

**“SETTING ASIDE BINDING FINANCIAL
AGREEMENTS – DURESS, UNDUE INFLUENCE AND
UNCONSCIONABLE CONDUCT”**

Seminar Paper for FLPA in the Tropics

Saturday 18 November 2017

Family Law Practitioners Association

Pacific Hotel, 43 The Esplanade, Cairns

The Hon. Matt Foley

Barrister and Mediator
Brisbane Chambers,
Level 27, Santos Place
32 Turbot St, Brisbane, Q 4000

Adjunct Professor of Social Work at the University of Queensland

“In this world justice comes into question only between equals. The strong do what they can and the weak accept what they must.”

Thucydides *Melian Dialogue* (416 B.C.)

Common law

1. At canon law, marriage was and is a sacrament.¹ At common law, marriage is both a contract and a status.² The status of marriage is not a quaint archaism of ecclesiastical law. It is high public policy, as evident in the current national debate on marriage equality.
2. Traditionally, financial agreements to oust the matrimonial jurisdiction of courts were regarded as contrary to public policy.
3. The common law position was articulated by Lord Atkin in the House of Lords decision of *Hyman v Hyman* [1929] AC 601 at 629; [1929] All E Rep 245 at 258, 259:

“No agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife...the wife’s right to future maintenance is a matter of public concern, which she cannot barter away”.

4. The public policy considerations in assessing marital financial agreements are neatly summarised in the spirited dissent of Lady Hale in the UK Supreme Court case of *Radmacher v Granatino* [2010] UKSC 42, [2011] AC 534 at [132]:

“Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple’s mutual duty to support one another and their children.”

¹ Code of Canon Law 1055 §1

² See the dissent of Lady Hale in UK Supreme Court case of *Radmacher v Granatino* [2011] AC 534 at [132]

5. For a general historical account of the development of the case law, public policy and statutory provision in this area see the decision of the Full Court of the Family Court *In the Marriage of Wright* (1977) 14 ALR 561; 3 Fam LR 11,150 at 11,155-64; 29 FLR 10; (1977) FLC ¶90-221 per Watson J with whom Evatt CJ and Asche J agreed.

6. A brief history of ante-nuptial agreements since before the enactment of the *Statute of Uses* in 1536 is set out by the learned authors S Gree and J Long in “*Marriage and Family Law Agreements*”³. A jointure, a premarital property settlement for the wife, was explained by Blackstone in that “*it became usual, on marriage, to settle by express deed some special estate to the use of the husband and wife, for their lives, in joint-tenancy, a jointure; which provision would be a provision for the wife in case she survived her husband*”.⁴ The learned authors also describe the cause of action of breach of promise to marry, with roots in Roman law, as an important action in England “*where marriage was a largely a property transaction which had the social significance of saving a woman from the cruel fate of spinsterhood*”.⁵

7. For discussion of the High Court’s historical approach to financial agreements between spouses and the interaction of legislation, public policy and the Courts’ jurisdiction, see *Brooks v Burns Philp Trustee Company Ltd* (1969) 121 CLR at 456 per Windeyer J and *Felton v Mulligan* (1971) 124 CLR 367.

Part VIIIA Family Law Act 1975: setting aside agreements on “*the principles of law and equity*”

8. In 2000 the law changed. A brave new world of financial agreements emerged. The *Family Law Act 1975* was amended by the introduction of Pt VIIIA pursuant to the *Family Law Amendment Bill 1999*.

9. The Revised Explanatory Memorandum to the Bill sets out the intention of the relevant amendments at paragraphs 159 to 162. Four significant features of this amendment were: —
 - Parties to a proposed marriage could, for the first time, enter into a pre-nuptial agreement;

 - Parties could enter into an agreement to alter their interests in property whilst

³ McGraw-Hill Book Company, Colorado. 1984 at 2.05 pp 109-110

⁴ W Blackstone *Commentaries* 137 (1832), as cited by Gree and Long op.cit.

