THORNE V KENNEDY – A FAMILY LAW CASE NOTE [2017] HCA 49

Written by Jamie Burreket

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Hark the herald angels (there are seven of them) sing! Twice in the same judicial calendar, the highest Court in the land has weighed in on the jurisprudence of the *Family Law Act*. It is probably a record. If it's not, it is worth noting it was achieved notwithstanding competition from a postal plebiscite and gaggle of geographically uncommitted politicians. Neither should it be forgotten that this is the first time that this Court has chosen to consider a Financial Agreement - nor that it took 16 years for it to occur.

In *Thorne v Kennedy* the High Court of Australia has considered and upheld an appeal from the Full Court of the Family Court of Australia. The effect of which is to set aside a pre and post nuptial Financial Agreement on the basis that it is vitiated by undue influence and unconscionable conduct. In addition, the High Court in passing discussed the likely expansion of the types of conduct that might vitiate an agreement by duress. By considering each of these types of equitable relief in the one decision and by reference to a Financial Agreement, the High Court has made a serious inroad into the production of a body of binding jurisprudence on the means by which equity will intervene to strike down a Financial Agreement.

This case provides useful commentary and guidance to:

(a) those brave family lawyers still drafting and advising on Financial Agreements (binding or otherwise);

(b) any family lawyer who wants to advise or act on the enforcement or setting aside of a Financial Agreement;

(c) any other lawyer who acts or advises in relation to equitable relief in other jurisdictions.

The last point is worth repeating as the implications that arise from *Thorne v Kennedy* are relevant to all jurisdictions where these types of equitable relief are available, and not just the Family Law courts.

"I WILL MARRY YOU IF I LIKE YOU BUT YOU WILL HAVE TO SIGN PAPERS - MY MONEY IS FOR MY CHILDREN"

This was what Mr Kennedy, a 67 year old man worth $18-24 million said to the then 36 year old Ms Thorne whom he had met on the internet before he then travelled overseas to meet her in person for the first time. Probably realising he had less years ahead of him than behind him - 12 months later Ms Thorne travelled to Australia to live with him and 7 months later marries him.

IF YOU DON'T SIGN IT, THE WEDDING IS OFF

Eleven days before the wedding, Mr Kennedy informed Ms Thorne that he is taking her to see a lawyer to sign a document. He also told her if she does not sign it, the wedding was off. The following day he waited downstairs in the car park, while Ms Thorne read an agreement with her lawyer for the first time. The agreement provided for accommodation and a monthly sum during the parties' marriage and on the death of Mr Kennedy if they were living together at that time. The agreement provided that if the parties separated within 3 years, Ms Thorne received nothing (with or without a child having been born of the relationship). If the parties separated after 3 years without a child born of the relationship, Ms Thorne received $50,000.

Handwritten amendments were requested on behalf of Ms Thorne and agreed to the next day – they were minor. Ms Thorne's lawyer advised against the agreement but Ms Thorne believed she would never leave Mr Kennedy, did not turn her mind to the possibility of separation and was focused instead upon her rights in the event of Mr Kennedy's death. Four days before the wedding, Ms Thorne signed the Financial Agreement. Some time before, all of her family had travelled to Australia for the wedding. In a distracting turn of events, the Financial Agreement required the parties to enter into an identical agreement within 28 days of the marriage. Ms Thorne signed that second agreement 5 days later.

The trial Judge aptly recorded Ms Thorne's position at the time she signed the Agreements:

> She was in Australia only in the 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 consequence of the relationship being at end would have significant and serious consequence 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.

Three years later, there was trouble in paradise. Mr. Kennedy was terminally ill. A Separation Declaration was served and then two months later Ms Thorne left their joint residence (not the usual order of those events). Three years later, being roughly the same length as their cohabitation, Mr Kennedy succumbed to his illness and died the day after his cross-examination at Trial.

POWERLESS WITH NO CHOICE OR JUST NOT THAT INTERESTED

For the learned Judge of the Federal Circuit Court six critical factual findings led to her conclusion that Ms Thorne was powerless and had no choice but to sign the Financial Agreement(s):

1. her lack of financial equality;
2. her lack of permanent status in Australia;
3. her reliance on Mr Kennedy for all things;
4. her emotional connectedness;
5. her emotional preparation for marriage; and
6. the publicness of her upcoming marriage.

