HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

THORNE APPELLANT

AND

KENNEDY RESPONDENT

Thorne v Kennedy
[2017] HCA 49
8 November 2017
B14/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Family Court of Australia made on 26 September 2016 and, in their place, order that the appeal to that Court be dismissed with costs.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Family Court of Australia

Representation

M J Foley with P J Woods for the appellant (instructed by Somerville Laundry Lomax)

R G Lethbridge SC with G C Eldershaw and D Birch for the respondent (instructed by Jones Mitchell Lawyers)

CATCHWORDS

Thorne v Kennedy

Family law – Financial agreements – *Family Law Act* 1975 (Cth), Pt VIIIA – Pre-nuptial agreement – Post-nuptial agreement – Where fiancé wealthy – Where fiancée had no substantial assets – Where fiancée moved to Australia for purposes of marriage – Where fiancée had no community or connections in Australia – Where fiancée relied on fiancé for all things – Where pre-nuptial agreement provided to fiancée shortly before wedding – Where fiancé told fiancée that if she did not sign agreement wedding would not go ahead – Where independent solicitor advised fiancée against signing – Where pre-nuptial agreement signed – Where substantially identical post-nuptial agreement signed – Whether agreements voidable for duress, undue influence, or unconscionable conduct – Whether primary judge's reasons adequate.

Words and phrases – "adequate reasons", "duress", "financial agreement", "illegitimate pressure", "independent legal advice", "maintenance order", "post-nuptial agreement", "pre-nuptial agreement", "property adjustment", "special disadvantage", "unconscionable conduct", "undue influence", "vitiating factor".

Family Law Act 1975 (Cth), ss 90F, 90G, 90K, 90KA.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND EDELMAN JJ. This appeal concerns two substantially identical financial agreements, a pre-nuptial agreement and a post-nuptial agreement which replaced it, made under Pt VIIIA of the *Family Law Act* 1975 (Cth). The agreements were made between a wealthy property developer, Mr Kennedy, and his fiancée, Ms Thorne. The parties met online on a website for potential brides and they were soon engaged. In the words of the primary judge, Ms Thorne came to Australia leaving behind "her life and minimal possessions ... If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community"[1]. The pre-nuptial agreement was signed, at the insistence of Mr Kennedy, very shortly before the wedding in circumstances in which Ms Thorne was given emphatic independent legal advice that the agreement was "entirely inappropriate" and that Ms Thorne should not sign it.

2 One of the issues before the primary judge, Judge Demack, was whether the agreements were voidable for duress, undue influence, or unconscionable conduct. The primary judge found that Ms Thorne's circumstances led her to believe that she had no choice, and was powerless, to act in any way other than to sign the pre-nuptial agreement. Her Honour held that the post-nuptial agreement was signed while the same circumstances continued, with the exception of the time pressure. The agreements were both set aside for duress, although the primary judge used that label interchangeably with undue influence, which is a better characterisation of her findings. The Full Court of the Family Court of Australia (Strickland, Aldridge and Cronin JJ) allowed an appeal and dismissed a notice of contention by Ms Thorne, concluding that the agreements had not been vitiated by duress, undue influence, or unconscionable conduct. For the reasons which follow, the findings and conclusion of the primary judge should not have been disturbed. The agreements were voidable due to both undue influence and unconscionable conduct.

3 The names, and some details, of the parties were suppressed during the course of this litigation. That approach was generally followed on this appeal, including the use of pseudonyms to describe the parties.

Background

4 The parties met over the internet in 2006. At the time, Ms Thorne, who was an Eastern European woman, was living in the Middle East. She was

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1 *Thorne & Kennedy* [2015] FCCA 484 at [91].

36 years old. She had no substantial assets. She previously had been married and divorced and was subsequently in a four year de facto relationship which ended when her partner moved to Kuwait for work. Mr Kennedy was a 67 year old Greek Australian property developer. He had assets worth between $18 million and $24 million. He was divorced with three adult children.

5 Ms Thorne's profile on the website on which they met described her as a single woman with no children, of the Greek Orthodox religion, who spoke a little English and Greek. She shared the same religion with Mr Kennedy and generally conversed with him in Greek. Mr Kennedy travelled overseas to meet Ms Thorne very shortly after meeting her online. He told her that if he liked her then he would marry her but that "you will have to sign paper. My money is for my children"[2].

6 During their courtship phase, Mr Kennedy travelled overseas twice to meet Ms Thorne. He took her on an extended holiday around Europe, during which he met her family. He bought her expensive jewellery. In February 2007, about seven months after Mr Kennedy and Ms Thorne met, they moved to Australia to live in Mr Kennedy's expensive penthouse with the intention of getting married.

7 The wedding between Ms Thorne and Mr Kennedy was set for 30 September 2007. On 8 August 2007, Mr Kennedy had instructed a solicitor to prepare a pre-nuptial agreement. It is unclear whether Ms Thorne was, at this time, aware of the agreement but she was certainly not aware of its contents. Around 19 September 2007, Mr Kennedy told Ms Thorne that they were going to see solicitors about the signing of an agreement. Ms Thorne asked Mr Kennedy whether he required her to sign the agreement. He replied that if she did not sign it then the wedding would not go ahead. On 20 September 2007, Mr Kennedy took Ms Thorne and her sister to see an independent solicitor, Ms Harrison, who was an accredited family law specialist. Mr Kennedy waited in the car outside. It was during this appointment that Ms Thorne first became aware of the contents of the agreement. By this time, Ms Thorne's parents and sister had been flown to Australia from Eastern Europe and accommodated for the wedding by Mr Kennedy. Guests had been invited to the wedding. Ms Thorne's dress had been made. The wedding reception had been booked.

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2 *Thorne & Kennedy* [2015] FCCA 484 at [33].

8 The day after the meeting, Ms Harrison produced a written advice to Ms Thorne which she subsequently explained to Ms Thorne. There was no dispute that Ms Harrison's advice was accurate. Some of the key features of Ms Harrison's advice were as follows:

(1) The agreement provided for Ms Thorne to receive maintenance during the marriage of the greater of (i) $4,000 per month or (ii) 25% of the net income from the management rights of a proposed development. Ms Harrison observed that the $4,000 per month contained no provision for increase and was a very poor provision from someone in Mr Kennedy's circumstances.

(2) Ms Thorne would be permitted to live rent free in a penthouse located in the proposed development and her family would be permitted to live rent free in a unit located in that development. Ms Harrison noted, however, that Ms Thorne had informed her that the local council had refused planning permission for the proposed development.

(3) If Ms Thorne and Mr Kennedy separated within the first three years of marriage, with or without children, then Ms Thorne would get nothing. The rights described above would also cease.

(4) If Ms Thorne and Mr Kennedy separated after three years, without children, Mr Kennedy would only have an obligation to pay a single lump sum of $50,000 to Ms Thorne. This payment was indexed to the Consumer Price Index if the separation occurred after 1 July 2011. Ms Harrison described this amount as "piteously small".

(5) If Mr Kennedy died while they were living together and while they had not separated then the agreement provided that Ms Thorne would be entitled to (i) a penthouse in the proposed development or, if that were not possible, a unit she chose in the same city not exceeding a market value of $1.5 million; (ii) 40% of the net income of the management rights of the proposed development or $5,000 per month, indexed annually, whichever was the greater; and (iii) the Mercedes Benz car that was presently in her possession or a replacement vehicle of the same or higher value.

9 Ms Harrison's advice concluded as follows:

> "I believe that you are under significant stress in the lead up to your wedding and that you have been put in a position where you must sign this Agreement regardless of its fairness so that your wedding can go ahead. I also understand from what you have told me that you are longing to have a child and you see your relationship with [Mr Kennedy] as the opportunity to fulfil what may well be a long held desire. I hold significant concerns that you are only signing this Agreement so that your wedding will not be called off. I urge you to reconsider your position as this Agreement is drawn to protect [Mr Kennedy's] interests solely and in no way considers your interests."

10 On 21 September 2007, the same day that Ms Harrison had produced her written advice, the solicitors for Mr Kennedy wrote to Ms Harrison. The solicitors referred to amendments to the agreement that Ms Harrison had sought which had been incorporated. The solicitors then said that since the wedding was scheduled for 30 September it was Mr Kennedy's preference that the agreement be signed that day, ie on 21 September 2007.

11 The amendments made to the agreement at Ms Harrison's suggestion were relatively minor amendments concerning the provision for Ms Thorne if Mr Kennedy died while they were married and co-habiting. The provision concerning Ms Thorne's entitlement to a penthouse initially provided for the penthouse to be in the proposed development or in the same city if the development did not proceed. The amendment added the words "or if for any other reason the penthouse cannot be transferred to [Ms Thorne]". The second amendment concerned the mechanics of Mr Kennedy's undertaking to execute a will containing provision for Ms Thorne. The amendment added the words "if necessary a testamentary trust" and it was also provided that Mr Kennedy "will ensure that any further testamentary dispositions are drawn to contain these provisions and [Mr Kennedy] shall not execute any further testamentary dispositions without these provisions". No issue was raised in this proceeding about the enforceability of this provision.

12 On 24 September 2007, Ms Harrison explained her advice to Ms Thorne. Ms Thorne understood Ms Harrison's oral advice to be that the agreement was the worst agreement that Ms Harrison had ever seen. Ms Harrison's evidence was that the agreement was entirely inappropriate and that she told Ms Thorne that Ms Thorne should not sign it. Although Ms Thorne was advised by Ms Harrison about the effect of the agreement if Mr Kennedy chose to separate from her, Ms Thorne did not even turn her mind to the possibility that

Mr Kennedy would separate from her, or the consequences about which she was advised. Ms Thorne also believed that she would never leave Mr Kennedy. Her concerns were focused only upon her rights under the agreement if Mr Kennedy should predecease her.

13 The first agreement was signed by Ms Thorne on 26 September 2007, four days before her wedding. The agreement contained a recital that within 30 days Mr Kennedy and Ms Thorne would sign another agreement in similar terms.

14 The terms of the second agreement were substantially identical to the first. On 5 November 2007, Ms Thorne met with Ms Harrison to get advice on the second agreement. As Ms Harrison had done in relation to the first agreement, Ms Harrison again urged Ms Thorne not to sign the second agreement. During this meeting, Ms Thorne received a phone call from Mr Kennedy asking how much longer she was going to be. Ms Harrison gained the impression that Ms Thorne was being pressured to sign the document. Again, Ms Thorne ignored Ms Harrison's advice and signed the second agreement on the same day, 5 November 2007.

