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Section 79A – setting aside property settlement orders: Procedural courtroom challenges in Family Law

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Introduction

There has been much hype around the setting aside of financial agreements, particularly following *Thorne v Kennedy* (2017) FLC 93-807. Additional uncertainty arises as to whether financial agreements are binding or can be "saved". Consent orders are the fall-back and perhaps less risky option to settle property matters following a separation and provide some protection from spousal maintenance claims. Court orders can, however, still be set aside on grounds which partially overlap with the grounds for setting aside financial agreements. The vitiating factors considered in *Thorne v Kennedy* - duress, undue influence and unconscionable conduct - are relevant to the setting aside of property settlement orders. This paper is an overview of the main grounds for setting aside property settlement orders and an update on recent cases.

Relevant legislation – Section 79A/s 90N

A court can vary or set aside a s 79 order under s 79A (or a s 90SM order under s 90SN) either:

- in contested proceedings under s 79A(1) or s 90SN(1), or
- by consent under s 79A(1A) or s 90SN(2).

Under s 79A(1), any person affected by an order made by a court under s 79 may apply to have that order varied or set aside in the following circumstances:

(a) Where there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance;

(b) Where circumstances have arisen since the order was made whereby it is impracticable for the whole or part of the order to be carried out;

(c) Where a person has defaulted in carrying out an obligation imposed upon him or her by the order, and in the circumstances that have arisen as a result of the default, it is just and equitable either to vary the order or to set the order aside and make another order in substitution for it;

(d) Where, in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature, relating to the care, welfare and development of a child of the marriage, the child, or where the applicant has caring responsibility for the child (as defined in s 79A(1AA)) the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order;

(e) A proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage. Even if the ground is established, the court has a discretion as to whether to set aside the order, vary the order or leave the order intact.

This paper will deal with s 79A(1)(a), (b), (c) and (d), but not with s 79A(1)(e) or s 79A(1A). The focus is primarily on s 79A(1)(a).

Important matters to note about s 79A (and s 90SN) applications include:

1. Section 79A is a remedial section intended to "overcome miscarriages of justice and certain other specific difficulties, and should be construed liberally to effect its intended purpose" (*Gilbert & Estate of the late Gilbert* (1990) FLC 92-125 at 77,838). At the same time, it "cannot be used to circumvent the basic principle that there can only be one property settlement between the parties" (*Kowalski & Kowalski* (1993) FLC 92-342). If it is too easy to succeed in a s 79A application, this would enable and encourage parties to apply to set aside orders opportunistically.
2. Generally, the s 79A application and any consequential s 79 application should be heard at the same time (*Oastler & Oastler* (1993) FLC 92-390; *Patching & Patching* (1995) FLC 92-585). This is not a blanket rule but it is a general rule that is departed from only where the circumstances are sufficiently exceptional to justify it. It may, for example, be convenient to have separate hearings where the financial circumstances of the parties are complex. The Full Court in *Lancer & Lancer* [2008] FamCAFC 112 upheld the decision of the trial judge that the case was an exception to the general principle. The trial judge's reasons were:
    - the trial with respect to s 79A would not be lengthy
    - determination of the s 79A issue would only require an assessment by a judge of the evidence raised in the affidavits already filed
    - the costs of the parties would be significantly less
    - further witnesses and greater disclosure would be required if the matter was not simply determined on the s 79A issue
    - if the order was made to set aside the consent orders the parties would be able to negotiate a settlement of their respective claims for a property settlement. Without a determination of the s 79A issue first, a settlement of the balance of the matter was highly unlikely to occur.

    In the recent decision of *Trustee of the Bankrupt Estate & Hicks and Anor* (2018) FLC 93-824, the Full Court of the Family Court discussed the difficulties which arose because of the decision of the trial judge to bifurcate the proceedings.

3. If a s 79 order is set aside under s 79A, the fresh order is determined according to the facts and law at the date of the hearing and not at the date the original orders were made (*Fickling & Fickling* (1996) FLC 92-664).
4. Proceedings under s 79A, at least insofar as they seek to set aside existing property orders, are interlocutory in nature and leave to appeal is required (*Ebner & Pappas* (2014) FLC 93-619 at [33]).
5. It is important to distinguish between when it is appropriate to apply to set property settlement orders aside and when to appeal or to seek a review of a registrar's decision.

Badawi & Badawi [2017] FamCAFC 129 was an example of where an appeal may have been appropriate. The original property settlement orders were made in 2009. The Federal Magistrate only had before him the wife's financial statement and the consent orders. He did not ask for any further information from the parties. The husband argued that the orders were merely "rubber stamped" and that on the limited material before him, the Federal Magistrate could not have formed any opinion as to the appropriateness of the proposed orders or whether they were just and equitable. These matters could not be dealt with in a s 79A application. To raise them, the husband needed to seek leave to appeal out of time. The s 79A proceeding could not deal with alleged errors on the part of the Federal Magistrate.

