

FINANCIAL AGREEMENTS

**Bamboozled and bewildered - duress,
undue influence and financial
agreements**

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Bamboozled and bewildered - duress, undue influence and financial agreements

Duress and undue influence are factors which may vitiate a contract. They often overlap and are frequently used interchangeably, or at least pleaded in the alternative. The decision of *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 is the most recent High Court authority addressing these principles. The judgment was not unanimous, and the litigation history adds to the uncertainty for lawyers attempting to apply the principles to the facts of their client's case.

This paper aims to clarify the distinctions between the concepts of duress and undue influence and, to a lesser extent, unconscionable conduct.

What did the High Court decide?

The plurality in *Thorne v Kennedy* consisted of 5 of the 7 judges. They held that the findings and conclusion of the trial judge should not have been disturbed by the Full Court of the Family Court and both agreements were voidable due to both undue influence and unconscionable conduct under s 90K(1) *Family Law Act 1975* (FLA).

The plurality said that, although the trial judge used the term "duress", it 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 2 separate judgments Nettle and Gordon JJ concurred with the plurality that the agreements should be set aside for unconscionable conduct. The minority judges did not agree with the plurality that the agreements should be set aside for undue influence.

The High Court, by implication, clarified any doubt as to whether undue influence or unconscionable conduct (and presumably duress) could be found in circumstances where the party subject to the vitiating factor has independent legal advice. Some doubt had previously been expressed about this, although the trial judges in *Tsarouhi & Tsarouhi* [2009] FMCAfam 126 and *Blackmore & Webber* [2009] FMCAfam 154 held that, consistent with *Williams & Bailey* [1866] LR 1 HL 200, these vitiating factors could still be established despite the giving of legal advice. As Bender FM (as she then was) pointed out in *Blackmore & Webber*, the legislature would not have made unconscionability a specific ground for setting aside financial agreements in s 90K(1)(e) if the legal advice required for a financial agreement to be binding meant that unconscionability could not operate.

What did the lower courts decide?

The judges in the Federal Circuit Court and the Full Court of the Family Court reached different conclusions to the High Court. In all courts, the definitions of duress, undue influence and unconscionable conduct drawn from the case law were similar.

Given the same set of facts and statements as to the law, the scorecard is:

| Duress | Undue Influence | Unconscionable Conduct | None of these |
|--------------------------------------|--|---|---|
| Judge Demack (Federal Circuit Court) | Judge Demack (except she didn't say this. The High Court plurality said she meant to say it but used the incorrect term) | Chief Justice Kiefel and Justices Bell, Gageler, Keane, Edelman, Nettle and Gordon (High Court: 7 out of 7) | Justices Strickland, Aldridge and Cronin (Full Court of the Family Court: 3 out of 3) |
| | Chief Justice Kiefel and Justices Bell, Gageler, Keane and Edelman (High Court: 5 out of 7) | | |

The Full Court of the Family Court decided the case on the basis that the test for duress was incorrectly stated by the trial judge and the test was not met in the circumstances. Unlike the High Court, the Full Court did not re-interpret the trial judge's decision and say that she had simply used the incorrect term and should have described it as undue influence rather than duress. Further, in relation to undue influence, the Full Court found that there was no undue influence because the wife was not concerned with what she would receive if they separated, and for similar reasons found that there was no unconscionable conduct.

How can it be that given the same set of facts and definitions of undue influence, 2 out of 7 High Court judges and 3 out of 3 judges of the Full Court of the Family Court found that there was no undue influence?

Complexities arise, not only from the above litigation history, but from the following:

- Unconscionable conduct is a third concept or vitiating factor which can overlap with duress and undue influence, and is often pleaded in the alternative;
- The existence of "lawful act duress" remains unresolved, so it is unclear whether "illegitimate" pressure encompasses improper conduct as well as unlawful conduct;
- The concepts of duress, undue influence and unconscionable conduct are developing in differing ways in the common law world. Although the High Court referred to or relied on jurisprudence and commentary in England, New Zealand and the United States, Australian law is not the same and the overseas law needs to be dealt with warily.
- One thing all the authorities seem to agree on is that duress, undue influence and unconscionable conduct are overlapping concepts. They are NOT clear and distinct concepts. More than one may apply to a particular set of facts.