⁵ Gree and Long op.cit 202 p 103

still married;

- They could enter into a financial agreement that altered their interest in property after separation or divorce;

- Removal of the requirement that, before such agreements could oust the jurisdiction of a Family Law Court to make orders under Pt VIII, the agreement had to be approved by a Judicial Officer of a Family Law Court.

10. If the financial agreement/s made under Part VIIIA of the *Family Law Act 1975* are valid, then they oust the jurisdiction of the Federal Circuit Court and Family Court under Part VIII to make orders for the alteration of property interests and spouse maintenance. Section 71A (1)(a) provides that Part VIII does not apply to “*financial matters to which a financial agreement that is binding on the parties to the agreement applies*”.

11. Similar provisions were introduced at the same time for financial agreements in de facto relationships in Part VIIIAB.⁶

12. Procedural safeguards for the making of financial agreements are provided in section 90G:

- Agreement to be signed by all parties;
- Independent legal advice about the effect of the agreement;
- Written statement by legal practitioner that advice provided.

13. The question of whether a financial agreement or termination agreement is valid, enforceable or effective is to be determined by the court “*according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts*” pursuant to section 90KA.

14. A financial agreement or termination agreement may be set aside by a court pursuant to section 90K if, and only if, the court is satisfied of one or more of certain listed matters, including:

- Fraud (including non-disclosure of a material matter);
- Defeating a creditor;
- Defrauding another de facto party;
- The agreement is void, voidable or unenforceable;
- Circumstances have arisen to make the agreement impracticable;
- A material change in circumstances relating to the care of a child;
- Unconscionable conduct by a party in making the financial agreement;
- Superannuation interest unsplitable or payment flag unlikely to be terminated.

Vitiating factors for a financial agreement

⁶ See *Family Law Act 1975* Part VIIIAB Division 4 – Financial Agreements – sections 90UA to 90UN

15. Any factor at law or equity which would vitiate a contract may be relied on in determining the validity, enforceability or effect of a financial agreement.⁷ This would include fraud, misrepresentation and misleading conduct, mistake, duress, undue influence and unconscionable conduct.⁸
16. This paper will focus on the factors of duress, undue influence and unconscionable conduct arising in the context of a marriage or a de facto relationship.

Terminology – duress, undue influence and unconscionable conduct

17. In *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 Deane J at p 474 described the conceptual distinctions in these terms:

“Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.”

The conscience of equity

18. Section 90KA requires the court to consider the validity of a financial agreement according to the principles of both law and equity. The concepts of undue influence and unconscionable conduct are rooted in equity. It is thus essential that courts should not uncritically follow commercial precedents, but should heed “the conscience of equity”⁹ and act in the cause of justice on the basis that “*the ethical values of individual restraint, mutuality and social responsibility at play within the framework bequeathed by Chancery differ from the individualism and the universalism of the common law*”.¹⁰

Thorne v Kennedy [2017] HCA 49

19. On 8 November 2017, the High Court unanimously allowed an appeal from the Full Court of the Family Court on the setting aside of financial agreements. The Court published the following summary on its website with the proviso that “this statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court’s reasons”.

⁷ In view of the provisions of section 90KA.

⁸ See *Halsbury’s Laws of Australia* at [110- 5005].

⁹ See Keane, P A – “*The 2009 WA Lee Lecture in Equity: The Conscience of Equity*” (2010) 84 ALJ 92

¹⁰ Op cit page 110

Today the High Court unanimously allowed an appeal from the Full Court of the Family Court of Australia. The High Court held that two substantially identical financial agreements, a pre-nuptial agreement and a post-nuptial agreement, made under Pt VIII A of the Family Law Act 1975 (Cth) should be set aside.

Mr Kennedy and Ms Thorne (both pseudonyms) met online in 2006. Ms Thorne, an Eastern European woman then aged 36, was living overseas. She had no substantial assets. Mr Kennedy, then aged 67 and a divorcee with three adult children, was an Australian property developer with assets worth over \$18 million. Shortly after they met online, Mr Kennedy told Ms Thorne that, if they married, "you will have to sign paper. My money is for my children". Seven months after they met, Ms Thorne moved to Australia to live with Mr Kennedy with the intention of getting married.