Third Parties

Third parties are relevant to the exercise of the s 79A power in two ways:

1. In exercising the powers to set aside or vary an order under s 79A/s 90SN, the court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested (s 79A(2)/s 90SN(6)). A “person interested” includes:
    - a creditor, if the creditor is unable to recover their debt, because the order has been made (s 79A(4) and 90SN(7))
    - a bankruptcy trustee, if either:
        - when the order was made the party was a bankrupt, or
        - after the order was made, the party became a bankrupt (s 79A(5))
    - the trustee of a personal insolvency agreement, if a party is the debtor subject to personal insolvency agreement (s 79A(7) and 90SN(10))
    - a bankruptcy trustee, if a party to a marriage is a bankrupt and a s 79 order has been made with respect to the vested bankruptcy property (s 79A(6) and 90SN(9)).
2. The application to set aside a s 79A order can be made by “a person affected” by the order.

Process for determining a s 79A(1)(a) application

Section 79A(1)(a) is a broad and commonly relied upon ground covering duress, fraud and other matters. The process under s 79A(1)(a) is a three-part enquiry:

1. The facts must be established to prove that fraud, duress etc occurred;
2. If the facts are established, it must be determined whether this was a miscarriage of justice. There may, for example, have been fraud, but this may not have resulted in a miscarriage of justice;

3. If there was a miscarriage of justice, the court has a discretion as to whether to set aside the order and make another order, vary the order, or leave the order intact.

See *Suiker & Suiker* (1993) FLC 92-436 and *Lane & Lane* (2016) FLC 93-699.

Section 79A(1)(a) contains a list of grounds followed by the phrase "and any other circumstance". It might seem that the phrase "and any other circumstance" is limited by the preceding words so that the phrase is read down *ejusdem generis* (where general words follow an enumeration of things with a particular or specific meaning, the general words are not to be construed to their widest extent, but apply only to things of the same kind or class as those specifically mentioned). This reading of s 79A(1)(a) has been expressly ruled out by the Full Court – e.g. *Gebert & Gebert* (1990) FLC 92-137 and *Suiker & Suiker* (1993) FLC 92-436. In *Gebert*, the Full Court said (at 77,935-6):

> "We consider that the words 'any other circumstance' appearing in s 79A(1)(a) whilst not to be read *ejusdem generis* with fraud duress suppression of evidence [sic] or the giving of false evidence, are intended to cover other situations where, for one reason or another, a miscarriage of justice has occurred … The important matter that must be established for an application under this part of the section to succeed is that there has been a miscarriage of justice. It is, we think, clear as counsel for the appellant argued that the words 'miscarriage of justice' should not be given a restrictive meaning, particularly when coupled with the words 'any other circumstance' and that justice means justice according to law …." [footnotes removed]

Meaning of "miscarriage of justice"

Under s 79A(1)(a) or 90SN(1)(a) a court can vary or set aside an order made under s 79 or 90SM only if it is satisfied that there has been a "miscarriage of justice".

The court has treated the expression "miscarriage of justice" as meaning simply that an order has been unjustly obtained. In *Holland & Holland* (1982) FLC 91-243, the Full Court of the Family Court approved this meaning when it agreed (at p 77,339) with the trial judge that the expression "miscarriage of justice" in what is now s 79A(1)(a) is not limited to a vitiating element in the procedure followed by the court but extends to any situation "which sufficiently indicates that the decree or order was obtained contrary to the justice of the case".

The Full Court in *Barker & Barker* [2007] FamCA 13 (at 675), relying on *Suiker,* was quoted by the Full Court in *Lane & Lane* (2016) FLC 93-699:

> "that the words 'miscarriage of justice' should not be construed narrowly and the phrase 'integrity of the judicial process' should not be taken only to refer to the hearing in the court, the circumstances creating the miscarriage must nevertheless have been such as to have had an influence on the outcome of the litigation."

The Full Court in *Lane* also quoted from *Holland & Holland* (1982) FLC 91-243 (at 239), where the Full Court said:

> "To succeed in an application under s 79A, the wife must show some circumstance leading to a miscarriage of justice. Agreement to a consent order which may not adequately reflect a party's entitlements under s 79 does not, of itself, show that there has been a miscarriage of justice. There may be cases where the order consented to is so far outside the ambit of what is just and equitable that the Court may infer that a party has acted under duress, in ignorance or as a result of incompetent advice."

The above passage is particularly pertinent, when read in the light of the approach taken by the High Court in *Thorne v Kennedy* (2017) FLC 93-807 to a bad bargain; a bad bargain may be an indicator of undue influence. The High Court plurality said (at [56]):

> "However despite the usual financial imbalance in agreements of that nature, it can be an indication of undue influence if a pre-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature."

