Thorne v Kennedy — A reminder by the High Court of Australia the law of contract and equity underpin family law financial agreements

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A family law financial agreement made pursuant to pt VIIIA for parties to a marriage and pt VIIIAB for de facto relationships, of the Family Law Act 1975 (Cth), make it possible for parties to enter into an agreement with respect to the alteration of their property in the event of separation without a court scrutinising the terms. Where a party alleges their genuine consent or judgment has been compromised an application can be made to the Federal Circuit Court of Australia or Family Court of Australia pursuant to ss 90K[1] and 90KA[2] of the Family Law Act seeking the intervention of the common law or equity to overturn the financial agreement in circumstances where conduct is found to vitiate the agreement in the form of duress, undue influence or unconscionable conduct. This article explores the context in which equitable intervention, namely duress, undue influence and unconscionable conduct, were considered and applied by the High Court of Australia in the 2017 decision of ***Thorne v Kennedy*** *and analyses the impact of the decision for legal practitioners and parties when negotiating, drafting and signing a family law financial agreement.*

1 Introduction

The High Court of Australia in the decision of *Thorne v Kennedy*[3] set aside two financial agreements, an agreement before marriage and an agreement after marriage, on the basis they were voidable pursuant to s 90K of the *Family Law Act 1975* (Cth) ('*Family Law Act*').

The High Court held Ms Thorne was subjected to unconscionable conduct and undue influence by Mr Kennedy. Duress was not considered by the plurality, however, Nettle J analysed duress and made a finding duress could not be established due to a lack of illegitimate pressure.

2 Relevant facts in *Thorne v Kennedy*

Ms Thorne and Mr Kennedy met in 2006 via an online dating website. Ms Thorne was 36 years of age and was living in the Middle East with no substantial assets. She was from Eastern Europe, single with no children, she

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1 *Family Law Act 1975* (Cth) s 90K(1)(b) ('*Family Law Act*'): a court may set aside a financial agreement where it is found to be void, voidable or unenforceable or s 90K(1)(e) a court may set aside a financial agreement where a party to the agreement has engaged in unconscionable conduct.

2 Section 90KA empowers the court to apply the principles of law and equity.

3 (2017) 263 CLR 85.

spoke Greek and her English language skills were limited. Mr Kennedy was 67 years of age, from Australia with a career in property development and an asset pool worth between $18 million and $24 million. He was divorced with three adult children. Ms Thorne and Mr Kennedy were of the Greek Orthodox religion.

Following a period of online communication Mr Kennedy took Ms Thorne on a holiday around Europe where he met her family. Mr Kennedy informed her that his money was intended for his three children and if he liked her they would marry and said, 'you will have to sign paper'; this was in reference to the financial agreement. In 2007 she moved to Australia to live with Mr Kennedy and they planned their wedding for 30 September 2007. She wanted to have a child to Mr Kennedy and her Australian visa was soon to expire unless she married Mr Kennedy.

On 8 August 2007, Mr Kennedy instructed a solicitor to prepare prenuptial agreement pursuant to s 90B of the *Family Law Act*. On 19 September 2007 he informed Ms Thorne they were going to see a solicitor to sign an agreement and that if she did not sign the wedding would not go ahead. On 20 September 2007, Mr Kennedy took Ms Thorne to see an independent solicitor whilst he waited in the car. At this moment Ms Thorne first became aware of the terms of the agreement. Ms Thorne was advised by her solicitor to reconsider the agreement as the terms were drawn to protect Mr Kennedy's financial interests solely. At this point in time, Ms Thorne's parents and sister had flown to Australia for the wedding, her dress had been made, the wedding reception was booked, and guests had been invited to the wedding.

On 21 September 2007, Mr Kennedy's solicitors at the request of Ms Thorne's solicitor made minor amendments to the agreement. On 24 September 2007 Ms Thorne was advised the agreement was entirely inappropriate and she should not sign. On 26 September 2007, 4 days before the wedding, Ms Thorne signed the agreement. The wedding went ahead on 30 September 2007.

Following the wedding, and in accordance with the recitals of the first financial agreement, a second financial agreement pursuant to s 90C of the *Family Law Act* was prepared in substantially identical terms to the first and presented to Ms Thorne. She sought legal advice and was advised not to sign the agreement as the terms provided her, if the relationship ceased, with a lump sum payment of $50,000.00 (indexed). She signed the second agreement which revoked the first agreement.

On 16 June 2011, after close to 4 years of marriage, Mr Kennedy signed a separation declaration.[4] In August 2011, Mr Kennedy and Ms Thorne separated without children.

In April 2012, Ms Thorne commenced proceedings in the Federal Circuit Court of Australia to set aside the two financial agreements, a settlement payment of $1.1 million and a lump sum spousal maintenance order of

4 A separation declaration is made pursuant to the *Family Law Act* (n 1), s 90DA for married couples and s 90UF for de facto couples, and must state that the parties are separated, living separately and there is no reasonable likelihood of resuming cohabitation. When the declaration is signed the financial agreement will come into effect.

$104,000.00. During the trial in 2014 Mr Kennedy passed away and two of his children, in their role as executor and trustee of his estate, were substituted as parties in the trial.

3 Legislative context of family law financial agreements

The *Family Law Act* governs marriage, de facto relationships and property alteration in Australia.

On 27 December 2000, the *Family Law Act* was amended.[5] Pursuant to pt VIIIA of the *Family Law Act* parties in a relationship can enter into a financial agreement prior to marriage (s 90B), during marriage (s 90C), during marriage but after separation (s 90C) and after divorce (s 90D). Since 2009 for parties in a de facto relationship ss 90UB, 90UC and 90UD apply.

The intent of the Australian federal Parliament and the objective of the legislation can be ascertained from the reading speech of then Attorney-General Daryl Williams who said a family law financial agreement will: 'encourage parties to agree about the distribution of their matrimonial property and thus give them greater control over their own affairs, in the event of a marital breakdown'.[6] Parliament intended that parties who entered into a financial agreement would 'avoid costly court proceedings'[7] and would 'keep people out of court wherever possible'.[8] In effect a financial agreement will oust the jurisdiction of the court in determining whether the agreement is just and equitable in all the circumstances at the time the agreement takes effect.

When prepared in accordance with the legislation a financial agreement is enforceable. The legislation requires the agreement adhere to drafting requirements pursuant to s 90G(1) for married couples and s 90UJ(1) for de facto couples, including: (a) the agreement is signed by all parties; and (b) each party was provided with independent legal advice regarding the effect of the agreement including advice as to the advantages and disadvantages.

