IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B14 of 2017

BETWEEN: THORNE

Appellant

And

KENNEDY

Respondent

ANNOTATED APPELLANT'S SUBMISSIONS

Part I: PUBLICATION OF SUBMISSIONS

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: ISSUES

2. The central issues of this appeal are:

- Whether sections 90K and 90KA of the *Family Law Act* 1975 are to be read, given the statutory and public policy context in which they operate, in accordance with the obligations of mutual support and maintenance inherent in the marriage relationship.
- Whether the test for duress or illegitimate pressure in setting aside a contract is made out where:
  - applied pressure induces a party to enter into the contract; and/or
  - no reasonable alternative is available to a party; and/or
  - the conduct giving rise to duress is unconscionable but is otherwise a lawful act; and/or
  - independent legal advice against entering the contract has been provided.
- Whether the test for undue influence in setting aside a marital financial agreement:

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- has regard to the rule in *Yerkey v Jones* (1939) 63 CLR 649 at 675-676 per Dixon J; see also *Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J.
- can be met when a party proceeds on the basis that the marriage is a *"union...voluntarily entered into for life"* (as per section 5 of the *Marriage Act* 1961) and thus focusses on financial provision on death not separation.

- Whether the test for unconscionable conduct in setting aside a contract is made out where:
  - a fiancée in a position of special disadvantage is required by her fiancée to sign a financial agreement four days before a publicly scheduled wedding failing which there would no marriage and the disadvantaged fiancée would be left with *"no job, no visa, no home, no place, no community"*[1]; and/or
  - minimal provision in a financial agreement for a spouse on separation amounts to substantive unconscionability, having regard to the marital context of mutual support and maintenance.

Part III: SECTION 78B NOTICE

3. I certify that it is not necessary to give notice under section 78B of the *Judiciary Act* 1903 as this case does not involve a matter arising under the Constitution or involving its interpretation.

Part IV: JUDGMENTS BELOW

Thorne & Kennedy [2015] FCCA 484

Kennedy & Thorne [2016] FamCAFC 189

Part V: RELEVANT FACTS

4. The parties met over the internet in mid-2006 via an internet dating site.
5. The applicant was then a 36 year old lady born in Country A, living in Country B, with her English language skills informally acquired. She had no children and no assets of substance (Reasons of Demack J of 4 March 2015 paragraph 30).[2]
6. The former husband was then a 67 year old Australian property developer with assets in the order of maybe as much as $24 million, but at least $18 million. He

[1] AB 670-671
[2] AB 651

was divorced from his first wife, with whom he had three children, now all in adulthood (Reasons of Demack J of 4 March 2015 paragraph 31).[3]

7. During their courtship phase Mr Kennedy travelled to Country B twice and further, together they spent a couple of months travelling around Europe. They came to Australia in February 2007. The applicant moved into Mr Kennedy's penthouse. (Reasons of Demack J of 4 March 2015 paragraphs 36 and 37).[4]
8. On 26 September 2007, with their wedding scheduled for late September 2007, the applicant and Mr Kennedy signed a financial agreement providing for the applicant wife to receive a total payment of $50,000 plus CPI upon separation after three years. On 20 November 2007 a second financial agreement was signed by the parties to similar effect. (Reasons of Demack J of 4 March 2015 paragraph 52 page 15 and paragraphs 58-59).[5]
9. The parties had no children together. For a short time the applicant wife had tried IVF unsuccessfully (Reasons of Demack J of 4 March 2015 paragraph 61).[6]
10. On 16 June 2011, the husband signed a separation declaration. The applicant wife considers that the parties separated on a final basis in August 2011 (Reasons of Demack J of 4 March 2015 paragraph 62).[7]
11. The parties had been married and cohabitating, all up, for about four and a half years (Reasons of Demack J of 4 March 2015 paragraph 63).[8]
12. On 27 April 2012 the applicant wife filed an application in the Federal Circuit Court dealing with the financial agreements and seeking an order for property adjustment and spousal maintenance.
13. On 4 March 2015 Demack J made orders that the financial agreements were not binding, set them aside and adjourned for directions.
14. On 26 September 2016 the Full Court of the Family Court allowed an appeal, dismissed the wife's Notice of Contention, and declared the second financial agreement to be binding on the parties.[9]
15. The upshot of the Full Court decision is that the applicant wife in the present case

