

***Thorne v Kennedy* – Has the High Court hung financial agreements out to dry?**

Jacky Campbell
Forte Family Lawyers

There has been a strong reaction, almost panic-stricken, in the media and by lawyers to the first examination of financial agreements by the High Court. Is this reaction justified? Has the High Court hung financial agreements out to dry, or are they still a viable option?

In *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 the High Court set aside two financial agreements, casting considerable doubt on the viability of financial agreements which are a bad bargain for one of the parties. Unanimously, the High Court set aside the two agreements for unconscionable conduct. The plurality also set them aside for undue influence, finding it unnecessary to decide whether there was duress. Helpfully, the High Court explained the distinctions between the three concepts, as in the existing case law the concepts are often confused and used interchangeably. The question is, in clarifying the law, did the High Court set such a high bar, that it will be impossible for a financial agreement to withstand an application to set it aside?

The facts

The wife was aged 36 and the husband was 67 when they met on a bride website in mid-2006. The wife was living overseas, spoke Greek and very little English. She had no children and no assets of any substance, whilst the husband was an Australian property developer with assets worth at least \$18 million. He was divorced from his first wife, and had three adult children.

Following their courtship, during which the husband promised the wife that he would look after her like "a queen", the wife travelled to Australia with the husband in February 2007 and moved into his penthouse. The husband made it clear to the wife from very early on that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife, however, did not learn the terms of the first agreement until 10 days before the wedding. By that stage, the wife's parents and sister had arrived in Australia from Eastern Europe for the wedding. The husband told the wife that if she failed to sign the first agreement, the wedding was off.

When presented with the draft first agreement, the wife's only concern was with the testamentary provisions - not the separation provisions. Her solicitor advised the wife orally and in writing not to sign the first agreement, saying that it was all in the husband's favour. After some minor changes to the testamentary provisions of the first agreement requested by the wife's solicitors were agreed to by the husband, the wife received further advice on the amended first agreement. Her solicitor

again advised her not to sign it. The wife understood her solicitor's advice to be that it was the worst agreement that the solicitor had ever seen. Under the separation provisions, the wife was to receive a total payment of \$50,000 plus CPI in the event of a separation after at least three years of marriage, which the wife's solicitor described as "piteously small". In the event of the husband's death, the wife would receive an apartment worth up to \$1.5M, a Mercedes and a continuing income. The wife nevertheless signed the first agreement 4 days before the wedding. The first agreement contained a recital that within 30 days the parties would sign another agreement in similar terms. In November the wife signed the second agreement, revoking the first agreement but otherwise in the same terms. The wife's solicitor urged her not to sign the second agreement. During the meeting the wife received a telephone call from the husband asking her how much longer she would be. The wife's solicitor had the impression that the wife was being pressured to sign the second agreement.

The husband signed a separation declaration after the couple had been cohabiting for about 4½ years. It was slightly less than 4 years after the first agreement was signed.

Litigation history

The wife commenced proceedings in the Federal Circuit Court, seeking orders under the *Family Law Act 1975* ("FLA") that both agreements be declared not to be binding and/or to be set aside, and orders for a property settlement and spousal maintenance. The husband died part way through the hearing and the husband's legal personal representatives were substituted for him in the proceedings.

In March 2015 Demack J in *Thorne & Kennedy* [2015] FCCA 484 made orders that neither Agreement was binding and set them both aside. Demack J held (at [94]) that the wife had:

"signed the Agreements under duress borne of inequality of bargaining power where there was no outcome to her that was fair and reasonable."

On 26 September 2016 the Full Court of the Family Court (Strickland, Aldridge and Cronin JJ) in *Kennedy & Thorne* (2016) FLC 90-737 allowed an appeal by the husband's estate. The Full Court found that both agreements were binding on the parties, holding that there had *not* been duress, undue influence or unconscionable conduct by the husband.

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. Further details of the special leave application are in an article by the writer at <http://www.wolterskluwercentral.com.au/legal/family-law/high-court-rule-financial-agreements/>

The grounds of appeal were that the Full Court erred in law in failing to find the financial agreements were not binding and they should be set aside on the ground of duress, undue influence or unconscionable conduct.

What did the High Court decide?