A court may exercise its discretion under ss 90G(1A)–(1C) for married couples and ss 90UJ(1A)–(1C) for de facto couples and uphold the financial agreement in circumstances where the procedural requirements of s 90G(1) or s 90UJ(1) have not been met. This discretion is limited to circumstances where it would be 'unjust and inequitable' if the agreement were not binding, 'given the nature and extent of the non-compliance' with s 90G(1) or s 90UJ(1). This assessment does not consider the 'content of the bargain'.[9] Therefore, prudent drafting of a financial agreement should comply with the legislative requirements to avoid future litigation.

The validity of a financial agreement, which was central to the appeal to the High Court of Australia in *Thorne v Kennedy*, is contained in ss 90K and 90KA. The court is empowered to set aside a financial agreement if the court

5 *Family Law Amendment Act 2000* (Cth) sch 2.

6 Further Revised Explanatory Memorandum, Family Law Amendment Bill 2000 (Cth) 6.

7 Family Law Amendment Bill 1999 (Cth); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 August 2000, 19729 (Daryl Williams, Attorney-General).

8 Family Law Amendment Bill 1999 (n 7); Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2000, 19807 (Daryl Williams, Attorney-General).

9 *Hoult v Hoult* (2013) 50 Fam LR 260, 301 [206], 318 [306] (Thackray J).

is satisfied 'the agreement is void, voidable or unenforceable' pursuant to s 90K(1)(b) and when making the agreement 'a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable' pursuant to s 90K(1)(e).

The court has jurisdiction, pursuant to s 90KA, to determine whether a financial 'agreement is valid, enforceable or effective according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts'.

4 Overview of the judgment history

4.1 Decision of the Federal Circuit Court of Australia

Ms Thorne applied to the Federal Circuit Court of Australia for both agreements to be set aside. The trial judge, Judge Demack, set aside the agreements on the basis of duress,[10] finding Ms Thorne was powerless[11] and signed the first agreement with 'no choice' due to six key factors: lack of financial equality with Mr Kennedy; lack of permanent residency status in Australia at the time of signing; reliance on Mr Kennedy; emotional connectedness to Mr Kennedy and prospect of motherhood; and emotional preparation and publicness of the upcoming marriage.[12] In respect of the second agreement, the effect was the same, it was a 'continuation of the first' agreement and if Ms Thorne did not sign the agreement her marriage would have ended within weeks of commencement.[13]

4.2 Decision of the Full Court of the Family Court of Australia

Mr Kennedy appealed to the Full Court of the Family Court of Australia which overturned the trial judge's ruling and found the second agreement was binding on the parties because the second agreement terminated the first agreement.[14]

The Full Court upheld the appeal on the basis there was no duress, because financial inequality and inequality of bargaining power cannot lead to a finding of duress[15] and there was absent threatened or actual unlawful conduct.[16]

The Full Court held there was no undue influence because Mr Kennedy made his financial position to Ms Thorne clear and she was aware she would not receive his wealth in the event of a separation.[17]

The Full Court held there was no unconscionable conduct because Mr Kennedy did not make any misrepresentations regarding his financial position. Mr Kennedy had clearly stated from the outset of their relationship,

10 *Thorne v Kennedy* [2015] FCCA 484, [87]–[98] (Judge Demack).
11 Ibid [93].
12 Ibid [97].
13 Ibid [95].
14 *Kennedy v Thorne* [2016] FamCAFC 189.
15 Ibid [62]–[63], [73].
16 Ibid [71]–[72].
17 Ibid [76], [134].

which Ms Thorne accepted, his wealth was for his three children. Mr Kennedy did not take advantage of Ms Thorne, hence there was no unconscionable conduct.[18]

4.3 Decision of the High Court of Australia

Ms Thorne appealed to the High Court of Australia which held each financial agreement was voidable pursuant to s 90K of the *Family Law Act.*

The plurality, Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, held the agreements voidable because of undue influence and unconscionable conduct. Nettle and Gordon JJ did not support a finding of undue influence and found on the basis of unconscionable conduct only.

The plurality held it was not necessary to consider duress. Nettle J discussed duress and found it was not supported due to a lack of illegitimate pressure.

5 Equitable intervention to overturn a family law financial agreement

The common law and equity may intervene to overturn a financial agreement in circumstances where consent is vitiated by duress, undue influence or unconscionable conduct.

Duress is a doctrine originating in the common law. Duress is comprised of two elements: (1) the plaintiff is subjected to illegitimate pressure; (2) resulting in the plaintiff's acceptance to enter into an agreement that confers a benefit on the defendant.[19] The illegitimate pressure is deemed to be unacceptable resulting in the setting aside of the agreement.

Undue influence is an equitable doctrine and arises where the stronger or dominant party uses their influence over the weaker party which deprives the weaker party of their free will. The will of the weaker party cannot be considered 'independent and voluntary' as the 'will is overborne'.[20]

Unconscionable conduct is an equitable doctrine comprising three elements: (1) a party is under a special disability; (2) the stronger party is aware of the disability; and (3) the stronger party exploits the weaker party by taking advantage of the special disability when entering into an agreement. The will of the weaker party may be independent and voluntary, however, the agreement is reached due to their disadvantageous position in circumstances where the stronger party has taken 'unconscientious advantage' of that position.[21] Therefore, in contrast to undue influence, for a finding of unconscionable conduct it is 'not necessary to find that the will of the weaker party has been overborne so that there is no independent and voluntary act'.[22]

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18 Ibid [138].

19 *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45–6 (McHugh JA) ('*Crescendo*').

20 *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J) ('*Amadio*').

21 Ibid.

22 *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149, 161 [46] (Beazley, Ipp and Basten JJA) ('*Karam*').

5.1 Duress

Duress originated in the common law and was restricted to providing relief in three circumstances.[23] Firstly, a person made a threat to life or limb; secondly, fear arose to such an extent that the will of a party who sought to overturn the agreement was overborne, described as 'paralysing the will' of that party;[24] and thirdly, where a party sought to overturn the agreement they must establish that but for the threats he or she would not have entered into the agreement.