15 On 16 June 2011, slightly less than four years after the marriage, Mr Kennedy signed a separation declaration. Mr Kennedy and Ms Thorne separated, without children, in August 2011. Ms Thorne commenced this proceeding in April 2012. She sought orders, including orders setting aside the two agreements, an adjustment of property order in the amount of $1.1 million, and a lump sum spousal maintenance order of $104,000. Mr Kennedy died in May 2014, during the trial. He was substituted as a party by the executors and trustees of his estate, who were two of his adult children.

The statutory context

16 In 1929, the House of Lords held that an agreement could not exclude the power of the courts, which had existed since 1857, to make financial adjustment between the parties following the breakdown of a marriage[3]. The agreement might be taken into account when the court quantifies the amount of maintenance but it would not be binding[4]. Section 87(1)(k) of the *Matrimonial Causes Act* 1959 (Cth) modified that principle by empowering a court to "sanction" pre-nuptial or post-nuptial agreements concerning property distribution or

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3 *Hyman v Hyman* [1929] AC 601.

4 *Hyman v Hyman* [1929] AC 601 at 609 per Lord Hailsham LC.

maintenance[5]. That Act was repealed and replaced by the *Family Law Act*, which introduced a regime for registration of certain types of maintenance agreements and a regime for certain other maintenance agreements to be approved by the court.

17 On 27 December 2000, the *Family Law Act* was amended to "encourage people to agree about the distribution of their matrimonial property and thus give them greater control over their own affairs, in the event of marital breakdown"[6]. The amendments to the *Family Law Act* introduced Pt VIIIA, which allows couples to make regulated financial agreements. These agreements include financial agreements before marriage and after marriage, commonly described as pre-nuptial and post-nuptial agreements.

18 Part VIIIA of the *Family Law Act* imposes various requirements before a financial agreement will be binding and restrictions upon the content of those agreements. One restriction, in s 90G(1) (the effect of which has since been modified by the insertion of s 90G(1A)), is a requirement that the financial agreement contain a statement from each party that the party was provided with independent legal advice concerning the effect of the agreement on the party's rights and the advantages and disadvantages of making the agreement.

19 Another restriction upon pre-nuptial and post-nuptial agreements is s 90F, which, by ss 90F(1) and 90F(1A), prohibits the agreement from excluding or limiting the power of a court to make an order in relation to the maintenance of a party if:

> "when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit."

20 Despite Ms Thorne's extremely limited personal means, the agreements purported to provide for an "acknowledgement" that Ms Thorne was able to support herself without an income tested pension, allowance or benefit. It seems that this clause was an attempt to oust the operation of s 90F of the *Family Law Act*. However, no submissions were made about s 90F before the primary judge

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5 *Shaw v Shaw* (1965) 113 CLR 545; [1965] HCA 39.

6 Australia, House of Representatives, Family Law Amendment Bill 2000, Further Revised Explanatory Memorandum at 6.

or before the Full Court. In this Court, it assumed significance only as a matter for contextual construction after it was drawn to the attention of the parties by the Court.

21 The restriction upon the validity of financial agreements which is central to this appeal is contained in ss 90K and 90KA. Section 90K(1) provides that a court may make an order setting aside a financial agreement if the court is satisfied of matters including, in s 90K(1)(b), "the agreement is void, voidable or unenforceable" and, in s 90K(1)(e), "a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable". Section 90KA then provides, in part, that the question whether a financial agreement is valid, enforceable or effective "is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".

The issues in this case

22 The issues raised by the notice of appeal in this case concerned whether the Full Court erred in finding error in the primary judge's conclusion that the agreements should be set aside. The only issues were whether the agreements should be set aside because Ms Thorne was subject to any of the vitiating factors of duress, undue influence, or unconscionable conduct in her entry into each of the agreements and whether the reasons of the primary judge were adequate.

23 At all stages in this litigation it was assumed that each of the vitiating factors applied according to the principles of common law and equity as described in s 90KA. There were no submissions made concerning how the statutory prohibition against unconscionable conduct in s 90K(1)(e) might differ, if at all, from the equitable doctrine concerning unconscionable conduct. Further, although, in written submissions in this Court, Ms Thorne initially appeared to submit that the statutory context of ss 90K and 90KA might somehow have affected these principles, in oral submissions in this Court, counsel for Ms Thorne accepted that the principles were not altered although the particular circumstances of the marital context would be taken into account. This latter point was, properly, common ground.

24 Two other issues do not arise. First, although the issue of causation was raised in oral argument in this Court, there was no ground of appeal in this Court or in the Full Court which alleged that causation was absent because Ms Thorne would have entered into either agreement in any event. It is therefore

unnecessary to consider whether, as the oral submission assumed, but for any vitiating factor Ms Thorne would have entered into the agreements in any event[7]. It can be observed, however, that the failure to raise any ground of appeal alleging an absence of either causation or contribution is unlikely to have been an oversight. Where duress, undue influence, or unconscionable conduct is otherwise shown, an inference of the necessary causation or contribution is readily drawn if the particular transaction cannot reasonably be accounted for by "ordinary motives"[8], as clearly appears from the circumstance that Ms Thorne understood the advice of her solicitor to be that the agreements were the worst that the solicitor had ever seen.

25 Secondly, this case concerns only the presence of a vitiating factor between parties to an agreement. It is not concerned with the circumstances in which a person can take the benefit of a transaction procured by the duress, undue influence, or unconscionable conduct of a third party. Where the recipient is not a volunteer[9], the duress, undue influence, or unconscionable conduct of a third party raises additional issues[10].

Duress, undue influence, and unconscionable conduct

Duress

26 The vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction[11]. It does not

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7 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 970-971. Cf *Barton v Armstrong* [1976] AC 104 at 120 per Lord Cross of Chelsea; *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46 per McHugh JA, Samuels and Mahoney JJA agreeing.

8 *Allcard v Skinner* (1887) 36 Ch D 145 at 185 per Lindley LJ.

9 *Bridgeman v Green* (1757) Wilm 58 at 64-65 [97 ER 22 at 25].

10 *Bainbrigge v Browne* (1881) 18 Ch D 188 at 198-199 per Fry J; *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 56 per Isaacs J; [1924] HCA 13; *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 51-52 per Starke J, 60-61 per McTiernan J, 85 per Williams J; [1941] HCA 9.

11 *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289 per Kiefel J, Lindgren J agreeing.

require that the person's will be overborne[12]. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing "only too well" what he or she is doing[13]. As Holmes J said in *Union Pacific Railroad Co v Public Service Commission of Missouri*[14]:

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

27 Historically, the primary constraint upon an action based on duress was the threats that were recognised as sufficient for an action. The early common law rule was that the duress which was necessary to set aside an agreement required an unlawful threat or conduct in relation to the person's body, such as loss of life or limb[15]. Even duress in relation to a person's goods was not a basis upon which an agreement could be avoided at common law[16], although it was a basis for restitution of a payment of money[17]. The abandonment of this common law restriction[18] introduced a difficult question. This question is whether duress should be based on any unlawful threat or conduct or, alternatively, whether

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12 *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45 per McHugh JA, Samuels and Mahoney JJA agreeing; *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 695.

13 *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 per McHugh JA, Samuels and Mahoney JJA agreeing.

14 248 US 67 at 70 (1918).

15 *Sumner v Ferryman* (1708) 11 Mod 201 [88 ER 989]; *Skeate v Beale* (1841) 11 Ad & E 983 [113 ER 688]; Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 1 at 126-127.

16 *Skeate v Beale* (1841) 11 Ad & E 983 [113 ER 688].

17 *Astley v Reynolds* (1731) 2 Str 915 [93 ER 939].

18 *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293.

other illegitimate or improper, yet lawful, threats or conduct might suffice[19]. In 1947, Dawson described that question as one "which has chiefly arrested the modern development of the law of duress"[20].

28 A significant focus of the submissions by Mr Kennedy's executors was that a conclusion of duress was not open to the primary judge because any pressure exerted by Mr Kennedy upon Ms Thorne did not involve any unlawful threat or conduct. Senior counsel relied upon a decision of the New South Wales Court of Appeal which held, consistently with the older common law cases, that duress at common law requires proof of threatened or actual unlawful conduct[21]. He submitted that Ms Thorne had not set out any "justifiable formulation" by which lawful act duress could apply.

29 It was not necessary for the primary judge to consider common law duress. As will be explained later in these reasons, the sense in which the primary judge in this case described the pressure on Ms Thorne was to focus on Ms Thorne's lack of free choice (in the sense used in undue influence cases) rather than whether Mr Kennedy was the source of all the relevant pressure, or whether the impropriety or illegitimacy of Mr Kennedy's lawful actions might suffice to constitute duress. Nor did this Court receive any substantial submissions concerning when illegitimacy or impropriety might be established for duress at common law including in light of the statutory policy of the *Family Law Act* and, in that context, how the actions of Mr Kennedy should be characterised. In these circumstances, it is not necessary to address the arguments in favour of or against the conclusion of the New South Wales Court of Appeal that duress at common law requires proof of threatened or actual unlawful conduct[22]. Nor is it necessary to consider whether the recognition of

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19 Beatson, "Duress by Threatened Breach of Contract", (1976) 92 *Law Quarterly Review* 496 at 497-498.

20 Dawson, "Economic Duress – An Essay in Perspective", (1947) 45 *Michigan Law Review* 253 at 287.

21 *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 at 168 [66].

22 *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 at 168 [66].

lawful act duress adds anything to the doctrine concerned with unconscionable conduct[23].

Undue influence

30 In *Allcard v Skinner*[24], Lindley LJ said that "no Court has ever attempted to define undue influence". One reason for the difficulty of defining undue influence is that the label "undue influence" has been used to mean different things[25]. It has been used to include abuse of confidence[26], misrepresentation[27], and the pressure which amounts to common law duress[28]. Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred[29]. One reason why there is no clear distinction is that undue influence can arise from widely different sources[30], one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is

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23 Compare Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales", (2008) 27(2) *University of Queensland Law Journal* 41.