- It is not just in *Thorne v Kennedy* that the trial judge was said by the High Court to misuse the term “duress”, but many other cases in the family law and commercial contexts misuse or confuse the terms. Reading earlier cases may not help the reader's understanding.
- A ground for setting aside a property settlement order under s 79A or s 90SN is “duress ... or any other circumstance”. Duress is front of mind because it, unlike undue influence, is expressly referred to in the FLA and has been in the FLA for decades longer than financial agreements, but the concepts of undue influence and unconscionable conduct are often over-looked.

Requirements for duress

The plurality set out the requirements of duress, although found it was not necessary to decide whether the agreements should be set aside for duress. The plurality described the requirements for duress (at [26]) in the following way:

“The vitiating factor of 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]

This is phrased in the negative and difficult to apply in practice.

A more useful quotation of McHugh JA (who only a year later joined the High Court) from *Crescendo Management* (at [46]) is:

"In my opinion the 'overbearing of the will' theory of duress should be rejected. 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."

The plurality noted (at [27]) the uncertainty as to whether duress should be based on only unlawful threat or conduct, or whether lawful threats or conduct might suffice. In *Crescendo Management*, the latter were referred to as pressure which amounts to unconscionable conduct. The concept of lawful act duress seemed to be accepted by the New South Wales Court of Appeal in that case, but there was a significant overlap with unconscionable conduct.

The plurality said that the question was a “difficult” one, but did not shed any light on the answer to it. Justice Nettle believed that the law of duress in Australia was "settled" and that (at [71]) the test of

illegitimate pressure was "whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests".

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 focussed on the wife's lack of free choice (in the sense used in the undue influence cases, rather than in the duress cases). The question was not whether the husband was the source of all the relevant pressure.

Requirements for 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 is "deprived ... of 'free agency'". [footnotes removed]. The quality of the consent is different to duress - with undue influence the weaker party is influenced into willing acceptance.

One reason why defining undue influence is so difficult is that it can arise from widely different sources, only one of which is excessive pressure. The pressure need not be illegitimate or improper.

There are 3 main ways of establishing undue influence:

1. Establish actual undue influence by direct evidence of the circumstances of the particular transaction. This was the approach relied upon by the trial judge and the High Court. The pressure need not be illegal or even improper;
2. Presumed undue influence where a relationship gives rise to a presumption of undue influence because it is a deemed relationship. These relationships include solicitor and client and parent and child, which are relationships inapplicable to financial agreements. The plurality in *Thorne v Kennedy* 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, saying that presumption no longer existed;
3. A relationship where one party places such trust and confidence in the other that the relationship is found to be one where a presumption of undue influence arises.

If there is a relationship which gives rise to a presumption of undue influence, the presumption of undue influence must be rebutted by the stronger party.

The trial judge concluded that the wife was powerless to make any decision other than to sign the first agreement, and referred to the 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 (at [93] of trial judgment) "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 (at [93] of the trial judgment and quoted at [47] by the High Court):

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 6 matters were the basis for what the plurality described as the "vivid" description by the trial judge (at [91]-[92] of the trial judgment and quoted at [47] by the High Court) 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."

The trial judge's 6 factors and the plurality's summation of the wife's position, demonstrate that in contrast to duress, the assessment of undue influence looks at the position of the weaker party, and the actual conduct of the stronger party is of less importance. It doesn't matter how the stronger party's conduct is characterised, it is the impact on the weaker party which is important.

The Full Court of the Family Court said, in relation to these 6 factors, (at [62]) that "a finding of financial inequality could never provide a reasoned basis for duress". Of course, this was in the context of labelling the concept as duress because that was the term the trial judge used, rather than labelling it as undue influence which is what the High Court plurality did.