The judgment of the plurality was delivered on 8 November 2017 by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ. They held that the findings and conclusion of the trial judge should not have been disturbed by the Full Court and both agreements were voidable due to both undue influence and unconscionable conduct.

The plurality said that the trial judge used duress interchangeably with undue influence, and considered that undue influence was (at [2]) “a better characterisation of her findings”. The plurality decided that it was not necessary to consider whether the agreement should be set aside for duress.

In two separate judgments, Nettle and Gordon JJ agreed that the agreements should be set aside for unconscionable conduct, but did not agree that they should be set aside for undue influence.

Marriage and equitable principles

Although initially the wife’s case was that the principles of common law and equity as described in s 90KA (and also applied in s 90K) might be affected by their statutory context and interpreted differently because of the marital relationship, she conceded (at [23]) “that the principles were not altered although the particular circumstances of the marital context would be taken into account”. The High Court plurality accepted that the same tests applied to marital relationships as to commercial relationships when assessing vitiating factors such as duress, undue influence and unconscionable conduct, although, of course, duress and undue influence generally, if not always, arise in non-commercial contexts.

Requirements of duress

The plurality commenced by considering the requirements of duress, although it held that it was not necessary to decide whether the agreement should be set aside for duress. The plurality described the requirements for duress (at [26]):

“Duress does not require that the person'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 subjected 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”
[footnotes removed, but relying strongly on *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40]

The plurality noted (at [27]) the uncertainty as to whether duress should be based on any unlawful threat or conduct or, whether lawful threats or conduct might suffice. It said that the question was a “difficult” one, but did not shed any light on the answer to it.

The plurality’s view was that it was not necessary for the trial judge (and therefore the High Court) to determine whether there was common law duress, because the sense in which the trial judge described the pressure on the wife was to focus on the wife’s lack of free choice (in the sense used in the undue influence cases) rather than whether the husband was the source of all the relevant pressure, or whether the impropriety or illegitimacy of the husband’s lawful actions might suffice to constitute duress.

Requirements of undue influence

The High Court plurality referred (at [30]) to

“the difficulty of defining undue influence” and that “the boundaries, particularly between undue influence and duress, are blurred”. Undue influence occurred when a party was “deprived ... of ‘free agency’” [footnotes removed].

In *Johnson v Buttress* (1936) 56 CLR 113 at 134; [1936] HCA 41, Dixon J described how undue influence could arise from the “deliberate contrivance” of another (which naturally includes pressure) giving rise to such influence over the mind of the other that the act of the other is not a “free act”. The plurality accepted this analysis, and said (at [32]):

“The question 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. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party ... 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.” [footnotes omitted]

The plurality noted (at [14]) that there were different ways to prove the existence of undue influence. One method of proof was by direct evidence of the circumstances of the particular transaction and that was the approach relied upon by the trial judge and the High Court. The plurality rejected the proposition that the wife was entitled to the benefit of a presumption of undue influence because of the relationship of fiancé and fiancée, as that presumption no longer existed.

Requirements of unconscionable conduct

The parties agreed that the applicable principles of unconscionable conduct in equity were recently restated by the High Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25. No submissions were made as to whether the statutory concept of unconscionable conduct in s 90K(1)(e) might differ from the equitable concept in s 90K(1)(b) and the High Court did not determine that issue.

A finding of unconscionable conduct requires (at [38]) the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests". The other party must also unconscientiously take advantage of that special disadvantage, and have known or ought to have known of the existence and effect of the special disadvantage.

The plurality quoted favourably from *Amadio* (1983) 151 CLR 447 at 461, where Mason J emphasised the difference between unconscionable conduct and undue influence:

"In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position'."

The trial judge's decision

The plurality found that the trial judge was at a considerable advantage in assessing the parties and their personalities, particularly where issues of undue influence and unconscionable conduct were involved. In *Kakavas* the High Court said that where a transaction is sought to be impugned for vitiating factors, such as duress, undue influence or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts." On appeal, it is essential for the appellate court to scrutinise the trial judge's findings in light of the advantages enjoyed by the trial judge.

The trial judge posed the hypothetical question of why the wife would sign an agreement when she understood the advice of her solicitor to be that the agreement was the worst that the solicitor had ever seen. The trial judge also asked, despite the advice of her solicitor, why the wife failed to conceive of the notion that the husband might end the marriage.