24 (1887) 36 Ch D 145 at 183.

25 Swadling, "Undue Influence: Lessons from America?", in Mitchell and Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays*, (2013) 111 at 113.

26 *Yerkey v Jones* (1939) 63 CLR 649 at 675; [1939] HCA 3.

27 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 820 [103] per Lord Hobhouse of Woodborough.

28 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 820 [103] per Lord Hobhouse of Woodborough.

29 *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 290 per Kiefel J, Lindgren J agreeing.

30 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 795 [7] per Lord Nicholls of Birkenhead.

not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper[31].

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

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31 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment*, (2011), §15, comment a; Burrows, *A Restatement of the English Law of Contract*, (2016) at 201-202, discussing *Langton v Langton* [1995] 2 FLR 890, *Killick v Pountney* [2000] WTLR 41, and *Daniel v Drew* [2005] EWCA Civ 507.

32 Snell, *The Principles of Equity, Intended for the use of Students and the Profession*, (1868) at 370.

33 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, (1836), vol 1 at 243.

34 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, (1836), vol 1 at 243.

35 *Williams v Bayley* (1866) LR 1 HL 200 at 215-216 per Lord Chelmsford.

36 *Hall v Hall* (1868) LR 1 P & D 481 at 482.

37 (1936) 56 CLR 113 at 134; [1936] HCA 41.

38 (1941) 65 CLR 42 at 61, citing *Bainbrigge v Browne* (1881) 18 Ch D 188 at 196, 197 per Fry J and *Yerkey v Jones* (1939) 63 CLR 649 at 677.

characterised the absence of undue influence as a "free and well-understood act" and Williams J referred to "the free exercise of the respondent's will"[39].

32 The question whether a person's act is "free" requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party[40]. It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party seeking relief was reduced entirely to an automaton or that the person became a "mere channel through which the will of the defendant operated"[41]. Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be "markedly sub-standard"[42] as a result of the effect upon the person's mind of the will of another.

33 An example which illustrates the characterisation by a court of a lack of free will sufficient to amount to undue influence is the decision of this Court in *Johnson v Buttress*[43]. In that case, Mr Buttress was a 67 year old man, who was "wholly illiterate, not very intelligent, and of little or no experience or capacity in business"[44]. He made a voluntary transfer of land to a relative of his wife. The land was his only property and his only means of livelihood. When he made the transfer he did not understand that he had parted with the land irrevocably. After Mr Buttress died, the administrator of his estate brought an application to set aside the transfer. The trial judge set aside the transfer on the basis of undue influence. This decision was upheld in this Court. Although other members of the Court relied upon a presumption of undue influence, which is considered

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39 *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 85.

40 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment*, (2011), §15.

41 *Tufton v Sperni* [1952] 2 TLR 516 at 530 per Jenkins LJ. See also *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 969.

42 Birks and Chin, "On the Nature of Undue Influence", in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995) 57 at 67.

43 (1936) 56 CLR 113.

44 *Johnson v Buttress* (1936) 56 CLR 113 at 124.

below, one member of the Court, Starke J, concluded that it was open to the trial judge to find that undue influence arose without any presumption. His Honour upheld the conclusion of the trial judge that the circumstances of the transfer invited the inference that it was "not the result of the free and deliberate judgment of the deceased"[45].

34 There are different ways to prove the existence of undue influence. One method of proof is by direct evidence of the circumstances of the particular transaction. That was the approach relied upon by the primary judge in this case. Another way in which undue influence can be proved is by presumption. This presumption was relied upon by Ms Thorne in this Court as an alternative. A presumption, in the sense used here, arises where common experience is that the existence of one fact means that another fact also exists[46]. Common experience gives rise to a presumption that a transaction was not the exercise of a person's free will if (i) the person is proved to be in a particular relationship, and (ii) the transaction is one, commonly involving a "substantial benefit"[47] to another, which cannot be explained by "ordinary motives"[48], or "is not readily explicable by the relationship of the parties"[49]. Although the classes are not closed, in *Johnson v Buttress*[50] Latham CJ described the relationships that could give rise to the presumption as including parent and child, guardian and ward, trustee and beneficiary, solicitor and client, physician and patient, and cases of religious influence. Outside recognised categories, the presumption can also be raised by proof that the history of the particular relationship involved one party occupying a similar position of ascendency or influence, and the other a corresponding position of dependency or trust[51]. In either case, the presumption is rebuttable by

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45 *Johnson v Buttress* (1936) 56 CLR 113 at 126.

46 *Calverley v Green* (1984) 155 CLR 242 at 264 per Murphy J; [1984] HCA 81.

47 *Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J.

48 *Allcard v Skinner* (1887) 36 Ch D 145 at 185 per Lindley LJ.

49 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 798 [21] per Lord Nicholls of Birkenhead.

50 (1936) 56 CLR 113 at 119. See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42 at 51 per Starke J.

51 *Johnson v Buttress* (1936) 56 CLR 113 at 134-135 per Dixon J.

the other party proving that the particular transaction or transfer, in its particular circumstances, was nevertheless the result of the weaker party's free will[52].

35 Ms Thorne submitted that she was entitled to the benefit of a presumption of undue influence because the relationship of fiancé and fiancée should be recognised as one to which the presumption attaches. This submission was concerned with a presumption of undue influence (that a transaction was the result of a lack of free will) and not with the different doctrine concerning the possibility of an abuse of confidence in any relationship of intimacy[53]. The submission should not be accepted.

36 Although the relationship of fiancé and fiancée was first seen as falling within the recognised categories by Lord Langdale MR in 1848[54], and although it was also recognised in this Court by Dixon J in 1936[55] and 1939[56], in 1961 in England Lord Evershed MR refused to apply the established presumption, saying that "this is 1961 and what might have been said of the position, independence, and the like, of women in 1848 would have to be seriously qualified to-day"[57]. In 1992 in *Louth v Diprose*[58] Brennan J observed that it "may no longer be right to presume that a substantial gift made by a woman to her fiancé has been procured by undue influence". Common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other.

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52 *Spong v Spong* (1914) 18 CLR 544 at 549 per Griffith CJ; [1914] HCA 52; *Johnson v Buttress* (1936) 56 CLR 113 at 123 per Latham CJ.

53 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; [1998] HCA 48.

54 *Page v Horne* (1848) 11 Beav 227 at 235 [50 ER 804 at 807].

55 *Johnson v Buttress* (1936) 56 CLR 113 at 134.

56 *Yerkey v Jones* (1939) 63 CLR 649 at 675.

57 *Zamet v Hyman* [1961] 1 WLR 1442 at 1446; [1961] 3 All ER 933 at 937-938.

58 (1992) 175 CLR 621 at 630; [1992] HCA 61.

Unconscionable conduct

37 There was no controversy on this appeal concerning the principles of unconscionable conduct in equity. Those principles were recently restated by this Court in *Kakavas v Crown Melbourne Ltd*[59].

38 A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage "which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests"[60]. The other party must also unconscientiously take advantage of that special disadvantage[61]. This has been variously described as requiring "victimisation"[62], "unconscientious conduct"[63], or "exploitation"[64]. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage[65].

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59 (2013) 250 CLR 392; [2013] HCA 25.

60 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J; [1983] HCA 14.

61 *Cory v Cory* (1747) 1 Ves Sen 19 [27 ER 864]; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 398 [6].

62 *Hart v O'Connor* [1985] AC 1000 at 1028; *Louth v Diprose* (1992) 175 CLR 621 at 638; *Bridgewater v Leahy* (1998) 194 CLR 457 at 479 [76]; [1998] HCA 66; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 401 [18], 402 [22], 403 [26], 439-440 [161].

63 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J, 474 per Deane J; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 64 [15]; [2003] HCA 18.

64 *Louth v Diprose* (1992) 175 CLR 621 at 626; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 63 [9], 64 [14]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 439-440 [161].

65 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J.

39 In *Commercial Bank of Australia Ltd v Amadio*[66], Deane J said that the equitable principles concerning relief against unconscionable conduct are closely related to those concerned with undue influence. The same circumstances can result in the conclusion that the person seeking relief (i) has been subject to undue influence, and (ii) is in a position of special disadvantage for the purposes of the doctrine concerned with unconscionable conduct. For instance, in *Diprose v Louth (No 1)*[67], the trial judge, King CJ, observed that both doctrines were satisfied where the defendant "was in a position of emotional dominance which gave her an influence over the [plaintiff] which she exercised unconscientiously to procure the gift of the house". Before the High Court in that case, Mr Diprose relied only upon the ground of unconscionable conduct.

40 Although undue influence and unconscionable conduct will overlap, they have distinct spheres of operation. One difference is that although one way in which the element of special disadvantage for a finding of unconscionable conduct can be established is by a finding of undue influence, there are many other circumstances that can amount to a special disadvantage which would not establish undue influence. A further difference between the doctrines is that although undue influence cases will often arise from the assertion of pressure by the other party which might amount to victimisation or exploitation, this is not always required. In *Commercial Bank of Australia Ltd v Amadio*[68], Mason J emphasised the difference between unconscionable conduct and undue influence as follows:

> "In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."

The proper appellate approach to findings concerning vitiating factors

41 In any case where a transaction is sought to be impugned by the operation of vitiating factors such as duress, undue influence, or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts ... in

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66 (1983) 151 CLR 447 at 474.

67 (1990) 54 SASR 438 at 448-449.

68 (1983) 151 CLR 447 at 461.

order to determine whether a claim to relief has been established"[69]. On appeal, it is also essential for the appellate court to scrutinise the trial judge's findings and assess any challenge to the trial judge's conclusions in light of the advantages enjoyed by that judge.

42 In *Kakavas v Crown Melbourne Ltd*[70], quoting with approval from the judgment of Dawson, Gaudron and McHugh JJ in *Louth v Diprose*[71], this Court described how the "proof of the interplay of a dominant and subordinate position in a personal relationship depends, 'in large part, on inferences drawn from other facts and on an assessment of the character of each of the parties'". As Rich J said, in the context of a claim to set aside a transaction, the advantage of the trial judge "of seeing the parties and estimating their characters and capacities is immeasurable"[72]. These matters led Toohey J, in *Louth v Diprose*[73], to say that the "formidable obstacles" involved in an attack on findings of fact by a trial judge "may be enhanced where issues of undue influence and unconscionability are involved".