Justice Deane in *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 (at [474]) said that the principles concerning relief against undue influence and unconscionable conduct were "closely related", although he also said they were "distinct". The plurality in *Thorne v Kennedy* quoted favourably from *Amadio* (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 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 why, despite the advice of her solicitor, the wife failed to conceive of the notion that the husband might end the marriage. These questions helped lead to the finding of undue influence.

As to the second agreement, the High Court plurality noted (at [48]) that the 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 High Court plurality agreed with this analysis.

The plurality concluded (at [59]):

"The primary judge's conclusions were open to her on the evidence. Each of the factors which the primary judge considered was a relevant circumstance in the overall evaluation of whether Ms Thorne had been the subject of undue influence in her entry into the agreements. In combination, it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. 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."

In contrast to the plurality, Gordon J 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. She voluntarily chose to enter into the marriage and she had a choice about that. It was only after she chose to enter into the marriage that the absence of choice about entering into the financial agreement arose, so there was no undue influence.

Justice Nettle also appears to have rejected the application of undue influence to the facts. Although he did not expressly reject it he did not expressly state that there was undue influence, but decided the case on the basis of unconscionable conduct.

***Johnson v Buttress* - undue influence**

One of the most commonly referred to Australian cases on undue influence is *Johnson v Buttress* (1936) 56 CLR 113 at 134; [1936] HCA 41. Justice Dixon 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 in *Thorne v Kennedy* 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 facts of *Johnson v Buttress* illustrate the characterisation by a court of a lack of free will sufficient to amount to undue influence. Mr Buttress was 67 years old, illiterate, not very intelligent and with little or no experience or capacity in business. His wife had died a few months earlier and he was much affected by her death. He transferred his only property, which was his only means of livelihood, to a relative of his wife upon whom he relied heavily for advice. The trial judge found that Mr Buttress did not understand the nature of the transaction and that he had parted with the land irrevocably. After his death, his estate's administrator applied to set aside the transfer. The trial judge set aside the transfer on the basis of undue influence and this was upheld by the High Court.

The majority in *Johnson v Buttress* found that there was a relationship of undue influence arising from the trust and confidence the deceased put in the defendant. Justice McTiernan said:

"There can be no doubt that when the transfer was made the relationship in which she stood to Buttress would enable her to acquire great influence over him. It is unreasonable to suppose that very considerable influence was not in fact acquired by her over Buttress. The relationship which was in fact established between the donor and the donee and the immoderate nature of the gift brings the case within the range of the principle upon which equity sets aside a voluntary gift upon the presumption that the gift was obtained by abuse of the relationship, unless the donee can prove that the gift is a free exercise of the donor's will."

The High Court in *Thorne v Kennedy* pointed out that Starke J in *Johnson v Buttress* concluded that it was open on the facts to find that undue influence arose without any presumption. Justice Starke noted that the trial judge had the advantage of hearing the evidence (an advantage which the High Court plurality in *Thorne v Kennedy* noted the trial judge had over the Full Court of the Family Court). Starke J said (at p.126):

"Now I feel some difficulty in assenting to the learned judge's view that the facts disclose a peculiar relationship of trust and confidence between the deceased and the appellant which

brings him within the 'protected class' in respect of which there is a presumption of undue influence. But the age and capacity of the deceased, the improvident and unfair nature of the transaction, the want of proper advice, the retention of the rents of the property transferred, the various testamentary dispositions, and the other circumstances mentioned, afford evidence from which the learned judge might justly infer that the transfer was not the result of the free and deliberate judgment of the deceased, but the result of unfair and undue pressure on the part of the appellant. The learned judge, it must be remembered, saw and heard the appellant and her family, and did not accept their version of either the facts and circumstances surrounding the making of the will of the deceased in favour of the appellant, or of those surrounding the transfer to her. His judgment in the case must necessarily have been influenced by the credibility and demeanour of these witnesses, and this court is wholly deprived of that advantage."