The trial judge described duress ([2015] FCCA 484 at [68]) as "a form of unconscionable conduct". The plurality said that this did not mean that duress was subsumed within the doctrine of unconscionable transactions, but the trial judge used "unconscionable" in the sense described by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd* [(1998) 194

CLR 395 (at [34])) as "to characterise the result rather than to identify the reasoning that leads to the application of that description".

The trial judge concluded that the wife was powerless to make any decision other than to sign the first agreement, and referred to an inequality of bargaining power and a lack of any outcome for the wife that was "fair or reasonable". However, the trial judge also explained that the wife's situation was "much more than inequality of financial position", setting out six matters which, in combination, led her to the conclusion that the wife had "no choice" or was powerless:

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

These six matters were the basis for what the plurality described as the "vivid" description by the trial judge (quoted at [47]) of the wife's circumstances:

"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."

As to the second agreement, the High Court plurality noted (at [48]) that trial judge held that it was "simply a continuation of the first – the marriage would be at an end before it was begun if it wasn't signed". In effect, the trial judge's conclusion was that the same matters which vitiated the first agreement, with the exception of the time pressure caused by the impending wedding, also vitiated the second agreement. The factors had not otherwise dissipated.

The Full Court's decision

The Full Court found that the agreements were fair and reasonable because, as summarised by the plurality (at [51]):

1. The husband had told the wife at the outset of their relationship, and she had accepted, that his wealth was intended for his children
2. The wife's interest, which was provided for in the agreements, concerned only the provision that would be made for her in the event the husband predeceased her.

The Full Court held that the wife could not have been subject to undue influence because she acquiesced in the husband's desire to protect his assets for his children and because she had no concern about what she would receive on separation. The Full Court also held that the husband's conduct was not unconscionable because he did not take advantage of the wife, referring to:

1. Its findings of the lack of any misrepresentation by the husband about his financial position;
2. The husband's early statements to the wife that made clear that she would not receive any part of his wealth on separation;
3. The wife's staunch belief that the husband would never leave her and her lack of concern about her financial position while the husband was alive; and
4. The husband's acceptance of handwritten amendments to the agreements that were made by the wife's solicitor.

The High Court plurality, noting (at [54]) the advantages enjoyed by the trial judge in evaluating the evidence, said that with one exception, none of the findings of fact by the trial judge were overturned by the Full Court. That exception was the Full Court's rejection of the trial judge's finding that there was no outcome available to the wife that was fair or reasonable. The High Court found that the Full Court erred in rejecting this finding. It was open to the trial judge to conclude that the husband, as the wife knew, was not prepared to amend the agreement other than in minor respects. Further, the High Court plurality said (at [55]) that the description of the agreements by the trial judge as not being "fair or reasonable" was not merely open to her, it was "an understatement". The unchallenged evidence of the wife's solicitor was that the terms of the agreements were "entirely inappropriate" and wholly inadequate.

As the terms of the agreement were so unfavourable to the wife – a bad bargain – the plurality considered those terms to be relevant to a finding of undue influence. It said (at [56]) that the trial judge:

“was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature.”

The plurality did not agree with the Full Court that the trial judge’s conclusion was based only upon an inequality of bargaining power. The trial judge carefully set out the 6 specific factors (stated earlier in this paper) which, together with the lack of a fair or reasonable outcome, led her to the conclusion that the wife had no choice but to enter into the two agreements.

The plurality’s conclusion

The plurality set out factors which it identified as being relevant to whether a financial agreement should be set aside for undue influence (at [60]):

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

These factors were not only important to the determination in this case, but clear guidance as to the factors which should be looked at in future applications to set aside a financial agreement for undue influence.

In relation to unconscionable conduct, the High Court plurality relied on *Amadio* and said (at [64-65]) that the adjective "special" in the requirement for “special disadvantage” is “used to emphasise that the disadvantage is not a mere difference in the bargaining power but requires an inability for a person to make a judgment as to his or her own best interests”.

