Emancipated and Thorn and Kennedy

Pressure, Influence, and Exploitation in Thorne v Kennedy

Posted on **24 July 2017** by **Joanna Bloore**

By Joanna Bloore

The forthcoming case of *Thorne v Kennedy* will provide the High Court with a rare opportunity to consider and clarify the nature of the doctrines of undue influence, duress, and unconscionable dealing, and the relationships between them. It is increasingly argued that undue influence, like duress, is a vitiating factor within the law of unjust enrichment. By contrast, unconscionable dealing is generally accepted to constitute an equitable wrong, operating independently of the law of unjust enrichment. The three doctrines often suggest themselves from the same set of facts, and the appearance of the language of 'unconscionability' in unjust enrichment cases has introduced further confusion. There are, however, important distinctions between the three forms of claim. The body of this post examines the doctrines of duress, undue influence, and unconscionable dealing. The nature of each doctrine, and the relationships between them, are explored through their potential application to the facts of *Thorne v Kennedy*.

The dispute is set to be heard in the High Court on appeal from the Full Family Court in *Kennedy v Thorne* [2016] FamCAFC 189. Mr Kennedy was an Australian property developer with assets valued at $18 million. Ms Thorne lived overseas, and occupied a position of relative disadvantage (with poor English skills, relative poverty, and fragile immigration status). The two met through an online dating site. After meeting in person, they decided to get married and Ms Thorne accompanied Mr Kennedy back to Australia on a tourist visa. About a week before the wedding, and after Ms Thorne's family had travelled from overseas to attend, Mr Kennedy insisted on the signing of a prenuptial agreement as a condition of their marriage. His aim was to preserve the economic wellbeing of his children. Ms Thorne received independent legal advice that the agreement was 'no good', but she signed it nonetheless. Four years later, the parties divorced, and Ms Thorne sought to set aside the prenuptial agreement.

Can Ms Thorne Succeed in a Claim of Duress or Illegitimate Pressure?

Duress, or 'illegitimate pressure', was well recognised as a factor capable of vitiating a transfer of a benefit from the plaintiff to the defendant in *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48. On this view, duress involves the 'illegitimate' exertion of pressure on the plaintiff, and this pressure causes the plaintiff to enter the transaction that enriches the defendant. Although there has been controversy about the circumstances in which the doctrine applies (see Elise Bant's post that details some of that controversy here) it is increasingly accepted that pressure upon a plaintiff will be 'illegitimate' where it is either: (1) unlawful; or (2) lawful, but unconnected or disproportionate to the subject matter of the demand.

The law accepts that people constantly make decisions under pressure. For example, commercial decisions are often made in situations of extreme pressure, without that pressure being described as 'illegitimate'; and relationships routinely produce emotional pressure. The exertion of pressure will only be illegitimate if it interferes with and constrains the plaintiff's decision-making in a way that the law considers inappropriate.

In *Thorne v Kennedy* the pressure allegedly exerted on the plaintiff was lawful and of an emotional nature. It is doubtful that the 'threat' of refusing to marry the plaintiff will be considered sufficiently disproportionate to the demand for a binding financial agreement to warrant the label 'illegitimate'. An analogy may be drawn with lawful-act duress cases in the context of economic pressure, where threats not to enter into a contractual relationship rarely constitute illegitimate pressure. Mr Kennedy essentially threatened not to enter a binding (marriage) agreement with Ms Thorne unless a certain condition was first fulfilled.

As noted by Edelman and Bant in *Unjust Enrichment* (2nd edn, Hart, 2016) at 218, emotional pressures may be legitimate where they are connected to the 'underlying legitimate concern that the demand seeks to protect'. In *Bank of Scotland v Bennett* [1999] EWCA Civ 1965, a husband's threat of separation was illegitimate because it was aimed at extracting a benefit related to his business debts. By contrast, in *Thorne v Kennedy*, the pressure allegedly exerted on Ms Thorne to sign the pre-nuptial agreement was aimed at preserving the economic wellbeing of Mr Kennedy's children. It is arguable that a financial agreement in relation to an anticipated marriage is not disproportionate to or disconnected from the desire to protect one's children from the potential financial consequences of that marriage. These considerations suggest that if Ms Thorne is to succeed with her restitutionary claim, then she may be required to find a vitiating factor other than duress on which to rest her claim.

Can Ms Thorne Succeed in a Claim of Undue Influence?