About 11 days before their wedding, Mr Kennedy told Ms Thorne that they were going to see solicitors about signing an agreement. He told her that if she did not sign it then the wedding would not go ahead. An independent solicitor advised Ms Thorne that the agreement was drawn solely to protect Mr Kennedy's interests and that she should not sign it. Ms Thorne understood the advice to be that the agreement was the worst agreement that the solicitor had ever seen. She relied on Mr Kennedy for all things and believed that she had no choice but to enter the agreement. On 26 September 2007, four days before their wedding, Ms Thorne and Mr Kennedy signed the agreement. The agreement contained a provision that, within 30 days of signing, another agreement would be entered into in similar terms. In November 2007, the foreshadowed second agreement was signed. The couple separated in August 2011.

In April 2012, Ms Thorne commenced proceedings in the Federal Circuit Court of Australia seeking orders setting aside both agreements, an adjustment of property order and a lump sum spousal maintenance order. One of the issues before the primary judge was whether the agreements were voidable for duress, undue influence, or unconscionable conduct. The primary judge set aside both agreements for "duress". Mr Kennedy's representatives appealed to the Full Court of the Family Court, which allowed the appeal. The Full Court concluded that the agreements should not be set aside because of duress, undue influence, or unconscionable conduct. By grant of special leave, Ms Thorne appealed to the High Court.

The High Court unanimously allowed the appeal on the basis that the agreements should be set aside for unconscionable conduct and that the primary judge's reasons were not inadequate. A majority of the Court also held that the agreements should be set aside for undue influence. The majority considered that although the primary judge described her reasons for setting aside the agreements as being based upon "duress", the better characterisation of her findings was that the agreements were set aside for undue influence. The primary judge's conclusion of undue influence was open on the evidence and it was unnecessary to decide whether the agreements could also have been set aside for duress. Ms Thorne's application for

property adjustment and lump sum maintenance orders remains to be determined by the Federal Circuit Court.

Majority Judgment

20. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ delivered a joint judgment. Their Honours summarised the case in these terms at paragraphs 1 and 2.

1. *This appeal concerns two substantially identical financial agreements, a pre-nuptial agreement and a post-nuptial agreement which replaced it, made under Pt VIIIA of the [Family Law Act 1975](#) (Cth). The agreements were made between a wealthy property developer, Mr Kennedy, and his fiancée, Ms Thorne. The parties met online on a website for potential brides and they were soon engaged. In the words of the primary judge, Ms Thorne came to Australia leaving behind "her life and minimal possessions ... If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community". The pre-nuptial agreement was signed, at the insistence of Mr Kennedy, very shortly before the wedding in circumstances in which Ms Thorne was given emphatic independent legal advice that the agreement was "entirely inappropriate" and that Ms Thorne should not sign it.*
2. *One of the issues before the primary judge, Judge Demack, was whether the agreements were voidable for duress, undue influence, or unconscionable conduct. The primary judge found that Ms Thorne's circumstances led her to believe that she had no choice, and was powerless, to act in any way other than to sign the pre-nuptial agreement. Her Honour held that the post-nuptial agreement was signed while the same circumstances continued, with the exception of the time pressure. The agreements were both set aside for duress, although the primary judge used that label interchangeably with undue influence, which is a better characterisation of her findings. The Full Court of the Family Court of Australia (Strickland, Aldridge and Cronin JJ) allowed an appeal and dismissed a notice of contention by Ms Thorne, concluding that the agreements had not been vitiated by duress, undue influence, or unconscionable conduct. For the reasons which follow, the findings and conclusion of the primary judge should not have been disturbed. The agreements were voidable due to both undue influence and unconscionable conduct.*

Duress

21. The trial judge had made a finding that the two agreements were made under duress.¹¹ The plurality concluded that it was not necessary to consider duress as the better characterisation of Her Honour's findings was that the agreements were set aside for undue influence.¹²