43 Related to the fact finding advantage of the trial judge is the evaluative nature of the judgment involved in determining whether the vitiating factors have been established. For example, in undue influence there will be questions of evaluative judgment involved in assessing whether the extent to which a person's will has been subordinated to another's is sufficient to characterise the person as lacking free will. The same evaluative exercise was described by this Court in *Kakavas v Crown Melbourne Ltd*[74] in relation to unconscionable conduct, quoting from Dixon CJ, McTiernan and Kitto JJ in a passage from *Jenyns v Public Curator (Q)*[75] which emphasised how the application of these equitable principles:

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69 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [14].

70 (2013) 250 CLR 392 at 434-435 [144].

71 (1992) 175 CLR 621 at 639-641.

72 *Wilton v Farnworth* (1948) 76 CLR 646 at 654, Dixon J agreeing; [1948] HCA 20.

73 (1992) 175 CLR 621 at 649-650.

74 (2013) 250 CLR 392 at 426 [122]. See also at 401 [18].

75 (1953) 90 CLR 113 at 118-119; [1953] HCA 2.

> "calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [other party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord *Stowell's* generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case'".

The primary judge's decision

44 The primary judge posed the hypothetical question of why Ms Thorne would sign an agreement when she understood the advice of her solicitor to be that the agreement was the worst that the solicitor had ever seen[76]. The primary judge also asked why, despite the advice of her solicitor, Ms Thorne failed to conceive of the notion that Mr Kennedy might end the marriage. The primary judge found that the answer to these questions did not lie in Ms Thorne's lack of proficiency in English. Instead, the primary judge attributed Ms Thorne's beliefs and actions to matters of duress or undue influence.

45 The primary judge described duress as "a form of unconscionable conduct"[77]. This description was not subsuming the vitiating factor of duress within the doctrine of unconscionable transactions, which would require a finding of special disadvantage and an unconscientious taking advantage of that special disadvantage. Her Honour was using "unconscionable" in the sense described by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd*[78] as "to characterise the result rather than to identify the reasoning that leads to the application of that description".

46 The critical findings of the primary judge concerning duress and undue influence were based primarily upon Ms Thorne's evidence. Although the

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76 *Thorne & Kennedy* [2015] FCCA 484 at [85].

77 *Thorne & Kennedy* [2015] FCCA 484 at [68].

78 (1998) 194 CLR 395 at 409 [34].

primary judge described Mr Kennedy's evidence as having "many difficulties"[79], she had no such concerns about Ms Thorne's evidence. The primary judge concluded that Ms Thorne was powerless to make any decision other than to sign the first agreement. The primary judge referred to an inequality of bargaining power and a lack of any outcome for Ms Thorne that was "fair or reasonable"[80]. However, her Honour also explained that Ms Thorne's situation was "much more than inequality of financial position"[81].

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

> "She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions ... She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.

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79 *Thorne & Kennedy* [2015] FCCA 484 at [23].

80 *Thorne & Kennedy* [2015] FCCA 484 at [94].

81 *Thorne & Kennedy* [2015] FCCA 484 at [93].

82 *Thorne & Kennedy* [2015] FCCA 484 at [97].

83 *Thorne & Kennedy* [2015] FCCA 484 at [93].

84 *Thorne & Kennedy* [2015] FCCA 484 at [93].

85 *Thorne & Kennedy* [2015] FCCA 484 at [91]-[92].

> Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear."

48 As to the second agreement, the primary judge held that it was "simply a continuation of the first – the marriage would be at an end before it was begun if it wasn't signed"[86]. In effect, her Honour's conclusion was that the same matters which vitiated the first agreement, with the exception of the time pressure caused by the impending wedding[87], also vitiated the second agreement.

The Full Court's decision

49 The approach taken by the parties on appeal was to raise so many grounds of appeal that the essential point of the appeal – whether a vitiating factor had been established – was concealed. The Full Court was confronted with 13 grounds of appeal and a notice of contention with eight grounds. As the Full Court held, many of those grounds went nowhere or had no merit. For instance, Mr Kennedy's executors and trustees challenged many of the findings of fact by the primary judge despite there being a solid foundation for all of those findings. With one exception, discussed below, each of those challenges properly failed.

50 However, the Full Court upheld the grounds of appeal in two respects. First, the Full Court held that the primary judge's reasons were inadequate because in the list of six matters relied upon by the primary judge, it was not possible to determine which of the factors were fundamental, and which were subsidiary, to the decision concerning either the first or the second agreement. The Full Court considered that the lack of financial equality might have been determinative, although "a finding of financial inequality could never provide a reasoned basis for duress"[88].

51 Secondly, relying upon the decision of the New South Wales Court of Appeal in *Australia & New Zealand Banking Group v Karam*[89], the Full Court held that the primary judge had erred in the test for duress which she had

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86 *Thorne & Kennedy* [2015] FCCA 484 at [96].

87 *Thorne & Kennedy* [2015] FCCA 484 at [95].

88 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,807 [62].

89 (2005) 64 NSWLR 149 at 168 [66].

applied[90]. The Full Court held that duress required threatened or actual unlawful conduct but that the primary judge had not concluded that the pressure was "illegitimate" or "unlawful"[91]. The Full Court also overturned the finding by the primary judge, which had been a factor in her assessment that the agreements were vitiated, that there was no outcome available to Ms Thorne that was fair or reasonable. In effect, the Full Court considered the agreements to be fair and reasonable because (i) Mr Kennedy had told Ms Thorne at the outset of their relationship, and she had accepted, that his wealth was intended for his children, and (ii) Ms Thorne's interest, which was provided for in the agreements, concerned only the provision that would be made for her in the event Mr Kennedy predeceased her.

52 The Full Court also dismissed a notice of contention by Ms Thorne which, amongst other matters, sought to uphold the primary judge's conclusions on the basis that the agreements were vitiated by either undue influence or unconscionable conduct.

53 The Full Court held that Ms Thorne could not have been subject to undue influence because she acquiesced in Mr Kennedy's desire to protect his assets for his children and because she had no concern about what she would receive on separation[92]. The Full Court held that Mr Kennedy's conduct was not unconscionable because he did not take advantage of Ms Thorne. The Full Court referred to: (i) its findings of the lack of any misrepresentation by Mr Kennedy about his financial position; (ii) Mr Kennedy's early statements to Ms Thorne that made clear that she would not receive any part of his wealth on separation; (iii) Ms Thorne's staunch belief that Mr Kennedy would never leave her and her lack of concern about her financial position while Mr Kennedy was alive; and (iv) Mr Kennedy's acceptance of handwritten amendments to the agreements that were made by Ms Thorne's solicitor[93].

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90 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,809 [71].

91 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,809 [71].

92 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,817 [132]-[134].

93 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,815-81,816 [111]-[122], 81,817-81,818 [138]-[139].

The agreements were vitiated by undue influence

54 Any assessment of whether the agreements were vitiated by undue influence must begin by consideration of the findings of the primary judge, with due regard for the advantages enjoyed by the primary judge and the evaluative exercise involved in the primary judge's consideration.

55 With one exception, none of the findings of fact by the primary judge was overturned by the Full Court. That exception was the Full Court's rejection of the primary judge's finding that there was no outcome available to Ms Thorne that was fair or reasonable. The Full Court erred in rejecting this finding. It was open to the primary judge to conclude that Mr Kennedy, as Ms Thorne knew, was not prepared to amend the agreement other than in minor respects. Further, the description of the agreements by the primary judge as not being "fair or reasonable" was not merely open to her. It was an understatement. Ms Harrison's unchallenged evidence was that the terms of the agreements were "entirely inappropriate" and wholly inadequate "[i]n relation to everything". She said that the agreements did not show any consideration for Ms Thorne's interests. Even without Ms Harrison's evidence, it is plain that some of the provisions of the agreements could not have operated more adversely to Ms Thorne. For instance, the agreements purported to have the effect that if Ms Thorne and Mr Kennedy separated within three years then Ms Thorne was not entitled to anything at all.

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

57 The Full Court also mischaracterised the effect of the primary judge's reasons. As explained above, the primary judge found that Ms Thorne was "powerless" and that Ms Thorne believed that she had "no choice" to do anything other than sign the agreements as presented. The primary judge's finding was, in

effect, that Ms Thorne was deprived of the ability to bring a free choice to the decision as to whether to sign the agreements. Ms Thorne's choices about entering the agreements on Mr Kennedy's terms were subordinated to the will of Mr Kennedy. Despite the strong advice from Ms Harrison, Ms Thorne accepted the terms of the agreements in part due to her "reliance on Mr Kennedy for all things". Although the primary judge described her conclusion as one of "duress", for the reasons explained above her conclusion is more aptly described as one of undue influence. It was, therefore, unnecessary for the primary judge to assess the extent to which the pressure upon Ms Thorne came from Mr Kennedy as might be required for the doctrine of duress. It was also unnecessary for the primary judge to consider whether, for the purposes of the doctrine of duress, the pressure that Mr Kennedy exerted upon Ms Thorne was improper or illegitimate. These are matters within the domain of duress rather than undue influence. Contrary to the reasoning of the Full Court, the failure of the primary judge to reach these conclusions was not an error.

58 Mr Kennedy's executors also relied upon the Full Court's reasoning that the primary judge had based her conclusion only upon an inequality of bargaining power. That submission cannot be accepted. Contrary to the reasoning of the Full Court, the primary judge carefully set out the six factors which, together with the lack of a fair or reasonable outcome, led her to the conclusion that Ms Thorne had no choice but to enter the agreements[94].

59 The primary judge's conclusions were open to her on the evidence. Each of the factors which the primary judge considered was a relevant circumstance in the overall evaluation of whether Ms Thorne had been the subject of undue influence in her entry into the agreements. In combination, it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. In other words, the extent to which she was unable to make "clear, calm or rational decisions"[95] was so significant that she could not aptly be described as a free agent. In the *Restatement of the Law Third, Restitution and Unjust Enrichment*[96], the Reporter said that:

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94 *Thorne & Kennedy* [2015] FCCA 484 at [97].

95 *NA v MA* [2007] 1 FLR 1760 at 1785 [114] per Baron J.

96 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment*, (2011), §15, comment c.