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[3] AB 651
[4] AB 653
[5] AB 663
[6] AB 663
7 AB 663
[8] AB 663
[9] AB 725

will receive a mere $50,000 entitlement (plus CPI) from a matrimonial asset pool of $18 million to $24 million after four and a half years of marriage and cohabitation.

16. The learned Trial Judge after 5 days of hearing held (at paragraph 94) that *"the wife signed the first agreement under duress.... borne of inequality of bargaining power where there was no outcome available to her that was fair or reasonable"* and (at paragraph 95) that for the second agreement *"the wife had no bargaining power, nothing to persuade a different outcome, no capacity to affect* [sic] *any change"*.[10]

Findings of fact

17. The trial Judge made the following findings (at paragraphs 91 to 93), not overturned on appeal to the Full Court.[11]

> *"91. She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions in (Country Omitted). 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.*
>
> *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.*
>
> *93. Mr Kennedy knew that Ms Thorne wanted to marry him. For her to do that, she needed to sign the document. He knew that she would do that. He didn't need to open up negotiations. He didn't need to consider offering something different, or more favourable to Ms Thorne. If she wanted to marry him, which he knew her to want, she must sign. That situation is something much more than inequality of financial position. Ms Thorne's powerlessness arises not only from her lack of financial equality, but also from her lack of permanent status in Australia at the time, her reliance on Mr Kennedy for all things, her emotional*

[10] AB 671
[11] AB 670-671

connectedness to their relationship and the prospect of motherhood, her emotional preparation for marriage, and the publicness of her upcoming marriage."

18. The findings of fact by the trial Judge formed the basis of grounds 1 to 5 of the appeal before the Full Court which dismissed these grounds (paragraphs 54 to 59 of Full Court judgment). The Full Court found at paragraph 54 that "the findings by Her Honour were open to her".[12] Thus, the factual basis on which this appeal is to be determined must be taken to include the following:
    - the fact that the wife "*save and except for her visa status, if the relationship with the [husband] 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 for [the wife]. She would not be entitled to remain in Australia and she has nothing to return to anywhere else in the world' (Trial Judge Reasons at [91] and [93]).*" - Full Court reasons above paragraph 54.[13]
    - the fact that "*the wife relied on the [husband] 'for all things' at the time the first financial agreement was signed (Trial Judge Reasons [93]*" - Full Court reasons above paragraph 57;[14]
    - the fact that *"the [husband] "held every bargaining chip and every power" Trial Judge (Reasons [92])* - Full Court reasons above paragraph 57;[15]

Part VI (a): ARGUMENT

Contractual context – financial agreements within a relationship of mutual support and maintenance (error common to Appeal Grounds 1,2 and 3)

19. The Full Court of the Family Court in this case has set an excessively narrow and harsh precedent on financial agreements which will wrongly deny separated spouses access to the court's jurisdiction to make just and equitable property adjustment and spouse maintenance orders.
20. The Court erred in assessing the validity of the financial agreements under sections 90K and 90KA of the *Family Law Act* 1975 by failing to have regard to the

[12] AB 694
[13] AB 694
[14] AB 695
[15] AB 695

principles of law and equity relevant to marriage as a relationship of mutual support and maintenance. (An error common to Appeal Grounds 1, 2 and 3).