Justice O'Leary in *Simpson & Simpson* (1983) FLC 91-349 (at p 78,351) said:

> "The term itself, of course, means no more than that, in a particular case, justice has miscarried, that there has been a failure by a Court to attain justice. But 'justice' means 'justice according to law' … And so there are imported into the expression 'miscarriage of justice' all those concepts and principles of law and equity, of natural justice and of proper judicial procedures which our law regards as essential for the doing of justice between parties."

In *Gebert & Gebert* (1990) FLC 92-137 (at p 77,935–6), the Full Court accepted the proposition that "miscarriage of justice" should not be interpreted narrowly, saying:

> "The important matter that must be established for an application under this part of the section to succeed is that there has been a miscarriage of justice. It is, we think, clear as counsel for the appellant argued that the words 'miscarriage of justice' should not be given a restrictive meaning, particularly when coupled with the words 'any other circumstance' and that justice means justice according to law."

Suppression of evidence and fraud

Suppression of evidence and fraud are different concepts, but overlap to some extent. The meaning of "suppression of evidence" is assisted by the words which follow in brackets "including failure to disclose relevant information".

The expression “fraud” has a very wide meaning. A helpful explanation was given by Cronin J in the context of setting aside financial agreements (where any failure to disclose must be “material”, not simply “relevant” (as is the requirement for property settlement orders) in *Jeeves & Jeeves (No 3)* [2010] FamCA 488 (at [485]):

> “The simple use of the word ‘Fraud’ in s 90K must be read widely because of the inclusion of the reference to non-disclosure of a ‘material matter’. Thus it encompasses knowledge and intention relating to financial matters that, if known, would create a different picture to that portrayed on the surface. It is hardly distinguishable from the s 90K(1)(e) reference to conduct that was in all of the circumstances unconscionable. Fraud no longer means just the unlawful use of pressure to enter into such an arrangement.”

Justice Cronin emphasised that establishing fraud was not of itself sufficient. He asked (at [488]):

> “Did the wife enter into the financial agreement on the basis of an inducement that what she was presented with was a true and accurate representation of the parties’ financial circumstances? Again, the wife faces the problem of her own evidence that she did not believe the husband to be truthful.”

The wife unsuccessfully appealed against the dismissal of her s 79A application and application to set aside a financial agreement in *Jeeves & Jeeves* [2011] FamCAFC 94. Of relevance was that the source documents were available to the wife’s valuers and it was not established that the husband failed to disclose relevant material or misled the wife. The evidence did not conclusively establish whether or not the husband had disclosed his improved trading result, or that if there was non-disclosure that it was, or could reasonably have been, material to the wife’s consent.

Under the *Family Law Act* the commonly accepted definition of "fraud" is that relied on in *Green & Kwiatek* (1982) FLC 91-259. The Full Court of the Family Court adopted the classic common law definition of Lord Herschell LC in *Derry* v *Peek* (1889) 14 AC 337 (at p 374):

> “Fraud in this context consists of a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact so acted upon.”

In *Ebner & Pappas* (2014) FLC 93-619, the Full Court said (at [64]) that for orders to be set aside or varied under s 79A(1)(a), there needed to be not only a suppression of evidence, but also miscarriage of justice by reason of that suppression. The husband’s appeal against the dismissal of his s 79A application was dismissed. Although the wife had failed to disclose assets in a particular court document and in statements to the court, the husband was aware when he entered into the consent orders from earlier disclosure by the wife of the wife's assets and he had evidence as to their value.

In *Lane & Lane* (2016) FLC 93-699, the wife unsuccessfully appealed against an order dismissing her application pursuant to s 79A(1)(a) in which she sought to set aside property settlement orders

that had been made by consent in 2003. The wife claimed that the husband suppressed evidence from the court and from her of the value of his interest as a beneficiary of a family trust, which was of considerable value, resulting in a miscarriage of justice. Justice Murphy (at [116]) noted that the trial judge was correct in finding that the wife had not established suppression of evidence by the husband and correct in finding that there was no miscarriage of justice within the meaning of s 79A.

Justice Murphy held that the parties were able to conclude their agreement on the basis that the value of the trust was not known. The wife had not established that the husband had any information as to the value of the trust which he did not disclose.

There are numerous Full Court authorities on the duty of parties to make a full and frank disclosure of their financial affairs. One example is the Full Court decision of *Morrison & Morrison* (1995) FLC 92-573. In looking at miscarriage of justice, the Full Court said (at p 81,665):

> "1. In order for there to be a just and equitable and an appropriate order altering interests of parties in property, there must be a full and frank disclosure between them of all circumstances which may be relevant to the determination of their true financial position both presently and in the foreseeable future.
>
> 2. The obligation to make full and frank disclosure is regarded as so crucial that the deliberate failure by one party to meet that obligation may result in the court drawing adverse inferences against the non-disclosing party where there is material by which such inferences can be based.
> 3. The failure of the husband to disclose the true position robbed the wife of the opportunity of litigating the issue of the true value of the license. The non-disclosure was of such magnitude that it amounted to miscarriage of justice."

