IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B14 of 2017

ON APPEAL FROM FULL COURT OF
THE FAMILY COURT OF AUSTRALIA

B E T W E E N:

THORNE
Appellant
-and-

KENNEDY
Respondent

APPELLANT'S REPLY

PART I: PUBLICATION OF SUBMISSIONS

I certify that this reply is in a form suitable for publication on the internet.

PART II:

Concessions

1. The Appellant welcomes the Respondent's acceptance (RS par.60) *"that the fact that the Appellant received independent legal advice is not, in itself, a sufficient basis to find that there was no duress"*. The Full Court of the Family Court (FC) made a fundamental error in finding that "*the real difficulty for the wife in establishing duress is that she was provided with independent legal advice about the agreements*".[1]
2. The Respondent's submissions do not challenge the Appellant's submission that the FC erred in finding that the wife's senior counsel in oral submissions before the FC *"effectively conceded"* that the trial judge had *"applied the wrong legal test to the facts"* regarding duress.[2] This was a serious error. No such concession was made.

Husband's Promises of Financial Support to Wife

3. The Respondent's submissions posit a false dichotomy between the husband's wealth going to his children and reasonable provision for his wife.
4. The Respondent's submissions make much of the expressed desire of the husband that his wealth should go to his children.[3] This blithely ignores the repeated evidence of the husband's promises to the wife to provide financial support to her for her life. The evidence indicates that the husband said to the wife:[4]"*I will provide you with a house, car and money and I will keep you safe for your life. I am a rich man.*"
5. The wife in her affidavit at paragraph 48 deposes to her concern for her financial security and the continuous assurances by the husband as far back as October 2006 on her initial trip to Australia:[5]

[1] AB 720 FC Reasons par. 167. See also Appellant's Submissions page 10.
[2] AB 698 FC Reasons par. 68. Appellant's submissions(AS) p.10.
[3] RS at 4 (B), 7(A), 39(A) and 55.
[4] AB 428 Affidavit of Appellant filed 14 January 2013, paragraph 25.
[5] AB 431 Affidavit of wife filed 14 Jan 2013 par. 48.

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"I was still concerned about my financial security and frequently raised the question with (Kennedy) and he continuously assured me that I would never be poor and that he would always provide for me."

6. The husband in his affidavit[6] agrees with the above contents of paragraph 48 of the wife's affidavit.
7. The terms of the financial agreement were not disclosed to the wife until 21 September 2007, nine days before the scheduled wedding,[7]well after the parties had applied for a spousal visa on 14 February 2007 and arrived in Australia in April/May 2007 and after the wife's parents and sister had arrived in Australia for the wedding.
8. The Recitals to each of the agreements[8] state that the purpose of the agreement is to *"protect and make provision for his children without their prospective inheritance being substantially reduced because of his marriage to (name omitted)."*
9. Recital C3 in each of the Agreements records that the husband has 3 children aged 45 years, 43 years and 38 years who all live independently of the husband and are financially independent of him.[9]
10. Clause 27 in each of the agreements provides for a financial benefit for the wife in the event that the husband should die whilst the agreement was in effect.[10] The specified benefit is a house to the value of $1.5 million, spousal maintenance of $5,000 per month varied by CPI and a motor vehicle. This was clearly regarded within the terms of the agreement as not having "substantially reduced" the prospective inheritances of the adult children. The respective provisions for wife and children were not mutually exclusive.

Findings of Fact Arising from Dismissal of Appeal Grounds 1-5 of the Full Court

11. The Respondent's submissions at paragraph 5 argue wrongly that *"the findings that were the subject of appeal grounds 2-5, as set out in FC [57], were (at least implicitly) overturned by the Full Court."* This argument flies in the face of the explicit dismissal of grounds 2-5 by the FC.[11] This point however, does highlight the inconsistency in the FC's logic between dismissing appeal grounds 1-5 against the trial judge's findings of fact (thus creating res judicata) and then later seeking (impermissibly) to depart from the trial judge's finding that the financial agreements were non-negotiable.[12] This FC finding was also defective as based on insufficient evidence, namely handwritten amendments to the agreements which, on their face, are machinery or cosmetic in nature and not substantive provisions arising from negotiation.[13]

Legislative Context

12. The Respondent's submissions on the legislative context[14] do not address the common law and legislative history of marriage as an institution characterised by mutual support