Equity developed the scope of duress, as a 'parallel' jurisdiction to common law duress, due to the limited circumstances in which common law duress could apply.[25]

For instance, equity expanded relief to a party, who sought to overturn an agreement, where it is alleged they had been subjected to pressure considered illegitimate in circumstances where pressure could not be regarded as 'paralysing the will'.[26] An example of this development arose in the New South Wales Supreme Court of Appeal decision of *Crescendo Management Pty Ltd v Westpac Banking Corporation* where the court rejected the overborne will theory and held the test for pressure is whether such pressure 'went beyond what the law is prepared to countenance as legitimate'.[27] The illegitimate pressure only needs to be 'a reason' for entering into an agreement and 'not *the* reason, nor the *predominant* reason nor the *clinching* reason'.[28] The pressure should have led to a 'conscious reason' for entering into the agreement so that when the plaintiff gives evidence he or she can say 'I acted because I was forced'.[29]

In *Thorne v Kennedy* the plurality did not make a finding in respect of duress due to a lack of argument by counsel that Mr Kennedy's conduct was 'improper or illegitimate' and because there could be no reliance on duress given the absence of any factual findings by the trial judge that Mr Kennedy had engaged in conduct that was improper or illegitimate.[30] The trial judge described the pressure on Ms Thorne as one of a lack of free choice, as opposed to illegitimate pressure exerted by Mr Kennedy, and therefore his conduct was not improper or unlawful.[31] The High Court confirmed duress examines the effect of pressure on the person who seeks to set aside a transaction, it does not require the person's free 'will be overborne' or that their free will or agency is lost.[32] This is a contrasting feature to undue influence.

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23 *Barton v Armstrong* [1976] AC 104, 121–2 (Lord Wilberforce and Lord Simon) ('*Barton v Armstrong* (PC)'). At 107, BC Counsel PE Powell QC and JS Goldstein, for the first six respondents, confirmed the case was pleaded on these elements.

24 *Barton v Armstrong* [1973] 2 NSWLR 598, 606 (Jacobs JA) ('*Barton v Armstrong* (CA)').

25 *Barton v Armstrong* (PC) (n 23) 118 (Lord Cross).

26 *Barton v Armstrong* (CA) (n 24) 606–7 (Jacobs JA).

27 *Crescendo* (n 19).

28 *Barton v Armstrong* (PC) (n 23) 121 (Lord Wilberforce and Lord Simon).

29 Ibid 122.

30 *Thorne v Kennedy* (n 3) 111 [63] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

31 Ibid 98 [29], 109 [57].

32 Ibid 97 [26].

Nettle J considered the doctrine of duress. Nettle J would have found Ms Thorne's assent to both agreements came about from illegitimate pressure and both agreements should be vitiated by duress. However, he was precluded from making a finding of duress due to the New South Wales Court of Appeal decision of *Australia & New Zealand Banking Group v Karam* ('*Karam*').[33] In *Karam,* the Court of Appeal held duress will only vitiate an agreement where it is established there has been 'threatened or actual unlawful conduct'.[34] In comparison, unconscionable conduct is 'not restricted to unlawful means'.[35]

Nettle J concluded that *Karam* continues to be authority for duress and said:

> there would need to be detailed argument and deep consideration of the ramifications of departing from *Karam* before this court would contemplate that course, and, although counsel for Ms Thorne essayed something of that task in written submissions, in oral argument it was accepted that what was said about illegitimate pressure by lawful means was subsumed by what was advanced under the rubric of unconscionable conduct.[36]

Given his Honour's reference to and reliance on the definition of duress in *Karam*, it is pertinent to discuss the facts and findings of the decision.

In 1972 Mr Charles Karam and Mr John Karam commenced a shoe manufacturing partnership in Greenacre and in 1980 the Karam Bros Footwear Pty Ltd ('the company') incorporated. In 1979 the Karams, and their respective wives, jointly purchased vacant land at Regents Park on which they built a factory. A bank file note of 27 February 1980 stated: 'the partnership is operating quite profitably and exceeded turnover the company is showing a pleasing record of growth and profitability the principals are reliable and astute businessmen who can be relied upon to liquidate any borrowings as quickly as practicable'.

On 22 May 1980 the company's overdraft was almost $70,000.00 and the Australia & New Zealand Banking Group ('the bank') requested the company take out a loan with securities to formalise the overdraft which included a guarantee from each of the Karam brothers and their wives to secure the indebtedness of the company supported by a mortgage.

The bank provided finance of $2,070,000.00 on 22 December 1989 for the purchase of land at Ingleburn where operations commenced.

Bank file notes of 5 May 1993 noted the company was experiencing financial difficulties. The bank sought a registered mortgage debenture over the assets of the company.

On 10 June 1993, anticipating the company would need $300,000.00 to $400,000.00 the Karams signed a document with the heading 'Acknowledgment' which confirmed the Karams had obtained independent financial advice and independent legal advice and the 'Guarantee, Mortgages and other documents referred to in this Schedule' had been provided to them by the Bank and were intended to secure the bank 'payment of all present, future, actual and contingent liabilities of the company to the bank.[37] On

33 Ibid 113 [70] (Nettle J).
34 *Karam* (n 22) 155 [66].
35 *Thorne v Kennedy* (n 3) 115 [74] (Nettle J).
36 Ibid 115 [73].
37 *Karam* (n 22) 159 [37].

1 October 1993 the Karams signed a cross-deed of covenant obligating them to pay to the bank all sums of money owing and unpaid by each of the signatories.

In 1993 John Karam and Charles Karam sold their properties with those proceeds received by the bank. In October 1995 the bank refused to advance further funds and on 3 November 1995 the bank appointed a receiver and manger to the company and the company ceased trading on 12 January 1996. Business properties were sold, and the company remained indebted to the bank in excess of $1.7 million as at 1 July 1996.

The Karams made an application to the Supreme Court of New South Wales and alleged the bank acted unconscionably on the basis the 'Bank had not provided copies of the relevant documents referred to in the schedule of acknowledgement' and they were unable to consider the full legal effect.[38] The Supreme Court held this 'narrow' event as the 'critical issue'.[39] The primary judge found the transaction was unconscionable and subsequent transactions should be set aside on the grounds of duress.