A case which makes applying the doctrine of undue influence more confusing is *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 4657. *Diprose v Louth (No.2)* (1990) 545 ASR 450 and the appeal in *Louth v Diprose* [1992] HCA 61; 175 CLR 621, an unconscionable conduct case, are also challenging. These cases seem to muddy the principles and make them harder to apply.

Requirements for unconscionable conduct

For the sake of clarity and comparison it is useful to include the requirements for unconscionable conduct, although this principle is not considered at length in this paper. The law of unconscionable conduct is well developed in Australia, both in its statutory contexts and in equity. In general terms, the conduct must be so harsh or unreasonable that it goes against good conscience. No informed person would agree to enter the contract.

No submissions were apparently made in *Thorne v Kennedy* 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 consider or determine that issue.

In *Thorne v Kennedy* 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. Mr Kakavas was unsuccessful in arguing that Crown Casino took unconscientious advantage of any special disability. His claim was based on s 51AA *Trade Practices Act 1974*. The High Court found that being a pathological gambler was not a special disadvantage which made him susceptible to exploitation by Crown Casino.

A finding of unconscionable conduct requires that:

1. The innocent party is subject to a special disadvantage (at [38]) "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests".
2. The other party must unconscientiously take advantage of that special disadvantage.

3. The other party must have known or ought to have known of the existence and effect of the special disadvantage.

In *Blomley v Ryan* [1948] HCA 20; (1948) 76 CLR 646, the defendant took advantage of the plaintiff's alcoholism to induce him to enter a transfer when his judgement was seriously affected by alcohol. Justice Fullagar, in discussing the circumstances which might be considered in determining whether there had been unconscionable conduct, said (at [405]):

"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

Six indicators of undue influence

The plurality set out 6 general 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 give guidance as to what is relevant in future applications to set aside financial agreements for undue influence, and probably duress and unconscionable conduct as well. The "take it or leave the relationship" type of agreement which is signed when one party has little time for careful reflection is likely to be doomed. More time will probably be needed for "careful reflection" where the agreement is unfair and unreasonable, and the education, English literacy, business acumen, family support and/or the financial position of the weaker party are low.

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 why, despite the advice of her solicitor, the wife failed to conceive of the notion that the husband might end the marriage. These questions helped lead to the finding of undue influence. The wife had strong advice from her solicitor not to sign, she understood

the advice, she knew it was a bad bargain and unfair and unreasonable, yet she failed to conceive of a notion that the husband might end the marriage. These were indicators of undue influence.

The plurality said that it was open to the trial judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter into the agreements. In other words, the extent to which she was unable to make (at [59]) "clear, calm or rational decisions" was so significant that she could not aptly be described as a free agent.

Lawful act duress debate

Part of the problem with defining duress arises from the debate over whether lawful act duress exists. If the test for duress is that there must be threatened or actual illegitimate pressure, in the sense of an illegal act, the distinction between duress and undue influence is much easier. On a strict interpretation, an illegal act requires conduct which is unlawful in the criminal sense (e.g. blackmail, threat to kill, assault), or the civil sense (e.g. breach of contract, breach of court order). Alternatively, duress could simply require illegitimate pressure in the sense of improper or unreasonable conduct, which may be lawful.

The plurality in *Thorne v Kennedy* referred to the question (at [27]) of "whether duress should be based on any unlawful threat or conduct or, alternatively, whether other illegitimate or improper yet lawful threats or conduct might suffice". The plurality did not find it necessary to determine the issue. The focus was (at [29]) on "Ms Thorne's lack of free choice (in the sense used in undue influence cases) rather than whether Mr Kennedy was the source of all the relevant pressure, or whether the impropriety or illegitimacy of Mr Kennedy's lawful actions might suffice to constitute duress".