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[6] AB 509 Affidavit of husband filed 9 October 2013; paragraph 45.
[7] AB 433 Affidavit of Appellant filed 14 January 2013; paragraph 68.
[8] AB 556 Exhibit 2 and AB 556 Exhibit 3 at A1 in each.
[9] AB 558 and AB 588.
[10] AB 568 and AB 598.
[11] AB 695 par. 56 and AB 696 par. 59 of FC reasons.
[12] AB 670 Reasons of Trial Judge J para 89 and AB 712 and 720 FC Reasons paras 139 and 166.
[13] AB 568 Ex. 2 clauses 27(a) and 28 and AB 598-599 Ex. 3 clauses 27(a) and 28.
[14] RS Pages 4-6 Paragraph 10-21.

and maintenance.[15] It is incorrect to characterise the legislative amendments of 2000 as introducing an unbridled laissez-faire approach to financial agreements without regard to the significance of marriage in the property relations of parties at common law[16]. The Respondent correctly identifies that section 43 of the *Family Law Act* 1975 requires the Family Court to have regard to *"the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life"*. This principle has not been eclipsed by the introduction of financial agreements under Part VIIIA; quite the contrary. The Court is statutorily obliged to approach the validity of such financial agreements not merely as bargains in the commercial marketplace but with careful regard to the matrimonial context in applying the principles of law and equity.

13. Significantly, the Respondent's own submissions[17] highlight a passage at page 6 of the Further Revised Explanatory Memorandum indicating a legislative recognition that *"marriage is becoming increasingly recognised as an economic partnership as well as a social relationship"*. Far from suggesting a laissez-faire approach to contract, this points to the fiduciary duties of the parties. As Dixon J observed:[18] *"The relations between partners is, of course, fiduciary. Indeed it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners."*
14. Section 90KA expressly requires that the validity of agreements be determined according to "the principles of law and equity". Such principles have been held to include the following in the case of marital financial agreements.[19]
    a. *"[72] The court may take into account a party's emotional state and what pressures he or she was under to agree...*[20]
    b. *[75]'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."*[21]

Duress (Appeal Ground One)

15. The Respondent's submissions on duress do not challenge the Appellant's proposition that the current Respondent (the Appellant before the FC) was estopped from relying in the FC on the trial judge's purported adoption of the proposition that *"to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice"*.[22] This was the very proposition advanced by the current Respondent before the trial judge.[23]

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[15] See Appellant's submissions paras. 41-43; and CTL Perry The "Essentials of Marriage": Reconsidering the Duty of Support and Services – *Yale Journal of Law and Feminism* (Volume 15, Issue 1) Pages 8-14.
[16] For discussion of the common law approach to pre-nuptial and post-nuptial agreements see *Halsbury's Laws of England* " Matrimonial and Civil Partnership Law" paras. 332 and 343-349.
[17] Respondent's Submissions par. 16.
[18] *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407 per Dixon J.
[19] *Radmacher (formerly Granatino) v Granatino (pre-nuptial contract)* [2010] UKSC 42, [2011]1 AC 534 per majority decision of Lord Phillips P, Lord Hope DP, Lord Rodger, Lord Walker, Lord Brown, Lord Collins and Lord Kerr JJSC.
[20] op. cit. at [72].
[21] Op. cit at [75].
[22] Appellant's submissions – page 10 ; reasons of FC pages 12-15; AB 697-700.
[23] AB 670. Trial Judge's Reasons par. 87.

16. The reliance by the FC and the Respondent on the doctrine in *Karam*[24] is bad law. It would lead to an excessively narrow and harsh precedent for the law of duress generally and particularly in the matrimonial context.
17. This case presents an opportunity for the High Court to clarify the law of duress .
    - Lawful act duress - Duress may arise from lawful but illegitimate pressure (such as the groom's insistence on the applicant's signing the agreement or the marriage was off).[25]In *Bank of Scotland v Bennett*[26], a wife signed a guarantee under threat from her husband that, unless she did so, he would leave her and the family would be split up. The court found that the wife entered the transaction as a result of illegitimate pressure.[27]
    - No reasonable alternative – Causation of duress or illegitimate pressure plainly arises when a party has no reasonable alternative available (such as the finding by the Trial Judge that *"the wife plainly had no choice that she could reasonably see, but to sign the agreement".)*[28]It should be noted however that *"the critical question is not whether there was an alternative. It is whether the choice made between alternatives was made freely or under pressure"*, as Kitto J observed in *Mason v New South Wales* [1959]102 CLR 108,128[8].