The UK case *Benedetti v Sawiris* [2013] UKSC 50 explicitly recognises undue influence as an unjust factor within the law of unjust enrichment, although this view is yet to be affirmed in Australia. If undue influence is regarded as an unjust factor, then it has two clear requirements: first, the plaintiff must have been under another person's excessive influence when she entered into the transaction; and secondly, there must be a contributing link between the influence and the plaintiff's decision to enter into the transaction.

The key difference between the 'unjust factors' of undue influence and illegitimate pressure is the *way* in which the plaintiff's consent in vitiated. As noted by Edelman and Bant in *Unjust Enrichment* (2nd edn, Hart, 2016) at 230–1, cases of illegitimate pressure are recognisable for the plaintiff's 'profound and conscious unwillingness' to enter into the transaction; by contrast, undue influence is distinctive for the plaintiff's 'lack of emancipation from the dominant influence'. A plaintiff affected by undue influence consciously and willingly enters into the transaction, and may even have the benefit of independent legal advice. However, if another person's influence impedes the exercise of her 'full and free independent judgement', then that influence vitiates her consent. The

plaintiff may then rescind and obtain restitution of benefits conferred pursuant to the transaction.

To prove that she was affected by excessive influence at the time she entered into the pre-nuptial agreement, Ms Thorne will most likely need to rely on evidence of the history of her relationship with Mr Kennedy. Although the fiancé–fiancée relationship was historically treated as one of *presumed* influence, it is unlikely to be treated so today. The presence of excessive influence may be difficult to prove, because it requires proof of the state of the plaintiff's mind at a past time. However, influence may be inferred from evidence of the history of the relationship and the circumstances surrounding the transaction. Such an inference is commonly found in cases relating to bank guarantees between spouses: a wife who guaranteed her husband's debts might demonstrate a history of being financially influenced by her husband.
The question in *Thorne v Kennedy* will be whether the history of the relationship between Mr Kennedy and Ms Thorne shows that Mr Kennedy, as the alleged influencer, had an 'ascendency of judgment' over Ms Thorne, and that she was excessively dependent upon him. It is important to note that the possibility that Ms Thorne occupied a position of relative disadvantage (with poor English skills, relative poverty, and fragile immigration status) is not relevant in the undue influence inquiry (although it will become relevant in the unconscionable dealing analysis below). This point is illustrated by *Christodoulou v Christodoulou* [2009] VSC 583: despite being elderly and illiterate, speaking little English, and having been abandoned by her husband and daughters, a woman was nonetheless held to be of an 'independent disposition' for the purposes of the doctrine of undue influence.

Can Ms Thorne Succeed in a Claim of Unconscionable Dealing?

As noted by Deane J in *Commercial Bank of Australia v Amadio* [1983] HCA 14 (at [13]) the equitable doctrine of unconscionable dealing 'looks to the conduct of [the defendant] in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so'. Unconscionable dealing usually involves the defendant's *knowing exploitation* of the plaintiff's special disadvantage. This requirement has been strengthened in *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, where the High Court stated that to be liable, the defendant must have had a 'predatory state of mind'.

Unconscionable dealing and undue influence are often suggested by the same facts, because a plaintiff who suffers from a 'special disability' may also be limited in her ability to make decisions in her best interests. But the doctrines each have a different focus. The focus of an unconscionable dealing inquiry is squarely on the behaviour of the defendant. By contrast, undue influence asks whether the plaintiff's intention was unduly affected by the excessive influence of another person.

The use of the word 'unconscionable' has created some confusion. The word appears in the equitable doctrine of unconscionable conduct, in which a defendant's knowing victimisation of a person with a special disadvantage is at the heart of the inquiry.

However, the word is also appearing with increasing frequency in decisions relating to unjust enrichment: see, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, at [104] (Gummow J). The best way to understand the use of the word 'unconscionable' in cases of unjust enrichment is as a statement of conclusion, and not as a step in the reasoning. So, in deciding whether the estate of Mr Kennedy has been unjustly enriched at the expense of Ms Thorne, the High Court does not need to pose itself the question of whether it would be *unconscionable* for the estate to retain all assets. The Court might however *conclude* that it would indeed be unconscionable for the estate to retain the benefit of an agreement that resulted from duress or undue influence. But that conclusion is not relevant to, and does not actively inform, the prior legal analysis. By contrast, in order to establish the doctrine of unconscionable dealing proper, Ms Thorne must show that Mr Kennedy acted with the requisite predatory intent. Whether Ms Thorne can clear this significant hurdle to relief remains to be seen.