A layman's reading of the decision of the learned Judge of the Federal Circuit Court would lead one to conclude that equity was intervening to set this agreement aside on the grounds of duress. According to the High Court, that is not what was meant. In any event – at Trial the Agreement(s) were set aside.

An appeal was raised by Mr Kennedy to the Full Court of the Family Court and for Ms Thorne's part a Statement of Contentions was introduced into that contest. In a joint decision upholding the husband's appeal, the Full Court concluded:

1. It could not be discerned which of the six matters the Trial Judge identified were fundamental and which were subsidiary to her decision – her reasons were inadequate;
2. The Trial Judge did conclude the agreement(s) were vitiated by duress and that was a misapplication of the law because there had been no threatened or actual unlawful act – she had misapplied the law;
3. The evidence was clear that Ms Thorne had acquiesced in Mr Kennedy's desire to protect his wealth for his children and had no concern about what she would receive on separation – there could be no undue influence as her will was free and she knew what she was doing; and
4. there had been no misrepresentation on the part of Mr Kennedy, his earlier statement to Ms Thorne made it clear she would receive nothing, she believed he would never leave her and so had no concern about her financial position on a separation and Mr Kennedy had agreed to the handwritten amendments – there was nothing unconscionable because Mr Kennedy had not taken advantage of the situation.

The Full Court revived the Agreement(s) – in what might be considered the furtherance of a trend of upholding Financial Agreements wherever possible.

Ms Thorne appeals to the High Court of Australia

and that Court does not like the arguments made on Mr Kennedy's behalf. The Agreement(s) failed and this time for good. All seven Judges conclude the Agreement(s) had been vitiated but there is not commonality among them in their reasons. The plurality of Kiefel CJ with Bell, Gageler, Keane and Edelman JJ rely on both undue influence and unconscionability to ground the failure of the Agreement(s) in equity. On the part of Nettle and Gordon JJ the Agreement(s) failed for reasons of unconscionability alone with a particular focus on the challenges to a finding of duress by Nettle J and the rejection of the notion of undue influence by Gordon J. However, all were agreed and strongly that the Agreement(s) were vitiated by unconscionable behaviour on the part of Mr Kennedy.

DURESS

Ultimately, the High Court did not need to decide the issue of duress. It concluded that the Trial Judge had used the word duress interchangeably with the word undue influence and that what the Trial Judge was really concluding was the latter.

Historically, duress arose where life or limb was threatened. Importantly there was no impairment of free will on the part of the threatened party – indeed the stronger party was entirely relying on their victim to be of sound mind and choose the lesser of the two evils presented to them. Traditionally, threats of economic loss were not sufficient to ground vitiation because of duress. In the last century, that law changed and economic threats were sufficient. In 2005, the Court of Appeal of New South Wales in *Australia & New Zealand Banking Group v Karam* placed a significant handbrake on the further development of that remedy. According to the Supreme Court, the threat needed to be unlawful.

On the part of the Full Court of the Family Court, it could find nothing illegal or unlawful about the actions of Mr Kennedy and therefore nothing that would bring his conduct within the realm of duress as limited by the Supreme Court's decision in *Karam*. In avoiding having to determine the duress question the plurality and Nettle J. went out of their way to suggest a likely challenge to the approach taken in *Karam*. The High Court signalled loudly that it was likely, after the benefit of proper argument and consideration, to accept that lawful but illegitimate and improper conduct was sufficient to vitiate an agreement in equity.

This has real implications for the general law of equity in Australia and may encourage other intermediate appellate courts in Australia to reconsider this issue at the first available opportunity. The question that will then arise is one of degree. How illegitimate and how improper must the conduct be?

In any event, duress is a matter that will need to be considered in relation to many challenges to a Financial Agreement. If it arises, on the lower standards suggested by the High Court, it should be pleaded. Care needs to be taken about how that claim interacts with Undue Influence where the former relies upon a free will and the latter looks to an impairment of free will. The distinction is well made out in the separate judgment by Gordon J. on the undue influence aspect of this case.

UNDUE INFLUENCE

There are a number of species of undue influence:

(a) *actual* undue influence where the facts of the particular transaction give rise to the conclusion;

(b) *presumed* undue influence where the parties fall within a class of relationship that has historically been regarded as presumptive of that description; and

(c) a *relationship* where the facts of the parties' relationship (rather than the facts of a particular transaction) give rise to the conclusion that the relationship itself is one of undue relationship.