21. The common law position was articulated by Lord Atkin in the House of Lords decision of *Hyman v Hyman* [1929] AC 601 at 629; [1929] All E Rep 245 at 258, 259 that *"no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife...the wife's right to future maintenance is a matter of public concern, which she cannot barter away".*

10 22. In 2000 the *Family Law Act 1975* was amended to provide for financial agreements of the kind used in this case. For further discussion of the legislative history see Part VI (c) hereunder. These amendments had the effect of allowing financial agreements to oust the jurisdiction of the Family Law Courts to make "just and equitable" property adjustment orders and spousal maintenance orders, but the Courts retained power to set aside such agreements under sections 90K and 90KA.

23. The public policy considerations in assessing marital financial agreements are neatly summarised in the spirited dissent of Lady Hale in the UK Supreme Court case of *Radmacher v Granatino* [2010] UKSC 42, [2011] AC 534 at [132]:

> *"Marriage is, of course, a contract, in the sense that each party must agree*
20 *to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children."*

30 **Duress (Appeal Ground 1)**

24. The Court erred in its approach to the law of duress or illegitimate pressure (Appeal Ground 1). The Full Court upheld an appeal on ground seven that the trial Judge had applied the wrong test for duress. In so doing the Full Court failed to consider

properly the references by Demack J to duress and its interaction with undue influence and unconscionable conduct.

- Demack J observed at paragraph 68 of the Reasons: [16]

"Conduct which is unconscionable would have a bearing on the validity or enforceability of an agreement. Duress is a form of unconscionable conduct."

25. In *Commercial Bank of Australia* v *Amadio* (1983) 151 CLR 447 Deane J at p 474 described the conceptual distinctions in these terms:

- *"Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing 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."*

- Although duress is more commonly linked to the equitable concept of undue influence it is clear from paragraph 68 of the Trial Judge's Reasons that Demack J was using it in the statutory context of section 90 KA of the *Family Law Act* 1975 dealing with *"the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts"* having regard to unconscionable conduct set out at section 90K (1)(e).

- Similarly Demack J expressly referred to *"Any Matters of Duress or Undue Influence"* in the heading above paragraphs 87 to 98.[17]

26. The errors of the Full Court of the Family Court on duress may be summarised as follows.

- Failing to accept "lawful act duress", namely that the appellant was acting under duress from acts which, even if lawful, amounted to duress or illegitimate pressure in all the circumstances surrounding the marriage. The Full Court of the Family Court relied on the NSW Court of Appeal decision in *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR in reaching the erroneous conclusion that the correct test for duress was *"threatened or actual unlawful conduct"* (Reasons page 14 paragraph 71).[18] This differs with the broader approach taken by

[16] AB 665
[17] AB 670
[18] AB 699

McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 that "*pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct*". A similarly broad approach was taken by a majority of the Privy Council in *R v Attorney-General for England and Wales* [2003] UKPC 22 in holding at [16] that *"the fact that the threat is lawful does not always make the pressure legitimate"*.

The learned authors J Edelman and E Bant in *Unjust Enrichment (2nd edition)* (Hart Publishing, Oxford and Portland, Oregon 2016) at pages 210 – 218 analyse cases of exertion of pressure by lawful threats, including economic pressure (pp215-217) and emotional pressure (p 218). Edelman and Bant observe at page 212 that *"the requirement of disproportionality between (i) the lawful threat and (ii) the defendant's legitimate interest in the demand it supports underlies all cases of lawful, but illegitimate pressure"*. The learned authors cite an Australian case decided after *Karam* of *Tsarouhi v Tsarouhi* [2009] FMCAfam 126 where Federal Magistrate Riley set aside a financial agreement between husband and wife on the grounds of duress and unconscionability under s.90K of the *Family Law Act* 1975 where the wife had consented to the agreement under a threat of prosecution for forgery. Edelman and Bant observe at page 212 that *"the disproportionality between the subject of the agreement and the true size of the debt to which she was legitimately entitled was a major factor in determining that the agreement was voidable for illegitimate pressure"*. Justice Paul Brereton in a scholarly article *"Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements"* [2012] NSWJSchol 35 at pages 10-11 discusses this and other cases where the threat was not unlawful as "*better seen as cases of actual undue influence*".