The bank appealed and the New South Wales Court of Appeal held the bank did not subject the Karams to pressure because the bank could not be at fault for the 'perilous financial circumstances' in which the company was experiencing.[40] The parlous financial state of the business was not a form of illegitimate pressure.[41] It was the Karams who sought further credit to continue trading, without such credit the company would cease trading. The bank 'was under no obligation to extend credit' to the company 'or to do so without securing' the position of the bank.[42] The Karams were aware if they did not sell the properties the company would be trading while insolvent and to trade out of the financial difficulty without reducing the burden of debt was 'increasingly unrealistic'.[43]

Karam is authority that where a claim is made to vitiate an agreement due to duress, the legal analysis is not focused on the will of the weaker party but on the degree of pressure from the stronger party. At common law physical duress required the will, of the party complaining that it was not a true consent, to be overborne and render a contract void. However, 'the accepted doctrine is the contract is merely voidable', hence the concept of the will being overborne should be 'rejected' because a 'person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action'. In such cases the court must ascertain whether the pressure applied to induce the weaker party to enter into the agreement is found to be pressure that 'went beyond what the law is prepared to countenance as legitimate'. Pressure will be deemed 'illegitimate if it consists of unlawful threats or amounts to unconscionable conduct', the categories of conduct a court may consider as illegitimate are 'not closed'. 'Even overwhelming pressure, not amounting to

38 Ibid 170–1.
39 Ibid 170 [73].
40 Ibid 171 [95].
41 Ibid 151 [6], 175 [123].
42 Ibid 151 [4], 171 [95].
43 Ibid 172 [96].

unconscionable or unlawful conduct will not necessarily constitute economic duress'.[44]

Therefore, the Court of Appeal in *Karam* held duress was limited to illegitimate pressure that consists of threatened or unlawful conduct. *Karam* confirmed that a claim for relief based on illegitimate pressure, where that conduct is not 'unlawful, should be determined under the equitable doctrines' of undue influence or unconscionable conduct and not duress.[45] This approach is consistent with the High Court of Australia in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*'):[46]

> If the conduct or the threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage.[47]

Nettle J said the English and American authority for duress is not as restrictive as duress defined in *Karam*.[48]

In the United Kingdom a claim for duress will consider whether there has been improper pressure regarded as a 'coercion of will'. If this is established, it will vitiate consent because the consent of the victim to make a monetary payment or enter into a contract is 'not a voluntary act'.[49] Duress may involve: (1) unlawful pressure normally in the form of a threat to a person, property or resulting in economic harm; or (2) illegitimate pressure including pressure which is lawful. Illegitimate pressure is measured applying a value judgment of what society considers acceptable by determining whether the conduct goes 'beyond what is reasonably necessary for the protection of legitimate interests'.[50]

Duress in the United Kingdom is defined by two seminal speeches of the House of Lords. The following two decisions underscore the wider scope of the application of duress in the United Kingdom compared to the Australian definition of duress in *Karam*.

Firstly, lawful action can be considered duress in the United Kingdom. Whereas in Australia *Karam* rejected the existence of lawful act duress, in effect limiting the doctrine of duress to unlawful action.

In *Universe Tankships Inc of Monrovia v International Transport Workers Federation* ('*The Universe Sentinel*') Lord Scarman said:

> The origin of the doctrine of duress in threats to life or limb, or to property, suggest strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand.[51]

Secondly, economic pressure that is found to be illegitimate can amount to

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44 Ibid 162–4 [48]–[53], quoting *Crescendo* (n 19).
45 *Karam* (n 22) 151 [1].
46 *Amadio* (n 20).
47 *Karam* (n 22) 168 [66].
48 *Thorne v Kennedy* (n 3) 114 [71] (Nettle J).
49 *Pao On v Lau Yiu Long* [1980] AC 614, 635–6 (Lord Scarman delivering the judgment on behalf of Lord Wilberforce, Viscount Dishorne, Lord Simon and Lord Salmon).
50 *Thorne v Kennedy* (n 3) 114 [71] (Nettle J).
51 [1983] 1 AC 366, 401 (Lord Scarman).

duress in the United Kingdom. In Australia, *Karam* held the term economic duress was vague and the better approach was to categorise threatened or unlawful conduct in one category only, namely duress.

In *Dimskal Shipping Co SA v International Transport Workers Federation* Lord Goff said:

> Economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract.[52]

In Florida, in the United States of America, where a party alleges duress, a financial agreement — termed prenuptial agreement, may be set aside if the conduct meets the definition of duress. Duress is 'a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition'.[53] There are two elements of duress: (1) the 'act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will; and (2) the condition of mind was caused by some improper and coercive conduct' of the stronger party.[54]

5.2 Undue influence

Undue influence is an equitable doctrine. Where a party has been induced to enter into an agreement by the undue influence of another, equity will intervene, and the agreement will be voidable and set aside.

Where undue influence is alleged, the court assesses the quality of the consent or assent of the weaker party and decides whether the agreement arose from free consent. If the will of the weaker party has been overborne, the court will find the influence of the stronger party as undue. In these circumstances the decision to enter into the agreement is not an exercise of a person's free will because the decision to consent or assent is 'not independent and voluntary'.[55]

Where a party is constrained from 'assessing alternatives'[56] and cannot make a 'deliberate' informed decision as to the impact of those alternatives, the court will find the will of the weaker party is not free and undue influence is present so that it will vitiate an agreement.[57]

Undue influence is not restricted to threats or coercion and has a 'connotation of impropriety. The court must ascertain whether the defendant abused the influence he acquired in the parties' relationship [because he] preferred his own interests'.[58]

Undue influence may arise from three scenarios:

(1) Actual undue influence; or

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52 [1992] 2 AC 152, 165 (Lord Goff).
53 *Williams v Williams,* 939 So 2d 1154, 1157 (Fla D Ct App, 2006).
54 *City of Miami v Kory,* 394 So 2d 494, 497 (Fla D Ct App, 1981).
55 *Amadio* (n 20) 461 (Mason J), 474 (Dean J).
56 *Thorne v Kennedy* (n 3) 100 [32] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
57 *Johnson v Buttress* (1936) 56 CLR 113, 126 (Starke J).
58 *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, 800 [32] (Lord Nicholls).

(2) Presumed undue influence due to a recognised relationship; or

(3) Presumed undue influence where a relationship of trust and confidence exists.

With respect to the second and third scenarios, a presumption of undue influence may arise in the following circumstances: parent and child, religious advisor and advisee, solicitor and client, and doctor and patient.[59] When a presumption exists, the defendant is required to lead evidence to rebut the presumption.

In *Thorne v Kennedy* the High Court held the relationship of fiancé and fiancée was no longer one of presumed undue influence. The 'wide variety of circumstances' that give rise to two parties agreeing to marry was held to negate the 'presumption that either person substantially subordinates his or her free will to the other'.[60] Therefore, the onus was on Ms Thorne to establish that Mr Kennedy engaged in actual undue influence and his conduct resulted in her entering into the two financial agreements.