The trial judge found that the wife's powerlessness and lack of choice but to enter into the agreements pointed inevitably to the conclusion that she was at a special disadvantage. The husband was aware of the wife's special disadvantage and it was, in part, created by him:

1. He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it.
2. She had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements, even though she knew in advance that there was to be some type of document.
3. The wife and her family members had been brought to Australia for the wedding by the husband and his ultimatum was not accompanied by any offer to assist them to return home.

The High Court plurality said these matters increased the pressure which contributed to the substantial subordination of the wife's free will in relation to the agreements. The husband took advantage of the wife's vulnerability to obtain agreements which, on the uncontested assessment of the wife's solicitor, were entirely inappropriate and wholly inadequate.

Minority judgments

There were two separate minority judgments, being of Justices Nettle and Gordon. Both agreed that the 2 agreements should be set aside for unconscionability, but not for undue influence.

Justice Nettle felt he could not depart from the decision of the Court of Appeal of the Supreme Court of New South Wales in *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149, which decided that the concept of illegitimate pressure should be restricted to the exertion of pressure by "threatened or actual unlawful conduct". He said that had "largely been followed without demur".

Justice Nettle said (at [71]) that there was much to be said for the view that, the test of illegitimate pressure should be whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests. However, the equitable doctrine of unconscionable conduct did not have the same restrictions as undue influence and is not restricted to unlawful means.

Although Nettle J believed that the concept of illegitimate pressure might be more appropriate for this case, it was also capable of being seen as unconscionable conduct, for reasons similar to those expressed by the plurality. Like the plurality, Nettle J's view (at [76]) was that the circumstances had so affected the wife's state of mind that she was incapable of make a judgement in her own interests. There was no other rational explanation for the wife's decision not

to insist upon the substantive changes which her solicitor recommended, and instead to acquiesce to the husband's "extraordinary demands".

The second agreement was dependent for its efficacy upon the first agreement, and so it fell with the earlier agreement, but, if that were not so (at [77]) the wife was "in a position of special disadvantage which rendered her even less capable of making a decision in her own best interests to refuse to sign the second agreement than she had been capable at the time of the first agreement of insisting upon amendments in accordance with [her solicitor's] recommendations". On this analysis, the second agreement was more at risk of being set aside than the first agreement.

Justice Nettle held that it was against equity and good conscience for the husband or his successors to be permitted to enforce either agreement.

Justice Gordon said in relation to unconscionability, (at [81]) that although the wife's "independent, informed and voluntary will was not impaired, she was unable, in the circumstances, to make a rational judgement to protect her own interests". Those circumstances were evident to and substantially created by the husband, and it was unconscionable for the husband to procure or accept the wife's assent to the agreements.

Justice Gordon held that undue influence did not apply because (at [80]) the wife's "capacity to make an independent judgment was not affected". She "was able to comprehend what she was doing when she signed the agreements, and that she knew and recognised the effect and importance of the advice she was given". Moreover, she wanted the marriage to proceed and to prosper. She knew and understood that it would proceed only if she accepted his terms. Once she decided to go ahead with the marriage, it was right to say, as the trial judge said, that she had "no choice" except to enter into the agreements. No other terms were available. But her capacity to make an independent, informed and voluntary judgment about whether to marry on those terms was unaffected and she chose to proceed. Her will was not overborne.

Justice Gordon set out the requirements to establish unconscionable conduct (at [113]):

"A special disadvantage may also be discerned from the relationship between parties to a transaction; for instance, where there is 'a strong emotional dependence or attachment' ... Whichever matters are relevant to a given case, it is not sufficient that they give rise to inequality of bargaining power: a special disadvantage is one that "seriously affects" the weaker party's ability to safeguard their interests."

She found that the wife was under a special disadvantage and that the agreements were "grossly improvident" (*Bridgewater v Leahy* (1998) 194 CLR 457 at 493). It was relevant that the wife's entitlements in the event of separation were (at [121]) "extraordinarily and disproportionately small

in comparison to what the wife would have been entitled to if she had not entered into the agreements". Unlike the other judges, who looked at the general fairness of the agreements, Gordon J, expressly compared the wife's entitlements under the agreements to her entitlements under the FLA, if she had not entered into the agreements.

Although the wife was expecting an agreement about the husband's wealth, he had brought her to Australia promising to look after her like "a queen" and it was only 10 days before the wedding that she received detailed information about the husband's finances and became aware of the specific contents of the first agreement.