The facts of *Morrison* are a good illustration of suppression of evidence. The parties married in 1964 and separated in 1984. There were four adult children of the marriage. The husband commenced working as an abalone diver in Port Lincoln in 1965. The relevant department had a policy under which only owners of abalone fishing licences could dive for abalone, except by way of specific arrangements under the Regulations.

In 1985 the husband, who was suffering from significant ill-health, arranged for D to work as a relief diver. In March 1985 they executed a document transferring the husband's licence to D on a share fishing basis for $150,000 payable on 30 April 1986. They also executed a second agreement providing that D would sell the licence back to the husband on that date for the same amount.

In July 1985 the wife commenced property proceedings. She was not then aware of the agreements and valued the husband's licence at $250,000, although she referred in her material to higher prices received for other licences.

In April 1986 the husband and D executed a further agreement under which D could use the licence provided he paid to the husband $30,000 per year plus approximately 50% of the gross

proceeds until 1990/91. The three documents were brought to the attention of the wife's solicitors. The wife was suspicious of the ownership of the licence and requested further investigations. The husband and D swore affidavits that D was the owner of the licence and that there was no private agreement between them. The wife was advised to accept the circumstance that the licence had been transferred to D.

In 1987 the parties settled the proceedings on the basis that the licence was valued at $250,000 and was the notional property of the husband. The wife received 20% of the pool.

In 1988, a year later, the husband received approximately $800,000 from the sale of the licence. The wife became aware of this shortly afterwards and sought legal advice which wasn't favourable. She didn't institute proceedings to set aside the property orders for three years, until 1991.

The trial Judge found that the third agreement was, in effect, a sham and the husband and D always regarded the husband as the owner of the licence. Her Honour concluded that those circumstances amounted to a "suppression of evidence" or "any other circumstance" and amounted to a miscarriage of justice in the making of the consent orders and set those orders aside under s 79A. The wife wasn't penalised for her delay in instituting the proceedings.

The Full Court upheld the decision on appeal.

In *Pearce & Pearce* [2016] FamCAFC 14, the Full Court upheld the trial judge's decision to set s 79 orders aside on the ground of the husband's failure to make full and frank disclosure in five respects. The trial judge found that the husband failed to disclose to the wife significant information concerning the negotiations and proposals concerning the husband's acquisition of a substantial interest in a business and a real property. He failed to disclose shares and the representation that he made to a bank of the value of the D Street property. He did not disclose his expectation of greater income, and asserted to the wife that his income would be lower, thus justifying a delay of 12 months before a payment of $15,000 could be made to the wife. The trial judge found that the wife would have made further inquiries before consenting to the property settlement order if she had been aware of the matters the husband failed to disclose.

The effect of the variation of the s 79 order was that the husband was required to pay to the wife just under $2 million more than under the original orders.
On appeal, the husband did not deny that he had failed to disclose relevant financial information.

The Full Court summarised the impact of the husband's failure to disclose to the wife his representation to the bank (at [21]):

> "The impugning of 'the integrity of the judicial process' which, as her Honour recognised, lies at the heart of s 79A's requisite miscarriage of justice occurred here

> not because the property may or may not have had a particular value, but because the wife's consent was not a fully-informed consent. The integrity of the judicial process in respect of orders by consent demands full and frank disclosure in and about the orders and their antecedent negotiations because the integrity of that process depends upon each party giving a free and fully-informed consent to the orders."

One of the husband's grounds of appeal related to whether it was open to the trial judge to arrive at a conclusion as to the materiality of the non-disclosure without assessing the worth of what the wife received by reference to the value of the property dealt with by the orders. The Full Court disagreed and said (at [33]):

> "We consider that senior counsel for the wife put it correctly when he submitted that the process contended for by the husband may be relevant but is not essential to the finding. The maintenance of the integrity of the judicial process through the measure of miscarriage of justice is not **necessarily** connected with a comparison of what the orders provide compared with what a party might have received from a court, had consent not been given. As will be seen, we do not consider that they are connected in this case."

In relation to the nature of the "consent" in consent orders, the Full Court said (at [35], [36]):

> "… the requisite miscarriage of justice derives from a party's consent not being a 'free and informed consent'; where there is a failure to disclose matters relevant to the decision to enter the consent orders that are '… peculiarly within [the] knowledge' of that party or omissions which knowingly engendered, or permitted, a mistaken understanding on the part of the other party.
>
> Facts and circumstances as to value *might* inform the application of those principles in a particular case but, equally, facts and circumstances independent of value might do so." [footnotes removed]

The Full Court found (at [20]) that if the wife knew about the representation by the husband to the bank that the value of the D Street property was $700,000, not the agreed value in the notations to the orders of $550,000:

> "… the wife would have been put on notice of the discrepancy between that **representation** as to value and the significantly different **representation** as to value made relatively contemporaneously in the consent orders. She was denied that knowledge, and the consequent opportunity to make such further or other enquiries as she might choose, as a consequence. She was also denied the opportunity to negotiate a settlement whose terms may have reflected that difference."