On the facts of the present case, as found by the Trial Judge and upheld by the intermediate appellate court, the groom's threat four days before the publicised wedding with the bride and her family having come from overseas amounted to duress or illegitimate pressure. The disproportionality between a *"just and equitable"* sum for the appellant on separation and the minimal amount provided in the agreement is further evidence of duress or illegitimate pressure.

- Failing to accept "no reasonable alternative duress", namely that duress arose

where the appellant had no reasonable alternative but to sign the agreements, having regard to all the circumstances surrounding the marriage.

The learned Trial Judge after 5 days of hearing held (at paragraph 94) that *"the wife signed the first agreement under duress.... borne of inequality of bargaining power where there was no outcome available to her that was fair or reasonable"* and (at paragraph 95) that for the second agreement *"the wife had no bargaining power, nothing to persuade a different outcome, no capacity to affect* [sic] *any change"*.[19] This finding of no reasonable alternative should have led to a conclusion of duress.

Indeed, the learned authors Edelman and Bant point out in their review of case law (op. cit. pp 223-224) that duress may arise even when a plaintiff had reasonable alternatives available to them. As Kitto J said *in Mason v New South Wales* [1959] 102 CLR 108, 128 [8], *"the critical question is not whether there was an alternative. It is whether the choice made between alternatives was made freely or under pressure"*.

- Failing to find duress on the basis of the extraordinary facts of compulsion by the husband of the wife as found by the Trial Judge and upheld on appeal. The facts as found and as outlined above graphically illustrate a case of duress or illegitimate pressure.

- Wrongly finding that duress could not arise when independent legal advice about the agreements was provided (Paragraph 167 of Reasons).[20] In the present case, the intermediate appellate court noted (Reasons paragraph 16) that *"the wife was advised that the agreement was 'no good' and should not be signed"*.[21] The wife proceeded nonetheless as she had *"no outcome available to her that was fair and reasonable"* (Trial Judge Reasons paragraph 94).[22] Independent legal advice, especially when not accepted, cannot act as a talisman to ward off all evils of procedural and substantive vitiating factors. As to the presumption of undue

[19] AB 671
[20] AB 720
[21] AB 688
[22] AB 671

influence, Justice P Brereton observes that "the mere existence of independent legal advice does not rebut the presumption, at least unless it is acted on..."[23] The appellant's situation illustrates the observation by McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 that *"a person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action"*.

- Wrongly observing (Paragraph 68 of Reasons) that the Trial Judge *"applied the wrong legal test to the facts"* and *"that was effectively conceded by the wife's senior counsel in oral submissions before us"*.[24] That observation is incorrect. It is inconsistent with the transcript of proceedings page 25 line 20 to page 26 line 12. No such concession was or is made. In any event the duress issue was expressly raised in Ground 5 of the Notice of Contention and never abandoned.

- Wrongly upholding an appeal against the Trial Judge's purported reliance on the proposition that *"to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice"* (Reasons pages 12 to 15)[25] when the then appellant (the current respondent) was estopped from relying on such a ground as it was a proposition advanced by the then appellant (the current respondent) in written submissions before the Trial Judge (Reasons paragraph 87).[26] The proposition comes from Lord Scarman in *Universe Tankships Inc of Moravia v International Transport Workers Federation* [1983] 1 AC 333, as quoted by McHugh JA in in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45F. It seems bizarre that an appellate court could uphold an appeal by a party on the ground that that party had itself led the court below into error

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[23] Justice Paul Brereton "Binding or Bound to Fail? Equitable Remedies and Rectification of Financial Agreements" Australian Family Lawyer Vol 23 No 2 31 at 36
[24] AB 698
[25] AB 697-700
[26] AB 670

- Failing to consider in assessing the second agreement that the appellant had already agreed in the first agreement to enter into the second agreement in similar terms. The first agreement (Exhibit 2) provides for this in Clause B3. Thus the duress or illegitimate pressure tainting the first agreement similarly taints the second. This is also relevant to the appeal grounds of undue influence and unconscionable conduct.