Justice Gordon said (at [123]) that the fact that the wife received independent legal advice about the two agreements and rejected her solicitor's recommendation on each occasion did not mean that there was not unconscionable conduct. The fact that she was willing to sign both agreements *despite* being advised that they were "terrible" served to underscore the extent of the special disadvantage under which she laboured, and to reinforce the conclusion that it was unconscientious for the husband to procure or accept her assent.

Section 90F

The agreements included an "acknowledgement" that the wife was able to support herself without an income tested pension, allowance or benefit, taking into account the terms and effect of the agreement when the agreement came into effect. This statement was designed to ensure that the agreement, in compliance with s 90F, ousted the jurisdiction of the court to make an order for spousal maintenance.

As the plurality said, this statement was made (at [20]) despite the wife's "extremely limited personal means". The plurality made no findings on whether the s 90F declaration was effective as submissions were not made with respect to it either in the Full Court of the Family Court or in the High Court, but the plurality appeared to express doubt as to whether the wife was bound by her "acknowledgment". The High Court drew the attention of the parties to the issue, but because of the way the case was presented it was significant only (at [20]) "as a matter of contextual construction", which suggests that the incorrect statement may have assisted the plurality to reach the conclusions it made.

What next?

The High Court unanimously agreed that a financial agreement which was a bad bargain for a party who had been given legal advice not to enter into it, might be evidence of a vitiating factor

such as duress, undue influence and unconscionable conduct. In the process, it clarified aspects of the law relating to the financial agreements, but also created new uncertainties.

Areas where *Thorne v Kennedy* gives some clarity for the future include:

1. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing where there has been undue influence in the particular context of pre-nuptial and post-nuptial agreements. They are repeated here because of their importance:
 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; and
 6. The independent advice that was received and whether there was time to reflect on that advice.
2. Unfair and unreasonable terms of a financial agreement are relevant to a consideration of whether there has been undue influence or unconscionable conduct.
3. It is safer if the agreement provides for a fair outcome, by reference to s 79 or otherwise, and is not a "bad bargain".
4. Entering into an agreement after marriage in the same terms as one entered into before the marriage will not overcome issues of undue influence or unconscionable conduct associated with the pre-nuptial agreement.
5. There is no longer any doubt as to whether undue influence can arise where a party has received independent legal advice.
6. Solicitors are sensible to be wary of "ink on the wedding dress" or "ink on the tuxedo" type agreements. If there are those concerns, the better approach is probably not to have a pre-nuptial agreement, but to simply have a post-nuptial agreement. Of course, the client may not want to marry without an agreement, because of the risk that the other party may not sign one afterwards. In *Thorne v Kennedy* the pre-nuptial agreement required both parties to enter into a post-nuptial agreement in the same terms as the pre-nuptial agreement, which

was almost certainly counter-productive to finding that she entered into the second agreement voluntarily.

7. The principles of common law and equity are interpreted in the same way in a marital relationship as in other contexts.
8. The relationship of fiancé and fiancée is no longer a category of relationship where the presumption of undue influence applies.

Whilst the High Court gave clarity on some issues, many others were left unresolved. In reality, there are more uncertainties than there were before. These include:

1. How will the 6 factors be applied to other cases? – Dilemmas will undoubtedly arise when applying them to other facts. Does every factor need to be relevant? How long is needed for "careful reflection"? What if there are limited negotiations? What if the advice received by the weaker party was not as emphatic as it was in *Thorne v Kennedy*?
2. Although the plurality was clear that the circumstances constituted undue influence, there were two dissenting judgments.
3. Duress – The High Court did not address whether the agreements could have been set aside for duress.
4. Lawful act duress – There is limited Australian authority on "lawful act duress" and conflicting authority in England as to whether pressure must be "illegitimate" to constitute duress. The law in this area has not been clarified.
5. Test for "bad bargain" – The plurality described the agreements as "unfair and unreasonable", and Nettle J described the husband's demands as "extraordinary". Only Gordon J expressly tested the terms of the agreements against the wife's entitlements under the FLA without the agreements. Is Gordon J correct? Or are financial agreements in the context of vitiating factors tested against another standard?
6. Effect on s 90K(1)(a) – Will "a bad bargain" mean that a financial agreement is more likely to be set aside for fraud, remembering that the court has a discretion as to whether to set aside an agreement, even if it finds that there was fraud?
7. Effect on s 90K(1)(d) – Will the test for hardship in relation to the care of children in *Fewster & Drake* (2016) FLC 93-745; [2016] FamCAFC 124 be ameliorated and the courts adopt a test along the lines of the test in *Pascot & Pascot* [2011] FamCAFC 945?