Official Trustee in Bankruptcy & Bryan and The Estate of Christine Ann Gatenby (Deceased) (2006) FLC 93-258 concerned a husband and a wife who wilfully failed to disclose to the court the existence of two creditors in an application under s 79 for consent orders in 1992. The consent orders provided, *inter alia*, for the transfer of joint property from the husband to the wife. The Official Trustee in Bankruptcy applied under s 79A(1)(a) for the orders to be set aside.

Justice Young found that the failure by the husband and the wife to disclose the existence of the creditors to the court at the time they applied for consent orders amounted to suppression of evidence and deceitful conduct and consequently, a miscarriage of justice. The orders relating to the transfer of the property were set aside and no s 79 order was made in their stead. See also *Costello & Condi* [2012] FamCA 355.

In *Waterman & Waterman* (2017) FLC 93-762, the Full Court found that there had been a failure to disclose by the husband. The husband had not disclosed the nature, extent or value of the assets and liabilities of the parties. The proposed terms were not discussed between the parties before the wife attended the office of the husband's solicitor. There was no discussion as to how the terms of the proposed settlement might reflect a just and equitable outcome by reference to known assets and resources with estimates of values. Due to the husband's manipulations after the orders were made, the wife only received slightly more than half of her entitlements under the orders. Justice Murphy concluded (at [65]):

> "Taken together, in my view, the wife's lack of literacy; the husband's failure to disclose; the lack of prior discussion as to the proper entitlements and division of the proceeds of the home; the wife's self-representation at the time the husband's solicitor 'told' the wife of the proposed orders; the circumstances in which that occurred at the husband's solicitor's office; the fact that the orders were read to her only once in those circumstances and that she did not have them read to her again; and the fact that she was not advised as to entitlements, all, in my view, amount to a miscarriage of justice in and about the making of the orders.
>
> It will, I would have thought, be a highly unusual case where the factual determination and miscarriage of justice and the discretionary determination of whether the order should be set aside or varied can be successfully bifurcated from the discretionary issue of what order if any should be made if the orders are set aside or varied."

In *Pendleton & Pendleton* [2017] FamCAFC 108 the Full Court agreed with the husband that he had no obligation to explain the documents to the wife, who was legally represented at all times. The Full Court did not, however, accept the husband's argument that the trial judge who set aside the orders under s 79A had found that he had that obligation.

The agreed list of assets of $622,000 made no reference to a significant payment of about $44,500 received by the husband shortly prior to the making of the consent orders and 2 payments totalling about $46,800 several months later. He also received a redundancy of an amount not specified in the judgment and $55,950 from the sale of shares. There was also an unexplained bank account of a company incorporated by the husband after the orders were made, which had a balance of US$180,000. In relation to whether the husband's disclosure of his employment contract was sufficient, the Full Court said (at [59]) that:

> "The husband had to be frank so as to place the wife in possession of the information he had, which would in turn, allow the wife to form her own view of the likelihood of him receiving benefits under the contract."

Some of the payments were made pursuant to the husband's contract of employment, but others were not. The husband argued that there was no contractual right to a redundancy and therefore he had no obligation to disclose it. However, even if, as the husband said, he did not have the documentation to evidence the planned payment to him, he was on notice that he was to receive a payment and the disclosure rules required him to make whatever enquiry was necessary in order to inform the wife of what he was receiving.

The husband's appeal against the orders being varied by the trial judge rather than there being a fresh hearing and full consideration of s 79 was successful. The magnitude of the change to the consent orders (increasing the payment to the wife of $140,000 to $440,000) went beyond mere variation and required the order to be set aside and a new s 79 order to be made giving full consideration to the matters arising under s 79(4) and considering the present financial circumstances of the parties.

Does establishing a "miscarriage of justice" mean an order must be varied or set aside?

> "Section 79A confers a discretion to vary or set aside an order and make a fresh order if there has been a miscarriage of justice in the relevant sense. The mere fact that there has been a miscarriage of justice does not seem … to mean that the Court must vary the order or set it aside."

This statement by Strauss J at first instance was approved by the Full Court in *Prowse & Prowse* (1995) FLC 92-557; [1994] FamCAFC 91. The Full Court said (at [50]):

> "an applicant for an order under s 79A(1) bears the onus of satisfying the Court that the original orders should be set aside or varied, and that includes the onus of satisfying the Court not just that there has been a 'miscarriage of justice' but also that the appropriate exercise of the discretion is to so order."

Examples of what circumstances may justify the exercise of the discretion under s 79A were identified by Strauss J (quoted at [35] by the Full Court) as:

> "lack of any or any proper representation or advice, concealment by the husband or ignorance by the wife of relevant financial matters, pressure on or undue persuasion of her, or unequal bargaining power on her part, and no doubt there may be many other such circumstances."