Undue Influence (Appeal Ground 2)

27. The Court erred in its approach to the law of undue influence (Appeal Ground 2), in particular:

• Failing to have proper regard to the presumption of undue influence between fiancées and marital partners pursuant to *Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J and *Yerkey v Jones* (1939) 63 CLR 649 at 675-6 per Dixon J (*"equitable presumptions of an invalidating tendency"),* as confirmed by a majority of the High Court in *Garcia v National Australia Bank Ltd* (1998)194 CLR 395. In the latter case, the vigorous dissent of Kirby J rested on historical anachronism and the rejection of discriminatory stereotypes, neither of which apply on the facts of the present case.

- The intermediate appellate court referred to the above authorities (Reasons paragraphs 128-129)[27] in the course of rejecting undue influence (Reasons paragraphs 125 -134)[28]; however, wrongly found that the evidence demonstrated that the agreements were *"entered into free of influence"*. This is blithely contrary to the above-listed findings of fact of the Trial Judge upheld on appeal grounds 1 to 5. The evidence confirms, not rebuts, the presumption.

- The intermediate appellate court placed much weight on discussion between the parties of the husband's intention that his wealth go to his children (paragraphs 131 to 133)[29], but this is, with respect, to ignore the marital context of mutual support and maintenance and to posit a false dichotomy between the interests of the children and the interests of the wife in an estate of between $18million and $24million. The husband had duties both to his children and his wife. The evidence is that the husband said to the wife via Skype from an early stage not only that "my money is for my children" but also "I will provide you with a

[27] AB 710-711
[28] AB 710-712
[29] AB 711

house, car and money and I will keep you safe all your life. I am a rich man."[30]In an estate of that magnitude both sets of reasonable interests could and should be accommodated. Each of the two agreements (Exhibits 2 and 3 at paragraph A1) refers to a purpose of the agreement *as "to protect and make provision for his children without their prospective inheritance being substantially reduced by his marriage to (Thorne)"*. [31]The wife's application filed 27 April 2012 in the Federal Circuit Court seeks a property adjustment order of $1,100,000 and a lump sum spousal maintenance order of $104,000 (Reasons of Trial Judge paragraph 7).[32] In the context of the overall estate this will not substantially reduce the children's inheritance.

- Failing to consider the improvidence of the transaction in deciding whether the presumption of undue influence had been rebutted. (Reasons paragraphs 125 to 134).[33] In presumed undue influence the improvidence of a transaction is important in deciding whether a presumption has been rebutted (*Bester* v *Perpetual Trustee Co Ltd* [1970] 3 NSWR 30, *Everitt v Everitt* (1870) LR 10 Eq 405, *Bullock* v *Lloyds Bank Ltd* [1955] Ch 317).
- Wrongly finding that *"the wife could not have been influenced by the husband when she had no concern about what she would receive upon separation"* (paragraph 134 of Reasons)[34] in disregard of the wife's love for and trust in the husband and in disregard of the meaning of marriage as *"the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"* under section 5 of the *Marriage Act* 1961.

- This erroneous finding also fails to have regard to the evidence of both the wife and husband of a common intention that *"the marriage would last as long as we lived"* and of a common belief in the religious importance of marriage, as set out in the affidavit material below.

