

High Court to rule on financial agreements

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How do the concepts of duress, undue influence and unconscionability apply to the setting aside of financial agreements? Are they alternative arguments or overlapping? Does the giving of legal advice mean that a financial agreement cannot be set aside for duress? These are the types of questions which may be addressed in a forthcoming decision of the High Court.

Brief litigation history

The Federal Circuit Court in *Thorne & Kennedy* [2015] FCCA 484 decided that a financial agreement signed shortly before the wedding and a second agreement signed shortly after their wedding were not binding and should be set aside because of duress. The Full Court of the Family Court in *Kennedy & Thorne* (2016) FLC 90-737 upheld an appeal by the husband's deceased estate. The Full Court found that the two agreements were not signed under duress and allowed the husband's appeal.

On 10 March 2017 the High Court granted special leave to the wife to appeal from the decision of the Full Court of the Family Court. The special leave application is reported as *Thorne v Kennedy* [2017] HCA Trans 54.

Basis for special leave application

The wife's counsel said the central question of the application for special leave was whether the High Court should give authoritative guidance on the principles of law and equity for setting aside financial agreements. The controversy reflected the "longstanding tension between the common law's enthusiasm for the sanctity of freedom of contract and equity's concern to prevent unconscientious misuse of bargaining power" (quoting Brereton J in "Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements" *Australian Family Lawyer*, Vol. 23, No 2.). The main equitable principle relied upon by the wife was duress but her alternative grounds were undue influence and unconscionability.

Counsel for the wife said that this is "an area that cries out for some guidance", particularly as these principles were now usually dealt with in the context of consumer legislation. He contended that the facts of the case made it "a particularly good vehicle" and "a golden opportunity" for the High Court to examine the application of principles such as duress to financial agreements because:

"It is difficult to contemplate a starker set of circumstances - no job, no home, no visa, her parents brought out from Romania. Four days before the wedding she is put in a position of 'sign the agreement or the wedding is off'."

Another issue raised before the High Court was whether an agreement entered into after a marriage is tainted by the circumstances of an agreement entered into before the marriage.

Opposition to granting of special leave

The husband's counsel, opposing the granting of special leave to appeal, argued that the principles of law and equity that should govern the court's approach, were set out in s 90KA *Family Law Act 1975* which provides that the court will apply "the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts", and specifically that the court "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."

Justice Edelman was not certain that s 90KA was adequate for the task, asking:

"are there not large issues such as whether lawful actual duress is sufficient to set aside a contract, what is meant by the presumption of undue influence, whether the limited circumstances of a relationship is sufficient for setting aside a contract on the basis of undue influence or duress, what amounts to a sufficiently special disadvantage?"

His Honour noted that there was limited Australian authority on lawful act duress and conflicting authority in England.

The husband's counsel contended that the law of duress was clear as *ANZ Bank v Karam* [2005] NSWCA 344 said that the act must be unlawful. Edelman J referred to the conflicting Privy Council authority of *R v Attorney-General* [2003] UKPC 22, an appeal from New Zealand.

The husband's counsel also argued that the legal advice requirement for financial agreements under the *Family Law Act* removes the parties from the category of any special disadvantage. He relied on the plain reading of s 90G(1), rather than any case authority.

Justice Keane said that compliance with s 90G(1) did not ensure that there had not been unconscionability:

"These provisions are directed to ensuring that the parties know what they are doing. They cannot guarantee that there has not been the unconscionable exercise of a superiority of bargaining power by one of the parties."

There was a discussion as to whether there was anything special about marriage which affected the operation of the principles of unconscionability, duress and undue influence compared to their operation in relation to commercial contracts. Keane J noted that a marital relationship "necessarily involves mutual support and maintenance" but then went on to say that "the marriage relationship which for centuries has recognised as one of its fundamental elements the obligations of mutual support - 'With all my worldly goods I thee endow', except that now we do not endow anybody with anything apparently."

The husband's counsel argued that at the time the financial agreements were signed the wife was unconcerned about her entitlements under the financial agreement in the event of a separation (and only concerned about the testamentary provisions) so it was inappropriate for her to "subsequently, when the matter turns out in a fashion that she does not intend, come back and complain about that particular agreement". She got the bargain that she wanted, so there was no question of compulsion, duress or unconscionability. He also submitted that it was not an appropriate case for the High Court to examine the principles.

Special leave granted

The High Court granted special leave to the wife to appeal. At this stage, written submissions and other documents are due to be filed by 24 May 2017.

Cases mentioned in the special leave hearing which may be looked at by the High Court to examine their applicability to financial agreements include *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447; *Yerkey v Jones* [1939] HCA 3; (1939) 63 CLR 649; *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113; *Louth v Diprose* [1992] HCA 61; (1992) 175 CLR 621; and *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 457.

What can we expect?

The legal difficulties which may be addressed in the appeal include:

- The distinctions between duress, undue influence and unconscionable conduct but particularly duress. Some Family Law Court judges and family lawyers have found it difficult to apply them and to distinguish between them.
- Whether a different test applies to marital relationships than to commercial relationships.
- Whether duress requires "illegitimate pressure" or there can be "lawful act" duress.
- Whether the giving of legal advice as required by s 90G(1) means that there cannot be a finding of duress (or perhaps undue influence or unconscionable conduct).
- Whether an agreement signed after marriage is tainted by problems associated with an agreement signed prior to marriage.

This High Court appeal is "a golden opportunity" for Family Law Courts and family lawyers to receive some guidance, not only about the application of duress to financial agreements (and perhaps undue influence and unconscionable conduct as well) but also the interaction of s 90G(1) and s 90KA. It is over 16 years since financial agreements were introduced into the *Family Law Act*. Some guidance on these issues from the High Court is well overdue.

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