The importance of the discretion was emphasised by Mason J (with whom Aickin J agreed) in *Taylor* v *Taylor* (1979) FLC 90-674; [1979] HCA 38 (at p 78,595):

> "What s 79A(1) does is to give the court a discretion to set aside an order when it has been obtained by false evidence. In such a case the court will be extremely reluctant to exercise its discretion in favour of setting aside the order unless **something more appears than that false evidence has been given and has procured the making of the order**. The importance of bringing an end to litigation and the evil of allowing cases to be retried on the same evidence are powerful deterrents against setting aside a judgment whenever it appears that it has been obtained by false evidence without more."

The Full Court in *Scribe & Scribe* [2006] FamCA 1318 quoted the above passage, making the emphasis in bold, and held it was still good law despite later amendments to s 79A. The Full Court in *Scribe* also quoted Gee J in *Rohde & Rohde* (1984) FLC 91-592, who said (at 79,770):

> "It is in the public interest, that parties who have been the primary contributors to their own financial troubles in the way the husband has been in the case, should not be allowed to relitigate matters with a view to getting themselves out of those troubles."

The Full Court in *Scribe* applied this principle (at [84]):

> "to support the conclusion that the wife should not have been permitted to rely on her own apparently unexplained failure to seek proper and full independent legal advice. Had the wife had such advice, the misleading information may not have been put before the Court."

In relation to the importance of independent legal advice, the trial judge said (at [42]), and quoted (at [27]) by the Full Court:

> "I am more than satisfied the wife did not receive proper or detailed legal advice. It is not a requirement of law that she receive legal advice before entering into valid consent orders. The wife must take responsibility for the fact that the brief legal advice she did receive, she was advised not to sign. I accept she was also informed by [the husband's solicitor] that:
>
> (a) she should seek independent legal advice; and
>
> (b) that it was likely she would be entitled to more."

The court will not help parties who have been the primary contributors to their own financial troubles and let them re-litigate. In *Scribe* the wife could not explain why she had not sought proper and full independent legal advice.

The husband's appeal against the trial judge's decision to set aside the orders was upheld. Following *Thorne v Kennedy*, the outcome in *Scribe* is probably still good law. The wife would need to establish undue influence or another vitiating factor which affected her decision not to follow the advice she received.

In *Morrison* the discretion was exercised in favour of setting aside the orders because of factors which included:

- The wife's entitlement pursuant to the orders was only a small cash sum because of a unilateral instruction of the husband to solicitors holding monies for the parties to deduct an amount not provided for in the orders - so a post-order manipulation reduced the wife's entitlements further;
- Neither the wife when the orders were made, nor the court looking at the matter again, were able to ascertain from anything disclosed by the husband the values of any property or superannuation dealt with in the orders;

- Superannuation interests were susceptible to splitting orders at the time of the s 79A application, whereas they were not at the time of the orders; and
- The orders purported to deal with s 79 considerations by reference to a period of cohabitation of about 15 years, but the parties ultimately cohabitated for nearly 30 years.

In *Trustee of the Bankrupt Estate of Hicks & Hicks* [2016] FamCA 462, the court was satisfied that there was had been non-disclosure by the husband of his assets and liabilities in the Application for Consent Orders. No notice had been given of the proposed consent orders to a third party engaged in litigation with the husband. The court was satisfied that there had been a miscarriage of justice, however, the court declined to exercise its discretion in favour of the husband's trustee in bankruptcy. The wife had no liability for the debt to the creditor and any s 79 order was unlikely to be more favourable to the trustee than the order already made. The wife argued that the existing order only gave her 51.37% of the net pool and that her entitlements were 60%. There was also uncertainty and a lack of information as to the overseas assets and liabilities of the husband. This would hinder the ability of the court to make an alternative order that was just and equitable if the existing order was set aside.

An appeal by the trustee was allowed in *Trustee of the Bankrupt Estate of Hicks & Hicks* [2018] FamCAFC 37. The matter was remitted for re-hearing.

Justice Austin dissenting, dismissed the appeal on the basis that the trustee chose not to engage with the separate argument of whether the discretion should be exercised. This was a separate step to the finding of a miscarriage of justice.

“Duress … or any other circumstance”

Under s 79A(1)(a), a s 79 order may be set aside for “duress … or any other circumstance”. Most of the reported cases were decided before the High Court delivered judgment in *Thorne* v *Kennedy* (2017) FLC 93-807, in which the concepts of duress, undue influence and unconscionable conduct were considered in relation to the setting aside of financial agreements.

The concepts of undue influence and unconscionable conduct are likely to be captured by “duress … or any other circumstance” provided they amount to a “miscarriage of justice”.