> "Circumstances universally relevant to the proof of undue influence include the relation of the parties; the nature and terms of the transfer in question; the susceptibility of the transferor to the influence of the other; the opportunity of the other to exert undue influence; and the extent to which the transferor acted on the basis of independent advice."

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

The primary judge's reasons were not inadequate

61 As French CJ and Kiefel J said in *Wainohu v New South Wales*[98], "[t]he centrality, to the judicial function, of a public explanation of reasons for final decisions and important interlocutory rulings has long been recognised". The content of that judicial duty to give adequate reasons will depend upon the circumstances of the matter being considered. Importantly, it is not necessarily the case that reasons be lengthy or elaborate in order to be adequate[99].

62 The reasons given by the primary judge for her conclusion of undue influence were not inadequate. Those reasons assessed, evaluated, and characterised all of the circumstances before reaching the conclusion that Ms Thorne was powerless and believed that she had no choice to do anything other than sign the agreements. Contrary to the reasoning of the Full Court, an assessment of whether undue influence arises in the circumstances does not require, and may not even permit, a trial judge to assign some weight to each of the factors upon which the trial judge relies. Nor is a trial judge necessarily

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97 Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice*, (2015) at 115.

98 (2011) 243 CLR 181 at 213 [54]; [2011] HCA 24.

99 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443 per Meagher JA.

required to identify which factors are fundamental and which are subsidiary. An assessment of the will-power of a person is not an exercise of mathematical precision. Further, as was the case here, the factors which lead to a conclusion of undue influence might not be independent of each other. That was likely to be the case in relation to the six matters relied upon by the primary judge. For instance, Ms Thorne's "lack of financial equality" with Mr Kennedy and her "lack of permanent status in Australia" would likely have contributed to her "reliance on Mr Kennedy for all things" and may have affected her "emotional connectedness to their relationship and the prospect of motherhood" or "her emotional preparation for marriage".

The agreements were also vitiated by unconscionable conduct

63 This appeal should be allowed on the basis that the Full Court erred in concluding that the primary judge's reasons were not adequate and erred in overturning the primary judge's conclusion that, in effect, Ms Thorne was subject to undue influence. As we have explained, it is not necessary to consider the operation of the vitiating factor of duress. This is particularly so in the absence of any detailed argument about the operation of a criterion for duress that the conduct of the dominant party is improper or illegitimate, and the absence of any findings by the primary judge or the Full Court on these matters. In contrast, the issues concerning unconscionable conduct were fully argued. For the reasons which follow, the Full Court also erred in its conclusion that Ms Thorne's entry into the agreements was not procured by unconscionable conduct.

64 The Full Court recognised that Ms Thorne was labouring under a disadvantage[100], although the Court did not add the adjective "special", which, as Mason J in *Commercial Bank of Australia Ltd v Amadio*[101] explained, is used to emphasise that the disadvantage is not a mere difference in the bargaining power but requires an inability for a person to make a judgment as to his or her own best interests. The findings by the primary judge that Ms Thorne was subject to undue influence – powerless, with what she saw as no choice but to enter the agreements – point inevitably to the conclusion that she was subject to a special disadvantage in her entry into the agreements.

65 Ms Thorne's special disadvantage was known to Mr Kennedy. Her special disadvantage had been, in part, created by him. He created the urgency with

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100 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,817 [138].

101 (1983) 151 CLR 447 at 462.

which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it. While Ms Thorne knew Mr Kennedy required her acknowledgement that his death would not result in her receiving a windfall inheritance at the expense of his children, she had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements. Further, Ms Thorne and her family members had been brought to Australia for the wedding by Mr Kennedy and his ultimatum was not accompanied by any offer to assist them to return home. These matters increased the pressure which contributed to the substantial subordination of Ms Thorne's free will in relation to the agreements. Mr Kennedy took advantage of Ms Thorne's vulnerability to obtain agreements which, on Ms Harrison's uncontested assessment, were entirely inappropriate and wholly inadequate. Even within that class of agreement, the agreements which Ms Thorne signed involved "gross inequality"[102].

Conclusion

66 For these reasons, the appeal should be allowed. In the Full Court there was also a ground of appeal that the primary judge had failed to afford procedural fairness to Mr Kennedy's executors before making orders for costs against his estate[103]. That ground was conceded by Ms Thorne, although she argued that costs would follow in any event if the agreements were rescinded. Since Mr Kennedy's executors were successful in the Full Court, the costs orders of the primary judge were set aside. In this Court, Mr Kennedy's executors did not submit that the primary judge's costs orders should be disturbed if the appeal were allowed and the orders of the Full Court set aside.

67 The orders that should be made are:

(1) Appeal allowed.

(2) Set aside the orders of the Full Court of the Family Court of Australia made on 26 September 2016 and, in their place, order that the appeal to that Court be dismissed with costs.

(3) The respondent pay the appellant's costs of the appeal to this Court.

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102 *Gartside v Isherwood* (1778) 1 Bro CC 558 at 560-561 per Lord Thurlow LC [28 ER 1297 at 1298].

103 *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,811 [85].

Kiefel CJ
Bell J
Gageler J
Keane J
Edelman J

68 These orders do not affect Ms Thorne's application for property adjustment and lump sum maintenance orders, which remains to be determined by the Federal Circuit Court.

69 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of the plurality, and I agree in the orders which their Honours propose.

70 Were it not for the decision of the Court of Appeal of the Supreme Court of New South Wales in *Australia & New Zealand Banking Group v Karam*[104], I should be disposed to decide this appeal on the basis that Ms Thorne's entry into the agreements was the result of illegitimate pressure (or duress, as the primary judge aptly described it[105]) of such degree as to engage equity's jurisdiction to grant relief[106]. The difficulty with doing so, however, as the plurality observe, is that *Karam* decided[107] that the concept of illegitimate pressure should be restricted to the exertion of pressure by "threatened or actual unlawful conduct", and, by and large, *Karam* has since been followed without demur[108].

71 Of course, so to observe is not necessarily to accept that *Karam*'s rejection of illegitimate pressure by lawful means is doctrinally valid. To the contrary, there appears to be much to be said for the view that, rather than persist with a blanket restriction of illegitimate pressure to pressure exerted by unlawful means, it would better accord with equitable principle, and better align with English[109]

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104 (2005) 64 NSWLR 149.

105 *Thorne & Kennedy* [2015] FCCA 484 at [94].

106 See generally *Barton v Armstrong* [1976] AC 104 at 118 per Lord Cross of Chelsea (Lord Kilbrandon and Sir Garfield Barwick concurring); *SH v DH (No 1)* (2003) 202 ALR 660 at 668 [59]-[61], 669 [65]; *Wagner & Wagner* [2009] FamCAFC 16 at [39]-[41].

107 (2005) 64 NSWLR 149 at 167 [62], 168 [66].

108 See for example *Mitchell v Pacific Dawn Pty Ltd* [2006] QSC 198 at [20]-[24]; *A Little Company Ltd v Peters* [2007] NSWSC 833 at [44]-[45], [54]-[55]; *A v N* [2012] NSWSC 354 at [506]-[509], [520]; *May v Brahmbhatt* [2013] NSWCA 309 at [40] per Beazley P (Bergin CJ in Eq agreeing at [57]), cf at [54] per Basten JA; *Westpac Banking Corporation v Billgate Pty Ltd* (2013) 9 BFRA 1 at 82 [596]-[597]; *Commercial Base Pty Ltd v Watson* [2013] VSC 334 at [34]-[39]; *Zagar & Hellner* [2016] FamCA 224 at [80]-[82]; *Merrion Pty Ltd v Loustas* [2017] VSC 95 at [41]-[43]; *Tiernan & Tiernan* [2017] FamCA 23 at [32]; *Nalbandian v Commonwealth of Australia* [2017] FCA 45 at [55]-[57]. See and compare *Electricity Generation Corporation v Woodside Energy Ltd* [2013] WASCA 36 at [25] per McLure P (Newnes JA agreeing at [44]), [159] per Murphy JA; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302 at 321 [73] per Whelan JA (Garde AJA agreeing at 353-354 [218]).

109 See for example *Pao On v Lau Yiu Long* [1980] AC 614 at 635-636; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1

(Footnote continues on next page)

and American[110] authority, if the test of illegitimate pressure were whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests[111].

72 It has been suggested that *Karam* was consistent with this Court's decision in *Smith v William Charlick Ltd*[112]. Even if that were so, however, by the time *Karam* was decided, equity's capacity to relieve against illegitimate pressure exerted by lawful means had become established doctrine[113]. *Karam* was a significant departure from the preponderance of relevant Australian authority[114].

AC 366 at 383-384 per Lord Diplock (Lord Cross of Chelsea and Lord Russell of Killowen agreeing at 391-392, 397), 400-401 per Lord Scarman; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at 718 per Steyn LJ (Farquharson LJ and Sir Donald Nicholls V-C agreeing at 719); *Attorney-General v R* [2003] EMLR 24 at 506-507 [16] per Lord Hoffmann (Lord Bingham of Cornhill, Lord Steyn and Lord Millett concurring); *Borrelli v Ting* [2010] Bus LR 1718 at 1728 [34].

110 See *Corbin on Contracts: Avoidance and Reformation*, (2002), vol 7, §28.3; *French v Shoemaker* 81 US 314 at 332-333 (1871); *United States v Bethlehem Steel Corporation* 315 US 289 at 328-330 (1942) per Frankfurter J (dissenting in the result); *Nyulassy v Lockheed Martin Corporation* 16 Cal Rptr 3d 296 at 306-310 (2004); *Nino v Jewelry Exchange Inc* 609 F 3d 191 at 201-202 (3rd Cir 2010); *Pokorny v Quixtar Inc* 601 F 3d 987 at 996-998 (9th Cir 2010).

111 See Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016) at 211-212, 215-216.

112 (1924) 34 CLR 38 at 49, 51 per Knox CJ, 55-57, 62-63 per Isaacs J, 68 per Rich J, 69 per Starke J, cf at 64-65 per Higgins J; [1924] HCA 13. See Stewart, "Economic Duress – Legal Regulation of Commercial Pressure", (1984) 14 *Melbourne University Law Review* 410 at 425.