Affidavit of Thorne filed 14 January 2013

"Arrival in Australia for Wedding

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[30] Affidavit of Thorne filed 14 January 2013 paragraph 25.
[31] AB 556 and AB 586
[32] AB 646
[33] AB 710-712
[34] AB 712

57. We arrived in Australia in April/May 2007.[35]

58. (Kennedy) and I went to see Father... again. (Kennedy) gave Father the stamped form and we discussed setting a date. Father ...spoke with (Kennedy) and I separately on two different occasions. He asked did I love (Kennedy), I said of course I did. He spoke of the importance of marriage and the importance of marriage in a church. He said to (Kennedy) in words to the following effect:

'Your last relationship was not good as you didn't marry. You must not live with a woman if you don't marry her '

(Kennedy) nodded in agreement.[36]

59. I believed that I was entering into a marriage in the (religion omitted) Church and that the marriage would last for as long as we lived. (Kennedy) led me to believe that this also was his intention. We discussed marriage a lot but never at any time did (Kennedy) suggest that our marriage would be a normal marriage for life"[37]

Affidavit in reply of Kennedy filed 5 February 2013

"Reply to wife's Affidavit filed 14 January 2013

***57. Paragraph 58-** In relation to the facts that are within my knowledge, I agree. I recall that all of our conversations with the Priest were in (language omitted).*[38]

***58. Paragraph 59 -**I too had the same belief and intentions as (Thorne) at that time. It was my intention for the relationship to continue, however during the course of the relationship (Thorne) continued to frustrate me, and as a result the relationship broke down."*[39]

Affidavit of Kennedy filed 9 October 2013

47. "I was taken with (Thorne) at the time because she was (religion omitted) , spoke (language omitted)and English , had no children and was interested in me . I had thought that all of my dreams had come true. I therefore did not correct her when she considered the ring to be an engagement ring."[40]

- Failing to find undue influence on the basis of the extraordinary facts of the influence of the husband over the wife as found by the Trial Judge and upheld on appeal.

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[35] AB 431
[36] AB 432
[37] AB 432
[38] AB 510
[39] AB 511
[40] AB 509-510

Unconscionable conduct (Appeal Ground 3)

28. The Court erred in its approach to unconscionable conduct under sub-sections 90K(b) and 90K(e) (Appeal Ground 3), in particular:

- Having found that the wife was in a position of disadvantage vis-a-vis the husband, the Court erred in holding that the evidence did not support a finding that the husband took unconscionable advantage of that position in securing her signature to the agreements (paragraph 138 of Reasons)[41] despite the extraordinary conduct by the husband to the wife as found by the Trial Judge and upheld on appeal, including:
  - insisting on her signing the agreement just days before the scheduled marriage ceremony , failing which there would no marriage and the appellant would be left with *"no job, no visa, no home, no place, no community"*.(Paragraphs 54 to 56 of Reasons)[42];
  - the appellant's reliance on the husband "for all things" at the time of the first financial agreement (Paragraphs 57 to 59 of Reasons)[43]; and
  - the husband *"held every bargaining chip and every power"* (Paragraphs 57 to 59 of Reasons).[44] The ancient Greek historian Thucydides observed that *"in this world justice only comes into question between equals. The strong do what they can and the weak accept what they must"* (Melian Dialogue).
- Failing to have regard to the substantive unconscionability of an entitlement for the wife of a mere $50,000 out of a matrimonial asset pool of $18 million to $24 million (less than one third of one percent) after four and a half years of marriage and co-habitation and attempts to have a child together. In *West* v *AGC (Advances) Ltd* (1986) 5 NSWLR 610, McHugh JA in the Court of Appeal said (at p 620):
  - *"Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive justice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice."*
- Wrongly finding that the agreements were not non-negotiable (paragraph 166 of the

[41] AB 712
[42] AB 694-695
[43] AB 695-696
[44] AB 695-696

Reasons)[45] contrary to the evidence of the minor nature of the handwritten amendments thereto (Exhibits 2 and 3) and despite the estoppel arising from the Court's own dismissal of the appeals against the Trial Judge's findings of fact (at paragraphs 54 to 59 of the Reasons).[46]

Adequacy of Trial Judge's reasons (Ground 4)

29. Grounds 6 and 11 of the appeal before the Full Court were upheld on the ground of failure to provide adequate reasons. This arose principally because of a misunderstanding by the Full Court of the interaction between the ground of duress, on which the trial Judge expressly ruled, and the grounds of undue influence and unconscionable conduct to which reference was made. Despite a ten month period of having the decision reserved, and perhaps ironically, the Full Court's own reasons on this point were scant.