To establish actual undue influence a plaintiff must satisfy the following four elements:

(1) the other party to the transaction has the capacity to influence the plaintiff;

(2) the influence was exercised;

(3) the influence was undue; and

(4) the influence resulted in the plaintiff entering into the agreement.[61]

In *Thorne v Kennedy* undue influence was found to vitiate each financial agreement and both agreements were voidable. Undue influence was present to such an extent Ms Thorne was not able to 'make a clear, calm or rational' decision and was not a 'free agent' in the negotiation of the two financial agreements.[62] The plurality held the trial judge was right to consider that the 'grossly unreasonable' nature of the financial agreements were indicative that Ms Thorne was placed in a position of undue influence.[63]

In respect of family law financial agreements, the High Court considered the following six factors as indicia that may lead to a finding of undue influence:

(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;

(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

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59 *Johnson v Buttress* (n 57) 119 (Latham CJ).

60 *Thorne v Kennedy* (n 3) 102 [36] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

61 *Johnson v Buttress* (n 57) 134 (Dixon J).

62 *Thorne v Kennedy* (n 3) 110 [59] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

63 Ibid 112 [65].

(vi) The independent advice that was received and whether there was time to reflect on that advice.[64]

These six factors will provide legal practitioners responsible for drafting a family law financial agreement guidance as to how a plaintiff will run their case and what evidence a court will examine when deciding whether undue influence has arisen in the period preceding the signing of a financial agreement. Further, the six factors will provide practitioners with a clear checklist of what conduct they should be aware of, as part of their risk management processes, when negotiating and finalising the terms of the agreement and when they request their client and the other party sign the financial agreement.

Nettle J did not consider undue influence. His Honour found the financial agreements were vitiated due to unconscionable conduct by Mr Kennedy.

Gordon J discussed undue influence and held Ms Thorne was not subjected to undue influence because the trial judge had found Ms Thorne was 'able to comprehend what she was doing, she knew and recognised the effect and importance of the advice she was given and wanted the marriage to Mr Kennedy to proceed and prosper'.[65] Her Honour found Ms Thorne knew the agreements were 'terrible' and notwithstanding this knowledge she proceeded to sign.[66] Therefore, Ms Thorne's 'will was not overborne'.[67]

5.3 Unconscionable conduct

The doctrine of unconscionable conduct is a 'well-established but narrow principle' based in equity, 'consistent with the maintenance of the basic principles of freedom of contract'.[68]

There is no defined limit to the application or 'exemplifications' of the doctrine[69] because equitable intervention is 'based on a principle, not a rule'.[70] The court will look to the circumstances of each case and apply, as a guide, case law that has developed the doctrine. A party must justify equitable intervention and show they require relief against the 'detriment caused by unconscionable conduct'.[71]

Equity will scrutinise the circumstances during the bargaining and negotiation process that result in an agreement. The objective of equity is to uphold procedural fairness and intervene where there is procedural injustice in the procurement of that agreement.[72] Issues pertaining to substantive injustice, such as the content and terms of the agreement, are the subject of legislation. For example, in a consumer law dispute the unconscionable conduct

64 Ibid 110 [60].
65 Ibid 117 [80]–[81] (Gordon J).
66 Ibid 123 [104].
67 Ibid 124 [108].
68 *AG (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [120] (Spigelman CJ).
69 *Amadio* (n 20) 461–3 (Mason J), 474–5 (Deane J).
70 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [282] (Allsop CJ).
71 *Federal Airports Corporation v Makucha Developments Pty Ltd* (1993) 115 ALR 679, 698 (Davies J).
72 *Wilton v Farnworth* (1948) 76 CLR 646, 655 (Rich J).

provisions of the *Australian Consumer Law*, sch 2 of the *Competition and Consumer Act 2010* (Cth) apply. This is because the doctrine of unconscionable conduct does not confer power on a court to intervene and set aside an agreement on the basis of substantive injustice. Although where there is a significant disparity in the benefits provided by way of the terms of an agreement, a court may draw the inference of procedural unfairness and in those circumstances, equity may intervene to vitiate the agreement.[73]

The equitable doctrine of unconscionable conduct attempts to overcome exploitation by the stronger party[74] and scrutinises the 'matter from the point of view of the party seeking to enforce' the agreement.[75] The focus is on the 'conduct of the stronger party'[76] and to prevent victimisation,[77] the court does not provide relief for 'one's own foolishness or the consequences of their own mistakes'.[78] Unconscionable conduct is premised on the notion that it is against 'good conscience' for the stronger party to retain the benefit derived from holding the weaker party to the agreement.[79]

Equity will intervene to set aside an agreement due to unconscionable conduct when the following three elements, as identified by the High Court of Australia in *Amadio*[80] are present:

(1) One party is under a special disability compared to the other party;
(2) The special disability is known or ought to have been known by the stronger party; and
(3) The stronger party has taken unconscientious advantage of the weaker party's special disability resulting in the agreement.

First element: Special disability

Unconscionable conduct cannot exist in the absence of a special disability. The New South Wales Court of Appeal in *Karam* held a transaction cannot be set aside on the basis of unconscionable conduct, 'absent any special disability, where all that can be said is the victim "is by pressure impeded" from following his or her best interests'.[81] The special disability must 'seriously affect the ability of the innocent party to make a judgment as to his own best interests'.[82] Therefore, the Court of Appeal in *Karam* held where one party is experiencing financial difficulties and such is known to the other party, such financial pressure is not 'sufficient to establish unconscionable

73 *Blomley v Ryan* (1956) 99 CLR 362; *Amadio* (n 20) 475 (Deane J).
74 *Hart v O'Connor* [1985] AC 1000, 1018, 1024 (Lord Scarman, Lord Bridge, Lord Brightman and Sir Denys Buckley).
75 *Blomley v Ryan* (n 73) 401–2 (Fullagar J).
76 *Neale v Bank of Western Australia Ltd* [2014] NSWSC 315, [170]–[171] (Hammerschlag J).
77 *Louth v Diprose* (1992) 175 CLR 621, 638 (Deane J).
78 *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 357 [255] (Edelman J).
79 *Blomley v Ryan* (n 73) 402 (Fullagar J).
80 *Amadio* (n 20) 474 (Deane J), cited in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 398 [6], 424–5 [117]–[118], 436–7 [151], 438–40 [155]–[161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) ('*Kakavas*'), and cited in *Thorne v Kennedy* (n 3) 102 [37] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
81 *Karam* (n 22) 173 [100] (Beazley, Ipp and Basten JJA).
82 *Amadio* (n 20) 462 (Mason J).

conduct on the part of the stronger party'.[83]

It is the special disability that places the weaker party at a disadvantage,[84] it is deemed 'special' because it affects the ability of the weaker party to 'conserve his own interests'.[85]

A special disability can include various factors and may arise in an undeterminable array of circumstances.[86] Potential circumstances of a special disability may include; poverty or need of any kind; sickness; sex; infirmity of the body or mind; drunkenness; illiteracy or lack of education; and lack of assistance or explanation in circumstances where it is necessary for a party to be given sufficient assistance or explanation.[87]

One of those circumstances will not automatically indicate a party is under a special disability as a party may still be 'capable of making a judgment as to his or her own best interests'.[88] The circumstance must give rise to a disadvantage when compared to the stronger party so that the weaker party is inhibited from making a judgment about his or her own best interests.

