not true. Specifically, the inclusion of such a statement may be counter-productive in that it can assist to establish unconscionable conduct or undue influence.

9. Financial Agreements are contracts, and are subject to the same contract law and equitable principles as any other contract.

10. In *Thorne v Kennedy*, the advice given by Ms Thorne's lawyer could not have been less ambiguous. It was the worst agreement she ever saw. Ms Thorne understood this. What would have been the impact if the advice was not as strong, or Ms Thorne was found not to have understood the advice? Would undue influence have been made out?

11. There are a number of other references to equitable concepts in the *Family Law Act*. We have already seen the use of the equitable principles from *Thorne v Kennedy* applied to a consideration of the Court's discretion pursuant to section 79A. Another example is section 90G(1B), which allows the Court to "save" an otherwise defective financial agreement if it would be unjust and inequitable to do so. Will the fairness or otherwise of an Agreement now be relevant to the exercise of this discretion, in light of *Thorne v Kennedy*?

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