30. The Federal Circuit Court has a judicial duty to give reasons for its decisions however it should be noted that an object of the *Federal Circuit Court of Australia Act* 1999 in section 3(2)(a) is *"to enable the Federal Circuit Court of Australia to operate as informally as possible in the exercise of judicial power"*.

31. The Trial Judge made relevant findings of fact open on the evidence as the basis for a finding of duress in setting aside both agreements. Her Honour's reasons were cogent and quite sufficient to convey to the parties and to the world at large the facts and reasoning on which the Federal Circuit Court's determination was made.

PART VI (b): APPLICABLE LEGISLATION, PRINCIPLE OR RULE OF LAW

32. The *Marriage Act* 1961 provides in section 5 that the term "marriage" means *"the union of a man and a woman to the exclusion of all others, voluntarily entered into for life"*.

33. This is relevant to the appellant's argument that the financial agreements take their contractual context not in the one-off, supply-and-demand bargaining of the commercial marketplace but in the statutory and public policy context of *"a union... voluntarily entered into for life"* characterised by mutual support and maintenance. No adverse inference should be drawn against her because she entered the agreements on the basis that her marriage was *"voluntarily entered into for life"* and thus focused on

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[45] AB 720
[46] AB 694-696

financial provision in the event of death rather than separation.

34. Part VIII of the *Family Law Act* 1975 provides in section 79 for the Court to make *"just and equitable"* orders for alteration of the property interests of parties to a marriage, having regard to contribution (section 79(4)) and maintenance/need factors (section 75(2)).

35. Section 72(1) provides for the right of a spouse to maintenance in that "a *party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately"*. Some protection is afforded to the public purse through the requirement in section 75(3) that a court exercising jurisdiction in spouse maintenance "*shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit"*.

36. The jurisdiction of the Court to make "just and equitable" property orders and spouse maintenance orders under Part VIII is ousted by financial agreements made under Part VIIIA (introduced in 2000) pursuant to section 71A.

37. The *Family Law Act* 1975 provides in Part VIIIA for financial agreements before and during marriage. Section 90K sets out the circumstances in which a court may set aside a financial agreement. Section 90KA provides that the validity of financial agreements is to be determined by the court according to the principles of law and equity applicable in determining the validity of contracts and purported contracts

38. Proceedings with respect to such financial agreements constitute a matrimonial cause under clause (eaa) of the definition of matrimonial cause in section 4 of the *Family Law Act* 1975.

39. The Commonwealth has power to make laws with respect to matrimonial causes under section 51 (xxii) of the Constitution.

40. The above *Family Law Act* provisions are relevant to the appellant's argument that *"the principles of law and equity"* for determining the validity of contracts under section 90KA must have regard to the matrimonial context.

PART VI (c): RATIONALE OF THE LEGISLATION, POLICY OR RULE

41. For a general historical account of the development of the case law, public policy and statutory provision in this area see the decision of the Full Court of the Family Court *In the Marriage of Wright* (1977) 14 ALR 561; 3 Fam LR 11,150 at 11,155-64; 29 FLR 10;

(1977) FLC ¶90-221 per Watson J with whom Evatt CJ and Asche J agreed.

42. A brief history of ante-nuptial agreements since before the enactment of the *Statute of Uses* in 1536 is set out by the learned authors S Gree and J Long in *"Marriage and Family Law Agreements"*[47]. A jointure, a premarital property settlement for the wife, was explained by Blackstone in that *"it became usual, on marriage, to settle by express deed some special estate to the use of the husband and wife, for their lives, in joint-tenancy, a jointure; which provision would be a provision for the wife in case she survived her husband"*.[48] The learned authors also describe the cause of action of breach of promise to marry, with roots in Roman law, as an important action in England "*where marriage was a largely a property transaction which had the social significance of saving a woman from the cruel fate of spinsterhood*".[49]

43. At common law such financial agreements between spouses were not enforceable where against public policy. In *Hyman v Hyman* [1929] AC 601 at 629; [1929] All E Rep 245 at 258, 259 the House of Lords per Lord Atkin held that *"no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife...the wife's right to future maintenance is a matter of public concern, which she cannot barter away"*.