113 See *Public Service Employees Credit Union Co-operative Ltd v Campion* (1984) 75 FLR 131 at 138-140; *CTN Cash and Carry* [1994] 4 All ER 714 at 718 per Steyn LJ (Farquharson LJ and Sir Donald Nicholls V-C agreeing at 719); *Attorney-General v R* [2003] EMLR 24 at 506-507 [16] per Lord Hoffmann (Lord Bingham of Cornhill, Lord Steyn and Lord Millett concurring). See generally *Williams v Bayley* (1866) LR 1 HL 200 at 212-213 per Lord Cranworth, 216 per Lord Chelmsford, 222 per Lord Westbury; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 at 395; Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016) at 210-215.

114 See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46 per McHugh JA (Samuels JA and Mahoney JA agreeing in the result). See also *Equiticorp Financial Services Ltd (NSW) v Equiticorp Financial Services Ltd (NZ)* (1992) 29 NSWLR 260 at 296-297, 300; *Equiticorp Finance Ltd*

(Footnote continues on next page)

Moreover, *Karam*'s rejection of illegitimate pressure by lawful means was largely based on a view[115] that the concept is too uncertain to be acceptable. Yet it is by no means immediately obvious[116] why it should be considered any more uncertain than the equitable conceptions of unconscionable conduct and undue influence to which *Karam* held[117] it should be consigned.

73 Nevertheless, 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.

74 The equitable doctrine of unconscionable conduct is not restricted to unlawful means. Equity may intervene to relieve against the consequences of a party taking unconscientious advantage of another party's position of special disadvantage regardless of whether the conduct is otherwise lawful[118]. And while

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(in liq) v Bank of New Zealand (1993) 32 NSWLR 50 at 149-151 per Clarke and Cripps JJA; *Caratti v Deputy Commissioner of Taxation* (1993) 27 ATR 448 at 457 per Ipp J (Wallwork J agreeing at 458); *Deemcope Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44 at 48; *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289-290 per Kiefel J (Northrop J and Lindgren J agreeing at 276); *Australasian Meat Industry Employees' Union v Peerless Holdings Pty Ltd* (2000) 103 FCR 577 at 589 [54]; *Cox v Esanda Finance* [2000] NSWSC 502 at [141]-[145]; *Ford Motor Company of Australia Ltd v Arrowcrest Pty Ltd* (2003) 134 FCR 522 at 543-545 [148]-[151], [155]-[163] per Lander J (Hill and Jacobson JJ agreeing at 524 [1]); *Denmeade v Stingray Boats* [2003] FCAFC 215 at [14]-[15]. See generally Sindone, "The Doctrine of Economic Duress Part 2", (1996) 14 *Australian Bar Review* 114 at 117-121; Cooper, "Between a Rock and a Hard Place: Illegitimate Pressure in Commercial Negotiations", (1997) 71 *Australian Law Journal* 686 at 694-696.

115 (2005) 64 NSWLR 149 at 166-167 [61]-[62], 168 [66].

116 See Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016) at 211-212; Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales", (2008) 27(2) *University of Queensland Law Journal* 41 at 65-70.

117 (2005) 64 NSWLR 149 at 168 [66].

118 See *Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61; *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66. See generally *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25.

this case might better be conceived of as one involving illegitimate pressure, it is also capable of resolution in terms of Mr Kennedy having taken unconscientious advantage of Ms Thorne's position of special disadvantage[119]. In effect, it was a position of special disadvantage which he created by 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[120]. 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 as a real possibility[121].

75 In all likelihood, things would have been different if, instead of waiting until the eleventh hour, Mr Kennedy had made clear to Ms Thorne from the outset of their relationship that his love for her was in truth so conditional that the marriage he proposed would depend upon her giving up any semblance of her just entitlements in the event of a dissolution of their marriage. In the scheme of things, it can hardly be supposed that a young woman in Ms Thorne's position would be persuaded to abandon her life abroad and travel halfway around the world to bind herself to a sexagenarian if, at the outset of the relationship, she had been made aware of the enormity of the arrangement that was proposed.

76 Mr Kennedy, however, never attempted so to persuade Ms Thorne. By the time he disclosed to her the full terms of the agreement, and by the time Ms Harrison had made Ms Thorne understand the purport of them, the circumstances in which Ms Thorne found herself appear so seriously to have affected her state of mind as to have rendered her incapable of making a judgment in her own best interests. As the plurality in effect observe, there is no other rational explanation for Ms Thorne's decision not to insist upon the substantive changes which Ms Harrison recommended, and instead to acquiesce in Mr Kennedy's extraordinary demands.

77 The second agreement takes the matter no further. It was dependent for its efficacy upon the first agreement, and so, in my view, falls with the first. But, if that were not so, by the time of the second agreement, given that Mr Kennedy no longer had the leverage of being able to refuse to marry Ms Thorne, it is apparent that Ms Thorne must then have been in a position of special disadvantage which

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119 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462 per Mason J; [1983] HCA 14.

120 *Thorne & Kennedy* [2015] FCCA 484 at [46]-[50], [88]-[93].

121 See and compare *Amadio* (1983) 151 CLR 447 at 467-468 per Mason J, 478-479 per Deane J (Wilson J agreeing at 468).

rendered her even less capable of making a decision in her own best interests to refuse to sign the second agreement than she had been capable at the time of the first agreement of insisting upon amendments in accordance with Ms Harrison's recommendations.

78 In the result, it would be against equity and good conscience for Mr Kennedy or his successors to be permitted to enforce either agreement[122]. Both should be set aside.

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122 See and compare *Blomley v Ryan* (1956) 99 CLR 362 at 401-402, 405 per Fullagar J; [1956] HCA 81.

79 GORDON J. I agree with the orders proposed by the plurality. However, the path I take is different: each financial agreement made under Pt VIIIA of the *Family Law Act* 1975 (Cth) was procured by unconscionable conduct, but not undue influence.

80 Underlying the difference in approach is an important point of principle. The point of principle concerns the relationship between undue influence and the judgment of the person whose will is said to have been affected. In this particular case, Ms Thorne's capacity to make an independent judgment was not affected. The primary judge found that Ms Thorne was able to comprehend what she was doing when she signed the agreements, and that she knew and recognised the effect and importance of the advice she was given. Moreover, Ms Thorne wanted the marriage to Mr Kennedy to proceed and to 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.

81 Although Ms Thorne's independent, informed and voluntary will was not impaired, she was unable, in the circumstances, to make a rational judgment to protect her own interests. In those circumstances, which were evident to and substantially created by Mr Kennedy, it was unconscionable for Mr Kennedy to procure or accept her assent to the agreements.

82 These reasons will consider undue influence and unconscionable conduct in turn. The background to these proceedings and the applicable statutory framework are set out in the reasons given by the plurality. It is unnecessary to repeat those matters except where it is necessary to explain the conclusions reached.

Undue influence

Applicable principles

83 It is neither possible nor desirable to provide an all-encompassing description of a court's jurisdiction to grant relief on the ground of undue influence[123]. The circumstances which might enliven the equitable jurisdiction are many and diverse: "the relief stands upon a general principle, applying to all

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123 *Boyse v Rossborough* (1857) 6 HLC 2 at 47 [10 ER 1192 at 1211]; *Allcard v Skinner* (1887) 36 Ch D 145 at 183; *National Westminster Bank Plc v Morgan* [1985] AC 686 at 709.

the variety of relations" in which one person may have a degree of influence or authority over another[124].

84 So far as methods of proof are concerned, the doctrine of undue influence may be engaged either by pointing to facts showing that a transaction was affected by undue influence, or by raising a presumption of influence which shifts the onus of justifying a transaction to the person seeking to uphold it[125].

85 As the reasons of the plurality explain, Ms Thorne and Mr Kennedy were not at any relevant time in a relationship that is recognised to give rise, without more, to a presumption of undue influence[126]. Moreover, there were no factual findings by the primary judge about the course of Ms Thorne and Mr Kennedy's relationship that would assist this Court to determine if there was otherwise a relationship of influence so as to shift the onus of justifying the financial agreements to Mr Kennedy. Accordingly, for undue influence to be established in this case, facts had to be identified which showed that entry into each financial agreement "was the outcome of such an actual influence over the mind of [Ms Thorne] that it [could not] be considered [her] free act"[127]. What, then, does that inquiry involve?

86 The doctrine of undue influence is concerned with "the quality of the consent or assent of the weaker party"[128]. Although it is natural to speak of a person "exercising" undue influence over another, and although the conduct of the stronger party may fall for consideration as part of the fact-specific inquiry that the doctrine requires[129], the "critical element in the grant of relief" is the impairment of the will of the weaker party[130]. In that respect, undue influence is

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124 *Spong v Spong* (1914) 18 CLR 544 at 550; [1914] HCA 52 quoting *Dent v Bennett* (1839) 4 My & Cr 269 at 277 [41 ER 105 at 108].

125 *Johnson v Buttress* (1936) 56 CLR 113 at 134-135; [1936] HCA 41.

126 Reasons of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ at [34]-[36].

127 *Johnson* (1936) 56 CLR 113 at 134.

128 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474; [1983] HCA 14; *Bridgewater v Leahy* (1998) 194 CLR 457 at 478 [74]; [1998] HCA 66.

129 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426 [122]; [2013] HCA 25 quoting *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; [1953] HCA 2.

130 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 7 quoted in *Bridgewater* (1998) 194 CLR 457 at 478 [75].

distinct from the doctrine of unconscionable conduct, which is concerned with the conduct of the stronger party in unconscientiously taking advantage of some special disability or disadvantage of the weaker party[131]. That distinction, though not always clearly drawn, may now be taken to be accepted in Australia[132]. Of course, that is not to deny that the two doctrines may be engaged by the same set of facts[133]; the point, rather, is that the focus of the inquiry is different.

87 In assessing the quality of the weaker party's consent or assent, the focus of undue influence is on the extent to which the weaker party's "will or freedom of judgment in reference to" the transaction was affected[134]. Accordingly, where undue influence is sought to be proved by reference to the particular circumstances surrounding a transaction, the question for the court will be whether those circumstances disclose that "the transaction was the outcome of such an actual influence over the mind of the [weaker party] that it cannot be considered [their] free act"[135]. As is well established, the transaction will be voidable if it was not the product of the free exercise of independent will[136].