8. Meaning and effect of s 90KA – At the special leave hearing, Edelman J was not certain that s 90KA was "adequate" for its task. The High Court did not consider the meaning and effect of s 90KA, which is an issue the Family Law Courts have struggled with.
9. Unconscionability – Whether there is a distinction between unconscionability making the agreement void, voidable or unenforceable under s 90K(1)(b) and statutory unconscionability under s 90K(1)(e) remains unresolved.
10. Third parties – The case was only concerned with the presence of a vitiating factor between parties to an agreement. The plurality noted that duress, undue influence or unconscionable conduct by a third party raises different issues.
11. Section 90F – What is the effect of a statement in an agreement that a party is able to support themselves without an income-tested pension, allowance or benefit when that statement is untrue? This issue was raised by the High Court plurality which seemed to express doubt as to the effectiveness of such statements, but the issue was not determined.
12. False recitals – If s 90F statements are not effective when they are clearly untrue, what about statements that the parties had the ability to inspect financial disclosure of the other party or engage accountants or valuers but chose not to do so, when in fact they had no real choice? If there is unequal bargaining power and the parties state that they have waived their rights to seek disclosure, will this help to establish that there has been undue influence or unconscionable conduct?
13. Section 79A – How do the principles of undue influence and unconscionable conduct apply when a party is seeking to set aside a property settlement order under s 79A? Whilst s 79A(1)(a) expressly refers to duress (which appears to be difficult to establish), does "any other circumstance" include undue influence and unconscionable conduct as applied by the High Court to financial agreements? The High Court said that despite legal advice there could still be undue influence. If the "agreement" has been made into orders of the court, does this intervening step reduce the likelihood of establishing undue influence?
14. Section 90G(1A) and "bad bargains" – A majority of the Full Court of the Family Court in *Hoult & Hoult* (2013) FLC 93-546; [2013] FamCAFC 214 said that the terms of the bargain were irrelevant when considering whether a financial agreement which does not meet the s 90G requirements should be "saved" under s 90G(1A) because it is "unjust and inequitable" if the agreement is not binding on the parties. Some judges, such as Murphy J (the trial judge in *Hoult*), and Thackray J (who supported the orders of the majority in *Hoult* but for different reasons) disagreed. Is it now open, and indeed proper, for the Family Law

Courts to re-consider whether a “bad bargain” should influence the exercise of the s 90G(1B) discretion as to whether it is “unjust and inequitable if the agreement were not binding on the spouse parties to the agreement”. Considerable weight was attributed by the High Court to the unfairness and unreasonableness of an agreement when considering whether there were vitiating factors under s 90K. Why should the s 90G(1A) discretion not take into account the fairness and reasonableness of the agreement?

Conclusion

The impact of *Thorne v Kennedy* reaches beyond cases where a party is seeking to set aside a financial agreement for a vitiating factor such as duress, undue influence or unconscionable conduct. Whilst its most obvious effect will be on lawyers (and their clients) negotiating pre-nuptial agreements where the parties have unequal bargaining power, *Thorne v Kennedy* is a salutary warning to all lawyers to be careful when negotiating and advising on all financial agreements, and possibly property settlement orders under s 79 and 90UM. It is also a useful reminder that despite the introduction of s 90G(1A)–(1C), which gives the court a discretion to save agreements which do not comply with the s 90G(1) requirements, the safest way to ensure a financial agreement is binding is to meet those requirements and for the terms of the agreement to result in a fair outcome for the less wealthy party.

13 November 2017

© Copyright - Jacqueline Campbell of Forte Family Lawyers and Wolters Kluwer/CCH. This paper uses some material written for publication in *Wolters Kluwer/CCH Australian Family Law and Practice*. The material is used with the kind permission of Wolters Kluwer/CCH.