There were no substantial submissions to the High Court on how the statutory policy of the *Family Law Act* impacted on the categorisation of Mr Kennedy's actions. As a result of the way the case was put, the plurality held that it was unnecessary for it to decide whether the NSW Court of Appeal case of *ANZ Bank v Karam* [2005] NSWCA 344; (2005) 64 NSWLR 149 should be followed as to whether duress at common law encompasses threatened or actual lawful act duress.

The plurality also noted that under the approach taken by the New South Wales Court of Appeal in *ANZ Bank v Karam* (but also in *Crescendo Management* - although this was not stated), lawful act duress added nothing to duress because unconscionable conduct (and undue influence) could be relied on where there was improper rather than illegal pressure.

The plurality in the High Court said (at [29]):

"It was not necessary for the primary judge to consider common law duress. As will be explained later in these reasons, the sense in which the primary judge in this case described the pressure on Ms Thorne was to focus on Ms Thorne's lack of free choice (in the sense used in undue influence cases) rather than whether Mr Kennedy was the source of all the relevant pressure, or whether the impropriety or illegitimacy of Mr

Kennedy's lawful actions might suffice to constitute duress. Nor did this Court receive any substantial submissions concerning when illegitimacy or impropriety might be established for duress at common law including in light of the statutory policy of the *Family Law Act* and, in that context, how the actions of Mr Kennedy should be characterised. In these circumstances, it is not necessary to address the arguments in favour of or against the conclusion of the New South Wales Court of Appeal that duress at common law requires proof of threatened or actual unlawful conduct. Nor is it necessary to consider whether the recognition of lawful act duress adds anything to the doctrine concerned with unconscionable conduct."

However, Edelman J, who was in the plurality, gave some indication of his views when he said in the High Court special leave application reported at [2017] HCA Trans 54:

"The point is that the principles concerning duress, such as lawful act duress or such as the nature of a reasonable alternative, those principles are unclear and these circumstances may require a focus upon how those principles operate."

Justice Edelman later pointed out:

"Well ... lawful act duress, admittedly we have not yet been referred to a lot of authorities on that, but there is very limited authority in Australia on that point. There is conflicting authority in England on the point."

The husband's counsel referred to *Karam* as being decisive, to which Edelman J referred to the Privy Council in "*R*" v *Attorney-General for England & Wales* [2003] UKPC 22. "R" was a Special Air Service soldier who was in the Gulf War. He signed a confidentiality agreement in circumstances where if he did not sign he would be demoted. After the war he returned to New Zealand and signed a publishing contract for his memoirs. The Privy Council heard the case on appeal from the New Zealand Court of Appeal.

The Privy Council found that the contract was not voidable for duress, and although the threat was lawful, that was not the reason for the decision. It said that lawful threats could amount to duress. The Privy Council said (at [15]-[16]):

"In *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 400 Lord Scarman said that there were two elements in the wrong of duress. One was pressure amounting to compulsion of the will of the victim and the second was the illegitimacy of the pressure. R says that to offer him the alternative of being returned to unit, which was regarded in the SAS as a public humiliation, was compulsion of his will. It left him no practical alternative. Their Lordships are content to assume that this was the case. But, as Lord Wilberforce and Lord Simon of Glaisdale said in *Barton v Armstrong* [1976] AC 104, 121:

'in life ... many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.'

The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support: see Lord Scarman in the *Universe Tankships* case, at p 401. Generally speaking,

the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, that fact that the threat is lawful does not necessarily make the pressure legitimate. As Lord Atkin said in *Thorne v Motor Trade Association* [1937] AC 797, 806:

"The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened ... What he has to justify is not the threat, but the demand of money'."

The husband's counsel disagreed with Edelman J, saying that the case law in Australia had proceeded on the basis of the correctness of *Karam*.