Many of the cases decided under s 79A which discuss duress might be better considered as cases in which there may have been undue influence, e.g. *Scribe & Scribe* (2006) FLC 93-302 (considerable pressure by the husband when the wife was in a fragile emotional state) and *Dunnett & Dunnett* [2013] FamCA 529 (threat not to pay the substantial mortgage). The s 79A cases on duress and undue influence therefore need to be read carefully in the light of the High

Court plurality in *Thorne v Kennedy* pointing out that the trial judge in that case had confused the concepts. It appears that the confusion is common in both s 79A and financial agreement cases.

Requirements for undue influence

The High Court plurality referred (at [30]) to "the difficulty of defining undue influence" noting that "the boundaries, particularly between undue influence and duress, are blurred". Undue influence occurs 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 alternative 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. Certain relationships can give rise to a presumption of undue influence. 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 there was 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 in *Kennedy & Thorne* [2015] FCCA 484 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 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 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. These same matters are likely to be relevant to consent property settlement orders.

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.

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."

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. Starke J said (at p.126):

> "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."

Requirements for unconscionable conduct

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.

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.

A useful illustration of the application of the principle is *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."

An example of duress and unconscionable conduct was *Pompidou & Pompidou* [2007] FamCA 879. Justice Brown set aside property orders on both grounds 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 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.

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* did not find it necessary to determine 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 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".

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.

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.

What is meant by "impracticable" in s 79A(1)(b)

There is no doubt that the term "impracticable" does not mean "impossible". Justice Gee made this quite clear in *Rohde & Rohde* (1984) FLC 91-592 at p 79,768. He relied on dictionary definitions of "not practicable", including "that cannot be carried out or done", "practically impossible", "unmanageable" and "intractable".

In *La Rocca & La Rocca* (1991) FLC 92-222, Kay J gave a rather different interpretation of the term "impracticable", allying it to the doctrine of frustration in contract. In particular, he said (at p 78,538):

> "My own view is that the concept of impracticability, as referred to in this section, is akin to the application of the doctrine of frustration in contractual matters. What the Parliament is concerned with and what ought to be concerning the Court is the happening of events which cannot be reasonably foreseen, which will have the effect of causing an injustice to one of the parties if the happening of such events is not given effect to …
>
> Now, in my view, what the appropriate application of s 79A(1)(b) ought to be is that circumstances that have arisen in which it becomes impracticable to carry out the orders are circumstances that could not reasonably have been contemplated and that in such circumstances, whilst impossibility is not the test and impracticability is, it may then become just and equitable to change the orders."

In *Gaudry & Gaudry (No 1)* (2004) FLC 93-202, Scarlett FM set aside a s 79 order and substituted a new order which gave the wife an increased amount from the net proceeds of sale of the home. After the original orders were made the husband demolished the residence, thereby reducing its value by $35,000. The orders were varied under s 79A(1)(b) to compensate the wife for this, because the husband had caused the impracticability.

In *Sanger & Sanger* (2011) FLC 93-489 the Full Court upheld the trial judge's decision not to set aside a financial agreement for impracticability. The failure of an agreement to deliver to a party

the outcome they hoped for did not render the agreement impracticable. The order was varied under s 79A to extend the time for compliance.

Default under s 79A(1)(c)

Under s 79A(1)(c) or s 90SN(1)(c), where a court is satisfied that a person has defaulted in carrying out an obligation imposed upon the person by an order made under s 79 or s 90SM and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set it aside and make another order in substitution for the order, the court may, in its discretion, vary the order or set the order aside and, if it thinks fit, make another order under s 79 in substitution for the order set aside.

There are two necessary conditions:

1. A person must have defaulted in carrying out an obligation imposed upon them by the original property settlement order;

2. In the circumstances that have arisen as a result of that default, it must be just and equitable to vary the original property settlement order or set it aside.

A party cannot seek an order under s 79A(1) as a result of their own default unless such default was due to circumstances beyond that party's control.

In *Blackwell & Scott* (2017) FLC 93-775, the husband unsuccessfully appealed against the wife's successful application to set aside consent orders under s 90SN(1)(c). The orders were intended to effect an equal division of the property, with the husband to retain a real property and pay the wife $130,000 within 90 days. The husband failed to pay and the sum was not paid until 13 months after the due date for payment. The wife issued proceedings and the husband paid 9 months after she did so. The husband paid interest as required under the *Family Law Rules*, but not until 5 months after he paid the principal sum.

Justice Kent said (at [38]) in relation to the husband's argument that the orders should not be set aside:

> "Whilst the husband acknowledges the wife to be "a person affected by an order" within the meaning of the subsection and that the husband was in "default", the essence of the husband's contention is that the substantial increase in the value of the Suburb K property is not causally related to the husband's default. The husband contends that the wife had to prove a cause and effect between the default on the one hand, and the increase in property value on the other, for the subsection to have operation. It is thus contended that the trial judge was in error in giving operation to the subsection absent the causation contended for by the husband. This is the specific question of interpretation raised."