¹¹ For an analysis of lawful act duress, economic and emotional pressure, and causation in duress cases see J Edelman and E Bant *Unjust Enrichment* (2nd edition) Hart Publishing, Oxford and Portland, Oregon 2016 at pages 210-218

¹² *Thorne v Kennedy* [2017] HCA 49 at par 29

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.*

Undue influence

22. The plurality observed at paragraph 31 that a person can be subjected to undue influence where the effect of factors such as pressure is that the person "has no free will, but stands *in vinculis* [in chains]" and that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him".¹³

31. *In 1836, in a passage which was copied verbatim by Snell thirty years later*^[32], *Story said that a person can be subjected to undue influence where the effect of factors such as pressure is that the person "has no free will, but stands in vinculis [in chains]"*^[33]. *He explained that "the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him"*^[34]. *In 1866, this approach was applied in equity by the House of Lords, recognising undue influence in a case of pressure that deprived the plaintiff of "free agency"*^[35]. *In 1868, in probate, Sir James Wilde also described undue influence as arising where a person is not a "free agent"*^[36]. *In Johnson v Buttress*^[37], *Dixon J described how undue influence could arise from the "deliberate contrivance" of another (which naturally includes pressure) giving rise to such influence over the mind of the other that the act of the other is not a "free act". And, in Bank of New South Wales v Rogers*^[38], *McTiernan J characterised the absence of undue influence as a "free and well-understood act" and Williams J referred to "the free exercise of the respondent's will"*^[39]. (footnotes omitted)

23. The Court accepted that actual undue influence was established on the findings of fact by the trial judge. Significantly, the Court rejected the submission that there was a presumption of undue influence arising from the relationship of fiancé and fiancée.¹⁴

36. *Although the relationship of fiancé and fiancée was first seen as falling within the recognised categories by Lord Langdale MR in 1848*^[54], *and although it was also recognised in this Court by Dixon J in 1936*^[55]*and 1939*^[56], *in 1961 in England Lord Evershed MR refused to apply the established*

¹³ *Thorne v Kennedy* [2017] HCA 49 at par 31

¹⁴ *Thorne v Kennedy* [2017] HCA 49 at par 36

presumption, saying that "this is 1961 and what might have been said of the position, independence, and the like, of women in 1848 would have to be seriously qualified to-day"^[57]. In 1992 in *Louth v Diprose*^[58] Brennan J observed that it "may no longer be right to presume that a substantial gift made by a woman to her fiancé has been procured by undue influence". Common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other. (footnotes omitted)

24. Legal practitioners advising clients on financial agreements should note that the plurality of the High Court considered the unfair and unreasonable terms of the financial agreements as matters relevant to a consideration of whether the agreements were vitiated.¹⁵ A grossly unreasonable financial agreement runs the risk of being set aside.

56. The primary judge was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature. In other words, what the Full Court rightly recognised as the significant gap between Ms Thorne's understanding of Ms Harrison's strong advice not to sign the "entirely inappropriate" agreement and Ms Thorne's actions in signing the agreement was capable of being a circumstance relevant to whether an inference should be drawn of undue influence.

Unconscionable conduct

25. The Court observed that a conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage and for the other party to take unconscientious advantage thereof.¹⁶

37. A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests"^[60]. The other party must also unconscientiously take advantage of that special disadvantage^[61]. This has been variously described as requiring "victimisation"^[62], "unconscientious conduct"^[63], or "exploitation"^[64]. Before there can be a finding of unconscientious taking of advantage, it is also

¹⁵ *Thorne v Kennedy* [2017] HCA 49 at par 56

¹⁶ *Thorne v Kennedy* [2017] HCA 49 at par 38

generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage^[65]. (footnotes omitted)

Findings of Trial Judge

26. The Court accepted the findings of the trial judge in holding that the agreements should be set aside on the grounds of undue influence and unconscionable conduct.¹⁷

47. The primary judge set out six matters which, in combination, led her to the conclusion that Ms Thorne had "no choice"^[82] or was powerless^[83]: (i) her lack of financial equality with Mr Kennedy; (ii) her lack of permanent status in Australia at the time; (iii) her reliance on Mr Kennedy for all things; (iv) her emotional connectedness to their relationship and the prospect of motherhood; (v) her emotional preparation for marriage; and (vi) the "publicness"^[84] of her upcoming marriage. These six matters were the basis for the vivid description by the primary judge of Ms Thorne's circumstances^[85]:

"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."

