

FOLEY'S | LIST

Thorne v Kennedy

[2017] HCATrans 54

Author: Emma Heggie

Date: 21 March, 2017

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High Court grants special leave for appeal from Full Court decision in *Kennedy & Thorne* [2016] FamCAFC 189 and creates opportunity for authoritative statements on the law relating to duress, undue influence, and unconscionable conduct

Emma Heggie, Barrister, Victorian Bar

21 March 2017

On 10 March 2017, Edelman and Keane JJ granted special leave to the wife to appeal the Full Court's decision in *Kennedy & Thorne* [2016] FamCAFC 189.¹

Background

At first instance, Demack J had set aside the financial agreement on the basis that the wife signed under duress.² *Kennedy & Thorne* was a decision of Strickland, Aldridge, and Cronin JJ which upheld an appeal by the husband and declared that the financial agreement was binding.

In upholding the financial agreement, the Full Court cited some commercial authorities. *ANZ v Karam*³ was cited in support of the proposition that duress required threatened or actual unlawful conduct, which was not present. *Amadio*⁴ was cited in relation to special disability and unconscionability. Although the Court found the wife to be at a disadvantage, they did not find that the husband took unconscionable advantage of that position.

Special leave application

The wife sought leave to appeal the Full Court's decision to the High Court. She raised a number of issues before the Court, including:

- The need for "*authoritative guidance on the principles of law and equity for setting aside marital financial agreements*" in the context of tension between freedom of contract and equitable principles preventing the unconscionable misuse of bargaining power. The question of the "*intersection of the contractual views with the obligations peculiar to the marriage bond*" spans issues such as:

¹ *Thorne v Kennedy* [2017] HCATrans 54.

² *Thorne & Kennedy* [2015] FCCA 484.

³ *Australia & New Zealand Banking Group v Karam* [2005] NSWCA 344.

⁴ *Commercial Bank of Australia v Amadio* [1983] HCA 14.

- The relevant principles of law and equity imported by s90A of the *Family Law Act 1975* (“the Act”).
- The meaning of duress in a family law context, and what scope for lawful act duress exists.⁵
- The meaning of undue influence in a family law context.⁶
- The meaning of unconscionable conduct in a family law context, and whether those principles apply with greater force because of the relationship between spouses.
- The impact of the markedly different public policy which sits behind family law matters and commercial matters on those relevant principles.
- The need for earlier cases to be revisited to bring them in touch with modern language and modern terms.

The husband’s estate resisted the appeal on the basis that:

- Section 90KA of the Act indicates that Parliament has already decided that the existing principles of law and equity are to be imported.
- Financial agreements should be treated no differently than other contracts.
- There is no special disability inherent in the relationship between spouses.
- Australian authority on lawful act duress is clear and limited to threatened or actual unlawful conduct.⁷

The Court accepted that the issues raised are a matter of public importance and that there is public policy in supporting marital relationship where that relationship is traditionally one founded on mutual support and maintenance. The wife’s application for leave was successful.

⁵ *R v Attorney General for England and Wales* [2003] UKPC 22.

⁶ *Yerkey v Jones* [1939] HCA 3; *Garcia v National Australia Bank* [1998] HCA 48.

⁷ *Australia & New Zealand Banking Group v Karam* [2005] NSWCA 344.

Potential scope for High Court decision

While the Full Court considered duress as a ground to set aside the financial agreement in *Kennedy & Thorne*, undue influence and unconscionable conduct were less substantive issues in that case.

In the hearing of the application for special leave, Edelman J questioned:

“are there not large issues such as whether lawful act duress is sufficient to set aside a contract, what is meant by the presumption of undue influence, whether the limited circumstances of a relationship is sufficient for setting aside a contract on the basis of undue influence or duress, what amounts to a sufficiently special disadvantage?”.

Some of those issues were anticipated to be dealt with in the recent High Court decision in *Electricity Generation Corporation v Woodside Energy Ltd.*⁸ That decision instead turned on specific issues of contract construction and the broader issues were not explored.

This grant of special leave may prove to be an opportunity for the High Court to clarify issues around duress, undue influence and unconscionable conduct. The decision will apply to all financial agreements for which *Kennedy & Thorne* was the binding doctrine and may have wider reaching implications for both family and commercial law.

⁸ *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.