Justice Kent concluded (at [58], [60]):

> "The relevant 'circumstances' when the subject consent orders of 24 February 2014 were made, included that the orders were intended and designed to effect an equal division of the parties' net assets. The adoption of $130,000 as the cash sum to be paid to the wife was plainly not arbitrarily selected, but was adopted to effect an equal division given, relevantly, the value of the Suburb K property at the time at $600,000 to $650,000. However, the orders could only ever effect an equal division, or any approximation of an equal division (given the 90 day period allowed for the payment) if the **payment** of $130,000, when made to the wife, secured her **receipt** of an equal division or approximately equal division relative to the then worth of the Suburb K property…
>
> In contrast, the critically important circumstances arising upon and from the husband's continuing default over the 13 month period referred to, included that when the wife finally received the payment of $130,000, even with the subsequent payment of interest, she was not then **receiving** an equal division by reference to the worth of the Suburb K property at the time of receipt."

An example of a successful application for variation of an order under s 79A(1)(c) is *Dudonova & Duransky* [2015] FamCA 935. The husband's intervening death meant that the transfer of the husband's interest in a property contemporaneously with a payment by the wife to the husband was unable to occur. The order was varied to extend the time for the estate to comply.

Exceptional circumstances in s 79A(1)(d)

Under s 79A(1)(d) and 90SN(1)(d), where the court is satisfied that exceptional circumstances relating to the welfare of a child have arisen since the making of an order under s 79 or 90SM, and either the child or (where the applicant has the caring responsibility of that child) the applicant will suffer hardship if the court does not vary the order or set aside the order and make another order in substitution for it, the court may, in its discretion, vary the order or set the order aside and, if it thinks fit, make another order under s 79 in substitution for the order set aside.

A person has the "caring responsibility" for a child if:

- the person is a parent of the child with whom the child lives, or
- the person has a residence order in relation to a child, or
- the person has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development (s 79A(1AA) or 90SN(3)).

In *Liu & Liu* (1984) FLC 91-572, Nygh J observed (at p 79,624) that the "exceptional circumstances" referred to in para (d) need not themselves relate to the original property order. He gave the example of a serious chronic illness of a child which causes a need for a remodelling of the house in which the child lives, which cannot be met out of increased maintenance but only out of an increased share of capital.

What amounts to “exceptional circumstances” is a matter of fact and degree in every case. In *Simpson & Hamlin* (1984) FLC 91-576 (at p 79,658), the Full Court agreed that a simple change to the custody arrangements for a child after the making of a property order would not constitute “exceptional circumstances", unless the change in arrangements “was so exceptional as to take it out of the normal vicissitudes of life”. The test appears to be whether the change in care arrangements was within the reasonable contemplation of the parties at the time the original property order was made.

The Full Court allowed the wife’s appeal against a decision to set aside property orders under s 79A(1)(d) in *Garden & Gavin (No 2)* [2010] FamCAFC 125. The Full Court considered the approach taken in *Simpson & Hamlin* to be correct and also relevant was that the hardship was not that of the applicant, as required under the section, but of the children. The children had moved from the comfortable former matrimonial home, in which the wife still resided, to the husband’s two bedroom apartment.

The Full Court in *Garden & Gavin (No 2)* agreed with the Full Court in *Y & Y* [1995] FamCA 102 where it was said:

> “We do not think the Full Court intended to limit the test of exceptional circumstances to circumstances which cannot reasonably be expected to arise.
>
> This was made clear when the Court said:
>
> > ‘What amounts to exceptional circumstances is very much a question of fact and degree.’”

The Full Court in *Garden* continued:

> “With respect, we agree. The Court should not limit itself to matters relevant only to expectations. It should consider all relevant facts and matters when deciding whether there have been circumstances of exceptional nature.”

In *Marras & Marras* (1985) FLC 91-635, Purdy J held that persistent refusal by a husband to pay child maintenance in accordance with a court order could constitute exceptional circumstances relating to the welfare of a child sufficient to enable a property order to be set aside and another made in substitution for it.

In *Public Trustee (as executor of the estate of Gilbert)* v *Gilbert* (1991) FLC 92-211, the Full Court of the Family Court agreed that the premature death of a party to a marriage soon after the making of property orders could constitute “circumstances of an exceptional nature” (though in this case they were found not to relate to the welfare of a child).

Conclusion

There is no doubt that the growth area in applications to set aside property settlement orders will continue to be under s 79A(1)(a), with respect to non-disclosure but also undue influence and

probably unconscionable conduct. The decision of the High Court in *Thorne v Kennedy* means that more lawyers are aware that undue influence and unconscionable conduct are easier to establish than "duress" which is expressly referred to in s 79A(1)(a). With these types of applications, it is vital to remember that it is necessary to establish not only the vitiating factor, but also that it has led to a miscarriage of justice.

With respect to all applications under s 79A, the court retains a discretion, so that even if the ground is established, the order may not be varied or set aside. The evidence and submissions must address all aspects of s 79A.

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