Justice Nettle said in the substantive proceedings in *Thorne v Kennedy* that he considered the law was settled in favour of duress requiring illegitimate pressure by *ANZ Bank v Karam*. Without that decision, Nettle J said he would have been disposed to decide the appeal on the basis of illegitimate pressure or duress of such degree as to engage equity's jurisdiction to grant relief. Justice Nettle pointed out (at [70]) that "by and large, *Karam* has since been followed without demur". He referred to a number of decisions, largely of the State Supreme Courts, but including the family law case of *Tiernan & Tiernan* [2017] FamCA 23 at [32]. In *Tiernan*, Cronin J said that there was no evidence before him to satisfy any of the tests as the law understood them. Justice Cronin referred to *Crescendo Management Pty Ltd v Westpac Banking Corporation* and *ANZ Bank v Karam*, thereby apparently accepting that lawful act duress did not apply in Australia. It was not clear that the law of duress was, however, argued before Justice Cronin.

Justice Nettle went on to say (at [71]-[73]):

"Of course, so to observe is not necessarily to accept that *Karam's* rejection of illegitimate pressure by lawful means is doctrinally valid. To the contrary, there appears to be much to be said for the view that, rather than persist with a blanket restriction of illegitimate pressure to pressure exerted by unlawful means, it would better accord with equitable principle, and better align with English and American authority, if the test of illegitimate pressure were whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests.

It has been suggested that *Karam* was consistent with this Court's decision in *Smith v William Charlick Ltd*. Even if that were so, however, by the time *Karam* was decided, equity's capacity to relieve against illegitimate pressure exerted by lawful means had become established doctrine. *Karam* was a significant departure from the preponderance of relevant Australian authority. Moreover, *Karam's* rejection of illegitimate pressure by lawful means was largely based on a view that the concept is too uncertain to be acceptable. Yet it is by no means immediately obvious why it should be considered any more uncertain than the equitable conceptions of unconscionable conduct and undue influence to which *Karam* held it should be consigned.

Nevertheless, there would need to be detailed argument and deep consideration of the ramifications of departing from *Karam* before this Court would contemplate that course, and, although counsel for Ms Thorne essayed something of that task in written submissions, in oral argument it was accepted that what was said about illegitimate pressure by lawful means was subsumed by what was advanced under the rubric of unconscionable conduct."

The Full Court of the Family Court in *Kennedy & Thorne* (2016) FLC 93-737 accepted that *Karam* was correct and that the trial judge had not applied the correct test for duress as the trial judge found that the pressure was not "illegitimate" or "unlawful" rather than whether there is "threatened or actual unlawful conduct" (at [71]).

Whilst the issue of the existence of lawful act duress remains unresolved, any "gap" left if a lawful act is insufficient to establish duress is likely to be filled by the principles of undue influence and unconscionable conduct. If so, the debate may only be of academic interest rather than having any practical impact.

Earlier financial agreement cases on duress, undue influence and unconscionable conduct

There are a number of financial agreement cases before *Thorne v Kennedy* which dealt with duress, undue influence or unconscionable conduct. Some of these are discussed below.

Saintclair & Saintclair (2015) FLC 93-684

Undue influence and unconscionable conduct were argued, but the trial judge's decision to set aside on these grounds was not upheld. The wife's postnatal depression had resolved about 11 months prior to the agreement being executed and so it was no longer an issue relevant to the wife's argument that there had been undue influence. In addition, the Full Court found that the husband had an intimate knowledge of the stresses under which the wife laboured but those "stresses" (such as her indebtedness) did not amount to a "special disadvantage" and nothing about his negotiating with knowledge of them amounted to unconscionable conduct. The Full Court found that the trial judge was in error in not distinguishing between "actual undue influence" and "unconscionable conduct", but rejected the proposition that there was either.