48. As to the second agreement, the primary 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"^[86]. In effect, her Honour's conclusion was that the same matters which vitiated the first agreement, with the exception of the time pressure caused by the impending wedding^[87], also vitiated the second agreement.

Factors affecting financial agreements

¹⁷ *Thorne v Kennedy* [2017] HCA 49 at paras 47 and 48

27. Family law practitioners dealing with financial agreements will be assisted by having regard to the factors listed by the Court in considering the question of undue influence.¹⁸

60. In the particular context of pre-nuptial and post-nuptial agreements, some of the factors which may have prominence include the following: (i) whether the agreement was offered on a basis that it was not subject to negotiation; (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement^[97]; (iii) whether there was any time for careful reflection; (iv) the nature of the parties' relationship; (v) the relative financial positions of the parties; and (vi) the independent advice that was received and whether there was time to reflect on that advice.

Judgment of Nettle J

28. Nettle J agreed with the orders proposed by the plurality but added some observations on the effect of illegitimate pressure or duress. Nettle J was critical of the decision of the NSW Court of Appeal in *ANZ Banking Group v Karam*¹⁹ that the concept of illegitimate pressure was restricted to the exertion of pressure by “threatened or actual unlawful conduct”. His Honour observed that “*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*”.²⁰ (footnotes omitted)

Judgment of Gordon J

29. Gordon J also agreed with the orders of the plurality on the basis that the financial agreement was procured by unconscionable conduct, but not undue influence. Her Honour observed that “*Ms Thorne's will was not overborne*” although her “*options were narrow, even eliminated*”.²¹

107. And the fact that Ms Thorne's options were narrow, even eliminated, is not to the point. The paucity of options is relevant to whether, for the purposes of the doctrine of unconscionable conduct, Ms Thorne was suffering from a special disability or disadvantage of which Mr Kennedy unconscientiously took advantage. But it says nothing about her will. It cannot be said that her entry into each agreement was the outcome of "such an actual influence over the mind" of Ms Thorne that it cannot be considered her free act^[156]. The only sense in which it can be said that Ms Thorne was not "free" was that circumstances (including Mr Kennedy's conduct) had

¹⁸ *Thorne v Kennedy* [2017] HCA 49 at par 60

¹⁹ (2005) NSWCA 344; (2005) 64 NSWLR 149

²⁰ *Thorne v Kennedy* [2017] HCA 49 at par 71

²¹ *Thorne v Kennedy* [2017] HCA 49 at paras 107 and 108

conspired to limit the outcomes that she could realistically obtain by exercising her decision-making capacity. As to that, equity does not aspire to resolve philosophical questions about whether it is meaningful to speak of "free will" when one's zone of autonomy has been bounded.

108. For those reasons, Ms Thorne's will was not overborne in the sense explained and there should not be a finding of undue influence. (footnote omitted)

CONCLUSION

30. The High Court's decision in *Thorne v Kennedy* speaks to the conscience of equity. It is a binding precedent for all Australian financial agreements under Part VIIIA of the *Family Law Act* 1975. It overturns the previous approach taken by the Full Court of the Family Court in this area.

31. This case starkly reminds all of us who practise in the Family Court and the Federal Circuit Court that they are not only courts of law but also courts of equity.²²

*'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case''.*²³

²² See the reference to "principles of law and equity" in section 90KA of the *Family Law Act* 1975.

²³ *Thorne v Kennedy* [2017] HCA 49 at par 42 per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ quoting from Dixon CJ, McTiernan and Kitto JJ in a passage from *Jenyns v Public Curator (Q)*(1953) 90 CLR 113 at 118-119 which in turn quotes Lord Stowell's generalization concerning the administration of equity.