88 In not dissimilar terms, Ashburner relevantly described the equitable jurisdiction to grant relief on the ground of undue influence as follows: "if A obtains any benefit from B, whether under a contract or as a gift, by exerting an influence over B which, in the opinion of the court, *prevents B from exercising an independent judgment in the matter in question*, B can set aside the contract or recover the gift"[137] (emphasis added).

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131 *Amadio* (1983) 151 CLR 447 at 474-475; *Kakavas* (2013) 250 CLR 392 at 424-425 [117]-[118].

132 cf *Tate v Williamson* (1866) LR 2 Ch App 55 at 61; Birks and Chin, "On the Nature of Undue Influence", in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995) 57 at 58-59.

133 *Amadio* (1983) 151 CLR 447 at 461; *Bridgewater* (1998) 194 CLR 457 at 477-478 [73].

134 *Johnson* (1936) 56 CLR 113 at 134.

135 *Johnson* (1936) 56 CLR 113 at 134.

136 *Yerkey v Jones* (1939) 63 CLR 649 at 677; [1939] HCA 3. See also *Watkins v Combes* (1922) 30 CLR 180 at 193; [1922] HCA 3; *Johnson* (1936) 56 CLR 113 at 120, 134, 138, 143.

137 Ashburner, *Principles of Equity*, (1902) at 411.

89 That focus on the independent judgmental capacity of the weaker party, whether undue influence is sought to be established in a particular situation or a presumption has been raised and is sought to be rebutted, is well settled. Two examples of cases decided by this Court in which undue influence was established with the assistance of a presumption illustrate the point. In *Spong v Spong*[138], a father sought to have a voluntary transfer of land to his son set aside. The father was elderly and the transfer was executed the morning after the death of his wife. It was apparent to the trial judge that the father was, at the time he executed the transfer, "feeble-minded, weak and unable to transact any business whatever"[139]. Griffith CJ, with whom Isaacs J agreed, observed that the relationship between the father and his son was such that the transfer could not be allowed to stand unless it were "abundantly plain that the father fully understood what he was doing" and it were established that the transfer "was the result of [his] own free will"[140].

90 *Watkins v Combes*[141] concerned a transfer of land by an elderly woman to a married couple upon whom she had come to depend. The principal consideration for the transfer was a covenant under which the defendants would maintain her for the rest of her life. Though not incompetent, the woman "was failing both physically and mentally"; her mind "was entirely under the dominion of the defendants"; and she was therefore "incapable of dealing with [the defendants] on a footing of equality"[142]. Isaacs J observed that the transaction could not stand unless it was "the free outcome of the donor's uninfluenced will"[143]. His Honour accepted that the issue could be expressed as being "*whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction*"[144] (emphasis of Isaacs J).

91 The extent to which a person's will or capacity to exercise independent judgment must be impaired involves questions of degree. In *Commercial Bank of Australia Ltd v Amadio*, Mason J observed that undue influence is concerned

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138 (1914) 18 CLR 544.

139 *Spong* (1914) 18 CLR 544 at 548.

140 *Spong* (1914) 18 CLR 544 at 549.

141 (1922) 30 CLR 180.

142 *Watkins* (1922) 30 CLR 180 at 187-188.

143 *Watkins* (1922) 30 CLR 180 at 193.

144 *Watkins* (1922) 30 CLR 180 at 196 quoting *Kali Bakhsh Singh v Ram Gopal Singh* (1913) 41 LR Ind App 23 at 31.

with a situation where "the will of the innocent party is not independent and voluntary because it is overborne"[145]. The metaphorical description of an "overborne" will does not mean that relief will only be granted if it is established that the weaker party abdicated all semblance of authority or was completely paralysed in making a decision or became a "mere vehicle for [the stronger party's] schemes"[146]. The word "voluntary" and its cognates are protean expressions which "take their colour from the particular context and purpose in which they are used"[147]. Even if a person may be perfectly competent to understand and intend what they did, the question remains as to how their intention to enter into the transaction was produced[148]. However, Mason J's observation that undue influence is concerned with circumstances where the will of the weaker party is so impaired that their decision to enter into a transaction cannot be described as "independent and voluntary" underscores five points.

92 First, it serves as a useful reminder that what needs to be "affected" or impaired is the will of the weaker party – that is, *their capacity to exercise independent judgment*. The gist of the ground on which relief is granted is "the actual or presumed impairment of *the judgment* of the weaker party"[149] (emphasis added). The question whether a person entered into a transaction in the independent and voluntary exercise of their will is not sufficiently answered by inquiries into whether they perceived there to be few or no practical alternatives to the course actually taken, or whether their options were *in fact* limited.

93 Second, although it is not necessary to show that the weaker party completely abdicated all decision-making authority, there must still be some relationship, or circumstances surrounding the transaction, which had the effect of "impair[ing] the autonomy of the weaker party to a serious and exceptional

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145 (1983) 151 CLR 447 at 461.

146 *Tufton v Sperni* [1952] 2 TLR 516 at 519. See Birks and Chin, "On the Nature of Undue Influence", in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995) 57 at 69.

147 *Tofilau v The Queen* (2007) 231 CLR 396 at 417 [49]; see also at 404 [6]; [2007] HCA 39.

148 *Huguenin v Baseley* (1807) 14 Ves Jun 273 at 300 [33 ER 526 at 536]; *Bridgewater* (1998) 194 CLR 457 at 491 [118].

149 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 7 quoted in *Bridgewater* (1998) 194 CLR 457 at 478 [75].

degree"[150]. As has sometimes been said, the judgmental capacity of the weaker party must have been "invaded" in such a way that it cannot be said that the decision to enter into the transaction was "the offspring of her own volition"[151].

94 Third, the focus on the free exercise of an independent and voluntary will demarcates undue influence from unconscionable conduct. In contrast to undue influence, establishing a special disadvantage or disability for the purposes of unconscionable conduct does not require asking whether the weaker party lacked the capacity to exercise independent judgment[152].

95 Fourth, although the free exercise of an independent and voluntary will provides that demarcation, there is no bright line. As the reasons of the plurality identify, the assessment of a set of circumstances is fact-specific. No one fact or matter will be determinative. The assessment of whether there has been the free exercise of an independent and voluntary will necessarily involves questions of fact and degree. And the outcome of that assessment may be that the circumstances of a particular case fall short of a conclusion of undue influence but provide a step towards a conclusion of unconscionable conduct.

96 Fifth, the bare fact of deep emotional commitment to securing the prospect of a shared life together is not of itself a loss of will. Describing commitment as "infatuation" is rhetorically powerful but conclusory.

97 It is against that background that it is necessary to consider the circumstances in this appeal.

No undue influence in this appeal

98 The central question in relation to undue influence is whether, when Ms Thorne entered into each financial agreement, she did so otherwise than in the free exercise of her independent will.

99 Under the heading "Any Matters of Duress or Undue Influence", the primary judge set out a number of factual findings about the circumstances in which the first agreement was entered into and the respective attitudes of Ms Thorne and Mr Kennedy.

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150 Birks and Chin, "On the Nature of Undue Influence", in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995) 57 at 69.

151 *Daniel v Drew* [2005] EWCA Civ 507 at [36]. See also *Hall v Hall* (1868) LR 1 P & D 481 at 482.

152 *Amadio* (1983) 151 CLR 447 at 461.

100 The primary judge concluded that there was no evidence to suggest that there would be any further relationship if the wedding did not take place. If the relationship ended, Ms Thorne "would have nothing. No job, no visa, no home, no place, no community". Her Honour found that "[e]very bargaining chip and every power was in [Mr Kennedy's] hands. Either the [first agreement], as it was, was signed, or the relationship was at an end". Ms Thorne was in a position of "powerlessness" which was attributable to "her lack of financial equality, but also [to] her lack of permanent status in Australia at the time, her reliance on [Mr Kennedy] for all things, her emotional connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage".

101 So far as Ms Thorne's attitude to the first agreement was concerned, the primary judge found that she "wanted a wedding", that she loved Mr Kennedy and that she wanted to have a child with him. And Ms Thorne knew that there would be no wedding if she did not sign the first agreement.

102 In relation to the second agreement, the primary judge found that "the marriage would be at an end before it was begun if it wasn't signed", and that the wife "plainly had no choice that she could reasonably see, but to sign the agreement".

103 The critical element for relief on the ground of undue influence is the impairment of the will of Ms Thorne[153]. Undue influence does not protect against bad deals. Here, the equitable jurisdiction will be engaged if entry into the agreements was "the outcome of such an *actual influence* over the mind of [Ms Thorne] that it cannot be considered [her] free act"[154] (emphasis added). Put another way, when Ms Thorne signed the agreements, was her capacity to make independent judgments impaired so that she was not acting in the free exercise of her independent and voluntary will?

104 The primary judge found that Ms Thorne knew and understood that the first agreement was "terrible". Yet, despite that knowledge and understanding, she signed it. The question posed by the primary judge was: why? There was an explanatory gap between the fact that Ms Thorne, an intelligent person, knew and understood how disadvantageous it was and the fact that she nevertheless signed it (and the second agreement). So what filled that gap? Her knowledge about the contents of each agreement and Mr Kennedy's financial

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153 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 7 quoted in *Bridgewater* (1998) 194 CLR 457 at 478 [75].

154 See *Johnson* (1936) 56 CLR 113 at 134.

position was not incomplete, although that information was provided late by Mr Kennedy.

105 Was her will impaired, or did she simply have a strong desire to marry him because, as the primary judge found, she was in love with Mr Kennedy, she wanted to marry him and she wanted to have a child with him? Was her "enthusiasm", or willingness, to sign the financial agreements the result of undue influence[155]?

106 Whatever metaphors and descriptors are used to describe the relevant principles, the focus of the doctrine is on identifying whether and how a person's will is impaired. A belief on Ms Thorne's part that she had no choice but to sign the agreements if she wanted the relationship to continue does not speak to a lack of will or capacity to exercise independent judgment. Indeed, in light of the primary judge's findings, such a belief demonstrates that she did enter into each agreement in the free exercise of her independent will. As the primary judge explained, Mr Kennedy held "[e]very bargaining chip and every power" and did not create any opportunities to negotiate. Ms Thorne's choices were limited to (1) signing each agreement, including agreeing to the clauses which substantially displaced her entitlements in the event of separation, or (2) ending the relationship, which would have disastrous consequences. Those findings were amply supported by the evidence. Accordingly, if Ms Thorne did believe that she had "no choice" but to sign each agreement if she wanted to fulfil her desire to marry and continue her relationship with Mr Kennedy, then her assessment of the options was plainly correct. The evident correctness of her assessment militates against the conclusion that her will was impaired.