Undue Influence (Appeal Ground Two)

18. The Respondent's submissions understate the equitable principles enunciated in the majority decision of this court in *Garcia*.[29]
19. The Respondent's submission that the second financial agreement cures any presumption of undue influence connected with the first agreement is flawed because a term of the first agreement[30] required the appellant to enter into the second agreement which is thereby tainted. Furthermore, the trial judge held that *"in all respects the second agreement was simply a continuation of the first".*[31]

Unconscionable Conduct (Appeal Ground Three)

20. The Respondent's rejection of "substantive unconscionability"[32] is misplaced. A court of equity should properly have regard to all relevant circumstances including, in this case, the manifestly inadequate provision in the first and second agreements for the maintenance and support of the wife upon the issue of a separation declaration by the husband. This arises not merely from statutory provision (as the RS implies[33]) but from equity's long-established jurisdiction to relieve from transactions on account of

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[24] *Australian New Zealand Banking Group v Karam* (2005) 64 NSWLR.
[25] AB at 670-671. Trial Judge's reasons paras 88-93 and 95-96.
[26] [1999] 1 FLR 1115; appeal conjoined and allowed on another ground by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773.
[27] For further cases of exertion of pressure by lawful threats, including economic pressure and emotional pressure see J Edelman and E Bant *Unjust Enrichment (2nd edition)* Hart Publishing, Oxford and Portland, Oregon 2016 at pages 210 – 218.
[28] AB at 671. Trial Judge's reasons par.97.
[29] *Garcia v National Australia Bank* (1998) 194 CLR 395.
[30] Clause B3 at AB 557.
[31] AB 671 par.96.
[32] Respondent's submissions page 17, paragraphs 83 and 84.
[33] Op. cit. page 17 par. 83.

equitable fraud, including the fraud which infects catching bargains with heirs, reversioners, or expectants[34].

21. In *Louth v Diprose* Deane J explained the equity court's jurisdiction to relieve against unconscionable dealing with a party under a special disability where an onus is cast upon the stronger party to show that the transaction was fair; just and reasonable.[35]
22. There is a touch of irony in the Respondent's submission that[36] *"the entire purpose of part VIIIA was to allow people to have greater control and choice over their own affairs in the event of marital breakdown"* despite the factual findings that:
    - The wife relied on the [husband] *"for all things"* at the time the first financial agreement was signed;[37]
    - The fact that the [husband] *"held every bargaining chip and every power"*;[38] and
    - The fact that the wife "save and except for her visa status, if the relationship with the [husband] ended: [39]

      "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 [the wife]. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world."
23. The trial judge summarised the position of the parties at the time of entering the financial agreements four days before the scheduled wedding:[40]

    "Indeed, I am satisfied that when Mr (Kennedy) said there would be no wedding, that meant the relationship would be at an end.

    The applicant wanted a wedding. She loved Mr (Kennedy), and wanted a child with him.

    She had changed her life to be with Mr (Kennedy).
24. In the event, the Appellant did not bend at the eleventh hour to remove herself from her beloved groom. She pursued a course described by Shakespeare four centuries ago:[41]

    "Let me not to the marriage of true minds
    Admit impediments. Love is not love
    Which alters when it alteration finds,
    Or bends with the remover to remove:..."

Dated: 24 May 2017

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[34] See *Halsbury's Laws of Australia* at [110-5890]; *Blomley v Ryan* (1956) 99 CLR 362 at 429 per Kitto J (dissenting).
[35] (1992) 175 CLR 621 at 637.
[36] Respondent's submissions page 17, paragraphs 84.
[37] AB 671 Trial Judge's Reasons [93] .
[38] AB 670 Trial Judge's Reasons [92] .
[39] AB 670-671 Trial Judge's Reasons [91] and [93].
[40] AB 670 Trial Judge Reasons paras. 89 and 90.
[41] William Shakespeare "*Let Me Not to the Marriage of True Minds*" (Sonnet 116) 1609.