The transaction does not have to be detrimental to the plaintiff; however, circumstances of inadequate consideration may be a relevant factor in determining whether the plaintiff was under a special disability — particularly in circumstances where the defendant has taken unconscionable advantage of this situation.[89]

Second element: Sufficient knowledge of the special disability

A claim for unconscionable conduct must show the defendant held sufficient knowledge of the plaintiff's special disability, because the defendant must have exploited the disability to their own advantage.

Actual knowledge of a special disability is not essential. This knowledge can arise from circumstances where the defendant should have known of the special disability. The test is whether the circumstances of the weaker party would 'raise in the mind of any reasonable person' engaging in the bargaining process a 'very real question' as to the ability of the weaker party to make a judgment call in 'their own best interests'.[90] In *Amadio* the court held that a reasonable person would have known of the circumstances of disability that gave rise to the plaintiff's disadvantage so that the conduct of the bank in pressing ahead with the transaction established on the part of the bank 'wilful ignorance'.[91]

The evidence must show that it was sufficiently obvious there was a special disability. The element of knowledge is essential because if the defendant does

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83 *Karam* (n 22) 152–3 [12] (Beazley, Ipp and Basten JJA).

84 *Blomley v Ryan* (n 73) 405 (Fullagar J).

85 Ibid 415 (Kitto J).

86 *Amadio* (n 20) 151 CLR 447, 474–5 (Deane J); *Kakavas* (n 80) 424 [117] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

87 *Blomley v Ryan* (n 73) 405 (Fullagar J), 415 (Kitto J).

88 *Anderson v McPherson [No 2]* (n 78) 359 [265] (Edelman J).

89 *Blomley v Ryan* (n 73) 405 (Fullagar J) where evidence of a sale of property that was undervalue and in terms favourable to the purchaser were considered by the High Court of Australia.

90 *Amadio* (n 20) 462–3 (Mason J), 474 (Deane J).

91 Ibid 467 (Mason J), 468–9 (Wilson J), 477–9 (Deane J).

not know or could not have known of the plaintiff's disability, then the defendant cannot have exploited the disability to their own advantage.[92]

The plaintiff must establish that the defendant had a 'predatory state of mind', because 'heedlessness of, or indifference to, the best interests' of the weaker party will not meet the knowledge requirement for equitable intervention under unconscionable conduct.[93] The description 'predatory state of mind' is a more definitive definition of the knowledge element than was enunciated by the High Court in *Amadio*. However, describing the state of mind of a defendant in such a definitive manner is not a new concept. In the United Kingdom the court has described the vitiating conduct of the stronger party as 'morally culpable'[94] and 'there must be some impropriety' in the mind and conduct of the stronger party so that it 'shocks the conscience of the court' rendering it against equity for the stronger party to retain the benefit they have derived from the agreement.[95] The definitive definition in *Kakavas v Crown Melbourne Ltd* is beneficial for litigation as it creates certainty as to the scope of the application of the element of knowledge when establishing whether there is unconscionable conduct.

Third element: Exploitation of the special disability

If a plaintiff establishes they are under a special disability and the defendant had sufficient knowledge thereof, the court must be satisfied the defendant took advantage of the plaintiff's disability by using their own superior position to gain the benefit. If the defendant has not taken advantage of the weaker party, equity will not intervene for unconscionable conduct. Therefore, it is the third element where the defendant must take advantage, when combined with the first element (special disability) and the second element (sufficient knowledge of the disability) that will form the basis for the intervention of equity for unconscionable conduct.

When all three elements are established it would be against good conscience for the stronger party to the agreement to maintain the benefit they have exploited from the weaker party. It is this 'unconscientious advantage' of the stronger party that warrants equitable intervention for unconscionable conduct.[96]

It is not necessary to establish that the defendant has actually taken any action to exploit the special disadvantage because 'passive acceptance' by the defendant of the plaintiff's disability will establish exploitation.[97]

If the plaintiff successfully establishes they were under a special disability and the defendant knew or ought to have known of the special disability an inference is drawn that the defendant has taken advantage of and exploited the plaintiff's position.[98] Following which the onus shifts to the defendant to show

92 *Tessmann v Costello* [1987] 1 Qd R 283, 293 (Williams J).
93 *Kakavas* (n 80) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).
94 *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB), [36] (Blair J).
95 *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944, 961 (Peter Millett QC) and not disturbed by the Court of Appeal: *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 184 (Dillon LJ), 189 (Dunn LJ), 192 (Waller LJ).
96 *Amadio* (n 20) 463 (Mason J).
97 *Bridgewater v Leahy* (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ).
98 *Amadio* (n 20) 474 (Deane J).

they did not take advantage of the plaintiff's disability[99] by establishing that the agreement was 'fair, just and reasonable'.[100]

In *Thorne v Kennedy* the High Court of Australia found the financial agreements were vitiated due to unconscionable conduct.[101] Ms Thorne was under a special disadvantage characterised by her lack of power in the bargaining of the two agreements in which she had no choice but to give her assent. This special disadvantage was found to be more than a 'mere difference in bargaining power'.[102] The special disadvantage resulted in her inability to 'make a judgment as to her own best interests'.[103] Mr Kennedy had, in part, created those circumstances, and was therefore aware of her special disability.