107 And the fact that Ms Thorne's options were narrow, even eliminated, is not to the point. The paucity of options is relevant to whether, for the purposes of the doctrine of unconscionable conduct, Ms Thorne was suffering from a special disability or disadvantage of which Mr Kennedy unconscientiously took advantage. But it says nothing about her will. It cannot be said that her entry into each agreement was the outcome of "such an actual influence over the mind" of Ms Thorne that it cannot be considered her free act[156]. The only sense in which it can be said that Ms Thorne was not "free" was that circumstances (including Mr Kennedy's conduct) had conspired to limit the outcomes that she could realistically obtain by exercising her decision-making capacity. As to that, equity does not aspire to resolve philosophical questions about whether it is meaningful to speak of "free will" when one's zone of autonomy has been bounded.

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155 See *Bridgewater* (1998) 194 CLR 457 at 491 [118].

156 See *Johnson* (1936) 56 CLR 113 at 134.

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

Unconscionable conduct

Applicable principles

109 Unconscionable conduct "looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so"[157]. The rationale of the doctrine is "to ensure that it is fair, just and reasonable for the stronger party to retain the benefit of the impugned transaction"[158].

110 Whether equity will intervene to prevent a party from enforcing, or retaining the benefit of, a transaction is determined by examining the circumstances under which the parties entered into the transaction. Specifically, the equitable jurisdiction is engaged if, *when the transaction was entered into*: (1) one party was under a special disadvantage in dealing with the other party; and (2) the other party unconscientiously took advantage of that special disadvantage. The existence of those circumstances at the time of the transaction is what "affect[s] the conscience" of the stronger party[159] and renders the enforcement of the transaction, or the taking of the benefit, "unconscientious" or "unconscionable".

111 That understanding of the equitable doctrine of unconscionable conduct is of long standing. In *Blomley v Ryan*, Kitto J described the circumstances in which equity would intervene on the basis of "unconscientiousness" in the following terms[160]:

> "The essence of the ground we have to consider is unconscientiousness on the part of the party seeking to enforce the contract; and *unconscientiousness is not made out in this case unless* it appears, first, that *at the time of entering into the contract the defendant was in such a debilitated condition* that there was not what Sir John Stuart called

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157 *Amadio* (1983) 151 CLR 447 at 474.

158 *Kakavas* (2013) 250 CLR 392 at 425 [118].

159 *Jenyns* (1953) 90 CLR 113 at 118. See also *Kakavas* (2013) 250 CLR 392 at 426 [122].

160 (1956) 99 CLR 362 at 428-429 (citation omitted); [1956] HCA 81 cited in *Amadio* (1983) 151 CLR 447 at 474.

> '… a reasonable degree of equality between the contracting parties'; and secondly, that *the defendant's condition was sufficiently evident to those who were acting for the plaintiff at the time to make it prima facie unfair for them to take his assent* to the sale. If these two propositions of fact were established the burden of proving that the transaction was nevertheless fair would lie upon the plaintiff". (emphasis added)

112 To similar effect, Mason J in *Amadio* identified the circumstances in which the equitable jurisdiction would be enlivened as follows[161]:

> "As we have seen, if A having actual knowledge that B occupies a situation of *special disadvantage* in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, *takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable*." (emphasis added)

113 It is not possible to identify exhaustively what amounts to a special disadvantage. Relevant matters may include "illness, ignorance, inexperience, impaired faculties, financial need or other circumstances" that affect the weaker party's ability to protect their own interests[162]. Those matters are illustrative, not exhaustive[163]. A special disadvantage may also be discerned from the relationship between parties to a transaction; for instance, where there is "a strong emotional dependence or attachment"[164]. Whichever matters are relevant to a given case, it is not sufficient that they give rise to inequality of bargaining power: a special disadvantage is one that "seriously affects" the weaker party's ability to safeguard their interests[165].

114 Retaining a benefit conferred under a transaction, or seeking to enforce a right or obligation under a transaction, cannot attract the intervention of equity without the existence of some factor that affects the conscience of the stronger party. Once it is accepted that (1) the doctrine of unconscionable conduct seeks to identify that factor in the wrongful (*scil* "unconscientious" or "exploitative"[166])

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161 (1983) 151 CLR 447 at 467.

162 *Blomley* (1956) 99 CLR 362 at 415; see also at 405.

163 *Amadio* (1983) 151 CLR 447 at 462.

164 *Bridgewater* (1998) 194 CLR 457 at 490 [115]; see also at 492 [120]. See also *Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61.

165 *Kakavas* (2013) 250 CLR 392 at 425 [118].

166 *Kakavas* (2013) 250 CLR 392 at 427 [124].

conduct of the stronger party[167], and (2) a person commits no wrong per se by retaining a benefit or seeking to enforce a right or obligation obtained through a lawful transaction, then the basis for equitable intervention must reside in some defect in how the dealing was entered into. That defect will exist if the special disadvantage was sufficiently evident to the stronger party at the time of the transaction to make it unconscientious to procure or accept the assent of the weaker party.

115 Although the doctrine of unconscionable conduct bears some resemblance to the doctrine of undue influence, there is an important difference between the two doctrines. As Mason J explained in *Amadio*, that difference concerns the will of the innocent party. For unconscionable conduct, "the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which [the innocent party] is placed and of the other party unconscientiously taking advantage of that position"[168]. By contrast, for undue influence, "the will of the innocent party is not independent and voluntary because it is overborne"[169].

Unconscionable conduct in this appeal

116 The primary judge's factual findings and reasoning did not specifically address whether Ms Thorne was under any special disadvantage or disability. But a special disadvantage may be discerned from the relationship between the parties[170] and the findings of fact in this case require a conclusion that Ms Thorne was under a special disadvantage at the time of each agreement[171]. In relation to the first agreement, that special disadvantage arose from the circumstances in which Mr Kennedy brought Ms Thorne to Australia, the proximity of the wedding and the circumstances in which the agreement was first provided, coupled with the finding that Ms Thorne knew that the wedding would not take place (and the relationship would be at an end) if she did not sign the agreement.

117 Moreover, Ms Thorne plainly depended on Mr Kennedy both financially and emotionally, was emotionally invested in their relationship and expected a future life with him. It is eminently plausible that she would have been unusually

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167 *Amadio* (1983) 151 CLR 447 at 461, 474.

168 *Amadio* (1983) 151 CLR 447 at 461.

169 *Amadio* (1983) 151 CLR 447 at 461.

170 See, eg, *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater* (1998) 194 CLR 457.

171 cf *Kennedy & Thorne* (2016) FLC ¶93-737 at 81,817 [138].

susceptible to entering into an "improvident transaction"[172] with Mr Kennedy if she felt that doing so would ensure, or was necessary to ensure, that their relationship continued and that any adverse consequences of ending the relationship were avoided.

118 The force of these conclusions is not lessened by observing that Ms Thorne signed the second agreement after they married. Save that the wedding had occurred by that point, the factors identified above as constituting a special disadvantage could hardly be thought to have dissipated immediately after they married. The wedding did not, of itself, relieve her of the special disadvantage she was under when she entered into the first agreement. Indeed, when Ms Thorne was meeting with her solicitor for the purpose of receiving advice about the second agreement, Mr Kennedy not only sat in the car but telephoned her to ask how much longer she was going to be. And, as the primary judge found, Ms Thorne had no bargaining power and no capacity to effect any change.

119 Accepting that Ms Thorne was placed at a special disadvantage, the question becomes whether Mr Kennedy unconscientiously took advantage of it.

120 Plainly, Mr Kennedy, as the other party to the relationship, not only was aware of, but played a central role in creating, the various factors constituting the special disadvantage[173]. And having regard to the circumstances in which they were entered into and their content, the financial agreements were "neither fair nor just and reasonable"[174] and the entry into them involved an unconscientious taking of advantage by Mr Kennedy.

121 First, the agreements were "grossly improvident"[175]. Although it is not essential or necessarily decisive that there is "an inadequacy of consideration"[176], it is relevant to observe that the entitlements for which they provided in the event of separation were extraordinarily and disproportionately small in comparison to

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172 See *Bridgewater* (1998) 194 CLR 457 at 492 [121]; see also at 490 [115].

173 See *Kakavas* (2013) 250 CLR 392 at 438-440 [155]-[161].

174 *Bridgewater* (1998) 194 CLR 457 at 492 [121].

175 See *Bridgewater* (1998) 194 CLR 457 at 493 [123].

176 *Amadio* (1983) 151 CLR 447 at 475.

what Ms Thorne would have been entitled to if she had not entered into the agreements[177].

122 Second, the circumstances in which the agreements were entered into support the conclusion that Mr Kennedy's procurement or acceptance of Ms Thorne's assent to each agreement was unconscientious. True it is that some kind of agreement or "paper" relating to Mr Kennedy's wealth had long been in the contemplation of the parties, and that Ms Thorne was not under any relevant misapprehension as to the effect of each agreement[178]. However, having brought Ms Thorne to Australia promising to look after her like "a queen", it was not until two weeks before the wedding that Mr Kennedy arranged for Ms Thorne to receive legal advice; and it was not until ten days before the wedding that she received detailed information about his finances and became aware of the specific contents of the first agreement.

123 It is not a sufficient response to the conclusion of unconscionable conduct to point to the fact that Ms Thorne received independent legal advice about the two agreements and chose to reject her solicitor's recommendation on each occasion. The fact that Ms Thorne was willing to sign both agreements *despite* being advised that they were "terrible" serves to underscore the extent of the special disadvantage under which Ms Thorne laboured, and to reinforce the conclusion that in these circumstances, which Mr Kennedy had substantially created, it was unconscientious for Mr Kennedy to procure or accept her assent.

Orders

124 I agree with the orders proposed by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

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177 See *Bridgewater* (1998) 194 CLR 457 at 492-493 [121] (noting that the assets in that case had been disposed of for a small fraction of their actual value).

178 cf *Amadio* (1983) 151 CLR 447 at 480.