Whether the undue influence is actual, presumed or arising from a relationship history – in each instance it is characterised by an ascendency or influence of the stronger party to the subjugation or dominion over the weaker. The focus here is on the will of the weaker party and whether that has been exercised freely or not.

In this case, the influence contended for on behalf of Ms Thorne was actual undue influence by Mr Kennedy. In that respect, the Court was being directed to the facts and circumstances of the particular transaction. However, even though it was not argued, the High Court made observations that resolved a particular aspect of presumed relationship of undue influence that is significant to matrimonial cases.

Historically, a fiancée and fiancé were presumed to be in a relationship of undue influence. This derived from a time where the laws relating to the legal status of women (particularly as it related to property) and the societal attitude to a failed engagement necessarily made these relationships ripe for undue influence. The relevance today of this classification at equity of parties' engagement to be married has been questioned by commentators for some time now. The issue has now been resolved by the High Court's conclusion that relationships of that type are no longer ones that give rise to a presumed relationship of undue influence. While it might be considered obiter, it is expressed in clear and final terms and is likely to be the end of the matter here in Australia.

The plurality of the High Court, unlike the Full Court, had no difficulty with the Trial Judge's finding that there was no outcome available to Ms Thorne that was fair and reasonable. The High Court concluded that it was open to the Trial Judge having regard to the six findings (identified above) to conclude that Ms Thorne was powerless or 'in other words' unable to make a clear, calm or rational decision such that she was not a free agent. That Ms Thorne's choices about entering the agreement were subordinated to the will of Mr Kennedy. That she was powerless. For the plurality of the High Court, the lack of viable choice impaired that will.

It is significant that the High Court concluded that the Trial Judge was correct to regard the unfairness and unreasonableness of the agreement as a relevant consideration. The plurality said:

> *… 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.*

Equity does not intervene to undo a bad bargain. The law has long recognised that there is often an imbalance in the respective bargaining powers of parties to any transaction. This has often made some Courts reluctant to entertain any significant exploration of the quantitative effect of the agreement. The High Court's approval of the course adopted by the Trial Judge may increase the propensity of Courts in the family law arena to make findings about the fairness or otherwise of the terms of a Financial Agreement, although that factor of itself is not likely to be a singularly determinative matter. Rather, it will assume relevance in cases where the grossness of the outcome made by the Agreement, demonstrates no one with a free mind would have consensually entered into such a bargain.

The dissenting Judgment on the issue of undue influence was that of Gordon J. Her Honour concluded that that paucity of options available to Ms Thorne or the quantitative outcome of each option was not the point. Ms Thorne did have options – sign and marry Mr Kennedy or don't and separate from him. She wanted to marry Mr Kennedy and she was exercising her free will when she made the decision to sign the agreement so that such a marriage could take place.

The plurality listed of some of the factors that would have prominence in determining the existence of undue influence in relation to a Financial Agreement. This is the first attempt of even a non-exclusive list of matters peculiar to the assessment of influence and free will when entering into Financial Agreements by any appellate court. In particular:

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 into including any explicit 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 position of the parties;
6. the independent advice that was received and whether there was time to reflect on that advice.

There is a lot to absorb in that catalogue of factors. If you act in these matters your brain should be ticking – just like those Financial Agreements you have signed clients up on that are sitting in your bottom drawer.

UNCONSCIONABILITY

All seven Justices of the High Court agreed that the agreement(s) were vitiated for unconscionability. The Court made it plain that in doing so it was considering 'unconscionability' as it arose in s90(K)(1)(b) where an "agreement is void, voidable, or

unenforceable" or 90KA and not the statutory use of the term "unconscionable" in s90K(1)(e).

There was no challenge to the law relating to unconscionability. Adopting the recent restatement of the law in *Kavaka v Crown Melbourne Limited* the High Court described the conclusion as open where there is a special disadvantage on the part of one party which affects that party's ability to make a judgment as to their own best interests and the other party knowingly takes advantage of that situation.

The majority of the High Court concluded that Ms Thorne was subject to a "special" disadvantage that Mr Kennedy knew about and he took advantage of. The finding by the trial Judge that Ms Thorne was powerless made the disadvantage "special" and not within a normal inequality in bargaining power that might exist between two parties. This was a stark departure from the course taken by the Full Court.