Mr Kennedy took advantage of the special disability because he acted unconscionably through the urgency and haste he created when he rushed to have Ms Thorne sign the financial agreement. Further, this was amplified when he threatened to call off the wedding if she did not sign the first agreement. This placed Ms Thorne in a position of 'substantial subordination' to Mr Kennedy.[104]

Nettle J said 'unconscionable conduct is not restricted to unlawful means', and while his Honour said the circumstances created by Mr Kennedy may be better described as illegitimate pressure, his Honour agreed with the plurality that Mr Kennedy took unconscientious advantage of Ms Thorne's position of special disadvantage that meant she was incapable of making a judgment in her own interests. Nettle J said:

> In effect, it was a position of special disadvantage which he created bringing her to this country, keeping her here for many months in a state of belief that he would marry her, allowing preparations for the wedding to proceed, and only then, when she had ceased for all practical purposes to have any other option, subjecting her to the pressure of refusing to marry her unless she agreed to the terms of the first agreement. It was thus also a position of special disadvantage of which Mr Kennedy was aware, or at least of which a reasonable person in his position would have conceived a real possibility.[105]

When Ms Thorne was provided with the first agreement, Mr Kennedy at this point in time made it known to her the true conditions of the relationship. Without signing there will be no marriage and in the event of a marital breakdown she would receive one lump sum payment of $50,000.00. These circumstances made it impossible for Ms Thorne to make a judgment in her own best interests. In respect of the second agreement, it was based on the first agreement and her position of disadvantage meant Ms Thorne was 'even less capable of deciding in her own best interests'.[106]

Gordon J held the first and second financial agreements were procured by

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99 *Louth v Diprose* (n 77) 632 (Brennan J).

100 *Amadio* (n 20) 474, 479–80 (Dean J); *Neale v Bank of Western Australia Ltd* (n 76) [170]–[171] (Hammerschlag J).

101 *Thorne v Kennedy* (n 3) 111 [63] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

102 *Amadio* (n 20) 462 (Mason J).

103 *Thorne v Kennedy* (n 3) 112 [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

104 Ibid 112 [64]–[65].

105 Ibid 115 [74] (Nettle J).

106 Ibid 116–17 [75]–[77].

unconscionable conduct and not by undue influence. Her Honour held the difference in approach was based on a 'point of principle', namely the relationship between undue influence and the judgment of Ms Thorne. Ms Thorne's 'capacity to make an independent judgment was not affected' given the trial judge, having assessed the evidence, found Ms Thorne knew she was signing an agreement that was not in her financial best interests, in part due to the legal advice she had received. Gordon J said:

> Ms Thorne wanted the marriage to Mr Kennedy to proceed and prosper. She knew and understood that it would proceed only if she accepted the terms proffered. Once she decided to go ahead with the marriage, it was right to say, as the primary Judge said, that she had no choice except to enter into the agreements. No other terms were available. But her capacity to make an independent, informed and voluntary judgment about whether to marry on those terms was unaffected and she chose to proceed. Her will was not overborne.[107]

Her Honour found unconscionable conduct arose because Ms Thorne was not able, when entering into the agreement, 'to make a rational judgment to protect' her own personal and financial interests and those circumstances were created, and known, by Mr Kennedy when he procured her to enter into the agreements.[108]

Gordon J said the will of the innocent party, is the significant difference between undue influence and unconscionable conduct. Unconscionable conduct requires that the will, even if independent and voluntary, is due to the disadvantageous position Ms Thorne was placed in and that Mr Kennedy took advantage of that position. Her Honour agreed with the trial judge that the circumstances of special disadvantage included: Mr Kennedy bringing Ms Thorne to Australia; the first agreement was presented to Ms Thorne within 4 days of the marriage; that Mr Kennedy said the relationship would end if she did not sign it; and that Ms Thorne was financially and emotionally invested in Mr Kennedy. The circumstances that created the special disadvantage, did not end when the marriage took place because when the second agreement was signed Ms Thorne continued to lack the power to negotiate, bargain or change its terms.[109]

Her Honour concluded, Mr Kennedy had contributed to and took advantage of Ms Thorne's special disadvantage. The agreements were 'grossly' unfair and unreasonable and the circumstances in which they were presented were 'unconscientious'.[110] Even though Ms Thorne received independent legal advice, she was still prepared to sign the agreement. This amplified the existence of her special disadvantage and 'it was unconscientious for Mr Kennedy to procure or accept Ms Thorne's assent'.[111]

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107 Ibid 117 [80] (Gordon J).
108 Ibid 117 [81].
109 Ibid 127 [116]–[118].
110 Ibid 128 [120]–[122].
111 Ibid 128 [123].

6 The legal approach for future family law financial agreements

The decision of the High Court of Australia in *Thorne v Kennedy* is a reminder the principles of contract law and equity law are as relevant in family law financial agreements as in commercial contracts. The decision will focus legal practitioner's attention to important contractual and equitable legal issues that arise when providing advice through to negotiating and drafting terms of a financial agreement.

The following seven legal issues will shape the way forward for financial agreements. They confirm a legal practitioner's role is grounded in risk management, assessing contractual and equitable legal issues, when negotiating and drafting a family law financial agreement, in the same way a commercial practitioner's role is grounded in undertaking due diligence before a contract is executed.

6.1 Free of pressure

In circumstances where there is a lack of genuine consent due to pressure, equity may intervene to vitiate the financial agreement for duress, undue influence or unconscionable conduct. The approach of Mr Kennedy stating to Ms Thorne 'sign it or the wedding will not go ahead' was one of the many sources of pressure that left the agreement vulnerable to the intervention of equity.[112]

A legal practitioner should advise their client not to exert any pressure on the other party when negotiating and considering the effect of the terms of a financial agreement.

When parties are negotiating the terms of the financial agreement, their legal practitioners must undertake an assessment of the circumstances and events that precede the signing of the agreement and be satisfied that all parties have formed an intention to enter into the financial agreement. This intention must be unaffected by pressure or threats. If pressure exists, the parties should be advised to avoid a financial agreement. They could either: reconsider a financial agreement at an alternate time which is free from pressure; or abandon any hope of a financial agreement and in the event of separation make an application to the Family Law Court or Federal Circuit Court of Australia for property alteration.

6.2 A financial agreement may not be final

Parties enter into a financial agreement with the intent to formally set out how their property will be altered, in the event of a breakdown of the relationship, with a view to ensuring certainty and finality without court litigation. The very nature of the amendments to the *Family Law Act* in 2000 underscore this was the objective and intent of federal Parliament.[113]

However, a client must be advised by their legal practitioner that the agreement may not be final. The circumstances preceding the signing of the

112 Ibid 91 [7], 94 [14], 98 [29] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

113 Further Revised Explanatory Memorandum, Family Law Amendment Bill 2000 (Cth) 6.

agreement, in addition to the terms for property alteration, may be considered by a court in the event a party makes an application to overturn the agreement for lack of genuine consent under the law of contract or equity.

6.3 A financial agreement must contain fair terms for property alteration

Parties enter into a financial agreement to protect their financial interests, particularly to protect the wealth of one party from the other. A financial agreement, unlike an application for consent orders, ousts the jurisdiction of the court to determine if the property alteration is fair at the time the agreement is made.