Blackmore & Webber [2009] FMCAfam 154

Federal Magistrate Bender set aside a financial agreement for duress, as she found that the pressure placed on the wife by the husband to sign the agreement was "illegitimate" in accordance with the test in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSW LR 40. The husband produced the agreement for the wife's signature less than 5 days before the marriage and threatened her that the marriage would not take place unless she signed it. At the time, the wife was pregnant, about to return to Thailand in circumstances where her family expected her to return as a married woman, and she was faced with the risk of not being able to return to Australia as her visa was about to expire. Her Honour used the broader sense of "illegitimate" to encompass improper but otherwise lawful conduct. The High Court plurality would probably have set the agreement aside for undue influence and unconscionable conduct. The minority would have relied on unconscionable conduct.

Moreno & Moreno [2009] FMCAfam 1109

Federal Magistrate Demack (who later was the trial judge in *Thorne v Kennedy*) set aside the agreement on the grounds of, *inter alia*, duress, (at [38], [43]) saying:

“That the wife feared for her visa status if her marriage did not continue and that issue was a motivator for her in signing the agreement. She did not want to return to Russia as a failure, with a failed marriage. She had left behind family and friends who believed her to be making a new life in Australia and she could not bear to return under such circumstances. Further, she wanted her marriage to work ...

I am satisfied that she understood that the agreement was unfavourable to her but that she considered she had no present option but to sign as the threat of leaving Australia loomed heavily. Her past experience was that the husband would continue to behave aggressively and that if she left him he would likely advise the authorities and her visa would be cancelled, forcing her to return to Russia.”

Federal Magistrate Demack said that the duress was of such a level as to constitute unconscionable conduct. Again, the outcome, if this case had been heard after *Thorne v Kennedy*, would probably have been decided similarly to *Thorne v Kennedy* and *Blackmore & Webber*. The only difference might be whether Gordon J would have set the agreement aside for undue influence. The extra factor of the wife's pregnancy might have been enough to give the wife less choice other than to proceed with the marriage.

Tsarouhi & Tsarouhi [2009] FMCAfam 126

The financial agreement was set aside, as the wife had been under duress and the husband had taken unconscionable advantage of the wife's special disadvantage by threatening to refer her to the police and have her charged. The wife had taken money from the parties' joint home loan account by forging the husband's signature. Federal Magistrate Riley found the wife took \$21,480. If these funds were notionally added back to the pool and treated as received by her, the financial agreement resulted in the wife receiving 21% of a pool of \$311,500 after 23 years of marriage. Two children aged 10 and 17 lived with the husband and the 22-year-old lived with the wife. Federal Magistrate Riley found that the wife signed the agreement based on a desire to prevent prosecution.

Federal Magistrate Riley applied the rule stated by Porter J in *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 (at [395]):

“Not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking was given owing to a desire to prevent prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply (as I do here) a term in the contract that no prosecution should take place”

The husband's conduct in threatening to prosecute was blackmail, which is an illegal act, so after *Thorne v Kennedy*, the same outcome could be expected. It was illegitimate pressure, amounting to duress.

Vickery & Drew [2012] FamCAFC 221

The wife alleged that the financial agreement should be set aside on the ground of duress as a result of the domestic violence she suffered throughout the relationship. The agreement was set aside for an unrelated reason (*Drew & Vickery* [2010] FMCAfam 1307), and the husband's appeal was successful. There is no reported judgment of the re-trial.

Parkes & Parkes [2014] FCCA 102

The parties entered into the agreement 2 days before the wedding, after the issue was raised by the husband 3 days before the wedding. The husband told the wife that if she didn't sign the agreement the wedding was off. The parties had been in a relationship for six years and had been engaged to be married for 11 months. All the arrangements had been made and the reception had been paid for by the wife's parents. Judge Phipps found that the wife was in a position of "special disadvantage" and her consent to the agreement was not independent and voluntary. The agreement gave her no rights at all in the future to any of the husband's property, and she knew it was to her disadvantage as the lawyer her husband took her to see told her so. Justice Phipps also set the agreement aside under s 90K(1)(d).