44. Thus if a court were to determine the validity of a financial agreement between spouses on a literal reading of section 90KA of the Family Law Act 1975(without more), "*according to the principles of law and equity that are applicable in determining the validity, enforceability and effects of contracts and purported contracts*", such a contract would be unenforceable in an appropriate case. Only as recently as 2010 has the UK Supreme Court abandoned this public policy rule: *Radmacher v Granatino* [2010] UKSC 42, [2011] AC 534 at [52].

45. For discussion of the High Court's approach to financial agreements between spouses and the interaction of legislation, public policy and the Courts' jurisdiction, see *Brooks v Burns Philp Trustee Company Ltd* (1969) 121 CLR at 456 per Windeyer J and *Felton v Mulligan* (1971) 124 CLR 367.

46. In 2000 the *Family Law Act* 1975 was amended by the introduction of Pt VIIIA pursuant to the *Family Law Amendment Bill* 1999. The Revised Explanatory Memorandum to the

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[47] McGraw-Hill Book Company, Colorado. 1984 at 2.05 pp 109-110
[48] W Blackstone *Commentaries* 137 (1832), as cited by Gree and Long op.cit.
[49] Gree and Long op.cit 202 p 103

Bill sets out the intention of the relevant amendments at paragraphs 159 to 162.Four significant features of this amendment were: —

- Parties to a proposed marriage could, for the first time, enter into a pre-nuptial agreement;
- Parties could enter into an agreement to alter their interests in property whilst still married;
- They could enter into a financial agreement that altered their interest in property after separation or divorce;
- Removal of the requirement that, before such agreements could oust the jurisdiction of a Family Law Court to make orders under Pt VIII, the agreement had to be approved by a Judicial Officer of a Family Law Court.

47. If the financial agreement/s made in this case under Part VIIIA of the *Family Law Act* 1975 are valid, then they oust the jurisdiction of the Federal Circuit Court (and Family Court) under Part VIII to make orders for the alteration of property interests and spouse maintenance as sought by the appellant. Section 71A (1)(a) provides that Part VIII does not apply to *"financial matters to which a financial agreement that is binding on the parties to the agreement applies"*.

48. This is in stark contrast to the observation (above) of Lord Atkin in *Hyman v Hyman* [1929] AC 601 at 629; [1929] All E Rep 245 at 258, 259 about the jurisdiction of the court to intervene in a particular case to order a husband to pay spouse maintenance. If Part VIIIA financial agreements are construed without proper regard to the marital context (as was done by the Full Court of the Family Court in this case) it would extinguish the critical public policy expressed by Lord Atkin that "*the wife's right to future maintenance is a matter of public concern, which she cannot barter away*".

Part VII: LEGISLATIVE PROVISIONS

49. The legislative provisions in the attached annexure are still in force, in that form, at the date of making these submissions.

Part VIII: ORDERS

50. That the appeal be upheld.

51. That the orders of the Full Court of the Family Court of 26 September 2016 be set aside.

52. That the matter be remitted to Judge Demack of the Federal Circuit Court in Brisbane for hearing and determination of the Appellant's application for property adjustment and lump sum maintenance orders under the *Family Law Act* 1975(Cth).

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53. That the Respondent pay the costs of and incidental to the appeal and the appeal before the Full Court of the Family Court.

Part IX: TIME ESTIMATE

54. I estimate 2 hours are required for presentation of the appellant's oral argument.

Dated: 1 June 2017

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