The High Court has confirmed, the terms of the financial agreement may leave it open to challenge. If a party to the agreement forms the view the terms for property alteration are unfair, those terms will be scrutinised for fairness by a court and may be found to be unconscionable.

Therefore, the terms of the financial agreement must provide adequate provision in the event of a breakdown of the relationship. The High Court has held where the property alteration of a financial agreement is not fair and reasonable, this will be a relevant consideration in determining the existence of undue influence or unconscionable conduct. The High Court has said 'it can be an indicium of undue influence if a prenuptial or postnuptial agreement is signed despite being known to be grossly unreasonable'.[114]

6.4 Sufficient time to negotiate the terms and reflect on the financial agreement

When preparing a financial agreement, the parties must have an opportunity to discuss and negotiate the terms with sufficient time to consider the financial implications of the agreement.

The High Court was critical of the approach taken by Mr Kennedy when he presented his terms, without negotiation[115] or input from Ms Thorne and in close proximity[116] of 4 days before the wedding. The *Family Law Act* does not contain a time stipulation that prohibits the signing of a financial agreement preceding a wedding.

In the United Kingdom the Family Law Court has said it is preferable and 'considered acceptable' that a financial agreement is signed no less than 21 days before a wedding.[117] The Family Law Court said this time stipulation would ensure the court could be satisfied the parties had not been forced into signing the agreement and would have had sufficient time to properly consider the terms of the financial agreement and obtain legal advice.[118]

However, enacting legislation to prohibit the signing of a financial agreement 21 days before a wedding may have no utility in saving a financial agreement if a party seeks equitable intervention to overturn the agreement

114 *Thorne v Kennedy* (n 3) 93 [11] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
115 Ibid 110 [60].
116 Ibid 127 [116] (Gordon J).
117 *KA v MA (Prenuptial Agreement: Needs)* [2018] 2 FLR 1285, 1292 [20] (Roberts J).
118 *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120.

due to a lack of genuine consent. When assessing genuine consent, the court scrutinies the individual circumstances of each case to determine if consent is free of a vitiating factor. The following two circumstances argue a 21-day time stipulation is not required:

Firstly, parties may sign an agreement within days leading to the wedding in circumstances where they have had ample time to negotiate the terms and consider the effect of the financial implications. For example, in the District Court of Appeal of Florida the parties in *Francavilla v Francavilla*[119] signed a financial agreement within 1 hour of their wedding ceremony. The court upheld the agreement and found there was no duress and pressure. The court was satisfied the parties had sufficient time to consider the financial effect of the agreement. Those circumstances included 3 months of negotiating with attorneys, counterproposals were considered, the parties had complied with fair disclosure and independent counsel represented the wife.

Secondly, prohibiting signature 21 days before a wedding will not eradicate the argument there has been pressure to sign that may result in duress, undue influence or unconscionable conduct. A time requirement may move the circumstance of signing under pressure to an earlier point in the negotiation process — given the organisation of a wedding can be a long process where the finer details of selecting and confirming a church, garden or reception venue may be booked a year in advance whilst the travel itinerary of family members may be booked many months in advance to take advantage of less expensive flights and accommodation.[120]

This argument confirms that it is pivotal a legal practitioner determines if pressure exists during any stage of negotiating and drafting, as duress, undue influence or unconscionable conduct may arise many months or a year before a marriage ceremony. Where such pressure does arise, a client should be advised not to proceed with the financial agreement.

6.5 Independent legal advice may not save a financial agreement

A legal practitioner cannot be satisfied that a financial agreement will be held to be valid in circumstances where they have advised the other party to the agreement to obtain independent legal advice. The fact the other party has obtained independent legal advice will not negate the intervention of equity which may overturn the financial agreement. Unconscionable conduct can exist and vitiate the financial agreement, notwithstanding a party has received independent legal advice.[121]

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119 (2007) 969 So 2d 522, 525 (Gross J, Gunther and Warner JJ concur) (Fla D Ct App, 2007).

120 On 5 February 2014 the Law Commission of the United Kingdom presented to Parliament a report ordered by the House of Commons, Law Commission (UK), *Matrimonial Property, Needs and Agreements* (Law Com No 343, 26 February 2014) 111–12 and identified such concerns with a time stipulation in the period preceding the signing of a financial agreement.

121 *Thorne v Kennedy* (n 3) 128 [122]–[123] (Gordon J).

6.6 A second financial agreement may not save the terms for property alteration

If there has been a lack of genuine consent leading to duress, undue influence or unconscionable conduct during the negotiating, drafting and signing stages of the first financial agreement, the creation and signing of a second financial agreement may not save its terms if a vitiating factor continues to exist or arises.

6.7 Undue influence and the category of relationship of fiancé and fiancée

Thorne v Kennedy is a significant development as the High Court held where parties are in a relationship of fiancé and fiancée, this category of relationship will not give rise to the presumption of undue influence.[122] Accordingly, a party to the financial agreement seeking to vitiate the agreement by relying upon the doctrine of undue influence would need to establish there was a circumstance of actual undue influence.

7 Conclusion

The decision of the High Court of Australia in *Thorne v Kennedy* has created a greater awareness that equity may intervene to overturn a financial agreement when there is a lack of genuine consent, in circumstances where consent is vitiated by duress, undue influence or unconscionable conduct.

The judgment is a landmark decision as the High Court held the relationship of fiancé and fiancée is no longer one of presumed undue influence. Where undue influence is alleged to vitiate consent resulting in a financial agreement an applicant must establish actual undue influence.

Nettle J confirmed where a party seeks to overturn a financial agreement due to duress the court must make a finding of illegitimate pressure based on threatened or unlawful conduct, citing the leading Australian authority of the New South Wales Court of Appeal in *Karam*. Without illegitimate pressure a claim for duress will fail and the plaintiff should base their application on undue influence or unconscionable conduct.

The contractual and equitable circumstances that precede the signing of a financial agreement are vital to the existence of the terms that alter and protect property interests in the event of a separation. Parties to the financial agreement should be afforded an opportunity to discuss and negotiate the terms for property alteration and consider the financial implications that will take effect in the event of a separation. In addition, the High Court has confirmed the financial effect of the terms of a financial agreement are within the purview of the court and where such terms are considered not fair and reasonable, may give rise to a special disability and the intervention of equity due to unconscionable conduct.

One key message this article has argued, that in addition to adhering to the drafting requirements of the *Family Law Act*, complying with the principles of

122 Ibid 102 [36] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

contract and equity law in a family law financial agreement are as important as compliance with the principles of contract and equity law in a commercial agreement.