The High Court made particular mention of how Mr Kennedy had contributed to that special disadvantage by creating urgency, giving no anticipation that he would insist on terms as unreasonable as what was imposed, by bringing members of her family to Australia for the wedding and not offering to assist in their return home. All of these matters further increased the pressure on Ms Thorne.

HOW HAS THE FAMILY LAW WORLD CHANGED?

Across all that the High Court has said in this case, depending on where you sit on the spectrum of scepticism, there may be at least the following impacts on practice:

1. The grossness of the unfairness of a Financial Agreement may be sufficient to make it a relevant factor in vitiation by undue influence, but probably not by itself. The relevance will arise where the degree of unfairness can inform a Court about the likely lack of free will. Where the agreement is so unfair, free will cannot have been involved in its execution. This may give advisors leverage to modify expectations about what should be put in a Financial Agreement.

2. While the High Court did not deal in any way with s90G(1B) (as that saving provision only arises where an agreement is not "binding" rather than where an agreement is "set aside") and the discretion the Court has to declare an agreement binding, the relevance placed on the unfairness of the agreement in relation to undue influence may seep its way into the Court's consideration of what is "unjust and inequitable" where it seeks to revive an agreement which would otherwise have not met the statutory prerequisites for a declaration that it was binding.

3. Agreements ought to be proposed on the basis that they are (a) open to negotiation, with (b) sufficient time available for reflection, not only on the terms of the proposed agreement but also (c) on the advice provided. The first two elements are satisfied by a careful and considered approach to the negotiation of the instrument. Done properly evidence would come into existence which could satisfy those matters if they were ever called into question. But not necessarily the third. Presently the Act simply requires advice be given before the Financial Agreement was signed. Statements in writing from lawyers record that matter and are evidence (albeit not conclusive or deeming) of the fact. Those written Statements do not however record how early the advice was given and offer no proof of opportunity to reflect. It is likely new standard clauses attempting to deal with these considerations are going to develop, but they are never going to trump admissible material extraneous to the agreement as proof of the existence or lack of existence of these opportunities.

4. Statements in negotiations that link the execution of the agreement to the continuance of the relationship ought to be avoided. While it might be said that the extreme facts of this case may make it easy to distinguish, the risk will remain. At the very least any conduct of this type needs to be carefully weighed against the financial position of the weaker party if the agreement is not signed. Does this go so far as to suggest an economic parachute needs to be provided in some case if an agreement is not signed to make the playing field more level? At one point, there was mention of whether or not Mr Kennedy should have offered to fly all the relatives home if the wedding was not to proceed.

5. Duress is now a more accessible form of relief. Conduct that is lawful will be subject to scrutiny. Allegations of improper or

illegitimate acts will need to be measured and an appropriate formulation made about when a line has been crossed. Given the close proximity of parties to a Financial Agreement, as opposed to a commercial contract, this law is likely to develop faster with the Family Law jurisdiction than other civil jurisdictions. An opportunity exists for the Family Law Courts to lead the way in the development of this body of law.

6. While it did not arise for consideration in *Thorne v Kennedy*, there is still a need to consider the broad definition of family violence in legislation like the *Family Law Act* and where aspects of that definition like 'economic violence' sit within matters of undue influence and duress.

7. Lingering concerns that every pre-nuptial agreement where parties are engaged to marry give rise to a presumed relationship of undue influence have evaporated. However, this does not exclude a party from pleading a special relationship of dominance and subjugation based on the circumstances of their particular relation as opposed to the factual circumstances of the negotiation of the Financial Agreement.

8. There is an argument, that one of the factors that became relevant to the Trial Judge and the High Court, was an impairment of will brought about by the overpowering desire of Ms Thorne to marry and bear children with Mr Kennedy. So much so she could not even turn her mind to the possibility of separation. The expression 'emotional connectedness' to the relationship was used by the Trial Judge. Was Ms Thorne so in love with Mr Kennedy or the idea of a relationship with Mr Kennedy that her free will was impaired? Are we all vulnerable to this circumstance when we are in love? When does that emotion go so far as to inhibit our free agency? By itself that factor alone is unlikely to tip the scales but in the right circumstances and with limited other options presented it becomes more significant. The High Court catalogue of matters that have prominence when considering a financial agreement include the emotional circumstances of the parties. Are parties going to consider preventative measures when evidence is gathered before an agreement is signed about the emotional capacities and needs of a weaker party and how much the same limits their exercise of free will?

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