Judge Phipps did not distinguish at all between duress and undue influence. His Honour found that the wife's consent was not independent and voluntary because it was overborne and she was therefore subject to duress and undue influence. He also found that the requirements of unconscionable conduct were also satisfied. The special circumstances arose from the particular situation. He said (at [67]–[68]):

"... the wife had been in a relationship with the husband for 6 years. She had been engaged to be married for 11 months and was to be married in 3 days. All the arrangements were made, all the guests had been invited, and the wedding reception had been paid for by the wife's parents. The wife is then told by the husband that if she does not sign the prenuptial agreement the wedding is off. The wife was in the position of 'special disadvantage'. If she did not sign the prenuptial agreement not only was the wedding cancelled but the likely result of such a traumatic event would be that the wife's relationship with the husband would be over. This after 6 years and an 11 month engagement.

The wife says she considered that she had no choice. She was clearly in a position of special disadvantage and the husband knew so. The prenuptial agreement was not to the wife's advantage. It gave her no rights at all in the future to any of the husband's property. She knew that it was to her disadvantage because Mr C told her so. Nevertheless, she signed it because she considered she had no choice."

The husband appealed but died before the appeal was heard, and the appeal was discontinued.

The judge seemed to conflate duress and undue influence, determining that both were satisfied, as the wife's consent "was not independent or voluntary because it was not overborne". Unconscionable

conduct was also found, although it was not discussed at length. If *Parke* was heard after *Thorne v Kennedy*, it is likely to have been determined by the plurality to be undue influence and unconscionable conduct, and by the minority to have been unconscionable conduct.

Cases in which unconscionable conduct was successfully argued include *Teh & Muir* [2017] FamCA 138, *Zagar & Hellner* [2016] FamCA 224, *Parke & Parke* [2015] FCCA 1692.

What about the s 79A cases?

There is considerably more case law on duress in relation to setting aside property orders, but much of it probably needs to be read carefully. Section 79A(1)(a) provides that:

"Where, in an application by a person affected by an order made by a court under s 79 in property settlement proceedings, the court is satisfied that ... there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including the failure to disclose relevant information), the giving of a false evidence or any other circumstance ... the court may, in its discretion, vary the order or set the order aside."

There is no reference in s 79A(1)(a) to undue influence nor unconscionable conduct, but they appear to be encompassed by the words "or any other circumstance". Some of the s 79A cases rely on these other concepts to set aside property settlement orders, but they are often overlooked, as s 79A does not expressly mention them. The consent of the parties to a property settlement order must be free and informed (e.g. *Suiker & Suiker* (1993) FLC 92-436; *Lane & Lane* (2016) FLC 93-699). One example arose in *Pompidou & Pompidou* [2007] FamCA 879, where Brown J set aside property orders on the ground of duress and unconscionable conduct in circumstances where the wife signed the consent orders because she feared the husband would carry out his express threat to kill and the implied threat contained in his threat to arrange the biggest siege that the regional Victorian city had ever seen.

An extensive and useful examination of the principles of undue influence and unconscionable conduct in relation to s 79A was done by Brereton J in the Supreme Court of New South Wales in *Grace v Grace* [2012] NSWSC 976. He found there had been both, and set aside a s 79 order.

Conclusion

Understanding the High Court's approach to duress and undue influence is easier if the decision is looked at in the context of some of the earlier authorities, particularly *Blomley v Ryan*, and that unconscionable conduct is developing as a broad concept, a fall-back position, or a vitiating factor of last resort. The extent to which unconscionable conduct is able to catch or encompass duress or undue influence in circumstances where there is an inequality of bargaining power is being explored by the Courts, and not just in family law. The concept of undue influence seems to have been misunderstood by many lawyers and courts in the past. It appears to be a much wider and more

useful legal principle which can be relied upon to set aside transactions where duress may have otherwise been argued. Having said that, its application where parties have entered into financial agreements in fact scenarios which differ significantly from *Thorne v Kennedy* (and probably *Tsarouhi*, *Moreno*, *Blackmore & Webber* and *Parkes*) is uncertain.

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