An Opportunity to Clarify

Thorne v Kennedy presents the High Court with a unique opportunity to clarify the doctrines of undue influence, duress and unconscionable dealing. It is important that the High Court seize the opportunity to provide this area of the law with clarity and coherence, since the operation of these doctrines has far-reaching practical consequences. The doctrines arise in many situations beyond the matrimonial context of *Thorne v Kennedy*. For example, these doctrines often: underpin claims for relief brought by domestic sureties against banks; inform a growing quantity of consumer and commercial legislation; and ever more frequently support attempts by the elderly or their estate to revoke transactions that might have been undermined by pressure, influence or exploitation. *Thorne v Kennedy* demonstrates that these doctrines require courts to grapple with difficult and nuanced questions that relate to autonomy, responsibility and the protection of the vulnerable. In answering these questions, the wider legal community will surely welcome the High Court's guidance with open arms.

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1. Arky on **24 July 2017 at 11:22 am** said:

Very interesting piece, thanks for writing it.

One feels that a certain segment of the population and their divorce lawyers are going to be waiting anxiously on this one. From the facts set out in the lower court judgment, if unconscionable conduct was found here it seems tantamount to finding a wealthy person in Australia cannot enter into a binding financial agreement pre-marriage with a much poorer person without it being unconscionable. It does remind me a bit of Bridgewater v Leahy from 20 years ago… courts can be funny about unconscionable conduct claims. The mind still boggles that it was held unconscionable there for the nephew to buy land cheap from his uncle that the uncle was otherwise leaving to him in his (unchallenged) will for free anyway.

2. Elise Bant on **24 July 2017 at 5:10 pm** said:

Yes, a fascinating case. One of the most interesting – and practically important – aspects of the case is the opportunity it offers to clarify the role of independent legal advice. All too often, it is assumed that explaining to someone the mechanics of a transaction into which they are entering – the extent of a guarantee, the interest being created, the contract price etc – is all that is required. But understanding or knowledge is not the same, for example, as making an emancipated decision – arguably the main concern of the doctrine of undue influence. In those cases, the question is not whether the plaintiff understood the transaction but whether her consent to enter into it was full and unimpaired. The various codes of conduct that banks, for example, sign up to are very good on knowledge or understanding, but do not tend to address the sort of issues of want of emancipation that characterise cases of undue influence.
If legal advice simpliciter won't do to protect the recipient of benefits conferred under influence, what follows? In some cases, it may mean that the transaction cannot be completed (does it mean that the bank must seek someone else to guarantee the debt or, in the context in question in Thorne itself, the husband to be cannot obtain the pre-nup after all?) Clearly, the consequences of the application of this doctrine are very serious and raise real significant questions of policy: if, for example, pre-nups are seen as a good thing (in some cases at least), what does it mean to say that the defendant in Thorne could never have taken the benefit of one, no matter the extent and quality of the independent advice she received? Does this conclusion run the risk of infantilising the plaintiff (a key

concern of the late Professor Birks)? All fascinating questions and all on the table for the High Court to consider.

3. Michael Bryan on **25 July 2017 at 7:53 pm** said:

Thanks for the wonderfully clear explanation of the issues. At the special leave application ([2017] HCA Trans 54) both parties appealed to public policy but predictably the policies were diametrically opposed. Section 90KA of the Family Law Act provides that the validity of pre-nup agreements under the Act are to be determined by reference to principles of law and equity. But does the statutory framework of pre-nup agreements affect the application of these principles?
Both sides agree that that they do but agreement ends at this point. For the appellant the marital context requires that the principles of duress, undue influence and unconscionability should be applied with special intensity – more intense than their application to bank guarantee cases. For the respondent the detailed statutory regulation of pre- nups is a reason for caution in applying these doctrines. It will be interesting to see how these policies play out (if they do play out) in the High Court decision.

4. Malcolm Davies on **26 July 2017 at 7:27 am** said:

The decision to grant leave was made by Keane J and Edelman J.It will be interesting to see how influential Edelman's thinking will be on other members of the Court.

5. JJWPB on **26 July 2017 at 2:21 pm** said:

The special leave application transcript makes for, um, "entertaining" reading.